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NEWSLETTER OF THE LAW & COURTS SECTION OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION

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A Letter from the Section Chair

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I am pleased to report on several significant developments in the Law and Courts Section. The Professionals Committee is in the final stages of the first empirical description of the Section, and the Journal Committee in collaboration with the Executive Council is very close to establishing a Section journal, the *Journal of Law and Courts*.

Law and Courts Professionals Committee

Since August, the Law and Courts Professionals Committee has been engaged in a project to provide an empirical description of the diverse array of scholars who compose the Law and Courts Section. This first project will describe who we are and what we do, which will lay the groundwork for more nuanced inquiries into the various intellectual fields represented, our similarities, and our differences. The current members of the Professionals Committee are Wendy Martinek (Chair), Brent Boyea, Tom Clark, Malcolm Feeley, Mark Graber, and Paul Wahlbeck.

In this edition of the *Newsletter*, Wendy has provided a brief report on the activities of the Professionals Committee, and will follow with a complete report in a special edition of the *Newsletter*. This information will be invaluable to the Section and reflects the very hard work and excellent productivity of the committee's members.

Journal of Law and Courts

The Section's journal is rapidly becoming a reality. As readers may recall, this enterprise started in 2008-09, when Section Chair Stefanie Lindquist appointed an exploratory committee chaired by Larry Baum to investigate the feasibility of a journal sponsored by the Law and Courts Section. At the 2009 Business Meeting, Larry reported the results of an important survey of the Section membership, which

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Instructions to Contributors

General Information

Law and Courts publishes articles, notes, news items, announcements, commentaries, and features of interest to members of the Law and Courts Section of the APSA. **Law and Courts** is published three times a year in Winter, Spring, and Summer. Deadlines for submission of materials are: February 1 (Winter), June 1 (Summer), and October 1 (Fall). Contributions to **Law and Courts** should be sent to the editor:

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Articles, Notes, and Commentary

We will be glad to consider articles and notes concerning matters of interest to readers of **Law and Courts.** Research findings, teaching innovations, or commentary on developments in the field are encouraged.

Footnote and reference style should follow that of the *American Political Science Review.* Please submit your manuscript electronically in MS Word (.doc) or Rich Text Format (.rtf). Contact the editor or assistant editor if you wish to submit in a different format. Graphics are best submitted as separate files. In addition to bibliography and notes, a listing of website addresses cited in the article with the accompanying page number should be included.

Symposia

Collections of related articles or notes are especially welcome. Please contact the Editor if you have ideas for symposia or if you are interested in editing a collection of common articles. Symposia submissions should follow the guidelines for other manuscripts.

Announcements

Announcements and section news will be included in **Law and Courts**, as well as information regarding upcoming conferences. Organizers of panels are encouraged to inform the Editor so that papers and participants may be reported. Developments in the field such as fellowships, grants, and awards will be announced when possible. Finally, authors should notify ***BOOKS TO WATCH FOR EDITOR***:

Drew Lanier, of publication of manuscripts or works soon to be completed.

Law and Courts Newsletter

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revealed strong support for a journal and dissatisfaction with current outlets for law and courts scholarship. Also in the survey, a large majority of respondents expressed a willingness to pay higher section dues for a subscription to the new journal, which of course will be necessary.

Based on the survey results and other information gathered by the Journal Committee, the Executive Council unanimously approved a motion at the Council Meeting held just after the Business Meeting to create the journal. The Executive Council authorized Christine Harrington, Section Chair for 2009-10, to begin the task of establishing the journal. To this end, Christine appointed Joel Grossman to chair the new Journal Committee, which began an exploration of possible publishers.

Just after the APSA Meeting in 2010 in my role as newly elected Section Chair, I appointed a new Journal Committee to select an editor, obtain the necessary permission from APSA, solicit proposals from publishers, and enter into contract negotiations. The current members of this committee are Christopher Zorn (Chair), Lawrence Baum, Cornell Clayton, Joel Grossman, Valerie Hoekstra, Robert Howard, and Keith Whittington.

Over the past academic year, the Journal Committee has made remarkable progress. Among many other achievements, the Committee has selected the journal's first editor, who was approved enthusiastically by the Executive Council. The Committee also has established the basic management structure of the journal, is in the final stages of receiving official APSA approval, and currently is awaiting concrete proposals from four excellent publishers after extensive conversations about the feasibility and nature of the journal. In all of these endeavors, Chris Zorn has provided outstanding intellectual leadership. Each member of the committee also has dedicated considerable time and effort toward making the journal a reality. I am grateful for their hard work and careful attention to a very time-consuming and complicated process.

The inaugural Editor of the *Journal of Law and Courts* will be David Klein of the University of Virginia, who put forth an exceptional vision for the journal. As David's proposal carefully delineates, the purpose of the *Journal of Law and Courts* is to publish outstanding peer-reviewed articles that speak to multiple audiences in the Section. Indeed, the central mission of the *Journal* is to promote communication and intellectual fertilization across traditional boundaries by publishing only articles capable of attracting large numbers of readers from diverse methodological and theoretical perspectives. The *Journal* will welcome both qualitative and quantitative empirical studies as well as purely theoretical essays, and will embrace law and courts scholarship of all types.

In consultation with the Executive Council, David has invited the following highly accomplished scholars to serve as the Advisory Board, and each has graciously agreed to serve:

Brandon Bartels, George Washington University
Pamela Brandwein, University of Michigan
Keith Bybee, Syracuse University
Javier Couso, Universidad Diego Portales, Chile
Charles Epp, University of Kansas
Leslie Goldstein, University of Delaware
Stacia Haynie, Louisiana State University
Jeffrey Lax, Columbia University,
Lynn Mather, University at Buffalo, SUNY
Julie Novkov, University at Albany, SUNY
Georg Vanberg, University of North Carolina.

As is evident, the Advisory Board is fully representative of the Section's theoretical and methodological diversity. From a management perspective, the *Journal of Law and Courts* will be owned by the Law and Courts Section and managed by an Editor and Advisory Board. The Editor will be chosen by the Executive Council and the Advisory Board will be chosen by the Editor with the approval of the Executive Council. Terms for the Editor and the Advisory Board will be four years and will be renewable for up to two additional years.

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At the APSA Business Meeting, I will provide an update on concrete plans to launch the journal, which should progress quickly after all formal proposals are in from the publishers. Needless to say, this has been a group effort spanning several years, and we should thank and congratulate everyone who dedicated their time and attention to creating an exceptional resource for the Section and profession.

Other Section Business

This year's Nominations Committee has done an outstanding job of nominating candidates for the open positions in the Section for 2011-12. Members of this year's Nominations Committee are Chris Bonneau (Chair), Lisa Hilbink, Mark Hurwitz, Ryan Owens, and Jeffrey Yates. The committee nominates the following slate:

Chair-Elect: Wendy Martinek, Binghamton University

Secretary: Kevin McMahon, Trinity College

Executive Committee

Tom S. Clark, Emory University

James L. Gibson, Washington University in St. Louis

Todd Peppers, Roanoke College

For the 2012 APSA Meeting, I have asked Brandon Bartels, George Washington University, to serve as the Law and Courts Section Program Chair. Brandon has generously agreed to serve and will do an exceptional job of organizing us for New Orleans.

Finally, please be sure to attend the Section's panels at the 2011 APSA Meeting in Seattle. Of particular interest and importance is the Lifetime Achievement Award panel, which will discuss the contributions of this year's Award winner Jim Gibson. This panel is scheduled for Friday, September 2, at 4:15 pm.

Have a wonderful summer. See you in Seattle.

Symposium: Judicial Independence

Studying Judicial Independence: Trends and Research Agendas

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Interest in "judicial independence" as a scholarly topic is evident in the numerous books (see, e.g., Burbank and Friedman 2002; Geyh 2008; Russell and O'Brien 2001; Shugerman 2012) and hundreds of articles that have been written on the subject in political science, law, and other journals over the past decade. While popular commentators sometimes dismiss academic trends as irrelevant or out of touch with "real world" events, it may be reassuring to note that our preoccupation with court autonomy and power is intertwined with salient developments on the national and world stage. With respect to research on judicial independence, we seem to have a case where the dog of public affairs and current events has helped trigger a vigorous wag from the academic tail.

Explaining Today's Attention to Judicial Independence

At least three major trends have likely propelled both general and academic interest in judicial independence questions. First, we can turn to both impressionistic and more scholarly accounts suggesting we have experienced heightened—and potentially threatening—criticism of state and federal courts in recent years from elected officials and organized interests (see Clark 2009; Collett 2010; Gray et al. 2006; Peabody 2010). Mark Miller, for example, has claimed that over the past fifteen years, we have witnessed "one of the greatest periods of conflict" between Congress and the courts (Miller 2009). These purportedly hostile and distinctive conditions[1] have also been noted by judges who have both objected and offered suggestions for protecting courts' historic powers and autonomy (see, e.g., Chin 2010). A number of prominent interest groups and professional organizations have come to similar conclusions (see Citizens for Independent Courts 2000; American Bar Association 2003).

Second, and partly related, discussions about judicial independence have been prominent in academic, legal, and more popular contexts in response to increased attention to, and in some cases sharply expressed anxiety about, state courts and, especially, judicial elections. The increasing costs and supposedly novel campaign techniques adopted in state judicial contests have prompted some commentators (including, again, a number of sitting judges) to conclude that we are experiencing a "new politics of judicial elections" that is threatening to the integrity of the judiciary (Brennan Center 2010). The most well known spokesperson in this regard is former Associate Justice Sandra Day O'Connor, who has lamented "the flood of money" and the sway of partisan and other political forces in allegedly undermining judicial independence in state court systems (O'Connor, 2010).

A third factor that has fueled scholarly and wider interest in judicial independence involves developments overseas. Even before the 2011 revolutions and protest movements in the middle east prompted discussions about the role of courts in protecting rights and the rule of law in the region, academic and more "popular" commentators have discussed threats to courts, and ways to bolster judicial independence, in such diverse regions as Great Britain, Australia, Uganda, Israel, Cambodia, Venezuela, and Pakistan.

This symposium responds to and shares this developing interest in the elusive concept of "judicial independence." The authors assembled in this issue of *Law and Courts* have written recent books and articles on court independence. In different ways, their research has already made distinctive contributions to our understanding of the concept, but in their prior work, and in the pages that follow, they also offer new challenges, tools, and strategies pertinent to future efforts to conceptualize, study, and discuss the term.

For example Tom Clark and Jeff Staton make the case that studying judicial independence gives rise to broader questions and imperatives for our field—such as reflecting on how political scientists communicate and collaborate with colleagues in diverse areas of cognate study. In a different context, Randall Peerenboom argues that studying courts in China, among other nations, provides lessons that upset or at least temper some of the conventional wisdom about judicial autonomy in "non-liberal authoritarian regimes." Scott Gerber's contribution to this symposium outlines findings in his recently published book *A Distinct Judicial Power: The Origins of an Independent Judiciary,* in which he traces important links between the "various experiences of the original thirteen states and their colonial antecedents" and the arguments for and final language of Article III of the Constitution (and proponents' related claims about the importance and best means of guaranteeing courts' self-determination and power). Finally, Roger Hartley calls for a more systematic and self-aware scholarly investigation of the extent to which different notions of judicial independence are politically constructed (for ideological and strategic purposes) and historically contingent.

Ongoing Research

While the contributors to this symposium offer their own thoughts about the ongoing importance of judicial independence as a scholarly topic, I close this introduction by making a few independent observations in this regard. There are a number of enduring and emergent scholarly questions and problems that suggest court independence will remain a promising and even vital topic for future research and scholars.

To begin with, as already alluded, judicial independence has historically been poorly and inconsistently defined, and still produces considerable debate about its parameters and meaning. As Peter Russell notes 'there is little

agreement on just what this condition of judicial independence is" (Russell and O'Brien 2001, 1). Clark and Staton note that some academic consensus has emerged that independence can refer to either 1) decisional "impartiality" (deciding cases without bias and according to the rule of law); 2) the capacity of judges to see their preferences realized as outcomes (see, e.g., Iaryczower et al. 2002); and finally 3) institutional rules and features that support these other aspects of court independence. These different factors remind us that we can have distinct mixes or types of judicial independence at varied historical junctures and in diverse national contexts.

But while helpful, these designations raise numerous definitional questions. To what extent does judicial independence depend upon "both individual and institutional aspects" (O'Connor 2008, 2)—and how should we study and assess these different dimensions? Do existing accounts of judicial independence take sufficient account of how subjective and psychological factors, such as "fidelity, knowledge, legal reasoning, intelligence, ego, courage, cowardice, subtlety, integrity, fairness, clarity, courtesy, patience", (Brandenburg and Caufield 2009, 80) can influence a judge's sense of autonomy and protection from exogenous forces? Also: if one conceptualizes independence primarily as judges' ability to satisfy their own preferences, how should we regard the monitoring and disciplining of judges by other members of the judiciary? Is this "self-regulation" (Gant 2010) a threat to or an enhancement of independence? Moreover, (how) does independence differ between different kinds of courts? On this last question, Stephen Burbank (2002) has argued that our discussions of judicial independence in the U.S. are needlessly cramped because of our lingering preoccupation with the Supreme Court of the United States as the relevant referent. To the extent that "independence' is often referenced as the signature feature of effective and meaningful courts, getting a better handle on these and other descriptive questions is critical for understanding the very nature and purposes of judiciaries.

In addition to working out more fully what "judicial independence" means, scholars have more work to do in understanding court independence as an inherently relational concept. This is true in two senses. First, we need a firmer grasp of the conditions under which judicial independence is most likely to be supported (or threatened), and how and whether different regimes, institutions, and social and economic environments give rise to distinct forms of court independence (see Herron and Randazzo 2003). For example, Mathias Iaryczower, Pablo Spiller, and Mariano Tommasi (2002) have argued that the Argentinian judiciary was able to operate more independently when the legislature and president were politically opposed. But despite some corroboration of their general thesis (see Franck 2009) the extent to which we can transmit this thesis to other states is unclear. In a totally different context, Douglas and Hartley (2003) have explored the impact of court budgeting on judicial independence—an issue that needs greater exploration in the U.S. and other settings (see also Teff 2009).

A second relationship scholars need to investigate more thoroughly involves not the bases that give rise to independence, but the conditions under which it supports the values or outcomes that make independent courts worth supporting in the first place. In other words, how much and what kinds of judicial independence advance different regimes and objectives (see Gretchen Helmke and Frances Rosenbluth 2009)? "[H]ow much judicial independence is required for a liberal democratic regime" (Russell and O'Brien 2001, 1) or an authoritarian political system? What forms of judicial independence are most likely to support the rule of law (and individual rights), provide regime legitimization (see Domingo 2000), support democracy and democratic transition (Ginsburg 2003), or even undermine effective government policymaking (Santiso 2003)?

As indicated earlier, a third major field of judicial independence research, which has been and is likely to remain productive, relates to different state selection procedures and their effects, if any, on our courts, judges, and pertinent publics (see Baum 2003; Bonneau and Hall 2009; Gibson 2008; Moran 2003; Streb 2007). Despite the value of existing scholarship, there is clearly more work to be done here to substantiate or call into question asserted claims, and to extend existing studies to other settings. Bonneau and Hall, for example, openly concede that their recent work "in defense" of judicial elections only pertains to state supreme courts (Bonneau and Hall 2009).

A fourth and somewhat related area for ongoing judicial independence studies is arguably the least explored. In recent decades, scholars and politicians have come together (although not usually in coordinated fashion) proposing various reforms or changes to court systems (see, for example, Levinson 2006; Sabato 2007; Cramton and Carrington 2006). While the prospect of studying the potential impact of these proposals on judicial independence raises challenges (consider, for example, the complexity of studying whether a limitation on the number

of years a Supreme Court Justice could serve would impact the Court's, or an individual Justice's—independence, however understood), these obstacles are not obviously insuperable. Those interested in the impact of, say, proposals requiring the Supreme Court to televise its open proceedings (Tong 2006), are likely to learn something from state and lower federal courts that have engaged in similar practices.

A fifth and final category of independence research is increasingly familiar but still deserving of greater attention. While we have made some progress since Lee Epstein's call to seize the "comparative advantage" in studying law and courts (Epstein 1999) we still have much to learn about the autonomy and effectiveness of judiciaries by casting our gaze outside of the U.S.

For all these reasons, and undoubtedly others, judicial independence should remain an area of active and productive research into the immediate future. It is a subject that invites interesting, important, enduring, and sometimes usefully disorienting questions about our courts, our laws, and the values and results these organizations and systems are supposed to secure.

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[1] Organized opposition to judges and even the judiciary as a whole is as old as the republic, and there is an open debate about the extent to which today's political attacks and court curbing efforts represent (qualitatively or quantitatively) "new" forms of criticism. See Peabody 2010, 4-12.

Challenges and Opportunities of Judicial Independence Research

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It has been nearly a decade since Stephen Burbank and Barry Friedman edited their impressive volume, *Judicial Independence at the Crossroads*. One of the enduring lessons of that book was that research on judicial independence was, and ought to be, fundamentally interdisciplinary in nature. In the years since its publication, we have witnessed a substantial volume of research on the subject, and this work has certainly spanned multiple fields in law and the social sciences. Importantly, the questions that we are asking, the arguments we propose and the empirical tests we conduct are simply not all that different whether we are talking about American judges or judges abroad or even judges on international judicial bodies. Far from making us speak past each other, variation in sociopolitical and institutional context provides us leverage over the questions we seek to answer. Indeed, it is our view that as a scholarly subject, judicial independence raises concerns that are special cases of broader questions of institutional design. For these reasons, there is much to gain from conceiving of ourselves as writing in one coherent literature, linked not by region or governance system, but rather by the research challenges we confront.[1]

This interdisciplinarity tempts us to question whether it makes sense to continue dividing scholarship on judicial independence, perhaps on law and courts generally, according to the traditional APSA subfields (i.e. American politics, comparative politics and international relations). Readers of other APSA subfield newsletters are no doubt familiar with the variety of symposia published over the years considering the usefulness of these distinctions. Typically, the answer is that they are not all that helpful. Yet, work goes on as before, naturally leading to a new symposium a few years later, where the same question is taken up. Rather than elaborate further on the subfield usefulness question here, we simply note that work on judicial independence is, in fact, productively interdisciplinary, and we will assume that it will continue to be so. Instead, we will ask what this feature of judicial independence research implies for the challenges facing the field of study and the way that we train our students.

Below, we briefly describe what we mean by research on judicial independence and suggest why we see a highly interdisciplinary endeavor. We then identify three challenges and opportunities posed by the nature of research on judicial independence. We then suggest two implications of this research agenda for undergraduate and graduate training. Quite obviously, judicial independence is far from the only concept worth contemplating. Nevertheless, we believe that the simple lessons we draw from our experience working in this thematic area likely have broader implications for our field.

Judicial Independence

Although this is not the place for a complete review of the concept, it is helpful to say a few things about what we mean, or better what other scholars often mean, by "judicial independence" especially since another lesson of the Burbank and Friedman volume is that "judicial independence" is vulnerable to multiple conceptualizations. We see three ways in which the term is commonly used. One approach is closely connected to a core feature of the rule of law: impartiality. A judge is conceived of as independent when she can decide cases free from bias in favor of one party or another. In international relations this notion of independence emerges in work on the decision-making patterns of international human rights judges (e.g. Voeten 2008) and in a broader conversation about the appropriateness of independent judges on international judicial bodies (e.g. Posner and Yoo 2005). And of course, Gregory Caldeira and James Gibson have produced considerable work on the perceptions and consequences of judicial impartiality both in the American context and abroad (e.g., Gibson and Caldeira forthcoming; Gibson et al. 2011; Gibson 2009; 1998).[2] Importantly, and especially in the American context, growing interest in the influence of campaign spending and activity has raised questions (of both a public policy and political science nature) about judicial impartiality. New York State's recently-imposed restrictions on judges hearing cases where attorneys had contributed in excess of $2,500 to the judge's campaign are an example of the growing public scrutiny this issue is receiving.

A second approach draws on Nagel's (1975) notion of power. Power can be described as "a causal relationship between preferences and outcomes," so that we can say that a judge is independent when what she wants is the cause of how legal disputes are resolved (Cameron, 2002: 135). For this to be true, a judge must be both "autonomous," in the sense that her decisions reflect her preferences and "effective" in the sense that those decisions actually control the outcomes of legal controversies. Scholars interested in the ways that the separation-of-powers system operates have typically adopted the power concept of independence (Vanberg 2005; Rogers 2001). This is the approach we have taken in our own research, which builds on work in both American and comparative politics, most notably that of Gibson and Caldeira and Vanberg.

We both address implications of a mechanism for judicial independence that ultimately relies on public support for courts. In Clark's *The Limits of Judicial Independence*, he suggests that if the Supreme Court ultimately depends on public support, a central challenge it confronts involves learning about this support. He argues that congressional attacks on courts via so-called "court-curbing bills," are indicators of waning public support. To the extent that Congress can credibly signal waning public support through the introduction of these bills, the Court will exercise self-restraint upon observing heightened congressional hostility. Critically, rather than serving as direct threats to the Court, court-curbing instead constrains the judiciary indirectly by communicating information about likely public support. Staton's *Judicial Power and Strategic Communication* also considers an informational challenge judges confront if public support matters. When people are aware of particular interactions between judges and politicians, they can play a more direct role in constraining their representatives. So awareness, however constructed, is a critical piece of a public support story. For this reason, judges have incentives to raise awareness of their decisions in order to leverage public support. However, judges do not always prefer complete transparency. The reason is that voters can learn about judicial legitimacy from the interactions between courts and governments, and in political contexts (or episodes) where political constraints undermine impartiality; awareness, in these settings, can undermine public support. When this is true, judges prefer opacity.

Finally, judicial independence is also used to refer to a variety of formal institutional protections that are designed to induce impartiality or power or both. This distinction gives rise to familiar discussions over the occasional disconnects between de jure and de facto judicial independence. Although it is the convention to consider packages of these rules *de jure* independence, in our view, calling rules that might induce independent behavior "independence" further complicates the matter conceptually by combining two potentially related ideas. Judicial independence as a behavioral concept refers to the extent to which judges' choices are self-determined and/or effective; rules like fixed tenure or budgetary autonomy refer to institutional structures we conjecture might be related to independence. Indeed, the extent of the relationship between these two concepts is the subject of much research on judicial independence, and in our view the fact that this (potential) relationship commands so much attention is strong evidence that they are conceptually different and ought not be called the same thing.

An example from another field is useful to see why. There is consistent evidence suggesting that permissive electoral rules like high district magnitudes encourage a greater number of political parties in the electorate; however, we do not call high district magnitude "party system fragmentation." We simply describe it as a kind of electoral rule that influences the number of seats available in a particular district and then ask whether that number is causally related to the fragmentation of the party system. To be fair, if these concepts were perfectly correlated, then perhaps the distinction would be unhelpful as a practical matter; however, the connection between district magnitude and fragmentation turns out to depend on other features of state and society, and so beyond the issue of conceptual clarity, it is highly useful to keep the concepts separated. This is all the more important for judicial institutions that allegedly insulate judges from undue external influence, because studies looking for a strong relationship have been mixed, with some scholars finding some connection between rules and behavior and other scholars finding no such relationship (e.g. Hayo and Voigt 2007; Herron and Randazzo 2003). There is, of course, a long line of papers on the effects of formal legal institutions on economic growth and development (e.g. La Porta et al. 2004). And in American politics, there is considerable work on judicial selection mechanisms. This research has largely been concerned with the different incentives created by various selection mechanisms. In the American context, scholars have focused on how different electoral mechanisms condition judges' responsiveness to public opinion when deciding cases (Caldarone, Canes-Wrone and Clark 2009; Hall 1992; Huber and Gordon 2007). Beyond the context of American states, scholars have considered the effects of various retention and promotion schemes for judicial independence (Ramseyer 1994; Ramseyer and Rasmusen 2003).

Challenges and Opportunities

The inherently cross-subfield and inter-disciplinary nature of the study of judicial independence presents important challenges to scholars. These challenges, as we will see, bring useful opportunities.

One challenge is that, simply put, the literature is big and seemingly expanding at an increasing rate. Because it is probably too much to ask all scholars to be deeply familiar with all aspects of this literature, size raises related challenges of not "reinventing the wheel" while not also reinforcing past errors. Consider approaches to measuring judicial preferences. In the American context, this issue has received considerable attention and while various difficulties associated with the task remain, much ground has been covered. As we know, scholars have used proxies, like the partisanship of appointers and editorials from major newspapers. Recently, the field has turned to more direct measures of preferences, using the IRT framework where we let voting patterns shed light on a judge's position on a latent scale, which we often interpret ideologically. As more and more data is collected on judicial decisions abroad, scholars interested in theoretical arguments, the implications of which require measures of preferences, have naturally confronted the same challenges as their American colleagues. Unsurprisingly, it is not uncommon for comparativists to leverage appointer partisanship in order to measure judicial preferences, which may or may not be a good proxy for ideology in particular contexts. More recent work in IR and comparative politics has adopted the IRT approach (e.g. Voeten 2008; Sánchez et al. 2011). Borrowing of this sort is certainly appropriate in some contexts, but we do have to be careful about the context. Most obviously, the typical IRT approach assumes the attitudinal model—that judges are ideologically motivated and vote sincerely. For some research questions, this is an innocuous assumption. Yet scholars often wish to use estimates of preferences to then test decision-making hypotheses where justices are assumed to vote strategically. This is an obviously tenuous

approach, clearly inconsistent with the theory motivating the design. No matter the theory we are trying to test, though, this issue is particularly salient as scholars investigate judges in locations where the incentives for prudent decision-making are far stronger than they are in the American context. The concern here is that in our effort to not reinvent the wheel, to take advantage of new and careful approaches to estimating preferences, we risk using these methods inappropriately. On the other hand, we are confronted with a genuine opportunity. The increasing availability of data outside the United States, especially in places where we are very confident that judges confront serious political constraints, provides opportunities for scholars to develop methods for measuring preferences from observed behavior in ways that are sensitive to strategy.

A second, and related, challenge is that once we start opening up our research paradigm to work in alternative substantive areas, it can become clear that our work is really just a special case of a broader phenomenon. For example, many of the questions concerning the creation of independent courts have parallels in the study of central bank independence or bureaucratic independence. This only highlights the extent to which judicial independence studies are often a special case of larger institutional design problems. As another example, consider studies of compliance with judicial decisions. This topic has received considerable attention in both the American and comparative contexts. Far too infrequently, though, are the connections successfully made between the literature on compliance and courts and the literature on bureaucracy and compliance. However, it seems apparent that the two bodies of research should have direct implications for each other. Thus, as the onus is on the researcher to expose oneself broadly to many literatures, so too is there is a burden on each of us to write and present our research in a way that allows the connections to other fields to be as fruitful as possible.

A third challenge for scholars concerns the possibility of a disconnect between research on judicial independence and the deep, historical motivations for that research. Judicial independence (in whatever form you may like) often seems to be studied (or promoted) as a goal in-and-of-itself. Yet as Cameron (2002) notes, we are interested in the concept because we have the sense that it might very well be linked to normatively appealing ends, e.g. economic growth, development, the protection of human rights, perhaps happiness. Essentially we care about judicial independence because we care about the "good stuff" it provides. The key consequence of this disconnect is that scholars of judicial independence risk failing to communicate their findings effectively to scholars who don't really care about independence *per se* but do care about, say, development and human rights. This is problematic in two ways. It means that we are simply failing to publicize results that are interesting in their own right. More importantly, judicial independence research has implications for research on these broader subjects. One salient example is that comparative research has found considerable variation in links between formal institutions that allegedly insulate judges and independent judicial behavior. This immediately raises questions about cross-national development research that makes use of formal institutions (e.g. La Porta et al.). The rules that we think induce independence either do not do so, or they do so in different ways in different contexts, or they incentivize behavior that advances independence on one hand and undermines it on the other (Helmke and Staton 2011). For this reason, it is unclear what to conclude exactly from research designs that use formal institutions as proxies for independent behavior in all contexts. At a minimum, development scholars would do well to become familiar with the process by which courts become or maintain independence so that their measurement models have some connection to the process(es) that we believe produce independence. It is our responsibility to ensure that they can do this easily.

Implications

The concepts, questions and tools that characterize the study of judicial independence across the various subfields and disciplines are closely related. Perhaps more important, the various approaches can all have implications for each other. As we argued above, the interdisciplinarity we see presents challenges for us, but it also creates opportunities. It also has direct implications for how we teach our students and train future scholars. The key is to think about breadth. Yet we need ways of training students that encourage them to be *productively* involved in a broad research enterprise without undermining detailed knowledge of particular cases and issues.

Insofar as law and courts suggests a theme rather than a region or system of governance, we believe strongly that the subfield more generally benefits from productive cross-field exchange. The question is how to structure training to help our students best take advantage of this setting. At Emory, we have tailored our instructional approach to address implications of our view of the field. Here we discuss two. The first implication, what we take to be the most obvious, is that we benefit from a substantively broad curriculum framed around core theoretical problems that manifest in a variety of subfields in related if not totally identical ways. At the undergraduate level, we have both taught courses on judicial politics that are organized thematically, rather than by region or governance system. We have found that students are more likely to learn a lesson about, say, institutional design or legal mobilization, when it is pitched generally and when they can find examples in the particular context they find most interesting than when we teach the same lesson anchored to a particular place.

We have also expanded our undergraduate constitutional law sequence. We now teach a course on comparative constitutional law, which builds upon and compliments Thomas Walker's classes on the American system. As is true in Walker's course, the comparative course links core issues of constitutional interpretation to general questions about the nature and challenges of constitutional governance. At a minimum, by evaluating how different societies have resolved the very same constitutional questions, we both clarify lessons learned about the American approach and give students the opportunity to question that approach in light of genuine alternatives.

At the graduate level, we regularly teach a seminar on political institutions framed around common social and political dilemmas. For example, during one week we study commitment problems; during another we study coordination problems; we devote two weeks to principal-agent problems, etc. For each topic, substantive examples from myriad subfields are examined in concert, highlighting the theoretical and empirical linkages among the questions. In pushing our students to think about social phenomena outside of any one particular substantive focus, the course reinforces claims about productive interdisciplinarity in the study of institutions that we pitch from day one.

All of our law and courts students take this institutions course, but we should stress that it is intended for all students in our program. Still, the benefits for our judicial politics students are clear. A student interested in judicial independence, for example, would not only be encouraged to think about work on the subject done across the fields, but she would be pushed to think about what she might learn from research on central banks or bureaucracies. Further, since we expose the students to work in political economy on the connections between legal institutions and broad development outcomes, our approach requires that students think about concepts like judicial independence as potential means to ends rather than merely ends. It also encourages them to think about how work on independence might inform the broader literature.

A second implication, especially relevant at the graduate level, is that participating in (perhaps even constructing) a vibrant intellectual community is even more important than ever. Though increasing interdisciplinarity means that students benefit from a broad understanding of our discipline, it does not follow that they should be (or could be) experts in every literature, much less experts in the dominant methods of these literatures. You simply cannot know everything. But for that reason, cultivating a vibrant network of colleagues is critical. This much should be obvious. What is not, at least what was not obvious to us when we were graduate students, much less first year graduate students, was how to be a good member of a network. And we certainly had no idea about how to build one.

At Emory, we believe it is important not only to model professional behavior in an intellectual community, but to provide explicit training about how to do so. This means that in addition to designing a sequence to ensure quality research, we must teach how to present research, how to read and constructively evaluate research, how to engage research and provide useful comments, and how to take advantage of opportunities to meet like-minded graduate students and faculty. Part of this is done by directly building important activities into syllabi, as, say, by requiring peer evaluation assignments and setting up mini-conferences or poster sessions at the end of classes

where students can present their work. Another piece is advanced by constructing speaker series and working groups that are not aimed at a particular subfields and where the entire department is encouraged to attend. Like our colleagues elsewhere, we suppose, we also remind each other to seek out opportunities for our students to meet their peers at other institutions and eventually to expose their research to valued colleagues in settings that cultivate serious scholarly exchange. And some of this training we provide via workshops, on, for example, the general structure of a research presentation, on doing good reviews and even on the standard ways through which we go about meeting like-minded scholars. The point is that if networks matter, then we need our students to know how to engage them. We can do better than simply modeling how to participate in and build networks in the hope that some set of our students will "figure it out." We can provide explicit training.

Conclusion

The bottom line for us is that because the study of judicial independence is interdisciplinary and increasingly so, judicial scholars confront important challenges but also have corresponding opportunities. The commonality of the challenges we have reviewed is that they all imply that scholars need to remain mindful of the larger context in which their research is situated. From issues of theory to measurement to substantive interpretation, many of us are concerned with questions that the field cares about—it is our responsibility to conduct and frame our research in ways that allows us to clarify why the scholars who value the issues that we value should care about the particular contributions we are making. To do this well as we move forward, we also need an approach to training that gives our students the best possible chance to have a broad impact. In our view, we can advance this goal best via a broad curriculum and an approach to professionalization that specifically trains how to be a productive member and ultimately take advantage of a network of likeminded scholars.

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[1] For a more complete treatment of this claim, please see Staton and Moore (Forthcoming).
[2] The research agenda on procedural justice, led largely by Tom Tyler, seems particularly relevant as well.

Judicial Independence in Authoritarian Regimes: The China Experience

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Notwithstanding nearly universal support for the notion of judicial independence, the concept remains disturbingly contested and unclear even in economically advanced liberal democracies known for the rule of law. The conceptual and practical problems are magnified for developing countries and non-liberal authoritarian regimes.

Judicial Independence in China: Lessons for Global Rule of Law Promotion (Peerenboom 2010) contributes to the emerging literature on the development of legal systems in authoritarian regimes. Judicial independence is often assumed to be impossible in authoritarian regimes, where law plays a limited role in governance and takes a back seat to government policies and ruling party diktats, legal institutions are unable to restrain political power, and judges are faithful servants of the ruling regime. Yet even the most cursory glance at authoritarian regimes reveals that law has played and continues to play a much larger role in authoritarian states than commonly believed (see Moustafa and Ginsburg 2008; Hilbink 2007). Nor is that particularly surprising. Authoritarian regimes turn to the courts for many reasons, including to facilitate economic growth, maintain social order, supervise and discipline local officials, define and enforce the relationships between central and local governments, monitor the boundaries between competing state organs, distance the ruling regime from unpopular decisions, and enhance regime legitimacy at home and abroad.

Conversely, it is also commonly assumed that democratic regimes favor judicial independence. Yet even the most cursory glance at democratic regimes demonstrates that democracy is no guarantor of judicial independence. Many legal systems in developing democracies are plagued by judicial corruption, incompetence and inefficiency. The judiciary is often controlled by the executive, beholden to the political and economic elite, threatened by organized crime, and subject to social pressure from the general public and media.

Clearly much depends on the particular regime, whether authoritarian or democratic. In China, as in other authoritarian regimes, blanket denunciations of the lack of meaningful independence fail to capture a much more complex reality. The courts handle over 11 million cases a year. Judicial independence is not an issue in many cases, nor is the source, likelihood or impact of interference the same across cases.

There is therefore a pressing need to get beyond outdated stereotypes and broad generalizations, to examine a wider range of cases than just the high profile conflicts involving political dissidents so prominently featured in the reports of human rights groups and the Western media, and to overcome the knee-jerk reaction to blame all judicial shortcomings on the Chinese Communist Party and the lack of US-style separation of powers. In short, there is a need for more nuanced studies, new analytical frameworks, and thicker descriptions of the actual issues judges face in their daily lives, the reasons for existing policies, and the responses of the judiciary to such policies. The development of the legal system in China must also be situated within a broader comparative framework of other developing countries, many of which are experiencing similar issues.

In responding to these needs, the authors in *Judicial Independence in China* adopt a variety of perspectives and approaches, reflecting the interdisciplinary, holistic and comparative nature of the development process. There are contributions from legal scholars, political scientists and sociologists. Some authors take an institutional approach while others opt for a historical-cultural approach. Several chapters address directly the debate over globalization and the need to adapt universal norms and practices to local contexts. Some chapters are explicitly comparative, with authors drawing on the experiences of countries in Europe, the Middle East and East Asia. There is also due consideration given to different levels of wealth, and the diverse challenges faced by low, middle and high income countries, as well as to differences in the nature of the political regime. Theoretically, several chapters challenge conventional assumptions about judicial independence. Others develop new analytical frameworks that differentiate among types of cases, sources of interference, and levels of courts. While some chapters focus on urban courts, others focus on rural courts. There are discussions of civil, criminal and administrative cases. Several chapters present data from recent empirical studies, thus complementing and enriching the new and existing theoretical perspectives.

Among the main findings is first that the dominant approach of the rule of law industry of prescribing "international best practices" is inadequate and at times counterproductive. It is now clear in light of the historical development of legal systems in Euro-America, Asia and some countries in Eastern Europe, Latin America and the Middle East that there is no single path toward the rule of law and that rule of law principles are consistent with a wide variety of institutional arrangements, although the implications for policymakers are far from clear. Moreover,

the less than spectacular results of rule of law promotion efforts have called into question the role and influence of foreign actors, as well as the assumption that the best way for developing states to achieve rule of law is to seek to mimic or transplant Euro-American institutions, values and practices.

Although there is no shortage of generic off-the-shelf guidelines for promoting judicial independence, there is a danger of description passing as prescription—that is, of taking institutions in the US or Europe as necessary and sufficient for other countries. Conversely, any deviations from this standard “model” are condemned. Thus, China’s regulatory innovations—including individual case supervision, adjudicative committees, an extensive incentive structure for judges, and, most of all, the role of Party organs in the court system - have all been widely criticized. Yet the wide variation in legal systems calls into question what is needed, as do the poor results when developing countries try to mimic institutions and practices that have evolved over centuries in certain developed countries

These lackluster results strongly suggest that it is time to adopt a new approach to rule of law promotion that focuses less on substantive content and more on methodological issues and the processes of legal reform and development, including the historical and socio-political context. There is a need for a more empirical, less ideological approach to assessing legal reforms in general and issues such as judicial independence or the role of the Party in the judiciary in particular. Judicial independence in China and indeed all countries is far more complicated than is often recognized, and judicial behavior cannot be adequately explained without thick descriptions of the legal arguments, resource constraints and strategic interpretations open to the courts in a particular context. Of course, it may very well be that some of China’s innovations or current practices are on balance problematic. But in many cases we lack the empirical foundation to make a judgment one way or the other.

Second, the many attempts to create independent judiciaries around the globe have demonstrated that the process is holistic, involving interrelated changes in the social, economic, political and legal spheres, and crossing academic disciplines and administrative jurisdictions. Reforms to enhance judicial independence affect not just the judiciary as an institution but substantive and procedural law, the balance of power among state organs as well as social attitudes and practices. An approach focused primarily on the judiciary, or even on state institutions, is therefore not sufficient.

Third, given the lack of resources to solve all problems at once, legal reforms must also be prioritized and sequenced. This is one of the most difficult challenges for developing countries. Although there is growing recognition that judicial independence must be balanced with judicial accountability, the proper balance, and the methods, mechanisms and institutions to achieve it, vary depending on the particular context and the particular challenges.

Fourth, and related, judicial independence is not an end in itself but a means to other goals. There is substantive disagreement in China about how independent the courts should be and whether the courts are the appropriate forum for resolving certain types of disputes, notwithstanding the global trend toward judicialization.

Fifth, while the most pressing issues in low-income countries are typically lack of resources and weak institutions, as countries enter the middle-income stage, political economy issues become more important. What will the role of the judiciary be in policy making? Over what types of cases will courts exercise jurisdiction? On what basis will judges decide them? What will the judiciary’s relations be with other political organs? Will the court be able to determine its own budget? How much say will the judiciary have in promotions and appointments? Although there is widespread support in China for more independent courts from the central government, from judges and other legal complex actors, from investors and business people, and from the broad public, there is also disagreement about all of these issues. Virtually every significant legal reform is and will be opposed by one group or another for a variety of political, institutional, historical, practical and interest-based reasons. In China, as in other successful East Asian countries during their phase of rapid growth under authoritarian regimes, the main emphasis has been on politically safer reforms aimed at promoting judicial efficiency, legal predictability and legal consistency in the economic sector.

Sixth, whether courts are the proper forum for resolving certain disputes will depend on a number of factors, including the level of economic development, the status of the court, the relation of the judiciary to other political organs and the competence and integrity of judges. In China, and perhaps in developing countries more generally, forcing the courts to hear socio-economic cases for which they are unable to provide an effective remedy does not help the parties and undermines trust and confidence in the judiciary. While the long-term solution is to outgrow such problems, in the meantime non-judicial channels for addressing citizen needs must be strengthened. Nevertheless, the courts will still play a role, enforcing minimal standards and reviewing decisions by administrative or government agencies after parties have exhausted their judicial remedies or sought to resolve their disputes through mediation or other political and administrative channels. Over time, the role of the courts may be increased.[1]

In sum, given the diverse nature of the problems, there is no single solution—no silver bullet—that will ensure "meaningful" judicial independence in China, whatever that means, in light of the substantive disagreements about just how independent courts *should* be at this stage of development. Reforms to facilitate judicial independence must be tailored to the particular circumstances. The contested nature of reforms and the need for local knowledge limit the role of foreign actors and explain in part the meager results of the rule of law industry to promote judicial independence. The chapters in *Judicial Independence in China* show that in China there has been progress—often of a two-steps forward, one-step backward nature—in creating a more qualified and authoritative judiciary, able to handle an increasingly wide range of cases independently and competently. Nevertheless, as in other authoritarian regimes, there are likely to be limits on judicial independence in China, most notably in political cases that are perceived to challenge the ruling regime's grip on power.

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[1] For more detailed and comprehensive recommendations, see Randall Peerenboom, "Economic and Social Rights: The Role of Courts in China," http://ssrn.com/abstract=1693613.

Legal History as Political Science

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An independent judiciary is now a familiar foundation of American constitutionalism, yet no one had offered a systematic exegesis of its origins. The eminent historian Gordon S. Wood had been calling for a book about the origins of judicial independence in America for 40 years (e.g., Wood 1969; Wood 1988; Wood 2009). I tried to answer that call with *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787*, which was published in May by Oxford University Press (Gerber 2011).

The title of my book comes from John Adams's *Thoughts on Government*. Adams wrote as follows in his influential 1776 pamphlet:

> The dignity and stability of government in all its branches, the morals of the people, and every blessing of society depend so much upon an upright and skillful administration of justice, that the judicial power ought to be distinct from both the legislative and executive, and independent upon both, that so it may be a check upon both, as both should be checks upon that (Adams 1776).

Adams articulated the political architecture of an independent judiciary in *Thoughts on Government*. The pamphlet—a clarion call for separation of powers written in response to Thomas Paine's recommendation in *Common Sense* that all government power be vested in a unicameral legislature—was influential in a number of state constitutional conventions besides Adams's Massachusetts, especially those in Virginia and North Carolina. Adams recommended that judges be "nominated and appointed by the governor, with the advice and consent of council." However, he argued for more than merely making the judiciary a separate branch of government. He called for stable judicial compensation and tenure so long as judges behave well: "They should hold estates for life in their offices; or, in other words, their commissions should be during good behavior, and their salaries ascertained and established by law." He also insisted that judges who misuse their offices should be impeached by the "house of representatives … before the governor and council" and, "if convicted, should be removed." The U.S. Constitution of 1787 excludes the executive from participating in the impeachment process, but otherwise contains principles identical to those of Adams's proposal.

A Distinct Judicial Power

Adams, the American founding's most sophisticated political theorist, was not writing on a blank slate. Rather, he was building on centuries of political theorizing about government institutions that preceded him. Part I of *A Distinct Judicial Power* examines the political theory on which an independent judiciary was based. Chapter 1 traces the intellectual origins of a distinct judicial power from Aristotle's theory of a mixed constitution to Adams's modifications of Montesquieu. It is a complicated story, but one that needed to be told. Chapter 2 describes the debates during the framing and ratification of the federal Constitution regarding the independence of the federal judiciary.

Part II, the bulk of *A Distinct Judicial Power*, chronicles how each of the original thirteen states and their colonial antecedents treated their respective judiciaries. This portion, presented in thirteen separate chapters, brings together a wealth of information (charters, instructions, statutes, etc.) about the judicial power between 1606 and 1787, and sometimes beyond. In the apt words of legal historian John Phillip Reid, "American histories of judicial independence invariably begin with origins in the federal courts and pay slight or no heed to what was happening in the states. That is a mistake" (Reid 2009). The subtitles to each of the chapters are meant to highlight an intriguing aspect of the particular state's judicial history. For example, the subtitle to the North Carolina chapter is "Governor Thomas Burke and the Origins of Judicial Review," a phrase that credits one of the non-judicial precedents for judicial review I discovered while researching the book.

There were hints of judicial independence in almost all of the colonies—what a historian who read a draft of one of my state chapters colorfully termed a "groping" toward it. For example, in 1657 the burgomasters of New Amsterdam (today, New York City) established separate meeting days for their judicial and legislative responsibilities and also requested permission from Director-General Peter Stuyvesant that these two powers of government be exercised by two different sets of men; and the Fundamental Constitutions for the Province of East New-Jersey of 1683, for which William Penn was at least partially responsible, appeared to award judges life tenure during good behavior. Of course, these were only modest gestures—some more generous than others—and colonial judiciaries remained far from independent. Indeed, by the time the colonies became independent states, only Virginia and North Carolina completely *constitutionalized* the idea of judicial independence in the federal conception of the judicial institution prior to the U.S. Constitution of 1787: the judiciary as a separate branch of government, judges

who enjoy tenure so long as they behave well, and who were to be paid adequate and secure compensation. Not surprisingly, John Adams's *Thoughts on Government* proved dispositive in those states. Adams's home state of Massachusetts was close, but it permitted removal by address rather than solely by impeachment, a concession that Adams likely made to the democratic elements in the state.

Part III, the concluding segment, describes the influence the colonial and early state experiences had on the federal model that followed … and on the nature of the regime itself. I explain how the political theory of an independent judiciary investigated in Part I, and the various experiences of the original thirteen states and their colonial antecedents examined in Part II, culminated in Article III of the U.S. Constitution. I also explain how the principle of judicial independence embodied by Article III made the doctrine of judicial review possible, and committed that doctrine to the protection of individual rights.

The two original states with the strongest precedents for judicial review, Virginia and North Carolina, also were the two with the most independent judiciaries. Surely, this was not a coincidence. Virginia supreme court judge St. George Tucker, for example, emphasized in his famous edition of *Blackstone's Commentaries* the connection between judicial independence and judicial review. He wrote:

> In May, 1778, an act passed in Virginia, to attaint one Josiah Philips, unless he should render himself to justice, within a limited time: he was taken, after the time had expired, and was brought before the general court to receive sentence of execution pursuant to the directions of the act. But the court refused to pass the sentence, and he was put upon his trial, according to the ordinary course of law. —This is a decisive proof of the importance of the separation of powers of government, and of the independence of the judiciary; a dependent judiciary might have executed the law, whilst they execrated the principles upon which it was founded (Trent 1896).

North Carolina Governor Thomas Burke objected in 1781 to a court bill that threatened judicial independence and, hence, in the governor's judgment, judicial review. Governor Burke argued against the court bill in question because "civil liberty would be deprived of its surest defences against the most dangerous usurpations, that is the independency of the Judiciary power and its capacity of protecting Individuals from the operation of Laws unconstitutional and tyrannical" (Burke 1781). The year was 1781, not 1803—the year of *Marbury v. Madison*.

An Interdisciplinary Conversation

A Distinct Judicial Power includes "A Note on Methodology" that precedes the substance of the book. I mention in the Note that I am a lawyer and a political scientist who takes history seriously. The Note was directed primarily to historians, given that Gordon Wood provided the inspiration for the book, and I acknowledge there that historians would probably approach the subject of judicial independence differently than I do. For example, my legal and political science orientation explains my emphasis on texts, where constitutional ideas are memorialized, rather than solely on the surrounding contexts. This is why I invoke 1606, and not 1607, in the subtitle to the book: 1606 was the year in which the first effective Virginia charter was issued; 1607 was when the settlers landed in Jamestown.

With the possible exception of public law political scientists who write in the area of American political development, present day judicial politics scholars likewise approach the subject from a different perspective than mine, emphasizing as most of them do how independence—or the lack thereof—impacts what courts are doing *today*. My book, in contrast, explores the *origins* of the judicial institution that political scientists endeavor to understand best. In short, *A Distinct Judicial Power* is an exercise in legal history as political science, chronicling as it does the genesis of the *idea* of judicial independence that is largely responsible for making the U.S. Supreme Court the most powerful judicial institution in the world.

I have always believed that law professors, historians, and political scientists should write for each other rather than past each other (e.g., Gerber 1995; Gerber 1998; Gerber 1999, 2002), and the decade I spent researching and writing *A Distinct Judicial Power* reaffirms my commitment to interdisciplinary conversations. After all, to write legal history well a scholar must possess the strengths of multiple disciplines: the law professor's ability to grasp the big picture, the historian's attention to detail, and the political scientist's understanding of law as political theory. I closed my Note on Methodology by stating that I hope historians can learn as much from my work as I have from theirs. The same holds true for political scientists.

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Judicial Independence as Political Argument

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My colleagues who contributed to this symposium have already noted the difficulty in defining judicial independence and have raised important questions about its evolution, its relationship to institutional design, and how some institutional arrangements might promote more or less decisional or institutional independence. For many other scholars, judicial independence is set forth as an empirical concept that is sometimes conceived as a scale where the presence of institutional and behavioral patterns represent or imply more or less judicial independence.

Judicial Independence as a Politically Constructed and Contingent Argument

One important aspect of judicial independence that is less explored in the previous symposium contributions—and the political science literature more broadly—is its existence as a political argument. Is judicial independence, at times, a malleable political concept used to support self-interested political purposes (e.g., to protect policy gains secured through the judiciary or judicial actors who have similar policy goals)? What do we make of "judicial independence movements" such as interest groups who lobby to create, support, and protect judicial independence, or courts, against attack? Might those who support judicial independence in one political environment or era later shift interests and activity to support policies that curb the power of courts?

In raising these questions, my interest is not in searching for examples of political hypocrisy, but instead to help scholars better understand judicial independence by considering how the concept is employed as a political argument and invoked by different movements and interests. Recognizing the inherently political nature of judicial independence helps us to consider deeper motivations of efforts to design judicial institutions and to consider how efforts to secure judicial independence (or to attack it) might have shifting political constituencies over time that are based on partisan efforts to secure or protect policy gains. In essence, I raise the question of whether judicial independence is a loaded political term in the sense that it is both politically constructed and contingent on the political environment. A free, fair, independent, and legitimate judiciary may be important enough in constitutional tradition and lore to be a goal itself. However, judicial independence should also be considered as a set of powerful arguments to justify, and protect from attack, the decisions of judges that we agree with. In a later, and different, political environment, these very arguments might be ignored in favor of attacks or court curbing measures when judges make decisions that we disagree with. "Judicial independence," then, is also worth studying as a (temporal) political argument.

One of the most important contributions of political science to the study of law is the idea that judges are heavily motivated in their decisions by their values and attitudes. While there is still debate about how much judicial decision makers are impacted by law and legal tradition, scholars have made a powerful case that policy outcomes can be the primary drivers of judicial decisions (see Segal and Spaeth 2002). With this research backdrop in mind, the importance of judicial independence is evident in the politics of judicial selection and how political actors react to judicial decisions. Who holds a judicial seat or controls the judicial branch matters deeply to political elites and interest groups (see Goldman 1999; Nemachek 2008). Once judges are on the bench and issuing rulings, those who support these decisions have a motivation in continuing (or even expanding) that tradition of law or policy. They may mobilize to protect legal doctrine they support as well as those who fashioned the policy—against efforts to attack the decisions and decision makers. In turn, the opposition counter-mobilizes to minimize the scope of disfavored decisions and their impact through interpretation and by working to blunt, delay, and frustrate their implementation. In other words, those who support decisions are interested in impact since a judicial decision is really only the beginning and decisions must be later interpreted and implemented (see Canon and Johnson 1998). After the decision, the motivation to be involved in continuing the political/legal conversation is quite high for interest groups and political elites whether they support or oppose the decision.

Because the constitutional tradition and institutional arrangement of "judicial independence" is, generally speaking, considered normatively "good", "securing" or "protecting" judicial independence can be used as a powerful argument by political and social movements to support or attack political outcomes. For example, judicial independence can be used to oppose efforts to change judicial institutions, to guard the judiciary or judges (especially those that share the interests of political movements) from "attack," and to support other rational interests such as protecting past, immediate, and future political gains from political challenges. Efforts of executives and legislators to change judicial selection methods in order to increase the opportunity of selecting like minded judges, to pack the courts, to attack the budget of courts, or alter court jurisdiction in response to an unpopular decision, can be countered for several reasons including as threats to the institutional or decisional independence of courts. Stated somewhat differently, these self-interested, ideological arguments can be masked as institutional defense arguments.

As a political argument, judicial independence is not necessarily a "one way" strategy used to protect or entrench judges that interest groups prefer. The language of judicial independence could also be used to argue for judicial restraint or to replace so called "activist" judges. Political interests could argue that the judiciary has gone too far in reaching its policy goals, harming its legitimacy, and thereby inviting court curbing legislation—or

efforts to hold the judiciary accountable. In other words, the argument could be made that judicial independence (understood, as "impartiality," as Tom Clark and Jeff Staton put it) is harmed when judges go "outside" of traditional political and legal boundaries of the judicial role. Therefore, judicial independence language and arguments can be deployed to boost or restrain the power and authority of judges.

Aside from ideological and strategic considerations, those who believe deeply in the mission of courts as organizations may also employ judicial independence language to emphasize the legitimacy of courts and to protect their power. These actors can be judges, judicial administrators, members of the legal community, and interests that often work with or inside of courts. They may also be other allies who form "judicial support" groups. Interestingly, there are a host of groups, very much involved in political reform, that are dedicated in one way or another to improving judicial administration as well as securing judicial independence. Groups like the American Judicature Society, the American Bar Association's Standing Committee on Judicial Independence, the Brennan Center, the Constitution Project, Justice at Stake, and groups like the National Center for State Courts, State Administrative Offices of the Courts, and the United States Administrative Office of Courts have all engaged in direct or indirect work related to the protection of judicial independence (Cox and Hartley 2004). To what extent, how effectively, and to what ends do these groups engage in the use of "judicial independence" language to protect courts and judicial power generally? This might be done to protect the legal tradition of judicial review or for more self interested purposes like protecting the policy making power of judges and attorneys. Cox and Hartley (2004) argue that these groups represent a movement of sorts of their own that work together to protect courts when attacked by the other branches of government. To what extent do these groups lobby on behalf of court needs or to repel efforts to reign in courts—when judges or court official are less comfortable doing so themselves?

Judicial rules and norms suggest that judges should not behave in outwardly political ways. By doing so, they may risk the appearance of bias and undermine norms of judicial independence. Judges are arguably conservative in how they enter the political process and in how they respond to political attacks (Hartley 2009). One interesting question, then, is how courts mobilize support when attacked if they fear appearing political? Might judges and judiciaries turn to other groups to lobby for them and to respond to perceived attacks on independence? Judicial independence groups and others who can effectively employ judicial independence arguments may, in effect, lobby for them as surrogates (Cox and Hartley 2004; Hartley 2009).

Finally, it would be interesting to know if judicial independence arguments are persuasive, that is, the conditions under which they work. Are political movements to protect the independence of the judiciary effective in the face of powerful political majorities bent on undoing a judicial ruling? Answering these questions might help us better understand the legitimacy of courts. When does making political arguments and appealing to the value of autonomous courts shore up support for the legal institutions and norms that are the foundation of independent judiciaries?

Future Research

From my perspective, what is interesting about judicial independence is why it matters and to whom it matters most. We need to learn more about how shifting political contexts influence those who make judicial independence arguments, how these arguments are made, when they are made, and why they are made. As composition of the judiciary shifts, so might these arguments and who is making them. It would make sense, for example, for one political party or ideology to argue strongly for judicial independence to support policy change made by the judiciary and later strongly support court curbing measures when a judiciary of opposite political leaning makes so called "activist" decisions. Looking back over time, we see partisan efforts of Republicans to block judicial appointments as too liberal met with arguments by Democrats that this type of politics harms the independence of the branch. The partisan arguments about courts are likely to shift over time as the political environment shifts. For example, might Republicans make judicial independence arguments when Democrats block Republican backed judges? Might Democrats say little about judicial independence when they are doing the blocking or court curbing? Scholars should systematically examine and categorize various forms of court curbing and examine the use of judicial independence arguments as a defense against them. If evident, the shifts posited here raise questions about the very notion and value of judicial independence. They help underscore just how politically charged so called "nonpartisan" arguments about judicial independence can actually be.

On the other hand, we should also consider arguments about the extent to which "more" judicial

independence serves as a valuable end goal that might protect individual and human rights versus majorities. These arguments may remain consistent over time when linked to core, rights-oriented values that are often in conflict with majorities (e.g., those organizations committed to freedom to practice religion). Ginsburg (2003) suggests that the pursuit of judicial review in politically independent courts is advanced strategically by political interests who cannot achieve policy goals through the electoral process. Judicial review, coupled with independent judicial power, provides policy insurance to electoral "losers."

Conclusion

To some scholars, judicial independence suggests theory-driven, hypothetical correlations between increased independence and human rights, economic development, and the protection of individual liberties versus majorities. Normatively, the belief that there *are* high correlations between these variables leads to strong political arguments for protecting and increasing judicial independence. But, as I have tried to suggest in this essay, judicial independence may also be used more selectively to support or attack various policies. The purported foundation for stable, independent judicial branches may actually be an ever shifting and contested terrain of political argument. Surrounding our attempts to discern what arrangements might guard judicial power (and thereby promote the ability of judges to make unpopular, counter-majoritarian decisions about rights and liberties without fear of reprisal) are strong normative arguments employed by political actors that "more" judicial independence is somehow better than less—or vice versa. In other cases, the term might be used by political actors to guard the composition of a court that is deemed to be advantageous to their political interests—only to abandon such rhetoric and support for independence when a court does not.

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BOOKS TO WATCH FOR

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Susan Burgess (Ohio University) has published *The New York Times on Gay and Lesbian Issues* (Congressional Quarterly Press, 978-1-604-26593-4). "Burgess showcases relevant news stories, editorials, and letters to the editor to present the major political, social, and cultural issues that have affected gays and lesbians in the U.S. over the past 150 years. This book includes twelve chapters covering topics such as the Stonewall Uprising, gays in the military, youth and education, and AIDS. Each chapter features an overview of the issue at hand, introduction to each of the articles selected, and profiles of key events and personalities. This unique title allows students and researchers access to authoritative and engaging information, giving historical context to contemporary issues."

George C. Christie (Duke University) has published *Philosopher Kings?: The Adjudication of Conflicting Human Rights and Social Values* (Oxford University Press, 978-0-195-34115-7). The book "examines the attempts by courts to sort out conflicts involving freedom of expression, including religious expression, on the one hand, and rights to privacy and other important social values on the other. It approaches the subject from a comparative perspective, using principally cases decided by European and United States courts. A significant part of this book analyzes conflicts between freedom of expression and the right to privacy. In a world in which, freedom of expression and privacy are said to be of equal value, the book explores whether it is possible to develop, through case-by-case adjudication, a legal regime which can give clear direction as to what expression is or is not permitted. Otherwise, if such a regime proves impossible, in the guise of recognizing the equal value of expression and privacy, privacy may become de facto the preferred value."

Sean Farhang (University of California Berkeley) recently published *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton University Press, 978-0-691-14381-1), which "shows how government legislation created the nation's reliance upon private litigation, and investigates why Congress would choose to mobilize, through statutory design, private lawsuits to implement federal statutes. Farhang argues that Congress deliberately cultivates such private lawsuits partly as a means of enforcing its will over the resistance of opposing presidents. Using data from many policy areas spanning the twentieth century, and historical analysis focused on civil rights, *The Litigation State* investigates how American political institutions shape the strategic design of legislation to mobilize private lawsuits for policy implementation."

George H. Gadbois, Jr. (University of Kentucky, retired) published recently *Judges of the Supreme Court of India: 1950-1989* (Oxford University Press, 978-0-198-07061-0). This "study presents biographies of 93 judges of the Supreme Court of India who served the Court from its inception in 1950 to 1989... The essays embrace the entire lives of these judges and a complete list of each judge's publications, including the official reports prepared by him. The work examines the criteria for selection of judges, its political context, and the relationship between the Chief Justice of India and the executive. Analyzing the socio-economic background of the judges with respect to factors such as father's occupation, caste, economic status, religion, education, professional career, participation in politics, age, tenure, etc., this is a detailed study of the judges who served the court for a period of around forty years. This first-of-its-kind book provides a hands-on account of the first forty years of the Supreme Court of India."

Scott Gerber's (Ohio Northern University) most recent book is *A Distinct Judicial Power: The Origins of an Independent Judiciary, 1606-1787* (Oxford University Press, 978-0-199-76587-4). "Gerber provides the first comprehensive critical analysis of the origins of judicial independence in the United States. Part I examines the political theory of an independent judiciary. Part II, the bulk of the book, chronicles how each of the original thirteen states and their colonial antecedents treated their respective judiciaries. Part III, the concluding segment, explores the

influence the colonial and early state experiences had on the federal model that followed and on the nature of the regime itself. It explains how the political theory of an independent judiciary examined in Part I, and the various experiences of the original thirteen states and their colonial antecedents chronicled in Part II, culminated in Article III of the U.S. Constitution."

Ran Hirschl (University of Toronto), in his newest book *Constitutional Theocracy* (Harvard University Press, 978-0-674-04819-5), undertakes a rigorous comparative analysis of religion-and-state jurisprudence from dozens of countries worldwide to explore the evolving role of constitutional law and courts in a non-secularist world. Counter-intuitively, Hirschl argues that the constitutional enshrinement of religion is a rational, prudent strategy that allows opponents of theocratic governance to talk the religious talk without walking most of what they regard as theocracy's unappealing, costly walk. Many of the jurisdictional, enforcement, and cooptation advantages that gave religious legal regimes an edge in the pre-modern era, are now aiding the modern state and its laws in its effort to contain religion. The "constitutional" in a constitutional theocracy thus fulfills the same restricting function it carries out in a constitutional democracy: it brings theocratic governance under check and assigns to constitutional law and courts the task of a bulwark against the threat of radical religion.

Goodwin Liu (University of California, Berkeley), Pamela S. Karlan (Stanford University) and Christopher Schroeder (Duke University) have published *Keeping Faith with the Constitution* (Oxford University Press, 978-0-199-73877-9). "They describe their approach as 'constitutional fidelity'—not to how the Framers would have applied the Constitution, but to the text and principles of the Constitution itself. The original understanding of the text is one source of interpretation, but not the only one; to preserve the meaning and authority of the document, to keep it vital, applications of the Constitution must be shaped by precedent, historical experience, practical consequence, and societal change. The authors range across the history of constitutional interpretation to show how this approach has been the source of our greatest advances, from *Brown v. Board of Education* to the New Deal, from *Miranda* to the expansion of women's rights. They delve into the complexities of voting rights, the malapportionment of legislative districts, speech freedoms, civil liberties and the War on Terror, and the evolution of checks and balances."

Kevin McMahon's (Trinity College) forthcoming book is *Nixon's Court: His Challenge to Judicial Liberalism and Its Political Consequences* (University of Chicago Press, 978-0-226-56119-6). "Most analysts have deemed Richard Nixon's challenge to the judicial liberalism of the Warren Supreme Court a failure—'a counterrevolution that wasn't.' *Nixon's Court* offers an alternative assessment. McMahon reveals a Nixon whose public rhetoric was more conservative than his administration's actions and whose policy towards the Court was more subtle than previously recognized. Viewing Nixon's judicial strategy as part political and part legal, McMahon argues that Nixon succeeded substantially on both counts."

Bruce Peabody, ed. (Fairleigh Dickinson University) has published *The Politics of Judicial Independence: Courts, Politics, and the Public* (Johns Hopkins University Press, 978-0-801-89772-6). The judiciary in the United States has been subject in recent years to increasingly vocal, aggressive criticism by media members, activists, and public officials at the federal, state, and local level. This collection probes whether these attacks, as well as proposals for reform, represent threats to judicial independence or the normal, even healthy, operation of our political system. In addressing this central question, the volume integrates new scholarship, current events, and the perennial concerns of political science and law.

David Robertson (St. Hugh's College at the University of Oxford) has published *The Judge as Political Theorist: Contemporary Constitutional Review* (Princeton University Press, 978-0-691-14404-7). The book "examines opinions by constitutional courts in liberal democracies to better understand the logic and nature of constitutional review. [Robertson] argues that the constitutional judge's role is nothing like that of the legislator or chief executive, or even the ordinary judge. Rather, constitutional judges spell out to society the implications—on the ground—of the moral and practical commitments embodied in the nation's constitution. Constitutional review, in other words, is a form of applied political theory. Robertson takes an in-depth look at constitutional decision making in Germany, France, the Czech Republic, Poland, Hungary, Canada, and South Africa, with comparisons throughout to the United States, where constitutional review originated."

Mitchel A. Sollenberger (University of Michigan-Dearborn) has published *Judicial Appointments and Democratic Controls* (Carolina Academic Press, 978-1-59460-785-1). At various points in time, Congress and the president

have battled over how to exercise joined responsibility in making judicial appointments. Some argue that the Founding Fathers would have found the increased tension between the branches in recent decades regrettable as it has led to political posturing and too great a focus on ideological concerns. Sollenberger disagrees and believes that the Framers' intentions are still well maintained in the modern judicial appointment process. He contends that Congress and the president have been guided by republican values and structural protections intended by the Constitution. In presenting his thesis, Sollenberger delves into all stages of the judicial appointment process analyzing Congress's power to create and abolish offices, place qualifications on office holding, give advice and recommend candidates, and generally provide detailed scrutiny and review of all judicial nominations.

ANNOUNCEMENTS

CORRECTION: In the Winter 2011 issue of the *Newsletter*, we incorrectly identified Joyce Baugh's institutional affiliation. It should be *Central Michigan University*. Our apologies to Professor Baugh for the error.

Announcement from the Law School Admissions Council (LSAC)

The Law School Admissions Council (LSAC) Research Grant Program funds research on a wide variety of topics related to the mission of the LSAC. Specifically included in the program's scope are projects investigating precursors to legal training, selection into law schools, legal education, and the legal profession. To be eligible for funding, a research project must inform either the process of selecting law students or legal education itself in a demonstrable way.

The program welcomes proposals for research proceeding from any of a variety of methodologies, a potentially broad range of topics, and varying time frames. Proposals will be judged on the importance of the questions addressed, their relevance to the mission of the LSAC, the quality of the research designs, and the capacity of the researchers to carry out the project.

Application deadlines are February 1 and September 1.

For more details, go to http://www.lsacnet.org/LSACResources/Grants/lsac-legal-education-grant-program.asp

Announcement from James Gibson, Washington University in St. Louis

The Weidenbaum Center of Washington University in St. Louis announces the creation of The American Panel Survey (TAPS). TAPS is five-year panel survey in which a national probability sample of about 2000 panelists will be reinterviewed online each month, beginning in the Fall of 2011.

Scholars are welcome to propose questionnaire modules to be placed on TAPS, including survey experiments. Details on the panel, pricing, and application process are available at
http://wc.wustl.edu/node/511

TAPS is co-directed by James L. Gibson and Steven S. Smith, both professors of political science at Washington University in St. Louis.

Announcement from Jerry Goldman, Northwestern University and the Oyez Project

Please note the following apps related to constitutional law and SCOTUS, available for smart devices such as iPhone, iPad, and Android-based phones.

PocketJustice: This app focuses on constitutional law. It provides abstracts of the most important and popular cases along with searchable audio in many cases. We have added location data and a voting widget. The basic version ("Top100") is free. The entire corpus of 600+ cases is less than the cost of two lattes. There's an iPad version (PocketJustice HD) with much more functionality. It costs a few bucks more. All funds support the Oyez Project's app development effort.

OyezToday: This app focuses solely on the current SCOTUS docket. Every grant, argument, and decision will be available on your device within minutes of release. All versions (iPhone, iPad, Android) are FREE thanks to support from IIT Chicago-Kent College of Law. Abstracts, voting data, searchable audio, and opinions. In release version 1.3, you can create a clip of an argument (either a segment or a turn) and repurpose it for a presentation or document. OyezToday offers users five key functions: flip, tap, listen, clip, share.