

# **Dynamics of Judicial Independence: Independent Judges, Dependent Judiciary**

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## **1. 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 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 and so we are also concerned to provide 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. Judicial independence is also complex in that it really can't be seen as something of value in itself but is instrumental to the pursuit of other values such as rule of law or constitutional values.

In this paper I am concerned to characterize and try to explain the structure of institutional protections for judges and legal processes within the federal government. This is not to denigrate the importance of an seeking internal or normative understanding of independence. Unless judges can be counted on, for the most part to, to act as morally autonomous agents who share the values that underlie our constitutional democracy, extensive institutional protections are hard to justify. We want judges to be independent enough to make the right decisions without needing to worry about the personal consequences such decisions may have for them. But providing personal

protection for judge is no guarantee that they will in fact respond to law and the constitution in way we would want.

In fact, many of the historical conflicts about judges arose in circumstances in which it was widely believed that institutional protections provided too much leeway for judges to impose their views on society. This concern can be seen from 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 “the real effect of this system of government will ... be brought home to the feelings of the people, through the medium of the judicial power.”<sup>1</sup> And the 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.”<sup>2</sup> By so insulating its judges, Brutus worried that the proposed constitution created a government in which the judiciary would rule without legal or popular restraint.

Historically, Brutus’s worry has been addressed in two ways. The first, is to shape the appointment process so that it ensures, as far as possible that those appointed to the bench have appropriate character and independence of mind. Screening potential judges ex ante though is inevitably an imperfect process that cannot provide a guarantee that institutionally protected judges will have the right kinds of allegiance to law, Therefore, other mechanisms of control are needed and have in fact been provided within the constitutional structure. Our commitment to democratic values -- which has grown substantially over the past two centuries -- requires that we provide ways by which judges can be made at somewhat accountable, directly or indirectly, to the people

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<sup>1</sup> The Anti-federalist Papers and the Constitutional Convention Debates, (Ralph Ketchum, ed.), New York: Mentor, 1986, 293.

<sup>2</sup> Ibid.

or their representatives. Typically, the American states sought to achieve democratic accountability by resort 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.

## **2. Institutional Protections for Judges and the Judiciary**

Institutionally, judicial independence may be understood either narrowly as a set of protections for judges or as a broader guarantee of the integrity of the judicial system. Historically, attempts to secure judicial independence have often taken the narrower perspective and focused on providing protections individual judges that presumably allow them to decide cases free from threats of coercion or blandishments. The US Constitution, typically, provides for life tenure during good behavior and prohibits Congress from reducing judicial salaries during their term in office. Arguably for most of our history, these shields seem to have been reasonably effective in allowing individual judges substantial leeway for deciding cases.

But why would textual provisions in the constitution – mere parchment barriers in Madison’s words – be effective in protecting judges? One answer is that courts could overturn any congressional attempt to violate lifetime tenure or 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 or periodic periods of inflation to permit the reduction of real judicial salaries. What could or would be able to do about infringements of this sort? As far as I can tell, neither of these actions would be subject any external review or check. So it seems to me that a textual theory, even if is backed up with judicial review, can’t explain why the constitutional protections for judges are 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 subject to a two thirds voting rule and 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. And as far as reducing real salaries of judges, no congressional action at all is necessary, other than to do what congress excels at; running an irresponsible fiscal policy. It is hard to see any structural protection against such actions.

So it seems clear to me that the basic reason why the constitutional protections for judges have remained strong and stable over the years must be that the political branches or perhaps the people themselves, have not really wanted to alter them -- at least not badly enough to run whatever political risks such an effort might entail. But this is puzzling too given the controversial nature of many judicial decisions and frequently the wealthy and powerful are on the losing end of 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 was the likely consequence of a judiciary that was made too independent.

It seems clear in retrospect that 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 by which each branch of the federal government could protect itself against encroachments by the others. Thus, the veto power provide 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 president were given influence over the judiciary as well.

Indeed, even if the if the framers had aimed to provide perfect insulation for federal judges, subsequent developments – especially the appearance of (occasionally well organized) political parties – have conspired to break down whatever insulation judges might otherwise enjoy. The

triumph 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.

Moreover, whatever constitutional protections afforded to judges remained dependent on a congressional willingness to maintain a relatively high barrier for impeachment. As the early assaults on federal judges showed this willingness is politically tenuous. 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 whatever “precedent” was established in the failure of the attempt to convict Justice Chase can have any restraining effect on future congressional impeachments. It is true that judicial impeachments have been pretty rare historically and remain so for the most part. But it is wrong to put too much faith in the low frequency of impeachment as evidence of the security of constitutional protection because this may be due as much to judges' reluctance to take 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 that reason it is usually difficult to form a sufficiently large and unified congressional majority to do the job.<sup>3</sup> 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 Senate — but normally political considerations make impeachment a fairly blunt instrument. If congress wishes to influence judicial action, more effective ways are provided by the Constitution.

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<sup>3</sup> Indeed, the fact that procedural requirements for impeachment have been relatively onerous in Congress, is probably a reflection of the fact that it 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.

Even if judges enjoy some insulation from political intrusions, the Constitution ensures that the the 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.

The extent of congressional power under the Constitution to alter or abolish jurisdiction remains in dispute among legal scholars, with some writers maintaining that excepting the Supreme Court's original jurisdiction, congress has plenary authority over the allocation of federal jurisdiction while others find significant restrictions on congressional authority. But even if the extreme view is taken (which may, for all I know be the most defensible reading of Article III), it is still possible to see congressional alterations of court jurisdiction – especially if they arise out of dissatisfaction with judicial decisions – as infringements on judicial independence. This seems most clearly the case when congressional ire is focused on a particular decision and it reacts by enacting a statute that undermines the finality of the particular decision. But even if congressional action were restricted to shifting jurisdiction affecting how certain cases would be treated in the future -- for example, how death penalty appeals are handled in federal courts -- the possibility of such action might effectively undermine the independence of courts in deciding current cases within the class. And that such infringements may happen within the frame of thbbe Constitution makes the threat all the more credible.<sup>4</sup>

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<sup>4</sup> 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

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 dangers. This is especially so in that judges are often 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 a particular judge with any precision. There have been several impeachments of federal judges in the last few years but measured against the size of the judiciary the rate of impeachments does not appear to have increased. It remains quite difficult to remove judges. And 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.

So, in my view, the more genuine threats to judicial independence -- if we interpret it as providing a wide guarantee that people can have their disputes decided in front of independent judges -- are attempts to diminish or regulate the powers of the judiciary. Often these attempts are hidden in popular congressional actions directed at urgent problems where existing legal procedures have proved cumbersome.<sup>5</sup> They can take many forms: nibbling away and court jurisdiction by removing cases to administrative tribunals, altering rules of court procedure, limiting the number of judgeships, or failures to fill the ones 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 courts.

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Federal Court Jurisdiction: A Defense of the Traditional View,” 46 Catholic University Law Review, 671 (1997).

<sup>5</sup> A good example of this is found in the restrictions placed on federal courts deciding on habeas petitions found in the Antiterrorism and Effective Death Penalty Act of 1996, section 2254 (d) (1).

The dependence of the judiciary on the political branches is not a constitutional accident but fits within the broader Federalist scheme of making the major departments of government interdependent rather than establishing a strict separation of powers. In Federalist 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 “The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, a few, or the many ... may justly be called the very definition of tyranny.”<sup>6</sup> 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.”<sup>7</sup> Rather, he argued in Federalist 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.”<sup>8</sup> In principle, the interdependence of the branches of government should work to limit the frequency and severity of confrontation and gridlock between the constitutional departments. While allowing each to perform its constitutional duties.

Of course, things have not always worked out in practice in the way that Madison anticipated and there have been times within our history that 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 to the constitutional fabric. Rather we need to worry about ensuring that we can ride out the dangerous periods, trusting that the political forces will subside, and try limit the damage that is inflicted in such times.

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<sup>6</sup> The Federalist Papers, (Clinton Rossitor, ed.), New York, Mentor, 1961, 301.

<sup>7</sup> Ibid, 302.

<sup>8</sup> Ibid 308.

This system of independent judges within a dependent judiciary, whatever its merits, sets up certain kinds of characteristic tensions within the constitutional order. For example, individual judges are quite free to 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. In a sense, politically controversial decisions -- whether they are internally well justified or not -- are collective bads from the point of the view the judiciary as a whole. Given the threat to all judges of irresponsible, incompetent, or simply overly courageous individual 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. In an important sense, the development of appellate hierarchy with collegial courts at the appellate levels can be understood as strategies to ensure that no single judge can, by his or her actions alone, inflict too much damage on the judiciary as a whole by making aberrant or overly courageous judgements.

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. Within the federal judiciary these structures have the effect of ensuring that judging is always, at least implicitly, a collegial process which the lines of responsibility and accountability to other judges remain clear.<sup>9</sup>

It is always possible that some judges will mistakes or abuse their office but the availability of appeal and the collegial nature of appellate courts places, along with the other disciplinary mechanisms, limits on how badly things can go wrong. But fixing mistakes and abuses after they occur imposes great costs on particular litigants, and is damaging to the rule of law, and so in principle it is better to limit judgeships to those who can be counted on to be competent and well

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<sup>9</sup> For an analysis of decision making processes in collegial courts see Lewis Kornhauser and Lawrence Sager, "The One and Many: Adjudication in Collegial Courts," 81 California Law Review 1 (1993).

motivated and suitably cautious about exposing their fellow judges to political reaction. While we probably can't 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, and then providing institutional circumstances that protect and enhance those values.

As recent experiences around the world — in the former soviet states as well as in Latin America — attest, this is a subtle and difficult problem. This is so for two reasons. On the one side, because we want to institute a regime of law, 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 so it will be attractive to provide judges with a protective belt that insulates them from pressure. 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 in various ways. This concern directs us to worry about appointing competent judges with good character. But it also directs us to insure 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 pretty thoroughly dependent on the other branches of government for the means to do its constitutional business. I think that this curious structure can be understood as an institutional effort to permit the realization of three values that are always in some conflict: and the rule of law, constitutional government and democracy. Since these principles are in fundamental conflict, the institutional solution cannot be expected to work

perfectly all of the time, but if the public and their agents are appropriately motivated, it can set the ground rules for balancing and accommodating these complex and conflicting values.

### **3. Norms of Judicial Independence**

Understood traditionally, judicial independence concerns independence from the interference of 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. These rules would need to have sanctions attached to their violation and would need to be enforced if they are violated.

Alternatively, one could imagine the development of a set of conventions or norms of self restraint that politicians somehow consider as binding on themselves – a kind of political morality – without the necessity for a formal enforcement mechanism. Or, we might imagine that either formal rules or 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.

But a wider conception of judicial independence would not confine itself to restraining the actions or threats by public officials, but would aim at preventing interference with legal processes wherever it originates. 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 that legal services are provided constitutes a real source of danger to judicial independence, it is not so clear how the situation may be ameliorated. But realistically, it seems that judicial independence is substantially threatened by powerful non-governmental interests, acting legally to ensure themselves advantages.

#### **Independence from Governmental Interference**

What is the purpose of judicial independence in a constitutional democracy? In principle, judicial independence facilitates furthering three distinct values. First, a high degree of judicial independence seems a necessary condition for the maintenance of rule of law -- ensuring that everyone is subject to the same publically communicated general rules. This concern suggests the necessity of making sure, in particular, 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. Here the worry is that officials in the executive branch, or the current 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, then 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 judges make it possible that substantive rules that are adopted now will be reliably upheld in the future, even in the face of strong temptations not to do so. This commitment capacity is valuable to all of us but is fragile and difficult credibly 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 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 to ourselves unfair legal advantage but the vagaries of fortune make such self serving intolerably risky. Rule of law, from each of our

own viewpoints — behind a Rawlsian veil of ignorance — is an attractive second best alternative and independent judges are a necessary condition for securing it, because maintaining rule of law 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 terms 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 one in which each of us has some knowledge of our fortunes and circumstances and we are 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 publically understood terms. Since the founding period it seems clear that our allegiance to democratic values has deepened. 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 agreement 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 majority, having fought and won election, enacts a constitutional statute, it is with the expectation that the legislation will generally be given effect until such time as it is appealed or amended, even if current majorities or the sitting president, oppose it. 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 fully enforced,

within the limits that considerations of justice may impose. Independent judges are among our best ways of securing this advantage as long as they are willing to welcome fully welcome and give meaning to these democratic decisions..

Because independent judges are desirable from three separate perspectives, it is not surprising that the purposes served by judicial independence are in frequent conflict -- and therefore that independent judges will need to reconcile these conflicts in their decision making. 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.<sup>10</sup> From a constitutional point of view, judges should protect constitutional rights even where such protections conflict with deeply held legal or democratic values, free from undue pressures from the people or their agents. From a democratic perspective judges should strive to give the fullest meaning to constitutionally legitimate democratic commands even where such interpretation trespasses on legal values.<sup>11</sup>

### **Private Interests and Judicial Independence**

From 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 law in particular cases. 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 duties to defend the constitution even if they sometimes fail to live up to them. If providing judges with additional protections from the other branches worked to widen the opportunities for more economic or social interference in the legal process —

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<sup>10</sup> 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 suggest ways in which constitutional “requirements” may interfere with legal values.

<sup>11</sup> 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.

say, by permitting more unequal access to legal resources — guarantees of judicial independence from political officials would be pointless and unjustified.

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, there is a good case to be made that public officials constituted the most important threat, one that required the construction of constitutional provisions and norms to channel and oppose. At other times the military, economic interests, or as Madison feared, unified popular majorities, might be more significant threats to legal rule. Or, as many conservatives complain, independent judges themselves may pose the most important threat to 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 it (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. Here are some examples. In the United States, I think it is true that the Congress will occasionally satisfy condition (1), always satisfy condition (2) and will rarely satisfy condition (3). If we think of a powerful economic interest group, it may often satisfy (1), rarely satisfy (2) and usually satisfy (3). Popular majorities may sometimes satisfy (1), but rarely satisfy (2) or (3). The idea is that for interference to occur, there needs to be a concatenation of power, interest and will.

What this 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 when a value they hold very dear is at stake. Alternatively, we may try to prevent any group from having the power to interfere with legal processes. But this would entail massively interfering 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 though recent attempts to regulate the capacity unions to operate in the political realm suggest this strategy is not yet dead. But the regulation of unions has occurred when and where unions are weak and this suggests the difficulty of placing restraints on very powerful interests.

These considerations suggest that it will continue to be very difficult to achieve a circumstance in which powerful economic and social interests 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. The norm of political equality makes it at least plausible that democratic institutions can occasionally work to shift the distribution of wealth or to regulate the ways that private power can be exercised. But, it is also clear that the constitutional protections that private interests enjoy provide them with powerful protections against governmental attempts to check their powers or regulate their actions.

Only if some substantial degree of judicial independence can be maintained does it become possible to achieve more fundamental values of law, constitutional rule and democracy. The question then is how best to secure it. I have argued above that the American system of institutional protections is complex: protected judges, vulnerable judiciary. I believe that this complexity is required by our multiple allegiances to law, constitutionalism, and democracy and that it has evolved out of our peculiar political and social history. Individual judges should be independent so that they can do justice in the case before them. Doing justice in particular cases requires that the judges resolve in some way the legitimate claims that law -- both positive law and the rule of law -- and the constitution impose on them, and 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.

#### **4. Explaining Judicial Independence: Interest Driven Theories**

Judicial independence is, then, both a public and an instrumental good. To say that a certain institution or practice is a public or common 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 in 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.

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 bargains 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 — to enable them to extract more rents from interest groups. Independent judges who can be relied upon to enforce statutes make legislation more valuable than it would be in their absence of a reliable enforcement mechanism. Similar, though less cynical, arguments can be made from the perspective of the people at large. A populist explanation of judicial independence would be that it is the collective or public interest.

A more complex interest based theory predicates the existence of relatively unified competitive political parties each seeking to imposing 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 consolidate their electoral victories in 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 rule of law and constitutional values as well as to democratic ones, 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, explain judicial independence in terms of the common interest of some group that has the power to protect judges. Interest group theorists often don't specify the mechanism by which judicial independence provided; they are usually content to assert that somehow politicians will find a way to deliver whatever it is that interest groups agree to. 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 parties, which presumably have the wherewithal to directly create institutional protections.

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 restrain itself from infringing on them in the future. Such self restraint can

generally be sustained as an equilibrium in game theoretic models of repeated interaction. 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.

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, or interest groups or political parties) to pre-commit to an institutional apparatus that is capable of restraining us from giving into 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. This idea is quite parallel to that found in the literature on the creation of independent central banks. 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 a desire to create an independent judiciary and staff it with people who have an unusual and unrepresentative attachment to legal values.

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 and incomplete because it can also explain outcomes in which judges are not independent or are only partially protected. Interest based theories can also offer an *ex post* explanation as to why a system of independent judges, however it is brought into existence, could be stable. I am not sure, however, how any of these theories would be able to account for what I have described as the American system: independent judges within a dependent judiciary. Why, if judicial independence is a good thing from an interest based perspective, leave the door open for political meddling in the future?

## **5. Explaining Judicial Review: Historical and Institutional Accounts**

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 so. 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 – that the underlying game theoretical mechanism that has to do the explanatory work is underpowered – can be partly remedied by appealing to historical development of judicial independence. Here we don't see institutions created out of whole cloth but emerging out of political struggle and efforts to reform particular institutions and find acceptable compromises among powerful interests. The static explanations will still be able to do some work. 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 intrusion are most likely and which are most dangerous. And, 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 on the king, who had extensive legislative as well as executive powers and also exercised substantial direct control over the judiciary as well, assigning judges to various courts and sometimes removing them as well. The institutional solution to this long running conflict was to provide English judges with some degree of “constitutional” protection in the 1689 Bill of Rights, promising that judges serve on good behavior, and, more

robustly, by providing structural protections by placing the legislative powers 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.<sup>12</sup> One that was capable, remarkably, of vigorously developing the common in the face of the accepted ideology of parliamentary sovereignty.<sup>13</sup> But colonial judges remained dependent on the Crown throughout the eighteenth 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 with the competence to decide issues of law as well as fact. Jury trials, in which the people themselves would play a central role in the legal process, were seen by most eighteenth century Americans as a particularly robust guarantee of legal processes that were free from political interference.<sup>14</sup> 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

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<sup>12</sup> 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 policy making 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.

<sup>13</sup> See David Lieberman, *The Province of Legislation Determined*, New York: Cambridge University Press, 1989.

<sup>14</sup> Montesquieu, identified the jury trial as the most substantial guarantee of judicial independence.

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 with what James Madison called the “impetuous vortex” of the legislative power. The 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 lead in two directions. First, when framing the structure of the federal government, there was general agreement 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, or on the judiciary which was thought to be quite weak as well. 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.<sup>15</sup> They imagined the state pouring forth a veritable torrent of defective law that would form the most fundamental threat to the liberties of the people. And, 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 #48-9, the legislative power was insufficiently checked in most of the states. Specifically, he thought that state judges were much too dependent on legislatures to be depended on to stop the legislatures from undertaking unjust projects.

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<sup>15</sup> “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.” James Madison, “letter to Thomas Jefferson Oct.24, 1787” 10 The Papers of James Madison, (Robert A. Rutland, ed.) 206.

Thus, central to Madison's scheme for the new constitution was to give to Congress a negative over state legislation. A version of this idea -- which would essentially have made Congress the third house of every state legislature -- was placed in the Virginia plan and a majority of the states expressed support for it in the initial phases of the Convention. But as the Convention proceeded support for Madison's negative collapsed as an alternate method of restraining the states began to take shape. While the delegates shared Madison's worries about state legislation, they were less sanguine about providing congressional review.

If federal judges were to monitor state legislation Madison and other nationalists believed that there would have to be a system of lower federal 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 into the constitutional text, which with as it was emerged in form that required state judges to apply federal law. Moreover the delegates agreed to create a supreme court and to bestow the judicial power on it, and on any federal courts that Congress subsequently created. 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 would of course enjoy the same personal protections guaranteed to members of the supreme court and so appeals from the states would take place in independent courts.

However, because of worries on the part of those delegates worried about federal courts intervening too aggressively in the states, the delegates agreed that Congress should decide whether or not 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 threats that might emanate from the executive branch. Indeed, except for requiring senatorial consent for judicial

appointments, as Alexander Hamilton remarked in Federalist 78, the courts remained quite dependent on the executive for getting cases to hear and carrying out judicial orders. 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 harder to keep.

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 from the executive became obvious with the attempts of the Adams and Jefferson administrations to control the makeup of the judiciary. These attempts and their constitutional aftershocks left an enduring mark on our history. But while *Marbury v Madison* is often taught as a triumph for the courts, it is as plausible to see it as a recognition of the awful power of a really popular president to alter the workings of the constitutional structure, especially 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 wasn't enough, the bare margin by which Justice Chase escaped an impeachment conviction was another reminder of framer's misjudgement of presidential leadership.

Of course it can be said that even though the president turned out to be a more formidable threat to judicial autonomy than had been anticipated at the time, the president has been most dangerous to the judicial branch precisely 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, and that name captured the sense that the election was the first in which a sustained effort was made to tie a presidential candidate to the people. What Madison and others had misjudged then, was the opportunity the presidency to become the most popular branch, at least for a time. In a sense 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.

## **5. Threats to Judicial Independence**

In normal political circumstances, Congress and the President show extensive deference to the judiciary. Congress rarely overturns court decisions, seldom threatens to strip courts of jurisdiction, or to cut judicial budgets, or to intervene in the rules creation process. Politicians may grouse about certain judicial decisions and complain about some individual judges but, for the most part, it is probably done more with an eye to maintaining their electoral popularity rather than with any real intention to alter the constitutional balance. Even if these threats are made they are seldom made good. Similarly, the executive normally executes judicial orders and adopts practices of restraint in the way it relates to legal processes. And though the appointments process has become more political, the necessity of getting the consent of the Senate places some bounds on how much influence appointments can have, at least in the near term. But these forms of deference are sub-constitutional in that they take the form of statutes or conventions and 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 circumstance of threat is always there. Congress could strip federal court jurisdiction, it could abolish some offending circuit court, or slash judicial budgets even if it chooses not to do so. Indeed, Congress could lower the hurdle for impeachments if it chose to do so. 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 genuinely independent only as long as those whims do not congeal into a cohesive popular will determined to alter the performance of the judicial function.

It is only in circumstances of political crisis that we may see these incipient tensions become visible. In such a crisis, while political officials may complain about particular justices or judges, unless there is a plausible case for impeachment, there is relatively little that can be done to bring a particular judge into line. But the court system itself can be threatened by exploiting the institutional dependencies described above and such threats have happened from time to time in our history. Such crises can be and have been resolved in various ways; the political forces may shift because of electoral events, the personnel of the courts may be changed by what Bruce Ackerman has called transformative appointments, or as has happened more rarely, a new accommodation might be reached between democratic and legal values.

[This section will continue on to discuss historical moments at which judicial independence was threatened, arguing that these took place precisely at times of extraordinary political unity in the popular branches. The periods discussed will be 1800 (with the Jeffersonian rejection of Federalist policies and judicial appointments), The Jackson presidency, the Reconstruction Era with the remarkable degree of Republican party unity, 1937 (huge Democratic majority and very popular president combine to assault independence of Supreme Court), 1994 (after two decades of increasing party homogeneity, Republicans succeeded in achieving a short period of unity that produced several infringements on JJ)].

## **6. Conclusion**

[this is a sketch of the argument to be worked out here]

The independence of the judiciary, as opposed to that of the individual judges, is dependent on the willingness of the popular branches to refrain from using their ample constitutional powers to infringe on judicial authority. This willingness is usually preserved because of the success of the appellate structure to keep independent judges within acceptable bounds and usually this is sufficient to avoid strong popular reactions against judges. But sometimes, often for reasons that

external to judicial action, there are moments of party unity and (temporary) discipline and these are dangerous times for the court system.