

## WHY JUDICIAL INDEPENDENCE FAILS

*Aziz Z. Huq*

**ABSTRACT**—Judicial independence seems under siege. President Trump condemns federal courts for their political bias; his erstwhile presidential opponents mull various court-packing plans; and courts, in turn, are lambasted for abandoning a long-held constitutional convention against institutional manipulation. At the same time, across varied lines of jurisprudence, the Roberts Court evinces a deep worry about judicial independence. This preoccupation with threats to judicial independence infuses recent opinions on administrative deference, bankruptcy, patent adjudication, and jurisdiction-stripping. Yet the Court has not offered a single, overarching definition of what it means by the term “judicial independence.” Nor has it explained how its disjointed doctrinal interventions add up to a coherent theory of institutional autonomy. And it remains unclear how debates on judicial independence among jurists relate to debates about the same term in the larger public sphere.

This Article’s first contribution is to analyze how the Roberts Court understands the term judicial independence and how its doctrinal rules fall far short of realizing even the aspirations the Court has for that term. This case study in doctrinal specification illuminates the gap between the Justices’ own ethical aspiration toward judicial independence and its institutional realization—a gap that generates confusion, uncertainty, and opportunities for circumvention.

This Article then abstracts away from the particulars of the Roberts Court’s jurisprudence to explore the origins of this aspiration–implementation gap. To motivate this more general analysis, it first demonstrates that there is a large range of constitutional-design options for a founder seeking to create independent courts. The Framers of Article III embraced certain of these options and rejected others. Specifically, they preferred ex post to ex ante checks on political interference in the judiciary.

Subsequent experience, though, has shown that the Framers’ design of

In particular, the Framers failed to anticipate the rise of partisanship as a motivating principle for national political action, and also the unexpectedly strong incentives that push legislatures toward vague or ambiguous statutory texts, leaving ample discretion for judges’ policy preferences. Today, it is possible to identify a range of instruments through which elected actors can

achieve such unraveling. The three most important can be labeled cracking, packing, and stacking by analogy to techniques of partisan gerrymandering. This taxonomical exercise illuminates how, in practice, the jurisprudence and politics of judicial independence fall so far short of professed ethical aspirations. This exercise further points toward the possibility of a more institutionally grounded account of what plausibly can be expected in terms of federal court autonomy from the partisan currents of American political life.

**AUTHOR**—Frank and Bernice J. Greenberg Professor of Law, University of Chicago Law School. My deep thanks to Madeline Yzurdiaga, Meher Babbar, and the other editors of the *Northwestern University Law Review* for their careful editing, which improved this Article immensely. The Frank J. Cicero Fund provided helpful support.

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## INTRODUCTION

To judge from the polemics of the day, judicial independence is beset by enemies upon all sides. A perception of embattled precarity refracts through national political discourse and constitutional jurisprudence alike. From the White House streams a tweeted barrage of accusations alleging

rampant political bias and overreach among the federal judiciary<sup>1</sup> and promising a “litmus test” for new Justices.<sup>2</sup> The President’s nominees for the high Court, in turn, are condemned for their alleged “inability to be independent on any sort of issue salient to contemporary politics.”<sup>3</sup> Some threaten that the Court will “pay the price” for its bad decisions.<sup>4</sup> The Democratic presidential hopefuls of 2020, responding to such alarms, raced to outflank each other to the left, deploying a fusillade of proposals to “reform” the federal judiciary<sup>5</sup>—proposals that predictably worked as fuel for further outrage.<sup>6</sup> The Chief Justice of the United States, for his part, has been left plaintively to repudiate the existence of “Obama judges or Trump judges,” and instead to extoll the “independent judiciary” as “something we

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<sup>1</sup> See, e.g., John Kruzel, *Federal Judge Slams Trump’s Attacks on Judiciary*, HILL (Nov. 7, 2019, 4:13 PM), <https://thehill.com/regulation/court-battles/469499-federal-judge-slams-trumps-attacks-on-judiciary> [<https://perma.cc/UF9E-X5JY>] (quoting Hon. Paul Friedman: “We are witnessing a chief executive who criticizes virtually every judicial decision that doesn’t go his way and denigrates judges who rule against him, sometimes in very personal terms . . . .”); Jeremy Diamond & Ariane de Vogue, *Trump Rails Against 9th Circuit Court of Appeals in Wake of Asylum Ruling*, CNN (Nov. 20, 2018, 5:02 PM), <https://www.cnn.com/2018/11/20/politics/donald-trump-9th-circuit-court-of-appeals/index.html> [<https://perma.cc/ZZ54-XW6S>] (stating that President Trump called a Ninth Circuit asylum ruling “very unfair”); Kristine Phillips, *All the Times Trump Personally Attacked Judges—And Why His Tirades Are ‘Worse Than Wrong,’* WASH. POST (Apr. 26, 2017, 2:32 PM), <https://www.washingtonpost.com/news/the-fix/wp/2017/04/26/all-the-times-trump-personally-attacked-judges-and-why-his-tirades-are-worse-than-wrong/> [<https://perma.cc/JG8Z-8WJK>] (documenting Trump’s repeated criticism of the judiciary). Attacks on the judiciary also characterized Trump’s presidential campaign. Brent Kendall, *Trump Calls on Ginsburg to Resign from Supreme Court*, WALL ST. J. (July 13, 2016, 8:23 PM), <https://www.wsj.com/articles/trump-calls-on-ginsburg-to-resign-from-supreme-court-1468444857> [<https://perma.cc/GM6U-GW3D>].

<sup>2</sup> Jeremy W. Peters, *Trump’s New Judicial Litmus Test: Shrinking ‘the Administrative State,’* N.Y. TIMES (Mar. 26, 2018), <https://nyti.ms/2DXp5n5> [<https://perma.cc/3FFA-4ZS8>].

<sup>3</sup> Roger Cohen, *An Insidious and Contagious American Presidency*, N.Y. TIMES (Oct. 5, 2018), <https://nyti.ms/2Cuy3Mz> [<https://perma.cc/Z9SE-77A3>] (quoting University of Pennsylvania School of Law Professor Stephen Burbank).

<sup>4</sup> Adam Liptak, *John Roberts Condemns Schumer for Saying Justices ‘Will Pay the Price’ for ‘Awful Decisions,’* N.Y. TIMES (Mar. 4, 2020), <https://nyti.ms/2TnkrK7> [<https://perma.cc/7FNZ-MYNC>] (quoting Sen. Chuck Schumer).

<sup>5</sup> See, e.g., David A. Graham, *The Democrats Discover the Supreme Court*, ATLANTIC (June 4, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/buttigieg-supreme-court-plan-and-democratic-party/590905/> [<https://perma.cc/2GYV-BX62>] (describing Mayor Pete Buttigieg’s “[c]ourt-packing plan”); *Restoring Trust in an Impartial and Ethical Judiciary*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/restore-trust> [<https://perma.cc/53QR-L72C>] (proposing new recusal and conflict-of-interest rules).

<sup>6</sup> See, e.g., Dan McLaughlin, *Against the Democrats’ Court-Packing Scheme*, NAT’L REV., (June 6, 2019, 10:48 AM), <https://www.nationalreview.com/magazine/2019/06/24/against-the-democrats-court-packing-scheme/> [<https://perma.cc/R8AC-JWZC>] (“Court-packing is a Rubicon we should dread to cross.”).

should all be thankful for.”<sup>7</sup> Times are so uncertain that even the ordinarily anodyne Year-End Report on the Federal Judiciary in 2019—a bureaucratic document that rarely attracts public attention—shifts gears midway to offer a lofty peroration celebrating the federal bench’s “duty to judge without fear or favor, deciding each matter with humility, integrity, and dispatch.”<sup>8</sup>

Matters seem unequally unsettled and febrile when it comes to black-letter federal courts doctrine. In a 2016 opinion, Chief Justice John Roberts warned of an unprecedented threat to the “bedrock rule of Article III.”<sup>9</sup> Two years later, he again sounded an alarm that the judicial independence “necessary to secure individual freedom” was imperiled because Congress had “arrogate[d] the judicial power to itself.”<sup>10</sup> In penning both of these writings, however, he was in dissent. The barbarians, if the Chief Justice is to be believed, were already within the gates. Nor do his warnings stand alone. In 2015, Justice Clarence Thomas sounded an alarm that one of the staple deference rules of administrative law, the doctrine of *Chevron* deference, threatened the “[i]ndependent judgment” of the federal bench, which was necessary “to decide cases in accordance with the law of the land.”<sup>11</sup> A similar concern about other administrative law deference regimes would be seized upon four years later by Justice Neil Gorsuch. He expressed a strong objection to the prospect that the Court would “compromise our judicial independence and deny the people who come before us . . . impartial judgment.”<sup>12</sup> Writing in a similar tenor but on a different aspect of administrative law, Justice Gorsuch later railed against a “retreat from the

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<sup>7</sup> Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks ‘Obama Judge,’* N.Y. TIMES (Nov. 21, 2018), <https://nyti.ms/2DBp0sL> [<https://perma.cc/A7J7-MEGH>]. Naturally, the President disagreed. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 2:51 PM), <https://twitter.com/realDonaldTrump/status/1065346909362143232> [<https://perma.cc/D8ZU-YPYS>]; Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 21, 2018, 3:09 PM), <https://twitter.com/realdonaldtrump/status/1065351478347530241> [<https://perma.cc/RHE9-NQ29>].

<sup>8</sup> JOHN G. ROBERTS, JR., 2019 YEAR-END REPORT ON THE FEDERAL JUDICIARY 4 (2019), <https://www.supremecourt.gov/publicinfo/year-end/2019year-endreport.pdf> [<https://perma.cc/9NBP-6SSE>].

<sup>9</sup> *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1333 (2016) (Roberts, C.J., dissenting) (“There has never been anything like [the challenged provision of federal law].”).

<sup>10</sup> *Patchak v. Zinke*, 138 S. Ct. 897, 915 (2018) (Roberts, C.J., dissenting).

<sup>11</sup> *Perez v. Mortg. Bankers Ass’n*, 135 S. Ct. 1199, 1218 (2015) (Thomas, J., concurring in the judgment).

<sup>12</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2439 (2019) (Gorsuch, J., concurring in the judgment). This concern about deference was prefigured by Justice Anthony Kennedy a decade earlier. *Republic of Austria v. Altmann*, 541 U.S. 677, 735 (2004) (Kennedy, J., dissenting) (“[J]udicial independence . . . is compromised by case-by-case, selective determinations of jurisdiction by the Executive.”).

promise of judicial independence.”<sup>13</sup> Yet, like Chief Justice Roberts’s and Justice Thomas’s alarms, such concerns did not carry the day. Like Chief Justice Roberts’s intervention and Justice Thomas’s argument, Justice Gorsuch’s views were expressed in separate opinions that do not state the governing law. Indeed, heeding their call would force a dramatic recession from longstanding precedent. Whatever threats these Justices perceived to the principle of judicial independence were not persuasive to colleagues on the bench. The shadow over Article III persists.

Across all these contemporary examples, the concept of judicial independence is used as a capacious linguistic vessel carrying an unruly tangle of political and principled anxieties. To be sure, the concept works differently in political and judicial discourses. For elected politicians, judicial independence is an unsettled and ambiguously defined concept. It is alternatively a notionally shared desideratum of public life weaponized against ideological opponents; a dangerous threat to vital policy agendas; or simply a hinderance to be ignored when promising voters durable policy achievements.<sup>14</sup> In contrast to this vague and somewhat confusing rhetoric, the Justices have aimed at a relatively crisp and formal understanding of judicial independence. For the high Court’s Justices, the invocation of judicial independence is a way of capturing an “ethos”<sup>15</sup> oriented toward ideals of legality, regularity, and the quarantine of politics from law. The judicial and political discourses of judicial independence, therefore, are not at all harmonious with each other. Yet the sharp divergences of views observed in both domains hint that even if judges and politicians alike rush to embrace judicial independence in the abstract, their agreement should not be taken at face value. Consensus at the level of abstract generalities instead is likely to obscure as much as it reveals.<sup>16</sup>

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<sup>13</sup> *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting).

<sup>14</sup> Cf. Matthew Eshbaugh-Soha & Paul M. Collins, Jr., *Presidential Rhetoric and Supreme Court Decisions*, 45 *PRESIDENTIAL STUD. Q.* 633, 637–40 (2015) (finding that presidents have tended to avoid speaking about pending Supreme Court cases but commented thereafter “to promote their reelection goals and historical legacies and to guide the direction of public policy”); Bethany Blackstone & Greg Goelzhauser, *Presidential Rhetoric: Toward the Supreme Court*, 97 *JUDICATURE* 179, 180 (2014) (positing a similarly expansive set of presidential goals when speaking to the Court).

<sup>15</sup> PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 126 (1982) (characterizing ethical arguments in constitutional law as “appeals to an ethos from which rules may be derived, whether they are embodied in the text or not”).

<sup>16</sup> Commentators have long worried that “[w]hat is accepted as a definition of judicial independence is an occasional passing remark, a shrugging of the shoulders, a ‘You know what I mean.’” THEODORE L. BECKER, *COMPARATIVE JUDICIAL POLITICS: THE POLITICAL FUNCTIONINGS OF COURTS* 140 (1970). More recently, it has been suggested that “scholars have developed rigorous definitions of the concept.”

This Article hones in upon the *judicial* understanding of courts' autonomy.<sup>17</sup> It identifies and analyzes a large gap between the Court's conception of judicial independence and the institutional conditions in which that concept is necessarily propounded. This Article's core analytic claim is that there is a profound, unavoidable, and often unrecognized tension between judicial independence as an ethical aspiration and as an institutional dynamic. Judicial independence as glossed by the Court fails because it doesn't navigate this divide effectively. That failure needs to be understood and evaluated in light of the overall structure and operation of the Constitution as a whole. The normative project here, in other words, is to situate the failure of judicial independence not in the local circumstances of the Trump presidency but rather as an outcome of institutional design choices that were made in 1787.

To gain an initial purchase on the topic, this Article first offers a close reading of the Roberts Court's efforts to distill the ethical aspiration of judicial independence into a stable doctrinal form. Even if one anticipates an unavoidable measure of incompleteness in the doctrinal specification of abstract constitutional ideas, the Roberts Court's present jurisprudence of judicial independence presents concerns of a different magnitude. Its gaps, irrational discontinuities, and loopholes undermine, rather comprehensively, the Court's purported project of advancing a coherent concept of judicial independence. To the contrary, the central normative justifications of judicial independence are at best haphazardly served and at worst undermined by extant doctrine in a way that calls out for explanation.

To develop that explanation, this Article abstracts away from the Roberts Court's idiosyncrasies and adopts a more general constitutional-design perspective. In this second line of analysis, this Article argues that the disjunction between high constitutional aspiration and brute institutional circumstances in which judges and politicians interact arises not because of any failure of will or even for any malign or improper intention. Rather, it

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Michael D. Gilbert, *Judicial Independence and Social Welfare*, 112 MICH. L. REV. 575, 582 & n.29 (2014) (collecting fifteen sources, each offering such a definition). But scholarly precision, especially when it is highly heterogenous, hardly vouchsafes political or professional agreement.

<sup>17</sup> This is not to say that the political discourse does not raise worthy empirical and normative questions: Why, for example, should elected actors motivated generally by partisan concerns be so relentlessly worried about judicial independence? The latter has the character of what economists call a "public good," which invites free riding and therefore tends to be underproduced. It is hence not the sort of selective benefit that politicians seem likely to dole out. At the same time, why—if politicians seem to so fervently embrace the ambition of judicial independence—are judges so acutely concerned about the same constitutional norm? Surely, avowed political commitment to judicial independence should *mitigate* the need for an Article III jurisprudence of prophylaxis.

emerges because judicial aspiration is an ideal that must be realized through concrete design choices. Different constitutional designers make different choices when institutionalizing judicial independence. Sometimes their choices pay off, and sometimes they fail. Within a fairly wide space of institutional-design possibilities, therefore, the Framers made “distinctive” and contingent choices<sup>18</sup> about how to give the general concept of judicial independence a specific institutional form.

Alas, the Framers’ specific choices were based on presuppositions that no longer hold. In consequence, the specific way in which judicial independence is institutionalized in the United States baked in critical vulnerabilities from the get-go. The current crises in both politics and doctrine shake out from these weaknesses. The Framers made pivotal assumptions about the constraining effect of federal statutory law on judicial discretion, the absence of partisan motives among elected-branch actors, and the relative strength of partisan motives and “institutional loyalties”<sup>19</sup> within the federal government. Putting these assumptions together, we can see that the Framers viewed law as certain (and hence constraining) and the national government as capable of transcending factional politics. Time hasn’t treated these hopes kindly. Their failure creates contemporary opportunities for strategic action by the elected branches, largely via legitimate and well-recognized constitutional channels, to undermine an independent judicial function.<sup>20</sup> Judicial independence’s enemies, in other words, find their arsenal in the joints and ligaments of the Constitution’s very design. Its failure is a matter of original constitutional design—not a question of present infidelity.

To give this point more specific bite, this Article maps three methods through which contemporary elected actors can shape judicial behavior to a degree that is inconsistent with the Court’s conception of judicial independence. All are plausibly deemed constitutional despite their deep

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<sup>18</sup> Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 971 (2007) (arguing that “[t]he selection mechanisms contemplated by the Constitution represent a distinctive set of choices,” and flagging alternatives both inside and beyond the American context).

<sup>19</sup> See David Fontana & Aziz Z. Huq, *Institutional Loyalties in Constitutional Law*, 85 U. CHI. L. REV. 1, 3 (2018) (identifying institutional loyalty as one’s “tendency to identify with and to act in ways that promote their home institution”).

<sup>20</sup> It is uncontroverted that the Philadelphia Convention looked to prior models of judiciaries in order to select between potential ways of organizing a court system, even if scholars disagree about which models commanded the most respect. See James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1620–21 (2011) (recounting scholarly debates over the structure of Article III courts); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1577–82 (1990) (discussing the drafting history of Article III).

tension with the Justices' ideal of independence. Borrowing some terms from the scholarship on partisan gerrymandering, this Article labels these tactics *cracking*, *packing*, and *stacking*.<sup>21</sup> Cracking entails the strategic dissection of jurisdiction to undermine judicial autonomy. Packing entails manipulation of the appointment process. And stacking entails recalibrations of substantive law to undermine judicial independence. Recent conflicts over judicial independence reveal the abiding force of all three methods, notwithstanding the Court's effort to instantiate judicial independence in doctrinal form.

The analysis offered here is intended to help clarify what we should or should not expect from federal courts' judicial independence given the predictable institutional and partisan dynamics ushered into the world by the Constitution itself. Both judges and politicians invoke that term as if its defense could contribute to the rule of law, and the maintenance of a government constrained by the individual rights contained in the Constitution's Bill of Rights. This Article's analysis suggests that these hopes are overstated. When courts fail to vindicate the rule of law, the causes of their failure are deeply embedded in the Constitution. That failure follows from a fidelity to, not a heresy from, its original design. And a return to some "original" understanding will compound, not resolve, the difficulty.

The Article's approach is in one regard narrow and in another broad. On the one hand, it narrowly focuses exclusively and solely on federal courts. As the Court has recently noted, the organization of both state courts<sup>22</sup> and federal agency adjudications<sup>23</sup> raise separate independence- and integrity-related concerns. The question of how to define and implement federal court independence, this Article will argue, proves nettlesome enough to deserve careful treatment in isolation. On the other hand, this Article also offers a broader contribution by underscoring a deep conflict in constitutional discourse between "aspirational" or "nonconcessive" theories on the one

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<sup>21</sup> I borrow these terms from the literature on partisan gerrymandering. See, e.g., Pamela S. Karlan, *All over the Map: The Supreme Court's Voting Rights Trilogy*, 1993 SUP. CT. REV. 245, 249 ("There are basically three ways in which geographic aggregation rules might impair a voter's ability to elect her preferred candidate—the euphonious trio of cracking, stacking, and packing."); see also FRANK R. PARKER, *BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965*, at 48–51 (1990) (developing these terms).

<sup>22</sup> See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 457 (2015) (noting the different versions of independence instantiated in federal and elected state courts, but declining to adjudicate between them).

<sup>23</sup> See, e.g., *Ballard v. Comm'r*, 544 U.S. 40, 59 (2005) (holding that the Article I Tax Court, "like all other decisionmaking tribunals, is obliged to follow its own Rules").



hand, and “realist” or “concessive” accounts on the other.<sup>24</sup> An aspirational approach “holds individuals and institutions to standards that it is within their ability to meet, but that there is good reason to believe they will never meet.”<sup>25</sup> It does so as a way of clarifying moral obligations. The second, more realistic mode of analysis, in contrast, is a way of recognizing that “certain sound moral principles of politics are not likely to be met,” but we should still “go on to ask what should be done”—specifically in the light of those concessions.<sup>26</sup> It “counsels society to behave differently, and in ways that it could.”<sup>27</sup> The gap between judicial rhetoric and practice when it comes to judicial independence is an example of the failure to distinguish clearly between a nonconcessive and a realist approach. The Justices view and act upon judicial independence as if it were a matter of nonconcessive theory, i.e., an aspiration unalloyed by any adjustment for or concession to antecedent circumstances—whether institutional, political, or psychological.

This Article builds on a number of other important contributions to constitutional theory in the legal and political science literature. First, the distinction between aspirational and concessive levels of analysis is similar to Professor Richard Pildes’s rich and illuminating juxtaposition between a “general, essentialized level” of analysis and a more grounded “account of how these institutions actually function in, and over, time.”<sup>28</sup> Professor Pildes, though, is concerned with the way in which institutions are described within the doctrine, not with how the interplay between the real and ideal creates or constrains the possibility of realizing a constitutional ideal such as judicial independence.<sup>29</sup>

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<sup>24</sup> See DAVID ESTLUND, *UTOPOPHOBIA: ON THE LIMITS (IF ANY) OF POLITICAL PHILOSOPHY* 6 (2019); see also David Estlund, *Utopophobia*, 42 PHIL. & PUB. AFF. 113, 115–16 (2014) [hereinafter Estlund, *Utopophobia*] (developing the same distinction in a terser form). This is also known as the contrast between “full-compliance theory” and “‘partial compliance’ theory,” respectively. Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654, 654 (2012).

<sup>25</sup> Estlund, *Utopophobia*, *supra* note 24, at 117–18.

<sup>26</sup> *Id.* at 124.

<sup>27</sup> *Id.* at 121. This possibility is not uncontested. Charles Mills, for example, worries that this approach will be “deeply antithetical to the proper goal of theoretical ethics as an enterprise.” Charles W. Mills, “*Ideal Theory*” as *Ideology*, 20 HYPATIA 165, 170 (2005) (emphasis omitted). The proof, at least for legal analysis, is in the pudding: Is it possible to articulate a defensible normative agenda given the nonconcessive circumstances in which courts in fact operate?

<sup>28</sup> Richard H. Pildes, *Institutional Formalism and Realism in Constitutional and Public Law*, 2013 SUP. CT. REV. 1, 2. Professor Pildes recognizes that “the tension between institutionally formalist and realist approaches is pervasive, even if often obscured or latent” and often fuels “[d]ramatic conflicts within the Court, as well as public and academic debates.” *Id.* at 3–4. This Article’s approach harmonizes with these observations.

<sup>29</sup> For similar reasons, the analytic framing here also resonates with recent legal academic work relying on the economist’s “theory of the second best,” which concerns how social welfare can be

Second, this Article is a contribution to a vast literature on one of “most basic intellectual divisions in twentieth-century American legal thought . . . the law[–]politics divide.”<sup>30</sup> The law–politics divide aims to demarcate a domain of “principle and reason” free from the “deal-wielding and expedient compromises of politics.”<sup>31</sup> Judicial independence both capitalizes on this ideal and complicates it. Judicial independence is, on the one hand, a regulative ideal that aspires to cleave apart the distinct realms of law and active politics.<sup>32</sup> At the same time, judicial independence is itself constructed, as well as deconstructed, by strategic political action such as presidential invectives against the Court, bench-packing plans, and condemnations of specific judges. The conceptual and practical instability of judicial independence flows from this Janus-faced engagement with, and refusal of, the immersive field of politics. While the discourse of judicial independence draws on ideas of the law–politics divide, it should not be confused with the idea of a more general judicial capacity to drive social change. In large measure, the legal literature’s agenda in respect to the law–politics divide was established by the late Alexander Bickel’s worries about the so-called “counter-majoritarian difficulty.”<sup>33</sup> Bickel directed attention to the operation of judicial review by the Supreme Court alone, in particular its capacity to advance the interests of marginalized and mistreated minorities, such as African Americans.<sup>34</sup> Courts’ capacity for advancing social change,

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maximized under nonideal conditions. For a formal statement of the theory, see R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956). For applications of the theory to law as a counsel of indeterminacy, see Adrian Vermeule, *System Effects and the Constitution*, 123 HARV. L. REV. 4, 7, 17–23 (2009), and Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421, 422, 434 (2003).

<sup>30</sup> Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61, 121 (2009); see also B. Jessie Hill, *Resistance to Constitutional Theory: The Supreme Court, Constitutional Change, and the ‘Pragmatic Moment,’* 91 TEX. L. REV. 1815, 1820–23 (2013) (summarizing a range of descriptions and theorizations of the law–politics divide).

<sup>31</sup> Nourse & Shaffer, *supra* note 30, at 121.

<sup>32</sup> Cf. JUSTIN CROWE, BUILDING THE JUDICIARY: LAW, COURTS, AND THE POLITICS OF INSTITUTIONAL DEVELOPMENT 271 (2012) (noting the widely shared presumption that “judicial power is separate from and outside the realm of democratic politics,” and also doubting that presumption).

<sup>33</sup> ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 16, 250 (1962) (expressing skepticism about judicial review of state laws on constitutional and normative grounds, including the idea that courts lack a mandate from a majority of the electorate for their actions).

<sup>34</sup> Central to this debate has been a historiographical difference over the causal efficacy of the Court’s school-desegregation jurisprudence. Compare GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–41 (2d ed. 2008) (casting doubt on the causal efficacy of *Brown v. Board of Education*), and Michael J. Klarman, *How Brown Changed Race Relations: The Backlash Thesis*, 81 J. AM. HIST. 81, 82 (1994) (focusing on the role of massive resistance in catalyzing changed opinions on Jim Crow), with David J. Garrow, *Hopelessly Hollow History: Revisionist*

however, is not identical to their independence: Independence can manifest as a willingness to propel social change or as a principled refusal to engage in that enterprise. And an important reason for the efficacy of judicial intervention in favor of minorities has been the support of other branches of government.<sup>35</sup> To understand the judicial capacity for social change, therefore, is not the same as understanding the possible conditions of judicial independence.

The analysis proceeds as follows. To motivate the analysis, Part I unpacks the Roberts Court's ethical conception of judicial independence. Part II then explores the limits and internal contradictions of this jurisprudential vision. Switching to a more abstract level of analysis, Part III brings courts' ethical conception into dialogue with the strategic realities of judicial independence. This Article focuses on the presuppositions infusing the Framers' choice of one particular form of judicial independence from a larger design space of possibilities. This Article further explores the specific pathways created by the Constitution's design for impingement on the judiciary's autonomy as conceptualized by the Court. Part IV then offers a vision of what the ethical ambition of judicial independence can look like in praxis given these strategic constraints.

## I. JUDICIAL INDEPENDENCE AS ETHICAL ASPIRATION AND DOCTRINE

The phrase "judicial independence" is not found in the text of the Constitution.<sup>36</sup> Hence, its present jurisprudence cannot be a matter of textual exegesis alone. The doctrinal articulation of judicial independence instead starts from tradition and as an inference from the tripartite division between branches in the federal government. But tradition and structural inference alone cannot fully define the function and limits of the federal courts. Structural arguments and tradition, for instance, have failed to quell debate even on seemingly basic questions such as the scope of congressional authority over federal court jurisdiction.<sup>37</sup> To fill the resulting gap, the

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*Devaluing of Brown v. Board of Education*, 80 VA. L. REV. 151, 152–53 (1994) (emphasizing *Brown*'s effect on the Montgomery Bus Boycott leaders).

<sup>35</sup> See, e.g., J. Harvie Wilkinson, III, *The Supreme Court and Southern School Desegregation, 1955–1970: A History and Analysis*, 64 VA. L. REV. 485, 532–33 (1978) (discussing federal government involvement in desegregation).

<sup>36</sup> Of course, it was known at the time of the Framing. Alexander Hamilton, most saliently, praises "[t]he complete independence of the courts of justice [as] peculiarly essential in a limited Constitution." THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>37</sup> For recaps of this debate, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 295–97 (7th ed. 2015), and see also Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The*

jurisprudence of judicial independence relies on a set of “[e]thical constitutional arguments . . . [concerning] the sort of people we are and the means we have chosen to solve political and customary constitutional problems.”<sup>38</sup> Rather than a textual or historical imperative, it is an ethical ambition to create a distinction between law and politics that powerfully animates the Court’s jurisprudence of judicial independence.

Yet at the same time, judicial independence is not a self-evident ethical concept. On its face, it bespeaks some sort of relational quality. But it does not by its terms specify against whom independence is defined: Is it the elected branches, the public, the parties at bar, or the judge’s own preferences? Even focusing on the elected branches as the objects of distrust (since they are the obvious objects of separation of powers analysis), there remain important questions of calibration: How much influence can Congress or the executive have before it becomes excessive? And through what means can influence be licitly exercised?<sup>39</sup> Such questions are answered not in the abstract, but through a common law process of application and judgment. Rather than a Platonic ideal, therefore, judicial independence exists only in its particular, perhaps idiosyncratic, instantiations of a more general ethos.

Working in this ethical register, the Roberts Court has been preoccupied with how to practically delineate judicial independence as operational fact. This Part offers a reading and an internal critique of three lines of cases in which the Roberts Court has defined judicial independence and deployed it to practical effects. This provides a “case study” for the ways in which that concept can be implemented.

This Part proceeds first by identifying three distinct (and only loosely related) doctrinal strands that the Court has drawn from the abstract idea of judicial independence. These might be called independence in time, independence by the case, and independence in gross. The first, independence in time, concerns the timing of judicial intervention—as a response to private or state action and as the last word in respect to the legality of that event. The second, independence in gross, concerns the power to freely decide specific matters that are otherwise properly within the Court’s jurisdiction. As characterized by the Court, this is a matter of

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Dialogue (*Still*) *Has to Teach Us*, 69 DUKE L.J. 1, 70 (2019), which finds “lots of difficult problems still to wrestle with” in the field.

<sup>38</sup> BOBBITT, *supra* note 15, at 94–95; see also Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1394 (2013) (describing ethical arguments as “a rhetorical mode grounded in the character of the speaker, here the character of the American people as embodied in their constitutional arrangements”).

<sup>39</sup> Jackson, *supra* note 18, at 967 (noting questions of degree and mechanism in the definition of judicial independence).

exercising an independence of judgment. Finally, and notwithstanding the persisting uncertainty over the necessary scope of federal court jurisdiction, a third line of Supreme Court cases, concerning independence in gross, underscores the mandatory quality of such jurisdiction over whole classes of litigation. Despite sharing a conceptual and linguistic matrix, these three lines of cases are not in direct conversation with each other. Indeed, there is a dearth of academic analysis of their commonalities.

#### A. Independence in Time

A first element of the constitutional ethos around federal courts— independence in time—predates the Roberts Court. It imagines federal courts as standing in a distinct temporal relationship to litigants generally, and more specifically to other branches of government.<sup>40</sup> On one side, doctrines such as ripeness, standing, and the ban on advisory opinions are supposed to foreclose the possibility that courts would act as first movers, resolving “abstract” and “remote” questions of law.<sup>41</sup> On the other side of the temporal spectrum, the Court has constitutionalized the finality of federal court judgments.<sup>42</sup> The net effect of these doctrines is to preclude early intervention by the courts, while ensuring that when judicial intervention occurs, its effect is enduring.

Hence, in *Plaut v. Spendthrift Farm*, the Court established a categorical rule giving “the Federal Judiciary the power, not merely to rule on cases, but to *decide* them, subject to review only by superior courts in the Article III hierarchy.”<sup>43</sup> Citing the colonial experience with legislative tribunals as sites of “vigorous, indeed often radical, populism,” the *Plaut* Court attributed to the Framers a “sense of a sharp necessity to separate the legislative from the judicial power.”<sup>44</sup>

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<sup>40</sup> Cf. Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973) (discussing the “time frame” of federal court litigation).

<sup>41</sup> See Kenneth Culp Davis, *Ripeness of Government Action for Judicial Review*, 68 HARV. L. REV. 1122, 1122 (1955); see also Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 606 (1992) (“[T]he law of ripeness ensures that the plaintiff has not asserted the claim too early, and the law of mootness seeks to prevent the plaintiff from asserting the claim too late.”).

<sup>42</sup> *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) (asserting the “conclusiveness of judicial judgments”). Commentators underscore *Plaut*’s relationship to time. Frederic Bloom, *The Law’s Clock*, 104 GEO. L.J. 1, 30 (2015) (“To define finality, *Plaut* says, is to set the law’s clock and to exercise judicial power. That is the courts’ role alone.”).

<sup>43</sup> 514 U.S. at 218–19.

<sup>44</sup> *Id.* at 219, 221. The *Plaut* Court’s reliance on a gestalt understanding of the Framers’ general-design ambitions ranks it as an instance of ethical argument. For a similar argument canvassing a wider array of sources, see William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1816 (2008), explaining

The *Plaut* principle is repeatedly adduced in the lines of the jurisprudence described below.<sup>45</sup> It is also invoked in unrelated cases in a way that suggests that the Roberts Court now treats it as settled law.<sup>46</sup> Given the frequency with which it is cited, *Plaut* is plausibly viewed as a bedrock precedent in the Court's development of a more general account of judicial independence.

### *B. Independence by the Case: Two Variations*

The second element of judicial independence—independence by the case—interprets that concept in terms of a court's unfettered authority to exercise its judgment in respect to the legal questions in a specific case otherwise properly presented to the relevant tribunal. On this account, the elected branches traduce judicial independence when they impermissibly interfere with the *manner* in which a specific case is decided. Much of the Roberts Court's anxieties about the courts' autonomy have been channeled into this conception. To date, such concerns have not yet translated into the kind of crisp doctrinal breakwater found in *Plaut*. More modestly, they have destabilized an important structural pillar of the regulatory state and renewed litigant attention to a venerable federal courts rule of uncertain scope and impact. In both lines of cases, the extant doctrine appears highly contingent and unsettled. Even in the medium term of the Roberts Court's duration, it may well prove unstable.

Independence by the case takes two doctrinal forms. The first is a worry about judicial deference to administrative agencies' views on the law.<sup>47</sup> Federal administrative agencies commonly receive deference when they interpret either the federal statutes they are charged with enforcing<sup>48</sup> or the regulations that they have previously promulgated.<sup>49</sup> The first is called

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that "[n]umerous others' described the independent power of the Judiciary to resolve particular disputes as a central element of the Philadelphia Constitution."

<sup>45</sup> See, e.g., *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) ("The separation of powers, among other things, prevents Congress from exercising the judicial power." (citing *Plaut*, 514 U.S. at 218)).

<sup>46</sup> See, e.g., *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 150 (2015) (citing *Plaut*, 514 U.S. at 231–32, for the finality principle); *Gundy v. United States*, 139 S. Ct. 2116, 2142 & n.77 (2019) (Gorsuch, J., dissenting).

<sup>47</sup> These lines of criticisms are part of a more general assault on the federal regulatory state that "[i]n the last few decades . . . [has] reached a high level of intensity, a kind of fever pitch." Cass R. Sunstein & Adrian Vermeule, *The Morality of Administrative Law*, 131 HARV. L. REV. 1924, 1928 (2018) (situating attacks on deference in this context). With only a little loss of accuracy, we can generalize by saying these attacks emerge from the political right.

<sup>48</sup> See *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–45 (1984).

<sup>49</sup> See *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945).

*Chevron* deference and the second *Auer* deference. Both deference rules have been recently and vigorously impugned on the ground that such deference is inconsistent with a court's obligation to reach and apply an independent judgment of the law. This argument, to date, is fully articulated only in the law reviews.<sup>50</sup> Although Justices have started to criticize *Chevron* deference, they have not yet leveraged the concept of judicial independence against it.<sup>51</sup> Whether this remains a tenable equilibrium remains somewhat doubtful: A full-blown assault on *Chevron* deference, which draws on arguments about judicial independence, seems likely to be mounted sooner or later.

The challenge to *Auer* deference, in contrast, has been more fully aired in the courts, and underpinned there by a more robust assertion of judicial independence as a constitutional ethos. This challenge found a doctrinal form in *Perez v. Mortgage Bankers Association*, a 2015 case concerning a D.C. Circuit Court precedent that required agencies to employ notice-and-comment procedures when they wished to issue a new interpretation of a regulation that deviated significantly from a previously adopted view of the law.<sup>52</sup> In separate concurrences, Justices Samuel Alito, Antonin Scalia, and Clarence Thomas each seeded a constitutional argument against *Auer* deference.<sup>53</sup> Justice Thomas's version of the argument played upon the theme of judicial independence with greatest energy. The core of this argument was his assertion that deference "represents a transfer of judicial power to the Executive Branch."<sup>54</sup> The judicial power, on Justice Thomas's account, "include[s] the power to resolve [legal] ambiguities over time" in an

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<sup>50</sup> See, e.g., Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1189 (2016) (arguing that *Chevron* is incompatible with judicial independence by requiring Article III courts to defer to the views of one of the parties to a dispute); Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897, 907 (2019) (worrying that *Chevron* "puts agencies in the driver's seat with respect to both questions of law and questions of fact, with Article III courts retreating to the function of monitoring agencies for extreme outcomes that can be characterized as unreasonable").

<sup>51</sup> In a single, somewhat throwaway sentence, Justice Kennedy suggested that "[t]he proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary." *Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Kennedy, J., concurring); see also *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (mentioning but declining to rule on the petitioner's judicial-independence-based attack on *Chevron* deference). These hints have yet to reach fruition.

<sup>52</sup> *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1205–06 (2015). For an earlier intimation of the challenge, see *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155–59 (2012).

<sup>53</sup> See *Perez*, 135 S. Ct. at 1210 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213 (Scalia, J., concurring in the judgment); *id.* at 1213–15 (Thomas, J., concurring in the judgment).

<sup>54</sup> *Id.* at 1217 (Thomas, J., concurring in the judgment).

“authoritative” fashion.<sup>55</sup> Supplementing this formalist account, Justice Thomas also offered a consequentialist argument about “the judicial ‘check’ on the political branches” accumulating too much power.<sup>56</sup> This argument against tyranny of a sort complemented Justice Scalia’s concern about the risk of self-dealing that arises when an agency interpretation is given deference in cases where the agency itself is the defendant.<sup>57</sup>

In *Kisor v. Wilkie*, the ensuing frontal challenge to *Auer*, Justice Gorsuch made a similar (but less extensive) argument about judicial independence, bemoaning “the dangers of executive and legislative intrusion on judicial decision-making.”<sup>58</sup> He offered two further consequential arguments to illustrate the danger of deference. First, he contended that deference to an agency’s interpretation of their own regulations had an undesirable distributive effect because it would favor “the powerful, well-heeled, popular, and connected [who] can wheedle favorable outcomes.”<sup>59</sup> Second, Justice Gorsuch appealed to a distinction between “[t]he rule of law” and “the rule of men.”<sup>60</sup> On his theory, judicial independence by the case is a way of installing the law–politics distinction at the level of the discrete case. Its empirical premise is that judges and elected officials are driven by wholly different classes of motivation. Judges, in contrast to legislators or other holders of elected office, lack “their own [policy] interests, their own constituencies, and their own policy goals.”<sup>61</sup>

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<sup>55</sup> *Id.*; see also *id.* at 1218 (“Independent judgment required judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them through either internal or external sources.”).

<sup>56</sup> *Id.* at 1220; *id.* at 1221 (warning of “the accumulation of governmental powers” among administrative agencies); see also *id.* at 1212–13 (Scalia, J., concurring in the judgment) (striking a similar Madisonian note focused on the separation of powers).

<sup>57</sup> See *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68 (2011) (Scalia, J., concurring) (“It seems contrary to fundamental principles of separation of powers to permit the person who promulgates a law to interpret it as well.”).

<sup>58</sup> 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment). Of course, this was contested by Justice Kagan’s plurality opinion. *Id.* at 2421 (plurality opinion) (“Properly understood and applied, *Auer* does no such thing. In all the ways we have described, courts retain a firm grip on the interpretive function.”).

<sup>59</sup> *Id.* at 2438 (Gorsuch, J., concurring in the judgment).

<sup>60</sup> *Id.*

<sup>61</sup> See *id.* at 2439 (“When we defer to an agency interpretation that differs from what we believe to be the best interpretation of the law, we compromise our judicial independence and deny the people who come before us the impartial judgment that the Constitution guarantees them. And we mislead those whom we serve by placing a judicial *imprimatur* on what is, in fact, no more than an exercise of raw political executive power.”). Notice that Justice Gorsuch’s argument is not formalist. It is rather an assertion about actual, observable regularities in the different behavior of administrators and judges. It may be a species of “categorical realism,” which seems to describe agencies and “courts as a general or categorical matter.” See Pildes, *supra* note 28, at 8. But it is not a purely formalist claim.



The second form of independence by the case has emerged in an unclear and erratic line of cases starting with an obscure 1871 precedent concerning presidential pardons for former Confederate sympathizers, in which the Court has suggested that a legislative action should be invalidated because it denigrated judicial independence by interfering with the finality of a judicial judgment.<sup>62</sup> Like the assault on *Auer* deference, this second doctrinal form of independence by the case has yet to ripen into a binding holding backed by a Supreme Court majority. Indeed, after a long string of cases in which the Court distinguished the 1871 case, this form of independence experienced a palpable setback during the Roberts Court.

This line of cases rests on the contested and “deeply puzzling”<sup>63</sup> legacy of an 1871 precedent called *United States v. Klein*.<sup>64</sup> *Klein* seemed to announce a prohibition on legislative “rules of decisions” in pending cases, i.e., laws whereby “the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely contrary.”<sup>65</sup> Periodically after the 1870s, the Court has tangled with this cryptic yet seemingly vital presupposition about judicial power.<sup>66</sup> These encounters, however, have yielded little clarity.

The Roberts Court has twice glossed the *Klein* rule in only a handful of recent years. Over some sharply worded dissents, a plurality has winnowed it to a vestigial nub in two important cases. In *Bank Markazi v. Petersen*, the Court upheld provisions of the Iran Threat Reduction and Syria Human Rights Act of 2012, stating that the “financial assets that are identified in . . . Peterson et al. v. Islamic Republic of Iran et al.” would be available “to satisfy any judgment . . . awarded against Iran for damages for personal injury or death caused by” acts of terrorism.<sup>67</sup> Despite the fact that this language explicitly singled out a specific, then-ongoing litigation, and even nudged (or perhaps more accurately, violently shouldered) the federal courts toward a particular resolution of that matter, a majority of the Court validated it as consistent with the ideal of an “independent Judiciary” established by

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<sup>62</sup> *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146–47 (1871).

<sup>63</sup> Lawrence G. Sager, *Klein’s First Principle: A Proposed Solution*, 86 GEO. L.J. 2525, 2525 (1998).

<sup>64</sup> 80 U.S. (13 Wall.) 128.

<sup>65</sup> *Id.* at 146–47.

<sup>66</sup> *See, e.g.*, *Martinez v. Lamagno*, 515 U.S. 417 (1995) (holding reviewable judicial review of executive action when there is no persuasive reason that Congress intended the action to be unreviewable); *Robertson v. Seattle Audubon Soc’y*, 503 U.S. 429 (1992) (refusing to address whether the Court of Appeals’ reading of *Klein* was correct because Congress amended the underlying law rather than directing a particular result under old law).

<sup>67</sup> 136 S. Ct. 1310, 1318–19 (2016) (quoting 22 U.S.C. § 8772(a)(1)(C), (b)).

Article III.<sup>68</sup> Underscoring the foreign affairs tincture of the case, the majority rejected the argument that when a statute “directs courts to apply a new legal standard to undisputed facts,” it is invalid, especially when there was no “foregone conclusion[]” about the result.<sup>69</sup> Chief Justice Roberts, as intimated in the Introduction, demurred, insisting that the provision at issue did mandate a particular result, and that this “invad[ed] the judicial power.”<sup>70</sup>

The second decision glossing *Klein, Patchak v. Zinke*, concerned a Department of the Interior decision to take certain land into trust on behalf of an Indian tribe.<sup>71</sup> In relation to the statute at issue, Congress declared the Department’s decision lawful and directed the federal courts to dismiss all suits related to the land in question.<sup>72</sup> Again, the Court upheld a statutory impingement on a pending case from a *Klein* attack.<sup>73</sup> The *Patchak* plurality recognized the provision as precisely the kind of interest-group capture that Justices Gorsuch and Thomas had condemned in their sallies against *Auer* deference.<sup>74</sup> Yet, the plurality opinion by Justice Thomas nevertheless upheld the measure. It drew a clear, formalistic separation between the permissible enactment of “new laws that apply to pending civil cases” and legislative efforts to alter the outcome of a litigation without the creation of “new law.”<sup>75</sup> Three Justices concurred on the narrower grounds that Congress had authority to alter the underlying trust disposition or withdraw its waiver of sovereign immunity without creating a *Klein* problem.<sup>76</sup> Again, Chief Justice Roberts offered a sharply worded defense of “an independent judiciary” as “necessary to secure individual freedom” and imperiled when Congress “target[s] a single party for adverse treatment.”<sup>77</sup> This dissent is by no means

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<sup>68</sup> *Id.* at 1322.

<sup>69</sup> *Id.* at 1325.

<sup>70</sup> *Id.* at 1329–30 (Roberts, C.J., dissenting); *id.* at 1332 (characterizing the case as one in which “Congress assumes the role of judge and decides a particular pending case”).

<sup>71</sup> 138 S. Ct. 897, 902–03 (2018) (plurality opinion).

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

<sup>73</sup> *See id.* at 910.

<sup>74</sup> *See id.* (recognizing that “the Band exercised its political influence to persuade Congress to enact a narrow jurisdiction-stripping provision that effectively ends all lawsuits threatening its casino”).

<sup>75</sup> *Id.* at 909.

<sup>76</sup> *See id.* at 911 (Breyer, J., concurring) (“The petitioner does not argue that Congress acted unconstitutionally by ratifying the Secretary’s actions and the land’s trust status, and I am aware of no substantial argument to that effect.”); *id.* at 913 (Sotomayor, J., concurring in the judgment) (arguing that the relevant statutory provision “should not be read to strip the federal courts of jurisdiction but rather to restore the Federal Government’s sovereign immunity”); *id.* at 912–13 (Ginsburg, J., concurring in the judgment) (making the same sovereign-immunity-restoration argument as Justice Sotomayor).

<sup>77</sup> *Id.* at 915, 917 (Roberts, C.J., dissenting). Central to Chief Justice Roberts’s argument was the sense that the law in question singled out “a class of one,” and rejected the idea that Congress’s jurisdictional authority licensed it to resolve specific, individual cases. *Id.* at 918–20. Arbitrary treatment

doomed, moreover, to practical irrelevance. It might in the future peel away one of the concurring Justices who avoided the *Klein* question. It hence might be the foundation for a new majority at odds with the *Patchak* plurality view.

The immediate effect of *Bank Markazi* and *Patchak* is to license targeted legislation aimed at the goal of settling specific suits.<sup>78</sup> In the long term, the effect of these opinions will depend not just on the Court's coalitional politics, but also on how their licensing of congressional influence upon the judiciary's policy effects changes the balance of institutional power at the margin. As Part II elaborates, the magnitude of this marginal effect will depend on the nature of conflicts between the judiciary and elected branches in the future.

### C. Independence in Gross: The Private–Public Rights Distinction

The third jurisprudential strand of judicial independence is called independence in gross. It concerns the exercise of legislative power in respect not to individual cases, but rather to whole classes of litigation. Once again, these cases arise in the context of a broader assault on longstanding administrative law principles. Here, the Court has limited the types of cases non-Article III courts can hear by building on a distinction between public and private rights. A weaker manifestation of the same idea can be discerned when the Court construes statutes to avoid curtailment of the judicial power to settle legal questions.<sup>79</sup> This Article will focus here on the strand that has most preoccupied the Roberts Court, a strand that involves a policing of the private rights–public rights boundary, or the public rights doctrine.

The Roberts Court has drawn upon an early nineteenth-century distinction between “public rights” and “private rights” matters to identify a class of litigation that cannot be alienated to a non-Article III federal court.<sup>80</sup> Although the Court's distinction is not entirely pellucid—which this Article discusses more below—the Court seems to sort private rights of tort and contract on the one hand from statutory interests on the other. The former

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of a “class of one” can also violate the Equal Protection Clause. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564–65 (2000) (per curiam).

<sup>78</sup> See, e.g., Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095, 2095–97 (2005) (codified as amended at 15 U.S.C. § 7902(b)) (requiring immediate dismissal of pending lawsuits against manufacturers or sellers of firearms).

<sup>79</sup> See, e.g., *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2141–42 (2016); *Abbott v. Perez*, 138 S. Ct. 2305, 2321 (2018).

<sup>80</sup> The distinction's jurisprudence is conventionally traced to *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284–85 (1856), distinguishing cases of public rights from cases of common law, equity, or admiralty, the latter three being cases of private right.

must be resolved in Article III forums, while the latter can be removed from the Article III context.<sup>81</sup> The ensuing jurisprudence previously had an unstable quality, with the Court historically pinballing from a restrictive, formalist approach to a more latitudinarian, functionalist one.<sup>82</sup> In contrast, the Roberts Court's approach to date appears to be relatively stable and hospitable to concerns about judicial independence.<sup>83</sup>

Rather than occurring at the retail level of the specific case, the problem here arises wholesale: a genre of litigation that belongs in the federal courts because it involves a private right has been moved into another federal forum, either a non-Article III bankruptcy court or an administrative agency adjudication. In the bankruptcy context, the leading case is *Stern v. Marshall*, which held that the statutory category of “counterclaims by [the] estate against persons filing claims against the estate” assigned to non-Article III bankruptcy judges violated Article III.<sup>84</sup> Key to *Stern*'s conclusion was a background understanding of Article III as “‘an inseparable element of the constitutional system of checks and balances’ that ‘both defines the power and protects the independence of the Judicial Branch’”<sup>85</sup> for the sake of “liberty.”<sup>86</sup>

Using a similar framework, in *Oil States Energy Services v. Greene's Energy Group*, the Court evaluated the constitutionality of Congress's assignment to the United States Patent and Trademark Office of the “[i]nter partes review” process—the rereview and potential cancelation of previously

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<sup>81</sup> Note that the distinction in the main text misleads insofar as it omits the possibility of delegation to state courts, which appears uncontroversial. Professor Caleb Nelson has written an influential historical treatment of the distinction. Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 561–62 (2007) (“Americans . . . concluded that the protection of individual rights to person and property—core ‘private rights’ of the sort that (on John Locke’s influential account) government was instituted to safeguard—triggers different political calculations, and therefore requires different institutional arrangements, than the protection of ‘public rights’ belonging to the body politic.”); see also Gordon G. Young, *Public Rights and the Federal Judicial Power: From Murray’s Lessee Through Crowell to Schor*, 35 BUFF. L. REV. 765, 770–71 (1986) (offering a similar account).

<sup>82</sup> Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 YALE L.J. 346, 368–72 (2016) (documenting cycling in this line of cases).

<sup>83</sup> There are, for example, some Justices who would do away wholesale with agency adjudication. See, e.g., *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1316 (2015) (Thomas, J., dissenting) (“Because federal administrative agencies are part of the Executive Branch, it is not clear that they have power to adjudicate claims involving core private rights.”). At least so far, that does not appear to be a solution that is in the cards.

<sup>84</sup> 564 U.S. 462, 474, 503 (2011) (quoting 11 U.S.C. § 157(b)(2)(C)). For a history and description of the bankruptcy bench, see Anthony J. Casey & Aziz Z. Huq, *The Article III Problem in Bankruptcy*, 82 U. CHI. L. REV. 1155, 1167–73 (2015).

<sup>85</sup> 564 U.S. at 482–83 (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (plurality opinion)).

<sup>86</sup> *Id.* at 483.

issued patents.<sup>87</sup> Unlike the state law claim at issue in *Stern*, however, the patent at issue here was characterized as a public right on the ground that it “ar[ose] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments.”<sup>88</sup>

These cases share not just a common analytic framework—the distinction between public and private rights—but also a unified normative orientation. The challenges to judicial independence from bankruptcy judges and agency adjudication arise because of the way in which both arrogate a slice of the federal bench’s authority. But unlike the argument against *Auer* deference, which focuses on intralitigation distortions, the concern with non-Article III forums is described in terms of lost jurisdiction rather than compromised decisional autonomy. At least at first blush, though, there is a common intuition at work here and in the independence-by-the-case jurisprudence: the notion that judicial independence is closely associated with the sheer magnitude of judicial power to decide questions of law.

#### D. *The Roberts Court’s Uncertain Approach to Judicial Independence*

Judicial independence is a signature concern for the Roberts Court. This concern can be seen not only for the Chief Justice’s pronouncements in the judiciary’s annual report and in his rare public communications, but also in the case reporters. The modern Supreme Court has developed three doctrinal varieties of judicial independence. Not all are consistently honored. But each—at some level of generality, and with the right facts—commands majority support among the Justices. In net, the three lines of cases capture a comprehensive *judicial* specification of the more general and abstract ethic of judicial independence that is lurking in the background of the case law.

Moreover, judicial independence, when pitched at a high enough level of generality, seems not to be a matter of partisan ideological contention. Rather, a distinctive feature of judicial independence in the Roberts Court is its lack of a simple ideological correlate. Instead of having a consistent political valence, judicial independence has attracted a motley array of advocates. All Justices endorse the *Plaut* rule. In contrast, only the more conservative Justices fervently assert the distinctiveness of public rights, although others also toe that line. And Chief Justice Roberts, with unlikely bedfellows Justices Sonia Sotomayor and Gorsuch, has revived (or perhaps

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<sup>87</sup> 138 S. Ct. 1365, 1372–73 (2018).

<sup>88</sup> *Id.* at 1373 (quoting *Crowell v. Benson*, 285 U.S. 22, 50 (1932)).

transmuted) the *Klein* doctrine.<sup>89</sup> From these lineups, therefore, it would seem that the ethical aspiration of judicial independence holds some allure for all of the Justices—but not all of the time or necessarily in the same way.

The concept of judicial independence is, in sum, in its general form a nexus of ideological convergence and, in its specifics, an anvil for ideologically unexpected divisions.

## II. THE JUDICIAL RECESSION FROM JUDICIAL INDEPENDENCE

Judicial independence may be on everyone's lips, but that does not mean that all are singing from the same hymnal. The fragile persistence of *Auer* and the uncertain retirement of the *Klein* "rule of decision" prohibition suggest that the doctrine's stability should not be taken for granted. Yet, these tensions do not exhaust the Roberts Court's difficulties in instantiating judicial independence. Dig deeper into the doctrine and one quickly detects other cracks in the edifice. In some places, the Court's conceptualizations of judicial independence are hedged with provisos that rob them of much of their effectual force. Or else the Court conspicuously and inexplicably fails to extend its ethical understanding of judicial independence to a domain or legal question where, by its terms, it should logically extend.

These fissures are evidence of something more than the usual compromises and negotiations that attend doctrinal design. Instead, they suggest a more profound, structural conflict between the ethical aspiration and strategic institutional reality of judicial independence.

To establish the threshold premise that there are contradictions and tensions in the project of articulating judicial independence, this Part develops two lines of critique internal to the doctrine. In tandem, they supply a motivation for a more extensive diagnosis of that internal tension in Part III. The first critique develops a worry about how the Court chooses which forms of judicial independence to defend. The Justices consistently lack any explanation of why these three aspects of independence should be protected and not others. While other manifestations of institutional autonomy have been previously flagged by members of the Court, these alternatives have either been ignored or forgotten. The result is case law of judicial independence that lacks a single coherent and unified internal logic.

Second, this Article develops a concern about how the Court has chosen to extend or delimit its ethical aspiration through doctrine. In particular, this Article attends to what the Court pointedly fails to do once it has recognized

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<sup>89</sup> See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1329 (2016) (Roberts, C.J., joined by Sotomayor, J., dissenting); *Patchak v. Zinke*, 138 S. Ct. 897, 914 (2018) (Roberts, C.J., joined by Kennedy & Gorsuch, JJ., dissenting).

a specific form of independence as meriting doctrinal protection. Even within the carefully cultivated and securely immured garden of the Supreme Court's jurisprudence, Justices recoil from the full implementation of the grand ideals that they have otherwise articulated. In respect to each of the three doctrinal formulations of judicial independence, this Article shows that the Court has either (1) self-consciously formulated a rule of law that plainly leaves open the possibility of circumvention, in effect taking with one hand what it gives with the other, or (2) conspicuously failed to apply the doctrine of judicial independence to a domain to which it would obviously reach. What ensues is distinct from the well-recognized phenomenon of "underenforced" constitutional norms,<sup>90</sup> with derogation from the constitutional ideal far more substantial—even complete—than in the ordinary case.<sup>91</sup>

#### A. *Why These Aspects of Judicial Independence?*

A first concern about the Roberts Court's project of rejuvenating judicial independence goes to its internal coherence. The Court has offered no account of why it enforces *these* three instantiations of judicial independence and not others.<sup>92</sup> In the absence of a guiding theory, a mystery abides: There are a number of quite different ways of understanding and implementing judicial independence, as the Justices themselves have fleetingly recognized. Without a theory to serve as guiding compass, however, it is hard to know why these three particular instantiations should be made to bear all of the normative weight of the ethical aspiration toward judicial autonomy, and why other manifestations should be sidelined.

The Constitution's text does not pick out any one of the three forms of judicial independence mentioned above. Indeed, textual exegesis does not provide a solid berth for the finality rule, the public rights doctrine, the *Klein* rule, or the worry about *Auer* deference. Moreover, once one moves outside the text, a surfeit of different ways of understanding judicial independence appears.

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<sup>90</sup> Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978) (describing "an important distinction between a statement which describes an ideal which is embodied in the Constitution and a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues").

<sup>91</sup> Normally, the Court "adopts a decision rule to implement the operative proposition." Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1657 (2005). But here, the decision rule and the operative proposition are in conflict.

<sup>92</sup> See *supra* Sections I.A–C.

In the American constitutional tradition, it is possible to pick out several ways in which judicial independence could be conceptualized and protected. In a recent historical survey of debates about judicial independence, for example, Professor Tara Leigh Grove has argued that “much of the judicial independence that we take for granted today depends on convention”<sup>93</sup> rather than explicit constitutional norms or judicial precedent. To substantiate this argument, she has distinguished “court-curbing,” a tactic prohibited by “a political norm,” from “jurisdiction-stripping,” to which “no broad bipartisan norm” has emerged.<sup>94</sup> Her ensuing extensive taxonomy of the various forms of legislative action that fit into one of these two categories demonstrates that there are many ways in which one can imagine judicial independence being derogated. Yet, not only do political norms fail to cover all of this waterfront, but the Court has also conspicuously selected only three varieties of legislative action that can impinge on its autonomy.

This failure cannot be explained by a lack of opportunities to develop a more general theory of judicial independence. Within the federal system, Professor Vicki Jackson has observed, there are a number of different “packages” of institutional choices with respect to the independence “of Article III judges, of other judicial officers appointed by Article III judges, of Article I or ‘legislative’ tribunals in the territories and for specific subject matters.”<sup>95</sup> Allocating jurisdictional responsibilities between these forums might be thought to require a theory of why an Article III tribunal is distinct—a constitutional theory, that is, of institutional independence that allows the Court to sort between tribunals with different characteristics. Alas, the doctrine has not yielded a litmus test for this purpose.

In the public rights line of cases that includes *Stern* and *Oil States*, the Court instead appears to assume that the mere absence of an Article III label is itself a reliable indicator of an absence of independence. It is hardly clear why this would be the case. To the contrary, Professor Troy McKenzie has argued that “bankruptcy judges are . . . *more* insulated from the legislative and executive branches than most federal district judges” because they are “selected from the bankruptcy bar on their professional merits, not their political leanings,” and because they “do not generally seek elevation to

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<sup>93</sup> Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 517 (2018) [hereinafter Grove, *Origins*].

<sup>94</sup> *Id.* at 517–18.

<sup>95</sup> See Jackson, *supra* note 18, at 972; see also Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 582 (1985) [hereinafter Resnik, *Mythic Meaning*] (framing a similar question).



‘higher’ judicial office.”<sup>96</sup> It is not clear, that is, why Congress cannot fashion institutional characteristics that are at least as protective as Article III’s accoutrements.<sup>97</sup> The Court’s categorical refusal to entertain that possibility, however, means that it has not had to offer an account of what institutional characteristics do conduce to judicial independence and which are superfluous.

A similar theoretical lacuna arises in the federalism domain. Across the state and federal judiciaries, independence is operationalized in different ways. Despite occasional gestures of concern,<sup>98</sup> the Court has steered clear of offering an account of judicial independence that would cover both sets of institutions.<sup>99</sup>

Two efforts to theorize judicial independence are worth noting. The first fails to persuade, and the second has lacked any staying power. To begin with, Justice Thomas’s concurring opinion in *Perez*, an early and influential contribution to the independence-by-the-case formulation, invokes “John Locke and Baron de Montesquieu” to support the separateness of judicial power.<sup>100</sup> But this conjuration of eighteenth-century intellectual history is singularly unhelpful in thinking about which aspects of judicial independence are critical in practice. Locke’s analysis of the separation of powers, for example, does not support a focus on an independent judiciary for the rather simple reason that he had no conception of autonomous courts.<sup>101</sup> It would thus be quite implausible to take him, as Justice Thomas does, as providing an intellectual template for how judges could serve as safeguards of the rule of law against legislative or executive depredations. Montesquieu, it turns out, is not much more helpful. His work has been fairly described as “too complex and open to varying interpretations to produce a

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<sup>96</sup> Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 793 (2010).

<sup>97</sup> See *infra* Part III for a consideration of how well institutional safeguards in fact work.

<sup>98</sup> See, e.g., *Republican Party of Minn. v. White*, 536 U.S. 765, 788–89 (2002) (O’Connor, J., concurring) (expressing concern that “if judges are subject to regular elections[,] they are likely to feel that they have at least some personal stake in the outcome of every publicized case”).

<sup>99</sup> See, e.g., *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 457 (2015) (“It is not our place to resolve this enduring debate.”).

<sup>100</sup> *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 116–17 (2015) (Thomas, J., concurring in the judgment).

<sup>101</sup> See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 83–84 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690). Famously, Locke “treated judicial power as part of the executive power.” Suri Ratnapala, *John Locke’s Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 189 (1993).

meaningfully determinate blueprint for government at the level of detailed implementation.”<sup>102</sup>

A second pathway for the definition of judicial independence is Justice Lewis Powell’s account of “the *judicial power*” as being closely entangled with the judicial practice of *stare decisis*, i.e., “the respect [courts show] for [their] own previous opinions.”<sup>103</sup> Justice Powell’s intuition seemed to be that the manner in which courts and legislatures reason is fundamentally different. Judges must respond to historically situated grounds, such as statutory and constitutional text or precedent. Legislators, and, to a lesser extent, agency officials, are bound by no such reasoned decision-making obligation in relation to historical material. On this view, a court’s past decisions should motivate its future decisions, whereas a legislature’s past decisions are irrelevant to its future decisions. This idea of motivational differentiation across the branches is consonant with Justice Gorsuch’s account of motivational variation between regulators and judges.<sup>104</sup> Yet, despite sharp debates within the Roberts Court on the nature and force of *stare decisis*, the Powell conception of judicial independence fails to find an analytic purchase in the present debates over precedent.<sup>105</sup> However, there is no account in the Court’s own work of the reasons for instantiating judicial independence using these means and not others.

This Article defers to Part III for a more detailed exploration of the ways in which federal courts remain vulnerable to ends-oriented manipulation by

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<sup>102</sup> John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1996 (2011). While Montesquieu did at least conceptualize the judiciary as a distinct entity, he focused on *juries* (“the judges of the nation”) and not judges as the site of effectual independence. Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1064 (2007) (quoting CHARLES-LOUIS DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 163 (Anne M. Cohler, Basia Carolyn Miller & Harold Smauel Stone trans., Cambridge Univ. Press 1989) (1748)). The casual, opportunistic, and misleading invocation of intellectual history to offer supposedly originalist justifications for attacks on the administrative state is not central to the analysis here. But it does mean there is no template in intellectual history for the congeries of forms associated with judicial independence presently.

<sup>103</sup> Lewis F. Powell, Jr., *Stare Decisis and Judicial Restraint*, 47 WASH. & LEE L. REV. 281, 287 (1990).

<sup>104</sup> See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2437 (2019) (Gorsuch, J., concurring in the judgment).

<sup>105</sup> Recent cases feature sharp debate about the nature of *stare decisis*. See, e.g., *Janus v. Am. Fed’n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2460 (2018) (declining to follow precedent when “[f]undamental free speech rights” were at stake); *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (stating that *stare decisis* is not an “inexorable command” (quoting *Pearson v. Callahan*, 555 U.S. 223, 233 (2009))). The most sophisticated recent academic account of precedent, however, focuses on nonmerits considerations that “are susceptible to principled application by justices across the philosophical spectrum.” RANDY J. KOZEL, *SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT* 13 (2017). In attempting to use *stare decisis* to quell intracourt partisan divisions, Professor Randy Kozel usefully gestures toward the possibility of thinking about precedent in terms of judicial independence.

the political branches. But it is instructive to observe here that the Justices themselves (and not just Justice Powell) were once attentive to a wider palette of threats to judicial independence. Professors Thomas Merrill and Jerry Mashaw have separately pointed out that at the beginning of the twentieth century, the judiciary perceived its independence to be threatened not by excisions of jurisdiction, but by the opposite problem of jurisdictional overload as a consequence of the growing size of the federal regulatory state.<sup>106</sup> This suggests that additions of jurisdiction can compromise the judicial power, as much as subtractions. Yet, this concern seems now forgotten even though it dominated during the late nineteenth century. It plays no overt part in contemporary discussions of the separation of powers, even if it is at work in the background of certain doctrinal choices.<sup>107</sup>

Writing some thirty-five years ago about the bounds of Article III, Professor Judith Resnik noted a worrisome absence of theoretical coherence in the relevant case law of the day. She suggested that the doctrine was better understood as animated by a “myth” in which Article III judges “stand ready, as ‘gladiators’ of sorts, should the need arise” to “do battle with the executive (and in this country, with the legislature).”<sup>108</sup> She suggested an explanation sounding in ethical aspiration rather than text, precedent, or historical experience with threats to the judiciary.<sup>109</sup> In the intervening years, the theoretical aporia that Professor Resnik perspicuously isolated has not been ameliorated. This is so even as the Roberts Court has widened and deepened the doctrinal picture of judicial independence.

### B. Internal Limits to Judicial Independence

So much for theoretical coherence. Even if one lacks a global account of independence in the abstract, it still ought to be possible to defend specific redoubts of institutional autonomy. Yet, even in this more specific task, the Roberts Court’s doctrinal enterprise falls curiously short. By examining

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<sup>106</sup> Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 COLUM. L. REV. 939, 944, 980, 990 (2011) (“During the earlier era, the primary concern was that Article III courts would be drawn into matters of ‘administration’ that were not properly judicial. In other words, the concern was not dilution of the judicial power but contamination of that power.”); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 24–25 (2012) (offering a similar reading of the historical record).

<sup>107</sup> See Aziz Z. Huq, *Judicial Independence and the Rationing of Constitutional Remedies*, 65 DUKE L.J. 1, 53 (2015) [hereinafter Huq, *Rationing*] (identifying “caseload management as a core institutional interest of the federal judiciary,” and identifying specific doctrinal lines in which it alters the law).

<sup>108</sup> Resnik, *Mythic Meaning*, *supra* note 95, at 612.

<sup>109</sup> See *id.* at 612–13.

closely each of the three formulations of judicial independence, this Section illustrates how each is ignored, circumvented, or otherwise rendered a vacuity by the Court. The result is less a “right–remedy gap,”<sup>110</sup> and at times perhaps even a wholesale derogation from enforcement.

### 1. *When Finality Doesn’t Stick*

It is useful to begin with the bedrock *Plaut* rule of judgment finality.<sup>111</sup> This rule is commonly characterized as admitting of no exceptions.<sup>112</sup> But this is not entirely true. Finality is not a self-defining term. Rather, as Professor Resnik has acutely observed, it is “a normative conclusion,” not an “objective reality.”<sup>113</sup> Congress, as Professor Resnik noted, has some power to determine what counts as a judgment amenable to finality.<sup>114</sup> The Court also has power to define what material elements of a judgment will be accorded finality.<sup>115</sup> It could have exercised this definitional power to insulate judgments from any and all kinds of post hoc interference. But it has chosen not to do so—despite the fact that the norm of official compliance with federal court orders is of relatively recent vintage.<sup>116</sup>

Indeed, only a scant few years after *Plaut*, the Court upheld in *Miller v. French* federal legislation changing the prospective effect of a prison-reform injunction, notwithstanding Congress’s lack of lawful power to unpick the underlying judgment. Nothing in *Plaut*, the *Miller* Court explained, called into doubt “Congress’ authority to alter the prospective effect of previously entered injunctions.”<sup>117</sup> The practical effects of the *Miller* exception in cases where a Court has issued an injunction are large. Provided that legislation

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<sup>110</sup> See John C. Jeffries, Jr., *The Right-Remedy Gap in Constitutional Law*, 109 YALE L.J. 87, 98–100 (1999).

<sup>111</sup> See *supra* text accompanying notes 43–46 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995)).

<sup>112</sup> See Adrian Vermeule, *The Judicial Power in the State (and Federal) Courts*, 2000 SUP. CT. REV. 357, 367 (describing *Plaut* as a “broad” and “prophylactic” rule). Professor William Baude argues that the federal courts’ “judgment supremacy has jurisdictional limits.” Baude, *supra* note 44, at 1812. Professor Baude, though, recognizes that his argument is not purely descriptive of existing law, and would engender what he (mildly) characterizes as “[m]essy complications.” *Id.* at 1852.

<sup>113</sup> Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 615 (1985).

<sup>114</sup> See *id.* at 614; see also 28 U.S.C. § 1291 (setting forth provisions for appellate review of collateral orders).

<sup>115</sup> See 28 U.S.C. § 1291.

<sup>116</sup> Grove, *Origins*, *supra* note 93, at 488 (finding that “throughout much of our history, prominent federal and state officials presumed that they could obstruct federal court orders with which they firmly disagreed,” and “the current convention requiring compliance did not clearly emerge until after the civil rights movement of the 1950s and 1960s”).

<sup>117</sup> *Miller v. French*, 530 U.S. 327, 344 (2000) (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995)).

does not independently violate the Constitution, a prior injunction based on a valid judgment does not stop elected branches from engaging in ends-oriented manipulation of that injunction's practical force. Indeed, this is not the only way in which the elected branches can change the effective force of an injunction from a federal court. In practice, Professor Nicholas Parrillo has demonstrated, federal court orders against administrative agencies often generate extended "compliance negotiations" between the government and the court over the terms of future conduct.<sup>118</sup> Both Congress and the Executive Branch, therefore, exercise in practice a large measure of discretion despite the putatively binding effect of a federal court injunction.

What of money judgments? The Court has never addressed the question of whether Congress may alter monetary entitlements through its taxing or regulatory authority in ways that de facto negate the effects of a federal court judgment. To be sure, the United States may certainly waive the benefit of a prior judgment in its favor, in effect reassigning a right after a court has acted.<sup>119</sup> Perhaps closer to the mark, there is a well-known historical tradition of legislative indemnification of federal-officer defendants in the wake of adverse torts judgments.<sup>120</sup> Indemnification in constitutional tort cases, which remains common today,<sup>121</sup> alters the redistributive entitlements created by a money judgment. In the limited class of cases where government assumes a liability of a federal-officer defendant and then asserts a species of sovereign immunity to preclude relief, it can amount to an effectual negation of the judgment.<sup>122</sup> Hence, the doctrinal formulation of judicial finality creates no

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<sup>118</sup> Nicholas R. Parrillo, *Negotiating the Federal Government's Compliance with Court Orders: An Initial Exploration*, 97 N.C. L. REV. 899, 901 (2019).

<sup>119</sup> *United States v. Sioux Nation of Indians*, 448 U.S. 371, 397 (1980).

<sup>120</sup> See James E. Pfander & Jonathan L. Hunt, *Public Wrongs and Private Bills: Indemnification and Government Accountability in the Early Republic*, 85 N.Y.U. L. REV. 1862, 1866 (2010) (describing that an early nineteenth-century "practice of securing a determination of the right to indemnity almost invariably entailed the submission of a petition to Congress for the adoption of private legislation" (emphasis omitted)). For examples of legislation targeted at specific grievances, see *Pope v. United States*, 323 U.S. 1, 9 (1944), which describes legislation whose "purpose and effect seem rather to have been to create a new obligation of the Government to pay petitioner's claims where no obligation existed before."

<sup>121</sup> See Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 885, 912 (2014) (finding that "law enforcement officers employed by the eighty-one jurisdictions in my study almost never contributed to settlements and judgments in police misconduct lawsuits during the study period").

<sup>122</sup> This is not a hypothetical possibility. Pursuant to the Federal Employees Liability Reform and Tort Compensation Act, commonly known as the Westfall Act, in a suit against a federal employee, the U.S. government is often substituted for the individual employee defendants and the claim transformed into a claim under the Federal Tort Claims Act (FTCA). Pub. L. No. 100-694, 102 Stat. 4563 (1988) (codified in scattered sections of 28 U.S.C.). Westfall substitution occurs even where the FTCA "itself does not provide a means of recovery." *United States v. Smith*, 499 U.S. 160, 166 (1991); see also James E. Pfander & David P. Baltmanis, *W(h)ither Bivens?*, 161 U. PA. L. REV. ONLINE 231, 233 (2013) ("The

barrier to post hoc fiscal transfers that are designed to mitigate the practical effect of a judgment.

The specific doctrinal formulation of judgment finality, therefore, presents something of a mystery. Scholars have previously wondered why federal court judgments are obeyed, given that judges (in Alexander Hamilton's familiar locution) possess "neither force nor will, but merely judgment."<sup>123</sup> But this misses the point. A more profound puzzle is why compliance is not inexorably followed by the *entirely lawful* exercise of legislative or regulatory power to undo the positive or legal effects of a judgment. Neither money judgments nor equitable relief in the form of an injunction are immune from unraveling, even if predicated upon a final federal court judgment and the *Plaut* rule. It's unclear why elected actors do not engage in redistribution as a second and subsequent step to the judicial application of legal rules.<sup>124</sup> Even if it is difficult to identify who precisely should be paid off as a consequence of a legal ruling, why do we not see more rough-and-ready compensating legislative adjustments after litigation?

## 2. *Abandoning Independence by the Case*

The second doctrinal instantiation described in Part I, independence by the case, raises a different set of concerns. Here, worries about the integrity of the doctrine arise thanks to the Court's own failure to consistently apply a circumvention principle. This is different from failing to vote in favor of judicial independence across its different varieties, on which Part I focused. It would be thus irrelevant that only Chief Justice Roberts and Justice Gorsuch have joined (in different measures) both the interrogation of deference doctrines in the administrative law context, which have resulted in a narrowing of *Auer* deference, and also the campaign to revive the *Klein* doctrine. Gauging the salience of such seeming inconsistency is difficult in

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Westfall Act immunity was designed, we think, to apply broadly, displacing all state common law actions against federal employees, whether or not such actions seek to vindicate a constitutional right.”).

<sup>123</sup> THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis omitted).

<sup>124</sup> Indeed, this is a standard prescription in the law-and-economics literature. Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 677 (1994) (“Redistribution is accomplished more efficiently through the income tax system than through the use of legal rules, even when redistributive taxes distort behavior.”). This prescription is not an uncontested one. Cf. J.A. Mirrlees, *The Theory of Optimal Taxation*, in 3 HANDBOOK OF MATHEMATICAL ECONOMICS 1197, 1197–98 (K.J. Arrow & M.D. Intriligator eds., 1986) (“It is generally agreed by economists that the lump-sum transfers necessary to [accomplish perfectly corrective transfers] are scarcely ever feasible. There is no way of obtaining the information about individuals that is required except in a society of individuals who are truthful regardless of selfish considerations.” (footnote omitted)).

the absence of any supervening general theory of judicial independence.<sup>125</sup> The point here is more narrowly that even when a Justice embraces a specific doctrinal instantiation of judicial independence, they often do so in a fickle and unstable way.

Taking arguments against *Auer* deference seriously as a decanting of judicial independence would destabilize a suite of doctrines and outcomes. But the Justices who concurrently lead the charge against deference in the administrative law context have aggressively expanded conceptually indistinguishable deference doctrines elsewhere. And they have done so in ways that are flatly inconsistent with the Justices' own articulated theoretical critiques of administrative law deference doctrines.<sup>126</sup> The result is not just a failure to take a principle to its limit, but a flagrant kind of inconsistency.

To see the force of this worry, it is helpful to drill down first on the structure of *Auer* deference, and then ask whether that structure can be observed in other domains of law. As most recently reconstructed by a plurality of the Court, the triggering condition for *Auer*'s operation is that the administrative agency has issued a regulation where there is genuine ambiguity about the meaning of that regulation in light of "the text, structure, history, and purpose."<sup>127</sup> Only then does *Auer* instruct a court to treat the agency's construction of the regulation as decisive in the litigation context.<sup>128</sup> This deference means that in a private litigant's challenge to the agency's action, the government is more likely to prevail when *Auer* is applied.<sup>129</sup> There are two objections to this arrangement. The first sounds in the idea of *nemo iudex in sua causa*—no man should be judge in his own case. The

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<sup>125</sup> See *supra* Section II.A (detailing this absence).

<sup>126</sup> Even in the administrative law context, the derogation of *Auer* deference might not necessarily alter the balance of interpretative authority between courts and administrative agencies. As Professor Aaron Nielson has observed, an agency that lacks the authority to interpret its own regulations may seek the same sort of flexibility by simply declining to issue regulations and proceeding by adjudication rather than rulemaking. Aaron L. Nielson, *Beyond Seminole Rock*, 105 GEO. L.J. 943, 947–48 (2017). As Professor Nielson notes, the resulting arbitrage opportunity can be constrained by limiting the scope of agency discretion available through adjudication. See *id.* at 950–51. The limited point here is that even if *Auer* deference were abrogated, this would not achieve the ends that the Justices themselves purport to advance.

<sup>127</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (plurality opinion).

<sup>128</sup> See *id.* at 2418 ("When it applies, *Auer* deference gives an agency significant leeway to say what its own rules mean . . . [b]ut that phrase 'when it applies' is important—because it often doesn't."); see also Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 188–89 (2019) (suggesting that *Kisor* entails that "where there might be a better interpretation but the agency's view is at least permissible," a court should defer to the agency).

<sup>129</sup> It is not certain that the government will prevail: the agency's construction of the regulation might conflict with a hierarchically superior legal rule, such as a federal statute or a constitutional provision.

second is a concern about an improper allocation of hermeneutic authority—i.e., a worry about judicial independence. This Article sets aside the former concern<sup>130</sup> and focuses on the latter, which has become a central attack on *Auer*.

Administrative law is not the only domain in which hermeneutic authority is displaced from the judiciary in a fashion analogous to *Auer* deference. First, consider a case in which an official actor interprets an ambiguous law to impose a penalty or a harm on a private party. In response, a private party who has been subject to the ensuing regulation or rule (or deprivation of a benefit) sues that actor. The official, now a defendant in federal court, asserts that her action fell within a “zone of ambiguity.”<sup>131</sup> As a result of this deference, the private plaintiff is denied either injunctive or monetary relief, even though the official’s construal of the law plausibly varies (perhaps substantially) from the law’s *true* content as would be ascertained by an unconstrained bench. In effect, the official’s judgment of the law has been allowed to supersede the court’s exercise of hermeneutic judgment. This combination of circumstances generates constitutionally grounded suspicion in the administrative law context, so it should by rights also be constitutionally problematic elsewhere. But it does not seem to be viewed as an Article III concern.

Instead, there are a range of circumstances in which an official’s view of the law can supersede and negate that of a court. First, in the context of post-conviction review of state court criminal convictions, Congress has instructed that a precondition of relief is that a petitioner demonstrate that the state court’s conclusion “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”<sup>132</sup> The Court has not only embraced this standard,<sup>133</sup> but it has also aggressively expanded the scope of *Auer*-like statutory deference to reach instances in which there is no opinion drafted by a state court in view.<sup>134</sup> Deference, indeed, operates even when the state court

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<sup>130</sup> There are also reasons for doubting that the *nemo iudex* principle has the explanatory power often ascribed to it. Cf. Adrian Vermeule, *Contra Nemo Iudex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 395 (2012) (noting the possibility that “for structural reasons there can be *no* impartial decisionmaker in the relevant domain, so that any allocation of decisionmaking authority must necessarily violate *nemo iudex*”).

<sup>131</sup> See *Kisor*, 139 S. Ct. at 2420 (plurality opinion).

<sup>132</sup> 28 U.S.C. § 2254(d)(1).

<sup>133</sup> *Williams v. Taylor*, 529 U.S. 362, 412–13 (2000) (O’Connor, J., delivering the opinion of the Court as to this Part).

<sup>134</sup> See *Harrington v. Richter*, 562 U.S. 86, 103 (2011) (stating that claims rejected on procedural grounds in state court are barred from federal court unless exceptions are met).



has adopted verbatim, or almost word-for-word, an opinion that has been drafted by a prosecutor.<sup>135</sup> Across all these permutations of facts, the structure of post-conviction habeas review parallels the structure of *Auer* deference: The state, in its capacity as a party in a suit, receives deference to an actual or an imputed reasonable interpretation of the law in a way that forestalls federal court correction of the state's own errors.

Nor is it plausible to think that the Court was simply unaware of the Article III concern flowing from this arrangement. To the contrary, Justice John Paul Stevens flagged this concern in an early and important case, *Williams v. Taylor*, about the imperiled "federal courts' independent responsibility—independent from its coequal branches in the Federal Government, and independent from the separate authority of the several States—to interpret federal law."<sup>136</sup> A surfeit of deference, he warned, might be "inconsistent with the practice that federal judges have traditionally followed in discharging their duties under Article III of the Constitution."<sup>137</sup> Despite Justice Stevens's arguments, the Court has never examined the impact of post-conviction habeas review on Article III independence by the case. It has simply disregarded the Article III problem when what is at stake is not a regulation imposing monetary costs on regulated firms, but a conviction depriving a person of liberty or perhaps life.

Alternatively, consider the operation of deference doctrines in respect to assertions of constitutional rights in the national security context. Deference doctrines in this domain can also create analogous structural conditions that are condemned when they occur in the administrative law context. For example, in June 2018, the Supreme Court upheld President Trump's so-called "travel ban," which prohibited entry by nationals from several largely Muslim-majority countries.<sup>138</sup> In so doing, the Court addressed a religious-discrimination challenge based on the President's anti-Muslim statements while in office, while a candidate, and through a range of different proxies.<sup>139</sup> To uphold the ban in light of these statements, the Court

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<sup>135</sup> Natasha-Eileen Ulate, *The Ghost in the Courtroom: When Opinions Are Adopted Verbatim from Prosecutors*, 68 DUKE L.J. 807, 810 (2019) ("Ghostwriting by prosecutors occurs across the country."); *id.* at 810 n.14 (providing examples).

<sup>136</sup> 529 U.S. at 379 (Stevens, J., concurring as to this Part).

<sup>137</sup> *Id.*; see also James S. Liebman & William F. Ryan, "Some Effectual Power": *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 873 (1998) (arguing that large deference generated a "serious—we think fatal—Article III problem[]" in the context of post-conviction habeas review).

<sup>138</sup> *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018).

<sup>139</sup> See Aziz Z. Huq, *Article II and Antidiscrimination Norms*, 118 MICH. L. REV. 47, 61–62 (2019) (summarizing these statements in the context of the travel ban's implementation).

carved out a distinction between the “the statements of a particular President” and “the authority of the Presidency itself,” and disregarded record evidence of impermissible animus.<sup>140</sup> With that evidence aside, the Court framed its residual inquiry as a “deferential” judgment of whether the policy was “plausibly related to the Government’s stated objective to protect the country.”<sup>141</sup>

Although the Court’s argument here was ambiguous, the majority opinion is plausibly read as applying a deference regime that is in structure quite similar to the one employed in *Auer*. That is, the travel-ban Court did not formally derogate the requirement of strict scrutiny normally triggered by the presence of animus or a suspect classification. (Indeed, it had not that long before applied heightened scrutiny in another equality-based challenge to an immigration measure.<sup>142</sup>) Rather, in the context of immigration decisions pertaining to national security, the Court relaxed the strength of its review along two different margins. It first set aside the most pertinent evidence of animus. Then, it ratcheted down the intensity of scrutiny by demanding a weaker form of means–end rationality. The net result was in effect to delegate to the government a measure of deference respecting their application of constitutional-equality rules in the national security domain without derogating from those rules as a formal matter. To be sure, the resulting deference concerned a question of law’s application to facts, rather than the content of the law itself. But, on the other hand, *Auer* and its progeny lack the overlap of constitutional-rights concerns.

Recall, finally, that critics of *Auer* deference castigated the Court’s failure to protect those other than “the powerful, well-heeled, popular, and connected.”<sup>143</sup> The domains into which the independence-by-the-case logic has not been extended—prisoner suits and immigration enforcement—fall squarely under that reasoning. In post-conviction habeas and in the travel-ban case, the Court has used deference to disadvantage the politically marginalized. Yet in so doing, the Court has been silent about—or worse, has abetted—the state’s infringement of judicial autonomy.

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<sup>140</sup> See *Trump*, 138 S. Ct. at 2418.

<sup>141</sup> *Id.* at 2420.

<sup>142</sup> See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1692–94 (2017) (applying heightened scrutiny to a gender classification in immigration law).

<sup>143</sup> *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring in the judgment). The same is true of the public–private rights doctrine. *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (“Article III protects liberty not only through its role in implementing the separation of powers, but also by specifying the defining characteristics of Article III judges.”).

### 3. *When Independence in Gross Fails*

Like finality, the independence-in-gross principle loses force because it is amenable to circumvention. Following *Stern v. Marshall*, the Court has allowed parties to consent to non-Article III adjudication before a bankruptcy judge.<sup>144</sup> Institutional actors have been negotiating structural constitutional rules for a long while.<sup>145</sup> But with individual litigants rather than branches at the negotiating table, there may be “a real danger that the ‘consent’ will not in fact be voluntary.”<sup>146</sup>

More profoundly, the current doctrinal formulation of independence in gross is unsatisfying because it lacks a cogent foundational account of the conditions under which it operates. To see this, consider the facts of the Roberts Court’s leading precedent, *Stern v. Marshall*.<sup>147</sup> Centrally at issue in that case was the bankruptcy court’s power to adjudicate a state law counterclaim for tortious interference with a gift, a counterclaim that had been filed by the debtor against a third party.<sup>148</sup> The putative defendant in that state tort suit (who happened to be a creditor in the bankruptcy also) had already lodged a state law defamation claim, a claim that was unequivocally part of the estate.<sup>149</sup> Applying the public–private rights distinction, the Court concluded that the bankruptcy court had jurisdiction over the creditor’s state law defamation but not the debtor’s state law tortious inference claim.<sup>150</sup>

Why distinguish, though, between two state law claims, and classify one as public and the other as private?<sup>151</sup> After all, both the defamation and the tortious-interference claims are quintessential private law matters. But rather than providing a clear answer to this question, the opinion slithered

<sup>144</sup> See, e.g., *Wellness Int’l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1939 (2015) (“We hold that Article III is not violated when the parties knowingly and voluntarily consent to adjudication by a bankruptcy judge.”). In *Executive Benefits Insurance Agency v. Arkison*, the Court unanimously construed the Bankruptcy Code to allow bankruptcy judges to enter proposed findings of fact and conclusions of law for so-called *Stern* claims. 573 U.S. 25, 28 (2014).

<sup>145</sup> See Aziz Z. Huq, *The Negotiated Structural Constitution*, 114 COLUM. L. REV. 1595, 1599–1600 (2014).

<sup>146</sup> See Monaghan, *supra* note 37, at 49 n.224. For further criticism of the consent theory of Article III jurisdiction, see F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 731–47 (2018), and Peter B. Rutledge, *Arbitration and Article III*, 61 VAND. L. REV. 1189, 1194–1204 (2008).

<sup>147</sup> 564 U.S. at 469–71.

<sup>148</sup> *Id.* at 470–71.

<sup>149</sup> *Id.* at 470.

<sup>150</sup> *Id.* at 482, 487–88.

<sup>151</sup> And why find an Article III problem with a bankruptcy judge’s resolution of the claim when the same claim could have been resolved by another non-Article III adjudicator with possibly even less independence—a state court judge? Notice that *Stern*’s conclusion cannot rest on Madisonian arguments against concentrated power since the bankruptcy judge is selected and overseen by an Article III actor.

into circularity. The creditor's claim, explained the *Stern* Court, was a "federal claim[]" under bankruptcy law, which would be completely resolved in the bankruptcy process of allowing or disallowing claims," while the latter was not denominated a "federal" claim.<sup>152</sup> To explain this distinction, the Court reasoned that resolution of the defamation action was "integrally related to particular Federal Government action."<sup>153</sup> But the Court offered no account of why some state law claims are "integral" to bankruptcy while others are not.<sup>154</sup> Congress, after all, had by statute placed the debtor's tortious-interference action within the bankruptcy frame.<sup>155</sup> Presumably, it had believed that there was some bankruptcy-related justification for including potentially offsetting claims filed by the debtor's counterparties.<sup>156</sup> But the Court's decision conspicuously lacked any coherent constitutional account of the permissible scope of Article I bankruptcy courts' jurisdiction. The Court's failure to offer any justification at all for drawing the Article III bound between two species of state law claim leaves the doctrine unstable: It is not possible to predict whether and when separation of adjudication from the Article III berth will raise judicial-independence concerns.

The same theoretical gap occurs in the Court's more recent treatment of patent litigation.<sup>157</sup> Recall that *Oil States* concerned inter partes review of a previously granted patent.<sup>158</sup> The Court found this to be a public right by observing that such review "involves the same interests as the determination to grant a patent in the first instance," and the fact that it occurs after a patent is deployed in the market "does not make a difference here."<sup>159</sup> To explain why, the Court pointed to a statutory "qualification that the [United States Patent and Trademark Office] has 'the authority to reexamine—and perhaps cancel—a patent claim' in an inter partes review."<sup>160</sup> But why was this statutory grant of review power determinative of public rights status while

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<sup>152</sup> 564 U.S. at 487.

<sup>153</sup> *See id.* at 490–91.

<sup>154</sup> *See id.* at 490–93.

<sup>155</sup> *Id.* at 478 ("[The statute] permits the bankruptcy court to enter a final judgment on [the] tortious interference counterclaim.").

<sup>156</sup> For an economic analysis of why Congress may well have been justified in making this choice, see Casey & Huq, *supra* note 84, at 1218–23, which analyzes recoupment claims from an ex ante creditors' bargain perspective.

<sup>157</sup> *See Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC*, 138 S. Ct. 1365, 1372–75 (2018).

<sup>158</sup> *Id.* at 1370, 1373.

<sup>159</sup> *Id.* at 1374.

<sup>160</sup> *Id.* (quoting *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2137 (2016)).

the statutory classification of counterclaims in bankruptcy was constitutionally insignificant?<sup>161</sup>

Such pervasive instability about what counts as a private right has broader ramifications. Not least, this instability threatens the larger ethical ambitions associated with judicial independence. The Court, for example, has on occasion intimated that immigration adjudication falls outside the scope of mandatory Article III jurisdiction as a public right.<sup>162</sup> Immigration adjudication, however, plainly pertains to physical coercion and impingements on liberty. This seems to fall within the heartland of what the leading historical commentary has characterized as “private rights”—a “Lockean” idea of “the natural rights that individuals would enjoy even in the absence of political society,” which includes “the right of personal liberty.”<sup>163</sup> A theory of judicial independence whose border is so pliable that the physical detention of human beings—often, as it happens, in inhumane and appalling conditions<sup>164</sup>—can be ranked as a matter not concerning “the right of personal liberty” is a doctrine of infinite malleability. As such, its utility as a safeguard of the rule of law is properly doubted.

### C. *The Court as Enemy of Judicial Independence?*

The Justices, it turns out, are fickle followers of their own professed aspiration to judicial independence. This Part has emphasized the incomplete and internally incoherent quality of the Roberts Court’s arguments in defense

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<sup>161</sup> More baffling, the *Oil States* Court stated that the Patent Clause of the Constitution was “‘written against the backdrop’ of the English system.” *Id.* at 1377 (quoting *Graham v. John Deere Co. of Kan. City*, 383 U.S. 1, 5 (1966)). But if that kind of “backdrop” is relevant in the patent context, why was the analogous historical use of nonjudicial magistrates in English bankruptcy ignored? *See* Casey & Huq, *supra* note 84, at 1168–70 (describing “backdrop” of English bankruptcy practice). Even if one anticipates a certain degree of instability in judicial reasoning, the stark methodological divergences between *Stern* and *Oil States* are startling.

<sup>162</sup> *See, e.g.*, *Crowell v. Benson*, 285 U.S. 22, 50–51 (1932) (including immigration among matters “involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which Congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper” (quoting *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1856))); *see also* Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1565 (2000) (“Although the decisions defining the limits of the ‘public rights’ category are notoriously imprecise, immigration has long been considered a paradigm example of that category.”).

<sup>163</sup> Nelson, *supra* note 81, at 567–78 (internal quotation marks omitted) (citation omitted).

<sup>164</sup> *See, e.g.*, Dan Barry, Miriam Jordan, Annie Correal & Manny Fernandez, *Cleaning Toilets, Following Rules: A Migrant Child’s Days in Detention*, N.Y. TIMES (July 14, 2018), <https://nyti.ms/2NQeb0D> [<https://perma.cc/A79Z-DCRX>] (documenting migrant children’s days in detention). *See generally* Ingrid Eagly, Steven Shafer & Jana Whalley, *Detaining Families: A Study of Asylum Adjudication in Family Detention*, 106 CALIF. L. REV. 785, 792–94 (2018) (providing a summary of the inhumane conditions in certain U.S. detention facilities).

of its doctrinal version of judicial independence as ethical aspiration. Of course, the influence of strategic consideration on the Court's drawing of doctrinal lines is "ineradicable."<sup>165</sup> Some loose-fitting joints are to be expected in any doctrinal structure. But the Roberts Court's uniquely and pervasively "nonconcessive"<sup>166</sup> understanding of judicial independence is problematic in a different way, for a close examination suggests that the Court has comprehensively undermined its own ethical ambitions.

What ensues in the doctrine is an embarrassment of gaps, illogical limitations, and legal loopholes. For example, the Court has created exceptions to the finality rule that swallow the rule. It has allowed and amplified deference structurally identical to *Auer* deference, even as it rails against runaway agencies. It has capriciously carved the distinction between public and private rights in ways that undermine predictability, and instead open the gates to forms of nonjudicial adjudication that are seemingly antithetical to the central normative justifications of judicial independence. Reflecting on these aporias and their extensions in practice, it seems plausible to ask whether the Court has set itself the task of opposing rather than defending judicial independence.

A paradox of this sort, at the very least, calls for further inquiry. When it comes to the liming of a basic tenet of the judicial enterprise, such tensions are reasonably taken to index some greater strain on that ethical project. That is, it is not bad faith alone that explains these results, but rather a deeper difficulty in the project of extending judicial independence into the world. So, something more than the ordinary dose of the legal realist's "cynical acid"<sup>167</sup> is warranted. Some larger explanation is needful.

### III. JUDICIAL INDEPENDENCE AS A STRATEGIC AND INSTITUTIONAL CHOICE

This Part analyzes the gap between the ethical aspiration to judicial independence and the institutional circumstances that must be realized from a constitutional-design perspective. Its threshold premise is that judicial independence does not emerge or flourish solely by a constitution's textual command. To the contrary, scholars of the U.S. judiciary have underscored "the tentative nature of the Court's creation and initial operation."<sup>168</sup> In a

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<sup>165</sup> DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION: FIN DE SIÈCLE 2* (1997).

<sup>166</sup> See Estlund, *Utopophobia*, *supra* note 24, at 117, 124.

<sup>167</sup> See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

<sup>168</sup> WILLIAM R. CASTO, *THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIPS OF JOHN JAY AND OLIVER ELLSWORTH 2* (1995); accord CROWE, *supra* note 32, at 5–6 (emphasizing the early Court's institutional fragility); see also Wythe Holt, "To Establish Justice": *Politics, the Judiciary*

similar vein, comparative constitutional scholars have noted that judicial power and autonomy must be created in the form of new institutions when a new constitution is installed.<sup>169</sup> In practice this occurs first through a set of institutional-design choices and second through a set of strategic choices by elected and judicial actors within the institutional-design constraints. The ethical aspiration of judicial independence, therefore, is necessarily nested in the strategic choices within a constitution's threshold design and implementation. The failures of judicial independence can be traced back to the specific choices made in this original process. They are not a matter of a recent generation's fall from grace, but a question of original sin.

To develop this argument, this Part develops four interlocking claims. *First*, implementing judicial independence requires a choice from a wide design space of possible institutional specifications. Drawing on an empirical and comparativist literature beyond domestic constitutional law, this Article shows there is no one inevitable or necessary way to instantiate judicial independence. *Second*, the Framers' specific choices over the mechanisms to shield independence ex post via salary and removal protections—rather than institutional commitments or through ex ante design of the appointment process—reflect untenable and now falsified presuppositions. Drawing on Alexander Hamilton's canonical account in *Federalist No. 78*,<sup>170</sup> this Article identifies two particularly important yet fallacious assumptions motivating those design choices: the constraining effect of legal (especially statutory) texts and the general primacy of institutional over partisan incentives. The latter deserves special emphasis. Although there is ample literature worrying about the “politicization” of the appointment process,<sup>171</sup> insufficient attention has been allocated to asking how the phenomenon of powerful partisan polarization interacts with the feasible forms of judicial independence. Leading discussions of judicial

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*Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421, 1424 (noting “the astonishing lack of comment upon the need for a national court system in the period immediately before the Constitutional Convention”).

<sup>169</sup> See generally TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES (2003) (describing development of judicial institutions across a range of polities).

<sup>170</sup> THE FEDERALIST NO. 78, at 464–72 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>171</sup> See, e.g., David R. Stras, *Understanding the New Politics of Judicial Appointments*, 86 TEX. L. REV. 1033, 1034 (2008) (lamenting “the increasing politicization of the judicial appointments process”); STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS, at x–xi (1994) (discussing “the many ways in which we damage judicial independence when presidential candidates promise to pack the Court if elected”).

independence assume away the effect of partisan forces on interbranch interactions.<sup>172</sup> This Part aims to correct for this tendency.

*Third*, given the failure of those two presuppositions, this Part identifies three vectors through which elected actors can influence the judicial outcomes in potentially normatively disturbing ways (i.e., in ways that are in tension with the ethical aspiration of judicial independence). These vectors are labeled cracking, packing, and stacking. “Cracking” entails the strategic shaping of jurisdiction to undermine judicial autonomy. “Stacking” entails recalibrations of substantive law. “Packing” entails manipulation of the appointment process. The jurisprudence mapped in Parts I and II can be understood as a reflection of how difficult it is to establish a distinction between law and politics given the availability of these instruments.

*Fourth* and finally, this Article considers and rejects the possibility that federal judges’ institutional loyalties can mitigate those partisan pressures.

Mapping the tension between ethos and strategic action, this Article argues, illuminates the conditions in which the Court develops the doctrinal forms of judicial independence. Not only does it clarify why the ethos of judicial independence seems perpetually contested—not only by judges, but also by elected actors<sup>173</sup>—it also helps explain why the observed doctrinal forms are so unsatisfying. Judges choose how to define judicial independence in a nexus of partisan and institutional pressures that damage the coherent nonconcessive ideal animating judges’ rhetoric. While the specific forms observed in the doctrine depend on the contingent conditions of ideological and partisan conflicts, falling far short from the noble ethos of judicial independence is unsurprising, even inevitable.

#### A. *The Design Space of Judicial Independence*

The judiciary as an institution is created through a series of choices and institutional investments made by both elected and judicial actors, both at the point of constitutional design and then once a constitution is up and running. The array of strategic options available to political actors after the moment of constitutional creation, moreover, is constrained by the choices embedded in a constitution’s text. Hence, the range of options during and after a constitution’s adoption vary greatly. The Court’s jurisprudence of autonomy can be read to identify such independence with a specific set of design choices embodied in the text of Article III of the Constitution, and then

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<sup>172</sup> Professor Vicki Jackson’s 2007 study, for instance, asserts that “[a] political selection system, requiring agreement or compromise between the President and Senate, would appoint those with specialized competency in law.” Jackson, *supra* note 18, at 972.

<sup>173</sup> See *supra* text accompanying notes 1–5.



imbued with life by judges, presidents, and legislators thereafter.<sup>174</sup> But concluding that there is only one possible set of design choices at the point of constitutional origin is a mistake. Comparative constitutional scholars and economists have identified a large design space for the initial textual specification of judicial independence. They have further underscored the absence of any obviously optimal institutional strategy for installing autonomous tribunals. To that end, the leading analyses in political science and law highlight the difficulty, contingency, and institutional complexity of crafting independent tribunals from scratch.

Comparative studies of judicial independence have identified a diverse array of constitutional-design choices through which judicial independence can be realized. To clarify the nature of this choice, it is useful to notice two margins along which specific design choices can be arrayed. First, there is a choice between *ex ante* and *ex post* rules; second, there is a distinction between individuals and institutions as objects of protection. The first line divides those constitutional mechanisms that operate prior to the exercise of judicial power, *ex ante*, from ones that spring into action during or after the exercise of jurisdiction, *ex post*.<sup>175</sup> The second distinction cuts between measures that insulate an individual judge from “interference by another” and measures relating “to courts and to the judicial system as a whole.”<sup>176</sup> A judiciary might be independent (or not) depending on whether it can “do its job without relying on some other institution or group.”<sup>177</sup> Individual and institutional independence need not run together.<sup>178</sup> Indeed, it is possible to imagine purposive cultivation of “second-order diversity”<sup>179</sup> by placing nonindependent individuals within independent institutions perhaps with the

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<sup>174</sup> Professor Judith Resnik has forcefully pressed against this kind of identity. See Judith Resnik, “Uncle Sam Modernizes His Justice”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 622 (2002) (“The federal judiciary now includes hundreds of individuals who work within the Article III judiciary, who function in many respects like Article III judges, but who lack Article III protections.”).

<sup>175</sup> Notice that both *ex ante* and *ex post* forms of judicial independence are inscribed in a constitution, and in that sense are created “before” a particular controversy.

<sup>176</sup> John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

<sup>177</sup> *Id.*

<sup>178</sup> Indeed, in the American context, they don’t run together. American judges are individually independent because they make judgments “without fear . . . of (illegitimate) punishments,” but “the federal judiciary is institutionally dependent” on the other branches. *Id.*

<sup>179</sup> See Heather K. Gerken, *Second-Order Diversity*, 118 HARV. L. REV. 1099, 1102 (2005) (describing second-order diversity in terms of “variation among decisionmaking bodies”).

aim of leveraging their knowledge or influence while their individual biases are offset and netted out.<sup>180</sup>

Across these margins, a constitutional designer can select a range of different institutional forms in the hope of instantiating judicial independence. In practice, designers tend to employ divergent approaches.<sup>181</sup> At the institutional level, for example, a designer might incorporate ex ante a formal “declaratory” statement of judicial independence in constitutional text,<sup>182</sup> create a compulsory scope of jurisdiction,<sup>183</sup> or vest a court system with control of its own budget.<sup>184</sup> Ex post, a constitution might contain restrictions on jurisdiction-stripping, court-packing, or other recalibrations of size, jurisdiction, or personnel once a tribunal is up and running.<sup>185</sup> A similarly ex post requirement that opinions be published also may have effects that improve “de facto” a court’s reputation and hence its autonomy.<sup>186</sup> At the individual level, independence can be promoted ex ante

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<sup>180</sup> One version of this possibility relates to increasing the representation of historically marginalized groups. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 548 (1999) (“[I]mpartiality is better achieved by ensuring diverse perspectives on the bench rather than by striving for the selection of Chauncey Gardeners and stealth candidates.”). A more recent version, called the “balanced bench,” explicitly looks toward partisan identity. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 193 (2019) (describing, inter alia, a proposal with five Democratic and five Republican Justices, and then five additional Justices chosen by the five Democratic and five Republican Justices).

<sup>181</sup> For catalogs of these institutional aspects, see James Melton & Tom Ginsburg, *Does De Jure Judicial Independence Really Matter? A Reevaluation of Explanations for Judicial Independence*, 2 J.L. & CTS. 187, 195–96 (2014), and Bernd Hayo & Stefan Voigt, *Mapping Constitutionally Safeguarded Judicial Independence—A Global Survey*, 11 J. EMPIRICAL LEGAL STUD. 159, 163–65 (2014) [hereinafter Hayo & Voigt, *Global Survey*].

<sup>182</sup> See Melton & Ginsburg, *supra* note 181, at 195 (expressing skepticism of this strategy’s effect “in practice”). The Tenth Amendment has been described as “declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment.” *United States v. Darby*, 312 U.S. 100, 124 (1941).

<sup>183</sup> For instance, Article III, Section 2 has famously been read to make the Supreme Court’s original jurisdiction immune to derogation from Congress. See Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953).

<sup>184</sup> See McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105, 105–06 (2006).

<sup>185</sup> See Grove, *Origins*, *supra* note 93, at 505–06, 517–19 (describing extratextual norms respecting court-packing and jurisdiction-stripping in American law). For a summary of leading theories of when jurisdiction-stripping is permissible, see Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1046–47 (2010) [hereinafter Fallon, *Jurisdiction-Stripping*].

<sup>186</sup> Hayo & Voigt, *Global Survey*, *supra* note 181, at 165. For a list of American state constitutions that impose judicial-opinion-publication requirements, see Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2818 n.48 (2015).

by using a “judicial council”<sup>187</sup> or another nonpartisan or balanced body for appointments or by utilizing qualification rules. Ex post, individuals can be shielded through the procedural mechanisms of removal, a constraint on the substantive grounds of removal, and “[s]alary [i]nsulation.”<sup>188</sup> This menu of possibilities is summarized in Table 1 below.

TABLE 1: DESIGN MARGINS OF JUDICIAL INDEPENDENCE

	Ex Ante	Ex Post
<b>Individual</b>	Nonpartisan selection process (judicial councils) Qualification rules	Salary guarantees Tenure Protection from removal via substantive standards or procedure
<b>Institutional</b>	Textual declaration of judicial independence Budgetary control Compulsory jurisdiction	Publication requirements Prohibitions on court-packing, court-curbing, and jurisdiction-stripping

In practice, most constitutions contain between one and four textual elements that tend to promote independence.<sup>189</sup> A reasonable selection among these options is likely to reflect different estimates of what risks confront judicial independence under the specific national conditions in which a given constitution is crafted and implemented. For instance, some designers might be concerned about the state’s potential failure to invest in institutions or personnel up front. Others might be concerned that elected branches of government will create an independent judicial body, but then experience “time-inconsistent preferences” such that they are tempted to interfere with the decisions of judges after the fact.<sup>190</sup> The level of expected

<sup>187</sup> Nuno Garoupa & Tom Ginsburg, *Guarding the Guardians: Judicial Councils and Judicial Independence*, 57 AM. J. COMPAR. L. 103, 106 (2009) (“Judicial councils are bodies that are designed to insulate the functions of appointment, promotion, and discipline of judges from the partisan political process while ensuring some level of accountability.”).

<sup>188</sup> Melton & Ginsburg, *supra* note 181, at 196; Hayo & Voigt, *Global Survey*, *supra* note 181, at 166.

<sup>189</sup> Melton & Ginsburg, *supra* note 181, at 197.

<sup>190</sup> Bernd Hayo & Stefan Voigt, *Explaining De Facto Judicial Independence*, 27 INT’L REV. L. & ECON. 269, 272 (2007).

political competition within the national elected branches is also likely to shape incentives toward the judiciary. Where there is a “prospect that [independent courts] will . . . be imposed on [a] rival[] with very different policy views,” transient possessors of political power have a smaller incentive to renege on the bench’s autonomy.<sup>191</sup> Divergent threshold political conjunctions thus lead to distinct institutional templates of judicial independence.

Consistent with the variety of circumstances to which tribunals’ design might respond, there is no single, universally optimal institutional specification of judicial independence. Underscoring the lack of any one-size-fit-all solution for judicial independence, a recent global analysis finds that after controlling for country-level confounds, “the effects of . . . de jure attributes [i.e., in a constitution’s text] disappear.”<sup>192</sup> At a more granular level, another disconnect also emerges. A constitutional text can be a poor index of de facto independence because the latter will depend on how textual choices interact with a range of strategic choices made by political actors after a constitution is adopted. Japan’s constitution, for instance, declares that judges “shall be independent” and curbs removal through an impeachment mechanism.<sup>193</sup> This might be expected to yield a similar level of independence as the United States. But Japan’s ruling party has used “job assignments” to undermine the ability of judges to diverge from the government’s preferences.<sup>194</sup> This assignment power is not addressed in the Japanese constitution. This suggests the need to be alert to the possibility that extraconstitutional institutional-design choices can be used to undermine the textual predicates of independence. Predictions about independence from constitutional text, the Japanese case suggests, are fragile against the sheer range and heterogeneity of potential confounds.

Outside the legal academy, indeed, one influential view is that textual commitments are never determinative of judicial independence. An influential strand of economics research, for instance, associates judicial independence not with any aspect of constitutional design, but rather with

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<sup>191</sup> See F. Andrew Hanssen, *Is There a Politically Optimal Level of Judicial Independence?*, 94 AM. ECON. REV. 712, 727 (2004).

<sup>192</sup> See Melton & Ginsburg, *supra* note 181, at 203; accord Julio Ríos-Figueroa & Jeffrey K. Staton, *An Evaluation of Cross-National Measures of Judicial Independence*, 30 J.L. ECON. & ORG. 104, 105 (2012) (finding that “indicators of *de jure* and *de facto* independence are at best weakly correlated”).

<sup>193</sup> J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 723 (1994).

<sup>194</sup> *Id.* at 724–25.

the choice of a common law rather than a civil law framework.<sup>195</sup> Such works look beyond the textual specifications of a nation's courts to make predictions about judicial independence based on system-level variables, such as the degree to which “power is fragmented and diffused, either within or between government institutions.”<sup>196</sup> But even these studies should be viewed with a measure of skepticism. A tribunal that is “neither autonomous nor influential could appear to be both” if it was strategic about the way in which it selected cases and decided them.<sup>197</sup> Inquiries into such extrinsic determinants of judicial independence, in any case, yield scant guidance as to which of the various institutional safeguards cataloged in Table 1 should be preferred. These theories merely underscore the absence of any one set of optimal constitutional design for judicial independence.

So it is a conceptual and empirical mistake to assume that the term “judicial independence” takes a single institutional form. There are many ways of instantiating autonomous courts. The empirical literature suggests a deep difficulty in predicting performance based on *de jure* characteristics. The constitutional design space of judicial independence, in sum, is not just large; it is also largely devoid of signposts.

### B. *The Presuppositions of Article III*

The Framers of Article III selected from within this design space two *ex post*, individual implements for the vindication of judicial independence. First, Article III provides federal judges with tenure during “good [b]ehaviour”<sup>198</sup> to protect them from removal outside the impeachment process.<sup>199</sup> Second, they are protected from reductions in (non-inflation-

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<sup>195</sup> The leading paper about the role of law in development is Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998). More recent work casts some doubt on this claim. Gretchen Helmke & Frances Rosenbluth, *Regimes and the Rule of Law: Judicial Independence in Comparative Perspective*, 12 ANN. REV. POL. SCI. 345, 349 (2009) (noting that “common law status is a poor predictor of empirical levels of judicial independence”).

<sup>196</sup> Lisa Hilbink, *The Origins of Positive Judicial Independence*, 64 WORLD POL. 587, 588 (2012). Compare *id.* at 589–90 (doubting the effect of political fragmentation based on comparative studies of Spain and Chile), with Ramseyer, *supra* note 193, at 739–42 (emphasizing political fragmentation as a potential cause of judicial independence), and Matthew C. Stephenson, “*When the Devil Turns . . .*”: *The Political Foundations of Independent Judicial Review*, 32 J. LEGAL STUD. 59, 61 (2003) (stating that independent judicial review is “sustainable only when the political system is sufficiently competitive”).

<sup>197</sup> Ríos-Figueroa & Staton, *supra* note 192, at 109.

<sup>198</sup> U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

<sup>199</sup> The necessity of impeachment for a judge's removal has been contested. See, e.g., Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 129–30 (2006) (arguing that “during good Behaviour” allows judges to be removed through adjudicatory (not legislative)

adjusted) salary.<sup>200</sup> The Framers hence implicitly eschewed ex ante mechanisms such as nonpolitical appointment channels. The Framers' choice is most famously glossed in Alexander Hamilton's *Federalist No. 78* essay. This essay not only supplies justifications for the protections that Article III does install, but also tenders reasons for the absence of other prophylactic measures. These grounds are not themselves elements of the Constitution. They are rather what Professor Frederick Schauer called its "presuppositions," or the "extraconstitutional" foundations or cultural predispositions on which the Constitution rests.<sup>201</sup> The problem is that they are deeply flawed presuppositions—and their flaws undermine the possibility that tenure and salary protection alone will suffice to establish judicial independence.

A first presupposition evident in Hamilton's argument concerns the constraining effect of law on judicial behavior. An important Anti-Federalist line of attack against the proposed constitution trained upon the wide discretion it allegedly afforded federal judges. In January 1788, the Anti-Federalist Brutus described the federal courts as "totally independent, both of the people and the legislature, both with respect to their offices and their salaries. No errors they may commit can be corrected by any power above them."<sup>202</sup> Penned in May that year by Hamilton, *Federalist No. 78* responded at length to Brutus's charge of "arbitrary discretion."<sup>203</sup> It resisted that charge on the ground that judges would be "bound down by strict rules and precedents which serve to define and point out their duty in every particular

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mechanisms); Raoul Berger, *Impeachment of Judges and "Good Behavior" Tenure*, 79 YALE L.J. 1475 (1970) (similar).

<sup>200</sup> U.S. CONST. art. III, § 1 (entitling judges to "Compensation, which shall not be diminished during their Continuance in Office"). *But see* United States v. Hatter, 532 U.S. 557, 571 (2001) (holding that "the Compensation Clause does not forbid Congress to enact a law imposing a nondiscriminatory tax (including an increase in rates or a change in conditions) upon judges, whether those judges were appointed before or after the tax law in question was enacted or took effect").

<sup>201</sup> Frederick Schauer, *Amending the Presuppositions of a Constitution*, in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT 145, 147–48, 156 (Sanford Levinson ed., 1995) (noting that "constitutions rest on logically antecedent presuppositions that give them their constitutional status"); *id.* at 150 (describing presuppositions as "social fact[s]" or social practices that themselves stand outside the justificatory system that comprises the Constitution). Professor Frederick Schauer situates the idea of presupposition in a Kelsen-inspired form of legal positivism. I eschew reliance on that larger theoretical framework and borrow just the idea of a presupposition.

<sup>202</sup> *Essays of Brutus No. XI*, N.Y. J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417, 418 (Herbert J. Storing ed., 1981). Brutus was not the only Anti-Federalist to raise this complaint. *See Letter from the Federal Framer (Jan. 18, 1788)*, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra*, at 315, 315–16 ("[W]e may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department [the judiciary] than in any other.").

<sup>203</sup> *See* THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

case.”<sup>204</sup> Hamilton, to be sure, recognized that ambiguities arise and that judges resort to “rule[s] of construction, not derived from any positive law but from the nature and reason of the thing.”<sup>205</sup> Nonetheless, he underscored the “duty” to which judges are subject and the “inflexible and uniform adherence to . . . the Constitution” that is expected of them.<sup>206</sup>

Hamilton’s implicit model of the causal relationship between the law’s rules and precedent on the one hand and the narrow scope of judicial discretion on the other would have seemed eminently reasonable during the Founding period. The latter was characterized by a widespread belief that “judicial interpretation [was] constrained in a way that political decisionmaking was not,” and that the law was characterized by only “moderate indeterminacy.”<sup>207</sup> As Professor Jonathan Molot explains, the Framers’ account of an independent judiciary rested on this view of “law as sufficiently determinate and legislators sufficiently prescient for statutes to be self-applying.”<sup>208</sup> Further, there was a “relative paucity” of legislation in the Early Republic.<sup>209</sup> The absence of a dense thicket of statutory texts—or, for that matter, the bushels of regulation to which *Auer* deference responds—reduced the frequency of textual ambiguities and related uncertainties in the law’s substantive content. Judges in the Early Republic would thus be less likely to be confronted with ambiguous legal texts, conflicts between various statutes, or tensions between statutes and regulations. Hence, the idea that law was characterized by only limited indeterminacy was congruent with the observed corpus of law.

Today, however, the idea that the law constrains judges through “strict rules and precedents” is more difficult to credit for two reasons.<sup>210</sup> First, a

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<sup>204</sup> *Id.*; see also *id.* at 467 (“The interpretation of the laws is the proper and peculiar province of the courts.”).

<sup>205</sup> *Id.* at 468; see also THE FEDERALIST NO. 37, at 229 (James Madison) (Clinton Rossiter ed., 1961) (“All new laws . . . are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

<sup>206</sup> THE FEDERALIST NO. 78, at 470–71 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>207</sup> Jonathan T. Molot, *The Judicial Perspective in the Administrative State: Reconciling Modern Doctrines of Deference with the Judiciary’s Structural Role*, 53 STAN. L. REV. 1, 19–20 (2000). Dean John Manning has also argued that the Framers rejected the idea that “judges had broad independent authority to add to or subtract from the results of that process.” John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 57 (2001). But see William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990 (2001) (contesting the view).

<sup>208</sup> Molot, *supra* note 207, at 19.

<sup>209</sup> DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 3 (1992).

<sup>210</sup> See THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

sheer increase in the volume of legal texts generates new opportunities for internal conflicts and uncertainty that destabilize this impression. The greatly increased frequency of judicial review of constitutional questions since the Founding Era also means that a larger tranche of the constitutional text is amenable to judicial construction, revealing more opportunities for diverging judgment.<sup>211</sup>

Second, the legal realist “indeterminacy” thesis has undermined the idea that casuistic reasoning alone can stabilize the law.<sup>212</sup> Thanks to subsequent developments in positive political science, we also understand that the Framers did not know how the circumstances of legislation often conduce toward vague statutory text that imposes no effective constraint on judicial discretion.<sup>213</sup> Hence, political scientists David Epstein and Sharyn O’Halloran have demonstrated that legislators face a “make or buy” decision when crafting statutes.<sup>214</sup> Although committees can draft text, members may be uncertain of what policy should be and may face high transaction costs due to the number of vetogates in the legislative process.<sup>215</sup> As a result, “making” law through the legislative process can often be more costly than “buying” it by delegating to either agencies or courts.<sup>216</sup> Because of these incentives, legislators press toward statutory vagueness when doing so enables them to avoid controversial choices.<sup>217</sup>

Professor Sean Farhang has argued further “that courts are a more attractive delegate than agencies when Congress wishes to evade blame for politically conflictual policy decisions, and claim credit for responding to

<sup>211</sup> See Aziz Z. Huq, *When Was Judicial Self-Restraint?*, 100 CALIF. L. REV. 579, 586 (2012) (charting this increase); Adam M. Samaha, *Originalism’s Expiration Date*, 30 CARDOZO L. REV. 1295, 1309, 1365–68 (2008) (providing data on the timing of the first construal of different constitutional texts by the Supreme Court).

<sup>212</sup> See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 273–74 (1997) (emphasizing the legalistic and doctrinal tools with which the legal realists approached this project).

<sup>213</sup> Indeed, there is a long list of reasons for vagueness. Matthew C. Stephenson, *Legislative Allocation of Delegated Power: Uncertainty, Risk, and the Choice Between Agencies and Courts*, 119 HARV. L. REV. 1035, 1036–37 (2006) (noting that vagueness can arise due to “the need to leave technical questions to experts,” as well as “politicians’ desire to duck blame for unpopular choices or to create new opportunities for constituency service, the inability of multimember legislatures to reach stable consensus, and the impossibility (or excessive cost) of anticipating and resolving all relevant implementation issues in advance” (footnotes omitted)). I highlight only two.

<sup>214</sup> DAVID EPSTEIN & SHARYN O’HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 47–49 (1999).

<sup>215</sup> *Id.* at 48.

<sup>216</sup> *Id.* at 47–49.

<sup>217</sup> See Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 50–51 (1993) (giving the example of the Sherman Act).



public demand for congressional action.”<sup>218</sup> This “courts as dumping grounds” thesis, like the Epstein–O’Halloran make-or-buy model, suggests that Hamilton’s model of law as providing defined limits on judges, and hence restraining their pursuit of personal policy preferences, is a myth. Legislative preferences for claiming credit while avoiding controversy induce statutory vagueness. This is in tension with the Framers’ assumption that law would provide a constraining leash on judicial discretion. Law, in short, is just not what it used to be when it comes to ensuring that judges will act in a legalistic manner.

A second presupposition of the Framers’ conception of judicial independence went to the composition of the judiciary and, in particular, to the personal character of the judges who would staff the federal bench. Across various Federalist Papers, Hamilton supplied two reasons for anticipating that only persons of integrity who lacked bias would be appointed to the federal judiciary. First, Hamilton appealed to the screening function of the Senate confirmation process. In *Federalist No. 76*, he explained that Article II, Section Two, would select for persons of “intrinsic merit” and so would work as an “excellent check” on presidential “favoritism” and “unfit characters.”<sup>219</sup> Hamilton here built on James Madison’s idea of “successive filtrations” of personnel through the process of representational selection for national office as a mechanism for achieving a republican form of government on a national scale.<sup>220</sup> To be sure, his point encompassed all appointments within the Executive Branch subject to advice and consent, but it has a particular potency in respect to the judiciary given the Anti-Federalists’ concern of a completely independent judiciary.

Hamilton then offered a second and separate argument for independence in *Federalist No. 78*. Here, Hamilton proffered a sociological argument from scarcity for the quality of the federal bench to quiet Anti-Federalist unease. “[T]here can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges,” Hamilton predicted, and fewer still “who unite the requisite integrity with

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<sup>218</sup> Sean Farhang, *Legislating for Litigation: Delegation, Public Policy, and Democracy*, 106 CALIF. L. REV. 1529, 1547 (2018).

<sup>219</sup> THE FEDERALIST NO. 76, at 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961); accord John B. Fowles, *Compounding the Countermajoritarian Difficulty Through “Plaintiff’s Diplomacy”*: Can the International Criminal Court Provide a Solution?, 2003 BYU L. REV. 1129, 1142 (“[P]residential appointment of federal judges coupled with their ratification by the ‘Advice and Consent of the Senate’ [was] . . . meant to place the most qualified and virtuous people into such offices.” (quoting U.S. CONST. art. II, § 2)).

<sup>220</sup> JAMES MADISON, JOURNAL OF THE FEDERAL CONVENTION 80 (E.H. Scott ed., Chicago, Albert, Scott & Co. 1893) (1840).

the requisite knowledge.”<sup>221</sup> Scarcity of talent, that is, would mitigate the risk of opportunistic or pernicious logic of selection either at the presidential or the Senate stage. Because it would not be feasible for the President to credibly nominate people without “the requisite integrity” for the federal bench, there would be simply no room for the White House to inject its own policy preferences into the appointment process.<sup>222</sup>

Yet again, however, these presuppositions of an independent judiciary have proved vulnerable to social change. To begin with the obvious, Hamilton’s argument from scarcity no longer holds: There are more than enough men—and, happily, women—trained in the law to staff the judiciary. Accounting for the range of students attending various law schools, the eligible population as a whole is also ideologically heterogenous. Law students may be predictably uniform along some margins, but they are not clustered uniquely within one pole of today’s polarized political landscape.<sup>223</sup> In light of the democratization of the legal profession, it is implausible to assume that supply-side constraints will work as effective determinants of judicial independence.

More seriously, the Framers famously misunderstood the strength of partisan motivations in shaping institutional outcomes at the national level. Writing as Publius, James Madison predicted that “[a]mbition [would] counteract ambition” as “[t]he interest of the man [came to be] connected with the constitutional rights of the place,”<sup>224</sup> but it was not to be. As Professors Daryl Levinson and Richard Pildes have observed, our national political party system “tied the power and political fortunes of government officials to issues and elections.”<sup>225</sup> They emphasize the extent to which “Madison’s design [for the separation of powers] was eclipsed almost from the outset by the emergence of robust democratic political competition,” even though “[t]he idea of political parties, representing institutionalized divisions of interest, was famously anathema to the Framers.”<sup>226</sup>

The repulsive force of binary partisanship is arguably on the rise, thanks to recent changes to the structure of national politics. In a recent book, Lee Drutman has argued as much. Specifically, he has asserted that although the

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<sup>221</sup> THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

<sup>222</sup> *See id.*

<sup>223</sup> Adam Bonica, Adam S. Chilton & Maya Sen, *The Political Ideologies of American Lawyers*, 8 J. LEGAL ANALYSIS 277, 291–92 (2016).

<sup>224</sup> THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

<sup>225</sup> Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312, 2323 (2006).

<sup>226</sup> *Id.* at 2319–20.

two-party structure was latent in national politics even in the 1790s, until recently, the two parties have remained “capacious, incoherent, and overlapping” because of cross-cutting regional affiliations.<sup>227</sup> On Drutman’s account, the present moment of sharp political polarization is a result of unification and coherence within the two main national parties.<sup>228</sup> He suggests that the partisan polarization of the present moment was thus always latent in the constitutional design.<sup>229</sup> Again, it is not that there is a *new* failure—rather that a problem hardwired into the initial constitutional design has become particularly sharply defined now.

The importance of partisan dynamics to understanding national politics is not limited to the United States. More generally, comparative constitutional scholarship has shown that “political parties are a key site of political competition and a central factor in the relative concentration or dispersal of power in [both majoritarian and proportional] systems.”<sup>230</sup>

The account of “successive filtration” upon which Hamilton’s argument rests is inconsistent with this “separation of parties” understanding of American government. The latter, even applied as a description of only the Legislative or Executive Branches’ behavior, has important and destabilizing implications for the constitutional ethos of judicial independence. Under conditions of unified government, the Senate has no incentive to screen judicial nominees in the manner that Hamilton predicted. The available empirical evidence (which is, incidentally, not confined to the recent period of Republican dominance of the Senate) suggests that they do not.<sup>231</sup> Indeed, historical studies suggest that partisan considerations have been the norm rather than exception in judicial appointments.<sup>232</sup> Senators, for instance, have

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<sup>227</sup> LEE DRUTMAN, *BREAKING THE TWO-PARTY DOOM LOOP: THE CASE FOR MULTIPARTY DEMOCRACY IN AMERICA* 2, 24–25 (2020).

<sup>228</sup> *Id.* at 25.

<sup>229</sup> See *id.* at 22–23 (arguing that the Framers were “blinded by their aversion to political parties” and “[h]ad the Framers focused more on factional balancing . . . American democracy might have developed differently”).

<sup>230</sup> Stephen Gardbaum, *Political Parties, Voting Systems, and the Separation of Powers*, 65 AM. J. COMPAR. L. 229, 230 (2017).

<sup>231</sup> See, e.g., Lee Epstein, René Lindstädt, Jeffrey A. Segal & Chad Westerland, *The Changing Dynamics of Senate Voting on Supreme Court Nominees*, 68 J. POL. 296, 300 (2006) (presenting empirical evidence to demonstrate that “ideology and qualifications remain crucial to confirmation politics”); Wendy L. Martinek, Mark Kemper & Steven R. Van Winkle, *To Advise and Consent: The Senate and Lower Federal Court Nominations, 1977–1998*, 64 J. POL. 337, 357–58 (2002) (finding support for “a political model of confirmation politics”).

<sup>232</sup> See, e.g., MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 128–31 (2000) (presenting a historical study to show that “the single most commonly used criterion for federal appointments is demonstrated personal commitment to a president’s

routinely “blue slip[ped, i.e., blocked,] ideologically distant lower court nominees even when they are highly qualified.”<sup>233</sup> And when government is divided rather than united, senators also delay appointments in the hope of a more favorable administration being voted into office.<sup>234</sup> While there may be normative grounds for allowing present policy preferences to infuse appointments (at least under conditions of unified government),<sup>235</sup> the “separation of parties, not powers” model of judicial selection is sharply at odds with the presuppositions animating Article III.

The force of partisan incentives has decisively shaped the terms of judicial independence because of yet another key institutional design choice taken at the Philadelphia Convention: the so-called Madisonian Compromise. The original draft of James Madison and Edmond Randolph’s influential Virginia Plan envisaged a national judiciary “of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature.”<sup>236</sup> But opposition led by John Rutledge and Roger Sherman led to an abandonment of the idea of constitutionally mandatory lower federal courts.<sup>237</sup> As a result, Article III “empowers, but does not require, Congress to create lower federal courts.”<sup>238</sup> Congress alternatively could have relied on state courts for many (if not all) of the functions that early federal courts performed.<sup>239</sup> And in historical fact, Congress did not durably vest federal

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agenda”); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT 85–93 (1999) (describing several studies about the importance of political motivations in the selection of judicial nominees).

<sup>233</sup> Ryan J. Owens, Daniel E. Walters, Ryan C. Black & Anthony Madonna, *Ideology, Qualifications, and Covert Senate Obstruction of Federal Court Nominations*, 2014 U. ILL. L. REV. 347, 351.

<sup>234</sup> This occurred before the Judge Merrick Garland nomination. See Sarah A. Binder & Forrest Maltzman, *Senatorial Delay in Confirming Federal Judges, 1947–1998*, 46 AM. J. POL. SCI. 190, 197 (2002); E. Stewart Moritz, “Statistical Judo”: *The Rhetoric of Senate Inaction in the Judicial Appointment Process*, 22 J.L. & POL. 341, 352–54 (2006). Indeed, there is a secular trend of increasing nomination delays. See Sheldon Goldman, *Assessing the Senate Judicial Confirmation Process: The Index of Obstruction and Delay*, 86 JUDICATURE 251, 254 tbl.2 (2003) (documenting increasing delays in Senate consideration).

<sup>235</sup> For a normative defense of ideological criteria for judicial appointments, see Christopher L. Eisgruber, *Politics and Personalities in the Federal Appointments Process*, 10 WM. & MARY BILL RTS. J. 177, 180 (2001), which flags “a risk that the political character of the appointments process will undermine the independence and the integrity of the judiciary.”

<sup>236</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 22 (Max Farrand ed., 1911).

<sup>237</sup> Liebman & Ryan, *supra* note 137, at 715–16 (describing procedural maneuvers that led to the compromise).

<sup>238</sup> James E. Pfander, *Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation*, 101 NW. U. L. REV. 191, 197 (2007); see *id.* at 197 n.25 (summarizing literature on the Madisonian Compromise).

<sup>239</sup> *Id.* at 198 (persuasively developing the constitutional argument for this point).

question jurisdiction until 1875.<sup>240</sup> The federal judiciary it initially created “was understaffed and underpaid, was lacking in courtroom facilities . . . , attracted men of little prominence, and had only limited jurisdiction.”<sup>241</sup>

In February 1790, when the Supreme Court first convened in New York, it was a “sorry scene,” with only four of six Justices bothering to show up and not a single case in sight.<sup>242</sup> The first Chief Justice, John Jay, departed the Court in 1795, explaining that his “efforts repeatedly made to place the judicial department on a proper footing have proved fruitless.”<sup>243</sup> The lower federal courts of that day were little better. Most states had only one federal trial judge, and these judges “were essentially authorized to hear only admiralty cases plus penalties and forfeitures under the laws of the United States.”<sup>244</sup>

Nothing, though, comes of nothing. A strand of political science focuses on the positive contributions of elected actors and popular movements to the construction of judicial power. This work importantly stresses the weakness of the judiciary without political support.<sup>245</sup> A “vast literature documents an empirical association between public opinion and judicial decisions.”<sup>246</sup> A central finding in the political science literature is that the federal judiciary’s effectual authority did not emerge spontaneously or organically from the Constitution or even the First Judiciary Act. Rather, it arose thanks to “[c]ongressionally driven structural changes and executive-driven appointment[s]” that over time “transformed” the courts.<sup>247</sup> Especially relevant here, this literature casts important light on the way in which legislative motives—not only to advance certain policy aims, but also to

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<sup>240</sup> James H. Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 640 (1942) (tracing history).

<sup>241</sup> Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511, 512 (2002).

<sup>242</sup> See CROWE, *supra* note 32, at 1–2 (noting the “dramatic evolution” of the Court from its “feeble” beginnings to the “prestigious” and “powerful” institution it is today). For a useful overview of the field, see Julie Novkov, *Understanding Law as a Democratic Institution Through US Constitutional Development*, 40 LAW & SOC. INQUIRY 811, 815–19 (2015), which surveys scholarship that argued the Court is “simultaneously a legal and political institution.”

<sup>243</sup> Letter from John Jay to John Adams, President of the U.S. (Jan. 2, 1801), in 4 THE CORRESPONDENCE AND PUBLIC PAPERS OF JOHN JAY 284, 285 (Henry P. Johnston ed., New York, G.P. Putnam’s Sons 1893).

<sup>244</sup> Gillman, *supra* note 241, at 513.

<sup>245</sup> *Id.* at 513–14.

<sup>246</sup> Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74, 74 (2011) (collecting sources).

<sup>247</sup> Gillman, *supra* note 241, at 517.

place divisive questions off the partisan agenda—catalyze judicial power.<sup>248</sup> A similar analysis has developed concerning the narrower question of how judicial review emerged and stabilized. This has been described as an “ongoing political project”<sup>249</sup> that has prevailed only in “fits and starts” and then in unstable equilibriums.<sup>250</sup> Scholars working in the American Political Development school have thus underscored what Professor Keith Whittington has called the “political foundations” of judicial review<sup>251</sup> and Professor Justin Crowe calls “the historical processes contributing to the rise of the federal judiciary.”<sup>252</sup>

The absence of constitutional mandatory jurisdiction, beyond one paltry high Court composed of fewer than ten Justices, means that Congress has exercised a large measure of discretion over when and how to create and staff federal courts. And it has exercised that discretion in thoroughly political and predictably partisan ways.<sup>253</sup> Howard Gillman, for example, has shown that the pivotal moment in this development is found in the late nineteenth century. In the first half of the 1870s, a Republican Party “special[ly] focus[ed] on economic nationalism,” and facing a resurgent Democratic Party looking to dominate in national polls, used the 1875 lame-duck session of Congress to dramatically expand the federal courts.<sup>254</sup> Like the Federalists of 1800, that is, the Republicans sought to lock in a measure of policy influence in the form of new federal courts. Subsequently, the “political project”<sup>255</sup> of building and maintaining judicial power has been necessarily fueled by partisan motivations of the sort that dominate the elected

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<sup>248</sup> Graber, *supra* note 217, at 36 (noting that “prominent elected officials consciously invite the judiciary to resolve those political controversies that they cannot or would rather not address”).

<sup>249</sup> Keith E. Whittington, “Interpose Your Friendly Hand”: Political Supports for the Exercise of Judicial Review by the United States Supreme Court, 99 AM. POL. SCI. REV. 583, 583 (2005) (“[T]he maintenance of the judicial authority to interpret the Constitution and actively use the power of constitutional review is an ongoing political project.”).

<sup>250</sup> KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 285 (2007) [hereinafter WHITTINGTON, POLITICAL FOUNDATIONS]; see also Huq, *supra* note 211, at 583 (measuring the frequency of judicial review of both federal and state statutes over time).

<sup>251</sup> See WHITTINGTON, POLITICAL FOUNDATIONS, *supra* note 250.

<sup>252</sup> CROWE, *supra* note 32, at 5–6.

<sup>253</sup> For an articulation of this point at a relatively high level of generality, see Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 116 (2000), which argues that political leaders will empower the judiciary only if they have “a sufficient level of certainty . . . that the judiciary in general and the supreme court in particular are likely to produce decisions that . . . reflect their ideological preferences.”

<sup>254</sup> Gillman, *supra* note 241, at 516–17.

<sup>255</sup> Whittington, *supra* note 249, at 583.

branches.<sup>256</sup> Rather than being somehow outside politics, the judiciary has consistently been treated as a “potential partner in, rather than an obstacle to, [national] governing coalitions.”<sup>257</sup>

The shape and extent of the federal courts as a national institution, in short, has been thoroughly influenced throughout American history by the partisan choices of actors within the elected branches. To be sure, the federal judiciary has developed an institutional heft and lobbying instruments that enable it to operate as a de facto interest group. But this power accumulation merely makes it more difficult for the elected branches to undo grants of jurisdiction, personnel, or resources once granted. It constrains the partisan foundations of federal judicial power but hardly extinguishes them.<sup>258</sup> Rather, the political instruments needed for constructing judicial power can equally be used to unravel it.

To recapitulate, the Framers quite reasonably assumed that salary and tenure protections were necessary to mitigate elected officials’ excessive influence over judicial output. Less reasonably, they also assumed that those institutional-design choices would also be sufficient to achieve judicial independence. The fragility of their presuppositions about law and the selection of specific kinds of people into the judiciary saps the plausibility of their predictions about judicial independence.

### C. *The Constitution as the Enemy of Judicial Independence*

The Framers’ failed presuppositions about judicial independence mean that there is a domain of lawful political action through which the elected branches can deploy mechanisms to influence judicial behavior and outcomes. The resulting array of available policy tools enable interventions in the judiciary’s operations that can compromise judicial independence as conceived in Supreme Court doctrine.<sup>259</sup> They also allow for interventions that are in tension with the ethical ambitions of cabining elected-branch authority, protection of minorities and liberty interests, and facilitation of

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<sup>256</sup> See WHITTINGTON, *POLITICAL FOUNDATIONS*, *supra* note 250, at 127–34 (developing this point for the early twentieth century). On the manner in which vetogates in the legislative process have enabled political minorities to prevent jurisdictional contractions, hence preserving judicial power, see Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869, 890 (2011) [hereinafter Grove, *Structural Safeguards*].

<sup>257</sup> CROWE, *supra* note 32, at 274.

<sup>258</sup> See Judith Resnik, *Judicial Independence and Article III: Too Little and Too Much*, 72 S. CAL. L. REV. 657, 663–64 (1999) (discussing the judiciary’s institutional growth and the implements it has to operate as a de facto interest group).

<sup>259</sup> See *supra* Part II.

independent judgment on the part of the bench.<sup>260</sup> Yet, these vectors are often difficult or even impossible for the Court to police through doctrine. As Part II suggested (and as this Article will elaborate below), responses in the form of constitutional common law glosses on Article III are often either incentive incompatible for the judiciary or simply infeasible from an enforcement perspective. The result is a gap between the ethical aspiration of judicial independence and the circumstances of its institutional manifestation.

This Section taxonomizes ways in which the Constitution gives the elected branches tools to compromise either specific doctrinal instantiations of judicial independence or the related normative ambitions articulated in judicial doctrine. To emphasize, nothing in the ensuing analysis rests on the assumption that there is some a priori definition of judicial independence.<sup>261</sup> Rather, the analysis takes the Court at its word as to the normative aspirations traveling under an Article III flag and shows that the Constitution itself renders those ambitions infeasible or extremely fragile under the right partisan conditions. Rather than thinking about judicial independence's enemies as external to constitutional law, therefore, this Section presses toward an account that sees those enemies as blights arising endogenously from the Constitution's original design.

To this end, this Section borrows three categories from the literature on partisan gerrymandering to classify the most commonly observed constitutional mechanisms for limiting judicial independence. This borrowing is especially apt because there is a functional homology between gerrymandering and the instruments described here. Partisan gerrymandering entails the use of formally proper legitimate authority (i.e., the power to design single-member districts necessary for first-past-the-post elections) to achieve outcomes at odds with a central ethical aspiration of the American democratic order—the exercise by voters of an effective choice at the polls.<sup>262</sup> For judicial independence, the Constitution again supplies means

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<sup>260</sup> For invocations of these purposes, see, for example, *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring in the judgment), and *Stern v. Marshall*, 564 U.S. 462, 483 (2011).

<sup>261</sup> See *supra* text accompanying note 16 (rejecting that thesis).

<sup>262</sup> See Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 571–72 (2004) (worrying that “we continue to have regularly scheduled elections, but elected officials from both major parties unite to ensure that the election results are foreordained”). Even a Court otherwise hostile to partisan-gerrymandering claims has indicated that they may be constitutionally problematic. *Vieth v. Jubelirer*, 541 U.S. 267, 293 (2004) (plurality opinion) (accepting arguendo “the argument that an *excessive* injection of politics is *unlawful*,” although not elaborating on the argument’s grounds); see also *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019) (“Excessive partisanship in districting leads to results that reasonably seem unjust. . . . [S]uch gerrymandering is ‘incompatible with democratic principles.’” (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2658 (2015))).



to the political branch for realizing that end. But, as in the gerrymandering context, there is an immanent possibility that the tools will be applied in ways that thwart the larger ethical enterprise.

The focus here is on three such tools, which can be labeled *cracking*, *stacking*, and *packing*, but this Article makes no claim that these tools are exhaustive.<sup>263</sup> In brief, cracking involves strategic design of jurisdiction to undermine judicial autonomy; stacking entails recalibrations of substantive law to undermine judicial independence; and packing entails manipulation of the appointment process. This Section considers each of these in turn.

### 1. *Cracking*

First, “cracking” involves the exercise of legislative discretion to thwart either independence by the case or independence in gross. Recall that the Madisonian Compromise vested Congress with ample discretion to change the terms on which judicial power can be exercised.<sup>264</sup> Neither the courts nor commentators have fashioned a plausible outer perimeter for that power, leaving “jurisdiction-stripping” as one of the “levers for reproaching a wayward judiciary.”<sup>265</sup> Such constitutive authority, of course, can be employed to seed and then nurture Article III autonomy—and importantly was exercised to that end in the 1870s by the lame-duck Republican caucus.<sup>266</sup> But Congress can also feasibly use the same powers to contrary purpose and effect.<sup>267</sup>

To be sure, jurisdiction once created is politically difficult to unravel because of bicameralism and presentment or Executive Branch resistance to such unraveling.<sup>268</sup> But this is no surety against alterations at odds with some discrete element of jurisdictional independence. In particular, these “structural safeguards” have much diminished force during periods of

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<sup>263</sup> PARKER, *supra* note 21, at 48–51 (developing these terms).

<sup>264</sup> See *supra* text accompanying notes 236–241.

<sup>265</sup> Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 490 (2018).

<sup>266</sup> See Gillman, *supra* note 241, at 512–13.

<sup>267</sup> This Article’s terminology here is meant to capture instances in which laws have both a purpose and an effect of limiting judicial independence. This Article realizes this raises questions of how to define a collective (legislative) intent and how to define the threshold for an effect of sufficient magnitude, but thinks both these ambiguities are tolerably manageable as the present analytic purposes and do not require precise calibration here.

<sup>268</sup> On the causal relation of legislative vetogates to jurisdictional stability, see Grove, *Structural Safeguards*, *supra* note 256, at 890. On the role of the presidency, see Tara Leigh Grove, *The Article II Safeguards of Federal Jurisdiction*, 112 COLUM. L. REV. 250, 262 (2012) [hereinafter Grove, *Article II Safeguards*], which argues that “[t]he executive branch has a strong incentive to use this constitutional authority to oppose jurisdiction-stripping legislation.”

unified government, and especially when a president's ambition can be more cheaply pursued through a diminishment of judicial action.<sup>269</sup>

More subtly, the elected branches can use their jurisdictional authority to compromise independence by the case without appearing to engage in jurisdiction-stripping and can render independence in gross infeasible by manipulating the gap between jurisdiction and judicial capacity. For example, Congress has enacted a number of important statutes that mandate judicial deference to the constitutional judgments of other state and federal actors in ways that are at stark odds with independence by the case. In sheer numbers, the most important of these are the screening regimes installed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) for post-conviction habeas claims<sup>270</sup> and the Prison Litigation Reform Act's (PLRA) exhaustion rule for prisoner claims.<sup>271</sup> In the domain of private rights, the Federal Arbitration Act (FAA) has been interpreted over the past three decades to move "cases that would otherwise proceed in the public realm—the courts . . . to a purely private realm, which is largely shielded from judicial and public scrutiny."<sup>272</sup> The practical effect of the FAA is to alienate from federal court review a large category of private rights in a way that ought to seem intolerable given the constitutional theory of Article III proffered in cases such as *Stern* and *Oil States*.

These statutes (or at least the Supreme Court's interpretation of those statutes) have resulted in derogations from the very forms of judicial independence that—as seen in Part I—have been celebrated elsewhere as part of the constitutional canon. There is absolutely no suggestion in the case law that they are constitutionally problematic. Once again, this Article underscores the stark distance between the Court's embrace and even expansion of the AEDPA, PLRA, and FAA on the one hand, with its censorious tone in recent opinions on *Auer* deference or bankruptcy

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<sup>269</sup> And to be clear, Professor Tara Grove's careful and nuanced scholarship does not claim otherwise. See Grove, *Structural Safeguards*, *supra* note 256, at 916 ("On several occasions, when there has been a persistent political consensus in favor of limiting jurisdiction, Congress has successfully displaced the inferior federal courts."); see also Grove, *Article II Safeguards*, *supra* note 268, at 309 ("Presidents may be willing to sign [large omnibus] legislation, and yet permit the Department of Justice to 'oppose' the jurisdiction-stripping provisions via litigation.").

<sup>270</sup> Pub. L. No. 104-132, 110 Stat. 1214 (codified at 28 U.S.C. §§ 2254–55).

<sup>271</sup> Pub. L. No. 104-134, § 7(a), 110 Stat. 1321, 1321–71 (2005) (codified as amended at 42 U.S.C. § 1997e(a)); see also Van Swearingen, *Imprisoning Rights: The Failure of Negotiated Governance in the Prison Inmate Grievance Process*, 96 CALIF. L. REV. 1353, 1376 (2008) (describing the Act's components).

<sup>272</sup> J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015). For a similar assessment, see Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1812–14 (2014).

jurisdiction on the other hand.<sup>273</sup> This acoustic separation between judicial approaches to the FAA and bankruptcy jurisdiction, for instance, bespeaks an impressive juridical capacity for compartmentalization and suppression of internal contradictions. One can imagine a constitutional theory that would foreclose these impingements on independence by the case or in gross. However, such a theory lies beyond the present dominant constitutional imaginary.

One further point is worth drawing out. In the one instance in which the Court objected to such jurisdictional cracking, the elected branches found ways to undermine the force of its intervention. In *Boumediene v. Bush*, the Court interpreted the Suspension Clause to mandate the availability of habeas corpus jurisdiction to detainees housed at the Guantánamo Bay Naval Base and invalidated a jurisdiction-strip that had limited such review.<sup>274</sup> But empirical analysis of the post-*Boumediene* dynamics of detention policy found that the rate of actual releases dropped precipitously after *Boumediene*.<sup>275</sup> The cause of this change was “bureaucratic dynamics within the executive branch” that generated new and effective frictions on the possibility of release.<sup>276</sup> Even when jurisdiction is mandated under the Constitution, therefore, the elected branches have means to render it a practical nullity.

## 2. *Stacking*

By “stacking,” this Article means the use of substantive (as distinct from procedural and jurisdictional) law with the purpose and effect of extinguishing finality or independence in gross. This brackets the problems of vague statutory text and delegations to courts noted above to focus on intentional efforts to subvert one of the forms of judicial independence that the Court has embraced.<sup>277</sup> As with cracking, stacking arises because general legislative authorities necessary for the articulation of a legal system can be deployed equally to empower or hobble the bench. Relevant here, Congress has broad and uncontroversial authority to make changes to the law (including the law applied in pending cases) and to employ its fiscal authorities to mitigate the forward-looking effects of federal court money judgments. The latter power, at least since the heyday of federal-officer

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<sup>273</sup> See *supra* Sections I.B–C.

<sup>274</sup> 553 U.S. 723, 733 (2008) (declaring 28 U.S.C. § 2241(e) “an unconstitutional suspension of the writ”).

<sup>275</sup> See Aziz Z. Huq, *The President and the Detainees*, 165 U. PA. L. REV. 499, 534–35 (2017) (discussing the decision’s downstream effects).

<sup>276</sup> *Id.* at 537.

<sup>277</sup> See *supra* Part I.

indemnification,<sup>278</sup> has rarely been used. But it is hard to see the constitutional theory upon which such targeted remissions via defendant compensation could be resisted as unlawful. This Article focuses instead on the use of substantive law to mitigate judicial independence in other ways.

Stacking trades on the fungibility of certain procedural and jurisdictional adjustments of judicial power with changes to substantive regulation that directly bears on private conduct. Congress, all seem to agree, can change the “existing law[]” that “each court, at every level” must apply.<sup>279</sup> Good, practical reasons support Congress’s authority to make changes to the law applied in ongoing cases in response to sudden, exogenous shocks. Indeed, there are serious difficulties in even carving out a distinct domain of retroactive legislation.<sup>280</sup> And it is hard to see how a rule that prohibited Congress from altering the distributions achieved by a judicial opinion could even be crafted: For instance, once a class of plaintiffs obtained a certain right to monetary relief, would Congress be prohibited from increasing the tax burden of that class (either uniquely or as part of a larger class)?<sup>281</sup> Similarly, once the power to make changes to the law applicable in pending cases is recognized, it can be used equally to unravel both finality and independence by the case. Nothing in the Constitution’s text, after all, neatly carves at the joint between power to create on the one hand and to destroy on the other.

Worse, there is not much courts can do to respond in the long term to these tactics, beyond staccato bouts of one-shot resistance. The reason for this is that it is hard to design a rule that singles out all and only those instances in which Congress has acted with the intent and purpose of sapping independent judgment from the bench. Consider here Chief Justice Roberts’s efforts in this regard. Eschewing a motive analysis, Chief Justice Roberts recently suggested a “target[ing]” benchmark for impermissible excisions from Article III.<sup>282</sup> But it is hard to see how such a rule could be effective in the long term at protecting courts’ decisional autonomy. Once Congress is

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<sup>278</sup> Pfander & Hunt, *supra* note 120, at 1866.

<sup>279</sup> See *Patchak v. Zinke*, 138 S. Ct. 897, 909 (2018) (quoting *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 226–27 (1995)); accord *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 109–10 (1801); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994).

<sup>280</sup> DANIEL E. TROY, *RETROACTIVE LEGISLATION* 20 (1998) (“Retroactive legislation imposes economic costs on society by undermining predictability, or the ability to rely on expectations.”).

<sup>281</sup> Retroactive tax measures with a “legitimate . . . purpose” are treated as valid. *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729, 731 (1984); accord *United States v. Carlton*, 512 U.S. 26, 35 (1994) (upholding retroactive tax legislation as “rationally related to a legitimate legislative purpose”).

<sup>282</sup> *Patchak*, 138 S. Ct. at 917 (Roberts, C.J., dissenting).

aware of an antitargeting rule, it has ample incentive to simply write slightly broader laws, which sweep in some number of additional cases and hence avoid whatever prohibition the Court has set forth.<sup>283</sup> A stable equilibrium in which Congress has a plausible degree of regulatory authority and where judicial independence is formally insulated through doctrinal rules is unlikely to emerge.

That instability in part flows from the third vector of political-branch dissatisfaction with an independent judiciary—a mechanism that allows partisan actors sufficiently dissatisfied with the courts to utterly reorient them, or “packing.”

### 3. *Packing*

This third possible tactic for undermining judicial independence concerns the political (and hence necessarily partisan) character of the appointment process. Even if there is currently a constitutional norm against court-packing or partisan-motivated expansions in the scale of a federal court,<sup>284</sup> there is no equivalent norm against the exploitation of legislative power over the timing and nature of appointments to reorient the policy preferences that the federal judiciary is likely to serve. At least under the right partisan conditions, it is quite feasible to “pack the courts” without packing *the* Court in ways that traduce any constitutional norm. Further, the Framers’ neglect of informal, social instruments—increasingly powerful in recent decades—has also sapped the force of judicial independence.

The basic point here is quite simple and should not be confused with criticism of any particular political party or sequence of appointments. The

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<sup>283</sup> For an intimation of such a doubt, see *id.* at 910 (majority opinion). There, the Court says: “We doubt that the constitutional line separating the legislative and judicial powers turns on factors such as a court’s doubts about Congress’ unexpressed motives, the number of ‘cases [that] were pending when the provision was enacted,’ or the time left on the statute of limitations.” *Id.* (citing *id.* at 918 (Roberts, C.J., dissenting)).

<sup>284</sup> See Grove, *Origins*, *supra* note 93, at 525 (describing changes to the size of the Supreme Court for partisan ends as “out of bounds” (quoting David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2, 34 (2012))); accord Michael C. Dorf, *How the Written Constitution Crowds Out the Extraconstitutional Rule of Recognition*, in THE RULE OF RECOGNITION AND THE U.S. CONSTITUTION 69, 74 (Matthew D. Adler & Kenneth Einar Himma eds., 2009) (stating that packing the Court would “violate a customary rule observed by Congress and the President”). There is an argument that partisan-motivated changes to the size of the lower courts would be amenable to parallel criticisms. Richard Primus, *Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal*, HARV. L. REV. BLOG (Nov. 24, 2017), <https://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal> [<https://perma.cc/R4G4-RB3Q>] (describing a proposal to Republicans under unified government to dramatically expand the federal courts because it “departs from settled norms, and it does so in a way that threatens the continued operation of the system more generally”).

necessarily partisan character of the nomination and confirmation process means each party has an incentive to do two things. First, it will delay nominations when the Senate and the presidency are in different hands—as indeed the parties have done in recent years.<sup>285</sup> Second, when the Senate and the presidency are in the same hands, it will accelerate the rate of appointments in order to maximize the policy payoff from its tenure in office. Consistent with this dynamic, it is in the eras of American government most often characterized by united government that the rate of successful nominations to the Supreme Court has peaked.<sup>286</sup> And as the formative example of late nineteenth-century jurisdictional expansion demonstrates, this incentive will be experienced most sharply when the party in question has some reason for expecting that it will be out of power soon.<sup>287</sup> This happened three more times throughout the twentieth century.<sup>288</sup> That is, it cannot be said that such “gerrymandering by personnel” is so uncommon as to be safely ignored. It is a feature, not a bug, of the federal judiciary, and is constitutionally impossible to banish.<sup>289</sup> Today, a body of rapidly accumulating evidence showing ideology to be a very good predictor of judicial behavior suggests that these structural conditions have deeply influenced the character of the federal judiciary.<sup>290</sup>

Consider a further possibility. The conventional wisdom is that “the President and his supporters in the Senate cannot guarantee the ‘entrenchment’ of their ideology on the Court in the long, or even medium, term.”<sup>291</sup> But this may be increasingly not so for two reasons, both of which make politicized appointments more likely. A first factor is the rising tide of polarization among political elites, which has touched the Supreme Court as

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<sup>285</sup> See *supra* notes 233–234 and accompanying text.

<sup>286</sup> Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 383 (presenting data from the beginning of the republic).

<sup>287</sup> See Gillman, *supra* note 241, at 512–13.

<sup>288</sup> See Stone, *supra* note 286, at 463–64 (describing periods during the nineteenth and twentieth centuries “in which presidents from a single party have made ten or more successive appointments to the Court”).

<sup>289</sup> See *id.* at 466 (“Our government is, of course, a government of politics, even in the confirmation process.”).

<sup>290</sup> Seminal studies include JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2002), and LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL & EMPIRICAL STUDY OF RATIONAL CHOICE* 77–85 (2013), which both discuss previous studies of judicial ideology.

<sup>291</sup> Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483, 1486 (2007).

surely as it has washed over Congress and the Executive Branch.<sup>292</sup> Indeed, the trends are related: Increased polarization in Congress and the presidency has pushed up the chances that nominations will be evaluated in polarized terms with polarized results. Since 2010, indeed, “all of the Republican-nominated Justices on the Supreme Court have been to the right of all of its Democratic-nominated Justices.”<sup>293</sup> Such sorting on the bench is likely to conduce to increasing stable coalitions of Justices joining the same majority or dissenting opinions and developing over time the same lines of arguments.

Second, partisan influence on judicial outcomes need not be channeled exclusively through formal, institutional mechanisms. They can also be transmitted through vectors of sociality. The latter include “ties of personal acquaintance and friendship, and of family and party attachments,” such as those Madison recognized in *Federalist No. 46*.<sup>294</sup> Social and professional networks have important impacts on the arguments to which one is exposed, the way in which one experiences reputational costs and benefits, and ultimately the choices one makes.<sup>295</sup> There is no reason these effects would not shape the manner in which government institutions behave; to the contrary, social networks and contests are likely powerful influences at the aggregate level.<sup>296</sup>

Under appropriate conditions, a social network might provide a vehicle for the diffusion of partisan influences. Obviously, social networks can facilitate the identification of ideologically compatible nominees at the appointment stage.<sup>297</sup> But this is not all they can do. Social networks can also work as a way to “update” the policy orientations of affiliated judges so as to resist “ideological drift” of judges away from their initial partisan

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<sup>292</sup> See Donald Michael Gooch, *Ideological Polarization on the Supreme Court: Trends in the Court’s Institutional Environment and Across Regimes, 1937–2008*, 43 AM. POL. RSCH. 999, 1032 (2015) (finding “a strong linear trend of increasing ideological polarization on the Court over chief justice regimes and the pre-*Roe* to post-*Roe* jurisprudential regimes”).

<sup>293</sup> Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301 [hereinafter Devins & Baum, *Split Definitive*]. This effect arises because of the disappearing ideological overlap between the Court and both political parties.

<sup>294</sup> THE FEDERALIST NO. 46, at 295 (James Madison) (Clinton Rossiter ed., 1961).

<sup>295</sup> James H. Fowler, Michael T. Heaney, David W. Nickerson, John F. Padgett & Betsy Sinclair, *Causality in Political Networks*, 39 AM. POL. RSCH. 437, 438 (2011); see also David A. Siegel, *Social Networks and Collective Action*, 53 AM. J. POL. SCI. 122, 122 (2009) (“Across social science, a wealth of empirical evidence illustrates the ways in which social interactions can alter choice.”).

<sup>296</sup> Fontana & Huq, *supra* note 19, at 59–60 (developing this point).

<sup>297</sup> See Nancy Scherer & Banks Miller, *The Federalist Society’s Influence on the Federal Judiciary*, 62 POL. RSCH. Q. 366, 376 (2009) (finding Federalist Society membership to be a reliable proxy for voting behavior).

identities over time.<sup>298</sup> Politicized appointments become more likely when social networks facilitate such updating.

This second possibility is intimated by Professors Lawrence Baum and Neal Devins's work exploring how partisan networks, including organized groups active on constitutional and legal questions, have become important causal determinants of the Justices' policy preferences.<sup>299</sup> Professors Baum and Devins draw attention in particular to "the conservative movement [that serves] as an important reference group" for Justices appointed by Republican presidents.<sup>300</sup> Networks of this kind provide an effective vehicle for the ongoing recalibration of judicial positions. As Professor Amanda Hollis-Brusky acutely notes in her path-marking sociological and historical analysis of the Federalist Society, "[I]deas are most politically effective when buttressed by a strong 'support structure'—a group of individuals and institutions invested in nurturing, developing, and diffusing them."<sup>301</sup> Indeed, her work demonstrates the success that the Federalist Society has already had as a vehicle for the transmission of (generally politically conservative) ideas into judicial doctrine.<sup>302</sup> These findings demonstrate how social networks fashioned within elites circle can be an effective means for durably calibrating the judicial behavior of copartisan judges. (For once this technology of influence has become available, there is no reason to think it will remain the preserve of one side of the partisan aisle.) These networks increase the expected policy payoffs from politicized appointments. Moreover, they undermine the Framers' assumption that judicial independence can be defined simply in terms of formal characteristics of the kind contained in Article III.

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<sup>298</sup> Epstein et al., *supra* note 291, at 1486 (describing ideology drift through the claim that "virtually every Justice serving since the 1930s has moved to the left or right or, in some cases, has switched directions several times").

<sup>299</sup> See Devins & Baum, *Split Definitive*, *supra* note 293, at 360–65; Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1537 (2010) (arguing for "the salience of elite groups" in shaping the Justices' preferences).

<sup>300</sup> Devins & Baum, *Split Definitive*, *supra* note 293, at 351. For more general accounts, see STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008), which analyzes the transformation of the conservative moment, and AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION* (2015), which chronicles the influence that the Federalist Society exerts.

<sup>301</sup> Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 242 (2011) (quoting CHARLES EPP, *THE RIGHTS REVOLUTION* 3 (1998)).

<sup>302</sup> Amanda Hollis-Brusky, "It's the Network": *The Federalist Society as a Supplier of Intellectual Capital for the Supreme Court*, 61 STUD. L. POL. & SOC'Y 137, 165–66 (2013).



#### 4. Conclusion

Perhaps the most apt question to ask of judicial independence as defined and instantiated through Article III of the Constitution is simple: What remains? Cracking, packing, and stacking—all contingently available under certain political conditions—provide powerful vectors of ongoing partisan influence over judicial behavior. They also cast shadows on the judiciary's autonomy that are difficult—especially when it comes to the nomination and confirmation process—for the Court to regulate.

#### D. Institutional Loyalty as a Shield of Judicial Independence

But why do judges simply not try harder? To be sure, judges have intermittently crafted doctrinal rules to shield judicial independence. As Part I showed, these include the finality of judgments, the prohibition on “rules of decision,” the Article III mandate for public rights, and (perhaps soon) Article III constraints on judicial deference to agency constructions of law.<sup>303</sup> But as this Article has also shown, the Justices have repeatedly proved faint-hearted defenders of judicial independence. Even when courts have had the institutional capacity to push back against political curbs on judicial independence, they have not consistently done so. Even if one accepts that some measures—packing, certainly, and also some kinds of stacking—are difficult for courts to police, there remains a puzzle of underenforcement<sup>304</sup>: Where is it possible for judges to push back, and what explains their reluctance to defend their own institution's interests? There are two likely reasons.

A primary reason is the strength of partisan impulses even for judges. Simply put, judges are less likely to resist legislative curtailment of their independence when it coheres with their policy preferences. This is the flip side of the observation, central to the American Political Development literature that the courts are a “partner,” not an “obstacle,” to “governing coalitions.”<sup>305</sup>

There isn't any reason to think that the force of partisan incentives will abate any time soon. If Professors Baum and Devins are correct that the extrinsic forces polarizing the judiciary are growing stronger, with the natural result of increasing polarization within the Supreme Court,<sup>306</sup> then what should be expected in the near future is more selective paeans to judicial

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<sup>303</sup> See *supra* Part I.

<sup>304</sup> For a taxonomy of reasons, see Sager, *supra* note 90, at 1217–18, which discusses reasons for underenforcement of constitutional norms in terms of “institutional” and “analytic” constraints.

<sup>305</sup> See CROWE, *supra* note 32, at 274.

<sup>306</sup> Devins & Baum, *Split Definitive*, *supra* note 293, at 301–03.

independence in the body of judicial opinions stapled to yet other deafening yet incoherent silences.

The second reason for passivity is that even when judges act with institutional motives in mind, this does not necessarily mean that they will resist legislative constraints on judicial independence. Judges concerned about docket pressures and the prestige of the federal judiciary may well welcome the occasional legislative insertion of a bit or the casting on of tighter statutory reins.<sup>307</sup> Federal judges, as Professor Resnik has shown, complain about being “‘too important’ for certain kinds of cases.”<sup>308</sup> The relative judicial indifference to the Article III constitutional concerns raised by deference regimes in the AEDPA and the PLRA,<sup>309</sup> therefore, has an institutional foundation as well as a partisan–political one. The Court’s willingness to permit legislative foreclosure of injunctive relief based on a final judgment may well also be illuminated by a concern about the time and reputational costs of federal judges’ involvement in managing deeply troubled state institutions, beyond its obvious partisan coding.<sup>310</sup> The indifference to legislative alienation of constitutional claims beyond the purview of federal court, whether through the FAA or otherwise, again can be understood as wholly consistent with a zealous concern for Article III interests.

Given the strength of partisan motivations and the ambivalent effect of institutional ones, the patchwork approach to the doctrinal formulation of judicial independence ought not to be surprising—it is a predictable consequence of a federal judiciary whose design and staffing are so thoroughly “acted upon by politics”<sup>311</sup> and infused from tip to toes in deeply partisan orientations and aims.

#### IV. RECASTING EXPECTATIONS OF JUDICIAL INDEPENDENCE

The Supreme Court’s jurisprudence of judicial independence is cast in what the philosopher David Estlund calls “aspirational” or “nonconcessive”

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<sup>307</sup> Huq, *Rationing*, *supra* note 107, at 9–10 (noting “the judiciary’s institutional interests in prestige and docket management”).

<sup>308</sup> Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 972 (2000); *see also* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 980–82 (1926) (arguing that the Constitution does not require Article III judges or juries to determine “petty” criminal cases).

<sup>309</sup> *See supra* text accompanying notes 270–271.

<sup>310</sup> *See* *Miller v. French*, 530 U.S. 327, 344 (2000).

<sup>311</sup> CROWE, *supra* note 32, at 5 (emphasis omitted).

terms.<sup>312</sup> It “states requirements unconstrained by questions about how likely it is that they will be met.”<sup>313</sup> But whatever uses aspirational theory has in the abstract, even its leading contemporary defender acknowledges that it “would probably be wrong” to build institutions such that “people are not going to comply adequately.”<sup>314</sup> Having offered in the previous Part an account of the concessions that our Constitution forces upon the practice of judicial independence, it is worth asking what kind of normative demands one can and should legitimately make of the federal bench, when viewed in a more realistic light.

This Part sketches two answers to that question, in part as promissory notes for future work. First, it is possible to disaggregate a number of normative claims made on behalf of judicial independence and tease out a number that remain plausible. Clarifying which of these claims really matters in practice would be a first step to providing a better implementing armature for judicial independence. Second, there are certain extrinsic normative and even legal standards that can be applied to ascertain whether a given law or executive action impinging on judicial independence is problematic. An example from the New Deal era casts some light here.

A first potential response to the clash between the aspirational and the institutional dimensions of judicial independence would be to select among the plurality of normative ends associated with judicial independence, and then to pursue the most plausible of them. Judicial independence, on this view, should be imagined as a bundle of loosely related normative goods. Some are compromised by the aspiration–institution conflict. Others, however, persist and can be pursued even under the conditions engendered by the Constitution. If this is so, it should be possible to unbundle the “good” of judicial independence, and then to separately abandon or pursue its different strands.

For instance, it is implausible to think that courts will be a consistent check on majoritarian legislative preferences. Rather, the dense array of vectors of ongoing political influence over the federal judiciary, developed in Section III.C, constrain and contradict the libertarian and minority-protection aspirations intermittently expressed in the jurisprudence.<sup>315</sup> This

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<sup>312</sup> Estlund, *Utopophobia*, *supra* note 24, at 123–24.

<sup>313</sup> *Id.* at 125.

<sup>314</sup> *Id.* at 132.

<sup>315</sup> See, e.g., *Kisor v. Wilkie*, 139 S. Ct. 2400, 2438 (2019) (Gorsuch, J., concurring in the judgment) (stating that an independent judiciary “guard[s] the people from the arbitrary use of governmental power”); *Stern v. Marshall*, 564 U.S. 462, 483 (2011) (discussing how separation of powers principles help protect the individual).

suggests that the relationship between judicial independence and the rule of law—which is often asserted in legal philosophy but rarely examined<sup>316</sup>—is also contingent and fragile, not secure and stable, at least in the American context: Article III courts are not set up to protect vulnerable groups from consistent marginalization and subordination. Their ability to prevent incumbent abuse of the law is also weaker than commonly assumed. They are, as a result, not a complete defense against serious threats to the rule of law. Whatever role courts play in this domain should be given less weight, and more attention should be given to the role of other institutions or technologies. Other mechanisms for defending the rule of law, moreover, should be explored.

A more modest role for judicial independence can, however, be imagined. De facto judicial independence (but not formal indicia thereof) has been associated in large-N studies with higher rates of economic growth.<sup>317</sup> Consistent with this finding, there is evidence that courts in even the most authoritarian of regimes can perform the role of settling nonpolitical disputes, say, concerning property and tort in ways that allow the public to plan and execute personal and commercial projects. The post-Soviet judiciary, to take an especially extreme example, is still characterized by informal influence exercised by high officials through *telefonnoye pravo* or “telephone justice.”<sup>318</sup> And yet at the same time that “telephone justice” was being delivered, most contemporary litigants and informed observers believed that most judges gave a “fair shake” to both sides in most nonpolitical cases.<sup>319</sup> Even in authoritarian regimes in which political influence on the judiciary is far more extensive than the American case, courts can operate to provide a general dispute resolution function for the overwhelming majority of the population. Such a manifestation of the so-called “dual state”<sup>320</sup> suggests that some of the public goods associated with

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<sup>316</sup> See, e.g., Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 77 (2007) (describing “unimpeded access to a court” as a basic component of the rule of law); Joseph Raz, *The Rule of Law and Its Virtue*, in LIBERTY AND THE RULE OF LAW 3, 10 (Robert L. Cunningham ed., 1979) (explaining that the rules concerning judicial independence are “essential” to preserving the rule of law).

<sup>317</sup> Stefan Voigt, Jerg Gutmann & Lars P. Feld, *Economic Growth and Judicial Independence, a Dozen Years on: Cross-Country Evidence Using an Updated Set of Indicators*, 38 EUR. J. POL. ECON. 197, 197–98 (2015).

<sup>318</sup> Alena Ledeneva, *Telephone Justice in Russia*, 24 POST-SOVIET AFFS. 324, 325–27, 338–39 (2008) (defining “telephone justice” and finding through surveys that it was perceived by about one-third of the public).

<sup>319</sup> Kathryn Hendley, *Justice in Moscow?*, 32 POST-SOVIET AFFS. 491, 491–92 (2016).

<sup>320</sup> This term is associated with the jurist Ernst Fraenkel, whose astonishing monograph about legal practice in the early Third Reich has recently been recovered as a seminal treatment of the role that a judiciary plays in authoritarian contexts. See generally ERNST FRAENKEL, *THE DUAL STATE: A*

judicial independence—but not all—can be doled out even under conditions of intense political pressures. The reality that judicial independence is possible in some but not all cases, even in such extreme circumstances, suggests that there is no reason to slight potential benefits sounding in the same register in the far less extreme American condition.

A second potential response to the tension between judicial independence as aspiration and institutional fact is to search for alternative benchmarks for evaluating legislative or executive incursions on judicial authority. Rather than taking some ideal of judicial independence as a practical benchmark, the validity of “rules of decision,” jurisdiction-stripping, and deference regimes should be evaluated in terms of their likely impact on first-order constitutional values of democracy, inclusion, and the promotion of some notion of the general welfare. Perhaps the leading example in the case law of this approach is a Second Circuit Court of Appeals’ decision in *Battaglia v. General Motors Corporation*.<sup>321</sup> As glossed by Professor Richard Fallon, *Battaglia* holds that “when Congress can validly extinguish a substantive right, it can also strip courts of jurisdiction to enforce the right that it has abolished.”<sup>322</sup> The relevance of this principle here is that it exemplifies a criterion for the evaluation of manipulation of judicial power that does not depend on a “nonconcessive” account of courts’ power. Unlike the leading approach in the doctrine, it is not necessarily subject to the criticisms developed in Part III. Its application, instead, depends on the invocation of some extrinsic normative desideratum. It also has the virtue of focusing directly on the liberty and limited government goals that advocates of judicial independence claim to prize.

These two possibilities, this Article emphasizes, are merely examples (and briefly sketched ones at that). They are not intended to exhaust the field of possible approaches to judicial independence given the infeasibility of nonconcessive grounds. Both illustrate the way in which a benchmark can accommodate the limits generated by the Constitution upon the plausible reach of judicial independence. Rather than asking for an incentive-incompatible ideal, we do better by searching for the feasible alternative.

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CONTRIBUTION TO THE THEORY OF DICTATORSHIP, at xxiii–xxvi (E.A. Shils, Edith Lowenstein & Klaus Knorr trans., 2017) (characterizing the legal system of the Nationalist–Socialist regime in Germany as simultaneously containing a Prerogative State, allowing the government to exercise “unlimited arbitrariness and violence unchecked by any legal guarantees,” and a Normative State, an “administrative body endowed with elaborate powers for safeguarding the legal order as expressed in statutes, decisions of the courts, and activities of the administrative agencies”).

<sup>321</sup> 169 F.2d 254, 261–62 (2d Cir. 1948) (upholding jurisdictional limits in the Portal-to-Portal Act on the ground that it impinged on no substantive constitutional entitlement).

<sup>322</sup> Fallon, *Jurisdiction-Stripping*, *supra* note 185, at 1104.

## CONCLUSION

This Article has suggested that the Framers relied on flawed presuppositions when drawing up independent federal courts. As a result of these presumptions' failure, elected actors operate in a context in which they wield ample discretion to unravel judicial independence of the kind the Court indirectly holds dear. Therefore, judicial independence endures (if it endures) as "an independent and autonomous institution of governance" only as a consequence of "historical processes" dominated by "actors seeking to shape the structures of government in order to further their own interests."<sup>323</sup> Judicial independence's enemies hence stand in plain sight. These foes include the Court and the constitutional text itself.

Even though the ambition toward judicial independence runs deep in American constitutional and political discourse, that term is often deployed with an inchoate understanding of its implications. Worse, there is a tendency, especially among the Justices, to conflate the ideal of such independence with its specific instantiation in Article III. The tendency is regrettable, if understandable. Legal analysts, however, should do better. They should clarify the relationship between our ethical commitments and the obdurate limits of our institutional life. This is not at all to accept current patterns of institutional behavior as inevitable,<sup>324</sup> but rather to ask how reality should guide a ranking of normative ends, from the feasible to the difficult to the impossible. It is to understand judicial independence as an ethical aspiration that cannot be pried apart from its institutional and political circumstances. And it is to attend, carefully and sympathetically, to the ways in which our present constitutional circumstances channel and disable us from doing better.

This Article's account invites a more cautious and nuanced *judicial* approach to what judicial independence can and cannot do. It can usefully puncture some of the Justices' exaggerated expectations of judicial independence, occasionally tendered in the heat of the rhetorical moment. And it might cast clarifying light upon what is really at stake in political discussions about an independent judiciary.

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<sup>323</sup> CROWE, *supra* note 32, at 5–6.

<sup>324</sup> On the risks of quietism though nonideal theory, see Lorna Finlayson, *With Radicals Like These, Who Needs Conservatives? Doom, Gloom, and Realism in Political Theory*, 16 EUR. J. POL. THEORY 264, 267–68 (2017), which distinguishes between the tendency to see political constraints as "important" from seeing them as "fixed" (emphasis omitted).