

What Do We Mean by “Judicial Independence”?

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In this article, the author argues that the concept of “judicial independence” has served more as an object of rhetoric than it has of sustained study. He views the scholarly literatures that treat it as ships passing in the night, each subject to weaknesses that reflect the needs and fashions of the discipline, but all tending to ignore courts other than the Supreme Court of the United States. Seeking both greater rigor and greater flexibility than one usually finds in public policy debates about, and in the legal and political science literatures on, judicial independence, the author attributes much of the difficulty to three fundamental shortcomings, the failure to recognize that (1) judicial independence is not an end of government but a means to an end (or ends), (2) judicial independence and judicial accountability are not discrete concepts at war with one another, but rather complementary concepts that can and should be regarded as allies, and (3) judicial independence is not a monolith.

The author shows how the instrumental approach key to recognizing the first shortcoming also helps to grasp the second and third, and he explores the implications of each for the additional research that judicial independence needs and deserves. That research, he argues, should no longer ignore state courts or lower federal courts, and neither should it ignore changes in attitudes towards, or in the practical circumstances of, contemporary law and lawmaking. Recognizing that attention to the different functions that courts perform, even within the same system, may lead one to consider whether they should be subject to different arrangements concerning judicial independence (and accountability), the author suggests a number of inquiries that might profitably inform the answers to such questions.

I. INTRODUCTION

In order usefully to discuss why we value or should value judicial independence, it is necessary to answer the anterior question of what we mean by judicial

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independence. The answer to that question, I believe, is, in the words of William Jefferson Clinton, "it depends."

Judicial independence exists primarily as a rhetorical notion rather than as a subject of sustained, organized study. Many scholars assume that a judiciary with at least some independence is important to the protection of property rights and individual liberty, if not to the maintenance of democratic governance itself. But legal writing on the subject all too often seems part of a polemical debate between contending camps. Very little of this work even acknowledges the existence of state courts, let alone considers how the variety of arrangements governing state judiciaries might affect general theories of judicial independence. Meanwhile, the political science literature has not been immune to its own brand of extremism, much work failing to acknowledge that different courts may play different roles and, more generally, viewing the question of judicial independence in all or nothing terms. There is good, serious work about judicial independence in both the legal and political science literatures, but there is too little of it, and too often the products have been like ships passing in the night.¹

My goal is to achieve a degree of rigor on the one hand, and of flexibility on the other hand, that is missing from most public policy debates about, and much of the legal and political science literatures on, judicial independence. Many people simply assume that there is agreement about what judicial independence is, thereby relieving them of the duty to state precisely what they mean when invoking the term. Many others are quite clear what they mean by judicial independence, but their definitions are so obviously the product of the academy (or of self-interest) that they are ill-suited for the practical business of government. Still others capitalize on the multiplicity of possible meanings of judicial independence, with the same result.

These barriers to understanding and hence to progress tend to reflect, and to some extent may be due to, three fundamental shortcomings. The first is the failure to recognize and/or faithfully to incorporate in analysis the fact that, when the mists of rhetoric have parted, in no modern political society of which I am aware is judicial independence itself a goal of government. Those responsible for the formal structures of government, and for the informal norms that fill up their interstices, do not seek whatever degree of independence they favor for the judiciary because they believe that judicial independence is itself normatively desirable. Rather, *judicial independence is a means to an end (or, more probably, to more than one end)*.²

The second and third shortcomings are related to, at least in the sense that they may be encouraged by, the first. Thus, and second, discussions of judicial

¹ "There is no literature on judicial independence; rather, there are 'literatures'." Stephen B. Burbank et al., *Introduction, in JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH* 3 (Stephen B. Burbank & Barry Friedman eds., 2002) [hereinafter *JUDICIAL INDEPENDENCE AT THE CROSSROADS*].

² See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. REV. 315 (1999).

independence often proceed on the erroneous premise, stated or unstated, that judicial independence and judicial accountability are discrete concepts at war with each other, when in fact they are complementary concepts that can and should be regarded as allies. This supposed dichotomy between independence and accountability is a favorite target of legal scholars in search of a paradox; when it is found to be present, many political scientists regard it as proof that judicial independence is a myth (or a hypothesis not confirmed). The instrumental view of judicial independence taken here, on the other hand, requires no dichotomy and sees no paradox, since it proceeds from the premise that judicial independence and judicial accountability "are different sides of the same coin."³ An accountable judiciary without any independence is weak and feeble. An independent judiciary without any accountability is dangerous.⁴

The third shortcoming of many discussions of judicial independence is the erroneous assumption that judicial independence is a monolith. According to this view, judicial independence has the same value, even if instrumental value, no matter what the court. Most legal scholars who write about judicial independence know nothing and care less about state courts.⁵ Their incentive structures or utility functions reflect the prominence and prestige of the federal courts in general, and of the Supreme Court of the United States in particular.⁶ To their great credit, political scientists have not similarly dispensed with those courts that conduct the great majority of judicial business in this country. At the same time, however, much of the high profile political science work on judicial independence has similarly concentrated on the Supreme Court, attention that may be due to some of the same incentives operating in the legal academy but that surely also reflects the current perceived need for practitioners of the science to quantify and measure, and their need for data with which to do so.⁷

Whatever the reasons for the failure of most scholars of the subject to consider, let alone study, state courts and federal trial and intermediate appellate courts, the

³ *Id.* at 339 (emphasis added); see also Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 117-18 (1996).

⁴ See THE CONSTITUTION OF PHILLIPS ACADEMY, ANDOVER MASSACHUSETTS 11-12 (rev. ed. 1995) (on file with the author):

But, above all, it is expected, that the Master's attention to the disposition of the Minds and Morals of the Youth, under his charge, will exceed every other care; well considering that, though goodness without knowledge (as it respect others) is weak and feeble; yet knowledge without goodness is dangerous; and that both united form the noblest character, and lay the surest foundation of usefulness to mankind.

⁵ For a recent notable exception, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, 61 L. & CONTEMP. PROBS., Summer 1998, at 79.

⁶ See RICHARD A. POSNER, *OVERCOMING LAW* 81-144 (1995).

⁷ See Paul Brace & Kellie Sims Butler, *New Perspectives for the Comparative Study of the Judiciary: The State Supreme Court Project*, 22 JUST. SYS. J. 243, 243-46 (2001).

insight that judicial independence is a means to an end (or ends) and not an end in itself suggests that the quantum and quality of independence (and accountability) enjoyed by different courts in different systems, and indeed by different courts within the same system, may not be, and perhaps should not be, the same. To that extent *judicial independence is not a monolith*. Indeed, it could be otherwise only if the architects of, and the major players in, the governments of all American polities had the same attitudes towards and aspirations for their judiciaries, and for every court within their judicial system. Both history and a comparison of the arrangements that different states have made and now make for their courts tell us that this cannot be so. The point is also clear when one tries to imagine a general theory of judicial independence and takes account of experience in different (foreign) legal systems, as it does when one tries to conceive a general theory of independence as a tool of modern government.

II. JUDICIAL INDEPENDENCE IS A MEANS TO AN END (OR ENDS)

No rational politician, and probably no sensible person, would want courts to enjoy complete decisional independence, by which I mean freedom to decide a case as the court sees fit without any constraint, exogenous or endogenous, actual or prospective.⁸ Courts are institutions run by human beings. Human beings are subject to selfish and/or venal motives, and even moral paragons differ in the quality of their mental faculties and in their capacity for judgment and wisdom. In a society that did not invest judges with divine guidance (or its equivalent), the decision would not be made to submit disputes for resolution to courts that were wholly unaccountable for their decisions. One implication of this proposition is that, from a pre-modern, anthropological perspective, we need law to constrain judges rather than judges to serve the rule of law.⁹

As the reference to the rule of law may suggest, completely independent courts in this sense would also be intolerable because they would render impossible the orderly conduct of the social and economic affairs of a society. Citizens would not and could not long turn to courts for the resolution of their disputes if the result of each case were an immaculate conception, worthless for the governance of future conduct and, to citizens unguided by authoritative norms, apparently in conflict with the decision in another case involving similar facts and similar equities. In such a world, an opportunity to appeal to a higher court would represent insult added to injury, which helps to explain why, even in systems where first instance courts are in theory not

⁸ See Louis Michael Seidman, *The Impossibility of Judicial Independence* (undated) (unpublished paper prepared for the AJS/Brennan Center Conference, *see supra* note *) (on file with the author).

⁹ See Oscar G. Chase, *A Speculation on Judicial Independence, Triadic Disputing, and Cultural Legitimacy* (January 31, 2001) (unpublished paper prepared for the AJS/Brennan Center Conference, *see supra* note *) (on file with the author).

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constrained by precedent, such as Italy, they do not lightly depart from the law as previously articulated by a higher court.¹⁰

Thus, once a political society accepts the importance of law for the prospective governance of human affairs, courts cannot be accorded complete decisional independence. In societies that divide responsibility for making such law among different institutions, similar considerations require the creation of a hierarchy of authority providing decision rules for the resolution of conflict between or among those institutions. Unless such rules always privilege the views of the society's courts, complete decisional independence is for that reason also impossible.¹¹

In fact, most developed political societies privilege law made by legislatures. In such societies courts have the obligation to interpret and apply (subject to constraints found in a written or unwritten constitution) legislative law, with which obligation complete decisional independence is obviously and fatally inconsistent.¹²

No American federal or state court of which I am aware has ever enjoyed complete decisional independence, and if that is what judicial independence is taken to mean, as a historical matter it is, indeed, a myth.¹³ Moreover, and more important for present purposes, consideration of just the formal arrangements governing American courts reveals that the aspirations of those responsible for their creation and continued operation could not have included complete decisional independence.

Consider the federal courts, not because of their prominence or prestige, but because they appear to enjoy the greatest measure of judicial independence of any American courts.¹⁴ The Constitution confers on Congress the power to impeach and

¹⁰ See MAURO CAPPELLETTI ET AL., *THE ITALIAN LEGAL SYSTEM: AN INTRODUCTION* 246–47, 252–53, 270–73 (1967); Carlo Guarnieri, *Judicial Independence in Latin Countries of Western Europe*, in *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY: CRITICAL PERSPECTIVES FROM AROUND THE WORLD* 111, 112–13 (Peter H. Russell & David M. O'Brien eds., 2001) [hereinafter *JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY*]. There are likely other reasons having to do with the incentive structure in a career judiciary. See, e.g., Guarnieri, *supra*, at 113; J. Mark Ramseyer & Eric B. Rasmusen, *Skewed Incentives: Paying for Politics as a Japanese Judge*, 83 *JUDICATURE* 190 (2000).

¹¹ Taking Professor Rubin's perspective, complete decisional independence is revealed as intolerable for any institution of government where power is shared. See Edward L. Rubin, *Independence as a Governance Mechanism*, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, *supra* note 1, at 56–100. Moreover, attention to the allocation of government power suggests that, even if complete decisional independence for courts were tolerable, unless a society were also willing to give courts the means to enforce their decisions, it would be futile.

¹² See Geoffrey C. Hazard, Jr., *Judicial Independence: A Structure for Analysis* (December 21, 2000) (unpublished paper prepared for the AJS/Brennan Center Conference, *see supra* note *) (on file with the author).

¹³ See Herbert Jacob, *The Courts as Political Agencies: An Historical Analysis*, 8 *TUL. STUD. POL. SCI.* 9, 48, 50 (1962); Burbank, *supra* note 2, at 326.

¹⁴ The fact that decisions interpreting federal statutes can be effectively overruled by the enactment of subsequent legislation might be deemed relevant to the subject of judicial independence. Although one can certainly imagine a court avoiding a particular decision because

remove Article III judges from office.¹⁵ It is true that a very strong norm has developed against using this power in reaction to the content of judicial decisions (and hence to coerce different decisions in the future). We should remember, however, that the result in the early 1800s impeachment trial of Justice Samuel Chase, which is regarded as generative of the norm, was very close.¹⁶

The Constitution also confers on Congress the power to determine which if any lower federal courts will exist and, as interpreted, which if any of the cases and controversies enumerated in Article III they will be enabled to hear, and even the appellate jurisdiction of the Supreme Court is subject to exceptions and regulations Congress may prescribe.¹⁷ Although the triumph of judicial review and judicial supremacy in the nineteenth century may have helped to persuade Congress that it would be unconstitutional to strip the judges of the Commerce Court of their offices when it abolished that court early in the twentieth century, it did abolish the court and could take similar action in the future.¹⁸

Congress' formal powers to control or influence the decisions of the federal courts are not confined to the impeachment process, court-stripping, and the regulation of original and appellate jurisdiction. For Congress also decides how many judges will sit on a given federal court. Some scholars conclude that it has added justices to the Supreme Court directly to affect decisions on matters of great importance to it.¹⁹ Again, the fact that the failure of Roosevelt's 1937 court-packing

of concern that, in light of a high likelihood of override, the decision would be an embarrassment or a futility, the phenomenon seems best considered as part of the allocation of lawmaking power. See THE FEDERALIST NO. 81, at 484 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("A legislature, without exceeding its province, cannot reverse a determination once made in a particular case; though it may prescribe a new rule for future cases.").

¹⁵ See U.S. CONST. art. II, § 4.

¹⁶ See WILLIAM H. REHNQUIST, GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON 74-105, 125 (1992); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 132 (2d ed. 1985); JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 136-37 (1950).

¹⁷ The text is literally accurate, see U.S. CONST. art. III, §§ 1, 2; *Palmore v. United States*, 411 U.S. 389, 400-01 (1973), but here as elsewhere where congressional action requires legislation, the executive is involved.

¹⁸ See WILLIAM S. CARPENTER, JUDICIAL TENURE IN THE UNITED STATES WITH ESPECIAL REFERENCE TO THE TENURE OF FEDERAL JUDGES 78-100 (1918); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 431-32 (1998). Congress has also, albeit infrequently and not in modern times, sought to exercise decisional control over the Supreme Court by regulating its calendar and appellate jurisdiction. See CARPENTER, *supra*, at 76-77; REHNQUIST, *supra* note 16, at 132; David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801-1805*, 33 WAKE FOREST L. REV. 219, 233 (1998).

¹⁹ See FRIEDMAN, *supra* note 16, at 378-79; G. Edward White, *Salmon Portland Chase and the Judicial Culture of the Supreme Court in the Civil War Era*, in THE SUPREME COURT AND THE CIVIL WAR 37-39, 43 (Jennifer M. Lowe ed., 1996). But see Charles Gardner Geyh, *Customary*

plan has generated (or confirmed) a strong norm against the use of the formal power does not negate its existence or (entirely) eliminate the shadow it may cast.²⁰

All of this would probably suffice to persuade one new to the study of our institutional arrangements that the federal judiciary is the weakest and hence “least dangerous” branch.²¹ Yet, I have not even considered that which prompted Hamilton so to describe it in *The Federalist* No. 78, namely that Congress wields the power of the purse (controlling the budget of the federal courts), while the Executive wields the power of the sword (being responsible for the enforcement of judicial decisions). Nor, of course, have I considered state court systems, in most of which the judges of at least some courts must stand for some form of election and serve for terms far shorter than life.²²

These formal exogenous constraints are potent evidence against any assertion, explicit or implicit, that the “judicial independence” we use as a label to describe the result of the arrangements made for the federal judiciary means, or could possibly have been intended to mean, complete decisional independence. It is also likely that the architects of those arrangements envisioned and thus took into account endogenous constraints on decisional independence. Law itself may have been thought to function as such a constraint, at least to the extent that it was (sincerely) believed to be determinate and discoverable (as opposed to indeterminate and judicially created).²³ The existence in the Constitution of both the Supreme Court and the Supremacy Clause suggests others, to wit, a hierarchy of authority and at least the beginnings of institutional hierarchy.²⁴

For these purposes it is not necessary to agree about—and I do not here seek to identify—the goals that the architects of the federal (or any other) court system actually did seek to achieve in providing the measure of judicial independence they

Independence, in *JUDICIAL INDEPENDENCE AT THE CROSSROADS*, *supra* note 1, at 176 (“Either court packing was not their dominant motivation or they recognized that their plans to court pack ran counter to established norms against such a practice and so needed to be obscured.”).

²⁰ See Burbank, *supra* note 2, at 322–23. More subtly, Congress can use the power *not* to add judges to overburdened lower courts as a means to discipline those courts for unpopular decisions or simply to keep them busy and out of trouble. Similar motivation probably helps to explain the refusal of early Congresses to heed the pleas of the Justices of the Supreme Court that they be relieved of the onerous business of riding circuit. See Jacob, *supra* note 13, at 21–27.

²¹ *THE FEDERALIST* NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

²² See Am. Judicature Soc’y, *Judicial Selection in the States: Appellate and General Jurisdiction Courts*, at <http://www.ajs.org/Judicial%20Selection%20Charts3.pdf> (last updated December 2000).

²³ See Burbank, *supra* note 2, at 330, 336.

²⁴ See U.S. CONST. art. III, § 1; *id.* art. VI. Recent scholarship on the history of the struggles for judicial review and judicial supremacy, however, cautions us about inferences in that regard from the time of the founding. See Friedman, *supra* note 18. A recent decision exploring the history of precedent in this country is another reminder not to retroject modern views to that period. See *Hart v. Massanari*, 266 F.3d 1155 (9th Cir. 2001).

did, or that the architects of the future should seek to achieve. Professor Rubin's general approach, reflecting the modern administrative state, causes him to dismiss the contemporary relevance of separation of powers and to highlight the due process values served by decisional independence.²⁵ Professor Scheppele's awareness that due process, however important, may yield nothing more than arid formalism and her concern with constitutional courts in developing democracies cause her to highlight judicial review.²⁶ The framers of the United States Constitution appear to have sought to achieve both goals in making the arrangements they did for the federal judiciary.²⁷

The United States is not the same country it was in 1787, and although our Constitution has changed very little in the intervening years, the same cannot be said about our notions of law and lawmaking. Moreover, as we have seen, the Constitution would provide very little protection against an executive and legislature intent on controlling the decisional independence of the federal courts. Finally, change rather than permanence has been the norm in the architecture of the arrangements that formally determine state court independence.²⁸ This suggests that, as the ends to be achieved change, so (subject to federal or state constitutions) may the means.

III. JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY ARE DIFFERENT SIDES OF THE SAME COIN

In previous work positing as the central goal of the architects of federal judicial independence the enablement of judicial review, I explored the implications of the fact that the legal arrangements whose consequences are described by the terms "judicial independence" and "judicial accountability" are separately situated in the Constitution.

If this were all, one might plausibly maintain that, because the legal arrangements whose consequences they describe are separately situated in the Constitution, judicial independence and judicial accountability are analytically discrete concepts, at least as they concern the federal judiciary. Even on those terms, however, the argument would be difficult to maintain. That is because, as a concept that describes the consequences of legal arrangements, judicial independence invites attention to that which it denies, a process that quickly directs attention to the importance of context and purpose.

Once one has formulated the concept of judicial independence in light of its purposes, it becomes clear that, at the federal level, "the article respecting

²⁵ See Rubin, *supra* note 11.

²⁶ See Kim Lane Scheppele, *Declarations of Independence: Judicial Reactions to Political Pressure*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 1, at 227-79.

²⁷ See Burbank, *supra* note 2, at 318-26, 335-39.

²⁸ See Lee Epstein et al., *Selecting Selection Systems*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 1, at 191-226.

impeachments" is *not* the "only provision" that confers power, the exercise of which would deny the power of federal courts to make decisions free of executive or legislative control. Indeed, the impeachment article has become a virtual dead letter for that purpose, but, as we have seen, the political branches are hardly without alternative weapons.

To some extent, confusion on this matter may arise from the restricted meaning of "judicial accountability" that follows from consideration of the limits history has imposed on the federal impeachment power. But again, as a purposive legal concept, judicial independence is not so restricted, and in thinking about the level of executive or legislative control or influence that is compatible with a desired level of independence, we are thinking about accountability. The same is true in states with elective systems, where the inquiry also includes the level of popular control or influence.²⁹

The temptation to place judicial independence and judicial accountability in opposition may be difficult to resist if one views the problem of independence for judges as a unique phenomenon. The truth is that, to the contrary, independence is a tool used by those responsible for the structure and operation of many government institutions.³⁰ This perspective instantiates, and thus highlights the importance of, an instrumental approach to the concept of independence. Moreover, to the extent that we are not hostage to history and that constitutions permit, viewing the judiciary as one part of a complex governmental apparatus holds more promise of yielding a realistic conception of what it is we seek from courts today, and the balance between independence and accountability that we must afford them in order to get it, than an account that is stuck in 1787 and/or that disembodies (usually through apotheosis) courts and their independence.

Both the realization that judicial independence and judicial accountability are different sides of the same coin and the knowledge that achieving the proper balance between them is not a challenge unique to the judiciary should assist in identifying and understanding the complex set of informal norms and understandings that may have more practical importance to judicial independence (and accountability) than any formal rules.³¹ Insisting on the traditional dichotomy or on the uniqueness of the judiciary, to the contrary, obscures the processes of interaction and dialogue that we

²⁹ Burbank, *supra* note 2, at 340.

³⁰ See Rubin, *supra* note 11. Once one recognizes that, from an instrumental perspective, judicial independence is not unique, the possibility emerges both that theoretical work on independence confined to the judiciary is incompletely specified and that, as William Ross has observed, historical inquiry so cabined may miss trends that tend to affect the independence of other institutions of government as well. See William G. Ross, *Suggestions for Future Research on Judicial Independence 2* (undated) (unpublished paper prepared for AJS/Brennan Center Conference, see *supra* note *) (on file with the author).

³¹ See, e.g., Geyh, *supra* note 19.

know characterize institutional relationships in other systems, both ancient³² and very new,³³ and that I believe also characterize such relationships in this country.

Finally, viewing judicial independence and accountability as the joint product of purposive legal and political arrangements helps one to understand the weaknesses of another traditional dichotomy encountered in the literature: that between the independence of an individual judge and the independence of the court and/or judicial system of which that judge is a member:

The capacity of the judiciary, federal and state, to function independently of control by the executive and legislative branches . . . requires the capacity of individual judges to enjoy [a measure of] extrajudicial independence. It also requires that the judiciary, as a system of courts, function and be perceived to function according to law. This in turn requires that individual judges yield some intrainstitutional independence.³⁴

IV. JUDICIAL INDEPENDENCE IS NOT A MONOLITH (UNLESS THE ENDS ARE ALWAYS AND EVERYWHERE THE SAME)

I have suggested that the utility function of academics helps to explain the preoccupation of scholars, particularly legal scholars, with federal courts in general and the Supreme Court in particular.³⁵ Normative scholarship gravitates towards institutions that are perceived to be prestigious and influential because good scholarship may have an impact on the work of such institutions and because that is where, even for scholarship that does not seek to have such an impact, the prestige and influence of legal scholars are thought to lie. In part for the same reasons, such institutions attract empirical study and thus generate the data that contemporary political scientists require for their work.

If this is correct it helps to explain why those who write, and/or participate in policy debates, about judicial independence tend to refer to it as if it were a monolith, a concept having the same meaning everywhere and at all times. That tendency is in any event unsurprising to the extent that the individual in question treats judicial independence as an end in itself. Moreover, such a unitary goal would naturally take its shape from that which those harboring it know best, to wit, federal judicial independence (and the independence enjoyed by the Supreme Court in particular).³⁶

³² See Robert Stevens, *Judicial Independence in England: A Loss of Innocence*, in JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, *supra* note 10, at 155-72.

³³ See Scheppele, *supra* note 26.

³⁴ Burbank, *supra* note 2, at 342 (footnote omitted).

³⁵ See *supra* text accompanying note 7.

³⁶ Yet, as the legal realists taught us, even though the tendency to assume that the same word means the same thing in different contexts "has all the tenacity of original sin," it "must constantly

Of course, few scholars labor under this fallacy in fact, well recognizing the possibility that, even if they do not pause to inquire why, the quantum and quality of judicial independence (and accountability) may vary dramatically among courts in the United States. One reason they may not pause to inquire, however, has to do with a normative commitment to judicial independence on the federal model.³⁷ Such a normative commitment constitutes both a further disincentive to study state court systems (were it needed!) and an impediment to an instrumental understanding of judicial independence.³⁸

Even if one is predisposed for normative reasons to the federal model, an instrumental view of judicial independence (and accountability) requires attention to what it is that we seek from courts and to possible differences in that regard among the various court systems in the United States and among courts within the same system. Although the inquiry must attend to both formal (including constitutional) and informal constraints on changing the arrangements we make for courts and judges that bear on their independence and accountability, it simply will not do to read into constitutions protections that are not there or to pretend that informal norms will last forever. Here as elsewhere in the American legal landscape, comparative scholarship is most valuable for the light it sheds on domestic institutions, and here as elsewhere in scholarship that attends to functional relationships, it is useless to proceed as if nothing had changed since 1787.

On this view, rather than, for example, simply dismissing as defective state court systems where judges are not appointed and do not enjoy life tenure, and before seeking to bring about change in such systems, we need to try to make precise what it is we seek from courts, the degree of decisional independence (and accountability) that is necessary or desirable in order to achieve that end, and the arrangements, formal and informal, that are best calculated to yield that quantum of independence (and accountability). Although unable to elaborate this research agenda in great detail here, I set forth below some possible distinctions that may be helpful, if only in burying more deeply all three of the fallacies with which I am concerned in this article: that judicial independence is an end in itself, that it is in opposition to judicial accountability, and that it is a monolith.

be guarded against." WALTER WHEELER COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 159 (1942).

³⁷ This commitment itself may be a product of the academic utility function and, depending upon the historical period, may also reflect ideological allegiance to the products of federal litigation.

³⁸ There is irony in this neglect of state institutions, particularly in the legal scholarship on judicial independence. For, as the work of Jack Rakove has made clear, Madison was very attentive to those institutions and sought to prevent the excesses he perceived there in the arrangements he helped to fashion for the new federal government, including federal courts. See JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 290 (1996).

A. *Federal vs. State Courts*

From an instrumental perspective, the assertion or assumption that the only suitable arrangements affecting judicial independence (and accountability) for courts in the United States are those that have been and are made for federal courts implies not only that the latter are appropriate given the roles and functions of federal courts but that there are for these purposes no relevant differences between federal and state courts (or federal and state judges). Putting to one side evaluation of the federal arrangements, the hypothesis, in other words, is that there is nothing different about the roles and functions of state and federal courts, or the influences affecting their judges, that should cause those responsible for the rules that determine decisional independence (and accountability) to make different choices. A thorough evaluation of this hypothesis would be an enormous undertaking, requiring a detailed investigation of the various state court systems, the business they conduct, and their place in the larger political landscapes in which they are situated. The present occasion permits only the suggestion of some general considerations that may be useful in testing it.

Having said that I was putting the appropriateness of federal arrangements to the side, my first consideration nevertheless brings that question back on the scene. I raise it, however, because the federal model is likely to provide the baseline for comparative analysis of judicial roles and functions. It is the question of the significance, if any, that should be accorded the fact that the makers of the Constitution provided only for a Supreme Court, leaving to Congress the decision whether to create lower federal courts and if so to define the scope of their subject matter jurisdiction.³⁹ Whatever the makers thought Congress was likely to do,⁴⁰ the arrangements they made that formally determined the decisional independence (and accountability) of the federal judiciary would clearly and surely apply only to a high court, one moreover operating under a constitutional provision (the Supremacy Clause) that can (but need not) be read to contemplate judicial review.⁴¹

Whatever the implications of the Supremacy Clause for judicial review, its chief bite lies in the hierarchy of authority it establishes between federal and state law and the obligation it imposes on all courts, federal and state, to respect that hierarchy. With the acceptance of judicial review, that obligation extends to striking down state and federal laws found to be inconsistent with the federal constitution. Thus, unlike

³⁹ See U.S. CONST. art. III, § 1.

⁴⁰ See Geyh, *supra* note 19, at 168–69.

⁴¹ U.S. CONST. art. VI, § 1, cl. 2:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

the situation in a number of modern democratic societies, where there is a separate constitutional court with a monopoly on constitutional decisions, the members of which are subject to selection and retention arrangements quite different from the members of other courts,⁴² every court in the United States is a constitutional court.

To permit the consideration of the federal business of state courts to drive the inquiry into their roles and functions would be, however, again to exalt (in this case, without having separately evaluated) the federal model of arrangements bearing on decisional independence (and accountability). Moreover, and apart from the availability of Supreme Court review of the decisions of state courts on federal questions, the federal legislature and executive lack obvious means to control the decisions of state courts, to that extent negating the primary historic functional justification for the federal arrangements.⁴³ Of course, it may be that within a given state effective performance of the role of state constitutional judicial review might be thought to require functionally equivalent decisional independence. The question would then be whether the federal arrangements are the only or the best means to bring it about.⁴⁴

Finally in this aspect, particularly if testing the hypothesis proceeds, explicitly or implicitly, by comparison of state with federal judicial roles and functions, it may be important to pay close attention to the respective lawmaking powers of those courts. The common lawmaking power of the courts of most states has long been recognized as extensive (whether as a power to make law or simply to find it). At least since early in the Republic the federal courts have not been thought endowed with comparable power as to questions of federal law, and their ability to bring about functionally similar results in state law diversity cases has been seriously constrained since 1938.⁴⁵ Moreover, recent scholarship suggests that structural differences between state and federal courts call for very different limitations on their authority.⁴⁶

B. *Trial vs. Intermediate Appellate vs. Supreme (High) Courts*

We can never know whether, although it seems unlikely that, the makers of the Constitution would have fashioned different arrangements bearing on decisional independence (and accountability) for the lower federal courts than for the Supreme Court if they had established the former in that document rather than leaving decisions concerning them to Congress. If we knew the answer to that question was

⁴² See Guarnieri, *supra* note 10, at 112–15; Scheppelle, *supra* note 26, at 247–68.

⁴³ See Burbank, *supra* note 2, at 331.

⁴⁴ See *id.* at 331–35; HURST, *supra* note 16, at 138–46.

⁴⁵ See Stewart Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003, 1005 (1985); Stephen B. Burbank, *The Costs of Complexity*, 85 MICH. L. REV. 1463, 1475 (1987).

⁴⁶ See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833 (2001); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999).

negative, however, we still would not know much of significance for testing the hypothesis set forth above. For, as we have seen, the formal protections of decisional independence in the Constitution are dwarfed by those formal powers that could be used to control or influence decisions, and informal arrangements and understandings reached in their shadow may be far more significant to the quantum and quality of federal judicial independence (and accountability).

Rather, I have raised the question as one means of encouraging attention to the notion that, because different courts within a given judicial system may play different roles, the arrangements we make for them that bear on their decisional independence (and accountability) may appropriately vary. Thus, for example, one might explore whether the same degree of insulation from political influence appropriate for a trial court, deciding questions of fact and applying law in a hierarchical system of precedent, is appropriate for an appellate court whose primary role is the creation of precedent binding both in the case before it and in other similar cases.

The importance of judicial role is also a message carried by comparative scholarship exploring the etiology and functions of constitutional courts in emerging democracies.⁴⁷ Indeed, it is a message that seems likely to emerge from empirical and historical study of the means by which the members of different American courts within the same system have been and are selected and/or retained (including their terms of office).

As an example, data gathered throughout the country by the American Judicature Society indicate that in at least ten states different selection systems are used for members of trial and appellate courts.⁴⁸ Careful study of those state systems may reveal that one reason for the differences was their architects' belief that different judicial functions warrant different degrees of judicial independence (and accountability).⁴⁹

To take another example, when the question is federal judicial selection, there is a tendency to conceive of the role of the President and/or of the Senate in monolithic terms. Yet, as a number of studies clearly reveal, both have played very different roles in connection with nominations and confirmations to seats on the district courts, the courts of appeals, and the Supreme Court.⁵⁰ In a system where, from a political science perspective, accountability is front-end-loaded, the role differences of those responsible for selection thus have potentially significant implications for the

⁴⁷ See Scheppelle, *supra* note 26.

⁴⁸ See Am. Judicature Soc'y, *supra* note 22.

⁴⁹ It is a separate question whether careful normative analysis would support current differences, particularly to the extent that they reflect the proposition that greater decisional independence (less accountability) is appropriate for high courts than for trial courts. See *infra* text accompanying note 52.

⁵⁰ See, e.g., SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN (1997); Stephen B. Burbank, *Politics, Privilege & Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24 (2002).

quantum and quality of decisional independence (and accountability), and they may be due at least in part to views about differences in the roles and functions of the courts to which appointments are to be made.⁵¹

In studying the possible implications of role difference within a court system for the arrangements that bear on decisional independence (and accountability), it will be important to attend to both formal institutional structure and actual practice, to both the allocation of power that is supposed to exist and that which does exist. These inquiries will require attention to the theory and practice of precedent and of appellate review within the system. Moreover, in connection with trial courts, it will be important to consider the role of the jury.

One hypothesis such work might explore is that both a strong tradition of binding authority and a hierarchical structure providing more than one opportunity for review can act as powerful checks on decisional independence, and to that extent reduce the need for other forms of decisional accountability.⁵² That hypothesis would not pass unchallenged by political scientists, many of whom reject, if only because they cannot measure, the constraining force of law.⁵³ Perhaps, however, the reminder that political science has told us very little about the independence and accountability of courts other than the Supreme Court, coupled with attention to the point that even on that court “judges often agree with one another, no doubt because the law is clear and they follow it,”⁵⁴ will help to soften positions. Progress of that sort would be facilitated if legal scholars reciprocated by reading the political science literature and paid attention to the part that politics plays in judicial decisionmaking.

This discussion has suggested a number of considerations that seem to me important in pursuing the possible relevance of different judicial roles for the arrangements that determine the quantum and quality of judicial independence (and accountability). The first is the importance of attending to changes in the roles and functions of a court over time. The second consideration, related to the first, is the importance of not permitting theory or formal structure to obscure actual practice. The third consideration, related to the second, is the importance of not permitting the extraordinary to obscure the ordinary.

⁵¹ A similar perspective may help to understand the recent phenomenon of “treat[ing] all federal judicial appointments as if they were appointments to the Supreme Court.” Editorial, *Clinton’s Legacy or Bork’s?*, 84 JUDICATURE 224 (2001).

⁵² Professor Scheppele has likened a typical court structure to an inverse pyramid, pointing out how increasing the size of the court as one goes up the system could moderate the effect of individual partisanship and/or ideology. Kim Lane Scheppele, Remarks at the AJS/Brennan Center Conference, *see supra* note * (March 31, 2001) (transcript on file with the author).

⁵³ For recent progress in that regard, see, for example, Mark J. Richards & Herbert M. Kritzer, *Jurisprudential Regimes in Supreme Court Decision Making*, 96 AM. POL. SCI. REV. 305 (2002).

⁵⁴ Terri Jennings Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 1, at 111.

I have speculated that the makers of the Constitution may have regarded law as a consequential constraint on decisional independence and that such an attitude may have affected the choices they made concerning the formal arrangements bearing on such independence (and accountability) in the Constitution.⁵⁵ I have also noted, however, that attitudes towards law and lawmaking, particularly by judges, have changed since 1787, developments that could affect one's views about the appropriateness of those arrangements today. Moreover, wherever one looks in the federal judicial hierarchy, there have been substantial changes in the work and role, including the power, of the courts over time.⁵⁶

Of course, just as it is important not to permit, for instance, the theory or tradition of appellate review (*i.e.*, published opinion after full briefing and oral argument) to obscure the reality (*i.e.*, judgment order after page-limited briefing and no oral argument), so is it important not to forget that, at least in terms of numbers, ordinary cases surely dwarf extraordinary cases, with judges usually agreeing about that which they are pleased to call "the law." Perhaps most important, as we have seen, the formal arrangements in the Constitution that could be used to constrain decisional independence dwarf the formal protections and both may pale in significance to informal norms and understandings reached in their shadow.

V. CONCLUSION

It may be that, at the end of the day, there is a core to the notion of judicial independence, an irreducible normative essence that must be present in any political system for a court to operate as such. The very statement of the proposition gives pause, however, and a review of the fallacies described here well suggests the problems with, and the limitations of, any effort to identify such a core.

Foremost is the fact that judicial independence is not an end in itself but a means to an end, which requires that the inquiry focus on the goal(s) to be achieved in determining the quantum and quality of independence (and accountability). It remains for different polities to define what it is that they want from their courts and the measure (or quality) of judicial independence they believe is necessary or appropriate in order to secure it. Is there a goal that any enlightened architect of any judicial

⁵⁵ See *supra* text accompanying note 23.

⁵⁶ See DONALD R. SONGER ET AL., CONTINUITY AND CHANGE ON THE UNITED STATES COURTS OF APPEALS (2000); Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1981-82 (1997); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000). Thus, the federal judicial hierarchy may resemble an inverted pyramid, *see supra* note 52, but as proportionally fewer and fewer cases proceed up the pyramid and are fully considered by a superior court, the potential for the system effectively to constrain the decisional independence of inferior courts declines.

system would want courts in that system to be able to achieve and for which a measure of decisional independence would be necessary?

The fact that judicial independence is not a monolith requires that the search for a core, and the consideration of social and political goals, comprehend (and consider differences among) at least all courts within a given system, while the fact that achieving a balance between independence and accountability is a pervasive challenge of institutional architecture requires that attention to history and formal arrangements be tempered by a realistic appraisal of the practical needs of modern government. A modern polity's goals for its judiciary will almost surely include functions that require a measure of accountability, just as they do a measure of independence.

All of this suggests what comparative scholarship on judicial independence confirms, namely, the daunting obstacles that any attempt to develop a useful general theory of judicial independence confronts. The obstacles may appear less formidable, and the enterprise more tractable, to the extent that one assimilates other lessons of such scholarship. One such lesson, confirming an insight from comparative institutional scholarship, is that it is a mistake to take the measure of a court's judicial independence (or accountability) exclusively from formal arrangements.⁵⁷ Another, confirming the clear implication of an instrumental perspective, is that there are likely to be more ways than one to bring about the same measure of independence (and accountability).

What do we mean by "judicial independence"? It depends.

⁵⁷ See Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 U. CHI. ROUNDTABLE 205 (2000); J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEG. STUD. 721 (1994).