
ARTICLE

INDEPENDENT JUDGES, DEPENDENT JUDICIARY: EXPLAINING JUDICIAL INDEPENDENCE

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I. INTRODUCTION

Judicial independence is an idea that has both internal (or normative) and external (or institutional) aspects. From a normative viewpoint, judges should be autonomous moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations. Independence, or impartiality, in this sense is a desirable aspect of a judge's character. But judges are human, and the things they must decide can matter greatly to people. Therefore, we are also concerned with providing institutional shields against the threats or temptations that might come their way. Judicial independence, in this sense, is a feature of the institutional setting within which judging takes place. Institutional judicial independence is, however, a complex value in that it really cannot be seen as something valuable in itself. Rather, it is instrumental to the pursuit of other values, such as the rule of law or constitutional values.

In this Article, I focus on characterizing and explaining the structure of institutional protections for judges and legal processes within the federal

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government. This is not to denigrate the importance of seeking an internal or normative understanding of judicial independence. Unless judges can be counted on, for the most part, to act as impartial and morally autonomous agents who share the values that underlie our constitutional democracy, extensive institutional protections are hard to justify. We want judges to be institutionally protected so that they can make the right decisions without worrying about personal consequences from such decisions. But providing personal protection for judges is no guarantee that they will respond to law and the constitution in desirable ways.

In fact, many of the historical conflicts about judges arose under circumstances in which institutional protections were widely believed to provide too much leeway for judges to impose their own views on society. This concern existed in the earliest days of the Republic. During the New York debates over the ratification of the Constitution, Brutus, the most articulate and original of the Anti-Federalist opponents of the Constitution, worried that the Constitution created a judiciary that was much too independent. He noted that “[t]he real effect of this system of government, will . . . be brought home to the feelings of the people, through the medium of the judicial power.”¹ He also stated that judges who were entrusted with this power would be placed in an unprecedented situation:

They are to be rendered 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 . . . nor can they be removed from office for making ever so many erroneous adjudications.²

By so insulating judges, Brutus worried that the proposed Constitution created a government in which the judiciary would rule without legal or popular restraint.

Historically, Brutus’ concern has been addressed in two ways. The first has been to shape the appointment process so that it ensures as much as possible that those appointed to the bench have appropriate character and independence of mind. However, screening potential judges *ex ante* is inevitably an imperfect process that cannot guarantee institutionally protected judges will act impartially in deciding cases or exhibit an appropriate allegiance to legal values. Therefore, another mechanism of control was needed and, in fact, provided within the constitutional structure. Our commitment to democratic values—which has grown substantially over

1. Essays of Brutus, No. XI (Jan. 31, 1788), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 293 (Ralph Ketcham ed., 1986).

2. *Id.*

the past two centuries—requires that we provide a way by which judges can be made at least somewhat accountable, directly or indirectly, to the people or their representatives. Typically, the American states sought to achieve this accountability by resorting to judicial election of one sort or another. At the federal level, less direct mechanisms for connecting the popular and judicial branches have been employed.

Independence seems to have at least two meanings. One meaning—commonly invoked when considering the circumstances of the individual judge—is that a person is independent if she is able to take actions without fear of interference by another. In this sense, judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards. Another meaning is perhaps less common in discussions surrounding judges, but applies naturally to courts and to the judicial system as a whole. We might think of a person or an institution as being dependent on another if the person or entity is unable to do its job without relying on some other institution or group. In this context, the federal judiciary is institutionally dependent on Congress and the president, for jurisdiction, rules, and execution of judicial orders. Note that in this second meaning, judicial dependence is not necessarily pejorative. Whether congressional “interference” with the judiciary is normatively deplorable depends on the form it takes.

If we consider congressional or presidential interference with individual judges under the second meaning, however, things become more one-sided. If the executive fails to execute a particular judicial decision, or if Congress attempts to prevent a specific judge from hearing a case or reaching a particular decision, the pejorative characterization of dependence returns. While the other branches may legitimately “interfere” with the judiciary as a whole by “packing” courts with new judges, regulating their jurisdiction, or enacting general laws that overturn judicial interpretations of statutes, they should not try to get an individual judge to alter her decisions.³ Thus, while Congress may legitimately shape the jurisdiction of federal courts within very broad limits, whether a particular limitation constitutes objectionable “jurisdiction stripping” depends on whether it is aimed at inducing judges to act partially in the cases brought before them. Perhaps too, attempts to pick out domains of social policy, such as abor-

3. This is not to say that every congressional or executive intrusion on the judiciary is normatively neutral. One can easily imagine circumstances in which the point of overriding a judicial interpretation is to alter whether or how judges decide certain kinds of cases. In such circumstances, we might regard congressional action as normatively questionable. But this is a judgment to be made in the particular context within which a statute was enacted, rather than at the general level.

tion or school prayer, and remove them from the jurisdiction of federal courts would also count as illegitimate forms of jurisdictional regulation. There is a line, sometimes quite fine and hard to discern, that separates appropriate forms of institutional dependence from objectionable interferences with the execution of the judicial power.

II. INSTITUTIONAL PROTECTIONS FOR JUDGES AND THE JUDICIARY

Historically, attempts to secure judicial independence have often focused on the narrow perspective of the individual judge—freedom from interference—and focused on providing institutional protections for judges that presumably enable them to decide cases free from threats of coercion or blandishments. The U.S. Constitution specifically provides for life tenure during good behavior, and prohibits Congress from reducing judicial salaries during their terms in office.⁴ Arguably, for most of our history, these shields seem to have been reasonably effective in allowing individual judges substantial leeway in deciding cases.

But why would textual provisions in the Constitution—which are mere “parchment barriers” in Madison’s words⁵—be effective in protecting judges? One answer is that courts could overturn any congressional attempt to violate lifetime tenure or to lower judicial salaries. But suppose Congress lowered the bar to impeachment—a bar which it sets implicitly by impeaching and convicting judges from time to time—or suppose that it took advantage of periodic periods of inflation to permit the reduction of real judicial salaries. What would or could be done about “infringements” of this sort? As far as I can tell, neither of these actions would be subject to any external review or check.⁶ So it seems that a textual theory, even if backed up with judicial review, cannot explain why the constitutional protections for judges have remained relatively robust.

A second answer roots judicial independence in the structural protections afforded by the Constitution. Political intrusions on judicial terrain depend on the capacity of politicians to achieve sufficiently high levels of coordination to overcome the checks and balances imposed by the Constitution. For example, judicial impeachments must be tried in the Senate

4. See U.S. CONST. art. III, § 1.

5. THE FEDERALIST NO. 47, at 308 (James Madison) (Clinton Rossiter ed., 1961).

6. For an argument that judicial impeachments are reviewable, see Martin H. Redish, *Judicial Discipline, Judicial Independence and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 701-06 (1999).

subject to a two-thirds voting rule;⁷ majorities of this size are hard to put together and sustain over time. This is especially so if the impeachment is based on a politically controversial decision taken by the judge being impeached. But such hurdles would not seem to be very high if the judge's decision were very unpopular—as it would be if the judge were acting to protect the alleged rights of a murderer or drug runner. Moreover, to reduce real salaries of judges, no congressional action is necessary other than for Congress to do what it excels at: running an irresponsible fiscal policy. It is hard to see any structural protection against a congressional failure to ensure that judicial salaries keep up with the cost of living.

It seems clear, then, that the basic reason constitutional protections for judges have remained strong and stable over the years is that the political branches, or, perhaps, the people themselves, have not really wanted to alter them—at least not badly enough (or for long enough) to incur the substantial costs and political risks associated with such an effort. But this is puzzling, given the unpopularity of many judicial decisions and the frequency with which wealthy and powerful groups lose in such decisions. Surely from time to time there would have been the political basis for a reaction against independent judges. This is, at least, what Brutus believed to be the likely consequence of a judiciary that was made too independent.⁸

In retrospect, we can see that, by identifying judicial independence with the institutional insulation provided federal judges, Brutus misread the proposed Constitution as one that would hermetically seal off the judiciary from the influence of the other branches. This almost certainly was neither Madison's intention nor was it achieved by the Constitution. Rather, the Constitution instituted a complex set of interdependencies among the major departments of government, permitting each branch to exercise its assigned functions, but requiring them to enlist the cooperation of other branches for certain purposes. These interdependencies were aimed at providing the means for each branch of the federal government to protect itself against encroachments by the others. Thus, the veto power provided the president with a role in the legislative process. The requirement of senatorial assent to certain appointments gave Congress a role in the executive power. By the same means, both Congress and the president were given influence over the judiciary as well.

7. See U.S. CONST. art. I, § 3, cl. 6.

8. Brutus himself thought that the people's resentment would be aimed more broadly at the federal government and not just at the judges.

Indeed, even if the Framers had aimed to provide perfect insulation for federal judges, subsequent developments—especially the appearance of (occasionally well-organized and cohesive) political parties—have sometimes conspired to break down whatever insulation the judiciary might otherwise enjoy. The triumph of Jefferson’s Republican party in 1800 and the subsequent assault on Federalist judges was only the earliest example of the political vulnerability of the judiciary to a concerted partisan attack.⁹ This famous assault took place on two levels: impeaching Federalist judges (almost certainly to alter behavior on the bench) and repealing a statute that enlarged the federal judiciary (and firing the judges who had been hired under that statute).

Additionally, constitutional protections afforded to individual judges remain dependent on a congressional willingness to maintain a relatively high barrier for impeachment. As the early assaults on federal judges showed, this willingness can be tenuous under certain political circumstances. Congress could choose to redefine what constitutes an impeachable offense to include actions taken on the bench in good faith. It is hard to see that the Constitution or the Supreme Court could offer any real resistance to such efforts—particularly in the political circumstances in which they are likely to occur—and it is even more difficult to see how the “precedent” established in the failure of the attempt to convict Justice Chase can have any restraining effect on future congressional impeachments.¹⁰ It is true that judicial impeachments historically have been relatively rare and remain so today. However, the low frequency of impeachment should not be seen as evidence of the security of constitutional protection, because this may be due as much to judges’ reluctance to make politically controversial decisions as to any display of congressional virtue.

The only real barriers to the frequent resort to impeachment are, therefore, political. At least in politically controversial cases, impeachment, with whatever due process requirements Congress chooses to impose on itself, remains a cumbersome, costly, and visible process that exposes congressmen to electoral danger and distracts them from more politically attractive activities. For these reasons, it is usually difficult to

9. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Barry Friedman, “*Things Forgotten*” in *the Debate Over Judicial Independence*, 14 GA. ST. U. L. REV. 737, 739 (1998).

10. Cf. William H. Rehnquist, *The American Constitutional Experience: Remarks of the Chief Justice*, 54 LA. L. REV. 1161, 1163-67 (1994) (discussing the impeachment trial of Justice Samuel Chase of Maryland for criticizing the Judiciary Act of 1801). Justice Rehnquist asserts that the impeachment trial of Justice Chase established the political precedent that “a judge’s judicial acts may not serve as the basis for impeachment.” *Id.* at 1167.

form a sufficiently large and unified congressional majority to do the job.¹¹ Recent developments may have altered this calculus somewhat—particularly the Senate’s adoption of the practice of trying impeachments in committee rather than tying up the full Senate¹²—but normally political considerations make impeachment a fairly blunt instrument. If Congress wishes to influence judicial action, more attractive ways are provided by the Constitution.

Even though judges may enjoy some insulation from political intrusions, the Constitution ensures that institutions within which they work—their courts and the judicial system as a whole—remain remarkably dependent on political officials. The forms of institutional dependence of the judiciary in the United States are myriad: The Constitution gives Congress the authority to create (or not create) federal courts other than the Supreme Court, to create and regulate their jurisdictions, to decide how many federal judges there will be and how many will sit on each federal court, to appropriate funds for the courts, to enact rules of court procedure, to create alternative systems of courts under Articles I and IV, to insulate state court decisions from review, and of course to override certain kinds of judicial decisions. The president is given the authority to appoint judges (with senatorial approval), to set part of the courts’ agenda (by deciding which cases to bring and how to pursue them), and to execute (fully or not) court rulings.¹³

The exact extent of congressional power under the Constitution to alter or abolish jurisdiction remains in dispute among legal scholars. Some writers maintain that, excepting the Supreme Court’s original jurisdiction, Congress has plenary authority over the allocation of federal jurisdiction,¹⁴ while others maintain that there are significant restrictions.¹⁵ But even if the extreme view is taken—which may, for all I know, be the most defensible reading of Article III and its legislative history—it is still possible to see some congressional alterations of court jurisdiction, especially if they

11. Indeed, the fact that procedural requirements for impeachment have been relatively onerous in Congress is probably a reflection of the fact that impeachment is normally fragmented along partisan and regional lines. Even small political minorities, especially in the Senate, are generally able to place procedural hurdles in front of the majority, unless that majority is especially large, unified, and durable. Few majorities with these characteristics have appeared in our history.

12. See Holly Idelson, *Separation of Powers: Impeachment Appeals Challenge Senate’s Independent Authority*, 50 CONG. Q. WKLY REP. 3352 (1992).

13. See U.S. CONST. art. II, § 2, cl. 2, § 3.

14. See Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

15. See Lawrence Gene Sager, *Forward: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981).

arise from dissatisfaction with particular judicial decisions, as infringements on judicial independence. This seems most clearly the case when congressional ire is focused on a particular decision and Congress reacts by enacting a statute that undermines the finality of that decision.¹⁶ But even if congressional action were restricted to shifting jurisdiction, if such action affected how certain cases would be treated in the future—for example, how death penalty appeals would be handled in federal courts—the possibility of such action might effectively undermine the independence of courts in deciding current cases is distinct. That such infringements may happen within the framework of the Constitution makes the threat all the more credible.¹⁷

Beyond these formal dependencies, of course, is the more nebulous, but dangerous, capacity—present in any democratic government—of political leaders to mobilize popular sentiment against judges. As the Framers worried, the attachment of the popular branches of government to the people is a constant source of constitutional danger. This is especially so because judges often are unable to respond to attacks on particular decisions without violating their obligation to refrain from discussing pending cases. But while demagogic politicians may freely attack individual judges, it remains fairly difficult to target one with any precision. There have been several impeachments of federal judges in the past few years but, measured against the size of the judiciary, the rate of impeachments does not appear to have increased.¹⁸ It is also virtually impossible for politicians to alter or affect any particular judicial decision once it is reached. Unlike the case of impeachments, attempts to modify final court decisions are subject to judicial review and the Supreme Court has been fairly consistent in rejecting such attempts.¹⁹

Therefore, in my view, the more genuine threats to judicial independence—if we interpret it as providing a broad guarantee that people can have their disputes decided in front of independent judges—are not really the sporadic attacks on individual judges, but instead are found in attempts to diminish or regulate the powers of the judiciary as a whole. These attempts are often hidden in popular congressional actions directed at urgent

16. The Supreme Court struck down such a statute in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

17. A recent survey of this dispute along with a defense of the proposition that Congress has very wide discretion to regulate jurisdictions is found in Julian Velasco, *Congressional Control Over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671 (1997).

18. See Steven W. Fitschen, *Impeaching Federal Judges: A Covenantal and Constitutional Response to Judicial Tyranny*, 10 REGENT U. L. REV. 111, 144-46 & tbls 3, 4 (1998).

19. See, e.g., *supra* note 16.

problems where existing legal procedures have proved cumbersome.²⁰ They can take many forms: nibbling away at court jurisdiction by removing cases to administrative tribunals, altering rules of court procedure, limiting the number of judgeships or failing to fill vacancies that exist, and failing to give full effect to court orders. Politically, these events may not appear confrontational, but their cumulative effect can substantially erode the capacity of the judiciary to protect individual liberties by removing such issues from the federal courts.

Not every attempt to limit the jurisdiction of federal courts, however, is an objectionable intrusion on judicial independence. Some restrictions are aimed at increasing the efficiency of the system by removing certain unimportant cases, or those that can be fairly resolved by state courts. The monetary amount limitations specified in the first Judiciary Act are an example of such a restriction.²¹ Altering even these limitations can be politically controversial, as they were in the late nineteenth century.²² Still, as Frankfurter and Landis argued, there had been an enormous increase in federal litigation following the Civil War—some of it due to the expansion in the jurisdiction of the lower federal courts created in a series of congressional acts²³—and some kind of congressional response was required to deal with it. The political question was whether to reduce the volume of cases that could be heard in a federal court by reducing federal jurisdiction or, instead, to increase the capacity of these courts to deal with their expanded workload. It was also clear that if Congress failed to act one way or another, the Supreme Court was likely to attempt doctrinal innovations to deal with the problem, and these innovations would tend to take the form of jurisdictional restrictions.²⁴ As a result of the typically divided governments of the time, such restrictions were likely to stick.²⁵

20. A good example of this is the restrictions placed on federal courts deciding habeas petitions found in the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (Supp. II 1996).

21. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79.

22. See FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* 56-102 (1928).

23. This series culminated in the 1875 Judiciary Act, which expanded the jurisdiction of federal district courts up to the limits of Article III.

24. An example of such a restriction would be doctrinal restrictions on removal of suits to federal courts.

25. Frankfurter and Landis demonstrate that after 1875, the House and Senate were deeply divided over issues of reform of the judicial system. Southern and western representatives were frequently able to convince the House to produce bills limiting federal jurisdiction, especially that of lower courts, but such legislation generally died in the Senate. This political division meant that judicial attempts to regulate the jurisdiction of the lower federal courts was likely to remain in place for a long time. See FRANKFURTER & LANDIS, *supra* note 22, at 86-93.

The dependence of the judiciary on the political branches is not a constitutional accident. Rather, it fits within the broader federalist scheme of making the major departments of government interdependent rather than establishing a strict separation of powers. In *The Federalist No. 47*, responding to the Anti-Federalist arguments that the Constitution did not adequately separate the powers of the principal branches of government, Madison agreed that “[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, . . . may justly be pronounced the very definition of tyranny.”²⁶ But he argued that this “did not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other.”²⁷ Rather, he argued in *The Federalist No. 48*, that “unless these departments be so far connected and blended as to give each a constitutional control over the others, the degree of separation . . . essential to a free government, can never in practice be duly maintained.”²⁸ In principle, then, the interdependence of the branches of government should work to limit the frequency and severity of confrontation and gridlock, while allowing each to perform its constitutional duties.

Of course, things have not always worked out in practice the way Madison anticipated. There have been a few brief periods of history during which courts have been forced to work under circumstances of extreme political vulnerability. This does not mean that we should completely insulate the federal judiciary from dependence on the other branches. Such a move would not only go against the tenor of our constitutional structure and tradition, but as the Framers feared, it would set up circumstances of institutional confrontation that might be even more dangerous than mere political vulnerability of the judiciary. Indeed, it is not clear how such insulation could be accomplished except by having the Court devise constitutional defenses against institutional intrusions by the other branches. Such a course would expose the Supreme Court to political dangers which are, in view of the infrequency of the problem, probably not worth risking. Moreover, such judicial action would undercut the normative balance of constitutional and democratic impulses that have characterized constitutional practice.

This system of independent judges within a dependent judiciary, whatever its merits, creates certain kinds of characteristic tensions within the constitutional order. For example, individual judges are quite free to

26. THE FEDERALIST NO. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

27. *Id.* at 302.

28. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

decide cases without fear of negative personal consequences, even if the predictable result of such decisions is quite negative for the judiciary as a whole, and, indeed, for the exercise of the judicial power.²⁹ In a sense, politically controversial decisions—whether they are internally well-justified or not—are collective bads from the point of view of the judiciary. Given the threat to all judges of having irresponsible, incompetent, or adventurous individuals sitting on the bench as judges, it is probably no surprise that the judiciary has found ways to mitigate the damage that any individual judge can do, and to make sure that if a controversial step is to be taken, it is taken with adequate judicial deliberation. Examples of judicial attempts to regulate the capacity of federal judges to cause these collective harms are found in the development of various abstention doctrines, which limit the capacity of federal district judges to intervene in state judicial proceedings.³⁰ Not surprisingly, these doctrines remain politically controversial insofar as they limit the capacity of people to protect constitutional rights in federal courts when federal jurisdiction is clear.

Congress has from time to time played an arguably even more important role in restraining the inferior federal courts. In an important sense, the development of appellate hierarchy with collegial courts at the appellate levels can be understood as a strategy to ensure that no single judge can, by her actions alone, inflict too much damage on the judiciary as a whole, by making aberrant or overly courageous judgments.³¹ Indeed, the peculiar shape of the supervisory structure in the judicial system—in which the number of judges sitting together increases as one moves up the hierarchy—might also be explicable in these terms.³²

29. See Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 539 & n.22 (1999).

30. See, e.g., *Federal Civil Procedure—Sixth Circuit Holds That Federal Court Should Abstain from Deciding a Nonparty's First Amendment Challenge to a State Court Injunction*—Gottfried v. Medical Planning Services, Inc., 142 F.3d 326 (6th Cir. 1998), 112 HARV. L. REV. 976 (1999).

31. Often Congress creates the mechanism by which individual judges are regulated. Good examples of attempts to use the appellate hierarchy to control individual judges are easily found. For example, the Evarts Act (1891), which created the third tier of the appellate system, was an explicit effort to reign in district court judges. During the debate over the legislation, Congressman Culberson of Texas announced, "I have the supreme desire to witness . . . the overthrow and destruction of the kingly power of district and circuit judges." 21 CONG. REC. 3403, 3404 (1890).

32. I owe this point to a conversation with Larry Sager. It is developed further in Lewis Kornhauser & Lawrence Sager, *Unpacking the Court*, 96 YALE L.J. 82 (1986). Larger and more deliberative courts might be thought to be more likely to arrive at "right" answers than smaller ones, even if they are more cumbersome to operate. Placing a large court on top of an appellate structure, with the requirement of vertical stare decisis, would permit smaller and more efficient lower courts to manage large workloads, while subject only to occasional corrections from above.

There are other mechanisms as well for keeping judges in line. The capacity within the circuits to assign and reassign cases, and to initiate disciplinary proceedings against individual judges, works to keep individual judges responsive to their duties in the constitutional system.³³ Such mechanisms are controversial in that they create a method, short of impeachment, by which judges may effectively be prohibited from hearing cases. Moreover, it is not clear that these new disciplinary mechanisms do not constitute a way by which judges may be punished for political views or actions, or even for decisions issued from the bench. However these matters are interpreted, disciplinary mechanisms, when combined with the hierarchical structure of the appellate system, have the effect of ensuring that judging is always, at least implicitly, a collegial process in which the lines of responsibility and accountability to other judges remain clear.³⁴ While it is possible that some judges will make mistakes or abuse their office, the availability of appeal, along with the other disciplinary mechanisms, places limits on how badly things can go wrong.

Fixing mistakes and abuses after they occur imposes great costs on particular litigants and is damaging to the rule of law. So, in principle, it is better to limit judgeships to those who can be counted on to be competent, well-motivated, and suitably cautious about exposing their fellow judges to political reaction. While we probably cannot guarantee that all judges will have the appropriate character and temperament, we can take pains to select judges who appear likely to be well-suited to the job and to ensure that judging takes place in appropriate institutional circumstances—that is, circumstances in which there are unlikely to be strong pressures to act in inappropriate ways. It seems natural, therefore, to focus on creating practices that promote the appointment of independent-minded judges who are also responsive to the republican setting within which they do their work. When this process is fully developed, the focus should turn to providing institutional mechanisms that serve to protect and enhance these values.

As recent experiences around the world such as those in the former Soviet states and in Latin America attest, this is a subtle and difficult problem. On the one side, because we want to institute a regime of law,

33. In 1980, Congress created a mechanism by which federal judges may be disciplined within the judicial branch in the Judicial Councils Reform and Judicial Conduct and Disability Act. 28 U.S.C. §§ 331, 332, 372(c), 604 (1994) (authorizing councils of judges within each circuit to receive and investigate complaints, and to impose various sanctions or refer cases to the Judicial Conference of the United States, which can impose further penalties or recommend that Congress consider bringing charges of impeachment).

34. For an analysis of decisionmaking processes in collegial courts, see Lewis Kornhauser & Lawrence Sager, *The One and Many: Adjudication in Collegial Courts*, 81 CAL. L. REV. 1 (1993).

however that law is created and developed, we want the judiciary to have a wide mandate to resolve the disputes that arise in social life. This implies that what judges and courts do will matter greatly to the powerful as well as the weak. Thus, it will be attractive to provide judges with a protective belt that insulates them from pressure from the powerful. But on the other side, insofar as we want law to be responsive to popular majorities, we need to ensure that judges are directed to pay appropriate attention to the legal actions of such majorities or their agents. As Brutus warned, judges who are too well insulated may abuse the trust placed in them.³⁵ This concern directs us to worry about appointing competent judges with good character. It also directs us to ensure that judges are placed in institutional circumstances that encourage a certain kind of accountability to the people and to their elected agents.

On this account, then, the institutional structure established by the Constitution balances protections for individual judges with a judiciary that is rather thoroughly dependent on the other branches of government for the means to do its constitutional business. This curious structure can be understood as an institutional effort to permit the realization of three values that are always in some conflict: rule of law, constitutional government, and democracy. Since these principles are in fundamental conflict, the institutional solution cannot be expected to work perfectly all the time. However, if the public and their agents are appropriately motivated, it can set the ground rules for balancing and accommodating these complex and conflicting values.

III. NORMS OF JUDICIAL INDEPENDENCE

The complex structure of judicial independence can, in principle, be explained by the structure of the normative goals we wish courts to serve. There are several such goals which are in such deep conflict among themselves that there is likely to be no simple way of being faithful to them all simultaneously. For that reason, it has proved attractive to develop an institutional framework within which these norms can be applied in particular circumstances, while all the while being balanced against one another.

Understood traditionally, judicial independence concerns independence of judges from the interference of other governmental officials. There are several ways that independence from public officials might be achieved. We could construct legal rules—either statutory or constitutional—to restrain public officials from infringing on judicial authority.

35. See *supra* notes 1-2 and accompanying text.

These rules would need to be enforced with sanctions for violation. Alternatively, one could imagine the development of a set of conventions or norms of self-restraint that politicians would somehow consider as binding on themselves—a kind of political morality—without the necessity for a formal enforcement mechanism. Or, we might believe that both formal rules and normative conventions are enforced politically by the people through the ballot box. In each of these ways of securing judicial independence, the aim is to place restraints—institutional, moral, or electoral—on public officials.

A wider conception of judicial independence would not confine itself to restraining the actions of public officials. Rather, it would aim at preventing interference with legal processes wherever it may originate. Powerful economic or social interests have large stakes in judicial decisions, and can be expected to try to alter decision probabilities in their favor wherever they can legitimately do so. Obviously, there are many legal ways to take advantage of good lawyering to alter the decision agenda of courts and to ensure that cases are placed in their best light. But these methods are expensive and, therefore, are not available to everyone. Moreover, even if it is accepted that the way legal services are provided constitutes a real source of danger to judicial independence, it is not so clear how the situation may be ameliorated. Realistically, though, it does seem that genuine judicial independence may be substantially threatened by powerful nongovernmental interests acting legally to ensure themselves advantages in legal processes.

A. INDEPENDENCE FROM GOVERNMENTAL INTERFERENCE

What is the purpose of judicial independence in a constitutional democracy? In principle, judicial independence furthers three distinct values. First, a high degree of judicial independence seems a necessary condition for the maintenance of the rule of law—ensuring that everyone is subject to the same publicly communicated general legal rules. This concern suggests the necessity of making sure that powerful people—particularly elected officials—cannot manipulate legal proceedings to their advantage. Secondly, in a constitutional government, only those laws that are constitutionally legitimate ought to be enforced, and courts must be able to do much of the work in deciding which laws survive this test. Thus, there is a need to ensure that courts are sufficiently independent to overturn congressional statutes that subvert these values. Finally, in a democracy, it is important that constitutionally legitimate laws be given full effect. The worry here is that officials in the executive branch, or the cur-

rent legislature itself, may interfere in the enforcement of statutes enacted by previous legislatures without bothering to go through procedural formalities. In the interest of democracy, courts must have sufficient autonomy to resist the temptations to give too much deference to current holders of economic or political power.

Analytically, from the perspective of each of these three values, judicial independence can be seen as facilitating the provision of a certain kind of public or collective good. In the case of each value, the collective good takes the form of creating a capacity of the political system to commit to a future course of action—that is, to commit not to interfere with judicial decisions, no matter what their content. Independent judging makes it possible that substantive rules adopted now will be reliably upheld in the future, even in the face of strong temptations to do otherwise. This commitment capacity is valuable to all of us, but it is fragile and difficult to create and sustain.

All of us, in advance of knowing whether we will be among the weak or strong, have an interest in securing the kind of procedural fairness provided by the rule of law. Each of us wants to be able to make plans for living our lives secure in the knowledge of what the law is and how it may affect us. It would be better, of course, if we could secure for ourselves an unfair legal advantage, but the vagaries of fortune make such self-serving behavior intolerably risky. The rule of law, then, from each of our own viewpoints—behind a Rawlsian veil of ignorance—is an attractive second best alternative, and maintaining it requires that judges have the independence to assure legal stability.

Much the same can be said of testing the constitutionality of legislation. If we think of the Constitution as laying out fair terms³⁶ of social and political cooperation among people who know something about their interests, unconstitutional statutes are those in which current majorities attempt to take unfair advantage of their temporary hold on public office. Again, at the moment of adopting a constitution, all of us have a common interest in prohibiting the enforcement of unconstitutional statutes, and judges who are independent of current majorities are our main line of defense in securing this interest—as long as they act consistently to uphold and enforce the Constitution. This constitutional moment is best seen as one in which each of us has some knowledge of our fortunes and circumstances, and are

36. For the purposes of this discussion, “fair terms” can be understood either substantively or procedurally as the terms to which authorized constitution makers actually agreed.

seeking to establish the rules and understandings that will regulate the way in which we can constitutionally govern ourselves.

Finally, giving full effect to constitutionally legitimate legislative commands allows us to engage in political deliberation and persuasion on fair and publicly understood terms. It has seemed clear that our allegiance to democratic values has deepened over time. The growing importance of democracy is well reflected in the history of constitution-making in the states, which has seen waves of institutional change aimed at opening up new paths of popular rule: newer constitutions tended to adopt provisions for referendum, popular initiative, recall of public officials, direct primaries, and, of course, elected judges. But these concerns are present at the national level as well. While there is a good deal of disagreement as to how broadly democratic statutes should be construed, everyone agrees that however they are read, legitimate legislative commands ought to be enforced until they are removed from the books. When a (constitutionally defined) majority, having fought and won election, enacts a constitutional statute, it is with the (publicly shared) expectation that the legislation will generally be given effect until such time as it is repealed or amended, even if current majorities or the sitting president, oppose it. This seems a minimal requirement of the idea of popular self-determination or republican government. At the moment of enacting legislation, not knowing what future majorities will want, each of us has an interest that constitutionally legitimate statutes shall be given full effect, within the limits that considerations of justice and practicality may impose. Independent judges are among our best ways of securing this advantage, as long as they are willing to fully welcome and give meaning to these democratic decisions.

Because independent judges are desirable from each of these three separate perspectives, it is not surprising that the purposes served by judicial independence are in some conflict—and therefore that independent judges will need to reconcile these conflicts in their decisionmaking. Thus, from a rule of law perspective, we want judges to maintain values of stability, notice, and equality before law, free from pressures arising from democratic or even constitutional perspectives.³⁷ From a constitutional point of view, judges should protect constitutional rights even where such protections conflict with deeply held legal or democratic values. This should occur free from undue pressures by the people or their agents. Fi-

37. Conflicts between rule of law values and the Constitution arise when constitutional protections are given theoretical or substantive interpretation. The history of the notion of substantive due process, both in the late nineteenth century and in our own time, suggests ways in which constitutional “requirements” may interfere with legal values of stability and predictability.

nally, from a democratic perspective, judges should strive to give the fullest meaning to constitutionally legitimate democratic commands, even where such interpretation trespasses on other legal values.³⁸ It is not surprising that independent judges will arrive at different balances among these values in particular cases.

B. PRIVATE INTERESTS AND JUDICIAL INDEPENDENCE

From a more general perspective, the reason for seeking judicial independence is to permit the judicial process to be appropriately insensitive to arbitrary and irrelevant influences, in order to be able to weigh evidence and apply the law in particular cases in an unbiased manner. In our market driven society, such influences seem as likely to emanate from powerful social or economic forces as from other public officials. Public officials, after all, have a duty to defend the Constitution even if they sometimes fail to live up to that duty. If providing judges with additional protections from the other branches actually worked to widen the opportunities for more economic or social interference in the legal process, guarantees of judicial independence from political officials would be pointless and unjustified.

The Framers of the Constitution responded in part to these concerns by making bribery a grounds for impeachment. Federal judges have been disciplined and impeached for bribery several times.³⁹ But prohibition of outright bribes seems a pretty limited response to the likelihood of improper economic or social influence on courts and judges. It is obvious that the way we organize our legal system presents courts with a very biased set of disputes, from both an economic and social point of view. It is also clear that judges are not evenly drawn from all segments of society and, however well motivated they may be, they are likely to bring to their work the perceptions of an upper middle class, educated, largely male, and largely white elite.⁴⁰ Explicit bribes are not necessary to create a circum-

38. Pursuing these three abstract values of course places a continuing interpretive burden on judges. Each of the normative demands can be given narrow or broad readings, and so different judges will sometimes come to diverse answers in specific cases. And because individual judges are relatively well insulated, it is not surprising to find diversity and disagreement in judicial decisions and reasoning.

39. The impeachments of Judges Henry E. Claiborne, Alcee Hastings, and Walter L. Nixon, Jr. are illustrative. For a concise summary of their impeachments, see Alexa J. Smith, Note, *Federal Judicial Impeachment: Defining Process Due*, 46 HASTINGS L.J. 639, 650-56 (1995).

40. See Richard Delgado, *Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence*, 72 S. CAL. L. REV. 425, 434 (1999) (citing Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts*, 39 B.C. L. REV. 95 (1997)).

stance in which legally irrelevant factors influence how disputes are settled. Indeed, I would think that resort to bribes occurs only when the more invisible (and insidious) modes of such influence fail to operate as expected.⁴¹

Thus, appropriate protections for judges and courts must depend on some conception or theory of what the actual threat to the rule of law is. Sometimes, as English and American history have demonstrated, there is a good case to be made that public officials constitute the most important threat. Such fears prompted the construction of constitutional provisions to oppose these influences. At other times, the military, economic interests, or as Madison feared, unified popular majorities, might be more significant threats to legal rules. Or, as many conservatives complain, overly independent and unrestrained judges themselves may pose the most important threat to the rule of law and, obviously, to the extent that institutional guarantees of independence work, they increase this danger.

So how can we conceive of threats to judicial independence? I shall argue here that an organization or person is a potential political threat to judicial independence if the entity or individual: (1) has reason to get a judge or court to reach a decision on grounds irrelevant to law; (2) has sufficient resources—political, social and/or economic to influence or intimidate the judge; and (3) is capable of forming a will or intention to act in a way that interferes with judicial independence. Consider the following examples. In the United States, I think that Congress will occasionally satisfy the first condition, always satisfy the second condition, and will rarely satisfy the third condition. If we think of a powerful economic interest group, it may often satisfy condition one, rarely satisfy condition two, and usually satisfy condition three. Popular majorities may sometimes satisfy one, but rarely satisfy two or three. The idea is that, for interference to occur, there needs to be a concatenation of power, interest, and will.

What this argument implies is that if we want to limit inappropriate political interference with judges, various strategies are available to us. We might try to limit the extent to which powerful groups would want to interfere with judicial proceedings, perhaps by using moral indoctrination supporting respect for legal processes. But in a profoundly pluralist society it can hardly be hoped that acceptance of legal norms will always be sufficient to restrain groups from interfering; particularly when a value

41. This is to say nothing of the need that state judges have to raise campaign funds for reelection, often (perhaps nearly always) from those who are likely to appear in their courts. See, e.g., Kathryn Abrams, *Some Realism About Electoralism: Rethinking Judicial Campaign Finance*, 72 S. CAL. L. REV. 505, 516-17 (1999).

they hold very dear is at stake in a judicial proceeding. Alternatively, we may try to prevent any group from having the power to interfere with legal processes. But this would entail massive interference in the economy and society to prevent concentrations of power or the legal means of converting these concentrations into political influence. Or, we might try to find ways to make it hard for powerful groups to form a concerted will. Here again, the prospects for success are limited; especially when it comes to groups operating within the private sector.⁴²

These considerations suggest that it will continue to be very difficult to achieve a circumstance in which powerful economic and social interests are unable to infringe on legal processes. They also suggest that the instrument that is most capable of regulating or controlling these nongovernmental forces is democratic government itself. The widely accepted norm of political equality makes it at least plausible that the popular branches of government will seek to limit private interference with judges by punishing judges who take bribes or regulating the ways that private interests can influence the application of legal rules.⁴³ Moreover, the democratic branches may sometimes even place limits on income or wealth inequalities. But, it is also clear that the democratic branches are dangerous as well, and that the constitutional protections that private interests enjoy appropriately provide them with powerful protections against governmental attempts to check their powers or regulate their actions. Therefore, we should expect that, within a liberal democracy, the problem of private interests inappropriately influencing legal processes is likely to be chronic. The popular branches may place some limits on the forms of such inappropriate influence, but, short of extensive regulation of the private sphere, it is unlikely that all such forms of influence or interference can be prevented.

The complex American judicial system, with protected judges and a vulnerable judiciary, is required by our multiple allegiances to law, constitutionalism, and democracy, and has evolved out of our peculiar political and social history. Individual judges should be independent so that they can do justice in the cases before them. Doing justice in particular cases requires that the judges resolve, in some way, the legitimate claims

42. Recent attempts to regulate the capacity of unions to operate in the political realm suggest this strategy is not completely unfeasible. But, in fact, the regulation of unions has occurred when and where unions are numerically and politically weak, suggesting the difficulty of placing restraints on very powerful interests.

43. Judges themselves have an interest in eliminating bribe taking or other kinds of illegal interference. It is not so clear, however, that the judiciary has a common interest in regulating other ways in which private interests can influence legal processes.

that law—both positive law and the rule of law—and the Constitution impose on them. Different judges will legitimately reach different resolutions. Independent judges will, inevitably, display some degree of heterogeneity of judicial philosophy, but if this heterogeneity were to become too pronounced, not only would rule of law values be undercut, but the judiciary as a whole could come under political attack. The political dependence of the judiciary provides a way in which the diverse and conflicting rulings of judges can be harmonized and adjusted to political circumstances in a democracy.

Judicial independence is both an instrumental and a public good. Institutional independence is instrumental to furthering legal, constitutional, and democratic values. Judicial independence is a public good in the sense that we have a common interest in putting a system of instrumental independence—however complex—into place for these instrumental purposes. But to say that a certain institution or practice is a public good is not to say that it will actually be provided. Collective action problems in which those who stand to benefit from a public good fail to contribute adequately to its supply notoriously interfere with the provision of such goods. If we are to explain why judges are provided with institutional protections guaranteeing their independence, we will need show how it is that these problems have been overcome. Several such explanations have been suggested.

IV. EXPLAINING JUDICIAL INDEPENDENCE: INTEREST DRIVEN THEORIES

The interest group theory of government, for example, sees public policy as the result of interest group bargaining. From this perspective, independent judges who are willing to enforce interest group interests would facilitate efficient transactions, since resources would not need to be invested in private enforcement. A closely related theory, advanced by Landes and Posner, sees judicial independence as a post-constitutional innovation, introduced by politicians, and designed to enable them to extract more rents from interest groups.⁴⁴ Independent judges who can be relied upon to enforce statutes make legislation more valuable than it would be in the absence of a reliable enforcement mechanism.⁴⁵ Similar, though less cynical arguments can be made from the perspective of the people at large.

44. See William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 877-79 (1975).

45. See *id.*

A populist explanation of judicial independence would be that it is the result of a collective or public interest.

A more complex interest-based theory predicates the existence of relatively unified competitive political parties, each seeking to impose its own ideological vision on the larger society. In a competitive democracy, the party in power faces a risky future in which whatever it achieves when it controls the legislature can be undone by the next party that attains a majority. In a purely majoritarian setting, such as that found in the United Kingdom, independent courts do not provide much reassurance to future political minorities. It is true that British courts do act to restrain the executive from deviating substantially from parliamentary commands, but they provide little protection against the actions of future parliamentary majorities. Indeed, such courts provide an efficient means by which future majorities can rapidly transform their electoral victories into administrative achievements. In a majoritarian system, therefore, we would not expect courts to be very independent. Indeed, whatever protections are provided to judges in such a system must, by definition, be merely statutory and subject to legislative revision.

Things are somewhat different where there are procedural and substantial restrictions on legislative authority embedded within a constitution. If parties are risk averse, independent judges who respond to the rule of law and constitutional and democratic values can mitigate the risk of losing office by limiting the damage that the other party can cause. This works both substantively, by restricting the legislature from enacting unconstitutional statutes, and procedurally, by imposing super majority requirements for some kinds of legislation. We would expect therefore that judicial independence would tend to emerge and flourish in such nonmajoritarian settings. Insofar as parties are not unified and well-disciplined, the conclusion is even stronger. Judicial independence with weak parties provides the current majority with an especially strong guarantee that whatever policies are put in place are likely to be quite durable.

Interest-based theories, then, seek to explain judicial independence in terms of the common interests of some group which maintains the power to protect judges. Interest group theorists often do not specify the mechanism by which judicial independence is to be provided: They are usually content to assert that somehow politicians will find a way to deliver whatever it is that interest groups want. Models that focus on the shared interests of politicians—such as the Landes-Posner model—explain judicial independence in terms of the common interests of politicians or political parties, which presumably have the wherewithal directly to create institu-

tional protections. Explanations that focus on the shared interest of the people usually look at the Constitution as a bargain among the people (or their constitutional representatives) to restrain future politicians and interest groups from threatening the liberties enjoyed by the people. Presumably, the people or their special agents act at a constitutional moment to hardwire judicial independence into the Constitution, and protect it with both structural safeguards and judicial review.

From each of the interest-based perspectives, creating independent judges allows society—or politicians, interest groups, or political parties—to pre-commit to an institutional apparatus that is capable of restraining us from giving in to momentary temptations of lawlessness. This temptation is especially strong for political officials, but is felt as well by private interests and temporary majorities. Independent judges making unpopular rulings will often be an easy target for demagoguery, and both public and private actors will often be tempted to override or ignore their rulings. But we want judges to have sufficient attachment to legal values so that they can make such unpopular decisions when they are required. This idea is quite parallel to that found in the literature on the creation of independent central banks.⁴⁶ There, it has been established that the median member of the legislature is willing, *ex ante*, to create a central bank and appoint someone more fiscally conservative than herself to run it. Here, there is an *ex ante* desire to create an independent judiciary and staff it with people who have an unusual and unrepresentative attachment to legal values.

Of course, explaining why judicial protections would be provided is not sufficient: Interest-based theories also need to explain how a group that was powerful enough to create these protections can be prevented from infringing on them in the future. Thus, it is important to provide protections for independent judges that are sufficiently durable to ensure that such temptations will be reliably resisted. This can be done in two ways. First, judicial independence can be grounded so firmly in the Constitution that it cannot be threatened by politicians or interest groups. I argued above that this is not a plausible description of how federal judges are protected. Indeed, any such attempt would fall prey to Brutus' normative objection that extreme protective barriers seem inconsistent with democratic government.⁴⁷

46. A useful survey of this literature is found in ALEX CUIKERMANN, *CENTRAL BANK STRATEGY, CREDIBILITY, AND INDEPENDENCE* (1994).

47. See *supra* notes 1-2 and accompanying text.

Judicial independence is better explained as a consequence of self-restraint by powerful groups. Such self-restraint can be generated in several ways. People might be morally restrained from infringing on an institution of which they generally approve, even if they are disappointed by a particular decision or pattern of decisions. It is hard to believe, however, that moral restraint is sufficiently robust in circumstances of deep value conflict, such as in the case of abortion. Alternatively, as Madison's argument in *The Federalist No. 10* suggests, it would be very difficult in a large republic for those who are upset with judges to coordinate their efforts in a sustained political attack on judicial powers.⁴⁸ But this form of restraint seems weak when parties are highly organized and ideologically driven. Or, such restraint can be sustained as an equilibrium in game theoretic models of repeated interaction—essentially by devising a scheme of mutually reinforcing punishments and threats that will deter politicians from infringing on judicial independence. But, as is well known, the problem with such game theoretic explanations is that they generally support other outcomes as well, and so they provide an incomplete account of judicial independence. In short, it is hard to find a completely satisfactory account for the stability of judicial independence, even if there is an explanation for its provision.

It seems to me that interest-driven theories have the potential to give a partial explanation of the provision of judicial review. Such an explanation would be weak, because it can also explain outcomes in which judges are not independent, or are only partially protected. This incompleteness has plagued many theories beginning with Hobbes.⁴⁹ Hobbes' theory could explain why people might be able to form an agreement to leave the state of nature, but he had no account of which form of political government they would choose. Famously, in spite of his monarchical predilections, he had no basis on which to criticize republican or democratic governmental forms as long as they were constructed in a manner to provide effective security to the people.

Interest-based theories can offer, however, an *ex post* explanation as to why a system of independent judges, however it is brought into existence, could be stable, at least in some circumstances. A satisfactory interest-based theory would show that independent judges are part of a self-enforcing equilibrium from which nobody has an interest in deviating. The interpretation of such a self-enforcing equilibrium is more complex,

48. See THE FEDERALIST NO. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

49. See generally THOMAS HOBBS, LEVIATHAN (Richard Truck ed., Cambridge Univ. Press rev. student ed. 1996) (1651).

since, in such circumstances, neither judges nor those powerful enough to interfere with them are motivated to depart from equilibrium play. This characterization suggests that judges may be shaping their decisions to fit into a broader political equilibrium.

I am not sure, however, how any of these theories would be able to account for the creation of what I have described as the American system: independent judges within a dependent judiciary. Why, if judicial independence is a good thing from some interest-based perspective, leave the door open for political meddling in the future by allowing the political branches to influence the judiciary as a whole? Why not provide absolute barriers to influencing judges by eliminating the possibility of impeachment, allowing the judiciary to make its own rules and determine its own jurisdiction? Why permit politicians to nominate or select judges or to fix the budgets for the courts? Why rely on the executive to enforce judicial orders rather than, for example, create a judicial police force? Again, while interest-based theories are able to account for the stability of the American system of independence, they do not account for its complex structure or its creation. For such an account, we need to turn elsewhere, to historical explanations.

Historical considerations can supplement interest-based explanations by explaining how a particular configuration of judicial protections, together with beliefs and preferences that support it, arose as a response to particular historical circumstances. In the next section, I argue that the specific compromises framed in the Philadelphia Convention established the peculiar system of independent judges within a dependent judiciary. These compromises have been altered statutorily over the years in various ways—the Constitution invited Congress to play a part in shaping the federal judiciary as an institution—but it has also been altered conventionally, as beliefs and expectations have shifted in Congress, the courts, and the public at large.

V. HISTORICAL EXPLANATIONS OF JUDICIAL INDEPENDENCE

Interest-based explanations essentially argue that the reason judges are independent is that it is somehow in the interests of those with power that they should be. Historical explanations focus on the creation or genesis of independent courts as a response to specific political conflicts. I argue that the characteristic incompleteness of static accounts can be partly remedied by appealing to historical development of judicial independence. Here we do not see institutions created out of whole cloth, but we see them emerge out of political struggles and efforts to reform and find acceptable

compromises among powerful interests. If the new institution or practice has turned out to “solve” a relevant collective action problem, then a static story can, in principle, explain why it is not challenged. But the essential creative work of forming a new institution is done by historically situated political actors with imperfect and peculiar understandings of their circumstances, creating and selling solutions to imagined problems.

Thus, the starting point of an historical institutional approach is to identify the political problem which judicial independence is supposed to solve. While everyone might be able to agree on the importance of ensuring that judges are insulated from inappropriate political intrusions, there would probably be a great deal of disagreement over which kinds of intrusions are most likely to occur, and which are most dangerous. As a result, there would also be disagreement as to how best to secure judicial independence. For example, the concern throughout seventeenth-century Great Britain was with dependence of judges from the king, who had extensive legislative as well as executive powers.⁵⁰ He also exercised substantial direct control over the judiciary, assigning judges to various courts and sometimes removing them. The institutional solution to this long-running conflict was to provide English judges with some degree of “constitutional” protection in the Act of Settlement which promised that judges would serve on good behavior,⁵¹ and, more robustly, by providing structural protections such as placing the legislative powers within the tripartite Crown-in-Parliament model.

This solution worked well enough within the United Kingdom throughout the eighteenth century, allowing for the development of an extraordinarily independent and powerful judiciary.⁵² The judiciary that evolved was capable of vigorously developing the common law, in spite of the generally accepted ideology of parliamentary sovereignty.⁵³ But colonial judges remained dependent on the Crown throughout the eighteenth

50. See *THE STUART CONSTITUTION, 1603-1688: DOCUMENTS AND COMMENTARY 74-77* (J.P. Kenyon ed., 1986).

51. See *7 STATUTES OF THE REALM 637* (Dawson of Pall Mall 1963) (1700 & 1701). The Act of Settlement is, of course, only a parliamentary statute that can be abolished or amended by ordinary parliamentary majorities.

52. There is, however, reason to believe that the conditions for judicial independence in the United Kingdom substantially eroded in the course of the nineteenth century. Following the expansion of the franchise, the development of disciplined programmatic political parties able to organize new voters produced a circumstance in which two-thirds of the Crown-in-Parliament model—the Crown and the House of Lords—collapsed as independent political forces, leaving policymaking wholly concentrated in the House of Commons. Under these circumstances, British judges could hardly be expected to display the kind of autonomy that Mansfield had in the previous century.

53. See *DAVID LIEBERMAN, THE PROVINCE OF LEGISLATION DETERMINED 71-87* (1989).

century, and so Britain's domestic solution was no solution at all in the colonies. Judges remained essentially Crown officers whose duty was to apply British policies and British law within the colonies. Not surprisingly, this conception of their duties brought judges in frequent and acrimonious conflict with the colonists.

In that context, it was probably to be expected that Americans would embrace the use of juries to decide issues of law as well as fact. Jury trials were seen by most eighteenth century Americans as a particularly robust guarantee of legal processes that were free from (remote) political interference.⁵⁴ The federalists probably understood the jury trial as an additional guarantee of independent courts that would insulate them from interference from other political officials. The Anti-Federalist analysis, insofar as a single coherent strand can be reconstructed, was quite different. Throughout the ratification debates they expressed concern about the absence of guaranteed jury trials in civil cases, believing that public officials and judges would dominate legal proceedings to the detriment of the interests of ordinary citizens. Brutus, the most articulate of the Anti-Federalists, argued that the Constitution would make the judiciary so independent as to be completely insulated from any form of popular influence—even of influences that are wholly appropriate for a republican government—and that it would work to undercut the rights enjoyed by ordinary Americans.

By contrast, in post-revolutionary America, with the collapse of executive authority during and after the Revolution, the most profound concern was what Madison called the “impetuous vortex” of the legislative power.⁵⁵ The widespread eighteenth century conception of republican government, expressed by Montesquieu and Madison (among many others), saw the legislature as the most dangerous department of government because of its close ties to the people. The experiences of the state legislatures during the Revolution and its aftermath convinced Madison and the other Framers who met at Philadelphia of the cogency of this concern.

These concerns led to two proposed solutions. First, when framing the structure of the federal government, there was general agreement

54. Montesquieu, whose discussion of judicial independence in Book XI of the *Spirit of the Laws* seemed to confuse judges and juries. There he identified the use of local juries as the most substantial guarantee of judicial independence from executive and parliamentary interference in eighteenth century England. See MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Anne M. Cohler, Basia Carolyn Miller, & Harold Samuel Stone trans., Cambridge University Press 1989) (1748). The localism of English judicial administration at the time probably made the distinction between judges and juries less stark than it would come to seem a century later.

55. See THE FEDERALIST NO. 48, *supra* note 28, at 309.

among the delegates that a great deal of attention had to be paid to carefully laying out and limiting congressional powers. Much less worry was expended on placing limits on what Framers thought would be a relatively weak executive and judiciary. But more importantly, Madison, and most of the other Framers who met in Philadelphia, believed that the state legislatures were the most frequent source of dangerous and unjust legislation.⁵⁶ They imagined the states pouring forth a veritable torrent of defective law that would form the most fundamental threat to the liberties of the people. They took little solace in the capacity of the other institutions of state government to control or check the popular branches. As Madison argued in his masterly survey of state constitutions reported in *The Federalist No. 48* and *The Federalist No. 49*, the legislative power was insufficiently checked in most of the states.⁵⁷ Specifically, he thought that state judges were much too dependent on legislatures to be relied on to stop the legislatures from undertaking unjust projects.⁵⁸

Thus, central to Madison's scheme for the new Constitution was to give to Congress a negative over state legislation, which would have made Congress essentially a third house of every state legislature. A weaker version of this idea—which would have given Congress a negative over state legislation that infringed on federal authority—was placed in the Virginia Plan, and a majority of the states expressed support for it in the initial phases of the Convention. While most of the delegates shared Madison's concerns about state legislation, many of them were less sanguine about authorizing a congressional negative, fearing extensive congressional interference in state jurisdictions. But as the Convention proceeded, support for Madison's negative collapsed as an alternate method of restraining the states—permitting federal courts to check state infringement of federal authority—began to take shape.⁵⁹

If federal judges were to monitor state legislation, Madison and other nationalists believed that there would have to be a system of lower federal

56. The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism A reform therefore which does not make provision for private rights [as against the States] must be materially defective.

Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON, 1787-1788, at 206 (Robert A. Rutland, Charles F. Hobson, William M. E. Rachal & Fredrika J. Teute eds., 1977).

57. See THE FEDERALIST NO. 48, *supra* note 28, at 308; THE FEDERALIST NO. 49, at 313 (James Madison) (Clinton Rossiter ed., 1961).

58. See *id.*

59. See 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 (1998).

courts that could review appeals from the state courts. The question that came to occupy the delegates then was how to enlist the judiciaries of the thirteen states for this purpose. Here, a crucial role was played by the insertion of the Supremacy Clause into the constitutional text. Moreover, the delegates agreed to create a Supreme Court and to bestow the judicial power on it along with any federal courts that Congress subsequently chose to create. Crucially, therefore, these inferior federal courts would be empowered to review appeals from the states, and so would constitute a mechanism by which state courts could be conscripted in service of the Constitution and federal legislation. The judges on these new courts, of course, would enjoy the same personal protections guaranteed to members of the Supreme Court. Thus, appeals from the states would take place in independent courts.

However, because of worries on the part of those delegates concerned about federal courts intervening too aggressively in the states, the delegates agreed that Congress should decide whether or not to create other federal courts, and that Congress also retained the power to modify federal appellate jurisdiction if it so chose. In other words, in setting out the carefully compromised language of Article III, the delegates produced a plan which provided for independent federal judges, but within a judiciary that was dependent on congressional regulation.

There was much less explicit concern among the Framers with regard to threats that might emanate from the executive branch. Indeed, except for requiring senatorial consent for judicial appointments, as Alexander Hamilton remarked in *The Federalist No. 78*, the courts remained quite dependent on the executive for getting cases to hear and carrying out judicial orders.⁶⁰ The constitutional protections accorded to the courts were of little use against presidents who selectively enforced court rulings or who were able to organize successful public campaigns aimed at undermining judicial authority. In these cases, the only substantial protection for courts has been found in the necessity for the president to seek legislative and popular approval in order to interfere with the courts, and this has usually turned out to be quite hard to obtain and even harder to maintain.

It became clear during the first years of the new Republic, that the Framers had grossly underestimated the power of the executive within the new national government. The threat to the judiciary became obvious with the attempts of the Adams and Jefferson administrations to control the makeup of the judiciary. These attempts and their constitutional after-

60. See THE FEDERALIST NO. 78, at 464-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

shocks left an enduring mark on our history. While *Marbury v. Madison*⁶¹ is often taught as a triumph for the courts, it is just as plausible to see it as a recognition of the power of a really popular president to alter the workings of the constitutional structure. This is especially true in view of the Court's willingness to uphold the 1802 Judiciary Act, which effectively fired life-tenured judges without an impeachment trial. If this sorry concession to presidential power was not enough, the bare margin by which Justice Chase escaped an impeachment conviction was another reminder of the Framers' misjudgment of presidential leadership.⁶²

The president has been most dangerous to the judicial branch when he was most popular; that is, when his connection to the people was strongest. Thomas Jefferson's election was called, at the time, the Revolution of 1800, because it was the first in which a sustained effort was made to tie a presidential candidate to the people for the purpose of securing a particular policy mandate. The success of that election in destroying the Federalist party and its policies showed that it was possible for a popularly elected president to undermine constitutional protections. What Madison and others had misjudged, then, was the opportunity the presidency, rather than the legislature, had of becoming the leading popular branch. Today, we can preserve the thrust of the framer's advice as seeking to limit the influence of temporary and passionate majorities of the people, or their agents, whether legislative or executive, on judicial processes.

VI. CONCLUSION

However attractive the American system of independent judges within a dependent judiciary may be, it does not really provide much protection for judicial independence, all things considered. To say that such protections are political may seem to imply that they are somehow fragile or nonresilient and that all that stands between the history we have had of a fairly independent and quite powerful judiciary and a much more docile one is just dumb luck. I do not think this is the case. The protections provided for the judiciary, while fundamentally political, are designed to preserve a very wide latitude for judicial action except in cases where there is a serious and fairly prolonged imbalance between what judges think is right and what political majorities find acceptable. I think that such circumstances are, because of the design of our political system, guaranteed to be quite rare.

61. 5 U.S. (1 Cranch) 137 (1803).

62. See Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 909 (1994).

The independence of the judiciary, as opposed to that of individual judges, is dependent on the “willingness” of the popular branches of government to refrain from using their ample constitutional powers to infringe on judicial authority. This willingness is usually preserved because the diversity and heterogeneity of American political parties usually makes it difficult to form constitutional majorities capable of infringing on judicial powers, and because of the success of the appellate structure in keeping independent judges within politically acceptable bounds. But sometimes, often for reasons that are external to judicial action, there are moments of party unity and (temporary) discipline. These are dangerous times for the court system. And sometimes—especially on issues relating to politically weak minorities—federal jurisprudence becomes unpopular throughout the political spectrum. The evolution of protections for the rights of accused criminals or third world immigrants are examples of such situations.

In normal political circumstances, Congress and the President show extensive deference to the judiciary. Congress rarely overturns court decisions, threatens to strip courts of jurisdiction, cut judicial budgets, or intervenes in the rules creation process. Politicians grouse about unpopular judicial decisions and complain about some individual judges but, for the most part, the complaints are made more with an eye toward maintaining electoral popularity rather than with any real intention either to alter some judge’s decision or to affect the constitutional balance. Similarly, the executive normally executes judicial orders and adopts practices of restraint in the way it relates to legal processes. Though the appointment process has become more ideological in recent years, the necessity of getting the consent of the Senate places some limits on how much influence appointments can have, at least in the short run.

But these forms of deference are subconstitutional in that they take the form of statutes or conventions. In that sense they are not secured with the same cement that protects judges from suffering personal retaliation. Thus, as a matter of ordinary practice, the judiciary appears to be fairly independent, even if constitutionally it is quite vulnerable to the whims of those in the other departments of government. In normal times, therefore, there does not seem to be much genuine tension between judicial independence and the dependency of the judiciary. But it is important to recognize that this appearance may be misleading in that the institutional possibility of threat is always there. Congress could strip federal court jurisdiction, it could abolish some offending circuit court, or it could slash judicial budgets. Indeed, Congress could lower the hurdle for impeachments. In this sense, the practical security the judiciary as a whole enjoys

is entirely dependent on the whims of the popular branches and of the people themselves. Thus, the judiciary can remain relatively free from political pressures only as long as those whims do not congeal into a cohesive popular will determined to alter the performance of the judicial function. In view of the structural vulnerability of the judiciary, then, why have there been so few serious and sustained efforts to interfere?

The answer to this question must be that, in normal circumstances, the actions of the judiciary are not far out of step with the general policy preferences of the popular branches—at least not for long time periods. Why would this be so? I think there are two reasons. First, judicial preferences tend to be fairly stable and resistant to change. This is so because turnover on the federal bench is quite low, especially at the higher levels, and the general respect for legal values of stability and predictability work to make doctrine evolve quite slowly in most areas of the law. Second, elected officials learn to be quite effective in using official resources to stabilize their hold on office for fairly long periods of time. Thus, American political history tends to be made up of relatively long periods of stable political rule, characterized either by a dominant majority party (the Democrats from 1828 to 1860 and 1932 to 1968; the Republicans from 1898 to 1930), or by divided government (1876 to 1896 and 1968 to 1994). During these periods, the makeup of the courts has tended to come into alignment with the political configuration. A decisive electoral shift can suddenly alter the political landscape and, when that occurs, the judiciary can become vulnerable to political intervention.

When such an imbalance occurs—as it did following Jefferson's first election in 1800, during the post Civil War period, during the early years of the New Deal, and then again following the 1994 congressional elections—the popular branches may very well try to push the judiciary to alter the kinds of decisions it is producing in controversial cases by packing the courts with more sympathetic justices, altering jurisdiction, or even impeaching judges. Sometimes, in an attempt to bring the federal judiciary as a whole into line with popular preferences, Congress may enlist the services of some of the courts to regulate the behavior of others. The creation of the circuit court system in 1891 might be seen as an effort to create additional judicial capacity capable of controlling district courts. More often, the higher judiciary volunteers for such duty by creating doctrine aimed at regulating lower federal courts. A recent example is the Supreme Court's effort to limit habeas appeals.⁶³

63. See William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331 (1991). See also *Teague v. Lane*, 439 U.S. 288 (1989); *Wainwright v. Sykes*, 433

However these crises are resolved, the resolution tends to restore a circumstance of equilibrium between judicial action and popular preferences. Whether the new political majority loses popular support by overreaching itself, or the courts shift their behavior in such a way that it becomes acceptable to the other branches, it will no longer be possible to find majorities to produce further changes in political behavior. Either way, the pattern of court decisions will be within acceptable political bounds of not provoking the formation of a sufficiently large majority to threaten judicial independence. Once equilibrium is restored, the stabilizing forces alluded to previously will tend to preserve it for a relatively long period of time.