The Twilight of Judicial Independence

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ABSTRACT: Judicial independence is a fixture of American government, but its architecture has never been fully understood. As long as the federal judiciary has survived episodic attacks with its independence intact, there has been no pressing need to know how or why. But a confluence of cyclical, sustained, and sudden developments now threatens the federal judiciary's autonomy in arguably unprecedented ways and demands a more comprehensive analysis of judicial independence and its vulnerabilities. This article begins by reconceptualizing the structure of judicial independence in three tiers. At the apex is an ancient, Rule of Law Paradigm, which proceeds from the premise that independence enables judges to set extralegal influences aside and impartially uphold the law. In the middle tier is Article III of the U.S. Constitution, via which the framers implemented the Rule of Law Paradigm in a rudimentary way. At the base tier are informal constitutional conventions that emerged over time to fill gaps in the constitutional design and guide the political branches in their relationship with the courts in a manner consistent with Article III and the overarching paradigm. Next, the article explains how this three-tiered architecture came into being, how it evolved, later eroded, and how it recently began to collapse with the repudiation of judicial independence conventions in a neo-populist age that is sweeping the globe. It attributes the long-term erosion of support for judicial independence to the crumbling Rule of Law Paradigm and its increasingly antiquated premise that independent judges impartially uphold the law, unsullied by ideological and other influences. It recommends a gradual shift to what I call a Legal Culture Paradigm, which reframes and defends the role of judicial independence in a government with a judiciary whose judges are deeply acculturated to take law seriously but who are nonetheless subject to extralegal influences at the margins, where operative law is indeterminate. It argues, however, that a reboot of the prevailing paradigm cannot, by itself, quiet the fury firing the ongoing, neo-populist assault on judicial independence, because the judiciary and its autonomy have become little more than pawns subject to sacrifice in a high-stakes chess game played by polarized, partisan political leaders for the future of American Democracy. The article concludes that realistic hope for an accord that restores judicial independence conventions, guided by a new paradigm, must follow a period of destabilizing, no-holds-barred, partisan combat, in much the same way that settlement in contentious civil cases can often be achieved only after a period of exhausting and unrestrained hardball litigation.

I. Introduction

Judicial politics has recently morphed from a board game to a full contact sport. In 2016, Democrats accused the Republican Senate majority of stealing a

Supreme Court seat after the Senate refused to schedule a hearing for President Obama's nominee, Merrick Garland, thereby preserving the vacancy for President Trump to fill.[2] The next year, the Republican Senate majority exercised the "nuclear option" of stripping the minority of power to filibuster Supreme Court confirmations, after the Senate Democratic majority did the same to their Republican counterparts in lower court confirmation proceedings six years earlier.[3] In 2017, the Chairman of the Federalist Society's Board of Directors coauthored a memo to Congress urging it to double the size of the circuit courts and pack them with conservative partisans, while Democratic leaders have since proposed to increase the size of the Supreme Court and pack it with liberal partisans when they return to power.[4] For his part, President Trump has campaigned to discredit the "disgraceful" and "political" machinations of "so-called" judges and "Obama judges" who have issued rulings impeding his initiatives, prompting an extraordinary rebuke by the Chief Justice, and a retaliatory flurry of counterpunches from the President.[5]

Legal scholars have responded to this "crisis of legitimacy" with an array of "radical" recommendations.[6] Examples include proposals to: limit the terms of the

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[2] Erick Trickey, *The History of "Stolen" Supreme Court Seats*, SMITHSONIANMAG.COM (March 20, 2017), https://www.smithsonianmag.com/history/history-stolen-supreme-court-seats-180962589/

[3] Glenn Thrush, *Senate Republicans Go 'Nuclear' to Speed Up Trump Confirmations,* N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/politics/senate-republicans-nuclear-option.html.

[4] Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Courts,* N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html (discussing Federalist Society proposal); Burgess Everett & Marianne Levine, *2020 Dems warm to expanding Supreme Court,* SLATE (March 18, 2019), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625.

[5] *See* discussion in Part IV.B.3, *infra*.

[6] Amanda Frost, *Academic highlight: Epps and Sitaraman on how to save the Supreme Court*, SCOTUSBLOG (Dec. 18, 2018, 4:15 PM), https://www.scotusblog.com/2018/12/academic-highlight-epps-and-sitaraman-on-how-to-save-the-supreme-court/

Court's justices;[7] subject the justices to popular election;[8] establish an explicitly partisan Court comprised of half Democrats and half Republicans[9]; and select a rotating Supreme Court by lottery drawn from the ranks of the lower courts.[10]

These are fascinating and provocative proposals that force us to rethink the role of the Supreme Court in American government. As radical proposals, however, their prospects for implementation are poor, which effectively relegates them to the realm of thought experiments. Moreover, with exceptions, scholars have fixated on challenges currently confronting the Supreme Court with insufficient heed to the broader context in which those challenges have arisen. This broader context embraces the architecture, history, culture and politics of an independent judiciary—including but not limited to the Supreme Court—an appreciation for which is critical to charting a more nuanced and practical course forward that I propose here.

Judicial independence has been a defining feature of the American Constitutional landscape for centuries. It has been theorized in light of its objectives, taxonomized with reference to its forms, and described in relation to its conjoined twin, judicial accountability. The architecture of judicial independence, however, has never been fully explained or understood. As long as the foundations of judicial independence have remained sound and the structure has been adequate to support the weight of episodic

[7] REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington, ed. 2005).
[8] RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2005).
[9] Eric J. Segall *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018).
[10] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court, 129 YALE L. J. 148* (*2019*).

attacks, there has been no urgent need to fully understand why or how. But that is changing due to developments that are variously cyclical, sustained, and (as described at the outset of this article) sudden. These developments threaten the future of an independent judiciary in unprecedented ways, and counsel the need for a deeper and more systematic evaluation of judicial independence and its vulnerabilities that this article seeks to supply.

The powers that the U.S. Constitution delegates to the three branches of government enable each branch to make the others miserable. If he were so inclined, the President could decline to execute congressional enactments, defy court orders, and deploy the military to consolidate his power. Congress could slash appropriations to the executive and judicial branches and impeach insubmissive Presidents and judges. The judiciary could drive the executive and legislative branches into constitutional crisis via unbridled resort to judicial review.

Apocalyptic scenarios such as these have materialized rarely, if ever. Proceeding from James Madison's premise that "ambition must be made to counteract ambition,"[11] the framers embedded checks and balances into the constitutional design to equip each branch with the means to thwart attempted usurpations of power by the other two, which, the theory goes, have operated as a deterrent.

That said, those who peddled the proposed Constitution to the fledgling states did not conceive of the three branches as coequal in power. Rather, Alexander Hamilton characterized the judiciary as "least dangerous" because it possessed powers of neither sword nor purse.[12] In the abstract, Hamilton would seem to be right: If one conjured a

[11] THE FEDERALIST NO. 51 (James Madison).
[12] THE FEDERALIST NO. 78 (Alexander Hamilton).

new "Survivor" reality television series involving three contestants, each with an exclusive power—one who could shoot things, one who could buy things, and one who could declare things—the smart money would not ride on the survival of declare-things guy. A competitor who snubs the guy who shoots things, or the guy who buys things, risks being shot or starved; but the guy who declares things can be ignored with impunity unless one or both of the other two has his back.

To the extent that the judiciary has emerged, evolved, and endured as a separate, independent, and ultimately powerful branch of government, despite its vulnerabilities, it is because the people and the public officials who represent them have collectively willed it to be so. The collective will is embodied in a deeply rooted Rule of Law Paradigm that has guided the framing of the U.S. Constitution and structured the judiciary's role in relation to the other branches of government. That paradigm, in a nutshell, posits that judges who are afforded independence from the so-called "political" branches will exercise judicial power by setting aside extralegal influences and impartially upholding the law in their capacity as courts.[13]

The Rule of Law Paradigm acknowledges that judges should be accountable to Congress (in extreme situations) for treason, bribery, and other high crimes and misdemeanors, via the impeachment process. It accepts that judges should be accountable to "the law," in the sense that their decisions are subject to appellate processes, constitutional amendments, legislative overrides, oaths of office, and the dictates of conscience. But the paradigm's conception of accountability is sharply limited and does not envision that judges should be answerable to the public or political branches for the

[13] *See infra,* Section II.B. (Discussing the Rule of Law Paradigm).

choices they make, which would be antithetical to the independent judiciary that the Rule of Law Paradigm seeks to protect and promote.[14]

The Rule of Law Paradigm maps on a constitutional structure strewn with gaps and ambiguities that the political branches could exploit to impose their will on the judiciary in a manner contrary to the paradigm's tenets. To complement the Rule of Law Paradigm, then, an array of conventions has evolved over time to fill gaps, clarify ambiguities, and structure the exercise of political branch power in a manner consistent with the paradigm and Article III, which together give rise to a custom of respect for judicial independence.

In Part II of this article, I overview the architecture of judicial independence, beginning with a synopsis of the provisions in the U.S. Constitution that bear on the relative independence and accountability of judges and the federal judiciary. These provisions are akin to a list of parts for a machine that is unaccompanied by instructions for assembly. And so, I supplement the parts-list with a corollary to an instruction manual that explains how these parts are assembled into a three-tiered structure (organized by tiers moving from general to specific). On the top tier of that structure is the Rule of Law Paradigm that conceptualizes the role of judicial independence in American government. On the second tier is the U.S. Constitution, with its limited provision for an independent judiciary, the meaning of and support for which are guided and sustained by the overarching paradigm that the constitution embodies. On the third tier are constitutional conventions informally established and applied by the political branches over time. These conventions fill gaps in the constitutional design and provide additional protection for

[14] *Id.*

judicial independence consistent with the paradigm. Taken together, these discrete conventions have given rise to a custom of respect for the judiciary's autonomy, or "customary independence," that the political branches have, for the most part, respected.

In Part III, I trace the history of judicial independence across periods of establishment, evolution, and erosion. During the period of establishment (which I denominate Judicial Independence 1.0), the framers aspired to create an independent judiciary in Article III of the U.S. Constitution. Due to inattention and inexperience, however, they did not fully appreciate the extent to which other powers that the Constitution delegated to Congress and the President could be exploited to undermine the independent judiciary they sought to establish.

During the period of evolution (Judicial Independence 2.0), beginning in the early 19th century, discrete independence conventions emerged and evolved to constrain political branch encroachments on the judiciary's autonomy, in a manner consistent with the overarching Rule of Law Paradigm. These conventions came to deter congress from retaliating against judges for unpopular rulings by means of impeachment, budget cuts, salary freezes, or court-packing. They gave rise to standard operating procedures in judicial confirmation proceedings that encouraged deliberation and compromise, to the end of promoting a stable and independent judiciary deserving of public confidence. And they discouraged presidents from openly defying court orders and undermining the judiciary's legitimacy for partisan gain.

During the period of erosion, beginning in the early 20th century (Judicial Independence 3.0), the emerging social science of judicial decision-making, the changing politics of federal judicial appointments, and the shifting media coverage of the courts,

have combine to render judges' professed imperviousness to extralegal influences increasingly hypocritical-seeming, to the detriment of public confidence in the Rule of Law Paradigm. This period of erosion manifested a new skepticism of judicial autonomy driven by an emerging concern that independence is less a shield from external sources of intimidation that enables judges to uphold the law, than a weapon that insulates judges from accountability and enables them to disregard the law and substitute their ideological and other preferences.

Part IV describes the dawn of a new era—a period of convention collapse (Judicial Independence 4.0). If the period pf erosion was a slow-burning brush fire that encroached on the Rule of Law Paradigm gradually over time, then the period of collapse is a Molotov cocktail that has exploded in the age of Trump, and blown open a door to a more populist form of leadership that has little patience for an independent judiciary obstructing its agenda.

The era of convention collapse in Judicial Independence 4.0 is not about President Trump per se. It is about democracy fatigue, born of growing dissatisfaction with American government generally, which contributes to disenchantment with the judiciary. It is about anti-elitism, which has fueled distrust of the career politicians and life-tenured, "expert" judges responsible for a government increasingly viewed as broken. It is about a wave of neo-populism that world leaders (including but not limited to Donald Trump) are riding, in which democracy fatigue and anti-elitism have buoyed popular support for self-proclaimed men or women of the people, who have consolidated executive power by punishing dissent within the ranks of their own political party and diminishing the capacity of the other branches to keep the executive in check. And it is about political

polarization, as growing, factionalized distrust of and hatred for the opposing political party have engendered distrust of and hatred for judges nominated and confirmed by the opposing political party, which has undermined diffuse support for courts generally.

Whereas the earlier period of erosion was marked by crumbling support for the Rule of Law Paradigm, the new period of collapse threatens the discrete micro-conventions that comprise customary independence. President Trump has unified Republican Party support for a more openly partisan judiciary, which has elicited an equal and opposite reaction from congressional Democrats. As a consequence, serious partisans on the left and right have proposed to pack the Supreme and lower courts. Senate majorities from both political parties have repudiated time-honored procedural conventions that promoted consensus and compromise in confirmation proceedings. The President, in turn, has abrogated a convention against attacking the legitimacy of the federal courts and has flirted with challenging a convention against defying Supreme Court orders.

For one who respects the role of an independent judiciary in a tripartite system of government, the period of erosion during Judicial Independence 3.0 was troubling, and the period of collapse in Judicial Independence 4.0 is alarming. These two stages in the development of judicial independence have different causes and effects but are related in an important way. Eroding support for judicial independence in the Rule of Law Paradigm—the defining feature of the period of erosion—has enabled independence conventions to topple in the era of collapse by weakening the foundation upon which those conventions have rested.

Accordingly, Part V calls for a two-track approach to reform. One track remediates long-term erosion of support for an independent judiciary in the Rule of Law Paradigm. The second track addresses the latest assault on judicial independence conventions.

With respect to the first track, I argue that gradual diminution of support for judicial independence during the period of erosion in Judicial Independence 3.0 is attributable to stress fractures in the antiquated Rule of Law Paradigm—a paradigm that should be jettisoned in favor of a more defensible Legal Culture Paradigm. The Legal Culture Paradigm I propose, posits that judges are acculturated to take the law seriously—first as law students, then as lawyers, and later as judges. The inevitability of legal indeterminacy, however, requires judges to exercise judgment and discretion informed by a range of extralegal influences, including the judge's policy perspectives. Judicial independence remains essential to a Legal Culture Paradigm, because it enables judges to follow the law and administer justice as they are acculturated to do, even if they are subject to extralegal influences at the margins. Yet because the Legal Culture Paradigm acknowledges the inevitability of extralegal influence on judicial decision-making, it contemplates a more robust role for accountability to ensure that judges do not abuse their independence in pursuit of personal agendas.

As to the second track, those who have brought Judicial Independence 4.0's era of collapse into being include good faith actors who are understandably doubtful of the Rule of Law Paradigm and its premise that independent judges find facts and follow law unsullied by extralegal influences. But they also include opportunists determined to exploit public skepticism for tactical gain to the end of peopling the judiciary with

partisan soulmates and weakening the courts as a check on political branch power. Countering forces that include ingenuous and disingenuous actors, calls into play a strategy akin to that often used by parties in civil litigation: hardball, followed by settlement.

Thwarting those who are hell-bent to recreate the courts in their own partisan image or to marginalize the judiciary's capacity to keep Congress and the President in check leaves court defenders with no alternative but to adopt the standard litigation tactic of fighting hardball with hardball. Cycles of excessive, anti-court vitriol aimed at commandeering control of the judiciary have come and gone throughout our history and have been blunted by court defenders rising up and fighting to protect the prevailing paradigm and the judicial independence conventions that the paradigm has spawned against encroachment. In the context of the ongoing era of collapse, however, hardball in defense of an independent judiciary may require more than defending crumbling judicial independence conventions from further attack. Importuning those who have caused and profited from the collapse of independence conventions, to restore and respect the very conventions they have flouted, is an asymmetric form of hardball that is destined to fail, because convention-busters who are indifferent if not hostile to customary independence have no incentive to yield. Consequently—and this is more of a prediction than a recommendation—things must get worse before they can get better. The neo-populist political right, which has consolidated power in part by overriding judicial independence conventions for partisan gain, is unlikely to relent unless and until the center-left pushes back in equal and opposite measure, creating a convention vacuum that is too chaotic (and too inimical of independence norms) for either side to sustain.

Hardball on this order of magnitude is perilous and exhausting, and makes a companion, litigation-like strategy of pursuing negotiated settlement increasingly attractive. To that end, I propose a series of tri-branch summits—a proposal with ancient roots dating back to James Madison's failed proposal for a Council of Revision—for the purpose of diminishing inter-branch schisms, restoring paths of communication, and rebuilding independence conventions, guided by the proposed Legal Culture Paradigm. It is premature to convene tri-branch summits until the disputants are receptive to listening to each other and discussing the prospects for accord. There is, however, cause for cautious optimism that the current appeal of the biblical edict, "an eye for an eye," will eventually yield to the wisdom of Mahatma Gandhi's warning that "an eye for an eye makes the whole world blind."

Judicial independence is in a "twilight" that can precede either darkness or dawn. If the long and recently accelerated campaign to curtail judicial independence is left uncorrected, a gradual fade to black seems likely, and perhaps desirable, insofar as the erosion and collapse of an independent judiciary signifies that it has outlived its usefulness. To the extent, however, that judicial independence can, and as argued here, should, be revitalized with a modified paradigm and a restoration of constitutional conventions following period of turmoil, the prospects for a brighter future improve significantly.

II: The Architecture of Judicial Independence[15]

[15] In an important article entitled *The Architecture of Judicial Independence*, Professor Stephen Burbank discusses the theoretical underpinnings of judicial independence in relation to judicial accountability. Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339-40 (1999). I use the term "architecture" differently here, to describe the tiered structures that promote and protect judicial independence.

The structure of judicial independence in the federal courts is a topic best addressed in two stages. The obvious starting place is with the text of the U.S. Constitution and its provisions for an independent and accountable judiciary. It quickly becomes clear, however, that confining a discussion of judicial independence to the Constitution alone is inadequate to explain judicial independence and its scope because gaps in the constitutional structure could be exploited to obliterate an independent judiciary in all but name only. The second stage in the analysis thus requires that the Constitution be understood as part of a more elaborate architecture, sandwiched between the Rule of law Paradigm that animated the constitutional design and less formal constitutional conventions that implemented the constitutional design in light of the prevailing paradigm.

A. The Constitutional Structure and its Gaps

When it comes to the federal judiciary's independence and accountability, the conventional starting point in the analysis is the United States Constitution.
The "independence" side of the ledger includes: 1) The good behavior clause, which guarantees judges tenure during "good behaviour" and thereby insulates them from independence-threatening reappointment or reelection[16]; 2) the compensation clause, which deprives Congress of the power to constrain judicial independence via retaliatory cuts to judicial salaries[17]; 3) the due process clause of the Fifth Amendment, which guarantees litigants a hearing before an independent judge[18]; 4) the suspension clause, which buffers the federal courts from political branch encroachment by prohibiting

[16] U.S. CONST. art. III, § 1.
[17] U.S. CONST. art. I, § 6, cl. 1.
[18] Martin H. Redish & Lawrence C. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 YALE L.J. 455, 476 (1986); U.S. CONST. amend. V.

suspension of federal court authority to issue writs of habeas corpus, except "when in Cases of Rebellion or Invasion the public Safety may require it;"[19] 5) the judicial power clause, which grants the federal courts a monopoly on judicial power that offers the judicial branch a measure of independence from political branch encroachment on judicial functions[20]; and 6) structural separation of government into three independent (if also interdependent) branches.[21]

On the accountability side are congressional powers 1) to impeach and remove judicial officers, which Alexander Hamilton, writing as Publius, characterized as the primary means the Constitution supplied to ensure the "responsibility" of judges[22]; 2) to establish (and by negative implication, disestablish) inferior courts, which has been construed to authorize congressional regulation of court practice, procedure, administration, structure, and size, each of which can conceivably be used as carrots or sticks;[23] 3) to regulate the Supreme Court's appellate jurisdiction, which arguably subsumes the authority to constrain an uncooperative Court's judicial power;[24] 4) to tax and spend in relation to the judiciary's budget and salary increases;[25] and 5) to implement the foregoing powers by means "necessary and proper," which arguably authorizes supplemental powers to constrain or control.[26] In addition, the Constitution delegates to the Senate the power to consent to the appointment of federal judges, which enables it to

[19] U.S. CONST. art. I, § 9, cl. 2.
[20] U.S. CONST. art. III, § 1.
[21] U.S. CONST. art. I – III. *See also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach,* 81 CORNELL L. REV. 393, 415–19 (1996).
[22] THE FEDERALIST NO. 79 (Alexander Hamilton).
[23] U.S. CONST. art. III, § 1; Sibbach v. Wilson, 312 U.S. 1, 9-10 (1941); Hanna v. Plumer, 380 U.S. 460, 472-74 (1965).
[24] U.S. CONST. art. III, § 2.
[25] U.S. CONST. art. I, § 8, cl. 1.
[26] U.S. CONST. art. I, § 8, cl. 18.

exercise a form of prospective accountability by limiting the judicial workforce to judges it deems capable, qualified, and likely to render decisions the Senate regards as politically acceptable.[27]

The President, in turn, has two powers germane to judicial accountability: 1) "the" executive power, paired with the duty to "take Care that the Laws be faithfully executed," which give the President the raw power, if not the constitutional authority, to enforce or marginalize court orders as he sees fit and defy those he deems unconstitutional;[28] and 2) the power to nominate judges, which, like the Senate power to confirm judicial nominees, gives the President a form of prospective accountability that enables him to limit the pool of future judges to those who are more likely to be simpatico and less likely to get in his way.[29]

Making sense of the balance the Constitution strikes between judicial independence and accountability is compromised by questions the drafters and their boosters left unresolved. Five examples illustrate the challenge.

First, in Federalist #79, Alexander Hamilton opined that impeachment is the "only provision on the point [concerning 'precautions' for the 'responsibility' of judges] which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."[30] James Madison's notes of the constitutional convention reveal that the delegates devoted almost no debate to the impeachment clauses in relation to judges.[31] During the ratification

[27] U.S. CONST. art. II, § 2, cl. 2.
[28] U.S. CONST. art. II, § 1, cl. 1; *id.* art. II, § 3.
[29] U.S. CONST. art. II, § 2, cl. 2.
[30] THE FEDERALIST NO. 79 (Alexander Hamilton).
[31] James Madison, *Notes* (Aug. 27, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 426, 428 (Max Farrand ed., 1911).

debates, Federalists and Anti-Federalists agreed that impeachment would be available to deter or remedy "deliberate usurpations" of judicial power animated by "wicked or corrupt motives."[32] They likewise agreed that impeachment would not address "errors in judgment," or "misconstructions and contraventions of the legislature"—a state of affairs that bothered the Anti-Federalist Brutus, but not the Federalist Hamilton.[33] No one, however, discussed the possibilities that Congress could encroach on judicial independence by mischaracterizing errors as usurpations, by disregarding the distinction altogether, or by using threats of impeachment to intimidate.

Second, Article III, Section 1, which delegates to Congress the power to establish lower federal courts (or not), was a compromise between those delegates who wanted to enshrine inferior federal courts in the Constitution and those who wanted no such courts at all.[34] Whether the power to establish courts included the powers to disestablish such courts and constrain their institutional autonomy through regulation (for example, by manipulating court practice, procedure, structure, size, administration and jurisdiction), was an issue left for later generations to untangle.

Third, the framers understood that they had denied the judiciary the power of the purse, which, in Hamilton's view, rendered the judiciary less "dangerous."[35] But there is no indication that the framers considered the extent to which congressional power to manipulate judicial budgets could encroach on independence in ways comparable to manipulating the salaries they thought to protect.

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[32] BRUTUS, THE POWER OF THE JUDICIARY (pt. I) (Mar. 20, 1788), *reprinted in* THE ANTIFEDERALIST PAPERS 222, 223–24 (Morton Borden ed., 1965).
[33] THE FEDERALIST NO. 81 (Alexander Hamilton).
[34] CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM 43 (2006) [hereinafter WHEN COURTS & CONGRESS COLLIDE].
[35] THE FEDERALIST NO. 78 (Alexander Hamilton).

Fourth, at the constitutional convention, the delegates devoted considerable debate to the implications of dividing the appointment power between President and Senate.[36] But no thought was publicly expressed to suggest that the President's power to nominate or the Senate's power to confirm could be used to constrain decisional independence by extracting views, if not assurances, from nominees as to how they would decide future cases as judges.

Fifth, it was self-evident that the Necessary and Proper Clause empowered Congress to determine the size of the Supreme Court, because the Constitution established a Supreme Court without specifying the number of justices to comprise it.[37] But the possibility that the power to control Court size included the power to manipulate the composition of the Court's decision-making majority appears not to have been considered.

Embarking on the constitutional adventure with these issues unresolved, and often unrecognized, created an array of quasi-political questions for Congress and the President to answer over time. I use "quasi-political questions" to signify those issues that may or may not be nonjusticiable per se, but which, for reasons related to text, precedent, institutional competence, inter-branch comity, and political prudence, the courts have afforded Congress and the President a heightened degree of interpretive deference. Congressional oversight of the federal courts is awash in such questions. The Supreme Court has expressly denominated questions concerning congressional interpretation of the impeachment clauses "political;"[38] deferred to congressional regulation of court practice

[36] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 119–26 (Max Farrand ed., 1911).
[37] U.S. CONST. art. I, § 8, cl. 18.; *id.* art. III, § 1.
[38] Nixon v. United States, 506 U.S. 224 (1993).

and procedure as plenary;[39] acceded to legislation directing justices of the Supreme Court to serve as roving trial judges, given the Court's "practice and acquiescence" under the statute for the preceding fourteen years;[40] genuflected to legislation effectively removing circuit judges by disestablishing their courts because "there are no words in the constitution to prohibit or restrain the exercise of legislative power" to establish inferior tribunals;[41] acquiesced to Congress's authority to thwart judicial review by stripping the Supreme Court of jurisdiction to hear a pending case;[42] and abided by statutes subjecting the Supreme Court to disqualification standards and financial disclosure rules, despite what the Chief Justice has characterized as the uncertain constitutional status of such measures.[43]

B. The Three-Tiered Architecture of Judicial Independence

If Congress were so inclined, then, these quasi-political interpretive spaces would seem to afford it the discretion to destroy the judicial independence that the framers thought they were creating. What does tenure during good behavior achieve if Congress can disestablish an uncooperative judge's office or arbitrarily characterize her behavior as an impeachable crime and have her removed? What is the benefit of a salary that cannot be diminished if Congress can eliminate a judge's operating budget, deny her cost of living adjustments, or double her workload? That said, the limits of Congress's

[39] *Hanna*, 380 U.S. at 472-74; *Sibbach*, 312 U.S. at 1, 9-10.
[40] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).
[41] *Id.* at 309.
[42] Ex Parte McCardle, 74 U.S. 506, 514 (1869) ("We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words").
[43] *2011 Year-End Report on the Federal Judiciary* 1, 6-12 (Dec. 31, 2011), http://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf.

constitutional authority to manhandle the courts remains uncertain because the successful attempts have been old and few, which begs the question of why.

The answer begins prior to the establishment of the Constitution, with an emerging conceptual model or paradigm of the government that the founding generation sought to establish and operationalize imperfectly in its charter. The persistence of that model has enabled later generations to fill gaps and resolve ambiguities in the constitutional structure via constitutional conventions, in a manner more or less consistent with the overarching paradigm.

I have previously referred to this model as "the Rule of Law Paradigm" (ROLP).[44] The rule of law, in its most rudimentary form, proceeds from the premise that people enjoy certain fundamental rights that are better protected by a fixed body of self-imposed laws than by the whims of an autocrat. In the West, the rule of law germinated from seeds planted by the ancient Greeks that went dormant following collapse of the Roman Empire, blossomed anew during the High Middle Ages and Renaissance, and returned to full flower during the Enlightenment with the writings of John Locke, Jean-Jacques Rousseau, Charles Montesquieu, among others.[45] Those writers, in turn, influenced the thinking of those who framed the U.S. Constitution.[46]

The ROLP, as I describe it here, is a model that guided the framers of the U.S. Constitution and their successors on how best to implement the rule of law.

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[44] CHARLES GARDNER GEYH, COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY 16-23 (2016) [hereinafter COURTING PERIL].
[45] BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 15, 48–54 (2004).
[46] *Id. See also* David M. Kirkham, *European Sources of American Constitutional Thought Before 1787,* 3 USAFA J. LEG. STUD. 1, 17-22 (1992).

With respect to the judiciary, the framers sought to implement a ROLP in a rudimentary way. They meant to equip the judiciary with the means to uphold the law on a case-by-case basis by establishing a separate judicial branch armed with exclusive authority to exercise "the" judicial power.[47] They meant to protect federal judges from public and political branch intimidation—thereby enabling them to set extralegal influences aside and uphold the law—by providing for federal judges to be appointed, rather than elected, and affording them independence via special tenure and salary protections.[48] To keep the other branches in check, those who lobbied the states to ratify the proposed constitution, argued that the judicial power federal courts exercise would include the power to declare acts of the other branches unconstitutional.[49] And in anticipation of the concern that life-tenured judges might abuse the power of judicial review, cheerleaders for the proposed Constitution argued that the threat of impeachment operated as an adequate cross-check.[50]

Two hundred and thirty years later, the judiciary's role in the ROLP, and the centrality of judicial independence to that role, are oft repeated as a virtual mantra. "The strength of our democracy and the maintenance of the rule of law lie in the independence and impartiality of our judiciary," American Bar Association President Paulette Brown has declared.[51] U.S. Supreme Court Justice Stephen Breyer has elaborated that "judicial independence revolves around the theme of how to assure that judges decide according to law, rather than according to their own whims or to the will of the political branches of

[47] U.S. CONST. art. III, § 1.
[48] *Id*.
[49] THE FEDERALIST NO. 78 (Alexander Hamilton).
[50] THE FEDERALIST NO. 65 (Alexander Hamilton).
[51] *ABA President Paulette Brown's Statement on Judicial Independence and Impartiality*, ABA for Law Students (June 6, 2016), https://abaforlawstudents.com/2016/06/06/statement-of-aba-President-paulette-brown-on-judicial-independence-and-impartiality/.

government."[52] Wisconsin Chief Justice and past President of the Conference of Chief Justices, Shirley Abrahamson, has echoed that "'judicial independence' embodies the concept that a judge decides cases fairly, impartially, and according to the facts and law, not according to whim, prejudice, or fear, the dictates of the legislature or executive, or the latest opinion poll."[53] There are many others.[54]

Although the framers codified the emerging ROLP in the Constitution—a point that modern-day paradigm boosters never tire of repeating—they did so incompletely and imperfectly. To fill gaps and clarify ambiguities, constitutional conventions emerged and evolved over time to guide Congress and the President in their resolution of quasi-political questions in a manner consistent with the prevailing ROLP. With qualifications, most scholars have embraced constitutional conventions as a useful and important way for the political branches to regularize their operations and resolve quasi-political questions that the text of the Constitution does not answer, and which are not routinely subject to judicial gloss.[55]

Conventions are easiest to conceptualize and justify as a political branch corollary to court precedent. Like court precedent, constitutional conventions promote efficiency

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[52] Stephen G. Breyer, *Judicial Independence in the United States,* 40 ST. LOUIS U. L. J. 989, 989 (1996).
[53] Shirley S. Abrahamson, *Thorny Issues and Slippery Slopes: Perspectives On Judicial Independence*, 64 OHIO ST. L.J. 3, 3 (2003).
[54] *See* Samuel L. Bufford*, Defining the Rule of Law,* JUDGES' J., Fall 2007, at 16, 20; Julie A. Robinson, *Judicial Independence: The Need for Education About the Role of the Judiciary,* 46 WASHBURN L.J. 535, 544 (2007); Louraine C. Arkfeld, *The Rule of Law and an Independent Judiciary*, JUDGES' J., Fall 2007, at 12.
[55] Richard Albert notes that not all conventions are created equal. For a rule of law regime, conventions of "incorporation" that fill voids in the constitutional text (like the pre-22nd Amendment norm limiting the President to two terms) may be less problematic than conventions of "repudiation" that effectively rewrite the Constitution (like sole-executive agreements that enable Presidents to make international agreements without Senate consent required by the treaty clause in Article II, § 2). Richard Albert, *How Unwritten Constitutional Norms Change Written Constitutions,* 38 DUBLIN U. L. J. 387 (2015). The judicial independence conventions at issue here fall into the less problematic, void-filling category.

by obviating the need for the political branches to reinvent the wheel every time they encounter the same question that the Constitution does not answer for them. They promote stability in government by eliminating radical uncertainty concerning how the branches will operate in relation to the public and each other every time there is a transition of political power. They promote predictability for the benefit of others within and without the government who seek to structure their affairs in anticipation of what the political branches will or will not do. They promote institutional wisdom, insofar as conventions enable the government to fill cracks in the constitutional design with reference to accumulated experience and expertise embodied in institutional norms that past generations have deemed consistent with the guiding paradigm. By the same token, and again like court precedent, when a given convention comes to be regarded as unwise or outmoded, it can be rejected or replaced.

Constitutional conventions are unlike court precedent, however, in their lack of formality. Judicial precedent is memorialized in writing by courts that are assigned levels in a hierarchical pyramid with the United States Supreme Court at its apex. The Supreme Court has the final authority to declare with relative clarity when a precedent is established, what that precedent is, and when it is overturned. Constitutional conventions, in contrast, are not memorialized as such, or voted upon. Because of their informality, disputes over constitutional conventions logically focus on whether a putative convention actually exists, what the scope of that convention is, and how seriously the given convention should be taken.

Ivor Jennings, the godfather of constitutional convention scholarship, offered a three-part analysis for ascertaining when conventions are born: 1) there are precedents

for a given practice; 2) there are accepted reasons for respecting those precedents; and 3) public officials follow such precedents as binding.[56] Josh Chavetz and David Pozen, in turn, have theorized that conventions die in one of three ways: 1) When they are destroyed, via explicit flouting or repudiation; 2) When they decompose, by gradual disuse or neglect; and 3) When they are displaced by positive law that obliterates or formalizes a convention.[57]

It is one thing to opine on the life cycle of constitutional conventions in theory and another to show how given conventions are formed, rise, and decline. I turn to the latter task next, focusing on the rise and decline of judicial independence micro-conventions that have formed under the umbrella of a customary independence macro-convention, the support for and survival of which have depended on their role in relation to the ROLP.

III. The Establishment, Evolution, and Erosion of Judicial Independence

Political branch conventions have emerged, evolved, and entrenched themselves over time to fill gaps and resolve uncertainties in the text of Article III, thereby fostering a custom of judicial independence. Congress and the President have (with exceptions) respected customary independence, without an explicit directive from court orders or the text of the Constitution itself to do so. In this part of the article, I periodize the rise and decline of judicial independence into its first three phases: Establishment; evolution; and erosion.

A. Judicial Independence 1.0: Establishment

[56] IVOR JENNINGS, THE LAW AND THE CONSTITUTION 136 (5th ed. London, 1959).
[57] Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1435–38 (2018).

The founding generation's first sketch of an independent federal judiciary was framed by aspiration, inattention, and inexperience. The new English Americans aspired to establish a separate and independent judiciary as a means to implement the prevailing ROLP: They were thus devoted in principle to judicial independence and establishing a separate judicial branch of government.[58] They were familiar with English history and the story of English judges, their centuries of dependence on the crown, and their hard-fought victory in the 1701 Act of Settlement, which granted them tenure during good behavior.[59] They were acutely aware that colonial judges did not enjoy the same independence as their English counterparts, and included that fact among the reasons for their declaration of independence.[60] And prior to the constitutional convention, the young states guarded against judicial dependence on the executive branch by shifting control of judicial selection and tenure to the legislative branch, which engendered problematic judicial dependence on state legislatures.[61] The net effect of these developments was to

[58] Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic,* 74 CHI.-KENT L. REV. 31, 86 (1999).
[59] CHARLES GARDNER GEYH, WHO IS TO JUDGE? THE PERENNIAL DEBATE OVER WHETHER TO ELECT OR APPOINT AMERICA'S JUDGES 25-27 (2019) [hereinafter WHO IS TO JUDGE].
[60] RICHARD E. ELLIS, , THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 6 (1971) (observing that having colonial judges serve at the king's pleasure "met with stiff resistance from colonial legislatures and pamphleteers"); EDWARD DUMBAULD, THE DECLARATION OF INDEPENDENCE AND WHAT IT MEANS TODAY 115 (1950) (noting that in Massachusetts, the dependence of colonial judges on the crown rather than the state legislature for their salaries was opposed on the grounds that "it would be unconstitutional for the judges to be independent of the people and dependent on the crown"); THE DECLARATION OF INDEPENDENCE, para. 11 (U.S. 1776) (The King "has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries").
[61] GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787 161 (1969) ("giving control of the courts and judicial tenure to the legislatures actually represented the culmination of what colonial assemblies had been struggling for in their eighteenth-century contests with the Crown. The Revolutionaries had no intention of curtailing legislative interference in the court structure and in judicial functions, and in fact they meant to increase it").

create a general consensus in favor of a separate and independent judiciary reflected in both the constitutional convention[62] and ratification debates.[63]

These lofty aspirations for an independent judiciary, however, were compromised by inattention. The founders' intellectual energy was focused on regulating the relationship between the first and second branches of the national government—the respective powers of Congress and the President, and how those powers would be wielded and constrained—which relegated the establishment of the third branch to a relative afterthought.[64] In his history of the Supreme Court, Julius Goebel observed that the delegates' concern for the judiciary "generally came off with little more than an honorable mention."[65] Establishing a separate and independent judiciary "was a matter of theoretical compulsion rather than of practical necessity," Goebel explained, as a consequence of which the framers acted "more in deference to the maxim of separation

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[62] For example, Convention Delegate John Dickinson proposed to amend the good behavior clause to authorize a judge's removal by the President upon application from both houses of Congress, but the proposal was rejected, with John Randolph expressing the sentiments of amendment opponents when he said it "weakened too much the independence of the Judges." Madison, *supra* note 31, at 426-29. Debate on whether to prohibit upward adjustments to judicial salaries featured disputants on each side grounding their argument in concern for judicial autonomy. James Madison argued that it would be "improper even so far to permit a dependence" of judges on Congress for pay increases. James Madison, *Notes* (July 18, 1787), *in* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 40, 45 (Max Farrand ed., 1911). Opponents of Madison's proposal, who won the day, argued that given its stature as a separate and independent branch of government, "the importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U.S. can allow in the first instance." Madison, *supra* note 31, at 429.

[63] THE FEDERALIST NO. 78 (Alexander Hamilton) ("nothing will contribute so much as this [permanent tenure of judicial offices] to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty"); THE FEDERALIST NO. 79 (Alexander Hamilton) ("Next to the permanency in office, nothing can contribute more to the independence of judges than a fixed provision for their support"); BRUTUS, *supra* note 32, at 222-23 ("I do not object to the judges holding their commissions during good behavior. I suppose it a proper provision provided they were made properly responsible"); THE FEDERAL FARMER, LETTER XV (Jan. 18, 1788), *reprinted in* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 97, 99 (Walter Hartwell Bennett ed., 1978) ("[I]t is well provided, that the judges shall hold their offices during good behaviour"). With respect to antifederalist arguments concerning the perils of independence on judicial decision-making, *see* BRUTUS, *supra* note 32, at 223-24 ("[J]udges under this system will be *independent* in the strict sense of the word…[T]here is no power above them that can control their decisions, or correct their errors").

[64] JULIUS GOEBEL, 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES, ANTECEDENTS AND BEGINNINGS TO 1801 97 (1971).

[65] *Id.*

than in response to clearly formulated ideas about the role of a national judicial system."[66]

The perils of inattention were exacerbated by inexperience. Those political branch encroachments on judicial independence with which the framers had experience were largely limited to threats against judicial tenure and salaries of individual judges—threats that the framers duly countered in Article III, Section 1. A complaint embedded in the Declaration of Independence that the King had "obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary powers,"[67] was addressed by establishing a separate judicial branch in Article III, armed with "the" judicial power. But the founders had no practical experience with political branch encroachments on the judiciary as a separate department of government because in England and the colonies the judiciary, as an institution, was neither separate nor independent but an extension of the Crown.[68] When, in 1787, convention delegates created a separate judicial branch in Article III and empowered Congress to establish inferior courts (or not), the possibility that Congress and the President could exploit such power to disestablish those courts, control their operations, and undermine the judiciary's autonomy, went unexplored, and would remain unexplored for the next fourteen years. [69]

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[66] *Id.* at 206.
[67] DECLARATION OF INDEPENDENCE, para. 10.
[68] SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY, 1606-1787, 29-37 (2011).
[69] This inexperience was underscored after the constitutional convention, when Virginia enacted legislation establishing district courts and directing high court judges to staff them—legislation that the Virginia Court of Appeals invalidated as an unconstitutional encroachment on its judicial independence. At the Virginia ratification debate over the U.S. Constitution, Patrick Henry applauded his state court's decision, but wondered aloud: "Are you sure that your federal judiciary will act thus? Is that judiciary as well constructed, and as independent of the other branches, as our state judiciary?" Patrick Henry, Statement at the Virginia Ratification Convention (June 12, 1788) in 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 313, 325 (Jonathan Elliot ed. Lippincott & Co. 1863).

In 1801, when the outgoing Federalists were poised to transfer power to the incoming Jeffersonian Republicans, the lame Duck Congress and President enacted legislation establishing sixteen new circuit judgeships (known as the "Midnight Judges Act").[70] The very next year, Jefferson and his Republican cohort in Congress disestablished those judgeships, and removed their ostensibly life-tenured office-holders,[71] in a brazen, partisan move that a meek Supreme Court upheld despite private grumbling among the justices that the legislation was patently unconstitutional.[72]

For Senator William Giles, a cheerleader for the triumphant Jeffersonian Republicans, the theory of a separate and independent judiciary was "not critically correct," even though it was "obvious that the framers of our Constitution proceeded upon this theory in its formation;" a truly independent judiciary, Giles reasoned, would be able "to execute the peculiar functions assigned to it, without the aid, in other words, independent of," the other branches, which "is not the Constitutional character of our Judicial department."[73] The separate and independent judiciary that the framers had been committed to establishing on paper was on the brink of obliteration in practice.

B. Judicial Independence 2.0: Evolution

The Midnight Judges Act and its repeal was a fork in the road for judicial independence. The path Giles had cleared envisioned a future without any meaningful autonomy for judges or the courts, in which Congress could and would control the

[70] Judiciary Act of 1801, 2 Stat. 89 (1801); Jed Glickstein, *After Midnight: The Circuit Judges and the Repeal of the Judiciary Act of 1801*, 24 YALE J.L. & HUMAN. 543, 544–45, 558–74 (2012).
[71] Geyh and Van Tassel, *supra* note 58, at 78–85.
[72] *Id.*
[73] 17 ANNALS OF CONG. 114 (Feb. 11, 1808), 114-5 (statement of William Giles).

judiciary by "remov[ing]…all of its executive officers indiscriminately," via impeachment and disestablishment.[74] That, however, would be the road not taken.

Over the course of the next hundred and fifty years, a series of conventions would emerge, evolve, and entrench to guide Congress and the President. Such conventions would caution against initiatives that might threaten the independent judiciary so essential to the prevailing ROLP, which the framers aspired to protect in their Constitution. Making the case for the existence of constitutional conventions is tricky business under the best of circumstances, given their informality. It is especially difficult with judicial independence conventions because the primary evidence of their existence is often the absence of action—the steps inimical to judicial independence that Congress or the President could have taken but did not. Sometimes, evidence of the reasons for political branch inaction takes the helpful form of statements offered by elected officials, which explicitly link inaction to respect for a given judicial independence convention. In the absence of such statements, a judicial independence convention can only be inferred from an uninterrupted course of conduct compatible with a convention that cannot readily be explained on other grounds. Making the case for conventions of the latter type is more problematic, insofar as supporting evidence is entirely circumstantial. Ironically, however, conventions that enjoy silent acquiescence may be more robust, to the extent that explicit statements in defense of a convention tend to be necessary only when the convention is vulnerable to attack.

1. Congressional Conventions

[74] Letter from William Giles to Thomas Jefferson (March 16, 1801), *reprinted in* DICE ROBINS ANDERSON, WILLIAM BRANCH GILES: A STUDY IN THE POLITICS OF VIRGINIA AND THE NATION FROM 1790 TO 1830, at 77 (1914).

Convention Against Impeaching Judges for Their Decisions*:* Senator William Giles' campaign against judges appointed by Federalist presidents included an initiative to remove them via impeachment; and while he succeeded with Judge John Pickering, Pickering was more than a strident Federalist—he was an insane and alcoholic strident Federalist.[75] That made it easier to remove Pickering but at the expense of making it harder to cite his impeachment as precedent for removing judges who had fallen from political favor.[76] The Jeffersonian-Republicans then impeached Supreme Court Justice Samuel Chase because of his partisan pronouncements from the bench, but failed to convict him in the Senate, where the implications for judicial independence of removing a judge who issued problematic rulings was not lost on the prevailing Senate faction.[77] In the years since Chase was acquitted, alleged abuse of judicial decision-making power has been among the charges featured in petitions for the impeachment of over thirty federal judges, precisely none of whom was removed on that basis.[78] By 1986, the Chair of the House Judiciary Committee's subcommittee on Courts declined to investigate such matters, reporting categorically that "impeachment does not apply to judicial decision-making" because "[i]t would be a great irony if the protections found in the Judiciary's constitutional charter—Article III—did not shield judges in their decisionmaking role."[79]

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[75] EMILY FIELD VAN TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO PRESENT 91-92 (1999).
[76] *Id.*
[77] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 131-42.
[78] The analysis is complicated by the fact that judges targeted for impeachment are often subject to multiple charges, including but not limited to abuse of judicial power. Some judges were impeached and acquitted; some were impeached and resigned; and some were investigated and resigned. But none after Pickering were impeached and removed for highhanded decision-making. *Id.,* Table 1, at 120-24.
[79] Findings and Conclusions of Robert W. Kastenmeier on Citizen Petitions to Impeach Three Federal Judges (Sept. 25, 1986) (on file with the author).

Convention Against Removing Judges Via Disestablishment of Courts*:* Giles successfully exploited Congress's power to establish inferior courts as authority to disestablish an entire tier of federal courts and remove their officeholders. The Midnight Judges Act and its repeal would indeed set a precedent for the future, but not the one Giles had in mind, for it became a precedent to avoid rather than follow. Over the course of the nineteenth century, as Congress enlarged the judicial workforce to accommodate westward expansion, it became increasingly solicitous of the judiciary's institutional independence and reliably suspicious of proposals to revamp lower court structure, which were repeatedly rejected with negative reference to the ham-handed Midnight Judges Act and its repeal.[80] The convention against this form of court packing and unpacking became so entrenched that never again would Congress disestablish courts as a means to remove Article III judges from office.[81]

Convention Against Partisan Manipulation of Supreme Court Size*:* Congress's practice of retaining the basic structure of the federal courts established by the Judiciary Act of 1789—a practice expressly followed throughout most of the nineteenth century out of respect for the judiciary's status as a separate and independent branch of government—can fairly be described as a convention in its own right.[82] In 1891, that convention yielded (though not without a protracted fight) to caseload pressures, when

[80] *Id.,* at 61-65.

[81] In 1913, Congress disestablished the short-lived Commerce Court, which, in the minds of the majority who voted for its obliteration, had been corrupted by commercial interests as evidenced by the impeachment and removal of Commerce Court Judge Robert Archbald the previous year. Despite profound antipathy toward the Commerce Court and significant support for removing its judges, Congress preserved the judges' offices when it disestablished the court, with repeal of the Midnight Judges Act serving as a negative precedent. *Id.* at 81-85.

[82] Judiciary Act of 1789, 1 Stat. 73 (1789). *See generally* GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 51–111 (discussing Congress's century-long reluctance to disrupt the structure of the Judiciary Act of 1989 out of deference to the negative precedent set by the Midnight Judges Act and its repeal).

Congress established a new system of circuit courts of appeals.[83] But longstanding respect for the structure of the 1789 Act birthed a related convention against partisan manipulation of Supreme Court size. The 1789 Act established a system of circuits and district courts below the Supreme Court, with each Supreme Court justice assigned to oversee (and ride) one of the enumerated circuits.[84] The size of the Supreme Court expanded in lockstep with the establishments of new circuits in the western states until 1866, when Congress shrank the Supreme Court from ten justices to seven.[85]

One possibility is that Reconstruction era Republicans unpacked the Court to deny Democratic President Andrew Johnson multiple appointments.[86] This, however, is a dubious extrapolation from the available evidence. First, President Johnson signed the bill, which he would be unlikely to do if the measure was a partisan gambit to diminish his power.[87] Second, there is a more prosaic explanation for the bill: Chief Justice Salmon Chase had proposed that Congress shrink the size of the Court to accommodate a salary increase for the remaining justices.[88] Third, the bill passed with virtually no debate or explanation—hardly the mark of a contentious power grab by one party to deprive the other of prized appointments.[89] Fourth, a contemporaneous account observed that "[t]here seems to have been no serious opposition to the law, which was in no sense a

[83] Judiciary Act of 1891, 26 Stat. 826 (1891). *See generally* FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT (1927).
[84] Judiciary Act of 1789, 1 Stat. 73 (1789).
[85] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 68.
[86] FRANKFURTER & LANDIS, *supra* note 83, at 72.
[87] Stanley I. Kutler, *Reconstruction and the Supreme Court: The Numbers Game Reconsidered,* 32 J.S. HIST. 42, 43 (1966).
[88] 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88 (pt. I) 167–68 (Paul A. Freund ed., 1971).
[89] *Id.* at 169.

political measure, however much political feelings may have aided its passage."[90] Three years later, Congress increased the Court from seven to nine justices as part of an omnibus court reform package,[91] which restored traditional correspondence between the number of circuits and justices, and the Court has remained at nine in the years since. Some argue that the failure of Franklin Roosevelt's 1937 Court-packing plan established a new convention against further changes to Court size,[92] but it also represented the application of a much more deeply rooted convention against manipulating Supreme Court size for openly partisan purposes.

Qualified Conventions Against Constraining Judicial Independence Via Congressional Manipulation of Judicial Budgets, Salaries, and Workforce: Congress is not above playing games with the judiciary's budgets, salaries, and judgeships. Congress is more generous with its appropriations to the judiciary when its partisan orientation and that of the courts are aligned.[93] In the hopes of improving the prospects for giving itself a raise, Congress has linked increases in judicial salaries to increases in its own salaries—a failed gambit that has left judicial salaries to stagnate. [94] In a related episode, federal judges took Congress to court and prevailed in 2014, after Congress withheld cost of living adjustments to federal judges that it had previously authorized.[95] New judgeships

[90] 1 AMERICAN LAW REVIEW 1866-1867, at 206 (Boston, Little, Brown, and Company 1867). The possibility that this contemporaneous account was a work of revisionism written by a bill supporter intent on concealing its partisan motivations is belied by the author's criticism of the measure on the merits. *Id.* at 207.
[91] Act of Apr. 10, 1869, ch.22, § 1, 16 Stat. 44.
[92] Chafetz & Pozen, *supra* note 57, at 1440.
[93] Eugenia F. Toma, *A Contractual Model of the Voting Behavior of the Supreme Court: The Role of the Chief Justice,* 16 INT'L REV. L. & ECON. 433, 442 (1996) ("The larger the difference between the Court [ideological] output rating and the preferred output of Congress … the smaller the budget").
[94] *See* Russell R. Wheeler & Michael S. Greve, How to Pay the Piper*,* The Brookings Institution (April, 2007), https://www.brookings.edu/wp-content/uploads/2016/06/04governance_wheeler.pdf.
[95] James Rowley, *Federal Judges in Cost-of-Living Suit Collect a 14 Percent Raise After Years of Legal Battles*, WASHINGTON POST (January 16, 2014), https://www.washingtonpost.com/politics/federal-

bills are likelier to pass when the same political party controls Congress and the White House,[96] and such bills often include unnecessary judgeships in states of influential legislators, which can best be explained as a perk of power.[97]

Such shenanigans notwithstanding, Congress has never exploited these powers to subjugate the judiciary. It has never slashed the judiciary's operating budget in retaliation for unpopular judicial decisions, as many state legislatures have.[98] Congress has not wielded its power to grant or withhold salary increases to punish or reward judges for their decision-making, and when congressional outliers propose to manipulate judicial salaries or budgets in these ways, the ensuing rebukes and inaction illuminate an underlying convention against such practices.[99] In 1801, the Midnight Judges Act expanded the judicial workforce for arguably partisan purposes, but in the modern era, proposed new judgeships are supported by nonpartisan workload data supplied by the

judges-in-cost-of-living-suit-collect-a-14-percent-raise-after-years-of-legal-battles/2014/01/16/c06ee214-7eda-11e3-93c1-0e888170b723_story.html

[96] John M. De Figueiredo & Emerson H. Tiller, *Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary,* 39 J.L. & Econ. 435, 459–60 (1996).

[97] Ann Pelham, *Biden Takes Judiciary to Task,* LEGAL TIMES (July 2, 1990) https://www.fjc.gov/sites/default/files/2017/BB4-5-Federal%20Court%20Watch%207-2-90.pdf.

[98] AMERICAN BAR ASSOCIATION., JUSTICE IN JEOPARDY: Report of the AMERICAN BAR ASSOCIATION Commission on the 21st Century Judiciary 31-3 (July, 2003) https://www.americanbar.org/content/dam/aba/migrated/judind/jeopardy/pdf/report.authcheckdam.pdf.

[99] *Representative Steve King on Federal Budget Issues,* C-SPAN (Mar. 16, 2011), https://www.c-span.org/video/?298525-5/representative-steve-king-federal-budget-issues.

Judicial Conference,[100] which has the effect of exposing unnecessary judgeships as highly visible exceptions to a convention against such manipulations.[101]

Procedural Conventions in Judicial Confirmation Proceedings: The grounds upon which federal judges are nominated and then confirmed or rejected have always been openly partisan and unconstrained by conventions against intruding upon the prospective independence of nominees.[102] The President and Senate did, however, adopt procedural conventions (some memorialized as Senate rules) that fostered deliberation, compromise, and consensus in the confirmation process, which promoted an independent judiciary indirectly. The tradition of "senatorial courtesy," which began in the 1830s, called upon Presidents to confer with same-party Senators from a prospective district court nominee's home state, and defer to the Senators' recommendations.[103] The so-called "blue-slip" procedure enabled a nominee's home state senator to block a vote on the confirmation—a process that in practice added a layer of consultation and cooperation before a nomination could proceed.[104] Cloture rules empowered as few as forty-one Senators to kill a confirmation by means of a filibuster, which incentivized Presidents to

[100] Barry J. McMillion, CRS Report R45899, *Recent Recommendations by the Judicial Conference for New U.S. Circuit and District Court Judgeships: Overview and Analysis*, 1, 10-11 (Sept. 3, 2019) (describing the process that the Judicial Conference Subcommittee on Judicial Statistics employs to assess judgeship needs with reference to workload factors). DEBORAH J. BARROW ET. AL., THE FEDERAL JUDICIARY AND INSTITUTIONAL CHANGE 93–94 (1996) (describing the "expertise" relevant to the Judicial Conference's role as "initiator" of judgeships legislation in the modern era). The judiciary can manipulate the workload data to serve its own institutional interests, but that is a separate concern that does not implicate Congressional encroachment on the judiciary's independence. *See* Stephen B. Burbank et. al., *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1 (2012).
[101] *Id.*
[102] *See generally* HENRY J. ABRAHAM, JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II (5th ed. 2008).
[103] Stephen B. Burbank, *Politics, Privilege, and Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24, 25–26 (2002).
[104] Brannon P. Denning, *The"Blue-slip": Enforcing the Norms of the Judicial Confirmation Process*, 10 WM & MARY BILL RTS. J. 75, 76 (2001).

nominate judges who enjoyed bipartisan acquiescence, if not support.[105] Beginning in the 1950s, Presidents called upon the American Bar Association to review nominee qualifications, which facilitated broader consensus in support of the ABA's nonpartisan recommendations, and bolstered the credibility of nominees deemed qualified.[106] In promoting deliberation, consensus, and compromise, these rules cultivated a stable selection process, which yielded a judicial workforce that (with exceptions) enjoyed broad-based support—a workforce that, in the public's mind, could be trusted with its independence.

2. Presidential Conventions

Convention Against Openly Defying Court Orders*:* As a matter of constitutional principle, the President's obligation to comply with direct orders of the U.S. Supreme Court, consonant with the principle of checks and balances, is all but universally accepted.[107] It is just as universally understood, however, that the President possesses the raw political power to defy a direct order, and that the Supreme Court is helpless to force compliance if he does.[108] But true defiance, when the President openly flouts a Supreme

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[105] Betsy Palmer, CRS Report RL31948, *Evolution of the Senate's Role in the Nomination and Confirmation Process: A Brief History* 1, 13 (June 5, 2003) https://www.senate.gov/reference/resources/pdf/RL31948.pdf (noting that as of then, numerous threats of filibuster had culminated in only one judicial nominee being denied confirmation); *see generally* Valerie Heitshusen & Richard S. Beth, CRS Report RL30360, *Filibusters and Cloture in the Senate* (April 7, 2017) https://www.senate.gov/CRSpubs/3d51be23-64f8-448e-aa14-10ef0f94b77e.pdf

[106] Hilarie Bass, President, Am. Bar Ass'n., Statement Re: ABA judicial evaluations (Nov. 1, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/11/statement_of_abapre/.

[107] Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 131314 (1996) ("every modern departmentalist scholar has maintained that the President has an obligation to enforce specific judgments rendered by federal courts, even when the President believes that the judgments rest on erroneous constitutional reasoning."); *but see* Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217, 283 (1994)("[t]here is no general power of courts to issue direct orders to the President that the President is constitutionally obliged to obey.")

[108] Lee Epstein & Eric A. Posner, *The Decline of Supreme Court Deference to the President*, 166 U. PA. L. REV. 829, 831 (2018). For a general discussion of court orders and presidential defiance, *see* Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence,* 71 VAND. L. REV. 465, 467 (2018).

Court order directing him to take specified action, has occurred only once, when, in the midst of the Civil War, Lincoln activated the suspension clause and refused to comply with a writ of habeas corpus in the teeth of a Supreme Court order that he do so.[109]

Explanations for why Presidents do not defy court orders share a common theme introduced in the opening paragraphs of this article: The Constitution works because we will it to work. The ROLP has created a powerful default in favor of Presidential compliance with Court orders. The reservoir of legitimacy that an independent judiciary enjoys render defiance a perilous course for Presidents in all but the most extraordinary circumstances.[110] And the Supreme Court has acted strategically by issuing orders against Presidents infrequently and under circumstances in which the Court has an airtight rationale that deprives Presidents of plausible arguments for defiance.[111] One scholar has described the resulting "obligation of governmental officials to obey judicial orders," as possibly "the most important convention of all."[112] With the crisis-breeding option of brazenly defying direct courts order rendered effectively nonviable, Presidents and courts have confined their skirmishes over compliance to matters of degree, and on rare occasion, enforcement of Supreme Court orders issued against other parties.[113]

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[109] U.S. CONST. art. 1, §9, cl. 2; James A. Dueholm*, Lincoln's Suspension of the Writ of Habeas Corpus: An Historical and Constitutional Analysis,* 29 J. OF THE ABRAHAM LINCOLN ASS'N 47 (2008).
[110] Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in A Populist Age*, 96 TEX. L. REV. 487, 507 (2018)
[111] Michael J. Gerhardt, *Presidential Defiance and the Courts*, 12 HARV. L. & POL'Y REV. 67, 71 (2018). *See* Epstein & Posner, *supra* note 108, at 832 (2018). *See also* Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in A Populist Age*, 96 TEX. L. REV. 487, 507–08 (2018).
[112] James G. Wilson, *American Constitutional Conventions: The Judicially Unenforceable Rules That Combine with Judicial Doctrine and Public Opinion to Regulate Political Behavior*, 40 BUFF. L. REV. 645, 674–75, n. 128 (1992).
[113] *See* David Janovsky & Sarah Turberville, *The President v. The Courts,* POGO (Feb. 13, 2018), https://www.pogo.org/analysis/2018/02/president-v-courts/.

Qualified Convention against Rhetoric that Delegitimizes the Courts: There are innumerable examples of Presidents taking exception to judges, courts and judicial decisions, with colorful criticism of judges and judicial decisions making occasional appearances in off the record remarks.[114] Delegitimizing rhetoric, in contrast, which challenges the legitimacy of judges and the judiciary by attacking their integrity or accusing them of usurping power in derogation of their duty to uphold the law, is quite rare. Thomas Jefferson once characterized the federal courts as a "subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric"—but did so in private correspondence, after he had left office.[115] Andrew Jackson had his quarrels with the Marshall Court, but did not publicly challenge the Court's legitimacy or impugn its integrity.[116] Abraham Lincoln warned that "if the policy of the government…is to be irrevocably fixed by decisions of the Supreme Court, … the people will have ceased to be their own rulers, having, to that extent, practically resigned their government into the hands of that eminent tribunal"—but his observation was sandwiched between statements emphasizing his support for the Court and respect

[114] *See* Todd S. Purdum, *Presidents, Picking Justices, Can Have Backfires,* N.Y. TIMES (July 5, 2005), https://www.nytimes.com/2005/07/05/politics/politicsspecial1/presidents-picking-justices-can-have-backfires.html.
[115] *Jefferson on the Supreme Court,* N.Y. TIMES (June 23, 1861), https://www.nytimes.com/1861/06/23/archives/jefferson-on-the-supreme-court.html.
[116] Jeffrey Rosen, *Not Even Andrew Jackson Went as Far as Trump in Attacking the Courts,* THE ATLANTIC (Feb. 9, 2017), https://www.theatlantic.com/politics/archive/2017/02/a-historical-precedent-for-trumps-attack-on-judges/516144/ (Jackson vetoed a bill re-chartering the National Bank because he deemed it unconstitutional, notwithstanding a Supreme Court upholding the validity of the original charter, explaining that it was his duty to "decide upon the constitutionality of any bill," independently of the Court. Jackson may have questioned the limits of judicial supremacy, but he did not defy a Court order and cannot fairly be characterized as attacking the Court's legitimacy or integrity. When, in response to a later Court ruling, Jackson reportedly said that "John Marshall has made his decision, now let him enforce it," one might infer a more menacing threat to the Court's authority and legitimacy—but the best available evidence is that Jackson never made the statement.)

for its rulings.[117] Richard Nixon observed that "When you look at what the United States Supreme Court has done to hamper law enforcement … I wonder if we truly have representative government anymore"—but he said that as a candidate, before he became President.

The convention against delegitimizing rhetoric, however, should be qualified by the anti-Court campaign of Franklin Roosevelt. FDR's campaign was prompted by a series of Supreme Court decisions that invalidated legislation integral to FDR's New Deal agenda—an agenda that sought to combat the Great Depression by expanding the role of the federal government in the economic recovery.[118] FDR railed that the Court had usurped power, by "cast[ing] doubts on the ability of the elected Congress to protect us against catastrophe," and again, by "improperly set[ting] itself up as a third House of the Congress … reading into the Constitution words and implications which are not there, and which were never intended to be there."[119] After the Court upheld a piece of New Deal legislation, he impugned the dissenters' allegiance to the country and Constitution, accusing them of concluding that "the right under a private contract to exact a pound of flesh was more sacred than the main objectives of the Constitution to establish an enduring Nation."[120] As a consequence of these alleged usurpations, he argued that the

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[117] *Mr. Lincoln and the Supreme Court,* N.Y. Times (Mar. 9, 1861), https://www.nytimes.com/1861/03/09/archives/mr-lincoln-and-the-supreme-court.html. Immediately before making the quoted statement, Lincoln said that he did not "deny that [constitutional questions decided by the Supreme Court] must be binding in any case upon the parties… while they are also entitled to very high respect and consideration in all parallel cases by all other departments of the Government." Immediately after the quoted statement, Lincoln added "Nor is there in this view any assault upon the court or the judges. It is a duty from which they may not shrink to decide cases properly brought before them, and it is no fault of theirs if others seek to turn their decisions to political purposes."

[118] David E. Kyvig, *The Road Not Taken: FDR, the Supreme Court, and Constitutional Amendment*, 104 POL. SCI. Q. 463, 464-5 (1989).

[119] *Fireside Chat on Reorganization of the Judiciary,* Franklin D. Roosevelt Presidential Library and Museum (Mar. 9, 1937), http://docs.fdrlibrary.marist.edu/030937.html.

[120] *Id.*

Court could not be trusted, declaring that, "we must take action to save the Constitution from the Court and the Court from itself."[121] Such statements are undeniably a break from the convention of restraint in Presidential criticism of the Court. It bears emphasis, however, that Roosevelt was a convention-breaker extraordinaire. He attacked the Court like no other, tried to pack the Court like no other, expanded the role of the federal government in American life like no other, and was the first and only President in history to defy the two-term convention and seek a third term in office. Moreover, context is key to understanding FDR's role as convention-breaker, which occurred amid the back-to-back, protracted national emergencies of the Great Depression and World War II.[122] Therefore, FDR may fairly be characterized as sui generis—an outlier whose exceptional attacks upon the legitimacy of the Supreme Court highlight the prevalence of an underlying rule or convention against the practice that other Presidents have respected under all but the most exigent circumstances.

The many and varied conventions summarized here proceeded from a common premise: That they were needed to constrain powers that the President and Congress might otherwise exploit to undermine judicial independence in ways antithetical to the ROLP that the framers sought to implement in their Constitution. This cluster of conventions comprises a broader custom of political branch respect for the judiciary's autonomy that I have previously denominated "customary independence."[123] Customary independence is not grounded in some naively optimistic belief that political branch

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[121] *Id.*

[122] His abrogation of conventions against Court-packing, delegitimizing rhetoric, and a limited national government arose out of his campaign to combat the Great Depression, as discussed here, while his decision to run for a third term was attributable to the onset of World War II. https://historynewsnetwork.org/article/152895

[123] Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSS-ROADS (Stephen Burbank & Barry Friedman, eds, Sage Press, 2002).

actors stay their hand out of altruistic admiration for the judiciary's freedom from encroachment. Rather, customary independence is a biproduct of the deep-seated legitimacy that the judiciary enjoys with the public that the political branches serve, which renders political-branch power grabs at the expense of the judiciary's autonomy a perilous strategic ploy.[124]

The emergence and entrenchment of customary independence bespeaks a form of judicial branch exceptionalism. There are myriad constitutional conventions that regulate how the executive and legislative branches conduct their own affairs and interact with each other. But conventions regulating relationships with the judiciary are different: They represent a conglomeration of related practices that fill a sizable hole in the constitutional design of a branch of government that the framers left gaping through inexperience and benign neglect. Without customary independence, the political branches could comply with the tenure and salary protections of Article III but still bring the judiciary to its knees by exploiting other powers at their disposal, in derogation of the ROLP that the framers sought to implement. In other words, constitutional conventions are instrumental to the efficient operation of the political branches in relation to the other branches but they are essential to the very survival of a separate and independent judiciary.

C. Judicial Independence 3.0

During Judicial Independence 2.0, independence norms gradually evolved into discrete conventions that collectively comprised customary independence. The road to customary independence was bumpy. Judicial independence conventions often emerged

[124] For example, Professor William Ross explains the cool reception FDR's Court-packing plan received in Congress, with reference to grass roots opposition to the president's encroachment on the judiciary's autonomy. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937 1 (1994).

between or during cycles of anti-court sentiment that challenged judicial independence norms and sometimes threatened their survival.[125] But over the course of the nineteenth and into the twentieth centuries—the heyday of Judicial Independence 2.0—these cycles of court-directed hostility acquired a distinct pattern. Each cycle began in the aftermath of a major transition of political power—following the ascent of the Jeffersonian Republicans in 1801; the Jacksonian Democrats in 1829; Reconstruction Republicans in 1865; Progressive Reformers in the 1890s; the New Dealers in 1933; Richard Nixon (whose election culminated a campaign against the Warren Court) in 1969; and congressional Republicans in 1995. Leaders of each new regime, disgruntled by decisions of judges left behind by the former regime, would then propose to constrain the independence of the holdover judges. Court defenders, armed with judicial independence conventions, would challenge and thwart court critics; holdover judges would act strategically to reduce unnecessary confrontations; judges appointed by the new regime would gradually replace holdover judges as they retired, and the cycle would wind down.[126]

The longevity of customary independence is attributable to the ROLP, which guided both the formation of the Constitution itself, and the independence conventions that emerged to fill spaces in the constitutional text in a manner consistent with the paradigm. Beginning in the 1920s, however, a slowly gathering confluence of developments in social science, federal judicial appointments, state judicial elections, media coverage of courts, and public opinion, began to challenge assumptions core to the ROLP—most

[125] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 51–52.
[126] Charles Gardner Geyh, *The Choreography of Courts-Congress Conflicts*, in JUDGES UNDER SIEGE: COURTS, POLITICS & THE PUBLIC (Bruce Peabody, ed, Johns Hopkins University Press., 2010).

notably, the assumption that independent judges set extralegal influences aside and impartially uphold the law.

1. Legal Realism and the Rise of Social Science

The legal realism movement of the 1920s did not challenge the relevance of law to judicial decision-making, per se,[127] but did challenge legal determinacy. Proponents of the new "realistic jurisprudence," argued that empirical study was essential to understanding the choices judges made, because those choices could not be explained with reference to operative law alone.[128]

Beginning in the early 1940s, dissenting and concurring opinions on the Supreme Court increased in frequency.[129] That enabled an emerging cohort of political scientists to compare the ideological orientations of justices in the majority and dissent to the end of showing that the choices the justices made correlated with their preexisting ideological preferences. In the 1960s, Glendon Schubert dubbed this the "attitudinal model," because it explained voting patterns on the Supreme Court with reference to the underlying attitudes of the justices.[130] By the 1990s, Jeffrey Segal and Harold Spaeth declared the attitudinal model triumphant and the legal model "meaningless,"[131] while other political scientists relegated the relevance of law in Supreme Court decision-making to the status of myth.[132] In the early 2000s, a team of law professors and political scientists showed that a computer model, which incorporated attitudinal factors into its analysis and took no

[127] BRIAN TAMANAHA, A REALISTIC THEORY OF LAW 24-26 (2017).
[128] Karl N. Llewellyn, *A Realistic Jurisprudence – The Next Step,* 30 COLUM. L. REV. 431, 444 (1930)
[129] Cass Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769 (2015).
[130] GLENDON SCHUBERT, THE JUDICIAL MIND: THE ATTITUDES AND IDEOLOGIES OF SUPREME COURT JUSTICES, 1946-1963 (1965).
[131] JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 62-65 (1993).
[132] John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 936 (2000).

account of the specific legal issues at stake, was better able to predict the outcomes of cases in a pending Supreme Court term than a panel of legal experts.[133] In the years since, academic lawyers and political scientists have shifted focus to federal courts of appeal, where they have found that attitudinal influences, while less pronounced than on the Supreme Court, are nonetheless measurable.[134]

Back in the law schools, the Critical Legal Studies movement of the 1970s planted seeds for later germination of critical race and critical feminist theories, which explored (among other things) the role that race and gender play in the administration of justice.[135] Studies correlating the race of the judge to rulings issued on motions to dismiss in race discrimination cases underscored that political ideology is not the only extralegal influence on the decision-making of independent federal judges.[136]

2. Judicial Appointments and the Ascendance of Ideology

Meanwhile, the federal judicial appointments process was evolving on a parallel track. Supreme Court confirmation proceedings have never been apolitical. Throughout the 19th century, senators frequently offered makeweight, merits-based objections to Supreme Court nominees that concealed more deeply partisan motives aimed at punishing nominees for past political transgressions, thwarting unpopular Presidents, or backhanding Presidents for failing to consult with relevant Senate leaders before making

[133] Theodore Ruger et al., *Supreme Court Forecasting Project: Legal and Political Science Approaches to Supreme Court Decision-Making,* 104 U. PA L. REV. 1150 (2004).
[134] JEFFREY EPSTEIN ET AL., THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE 69–85 (2013); CASS SUNSTEIN ET AL., ARE JUDGES POLITICAL?: AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY (2006).
[135] Cortney A. Franklin & Noelle E. Fearn, *Gender, race, and formal court decision-making outcomes: Chivalry/paternalism, conflict theory or gender conflict?,* 36 JOURNAL OF CRIM. JUSTICE 279–90 (2008).
[136] Victor D. Quintanilla, *Beyond Common Sense: A Social Psychological Study of Iqbal's Effect on Claims of Race Discrimination,* 17 MICH. J. RACE & L. 1 (2011).

nominations.[137] It was not until 1888, though, that the Senate first focused on the prospective impact of a nominee's ideological orientation on his future decision-making as a basis for rejecting him—a focus that became increasingly prevalent throughout the twentieth century, culminating in the Senate's 1986 rejection of Supreme Court nominee Robert Bork.[138] In the years since the Bork rejection, nominee ideology has been a focus of virtually every Supreme Court confirmation proceeding, and has moved to the front and center of circuit and sometimes district court confirmation proceedings as well.[139] Like the attitudinal model's rejection of law as a meaningful influence on Supreme Court decision-making, the Senate's partisan battle for ideological control of the courts cannot easily be squared with a tenet core to the ROLP: that when deciding cases, independent federal judges set their ideological predilections and other extralegal influences aside and uphold the law.

As ideology became an increasingly pivotal issue in confirmation proceedings during Judicial Independence 3.0, senators from both political parties, keen to thwart the appointments of the opposing party's President, began to abuse procedural conventions in the service of changing objectives. Scheduling hearings and floor votes on nominees, once an unexceptional convention to promote reasoned deliberation, was morphed into a weapon to stall and sometimes kill nominations.[140] The blue-slip procedure, which had been employed to promote consultation between the President and a nominee's home

[137] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 195–204.
[138] *See* David J. Danelski, *Ideology as a Ground for the Rejection of the Bork Nomination*, 84 NW. U. L. REV. 900 (1990); Erwin Chemerinsky, *Ideology and the Selection of Federal Judges*, U.C. DAVIS L. REV. 619 (2003).
[139] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34, at 204–08.
[140] *Id.* at 216-22.

state Senator, was repurposed to block nominations outright.[141] Filibusters, the threat of which had long served to encourage compromise and consensus, were exploited by the Senate minority to thwart nominees.[142]

Another procedural convention in place since 1953,[143] granted the American Bar Association's Committee on the Federal Judiciary early access to administration files on prospective nominees, for the purpose of rating the qualifications of nominees on the basis of avowedly non-partisan criteria.[144] After the Committee awarded President Reagan's Supreme Court nominee Robert Bork a diminished (but favorable) rating in light of his ideology, conservatives began to accuse the ABA of having a liberal bias.[145] That suspicion was arguably corroborated by data showing that ABA ratings of Republican nominees were lower on average than for Democratic nominees[146] and culminated in President George W. Bush eliminating the ABA's early access to nominee files.[147] The ABA's post-nomination ratings, however, continued to be influential in the

[141] *Id.*
[142] *Id.*
[143] Linda A. Klein, President, Am. Bar Ass'n., Statement re: ABA's role in screening judicial nominations (Mar. 31, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/03/statement_of_abapre1/.
[144] Lee Rawles, *Its ratings system under fire, ABA stresses importance of federal judicial candidate evaluations,* ABA JOURNAL (Jan. 1, 2018), http://www.abajournal.com/magazine/article/federal_judicial_candidate_evaluations.
[145] *The ABA's BFF: Why Obama wants lawyers to rate judges*, THE WALL STREET JOURNAL (Apr. 21, 2009), https://www.wsj.com/articles/SB124027173965437107.
[146] Susan N. Smelcer et al., *Bias and the Bar: Evaluating the ABA Ratings of Federal Judicial Nominees,* 65 POL. RES. Q. 827–40 (2012). This may demonstrate a liberal bias. Alternatively, Republican administrations have arguably demonstrated a more robust commitment to appointing ideologically compatible judges than their Democratic counterparts, which could translate into diminished emphasis on qualifications relative to ideology for Republican nominees. *See* Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 397 (2003) (discussing Reagan administration blueprint for reorienting constitutional law via the appointment of ideological conservatives to the Supreme Court).
[147] Linda A. Klein, President, Am. Bar Ass'n., Statement re: ABA's role in screening judicial nominations (Mar. 31, 2017), https://www.americanbar.org/news/abanews/aba-news-archives/2017/03/statement_of_abapre1/.

confirmation of Bush nominees,[148] and President Obama later restored the ABA's traditional, pre-nomination role, never once nominating a judge that the ABA deemed "unqualified" (if only because he had the ratings in hand before making nominations).[149]

3. The New Politics of Judicial Elections

In a similar vein, beginning in the 1970s, a new politics of judicial elections morphed state supreme court races into well-funded campaigns to remove incumbents for making unacceptable decisions on such issues as tort reform, criminal justice, same-sex marriage, abortion, water rights, education funding, and other ideologically-charged issues.[150] These campaigns proceeded from the premise that independent judges could not be trusted to uphold the law impartially and needed to be controlled at the ballot box. And the data show that the strategy works: judges dependent on voters respond to fear of defeat at the ballot box, ruling differently when elections are impending, by, for example, sentencing criminal defendants more harshly.[151]

4. The Changing Media

In a series of developments spanning more than a generation, the media became apostles for the gospel of an ideological judiciary. In divided decisions, the traditional media report on Supreme Court opinions with reference to the ideological voting blocs of

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[148] Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges,* N. Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html; George W. Bush, President, United States of America, President Bush Discusses Judicial Accomplishments and Philosophy (Oct. 6, 2008), https://georgewbush-whitehouse.archives.gov/news/releases/2008/10/20081006-5.html

[149] Patrick L. Gregory, *Trump Picks More 'Not Qualified' Judges (1),* BLOOMBERG LAW (Dec. 17, 2018), https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1..

[150] GEYH, WHO IS TO JUDGE, *supra* note 59, at 60–67.

[151] Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?,* 48 AM. J. POL. SCI. 247, 258–62 (2004).

justices in the majority and dissent.[152] Cable television news networks emerged in the 1980s and oriented their programming toward ideologically driven infotainment that attacked or defended Supreme Court decisions with reference to the pundit's partisan inclinations.[153] With the explosion of the internet in the 1990s, non-traditional citizen journalists, unencumbered by fact-checking norms that regulate the mainstream media, took to the internet and social media to attack judicial decisions they deemed ideologically unacceptable.[154]

5. Public Perception

Survey data show that the public shares the views animating Judicial Independence 3.0. Seventy-five percent of the public thinks that "a judge's ruling is influenced by his or her personal political views to a great or moderate extent."[155] Fifty-eight percent agree with the statement that "judges always say that their decisions are

[152] MICHAEL F. SALAMONE, PERCEPTIONS OF A POLARIZED COURT: HOW DIVISION AMONG JUSTICES SHAPES THE SUPREME COURT'S PUBLIC IMAGE (2018) (finding that Supreme Court decisions with more dissenting justices receive more media coverage and are likelier to be framed in ideological terms) http://academia.edu/5058189/News_Media_Portrayal_of_Ideology_and_Division_among_Supreme_Court_Justices.

[153] *Partisanship and Cable News Audiences,* PEW RES. CTR. (Oct. 30, 2009), https://www.pewresearch.org/2009/10/30/partisanship-and-cable-news-audiences/.

[154] For instance, the Brennan Center for Justice issued "Court Pester" Awards on its website for several years, in response to the conservative Family Research Council's "Court Jester" Awards. Ken Weine, *Brennan Center Hands Out Court Pester Awards* (June 15, 1999), https://www.brennancenter.org/press-release/brennan-center-hands-out-court-pester-awards.

[155] The Annenberg Pub. Policy Center, Univ. of Pa., Fair and Independent Courts: A Conference on the State of the Judiciary, Summary of Survey Results/The Public and the Courts (2006), https://cdn.annenbergpublicpolicycenter.org/Downloads/Releases/Release_Courts20060928/Courts_Summary_20060928.pdf. This data point is arguably in tension with a more recent Annenberg survey which found that 49% of respondents agreed with the statement that Supreme Court justices "set aside their personal and political views and make rulings based on the Constitution, the law, and the facts of the case." The Annenberg Pub. Policy Center, Univ. of Pa., *Most Americans Trust the Supreme Court, but Think it is Too 'Mixed up in Politics*," October 16, 2019 https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/. While it is possible that the public thinks Supreme Court justices are less influenced by their political views than other judges, or that fewer people think judges are influenced by their political views in 2019 than 2006, the better explanation may lie with differences in how the questions were worded: whereas a substantial majority thinks that a judge "is influenced" by her political views, a lower percentage thinks that judges fail to "set aside" those views, with the latter phrase implying a more conscious choice.

based on the law and the Constitution, but in many cases judges are really basing their decisions on their own personal beliefs."[156] Fifty-seven percent think that the Supreme Court "gets too mixed up in politics."[157] The public regards elected judiciaries as more legitimate than appointed,[158] supports judges who promise to decide cases in a manner consistent with majority preferences,[159] and is evenly divided on the question of whether the Supreme Court should be "less independent" to ensure that it "listens a lot more to what the people want."[160]And while trust levels in the Supreme Court appear stable and strong (relative to support for Congress or the President), at 68%,[161] that support is to no small extent contingent, "what have you done for me lately?" support.[162] In other words, relatively stable-seeming support for the Court is the equivalent of still water at the surface, concealing cross-currents that shift from administration to administration between liberal and conservative respondents, depending on the ideological orientation of the appointing President and the Supreme Court' latest rulings.[163]

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[156] CAMPBELL PUB. AFFAIRS INST., MAXWELL SCH. OF SYRACUSE UNIV., LAW AND COURTS QUESTIONS FROM 2005 POLL (2005).
[157] The Annenberg Pub. Policy Center, Univ. of Pa., Most Americans Trust the Supreme Court, but Think it is Too 'Mixed up in Politics," October 16, 2019 https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/.
[158] JAMES GIBSON, ELECTING JUDGES: THE SURPRISING EFFECTS OF CAMPAIGNING ON JUDICIAL LEGITIMACY 107 (2012) (finding that judicial elections produce a net gain for legitimacy).
[159] James L. Gibson & Gregory A. Caldeira, *Campaign Support, Conflicts of Interest, and Judicial Impartiality: Can Recusals Rescue the Legitimacy of Courts?*, 74 J. POL. 18, 31 (2012).
[160] The Annenberg Pub. Policy Center, Univ. of Pa., *Most Americans Trust the Supreme Court, but Think it is Too 'Mixed up in Politics,"* October 16, 2019 https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/.
[161] *Id.*
[162] Stephen B. Burbank, *Judicial Independence, Judicial Accountability and Interbranch Relations*, 95 GEO, L. J. 909, 916 (2006) ("[T]here is reason to fear that the distinction between support for courts irrespective of the decisions they make ('diffuse support') and support depending on those decisions ('specific support') will disappear. If that were to occur, the people would ask of the judiciary not, 'What does the law require?' but rather, 'What have you done for me lately?'").
[163] *Id.* (attributing a recent rise in support for the Supreme Court to conservative respondents). *See also* Charles Gardner Geyh, *The Supreme Court is Losing its Luster,* NEW REPUBLIC (Mar. 11, 2016), https://newrepublic.com/article/131451/supreme-court-losing-luster.

There are sentiments common to developments in social science, Senate confirmation proceedings, judicial elections, the media, and public opinion: that courts are battlefields for control of legal policy; that judges are ideological animals; that judicial independence cedes control of legal policy to the ideological preferences of judges; and that it is problematic to vest judges, rather than the people judges serve, with the power to control legal policy. In short, Judicial Independence 3.0 embodies a generations-long reassessment of the principles underlying the ROLP.

The ultimate point is not that "we are all legal realists now," as if the public has been jostled awake from its formalist slumber by the epiphany that judges do more (and less) than apply the law.[164] To the contrary, the public has never been so naïve as to think that judges are impervious to extralegal influences.[165] That being so, longstanding support for the ROLP and its premise that independent judges set extralegal influences aside and impartially uphold the law, can best be explained in aspirational terms, as a worthy goal. Accordingly, the important point for purposes here is that during Judicial Independence 3.0, public perception of empirical reality became so far removed from the assumptions undergirding the ROLP that the hypocrisy of pretending that judges are something they are not began to wear thin.

IV. Judicial Independence 4.0: Collapse of Conventions

Judicial Independence 3.0 embodied an emerging skepticism of the ROLP and its premise that independent judges hold their personal predilections at bay and impartially uphold the law. The pace of Judicial Independence 3.0 was glacial, spanning the better part of a century. If this third phase in the evolution of judicial independence progressed

[164] *See generally* Joseph W. Singer, *Legal Realism Now,* 76 CAL. L. REV. 465–544 (1988).
[165] GEYH, COURTING PERIL, *supra* note 44 at 61-69.

at a steady rate, one could anticipate that respect for the paradigm would continue to decline, resulting in the gradual disintegration of the discrete conventions that comprise customary independence, and culminating in the eventual collapse of the paradigm itself. But other sociopolitical changes, much broader than the judiciary, have converged to accelerate the assault on the ROLP and fracture customary independence, culminating in the repudiation of several judicial independence conventions. Welcome to Judicial Independence 4.0.

A. The Road to 4.0

Four developments have contributed to the arrival of Judicial Independence 4.0: democracy fatigue; anti-elitism; the rise of neo-populism; and political polarization. The relationship between these developments and the accelerated decline of customary independence is speculative, insofar as the causal linkage between such developments and diminishing support for the judiciary and its autonomy is indirect. But there is nothing speculative or indirect about the relationship between these developments and the ascent to power of neo-populist regimes in the United States and elsewhere. Nor is there anything speculative or indirect about the ways in which neo-populist regimes have consolidated power by weakening the judiciary's check on executive branch authority, which, in the United States, has manifested in the repudiation of judicial independence conventions.

1. Democracy fatigue

In the United States, popular support for a democratic form of government remains robust. An overwhelming majority of Americans surveyed favor democracy over

autocracy or military rule.[166] There are, however, two chinks in the armor, manifested by a deepening distrust of the national government and deflated rates of voter participation.

First, while support for democracy is strong in principle, support for the government that American democracy has wrought, is not. During the unpopular Vietnam War, Lyndon Johnson withheld facts about the progress of the war effort that engendered public distrust of the national government.[167] That distrust deepened precipitously in later decades, after the Watergate scandal during the Nixon administration, [168] the Iran-Contra affair during the Reagan administration,[169] and an unpopular war in Iraq during the George W. Bush administration[170] The net effect: the percentage of respondents who trust the federal government all or most of the time has

[166] Richard Wike et al., *Democracy widely supported, little backing for rule by strong leader or military*, PEW RES. CTR. (Oct. 16, 2017), https://www.pewresearch.org/global/2017/10/16/democracy-widely-supported-little-backing-for-rule-by-strong-leader-or-military/; Lee Drutman et al., *Follow the Leader: Exploring American Support for Democracy and Authoritarianism*, VOTER STUDY GROUP (Mar. 2018), https://www.voterstudygroup.org/publication/follow-the-leader.
[167] *Public Trust in Government: 1958-2019*, PEW RES. CTR (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/; *Trust in Government*, GALLUP (Jan. 2019), https://news.gallup.com/poll/5392/trust-government.aspx. *See also* Karl Marlantes, *Vietnam: The War That Killed Trust*, N.Y. TIMES (Jan. 7, 2017), https://www.nytimes.com/2017/01/07/opinion/sunday/vietnam-the-war-that-killed-trust.html; Julian E. Zelizer, *How the Tet Offensive Undermined American Faith in Government*, THE ATLANTIC (Jan. 15, 2018), https://www.theatlantic.com/politics/archive/2018/01/how-the-tet-offensive-undermined-american-faith-in-government/550010/.
[168] *Public Trust in Government: 1958-2019*, PEW RES. CTR (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/; *Trust in Government*, GALLUP (Jan. 2019), https://news.gallup.com/poll/5392/trust-government.aspx. *See also* Ken Burns & Lynn Novick, *How the Vietnam War Broke the American Presidency*, THE ATLANTIC (Oct. 2017), https://www.theatlantic.com/magazine/archive/2017/10/how-americans-lost-faith-in-the-presidency/537897/; Lynn Vavreck, *The Long Decline of Trust in Government, and Why That Can Be Patriotic*, N.Y. TIMES (July 3, 2015), https://www.nytimes.com/2015/07/04/upshot/the-long-decline-of-trust-in-government-and-why-that-can-be-patriotic.html.
[169] *Public Trust in Government: 1958-2019*, PEW RES. CTR (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/; *Trust in Government*, GALLUP (Jan. 2019), https://news.gallup.com/poll/5392/trust-government.aspx.
[170] *Id.*; *Trust in Government: 1958-2015*, PEW RES. CTR. (Nov. 23, 2015), https://www.people-press.org/2015/11/23/1-trust-in-government-1958-2015/.

declined from 77% at the beginning of the Johnson administration, to around 17% today– with data suggesting that the trust levels will continue to decline even further.[171]

Second, voter turnout in U.S. elections is low relative to other democracies,[172] hovering at or near 60% in Presidential election years, and 40% in the midterms.[173] Explanations vary, but three are germane for purposes here: First, survey respondents report that they are too busy to vote,[174] that they do not think voting is meaningful,[175] and that they are insufficiently knowledgeable of the candidates to participate;[176] second, voters lose interest and participation drops off in less competitive races;[177] and third, voter interest and participation decline as democracies age.[178]

Relative to Congress[179] and the President,[180] the U.S. Supreme Court enjoys stronger public support, but the Court has not been immune to waning trust in the

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[171] *Public Trust in Government: 1958*-2019, PEW RES. CTR (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/; *Trust in Government*, GALLUP (Jan. 2019), https://news.gallup.com/poll/5392/trust-government.aspx.
[172] Drew Desilver, *U.S. Trails Most Developed Countries in Voter Turnout*, PEW RES. CTR. (May 21, 2018), https://www.pewresearch.org/fact-tank/2018/05/21/u-s-voter-turnout-trails-most-developed-countries/.
[173] *See* Michael P. McDonald, *National General Election VEP Turnout Rates, 1789-Present*, ELECT PROJECT (2018), http://www.electproject.org/national-1789-present; *Voter Turnout*, FAIR VOTE (2019), https://www.fairvote.org/voter_turnout#voter_turnout_101.
[174] *See* Asma Khalid et al., *On The Sidelines Of Democracy: Exploring Why So Many Americans Don't Vote*, NPR (Sept. 10, 2018), https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote; Gustavo López & Antonio Flores, *Dislike of candidates or campaign issues was most common reason for not voting in 2016*, PEW RES. CTR. (June 1, 2017), https://www.pewresearch.org/fact-tank/2017/06/01/dislike-of-candidates-or-campaign-issues-was-most-common-reason-for-not-voting-in-2016/; Michael D. Regan, *Why is Voter Turnout so Low in the U.S.?*, PBS (Nov. 6, 2016), https://www.pbs.org/newshour/politics/voter-turnout-united-states.
[175] *Id.*
[176] Khalid et al., *supra* note 174.
[177] Michael D. Martinez, *Why is American Turnout so Low, and Why Should We Care?*, OXFORD HANDBOOK OF AM. ELECTIONS & POL. BEHAV. 107, 108-09 (2010).
[178] Regan, *supra* note 174; *See generally* Filip Kostelka, *Does Democratic Consolidation Lead to a Decline in Voter Turnout? Global Evidence Since 1939*, 111 AM. POL. SCI. REV. 653 (2017); Anthony G. Fowler, Five Studies on the Causes and Consequences of Voter Turnout (2013) (doctoral dissertation, Harvard University).
[179] *Congress and the Public*, GALLUP (2019), https://news.gallup.com/poll/1600/Congress-Public.aspx.
[180] *Presidential Approval Ratings – Gallup Historical Statistics and Trends*, GALLUP (2019), https://news.gallup.com/poll/116677/Presidential-approval-ratings-gallup-historical-statistics-trends.aspx; *Public Trust in Government: 1958-2019*, PEW RES. CTR. (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019/.

national government, as public confidence in the Court dipped below fifty percent from 2011 to 2018.[181] Public support for the Supreme Court rallied in 2019, but that was best explained by an uptick in contingent support from conservative respondents in the wake of President Trump's appointments of justices Gorsuch and Kavanaugh.[182] And to the extent that growing distrust of American government is attributable in part to escalating anti-elitism, considered next, the implications for an expert, unelected, life-tenured judiciary are clear.

2. Anti-Elitism

Diminished confidence in the American government subsumes growing distrust of the elites at the helm of that government. Anti-elitism is baked into America's DNA, beginning with the Revolution itself—a rebellion of the people against the archetypal elite, King George III.[183] Waves of anti-elitism have come and gone in the generations since,[184] resurfacing aggressively in the aftermath of the 2008 recession—a recession which, in the minds of many, cast a spotlight on the roles of wealthy elites in causing the financial crisis, and of government elites in bailing out the well-to do with insufficient heed to the plight of the middle class.[185] This latest iteration of anti-elitism has targeted a range of actors including the wealthy (denominated the "top one percent"),[186]

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[181] *Supreme Court*, GALLUP (2019), https://news.gallup.com/poll/4732/supreme-court.aspx.
[182] The Annenberg Pub. Policy Center, Univ. of Pa., Most Americans Trust the Supreme Court, but Think it is Too 'Mixed up in Politics," October 16, 2019 https://www.annenbergpublicpolicycenter.org/most-americans-trust-the-supreme-court-but-think-it-is-too-mixed-up-in-politics/.
[183] Beverly Gage, *How 'Elites' Became One of the Nastiest Epithets in American Politics* (Jan. 3, 2017), https://www.nytimes.com/2017/01/03/magazine/how-elites-became-one-of-the-nastiest-epithets-in-american-politics.html ("The notion that distant elites might be conspiring against the people comes straight from the Founding Fathers").
[184] *Id.*
[185] Eric Merkley, Anti-Intellectualism Anti-elitism, and Motivated Resistance to Expert Consensus (Apr. 18, 2019) (Ph.D Dissertation, University of British Columbia), *available at* http://www.wpsanet.org/papers/docs/Merkley%20-%20WPSA%20Submission.pdf.
[186] Lisa A. Keister, *The One Percent*, 40 ANN. REV. SOC. 347, 348 (2014).

professionals,[187] intellectuals,[188] and experts,[189] including scientists, the media, and career government officials."[190]

Judges are, in many ways, consummate elites: A specialized corps of legal experts, comprised of professionals with post-graduate degrees who sit aloft on benches, judging the masses. This rise of anti-elitism is to no small extent responsible for ending the mid-twentieth century movement toward "merit selection" systems for choosing state judges, the appeal of which was premised on the notion that expert commissions are better equipped to assess the specialized credentials and qualifications of expert judges, than average voters.[191] Because unelected federal judges derive legitimacy from their perceived legal expertise, they are uniquely vulnerable to anti-elitism campaigns. As Suzanna Sherry observes, "many people no longer see judges as possessing *legal*

[187] Saffron Huang, *A Departure from the Truth,* HARVARD POL. REV. (Oct. 9, 2016), http://harvardpolitics.com/world/anti-intellectualism/ ("When the average person is repeatedly told that the professionals and experts know best about how to improve life, yet he or she feels that quality of life is declining, it becomes easier to distrust and resent 'intellectuals.'").
[188] Matt Motta, *'Had enough of experts?' Anti-intellectualism is linked to voters' support for movements that are skeptical of expertise,* L.S.E. U.S. CTR. (Aug. 30, 2017), https://blogs.lse.ac.uk/usappblog/2017/08/30/had-enough-of-experts-anti-intellectualism-is-linked-to-voters-support-for-movements-that-are-skeptical-of-expertise/ ("since the mid-1990s, anti-intellectualism has been on the rise in the American public, especially amongst self-identified ideological conservatives").
[189] *Id.* ("The electoral successes of Donald Trump and Brexit share something important in common. Both attempted to appeal to voters' distrust of expertise in rallying support for their causes").
[190] Conor Lynch, *Donald Trump's Glorious Victory for Anti-Intellectualism: "Drain the Swamp" Just Meant the Eggheads*, SALON (Jan. 7, 2017), https://www.salon.com/2017/01/07/donald-trumps-glorious-victory-for-anti-intellectualism-drain-the-swamp-just-meant-the-eggheads/ (For many of the millions who voted for Trump, the "swamp" in Washington … denote[s] … arrogant technocrats, bookish intellectuals and politically correct liberal elites who are indifferent to the struggles of the 'forgotten men and women' in middle America"); Cathleen Decker, *Analysis: Trump's war against elites and expertise,* L.A. TIMES (July 27, 2017), https://www.latimes.com/politics/la-na-pol-trump-elites-20170725-story.html ("for Trump and his allies, a war on elites has been central to the campaign which put him in the presidency… Among his targets so far: the government's intelligence agencies, the media, foreign allies, the Department of Justice, establishment politicians, scientists and the Congressional Budget Office).
[191] GEYH, WHO IS TO JUDGE?, *supra* note 59, at 93–95.

expertise" because of attacks by "politicians, pundits, and legal academics," who "explicitly accus[e] the Justices of twisting the law to serve their . . . political goals."[192]

3. The Rise of Neo-populism

When a broad swath of the public becomes disillusioned with its democracy, and distrustful of its government and the elites responsible for making public policy, it affords an opportunity for a strong, self-proclaimed, man or woman of the people to rise up and establish a more populist form of leadership.[193] The recent resurgence of populism is a world-wide phenomenon: President Trump is among more than forty-five populist-style leaders who have risen to power since the 1990s.[194] Features common to the neo-populist leader include: Striving to dismantle the political establishment; pitting those comprising the neo-populist's base against others in the society, differentiated along lines of wealth, religion, race, ethnicity, or status; claiming to represent the silent majority; blaming failures on sabotage by elites; and using simple, direct, and sometimes boorish-seeming behavior to establish themselves as one of the "real" people.[195]

Voter distrust of experts and disaffection for government as usual correlate with a desire for a stronger, more autocratic leader, who can wrest control from elites and reclaim government in the people's name.[196] Once elected, neo-populist leaders have

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[192] Suzanna Sherry, *Democracy's Distrust: Contested Values and the Decline of Expertise*, 127 HARV. L. REV. 7, 11 (2011).
[193] André Munro, *Populism*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/populism (defining populism as "a movement that champions the common person, usually by favourable contrast with an elite," which, "in its contemporary understanding … is most often associated with an authoritarian form of politics. Populist politics, following this definition, revolves around a charismatic leader who appeals to and claims to embody the will of the people in order to consolidate his own power.").
[194] Yascha Mounk & Jordan Kyle, *What Populists Do to Democracies,* THE ATLANTIC (Dec. 26, 2018), https://www.theatlantic.com/ideas/archive/2018/12/hard-data-populism-bolsonaro-trump/578878/.
[195] CAS MUDDE AND CRISTÓBAL ROVIRA KALTWASSER, POPULISM: A VERY SHORT INTRODUCTION (2017).
[196] Lee Drutman et al., *Follow the Leader: Exploring American Support for Democracy and Authoritarianism*, VOTER STUDY GROUP (Mar. 2018), https://www.voterstudygroup.org/publication/follow-

consolidated power by weakening institutional checks on their authority, via (among other strategies) stifling dissent within their own political parties, discrediting the media, and—of particular importance here—weakening the judiciary.[197]

Neo-populist regimes have weakened their respective judiciaries in different ways. Turkey, and later Hungary, employed a two-stage gambit: First, they expanded the jurisdiction of their high courts, which overwhelmed court dockets; second, to address the caseload crisis thereby created, they packed their courts with additional jurists sympathetic to the new regime. Hungary took an additional approach: It lowered the mandatory retirement age for judges, thereby removing a significant number of experienced judges in leadership roles, which the new regime replaced with jurists more to its liking, after discrediting the outgoing judges as products of the Communist era.[198] Poland and Egypt later adopted a similar tactic.[199]

4. Political Polarization

Neo-populism is divisive by design. It seeks to position the populist leader and his insular base of ordinary folk against elites, immigrants, the media, and anyone else who challenges the populist leader or his agenda. To that extent neo-populism exploits and exacerbates a polarized electorate. And in the United States, the electorate has become increasingly polarized over the course of the past generation.

Studies show that political leaders in the United States have recently become more polarized along ideological lines (in relation to their diverging positions on policy

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the-leader (correlating disaffection with government and distrust of experts with support for more autocratic leadership).

[197] Kim Lane Scheppele, *Autocratic Legalism*, U. CHI L. REV., 545, 547-48, (2018).

[198] *Id.* at 549-50.

[199] *Id* at 552-4.

issues) and affective lines (in relation to their growing dislike for members of the opposing political party).[200] With respect to the general public, the evidence does not support the conclusion that average Americans have become demonstrably more polarized in ideological terms.[201] Rather, the data show that the range of public opinion on public policy questions has remained relatively stable over time.[202]There is, however, substantial support for the proposition that the public has become more affectively polarized. The percentage of Republicans who view Democrats unfavorably rose from 74% in 1994 to 91% in 2016, while the percentage of Democrats who view Republicans unfavorably increased from 59% to 86% over the same time frame.[203] The dramatic uptick in political polarization during the latter years of Judicial Independence 3.0 has obvious and immediate implications for the future of judicial independence in the ROLP. Insofar as rising antipathy for the opposing political party extends to judges appointed by the opposing political party, conversations about the role ideology plays in judicial decision-making morph into darker suspicions about the influence of naked partisan politics. And if, in a highly polarized world, judges are perceived as partisan appendages of the President who appointed them,

[200] Nolan McCarty, POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES 16–70 (2006); Morris P. Fiorina & Samuel J. Abrams, *Political Polarization in the American Public*, 11 ANN. REV. POL. SCI. 563, 565 (2008); ROBERT FARIS ET AL., BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY, PARTISANSHIP, PROPAGANDA & DISINFORMATION: ONLINE MEDIA & THE 2016 U.S. PRESIDENTIAL ELECTION 41 (2017).; Yphtach Lelkes, *Mass Polarization: Manifestations and Measurements*, 80 PUB. OP. QUARTERLY 398 (2016).

[201] MORRIS FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE 17-42 (2017).

[202] *Id* at 29 ("All in all, the data compiled by academic and commercial survey organizations indicate that in broad outline the American public has changed little in the past four decades. In the aggregate, the public today looks much the same as the one that chose between Gerald Ford and Jimmy Carter in 1976, well before the polarization era").

[203] ROBERT FARIS ET AL., BERKMAN KLEIN CENTER FOR INTERNET & SOCIETY, PARTISANSHIP, PROPAGANDA & DISINFORMATION: ONLINE MEDIA & THE 2016 U.S. PRESIDENTIAL ELECTION 41 (2017).

longstanding conventions aimed at preserving the independence of such judges lose their reason for being.[204]

B. The Arrival of 4.0: Convention Collapse

Democracy fatigue, anti-elitism, and political polarization have engendered public support for a neo-populist leader in the mold of Donald Trump.[205] And consolidating executive power by weakening the judiciary's capacity to keep such power in check is an essential component of the neo-populist playbook.[206] With support for judicial independence in an already weakened state during Judicial Independence 3.0, the President, aided by a compliant Republican Senate (whose compliance the President has secured by consolidating power within his own party—another common, neo-populist strategy[207]) has heralded the arrival of Judicial Independence 4.0 by abrogating judicial independence and related conventions with unprecedented zeal. For their part, Democratic presidential candidates and congress-members have proposed to fight fire with fire if and when

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[204] BRANDON L. BARTELS & CHRISTOPHER D. JOHNSTON, CURBING THE COURT: WHY THE PUBLIC CONSTRAINS JUDICIAL INDEPENDENCE (forthcoming summer 2020) ("Thus, for both the left and right, actions that threaten the Court's power have become fair game .... [O]ur book's theory and empirical findings--focusing on when and why the public supports such attacks on the Court--have important implications for the extent of the Court's legitimacy and ultimately its independence and power in the political system.").

[205] Joshua J. Dyck et al., Primary Distrust: Political Distrust and Support for the Insurgent Candidacies of Donald Trump and Bernie Sanders in the 2016 Primary, 51 POL. SCI. & POL. 351, 352–355 (2018) (attributing success of populist candidates to government distrust); Melissa De Witte, The Great Recession has influenced populist movements today, STAN. NEWS (Dec. 26, 2018), https://news.stanford.edu/2018/12/26/explaining-surge-populist-politics-movements-today/ (crediting anti-elitism for success of Trump's populist appeal); Dalibor Rohac et al., Drivers of Authoritarian Populism in the United States, CTR. FOR AM. PROGRESS (May 10, 2018), https://www.americanprogress.org/issues/democracy/reports/2018/05/10/450552/drivers-authoritarian-populism-united-states/ (linking polarization to success of Trump's populist appeal).

[206] Sheppele, *supra* note 197, at 553; *see also* Michael Hoffmann, *[PiS]sing off the Courts: the PiS Party's Effect on Judicial Independence in Poland*, 51 VAND. J. OF TRANSNAT'L. LAW 1153, 1161-1189 (2018) (discussing tactics to weaken judicial independence as feature of Populist regime in Poland).

[207] Perry Bacon Jr., *Trump Completed His Takeover Of The GOP In 2019*, FIVETHIRTYEIGHT (Dec. 23, 2019), https://fivethirtyeight.com/features/trump-completed-his-takeover-of-the-gop-in-2019/.

they ascend to power, which all but assures that disruption of longstanding conventions will persist into the foreseeable future.

1. Dismantling Procedural Conventions in Confirmation Proceedings

Longstanding procedural conventions in judicial confirmation proceedings have collapsed. Time-honored rules and practices, weakened from misuse and marginalization during Judicial Independence 3.0, shattered with the arrival of 4.0.

In 2016, the Republican Senate majority took the extraordinary step of announcing that it would exploit its control of the calendar to deny President Obama's Supreme Court nominee, Judge Merrick Garland, a hearing or vote, 310 days before the President left office. The Senate leadership made clear that it was holding the vacancy open for then candidate Donald Trump to fill should he win the election, while one Senate Republican leader added that he would block all Supreme Court nominations for the next four years if Democratic Presidential nominee Hillary Clinton was elected.[208]

In characterizing the Garland gambit as extraordinary, I do not mean to suggest that there is no precedent for the Senate declining to act on pending Supreme Court nominations, thereby leaving the vacancy for the president's successor to fill. In 1829, the Senate voted to postpone action on President John Quincy Adams' nomination of John Crittendon to the Supreme Court, whom Adams had nominated in the final weeks of his term, after he had lost his bid for

[208] https://www.npr.org/2016/10/17/498328520/sen-mccain-says-republicans-will-block-all-court-nominations-if-clinton-wins (quoting Senator John McCain: "I promise you that we will be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up").

reelection.[209] In 1845, the wildly unpopular President John Tyler, who became President after the death of William Henry Harrison, nominated John Read to the Supreme Court 25 days before Tyler left office—a nomination that the Senate allowed to lapse.[210] In 1852 and 1853, three Supreme Court nominees (Edward Bradford, George Badger, and William Micou) of the likewise unpopular, President Millard Fillmore, who succeeded Zachary Taylor upon his death, were withdrawn or allowed to lapse 200, 60, and 18 days, respectively, before the end of Fillmore's term.[211] And in 1866, after Democratic President Andrew Johnson became president following the assassination of Abraham Lincoln, the Republican Congress reduced the size of the Supreme Court from ten to seven, killing the pending Supreme Court nomination of Henry Stanbery, 1063 days before the end of Johnson's term.[212] After Republican Ulysses Grant became president, Congress increased the Supreme Court's size from seven to nine, effectively handing Grant vacancies denied Johnson.[213]

These "precedents," however, are distinguishable in three ways: First, they are stale, the latest example having occurred one hundred and fifty years before action on the Garland nomination was suspended. Resurrecting a practice poised to

[209] Mark Lawrence, *Supreme Court Nominees Rejected by the Senate,* THE WASHINGTON POST (Sept. 15, 1987), https://www.washingtonpost.com/archive/politics/1987/09/15/supreme-court-nominees-rejected-by-the-senate/28abe505-180f-423d-a774-adfb861ef2e0/.
[210] SUPREME COURT NOMINATIONS (PRESENT-1789) https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm#17. In addition, Tyler nominees Reuben Walworth, John Spencer, and Edward King were variously rejected, postponed, withdrawn, or allowed to lapse, but their travails preceded Senate confirmation of Tyler nominee Samuel Nelson and so cannot serve as examples of nominations killed for the purpose of holding a vacancy open for the next president. *Id.*
[211] *Id.*
[212] *Id.*
[213] *Id.*

celebrate the sesquicentennial of its disuse may better be characterized as a repudiation of a convention against the practice. Second, all four "precedent" Presidents suffered electoral legitimacy problems: three were never elected president, and the fourth—John Quincy Adams—had been defeated in his bid for reelection when he made the nomination. Third, President Obama's nomination of Garland occurred months earlier in the President's term than the failed nominations of Adams, Tyler or Fillmore. Not so with Johnson, but legislation that reduced the size of the Court and ended Stanbery's nomination won bipartisan approval in Congress and was signed by the president himself, which belies the implication that it was a partisan power play to deprive Johnson of his appointment.[214] And when the Supreme Court was increased from seven to nine during the Grant administration, it was for the administrative purpose of restoring the traditional parity between the number of circuits and the number of justices on the Supreme Court.[215] If this was subterfuge, it was well-hidden, relative to the brazen power play of the Garland episode.

Beyond the Garland imbroglio, when President Trump took office, the Senate Republican majority exercised the so-called "nuclear option" to deprive Senate Democrats of the power to filibuster Supreme Court nominees,[216] six years after a Senate Democratic majority had done the same to Senate Republicans in lower court confirmation proceedings.[217] During Judicial Independence 3.0, senators from both

[214] *See* notes 86-91, *supra*, and accompanying text.
[215] Act of Apr. 10, 1869, ch. 22, § 1–2, (16 Stat.) 44.
[216] Glenn Thrush, *Senate Republicans Go 'Nuclear' to Speed Up Trump Confirmations,* N.Y. TIMES (Apr. 3, 2019), https://www.nytimes.com/2019/04/03/us/politics/senate-republicans-nuclear-option.html.
[217] *Id.*

parties had exploited their filibuster rights to kill nominations of the opposing party's President—an arguable abuse of the procedural convention that the nuclear option ended. At the same time, the Senate rule change eliminated a mechanism that ensured a measure of bipartisan consensus and compromise before nominees could win confirmation, thereby creating a vacuum to be filled by bare-knuckle, majoritarian, partisan politics.

In a similar vein, the Senate Republican majority ended the blue-slip prerogative.[218] In so doing, Senate Democrats were stripped of the power to obstruct the confirmation of President Trump's nominees via the expedient of withholding a blue-slip authorizing floor action on the nominees from the Senator's home state. But it also eliminated the opportunity for consultation and consensus that the blue-slip process had historically promoted.[219]

Finally, President Trump eliminated the American Bar Association's pre-nomination role in vetting judicial candidates.[220] President George W. Bush had done the same during Judicial Independence 3.0, but there were two new twists. First, the role of traditional qualifications, upon which ABA ratings are based, was diminished in relevance during the Trump administration, as reflected in an unprecedented number of Trump nominees being confirmed with ABA "unqualified"

[218] Sarah Binder, *The Senate confirmed Eric Miller to the 9th Circuit Court of Appeals — despite his home state senators' objections. That's new.,* WASHINGTON POST (Feb. 28, 2019), https://www.washingtonpost.com/politics/2019/02/28/senate-confirmed-eric-miller-ninth-circuit-court-appeals-despite-feinsteins-objection-thats-new/.
[219] GEYH, WHEN COURTS & CONGRESS COLLIDE, *supra* note 34 at 211.
[220] Adam Liptak, *White House Ends Bar Association's Role in Vetting Judges,* N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/us/politics/white-house-american-bar-association-judges.html.

ratings—including the first two ever at the circuit level.[221] Second, to assist it in pre-vetting judicial candidates, the Trump Administration replaced the ABA (which, despite accusations of liberal bias, professed ideological neutrality and was expressly nonpartisan) with the Federalist Society, an organization with an avowedly conservative, ideological agenda.[222]

With conventions designed to promote consensus, compromise, reasoned deliberation, and a focus on traditional qualifications thus repudiated, confirmation proceedings have become strangely perfunctory affairs in Judicial Independence 4.0. Nominees have been scheduled for hearings en masse, sometimes during legislative recesses, and have been confirmed along partisan lines with unprecedented speed for the modern era.[223] The fractious delays and protracted squabbling that characterized the appointments process during Judicial Independence 3.0, have been replaced with an efficient, partisan assembly-line featuring minimal independent Senate scrutiny.

2. Assault on Court-Packing Conventions

In 2017, Federalist Society Chairman, Steven G. Calabresi, coauthored a memo to both houses of Congress proposing that Congress double the size of the federal appellate judiciary for the explicitly partisan purpose of packing the circuit courts with conservative judges to neutralize the impact of Obama-era

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[221] Patrick L. Gregory, *Trumps Picks More 'Not Qualified' Judges,* BLOOMBERG LAW (Dec. 17, 2018), https://news.bloomberglaw.com/us-law-week/trump-picks-more-not-qualified-judges-1.
[222] David Montgomery, *Conquerors of the Courts*, WASHINGTON POST (Jan. 2, 2019), https://www.washingtonpost.com/news/magazine/wp/2019/01/02/feature/conquerors-of-the-courts/.
[223] Tessa Berenson, *President Trump Appointed Four Times as Many Federal Appeals Judges as Obama in His First Year,* TIME (Dec. 15, 2017), https://time.com/5066679/donald-trump-federal-judges-record/; Ariane de Vogue, *Senate committee backs 44 Trump judicial nominees over Democratic objections*, CNN (Feb. 7, 2019), https://www.cnn.com/2019/02/07/politics/senate-judicial-nominations/index.html.

appointments.[224] The proposal was remarkable in at least two respects. First, this was the recommendation of a highly influential player in the world of judicial politics: Calabresi was the face of the Federalist Society, which was not only the preeminent organization of conservative legal minds in the United States—it was, as previously noted, in the President's inner circle, having assumed responsibility for vetting the administration's prospective judicial nominees.[225] Second, for the leader of a conservative organization ostensibly devoted to interpreting the U.S. Constitution in a manner constrained by the original intentions of the founders, the proposal represents a seeming break from the Society's principles. From an originalist perspective, exploiting Congressional power to establish the lower courts by packing those courts with ideological soul-mates for the partisan purpose of manipulating the outcomes of the cases the courts decide, is in obvious tension with the apolitical, separate and independent, judiciary that the framers sought to create.[226]

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[224] https://thinkprogress.org/wp-content/uploads/2017/11/calabresi-court-packing-memo.pdf. In his memo to Congress, Calabresi did not identify himself as Federalist Society Chairman nor did he offer the customary disclaimer that he was writing in his individual capacity, which had the presumably intended effect of adding heft to a proposal that was widely reported with explicit reference to his leadership of the Federalist Society. *See* Josh Blackman, *Republicans Should Not Pack the Courts,* NAT'L REV. (Nov. 27, 2017), https://www.nationalreview.com/2017/11/republicans-court-nominations-congress-shouldnt-pack-courts/.

[225] *See* note 222, *supra*, and accompanying text. *See also,* Linda Greenhouse, *A Conservative Plan to Weaponize the Federal Courts,* N.Y. TIMES (Nov. 23, 2017), https://www.nytimes.com/2017/11/23/opinion/conservatives-weaponize-federal-courts.html.

[226] Senator William Giles, for example, a Jeffersonian Republican who led the only successful effort in American history to unpack the federal courts for explicitly partisan purposes, was admirably candid in acknowledging that his congressional campaign to disestablish unpopular federal courts (and effectively remove their office-holders) exploited gaps in the text of the Constitution in a manner that ran counter to the founders' intentions to establish a separate and independent judicial branch: "The theory of three distinct departments in government is, perhaps not critically correct; although it is obvious that the framers of our Constitution proceeded on this theory in its formation."17 ANNALS OF CONG. 114 (1808) (statement of William Giles).

The need for the Calabresi proposal was largely mooted by Senate rule changes that eliminated procedural impediments to Senate Republicans ending the sizable backlog of vacancies created by their dilatory tactics in declining to act on President Obama's nominations.[227] Meanwhile, congressional Democrats and Democratic Presidential candidates, not to be outdone in the convention-busting derby, proposed to neutralize the impact of the Garland ploy by packing the U.S. Supreme Court with additional justices, if and when the Democrats returned to power.[228]

3. Repudiation of Convention Against Delegitimizing Rhetoric

As described in relation to the emergence of constitutional conventions during Judicial Independence 2.0, Presidents have criticized judicial rulings throughout American history and made it clear when they thought that a case was wrongly decided.[229] With the notable exception of Franklin Roosevelt, however, there has been a longstanding norm against Presidents resorting to delegitimizing rhetoric that impugns the motives, integrity, or competence of the judges themselves. Beginning as a Presidential candidate, however, and carrying over into his presidency, President Trump has defied this convention and repeatedly challenged the legitimacy of court rulings adverse to his interests.

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[227] Such dilatory tactics were exploited by both political parties throughout the Clinton, G.W. Bush, and Obama administrations. Russell Wheeler, *Judicial Nominations and Confirmations: Fact and Fiction,* BROOKINGS INSTITUTION (December 20, 2013), https://www.brookings.edu/blog/fixgov/2013/12/30/judicial-nominations-and-confirmations-fact-and-fiction/.

[228] Burgess Everett & Marianne Levine, *2020 Dems warm to expanding Supreme Court,* SLATE (March 18, 2019), https://www.politico.com/story/2019/03/18/2020-democrats-supreme-court-1223625.

[229] *See* note 114, *supra* and accompanying text.

While a Presidential candidate, Mr. Trump criticized the presiding judge in a fraud case filed against Trump University. At a campaign rally, he described the judge as "a hater of Donald Trump," and a "total disgrace," and claimed that because of his "Mexican heritage," the judge was compromised by an "inherent conflict of interest," given Mr. Trump's campaign promise to build a wall to deter illegal immigration along the Mexican border.[230]

As President, he criticized lower court rulings invalidating an executive order that restricted travel into the U.S. by citizens of predominantly Muslim countries. He described one ruling as the work of a "so-called judge, which essentially takes the law enforcement away from our country."[231] He characterized related rulings by other courts as "done by a judge for political reasons," and as issued by courts that are "slow and political,"[232] that "seem to be so political," and that refuse to "do what they should be doing."[233] In response to the same line of cases, he expressed dismay that "a judge would put our country in such peril. If something happens blame him and court system;"[234]and again, that "because the ban was lifted by a judge, many

[230] Daniel White, *Donald Trump Ramps Up Attacks Against Judge in Trump University Case,* TIME (June 2, 2016), https://time.com/4356045/donald-trump-judge-gonalo-curiel/.
[231] Steven G. Calabresi, *Trump can criticize judges all he likes. Lincoln did*., THE HILL (Feb. 8, 2017), available at http://thehill.com/blogs/pundits-blog/the-judiciary/318547-trump-can-criticize-so-called-judges-all-he-likes-lincoln.
[232] David Jackson, *Trump seeks quick Supreme Court review of 'travel ban,'* USA TODAY (June 5, 2017), available at https://www.usatoday.com/story/news/politics/2017/06/05/donald-trump-travel-ban-supreme-court/102509292/; Garrett Epps, *With the Travel Ban, Federal Courts Face a New Legal Issue*, THE ATLANTIC (Mar. 21, 2017), available at https://www.theatlantic.com/politics/archive/2017/03/with-the-travel-ban-federal-courts-face-a-new-legal-issue/520200/.
[233] Jacob Pramuk*, Trump defiant on travel ban, blasts the courts as 'so political'*, CNBC (Feb. 8, 2017), https://www.cnbc.com/2017/02/08/trump-defends-his-immigration-order-to-police-claims-courts-seem-to-be-so-political.html.
[234] Peter Baker, *Trump Clashes Early With Courts, Portending Years of Legal Battles*, N.Y. TIMES (Feb. 5, 2017), available at: https://www.nytimes.com/2017/02/05/us/politics/donald-trump-mike-pence-travel-ban-judge.html.

very bad and dangerous people may be pouring into our country. A terrible decision."[235]

The President's attacks on the federal courts reached a crescendo in November, 2018, when he condemned the adverse ruling of a district judge in the Northern District of California as the work of an "Obama judge."[236] In a highly unusual move, Chief Justice John Roberts rebuked the President. "We do not have Obama judges or Trump judges, Bush judges or Clinton judges," Roberts said in a prepared statement. "What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them," adding that "The independent judiciary is something we should all be thankful for."[237] The President promptly rejoined with multiple Tweets: "Sorry Chief Justice John Roberts," the President chided, "but you do indeed have 'Obama judges,' and they have a much different point of view than the people who are charged with the safety of our country."[238] "It would be great if the 9th Circuit was indeed an 'independent judiciary,'" he added, but argued that it was not, given the frequency with which administration antagonists filed suit there and the rate at which Ninth Circuit decisions were reversed.[239] The next day, the President tweeted again, that "Justice Roberts can say what he wants, but the 9th Circuit is a complete

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[235] Matt Zapotosky, *Trump said dangerous people might be pouring in without his travel ban. But he's not rushing to restore it.,* WASHINGTON POST (Mar. 23, 2017), available at https://washingtonpost.com/news/post-nation/wp/2017/03/23/trump-said-dangerous-people-might-be-pouring-in-without-his-travel-ban-but-hes-not-rushing-to-restore-it.

[236] Katie Reilly, *President Trump Escalates Attacks on 'Obama Judges' After Rare Rebuke From Chief Justice,* TIME (Nov. 21, 2018), available at https://time.com/5461827/donald-trump-judiciary-chief-justice-john-roberts/.

[237] *Id.*

[238] *Id.*

[239] *Id.*

& total disaster. It is out of control, has a horrible reputation, is overturned more than any Circuit in the Country."[240]

Some commentators responded to this kerfuffle by dismissing the Chief Justice as naïve for claiming that "[w]e have no Obama judges or Trump judges," because Presidents nominate judges with compatible ideological outlooks that influence the decisions those judges make which, in turn, influences voter choices in presidential elections.[241] But this argument misses the Chief Justice's essential point. Yes, the vast majority of the public thinks that judges are subject to the influence of their political ideologies—an unexceptional manifestation of legal realism that social science data corroborate, the public finds untroubling, and that the Chief Justice's statement did not contest.[242] But the data also show that public confidence in the courts declines when judges are perceived as brazen, partisan actors.[243] It is the difference between honorable judges whose policy perspectives inform their understanding of what the law is, and dishonorable judges who surreptitiously implement the partisan agenda of the President who appointed

[240] *Id.* News report on the President's tweets noted that two other circuits—the Sixth and the Eleventh—have higher reversal rates than the Ninth. *Id.*

[241] *See*, e.g., Marc A. Thiessen, *Chief Justice Roberts is wrong. We do have Obama judges and Trump judges,* WASHINGTON POST (November 23, 2018), https://washingtonpost.com/opinions/chief-justice-roberts-is-wrong-we-do-have-obama-judges-and-trump-judges/2018/11/23/ee8de9a2-ef2c-11e8-8679-934a2b33be52_story.html.

[242] James L. Gibson & Gregory A. Caldeira, *Has Legal Realism Damaged the Legitimacy of the U.S. Supreme Court?*, 45 LAW & SOC'Y REV. 195, 214 (2011). The Chief Justice's own confirmation testimony, wherein he asserted that judges were like "umpires" who applied but did not make the rules, was a piece of political theater that hewed to a naïve formulation of the rule of law mantra that social science data has challenged, if not debunked. Chief Justice Roberts Statement—Nomination Process, http://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process.The Chief's statement here, in contrast, contended only that judges do not self-identify as appendages of their appointing Presidents and do their "level best" to treat the parties equally—unexceptional claims relating to judges' motivations that attitudinal studies of judicial decision-making do not address or contradict.

[243] JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND JUDGMENTS OF THE AMERICAN PEOPLE 123-125 (2009).

them. In other words, characterizing judges as partisan agents of their appointing President threatens to delegitimize the courts, in ways that conceding the influence of political ideology on judicial decision-making does not. Empirical support for characterizing federal judges and their decision-making in such crassly partisan terms is thin—and it was the partisan focus of the President's critique that triggered the Chief Justice's response.

4. Testing the Convention Against Defiance of Court Rulings

One possible end-game strategy in a neo-populist President's campaign to delegitimize the courts is to weaken public trust in the judiciary to a point where defying unwelcome court orders becomes thinkable.[244] The convention against Presidents openly refusing to comply with court orders is relatively muscular, with only one flagrant violation in American history—a violation that can be explained in light of the exigencies of a wartime emergency that President Lincoln confronted.[245] To date, Judicial Independence 4.0 has produced no new examples—but there has been one close call, in a political culture with a history of few close calls.

The Trump administration proposed to modify the 2020 census by adding a question asking respondents whether they were U.S. citizens.[246] Critics of the

[244] A second end-game strategy less germane to this sub-section on defiance of court orders but nonetheless relevant to the future of judicial independence generally, is that a campaign of delegitimizing rhetoric could intimidate judges into acquiescence to the President's will.

[245] *See* David H. Gans*, The President's Duty to Obey Court Judgments*, CONST. ACCOUNTABILITY CENTRE 13—15 (2018) *(https://www.theusconstitution.org/wp-content/uploads/2018/06/Trump-Obey-Court-Judgments-Issue-Brief.pdf)* (explaining how Lincoln did not seek to defy the Court in *Ex Parte Merryman,* but only to exercise a wartime exception). *See also* Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *4 Collected Works of Abraham Lincoln* at 421, 430 (emphasizing Lincoln's argument for an exception in the case of a wartime emergency). *See generally* Ex Parte Merryman, 17 F. Cas. 144, 148 (1861).

[246] Thomas P. Wolf & Brianna Cea, *A Critical History of the United States Census and Citizenship Questions,* 108 GEO. L.J. ONLINE 1, 3–4 (2019).

proposal filed multiple suits, claiming that the question would discourage immigrants (who lived disproportionately in states with Democratic majorities) from participating in the census, which would result in undercounting residents in those states, thereby frustrating the purpose of the census for the benefit of Republicans when legislative districts were redrawn in light of population changes.[247] The administration argued that the question was needed to assist it in enforcing the Voting Rights Act; a closely divided Supreme Court, however, rejected that justification as a pretext, but allowed for the possibility that some other explanation might pass muster.[248]

The President called the ruling "ridiculous," and indicated his intention to explore ways in which he might restore the question to the census via executive order.[249] The President's response caused speculation that he was poised to defy the Supreme Court's order.[250] There was room to argue that he was simply exploring alternative, legally defensible reasons for adding the citizenship question,[251] but that argument was undercut by reports of multiple, contradictory rationales being floated for including the question against the backdrop of documents discovered showing that Republican strategists had originally proposed

[247] Andrew Prokop, *Trump's census citizenship question fiasco, explained,* VOX (July 11, 2019), https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order.
[248] Department of Commerce v. New York, 139 S.Ct. 2551, 2575–2576 (2019).
[249] Tara Bahrampour et al., *Reversing course, Trump administration will look for a way to add citizenship question to 2020 Census*, WASHINGTON POST (July 4, 2019), https://www.washingtonpost.com/politics/trump-appears-to-contradict-his-own-administration-on-census-citizenship-question/2019/07/03/b720bb94-9da4-11e9-b27f-ed2942f73d70_story.html.
[250] Jacqueline Thomsen, *DOJ reverses, says it's trying to find ways to include citizenship question on 2020 census,* THE HILL (July 3, 2019), https://thehill.com/homenews/administration/451639-doj-ordered-to-find-ways-to-include-citizenship-question-on-2020; Michael Wines & Adam Liptak, *Trump Considering an Executive Order to Allow Citizenship Question on Census,* NEW YORK TIMES (July 5, 2019), https://www.nytimes.com/2019/07/05/us/census-question.html.
[251] Thomsen, *supra* note 250.

to add the question for the illicit purpose of discouraging immigrants from participating in the census.[252] Suspicions of impending defiance were heightened when the Department of Justice lawyers responsible for representing the administration in the matter sought to withdraw from the case, which implied the possibility that their client was poised to take action that the lawyers could not defend without running afoul of their ethical responsibilities.[253] One presiding judge denied the request of counsel to withdraw,[254] another declined to permit them to do so without a written explanation,[255] and the administration ultimately relented.[256]

Professors Josh Chafetz and David Pozen argue that when a convention withstands challenge, in situations such as this, it emerges stronger and more entrenched.[257] To that extent, this episode arguably strengthened rather than jeopardized the convention against presidential defiance of court orders. With history as a guide, I agree that conventions which survive periodic stress tests

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[252] JM Rieger, *The Trump administration changed its story on the census citizenship question 12 times in four months,* WASHINGTON POST (July 11, 2019), https://www.washingtonpost.com/politics/2019/07/08/trump-administration-has-changed-its-story-census-citizenship-question-least-times-four-months/?utm_term=.7511fb567c5d. *See also* Andrew Prokop, *Trump's census citizenship question fiasco, explained,* VOX (July 11, 2019), https://www.vox.com/2019/7/11/20689015/census-citizenship-question-trump-executive-order.

[253] Renato Mariotti, *Trump's Path Forward on Census Question Could be Headed to Constitutional Crisis,* POLITICO (July 10, 2019), https://www.politico.com/magazine/story/2019/07/10/trump-census-citizenship-question-supreme-court-department-justice-227280.

[254] Emma Newburger, *Judge rejects Trump administration's request to swap lawyers in census case,* CNBC (July 9, 2019), https://www.cnbc.com/2019/07/09/census-judge-rejects-trump-administrations-request-to-swap-lawyers.html.

[255] Mariotti, *supra* note 253.

[256] Hansi Lo Wang & Franco Ordoñez, *Trump Backs Off Census Citizenship Question Fight,* NPR (July 11, 2019), https://www.npr.org/2019/07/11/739858115/trump-expected-to-renew-push-for-census-citizenship-question-with-executive-acti. *See also Remarks by President Trump on Citizenship and Census*, WHITE HOUSE (July 11, 2019), https://www.whitehouse.gov/briefings-statements/remarks-President-trump-citizenship-census/.

[257] Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 U.C.L.A. L. REV. 1430, 1435–38 (2018).

emerge renewed, and that if the nation moves on from its current neo-populist romance with the census case as the only test of the convention against defiance, the same will hold true here. But for a president who has repeatedly revisited and revised his public positions and policy pronouncements, calling this episode a win for the convention rather than a worry for the future is akin to the people of ancient Pompeii celebrating the end of Vesuvius's first rumble.

In sum, during Judicial independence 4.0, democracy fatigue, paired with a swell of anti-elitism, has engendered a political atmosphere leading the United States to join a world-wide movement toward a more polarized, autocratic, and populist leadership that has little patience for an independent judiciary impeding its agenda. These developments, which followed generations of heightening skepticism over the putative role of an independent judiciary in the ROLP, have culminated in the disruption, and sometimes the repudiation, of longstanding judicial independence conventions, and placed the future of customary independence in jeopardy.

V. Envisioning Judicial Independence 5.0

Judicial Independence 3.0 eroded support for the traditional role of an independent judiciary in the ROLP, and in so doing rendered the conventions that had long protected judicial independence more vulnerable to cyclical attack. Judicial Independence 4.0 corresponds to the arrival of the latest cycle, which arose following the transition of power from the Obama to the Trump administrations. I have denominated Judicial Independence 4.0 as such because it poses a new and more potent threat to an independent judiciary, having disrupted or repudiated

long-respected constitutional conventions that withstood challenge in prior cycles of court-directed anger. With the future of an independent judiciary in doubt, the compound question becomes whether judicial independence is worth saving, and if so, how?

Insofar as the collapse of independence conventions in stage 4.0 was facilitated by protracted erosion of support for the role of judicial independence in the ROLP during 3.0, the search for solutions must begin with the ailing ROLP. Without a defensible paradigm to galvanize support for an independent judiciary, the political will to restore independence conventions lacks raison d'*ê*tre. In the meantime, however, independence conventions have been set aside, and a period of bare-knuckle, partisan judicial politics is upon us. Long-term strategies for the restoration of independence conventions guided by a more sustainable paradigm must therefore be coupled with short-term strategies for transitioning from the relative chaos of convention-free politics that Judicial Independence 4.0 has wrought.

A. A New Legal Culture Paradigm[258]

During Judicial Independence 3.0, a series of developments converged to challenge, if not debunk, a premise at the core of the ROLP: that independent judges impartially uphold the law, impervious to extralegal influences. One possible response to this generations-long turn of events is to allow the crumbling edifice of judicial independence to collapse under its own weight and accept the inevitability of a judiciary that is more responsive to partisan and majoritarian pressures. Such a

[258] For an initial stab at the Legal Culture Paradigm that I propose here, *see* GEYH, COURTING PERIL, *supra* note 44, at 76–100.

response makes sense if judicial independence is to blame for its own undoing—if its foundation is too antiquated to be salvageable. If, however, as I argue here, the problem lies not with judicial independence itself, but with how judicial independence has been conceptualized in the context of the ROLP, then the solution is not to jettison judicial independence but to rework the paradigm itself.

I begin from an unexceptional premise that is compatible with the ROLP: in the Unites States' version of a representative democracy that is committed to the rule of law, the judiciary's role is to uphold applicable law on a case-by-case basis. Accepting that premise, there are two potentially deleterious sources of interference with judicial decision-making. One is external: the role of the judiciary is undermined if outsiders influence judges to disregard the law via resort to carrots or sticks. The other is internal: the role of the judiciary is undermined if judges disregard the law by indulging their own ideological or other biases. The paradox embedded in the ROLP is that judicial independence, in the form of structural safeguards against outside interference with judicial decision-making, protects against distortions of law from external sources, at the same time as it exacerbates the potential for distortions of law from internal sources by eliminating controls on judicial decision-making that could deter bias.

This paradox results from an unduly parsimonious conception of judicial independence. The ROLP focuses on structural mechanisms, such as tenure and salary protections, aided by constitutional conventions, which buffer judges from external sources of interference with impartial judicial decision-making ("structural independence"), while paying insufficient heed to judicial independence from

internal sources of interference with judicial behavior ("behavioral independence").[259] In a theoretical vacuum, structural independence enables behavioral dependence, insofar as freedom from external controls on judicial decision-making liberates judges to satiate their internal biases without fear of consequence. The long, slow erosion of support for the ROLP during Judicial Independence 3.0 is in large part attributable to the paradigm's failure to come to terms with the need for behavioral independence, and the extent to which the muscular, structural independence that the paradigm embraces, can beget a form of behavioral dependence that social science has documented.

Proponents of the ROLP have addressed the behavioral dependence problem by positing it out of existence: Independent judges disregard their extralegal predilections and uphold the law—full stop. Apart from flying in the face of empirical research and public opinion, this proposition is hopelessly counterintuitive: In what parallel universe does a decision-maker's independence from external control incentivize that decision-maker to disregard her own biases when making decisions? The ROLPers have countered social science, public opinion, and common sense, with a hapless bromide, and it should surprise no one that they are losing the argument.

To the extent that judges do exhibit behavioral independence and uphold the law regardless of their own policy preferences, it is not due to structural independence from external sources of control over their decision-making by itself.

[259] Charles Gardner Geyh, *Judicial Independence as an Organizing Principle* 10 ANN. REV. OF L. & SOC. SCI. 185 (2014).

It is because judges are predisposed to bracket out their extralegal predilections and follow the law for other reasons—reasons that structural independence protects from encroachment. Those "other reasons" are supplied by the legal culture in which judges are entrenched.

In proposing a Legal Culture Paradigm, I borrow from anthropology to define "culture" as "a set of shared, signifying practices—practices by which meaning is produced, performed, contested, and transformed."[260] Next, in thinking about a distinct legal culture, I steer clear of innumerable "signifying practices" that are debatable or ephemeral and bear down on three essential, enduring, and less contestable practices that constitute tenets of the Legal Culture Paradigm.

First, judges are acculturated to take law seriously. This commitment to law begins in law school and continues in practice, where sound legal analysis and argumentation, (putatively) uncorrupted by feelings and personal beliefs, are the coin of the realm. The primacy of law in resolving legal problems is reflected in the law school curriculum, which is top-heavy with courses on substantive and procedural law; Socratic dialogues, where students are guided by their faculty to sort wheat from chaff and divine the law upon which cases and problems turn; law school exams, which test the student's command of law in its application to hypothetical fact patterns; the bar exam, which is a veritable trivia test on substantive and procedural law; and litigation practice, where motions practice and brief-writing proceed from the premise that applicable facts in relation to operative

[260] Naomi Mezeey, *Law as Culture*, in CULTURAL STUDIES, CULTURAL ANALYSIS, AND THE LAW: MOVING BEYOND LEGAL REALISM 37, 42 (Austen Saurat & Jonathan Simon, eds 2003).

law are of paramount importance. Social science corroborates the intuition that the legal culture's fixation on substantive and procedural law affects how law students and lawyers (who later become judges) think about and resolve legal problems.[261]

Second, likewise beginning in law school and continuing in practice, future judges are exposed to pervasive legal indeterminacy. Indeterminacy is inherent in difficult cases, where a legal issue is one of first impression; where a statute's meaning in its application to the facts of the case is ambiguous; where judicial precedents conflict or are unclear; or where operative law affords judges the discretion to reach different conclusions. "Learning to think like a lawyer," which law schools tout as their mission, is an exercise in critical thinking. Law students are disabused of their natural inclination to accept judicial opinions at face value, and are trained to challenge the assumptions, logic, and conclusions of those opinions. That exercise enables fledgling lawyers to exploit indeterminacy by seeing and arguing "both sides" of difficult legal questions (divorced from their own policy preferences), to the end of making themselves more effective advocates for their clients in an adversarial system of justice.

Third, future judges—again beginning as law students—seek to resolve indeterminate legal questions with reference to competing policy arguments that aid them in deciding which of two comparably plausible interpretations of law is

[261] LIEF H. CARTER & THOMAS F. BURKE, REASON IN LAW 8 (6th ed. 2002); Susan Daicoff, *Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 Am. U. L. Rev. 1337, 1408 (1997); James R. P. Ogloff et al., *More than "Learning to Think Like a Lawyer:" The Empirical Research on Legal Education* 34 Creighton L. Rev. 73, 111 (2000); EILEEN BRAMAN, LAW, POLITICS AND PERCEPTION: HOW POLICY PREFERENCES INFLUENCE LEGAL REASONING 164 (2009); MARK A. GRABER, A NEW INTRODUCTION TO AMERICAN CONSTITUTIONALISM 93 (2013).

best. Different maxims of interpretation can lead to different results;[262] the interests of fairness and justice may be in tension with the interests of predictability and efficiency; interpreting law with recourse to its plain meaning, original intent, primary purpose, or a need to avoid absurd results may yield different outcomes; and the dictates of prudence can lead judges to think strategically and resolve some indeterminate questions but not others. When judges are called upon to decide indeterminate legal questions with reference to competing policy arguments, the argument they find most persuasive can be informed by their background, education, life experience, common sense, and policy perspective, aided by a strategic sense for the political context in which the case arose.

These three practices core to the legal culture corroborate and qualify components of the ROLP. Behavioral independence—manifested as a predisposition to resolve legal questions with reference to operative law, divorced from personal attitudes—is a practice inculcated into judges as an essential part of the legal culture in which they are immersed. Structural independence promotes behavioral independence and the rule of law by buffering judges from external pressure to disregard what the first signifying practice of their legal culture predisposes them to do: Take law seriously. Such a claim is simplest to defend in the context of easy cases. Easy cases receive less attention, because they are less interesting, but American law is top-heavy with matters that lawyers decline to take because their prospective clients' claims are meritless; matters in which suit is threatened but

[262] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950).

never filed, filed but never litigated, or litigated but never tried, because the law is unambiguous and the outcome clear; and matters in which trial judges make demonstrable errors, or litigants and their lawyers have their judgment clouded by emotion, ego, avarice, or confusion, leading to easy appeals generating unanimous outcomes.[263] Structural independence from external sources of interference with impartial judicial decision-making facilitates the rule of law in easy cases by enabling judges to uphold and apply the law as they have been acculturated to do throughout their legal careers, without fear or favor clouding their judgment.

In the context of easy cases, then, the culturally embedded practice of taking law seriously helps to justify the traditional role of judicial independence in a new, Legal Culture Paradigm. In hard cases, the same analysis sometimes applies. For example, in cases made difficult because the law is complex or the facts are convoluted, structural independence buffers judges from external sources of pressure and gives them the breathing room to get to the bottom of the matter and reach the correct result. Many difficult cases, however, are made difficult because the applicable law in relation to the operative facts is not just complicated—it is indeterminate. In such cases, judges have no choice but to make new law by filling interpretive gaps in existing law. In the context of an adversarial system, that typically puts judges in the position of deciding which of two competing, and often comparably plausible, arguments yield the sounder interpretation of applicable law.

[263] Richard Posner, for example, has observed that "most cases are routine," and that "[t]he routine case is dispatched with least fuss by legalist methods." RICHARD POSNER, HOW JUDGES THINK 46 (2008); *see also* Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1897 (2009) ("When the relevant legal materials are uncomplicated, the issues are uncontroversial, and precedent is clear, judges' deliberations are straightforward and judgments are easily reached").

That is a kind of policy choice requiring discretion and judgment that can be informed by the judge's life experience, education, background (including race and gender), common sense, and ideological orientation, aided by a strategic appreciation for the political context in which the law was written and the case arose.

When judges are called upon to make new law in hard cases because existing law is indeterminate in its application to the facts before the court, there is no denying that judges make legal policy. And social science shows that when making legal policy in such cases, judges can be influenced by their ideological orientations, among other extralegal factors. This is inevitable. As Professor Stephen Burbank has wisely observed, law and judicial politics are "different sides of the same coin. They are not opposites, but rather complements,"[264] because extralegal considerations inform the policy perspectives that judges bring to bear when acting in a law-making role.

The question then becomes whether judicial "policy-makers," who are subject to extralegal influences in their policy-making role, should receive a measure of independence from popular and political influences that policy-makers in the legislative and executive branches neither enjoy nor deserve. The ROLP is helpless to answer this question because it disavows the notion that independent judges make policy or are subject to extralegal influence.

[264] Stephen B. Burbank, *On the Study of Judicial Behaviors: Of Law, Politics, Science and Humility*, in WHAT'S LAW GOT TO DO WITH IT? WHAT JUDGES DO, WHY THEY DO IT, AND WHAT'S AT STAKE? 41, 51 (Charles Gardner Geyh ed. 2011).

The Legal Culture Paradigm, in contrast, accommodates the empirical realities that the ROLP posits away and answers this question in the affirmative. The ripple effects of judicial policy-making can be widely felt, given the precedential effect of court rulings, but the fact remains that judges are called upon to say what the law is in the context of specific cases or controversies. The outcome of any given case turns on the application of law to the particular facts of the case before the court—facts and law with which the judge is familiar by virtue of the manner in which the adversarial process supplies judges with the specifics needed to make an informed decision. What structural independence enables in hard cases, then, is a judge's best assessment of what the applicable facts and law require, unpolluted by external threats or manipulations—an assessment that the judge is uniquely situated and fully acculturated to make. Insofar as that assessment unavoidably requires the judge to "make policy" by determining how uncertainties in applicable law should be resolved to decide a specific case before the court, it is fully informed, fact-driven, policy-making that is better suited to achieve just results on a case-by-case basis than if the judge was subject to the control of actors less familiar with the facts or law and concerned only with the outcome.

So conceived, this form of judicial policy-making is inevitable and unproblematic. In economics, the term "frictional unemployment" is used to describe the unavoidable percentage of workers who are between jobs or first entering the workforce, and whose unemployment is a natural and inevitable part of

a healthy economy performing normally.[265] In a similar vein, I would characterize routine judicial law-making in hard cases as frictional policy-making—the place where law and policy unavoidably converge and require good judges to offer their best assessment of what the law requires, aided by a range of extralegal considerations (including ideology) that inform their discretion and judgment. This is not judging gone rogue. It is judging done right.

The Legal Culture Paradigm, then, tweaks the ROLP in two important ways. First, it explains how a distinct legal culture gives rise to a default in favor of behavioral independence from internal sources of interference with impartial judicial decision-making—a default that structural independence helps to preserve and protect from external distortion. Second, the Legal Culture Paradigm comes to terms with legal indeterminacy and the role that a judge's ideology (among other extralegal considerations) plays in resolving indeterminate legal questions, to the end of rejecting the widely discredited premise of the ROLP that independent judges are impervious to extralegal influences and do no more or less than follow the law.

The virtue of a Legal Culture Paradigm is that it defends an independent judiciary in terms consonant with social science and public perception. The potential vice is that by acknowledging the role ideology plays in frictional policy-making, the Legal Culture Paradigm must also acknowledge the risk of gratuitous policy-making, in which judges abuse their structural independence by disregarding the law (knowingly or not) that they are acculturated to follow, and effectively

[265] Ronald S. Warren, Jr., *The Estimation of Frictional Unemployment: A Scholastic Frontier Approach*, 73 REV. ECON & STAT. 373, 376 (1991).

usurping power by imposing their own policy predilections. Accordingly, the Legal Culture Paradigm must welcome a more robust role for judicial accountability, relative to the ROLP, to deter gratuitous policy-making.

Ramping up the role of accountability creates a conundrum. Behavioral dependence manifested in gratuitous policy-making can be managed by holding judges more accountable for their internal biases. Constraining behavioral dependence in this way, however, invites incursions on structural independence, insofar as those who control the structures employed to curb judicial bias can misappropriate those structures to bend judges to their will, on the pretext of constraining behavioral dependence.

This conundrum is manageable, however, for three reasons. First, independence and accountability are in a perpetual state of constructive tension. Striking the optimal balance between them is a fluid process. Acquiescing to an additional measure of accountability is a reasonable price to pay for preserving the essential character of an independent judiciary that Judicial Independence 3.0 has imperiled. One must therefore accept that preserving the judiciary's legitimacy with the body politic necessitates a measure of political branch oversight. The nomination and confirmation of federal judges has always been a partisan, political affair, and in a post-realist age, the continuing relevance of a judge's ideology in the appointments process is inevitable. Defenders of an independent judiciary must likewise accept, if not embrace, the role Congress plays in regulating judicial bias, by means of disqualification statutes; financial disclosure laws (which can expose conflicts of interest that beget bias); the Judicial Conduct and Disability Act, which

delineates the scope of discipline for judicial misconduct that can implicate behavioral dependence;[266] and, in extreme cases of partiality manifested in bribery or other crimes or corruption, the impeachment processes.

Second, the proposed Legal Culture Paradigm is compatible with the existing constitutional structure and the conventions that have emerged and evolved over time to limit untoward incursions on the judiciary's structural independence. The Legal Culture Paradigm thus embraces customary independence, which will continue to push back against unwarranted political branch encroachments on judicial independence.

Third, the additional accountability that the Legal Culture Paradigm envisions can be supplied, in large part, by intra-judicial mechanisms that need not impinge on customary independence. The judiciary self-regulates for behavioral dependence in myriad ways: 1) appellate review of bias-induced errors; 2) mandamus actions to thwart judicial usurpations of power;[267] 3) disqualification processes that force the withdrawal of judges whose impartiality is in doubt;[268] 4) procedural rules that structure and limit problematic exercise of judicial discretion;[269] 5) the Code of Conduct for U.S. Judges, which regulates judicial partiality and partisan political conduct;[270] 6) the Judicial Conduct and Disability

[266] The Act does not regulate conduct related to the merits of rulings that judges issue, 28 U.S.C. § 352(b)(1)(A)(2), but can address extrajudicial conduct that casts doubt on the judge's capacity to serve as an impartial adjudicator.
[267] Will v. U.S., 389 U.S. 90, 95 (1967).
[268] 28 U.S.C. § 455 (West, Westlaw through Pub. L. No. 116-91).
[269] For example, there are explicit, rule-based constraints on a federal judge's discretion to grant dispositive motions for failure to state a claim, summary judgment, and a directed verdict ("judgment as a matter of law"). GENE R. SHREVE ET AL., UNDERSTANDING CIVIL PROCEDURE 212-13, 345, 401-02 (6th Ed. 2019).
[270] *Code of Conduct for United States Judges,* U.S. COURTS (March 12, 2019), https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

Act, whereby Congress authorized circuit judicial councils to discipline judges for behavior prejudicial to the effective administration of the courts;[271] 7) the oath of office, which calls upon judges to act impartially and uphold the U.S. Constitution;[272] and 8) informal norms among judges desirous of mutual respect on collegial courts, which discourage partisan judging contrary to the rule of law mission.[273] By highlighting the relevance of these mechanisms to judicial accountability, and reforming some to better serve their purpose, the judiciary itself can go a long way toward preserving its autonomy in the transition to a Legal Culture Paradigm.

B. A Litigation-Like Strategy for Restoring Constitutional Conventions

Implementing the proposed Legal Culture Paradigm should help to meet the challenge presented by eroding support for the ROLP in Judicial Independence 3.0. But the Legal Culture Paradigm is inadequate to the task of overcoming the threat to the constitutional order posed by Judicial Independence 4.0. That is because the Legal Culture Paradigm depends for its success on preserving customary independence by respecting constitutional conventions that are being trashed in the service of dueling campaigns to promote or thwart the neo-populist wave that is sweeping the United States and much of the world in Judicial Independence 4.0. It is unrealistic to hope that a modest reboot of the prevailing paradigm can, by itself, quiet the polarized, partisan, political fury firing Judicial Independence 4.0, because

[271] 28 U.S.C. § 351 et seq (2010).
[272] 28 USC § 453 (West, Westlaw through Pub. L. No. 116-91).
[273] Harry T. Edwards, *Collegial Decision Making in the U.S. Courts of Appeals* 26–28 (N.Y. Univ. Pub. Law & Legal Theory Research, Working Paper No. 17-47 (2017).

the judiciary and its independence have become little more than pawns subject to sacrifice in a chess game for the future of American Democracy.

Those seeking to defend or destroy the new populist order are akin to parties in high-stakes litigation. Litigants in contentious cases often begin with a period of hardball, followed by a period of growing receptivity to settlement. A similar sequence of events seems likely here.

Throughout American history, there have been cycles of anti-Court anger following major transitions of political power, in which holdover judges of the old regime become targets of the new regime.[274] The first two cycles of the twentieth century were related: The conservative Supreme Court's substantive due process jurisprudence thwarted the legislative agenda of angry Progressives as they ascended to power in the early twentieth century, just as that same jurisprudence impeded and infuriated the New Dealers a generation later.[275] The end of the latter cycle was punctuated (in part) by the Supreme Court's famous footnote 4 in *Carolene Products*, where the Court signaled its intentions to reserve heightened due process scrutiny for cases in which legislation and other state action impinged upon the rights of discrete and insular minorities.[276]

The net effect of this pivot was to withdraw the Court from protecting the property rights of businesses by second-guessing the wisdom of socio-economic legislation enacted by historically liberal-leaning legislatures and to shift the Court's

[274] Geyh, *supra* note 126 at 19–21.
[275] ROSS, *supra* note 124 at 1 (Characterizing FDR's attacks on courts during the New Deal as a "culmination" of the anticourt sentiment that began a generation earlier, during the Populist-Progressive era).
[276] U.S. v. Carolene Products Co., 58 S.Ct. 778, 783–784 (1938).

focus toward protecting the civil rights and liberties of political minorities against infringement by majoritarian—and often more conservative—state interests.[277] As a consequence of this shift, the next three cycles of anti-Court sentiment featured angry conservatives taking aim at more liberal federal courts: 1) Attacks on the Warren Court by state and federal officials, in the 1960s[278]; 2) The congressional Republicans' campaign against "liberal judicial activism" in the 1990s;[279] and 3) President Trump's ongoing effort to discredit "political" decision-making by "Obama judges," described in this article.

These conservative campaigns against liberal judges in the modern era featured fundamentally different strategies by the partisan participants. Republicans went on the offensive. They made recreating the courts as champions of selective "judicial restraint"—whose judges shared judicial philosophies that were more in keeping conservative partisan interests—a centerpiece of the Republican agenda dating back to the Reagan administration.[280] It was then, across a series of policy papers, that the Department of Justice's Office of Legal Policy devised a blueprint for an ideological regime change in American constitutional law—a change that could best be implemented through the appointments process.[281] In the

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[277] David Schultz, *Carolene Products, Footnote Four,* in ENCYCLOPEDIA OF THE FIRST AMENDMENT (2009), https://www.mtsu.edu/first-amendment/article/5/carolene-products-footnote-four ("Footnote four… presages a shift in the Supreme Court from predominately protecting property rights to protecting other individual rights…It is arguably the most important footnote in U.S. constitutional law").
[278] William G. Ross, *Attacks on the Warren Court by State Officials: A Case Study of Why Court-Curbing Movements Fail*, 50 BUFF. L. REV.483 (2002).
[279] AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 15-35 (1997).
[280] Cass Sunstein, *The Right-Wing Assault*, THE AMERICAN PROSPECT (Feb. 19, 2003), https://prospect.org/article/right-wing-assault.
[281] Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change,* 78 IND. L. J. 363 (2003).

decades since, Republican Presidents have shorthanded this ambition in terms of appointing justices in the mold of Antonin Scalia and Clarence Thomas.[282] Democrats, in contrast, adopted a more passive and defensive approach.[283] They came to regard the federal courts as allies in the cause of protecting the rights that liberals held dear (even after the Supreme Court began its turn to the right) and, instead of campaigning aggressively to establish a liberal Court, were content to join moderates in defending the judiciary's independence from cyclical, conservative assault.[284]

The net effect has been a manifestation of what Joseph Fishkin and David Pozen describe as "asymmetric constitutional hardball," [285] in which conservatives have (with exceptions[286]) tested the limits of independence conventions more aggressively than their liberal counterparts. In that regard, however, Judicial Independence 4.0, beginning with the Merrick Garland imbroglio and its aftermath, show signs of being a game-changer. Progressives are awakening to the realization that after successfully abrogating an array of constitutional conventions, their

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[282] Richard Wolf, *Trump's 21 potential court nominees are overwhelmingly white, male and from red states*, USA TODAY (Dec. 1, 2016), https://www.usatoday.com/story/news/politics/elections/2016/12/01/donald-trump-supreme-court-21-nominees-list-nomination/93964888/ ("[Donald] Trump promised to 'appoint justices who, like Justice Scalia, will protect our liberty with the highest regard for the Constitution.'"); *Bush picks Alito for Supreme Court*, N.Y. TIMES (Oct. 31, 2005), https://www.nytimes.com/2005/10/31/world/americas/bush-picks-alito-for-supreme-court.html (Kay Daly, president of the conservative Coalition for a Fair Judiciary said, "'The president has made an excellent choice today which reflects his commitment to appoint judges in the mold of Scalia and Thomas'"); Arianne De Vogue, *How the Presidential Election Might Change Supreme Court*, ABC NEWS (Nov. 5, 2012), https://abcnews.go.com/Politics/OTUS/presidential-election-change-supreme-court/story?id=17644255 ("Romney has vowed on his web site to nominate 'judges in the mold of Chief Justice Roberts and Justices Scalia, Thomas, and Alito.'''')

[283] Sunstein, *supra* note 280.

[284] *Id.*

[285] Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915 (2018).

[286] One notable exception being the Democrats' abuse of process conventions in judicial confirmation proceedings during the George W. Bush and Obama administrations. Wheeler, *supra* note 227.

conservative adversaries are poised to "win" a generations-long battle for ideological control of the Supreme Court. Sensing a major jurisprudential regime change,[287] progressives have begun to return to their roots, by launching an offensive in the spirit of their forbearers from the Progressive and New Deal eras. Most notable in that regard are serious proposals by leading Democrats (offered in anticipation of their return to power) to pack the Supreme Court with additional justices to offset recent Republican gains, in derogation of longstanding conventions against changing Supreme Court size for partisan purposes.[288]

For those who value the role that independence conventions play in promoting the orderly operation of government generally and the future of an independent judiciary in particular, things are likely to get worse before they can get better. Pokes to the eye of established conventions by conservative partisans will elicit reciprocal pokes by progressive partisans in lieu of unheeded warnings not to poke at all. This "eye for an eye" stratagem is very much in the spirit of aggressive, high-stakes civil litigation, in which both sides strain and sometimes exceed the limits of applicable rules in scorched earth campaigns to exhaust and intimidate their opponents in pursuit of tactical advantage.

In this environment, calls for compromise and détente will almost certainly go unheeded. The conservative, neo-populist wave has gained ground by means of tactics it has no incentive to discontinue. Progressives, who have lost ground, are in

[287] Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).
[288] Everett & Levine, *supra* note 228.

no mood to seek a truce that entrenches their diminished position. In the immediate future, then, a period of unrestrained hardball appears inevitable.[289]

Ultimately, however, scorched earth litigation is difficult to sustain. It becomes so disruptive, so expensive, and so exhausting, that settlement options begin to look more attractive to both sides. In a like vein, operating a government in which political branch relationships with the judiciary are unregulated by conventions portends to become hopelessly chaotic and dangerously destabilizing. Paradoxically, therein lies hope: the more insufferable the unrelenting game of unrestrained hardball gets, the more attractive the alternative of settlement becomes.

Looking ahead, it is important to begin the business of putting a structure in place to facilitate the negotiated settlement of differences between the institutional disputants in anticipation of a time when they will be receptive to such efforts. A key to enabling a negotiated or mediated settlement is to bring the parties together in a quieter and less formal setting, to promote candor and discourage posturing for the benefit of external audiences.

Separation of powers coupled with checks and balances entrench inefficiency and conflict in the constitutional design. But the inefficiency and conflict that the constitution contemplates, does not require isolation or alienation. Since the

[289] Fishkin and Pozen doubt whether Democrats are fit to play hardball into extra innings, noting that they have lacked the philosophical and financial resolve of their Republican counterparts. Fishkin & Pozen, *supra* note 285 at 976–82. The accuracy of that prediction may turn on whether Judicial Independence 4.0 yields the major jurisprudential regime change that Republicans have been seeking since the Reagan administration. If it does not, then Fishkin and Pozen are probably right. If, however, we are at a turning point that culminates in a more significant jurisprudential shift on the Supreme Court, the history of the left's protracted assault on the federal courts during the Populist, Progressive, and New Deal eras suggests that the Democrats will be playing hardball with sustained intensity into the foreseeable future.

founding, thoughtful observers have proposed ways to harness constructive, interbranch engagement to serve a variety of ends. At the Constitutional Convention, James Madison proposed a Council of Revision that called upon a body constituted of the President and federal judges to "examine every act of the National Legislature before it shall operate."[290] In the 1920s, Benjamin Cardozo proposed a Ministry of Justice, comprised of representatives from the bench, bar and academy to assist legislatures in recommending reforms to improve the administration of justice.[291] Many others have offered similar proposals in the years since.[292]

Congress has established several ad hoc, multi-branch commissions for the explicit purpose of facilitating effective administration of the courts. In 1972, Congress established the Commission on Revision of the Federal Court Appellate System, comprised of members appointed by the President, the Chief Justice, and both houses of Congress, to assess the need for realignment of the circuit courts.[293] In 1988, Congress established the Federal Courts Study Committee, with members appointed by the Chief Justice and drawn from all three branches of government, for the purpose of identifying problems with federal court operations and

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[290] 1 Max Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 21 (rev. ed. 1937).
[291] Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 114 (1921).
[292] Committee on Long Range Planning, Judicial Conference of the U.S., Proposed Long Range Plan for the Federal Courts 118 (1995) (proposing creation of National Commission on the Federal Courts); William E. Cooper, *A Proposal for a Congressional Council of Revision*, 12 SETON HALL LEGIS. J. 233, 238-40 (1989) (proposing council of revision comprised of former judges and legislators);); Larry Kramer, *"The One-Eyed are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources*, 54 LAW & CONTEMP. PROBS. 73,95 (1991) (advocating establishment of planning agency within legislative branch).
[293] THE COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975), https://www.fordlibrarymuseum.gov/library/document/0019/4520540.pdf.

recommending solutions.[294] In 1991, Congress created the National Commission on Judicial Discipline and Removal, comprised of members appointed by leaders from all three branches of government, to examine issues related to judicial impeachment and discipline, and recommend reforms.[295]

Of most immediate relevance, beginning in the late 1970s, the Brookings Institution hosted a series of conferences in Williamsburg, Virginia, and elsewhere.[296] These conferences brought representatives from all three branches of government together to discuss court-related issues for the purpose of improving interbranch communication and promoting mutual understanding of challenges confronting the judiciary.[297]

I recommend that three tri-branch summits be convened in the spirit of the Williamsburg conferences, when the participants are willing and receptive to meet. One summit could address core principles: The paradigmatic role of an independent and accountable judiciary in American government. A second summit could assess the state of constitutional conventions that have served to protect an independent judiciary from encroachment. And a third could examine the appointments process and the role of procedural conventions in promoting a stable system of selection and an independent, accountable judiciary.

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[294] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990), https://www.fjc.gov/sites/default/files/2012/RepFCSC.pdf
[295] REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (1993), https://judicial-discipline-reform.org/judicial_complaints/1993_Report_Removal.pdf.
[296] Mark W. Cannon & Warren I. Cikins, *Interbranch Cooperation in Improving the Administration of Justice: A Major Innovation,* 38 WASH.. & LEE L. REV. 1 (1981).
[297] *Id.*

At first blush, ending this article with a proposal for the disputants to get together and talk through their differences would seem to rival making s'mores and sharing puppy memes as a toothless, anodyne solution to addressing the debilitating problems that have beset the American judiciary. But I have analogized this proposal to settlement talks in high-stakes litigation for a reason. Settlement talks are not warm and fuzzy affairs. They are intense and fraught, because both sides are fully aware that their futures are at stake. For that reason, the concessions that parties make in a negotiated settlement have purpose and bite. The challenge, which this article has sought to meet, is to make plain, for the benefit of the disputants, that the stakes are comparably high in the ongoing partisan battle for the future of the American judiciary.

By the same token, as in settlement negotiations, the success of talks between partisans struggling for control of the courts does not depend on the naïve hope that the disputants will set self-interest aside and act for the greater good. As welcome as such displays of patriotism might be, détente and a restoration of independence conventions can be achieved with recourse to enlightened self-interest, and the adage, "what goes around, comes around." Forging consensus in support of constitutional conventions proceeds from the self-interested premise that acquiescing to standard operating procedures, which yields certain tactical advantages to my opponent when I am in power today, not only makes life less exhausting and chaotic, but will afford me those same tactical advantages when I am out of power tomorrow. Support for judicial independence proceeds on a similar, self-interested premise: The "optimal" scenario of judges whom I bend to my

will when I am in power today, will yield to the catastrophic scenario of judges whom my opponent bends to his will tomorrow, unless we settle on independent judges as the second best bet for us both. The key, in other words, is to reorient self-interest in terms that look beyond the next election cycle.

Conclusion

Judicial independence is in a twilight that can presage the darkness or herald the dawn. This article offers ample cause for pessimism and predictions of a dark future for judicial independence, but there is cause for guarded optimism. Changes generations in the making, which have heightened public skepticism of an independent judiciary in the rule of law paradigm, can be arrested with the gradual introduction of a new Legal Culture Paradigm. The independence conventions that a conservative neo-populist president and his progressive (and sometimes neo-populist) opponents seek to repudiate can be restored following a period of turmoil, as the neo-populist movement loses momentum and the disputants become more receptive to détente. Darkness may be nigh, but the dawn will follow.