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# The State of the Onion: Peeling Back the Layers of America's Ambivalence Toward Judicial Independence

CHARLES GARDNER GEYH\*

One hundred years ago Roscoe Pound addressed the American Bar Association on the sources of dissatisfaction with the administration of justice.<sup>1</sup> Among the sources of dissatisfaction that Pound identified in his speech was one he characterized as inherent in any legal system: popular impatience with restraint. As he explained:

Law involves restraint and regulation, with the sheriff and his posse in the background to enforce it. But, however necessary and salutary this restraint, men have never been reconciled to it entirely. The very fact that it is a compromise between the individual and his fellows makes the individual, who must abate some part of his activities in the interest of his fellows, more or less restive.<sup>2</sup>

If the public is predisposed to resent litigation outcomes that impose unwelcome restraints, it begs the question of whether the public really wants an independent judiciary in the first place, or would prefer judges who are subject to popular control and will render the decisions that the public favors. The question of whether the public really wants an independent judiciary has two parts: What is an independent judiciary? And does the public want one? The first part seemingly invites a protracted disquisition on the meaning of judicial independence, but that would be unnecessarily digressive. For purposes here, it will suffice to isolate, from the many facets of judicial independence that scholars have identified, those of central relevance to the public judicial independence debate. With those meanings in hand, I will then turn to the second part of the question and peel back the layers of the public's views on judicial independence, like an onion, to reveal the nature and extent of the public's ambivalence.

## I. WHAT IS JUDICIAL INDEPENDENCE?

Chief Justice William Rehnquist once likened judicial independence to "crown jewels."<sup>3</sup> His point: judicial independence is precious and intrinsically valuable—a sentiment that many court defenders express when responding to court critics in the media. The analogy to jewels likewise underscores the multifaceted character of judicial independence. Scholars, judges, and bar organizations have sought to cut the judicial independence stone in myriad ways.<sup>4</sup> In the context of a thought piece on whether the public supports judicial independence, these varied stabs at conceptualizing judicial independence are germane only insofar as they intersect with issues that have animated public concern. The key is to isolate which are most relevant to the public's conception of judicial independence.

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1. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 REP. A.B.A. 395 (1906).

2. *Id.* at 402.

3. William H. Rehnquist, *Keynote Address*, 46 AM. U. L. REV. 267, 274 (1996).

4. See *infra* notes 5–20 and accompanying text.

*A. Decisional and Institutional Independence*

One widely employed means to conceptualize judicial independence has been to differentiate between judges as individual decision makers and judges collectively as a branch.<sup>5</sup> “Decisional independence” relates to an individual judge’s capacity to make decisions without external interference, while “institutional independence” relates to the judges’ collective capacity as a branch to regulate themselves without institutional encroachment from the other branches of government.<sup>6</sup> Thus, efforts to coerce a judge into deciding X case in Y way implicate her decisional independence, while legislative attempts to micromanage the judiciary’s internal administration implicate its institutional independence.

To the extent that judicial independence is a matter of public concern, it is a matter that has come to the public’s attention in the context of specific cases: Representatives Tom DeLay and Steve King threatening federal judges with budget cuts and disestablishment of their offices after the Eleventh Circuit denied a petition to reinsert Teri Schiavo’s feeding tube;<sup>7</sup> Tennessee voters ousting Justice Penny White from office on account of her vote in a death penalty case;<sup>8</sup> President Clinton and Presidential candidate Dole threatening the tenure of District Judge Harold Baer after he suppressed evidence in a drug case;<sup>9</sup> and the House passing legislation to strip federal courts of jurisdiction to hear pledge of allegiance cases after the Ninth Circuit invalidated the “under God” clause.<sup>10</sup> These are matters of “decisional independence.” Although the press occasionally reports on issues implicating institutional independence, for example, when Chief Justices Rehnquist and Roberts have spoken on the subject of judicial salaries and their relationship to the strength and independence of the judiciary as a branch, such reports do not generate the same kind of “buzz” and are largely ignored.<sup>11</sup> Accordingly, when it comes to assessing public perception, the focus needs to be on the decisional side of the equation.

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5. Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 386 (2006) (“[I]t is common to distinguish decisional independence from institutional and other components of judicial independence.”) (emphasis omitted).

6. AM. BAR ASS’N, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, at iii (1997).

7. Carl Hulse & David D. Kirkpatrick, *Even Death Does Not Quiet Harsh Political Fight*, N.Y. TIMES, Apr. 1, 2005, at A1.

8. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decision?*, 72 N.Y.U. L. REV. 308, 314–15 (1997).

9. AM. BAR ASS’N, *supra* note 6, at 15–16.

10. Stephen Dinan, *House Targets Judicial “Errors” with a New Strategy: Votes to Stop Enforcement of Rulings on Pledge, Posting*, WASH. TIMES, July 29, 2003, at A1.

11. See, e.g., *A Judge’s Pay: Chief Justice John Roberts Echoes a Plea Made by New York State Chief Judge Kaye*, ALBANY TIMES UNION, Jan. 9, 2006, at A6 (reporting on Chief Justice Robert’s efforts to energize public support for increasing judicial salaries, which Chief Justice Rehnquist had concluded was like “beating a dead horse”).

*B. Doctrinal, Customary, and Functional Independence*

Another way to understand judicial independence that I have advocated in my writing is with reference to the sources from which the judiciary's independence is derived, be it constitutional text or judicial decisions ("doctrinal independence"); institutional customs, conventions, or norms that delineate what the scope of the judiciary's autonomy should be ("customary independence"); or a lack of political branch interference or regulation attributable to simple inaction or indifference ("functional independence").<sup>12</sup> Thus, a federal judge's tenure during good behavior is explicitly guaranteed by Article III of the U.S. Constitution and is thus a matter of doctrinal independence; removing judges by impeachment for making unpopular decisions is prohibited neither by constitutional text nor Supreme Court decision, but is effectively barred by a tradition of respect for the judiciary's autonomy, and is thus a matter of customary independence; and in those states that have not perceived a need to establish intermediate appellate courts, the trial judge's freedom from control by such courts is a matter of functional independence.

As a practical matter, doctrinal independence is at issue only infrequently;<sup>13</sup> most court-curbing measures—to impeach rogue judges, slash judicial budgets, strip subject matter jurisdiction, disestablish judicial offices, or punish judicial incumbents at the ballot box—are within the constitutional authority of legislatures or voters to implement. More typically, those who call court-curbing measures a threat to independence are arguing that the measures at issue undermine less formal judicial independence norms, i.e. customary independence, while court-curbing proponents are saying either that the judicial independence norms at issue have perpetuated bad public policy and should be abandoned, or that the independence at issue in a specific case is functional only and impedes judicial accountability. At the level of debate as it plays out in the media, such distinctions may be too subtle to attract public attention: the issue is simply whether controlling judges in a particular way is a good idea or a bad one. Still, whether proposals to exert greater control over judges are well received or not may turn, at least implicitly, on whether such proposals are thought to disregard cherished norms, abandon crumbling norms, or make a simple adjustment to the public policy du jour.

*C. Relational and Behavioral Independence*

Peter Russell has distinguished between the structures that facilitate a judge's independence in relation to others ("relational independence"), and whether the judge does in fact behave independently of others ("behavioral independence").<sup>14</sup> To

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12. Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 162, 162–63 (Stephen B. Burbank & Barry Friedman eds., 2002).

13. One illustrative exception is a bill introduced by Representative Mike Sodrel, which proposed not only to strip the federal courts of jurisdiction to hear future cases challenging prayer in state legislatures, but to disregard a judicial order, thereby arguably encroaching on judicial power and violating the separation of powers. Bill Ruthhart, *Sodrel: Prayer Measure Fights "Judicial Activism,"* INDIANAPOLIS STAR, Feb. 22, 2006, at B6.

14. Peter H. Russell, *Toward a General Theory of Judicial Independence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY 1, 6–9 (Peter H. Russell & David M. O'Brien eds., 2001).

illustrate, if a judge's continuation in office is subject to legislative whim, she lacks relational independence, and if, because of her relational dependence on the legislature, she makes decisions to appease the legislature, she exhibits a lack of behavioral independence as well. One would ordinarily expect relational and behavioral independence to go hand-in-hand, but that is not necessarily the case: some judges may, despite relational dependence on another branch, manifest behavioral independence by rendering decisions that disappoint the branch of government to which they are beholden; conversely, other judges with structural autonomy may nonetheless bend their decisions out of deference to the desires of another branch, so displaying behavioral dependence despite relational independence.

As a general matter, in public discussion, the conceptual distinction between relational and behavioral independence is blurred by a popular presumption that the two are joined at the hip: relationally dependent judges will issue behaviorally dependent rulings to appease the public or political branches to which they are beholden, while relationally independent judges will render behaviorally independent rulings. Thus, if judges are subject to impeachment and removal for ruling in particular ways, the assumption of those who support *and* oppose such a measure is that judges will stop ruling in those ways (with one side saying that is a good thing, and the other saying it is bad).<sup>15</sup>

Even if the distinction between relational and behavioral independence is not central to popular conceptions of judicial independence, it raises an underlying question that is prominent in the public's mind: to the extent that relational independence begets behavioral independence, does behavioral independence beget lawlessness—judges who abuse their independence by disregarding the law and substituting their own personal or political preferences without fear of reprisal? If so, is the solution to impose greater relational dependence, as a means to encourage greater behavioral dependence and thereby give policy-makers the leverage they need to curb abuses? These questions are at the heart of the distinction discussed below, between case and rule independence.

#### *D. Case and Rule Independence*

Professor Kim Scheppele has drawn a normative distinction between a judge's independence of the "case" she is to decide, and her independence of the "rule" she is to apply.<sup>16</sup> We want the former: judges should be "free to follow their best professional sense of what the law requires" in every case, uninfluenced by personal bias, or pressure from government officials or the general public.<sup>17</sup> On the other hand, we want judges who are accountable to and *not* independent of the rules they are sworn to uphold. Professor Pamela Karlan puts a similar point in a different way, when she distinguishes between independence *from* and independence *to*. Whereas we want

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15. AM. BAR ASS'N, *supra* note 6, at 15 (quoting critics for proposition that impeachment threats will serve as a deterrent); *id.* at 47–48 (criticizing threats of impeachment as "calculated to interfere with . . . decision-making independence").

16. Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 12, at 227, 230–31.

17. *Id.* at 230.

judges who are independent *from* external control, we do not want judges who are independent *to* disregard the law and pursue their own goals.<sup>18</sup>

This distinction occupies a front seat in public discussion of judicial independence issues. Court defenders emphasize the need for judicial independence to insulate judges from interference with their impartial assessment of the facts and law in politically charged cases.<sup>19</sup> Conversely, court critics decry “activist” judges who are so independent as to be unaccountable and who are thereby enabled to disregard the law they have sworn to uphold and decide politically charged cases with reference to their political and personal views.<sup>20</sup>

## II. DO AMERICANS SUPPORT JUDICIAL INDEPENDENCE?

Roughly stated, then, judicial independence as it is commonly understood (or at least as it is commonly described in media reports) concerns a judge’s freedom from external sources of interference with her capacity to decide cases according to her best assessment of the law and facts, as defined and limited by our constitutional traditions. Determining whether the public supports judicial independence, so understood, requires us to peel back the public’s reaction to judicial independence layer by layer, like an onion, to reveal an almost bi-polar ambivalence.

### A. *The First Layer—Judicial Independence as a Platitude*

The outermost, paper-thin layer of the judicial independence onion is a platitude. Judicial independence is, as Chief Justice Rehnquist put it, a “crown jewel.”<sup>21</sup> L. Ralph Mecham, the Director of the Administrative Office of U.S. Courts, called it “the cornerstone of a free society and the rule of law,”<sup>22</sup> while American Bar Association President Alfred P. Carlton effused: “Judicial independence is precious to our way of life. Judicial independence is a fundamental principle upon which our country was founded and for which Americans have died, not only at Yorktown and Valley Forge, but at the Alamo, Iwo Jima, Inchon, Khe Sanh, and, now, Mazar-E-Sharif.”<sup>23</sup> As with democracy, rainbows, and free checking, what is not to like about judicial independence? If it was good enough for James Madison and his fellow founders, it is good enough for us, and to argue otherwise is almost un-American. Of *course* Americans want judicial independence.

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18. Pamela S. Karlan, *Two Concepts of Judicial Independence*, 72 S. CAL. L. REV. 535, 535–36 (1999).

19. See, e.g., AM. BAR ASS’N, *supra* note 6, at vi; TASK FORCES OF CITIZENS FOR INDEP. COURTS, *UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS* 147–53 (2000).

20. See, for example, discussion quoting proponents of court-curbing measures in CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA’S JUDICIAL SYSTEM* 266–73 (2006).

21. Rehnquist, *supra* note 3, at 274.

22. L. Ralph Mecham, *Introduction to Mercer Law Review Symposium on Federal Judicial Independence*, 46 MERCER L. REV. 637, 638 (1995).

23. Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URB. L.J. 835, 837 (2002) (footnote call numbers omitted).

### *B. The Second Layer—Naked Self-Interest*

Beneath the superficial platitudes lies a reflexive spasm of antipathy toward judicial independence. When it comes to deciding whose interpretation of the Constitution will prevail, who will go to prison, who will recover damages, and whose rights will be vindicated, we want our side to win. We want a judiciary that will give us the outcomes we seek, and *independent* judges could give us the wrong result. Therefore, we want a judiciary that we can control. The more-rabid court critics who seek to control judges at every turn are often accused of adopting this approach to judicial independence by excoriating as “activist” any judge who issues rulings they dislike.<sup>24</sup>

When Roscoe Pound spoke in terms of impatience with restraint, his focus was here, on members of the public who reflexively object to decisions with which they disagree. In other words, in litigation there are always going to be losers and because the losers are going to be disgruntled, there will be a level of dissatisfaction with the courts inherent in any legal system. If the losers are angry and numerous enough, they become a force with which to reckon, as was true of the progressives in Pound’s day.<sup>25</sup> Similarly, today we see that 56% of the public surveyed in a poll conducted in 2005 reported their agreement with the proposition that court opinions should be in line with voters’ values and that judges who repeatedly ignored those values should be impeached.<sup>26</sup>

### *C. The Third Layer—Enlightened Self-Interest*

Beneath the layer of naked self-interest lies enlightened self-interest, which adopts a more nuanced and ultimately more sympathetic view of judicial independence. Self-interested litigants and court observers understand that litigation, at least at the appellate level, is typically a zero-sum game: for every winner, there is a loser. In a perfect world, you would prefer a winning result every time, but you are well aware that your opponent feels likewise. If judges are subject to external intimidation or influence, it creates an opportunity for you to finagle a favorable outcome, but it furnishes your opponent with the same opportunity. If you cannot be certain of your capacity to out-finagle your opponent, an independent judge—one who cannot be controlled by either side—is clearly preferable to one who is under the thumb of your adversary. Thus, for self-interested court observers enlightened by the realization that a bare-knuckle brawl for political control of judicial decision making is a fight they

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24. See, e.g., Tony Mauro, *K Street Rough Rider: Kermit Roosevelt III Looks at Law Firm Life, the Courts, and Washington*, LEGAL TIMES, June 26, 2006, at 38 (“When a commentator accuses the Court of ‘judicial activism’ [Professor Roosevelt] said, it usually means only that the commentator did not like the result.”); Mary Alice Robbins, *Bar Meeting Debate Centers on Definition of Judicial Activism*, TEX. LAW., June 26, 2006, at 5 (“To the common man, judicial activism refers to any decision you personally don’t like.” (quoting Emily Bazelon, Senior Editor, Slate, *Whose Ox Gets Gored?*, Debate at the State Bar of Texas Annual Meeting (June 16, 2006))).

25. See generally WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 (1994) (discussing anti-court sentiment during the Populist-Progressive era).

26. Martha Neil, *Half of U.S. Sees “Judicial Activism Crisis,”* A.B.A. J., Sept. 30, 2005, available at <http://www.abanet.org/journal/redesign/s30survey.html>.

could as easily lose as win, an independent judiciary becomes an attractive middle ground.

This sentiment underlying the enlightened self-interest perspective is nicely captured in the widely used metaphor of judge as umpire or referee. In 1998, Justice John Paul Stevens told a Chicago audience that:

The thousands and thousands of Cub fans who have repeatedly visited Wrigley [F]ield undoubtedly know much more about the rules of baseball and the ability of National League umpires to apply them fairly than most voters know about the law and the qualifications of judges of the Circuit Court of Cook County. Nevertheless, I think you would agree that the home-team fans should not have the opportunity to hire and fire umpires.<sup>27</sup>

Minnesota Justice Alan Page made the same point in 2006, when commenting on the potential for campaign contributions to undermine judicial independence: “We wouldn’t want umpires with a stated interest in the outcome of the contest.”<sup>28</sup> In baseball, the consummate zero-sum game, enlightened, self-interested adversaries voluntarily subject themselves to the judgment of an independent umpire, whose decisions they agree to respect. And the same is true, this popular argument goes, for judges: “The first lesson we teach our children when they enter competitive sports is to respect the referee, even if we think he might have made the wrong call,” Senator James Jeffords declared on the Senate floor in 2005, adding that “[i]f our children can understand this, why can’t our political leaders? We shouldn’t be throwing rhetorical hand grenades.”<sup>29</sup> Consistent with this view of judge as umpire, 73% of the public surveyed in 2005 reported their agreement with the statement that “judges should be shielded from outside pressure and allowed to make their decisions based on their own independent reading of the law.”<sup>30</sup> In another survey conducted that same year, 83% felt that judges should be protected from “political interference” by Congress.<sup>31</sup>

#### *D. The Fourth Layer—Skepticism of Judicial Motives*

The operating assumption of those who, in the spirit of enlightened self-interest, favor decision making by independent judges is that judges insulated from external sources of intimidation will follow the law. As Chief Justice Roberts explained during

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27. Molly McDonough, *U.S. Justice No Fan of Picking Judges by Ballot*, CHI. DAILY L. BULL., Sept. 17, 1998, at 1.

28. Michael Krieger, *Judiciary Post-‘White’ Discussed*, LEGAL LEDGER (St. Paul, Minn.), July 6, 2006.

29. Carl Hulse & David D. Kirkpatrick, *DeLay Says Federal Judiciary Has “Run Amok,” Adding Congress Is Partly to Blame*, N.Y. TIMES, Apr. 8, 2005, at A21.

30. CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., JUDGES AND THE AMERICAN PUBLIC’S VIEW OF THEM: RESULTS OF THE MAXWELL POLL 3 (2005), <http://www.maxwell.syr.edu/news/MaxwellPoll.pdf> [hereinafter MAXWELL POLL].

31. BELDEN RUSSONELLO & STEWART, ACCESS TO JUSTICE AND CONSTITUTIONAL RIGHTS VERSUS POLITICAL PRESSURE: DEFINING THE BATTLE FOR THE COURTS, *in* JUSTICE AT STAKE CAMPAIGN, SPEAK TO AMERICAN VALUES: A HANDBOOK FOR WINNING THE DEBATE FOR FAIR AND IMPARTIAL COURTS 13, 17 (2006), available at <http://www.justiceatstake.org/files/SpeaktoAmericasValues2.pdf>.



his confirmation testimony with yet another baseball analogy: "Judges are like umpires. Umpires don't make the rules; they apply them."<sup>32</sup> Beneath enlightened self-interest, however, lies a layer of public skepticism, animated by the concern that independent judges abuse their independence by disregarding the law and deciding cases on the basis of their own personal and political views. As one editorial writer put it, "Sen. James M. Jeffords . . . wants us to respect judges just as we 'respect the referee' in competitive sports . . . [b]ut the fans would never tolerate a baseball umpire changing the rules of the game by calling a batter out after two strikes."<sup>33</sup>

Skeptics, then, distrust judges, and distrust breeds antipathy toward judicial independence and desire for greater control. "Judicial independence does not equal judicial supremacy," declared House Majority leader Tom DeLay in 2005.<sup>34</sup> The judiciary has "run amok," he said, having "overstepped its authority on countless occasions," adding that Congress must "reassert [its] constitutional authority over the courts" to "make sure the judges administer their responsibilities."<sup>35</sup> Consistent with DeLay's sentiments, a poll conducted in 2005 revealed that 56% of those surveyed shared the view that judicial activism "seems to have reached a crisis" because "judges routinely overrule the will of the people, invent new rights, and ignore traditional morality."<sup>36</sup> Forty-six percent agreed with the statement that judges are "arrogant, out of control, and unaccountable," as compared with only 38% that disagreed,<sup>37</sup> while a 2001 survey found that 76% thought the term "political" described judges "well or very well."<sup>38</sup> In another survey from 2005, 56% of respondents agreed with the statement that "judges always say that their decisions are based on the law and the constitution but in many cases judges are really basing their decisions on their own personal beliefs."<sup>39</sup>

The thickness of this fourth layer of skepticism has varied with the age. Every generation since the nation was founded has witnessed an upsurge of court-directed hostility accompanied by calls to curb judges for issuing rulings that allegedly usurped political power:

When the nation was barely a decade old, President Thomas Jefferson and his cohort sought to impeach unpopular Federalist judges, whom Jeffersonians accused of bending the law to their will.<sup>40</sup>

A generation later, President Andrew Jackson challenged the authority of the Marshall Court to trump executive branch interpretations of the Constitution, and

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32. David G. Savage, *Roberts Sees Role as Judicial "Umpire,"* L.A. TIMES, Sept. 13, 2005, at 1.

33. Phyllis Schlafly, Editorial, *Liberals Rally Around Judicial Supremacy*, INTELLIGENCER (Doylestown, Pa.), Apr. 27, 2005, at 15A.

34. Hulse & Kirkpatrick, *supra* note 29.

35. *Id.*

36. Neil, *supra* note 26.

37. *Id.*

38. JUSTICE AT STAKE CAMPAIGN, NATIONAL SURVEY OF AMERICAN VOTERS 5 (2001), available at <http://faircourts.org/files/JASNationalSurveyResults.pdf> (survey conducted by Greenberg, Quinlan, Rosner Research, Inc.).

39. MAXWELL POLL, *supra* note 30, at 3.

40. GEYH, *supra* note 20, at 53–54.

Georgia openly defied as illegitimate the authority of the U.S. Supreme Court to bind it in habeas corpus proceedings.<sup>41</sup>

In the aftermath of the Civil War, a radical Republican Congress threatened to “annihilate” judges who obstructed the Reconstruction agenda, and went so far as to strip the Supreme Court of jurisdiction to rule on the constitutionality of a piece of Reconstruction legislation in a pending case.<sup>42</sup>

During the Progressive era at the turn of the twentieth century, legislators enacted laws to regulate workplace hours, wages, and conditions, only to have conservative judges declare them an unconstitutional deprivation of business’s freedom to contract. Progressives attacked these decisions as illegitimate, and proposed to end life tenure for federal judges, establish mechanisms for recall of recalcitrant state judges, eliminate judicial review, and retrench federal court jurisdiction.<sup>43</sup>

A generation later, President Franklin Roosevelt challenged the legitimacy of Supreme Court decisions invalidating his New Deal programs and proposed the infamous “Court Packing Plan,” which would have enabled the President to alter the decision-making majority of the Court with an infusion of new appointments.<sup>44</sup>

Still another generation after that, the Warren Court’s liberal-leaning rulings in civil rights and liberties cases prompted calls to strip the Court of jurisdiction and impeach its Justices.<sup>45</sup>

In short, there is ample precedent for the proposition that Americans are episodically suspicious of their judges. It bears emphasis, however, that while these episodes have come, they have likewise gone, which begs the question of why.

#### *E. At the Core—A Judicial Independence Tradition*

As just described, cycles of anti-court sentiment, driven by a deep-seated skepticism of independent judges and their motives, have a long and rich history. These cycles, however, have become decreasingly productive over time. Whereas in the nineteenth century, Congress occasionally made good on threats to impeach (though not remove) errant judges, disestablish unpopular courts, or strip the courts of jurisdiction to hear cases it did not want resolved in unapproved ways, by the twentieth century, the cyclical sound and fury had come to signify little more than cyclical sound and fury. Many threats were made, but virtually none were executed, despite widespread anger with judges’ decisions and suspicion of their motives.<sup>46</sup>

The best explanation for this development, as I have argued elsewhere, is the emergence and entrenchment of a judicial independence tradition over time.<sup>47</sup> The long-term survival of judicial independence in the United States cannot be explained with reference to our State and Federal Constitutions alone, which delegate to the political branches considerable power to undermine the judiciary’s autonomy if they were inclined to exercise it (by giving legislatures control over court budgets,

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41. *Id.* at 55–56.

42. *Id.* at 65–70.

43. *Id.* at 77–80.

44. *Id.* at 79–80.

45. *Id.* at 109–10.

46. *Id.* at 80–81, 109–11.

47. *Id.* at 1.

jurisdiction, judicial impeachment, and in some cases court size and structure).<sup>48</sup> Nor can the longevity of judicial independence be attributed to the power of the platitude (layer one), which by its very nature is an empty shell that could not survive a period of sustained criticism. Enlightened self-interest (layer three) offers a policy-based justification for judicial independence that may be strong enough to win the day much of the time, but it cannot, by itself, explain the almost complete failure of skeptics (layer four) to gain traction during periods of intense anti-court sentiment throughout the twentieth century. Rather, the policy-driven support for judicial independence that inspired the founders to adopt Article III of the U.S. Constitution has been hardened by the tests of time, to the point of becoming a deeply rooted institutional norm or tradition that can no longer be blown away by the occasional gust of anti-court sentiment.

At this core is a reservoir of public confidence in the courts, in which 76% of the public expresses some or a great deal of confidence in the U.S. Supreme Court, followed by 74% for federal courts and 71% for state courts.<sup>49</sup> Seventy-nine percent of the public thinks that “dedicated to facts and law” describes judges well or very well, while 75% says the same of “fair,” 68% of “honest and trustworthy,” and 62% of “impartial.”<sup>50</sup> And as previously noted, 73% thinks that judges should be shielded from outside pressure,<sup>51</sup> while 83% thinks that they should be protected from congressional interference.<sup>52</sup>

In short, what we have is a public that may be frustrated enough with particular judges to be sympathetic to the complaints of skeptics who occupy layer four (hence the 76% who think that judges are political and the 56% who think that judicial activism has reached a crisis point), but that is not so angry or shaken as to second-guess its core belief that judges are essentially fair and honest decision makers who are devoted to resolving disputes with reference to the facts and law, and who should be allowed to do their jobs free from threats or intimidation.

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48. *Id.* at 6–10.

49. BELDEN RUSSONELLO & STEWART, *supra* note 31, at 16.

50. JUSTICE AT STAKE CAMPAIGN, *supra* note 38.

51. MAXWELL POLL, *supra* note 30.

52. BELDEN RUSSONELLO & STEWART, *supra* note 31.