

Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts

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INTRODUCTION	154
I. DEFINING AND REDEFINING JUDICIAL INDEPENDENCE	159
II. THE CYCLES OF COURT CRITICISM AND THEIR INTERSTICES	166
<i>A. Spikes One and Two: Jeffersonian Anger, Jacksonian Defiance, and the Intervening Period of Calm</i>	167
1. Jeffersonian Anger: Court Packing, Unpacking and Impeachment in the Early Nineteenth Century	168
2. Jacksonian Defiance: Altercations With the Marshall Court During the 1830s	170
3. The Intervening Period of Calm: Westward Expansion of the Federal Court System	171
<i>B. Spike Three: Radical Republicans and Less than Radical Reform During the Civil War and its Aftermath</i>	179
1. Radical Republicans, <i>Dred Scott</i> , the Civil War, and Reconstruction	179
2. Less Than Radical Reform of the Lower Federal Courts During Reconstruction.....	182
<i>C. Spike Four: Populist, Progressive and New Deal Disaffection With the Courts, and the Contemporaneous Emergence of an Independent, Self- Regulating Judiciary</i>	188
1. Populist, Progressive, and New Deal Disaffection with the Courts	188
2. Populist, Progressive, and New Deal Disaffection with the Courts Reconsidered	190
3. The Contemporaneous Emergence of an Independent, Self-Regulating Judiciary	195
<i>D. Spike Five: Attacks on the Warren Court, and the Triumph of Customary Independence, Sort of</i>	209
III. CUSTOMARY INDEPENDENCE AND JUDICIAL APPOINTMENTS.....	211
<i>A. Appointment of Supreme Court Justices</i>	212
<i>B. Appointment of Lower Court Judges</i>	218
CONCLUSION	220

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INTRODUCTION

Commentators on the political left of center have sounded alarms over the recent spate of Supreme Court cases that have reinterpreted the Commerce Clause, the Fourteenth Amendment, and principles of federalism to strip powers from Congress and transfer them to the states.¹ Those alarms went from shrill to deafening following the Court's decision in *Bush v. Gore*, in which the same Republican-appointed majority of the Court previously criticized for being unduly state-friendly in its interpretations of federalism and the Fourteenth Amendment, employed what critics regarded as an unduly state-hostile analysis of federalism and the Fourteenth Amendment to reach the merits of Governor Bush's appeal and effectively resolve the 2000 presidential race in his favor.²

Liberals' call to arms against a conservative Supreme Court majority serves as a counterpoint to ongoing conservative attacks on federal district and circuit judges whose decisions court detractors have branded "liberal activist." Unlike the liberal assault on the Supreme Court, however, which outside of the appointments venue has been largely confined to sound and fury signifying, well, sound and fury, the conservative campaign against liberal activism has spawned a range of specific proposals to discourage activist decisionmaking. Senate Majority Leader and Presidential candidate Bob Dole, Speaker of the House Newt Gingrich, and House Majority Whip Tom Delay advocated impeachment and removal as a remedy for judges they characterized as activist.³ Former Circuit Judge and Supreme Court nominee Robert Bork has urged the adoption of a constitutional amendment that would enable Congress to override unpopular judicial interpretations of the Constitution.⁴ Some have challenged the notion of judicial supremacy and, in effect, invited the political branches to disregard judicial interpretations with which they disagree.⁵

1. See, e.g., *United States v. Morrison*, 529 U.S. 598 (2000); *Alden v. Maine*, 527 U.S. 706 (1999). For a critique of those decisions, see Daan Braveman, *Enforcement of Federal Rights Against States: Alden and Federalism Non-Sense*, 49 AM. U. L. REV. 611, 656 (2000); Peter M. Shane, *Federalism's "Old Dea": What's Right and Wrong with Conservative Judicial Activism*, 45 VILL. L. REV. 201 (2000).

2. *Bush v. Gore*, 531 U.S. 98 (2000); For an especially shrill critique, see Vincent T. Bugliosi, *None Dare Call it Treason*, THE NATION, Feb. 5, 2001, at *11, available at 2001 WL 2132273.

3. Citizens for Independent Courts Task Force on the Distinction between Intimidation and Legitimate Criticism of Judges, *Defending Justice: The Courts, Criticism and Intimidation*, in UNCERTAIN JUSTICE: POLITICS AND AMERICA'S COURTS 121, 139 (2000) (describing impeachment threats).

4. Joan Biskupic, *Bork, Uncorked: The Judge Holds Supreme Court in Contempt*, WASH. POST, Mar. 16, 1997, at C1.

5. *Congress, the Court and the Constitution: Oversight Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary* (1998) 1998 WL 8991286 at * 6 (prepared statement of Prof. Matthew J. Franck) (arguing that former Attorney General Edwin Meese was "absolutely right" for rejecting the notion that the Supreme Court has the final say over questions of constitutional interpretation, that "all the branches of the national government share a coordinate authority to interpret the Constitution, with none of them commanding the obedience of the others[,] and that "it is past time the Congress began to assert its coequal authority in practical ways").

Members of Congress have introduced legislation to strip the lower federal courts of jurisdiction to hear cases on politically sensitive subjects, and Congress has gone so far as to enact procedures limiting the opportunities for federal court review in such areas as habeas corpus proceedings, immigration, and prisoner rights litigation.⁶

For the most part, then, conservatives have threatened while liberals have merely whined, but the one point of convergence where each side has rattled, and in some cases wielded, the sabers is in the judicial appointments arena. Some trace the ignition source of the ongoing appointments conflagration to the nomination of Robert Bork to the United States Supreme Court in 1987, whose rejection at the hands of Senate Democrats politicized the judicial appointments process in unprecedented ways.⁷ Others insist that the Clinton administration invited Republican antipathy by nominating unnecessarily liberal candidates for lower court judgeships.⁸ In the mid 1990s, the conservative Free Congress Foundation launched an ambitious program to galvanize Senate opposition to “activist” judicial nominees, and challenged Senators to sign the “Hatch pledge” (so named, because the text of the pledge was drawn from a speech by Senate Judiciary Committee Chairman Orrin Hatch) vowing to vote against the confirmation of activist judges.⁹ Hearings on judicial activism were held in the Republican-controlled House and Senate, and the pace of Senate confirmations for lower court nominees slowed to such a point that the issue became a central cause for concern in Chief Justice Rehnquist’s annual state of the judiciary address.¹⁰

Democrats, meanwhile, sought to make judicial appointments a campaign issue in the 2000 election. In an address one month before the Bush/Gore election, President Clinton asserted that if the Republicans were to win the White House, “they’ll be able to move the judiciary way to the right and . . . accelerate the pace of decisions restricting not only some individual rights . . . but also the ability of the national government to protect certain vital interests,” such as those at stake “in the Brady Bill, the Violence Against Women Act, and any number of these other cases.”¹¹

If the strategy worked, it did not work well enough to affect the outcome, and shortly after George W. Bush became President, his administration announced that it would abandon a fifty-year tradition of including the American Bar Association in the review process for prospective judicial nominees. The generally accepted explanation for the move was that in the Administration’s view, the ABA had acquired a liberal bias, and in lieu of the ABA, the Administration was reportedly turning to the conservative Federalist Society as an informal advisor.¹² Senate Democrats, who two

6. Linda Greenhouse, *How Congress Curtailed the Courts’ Jurisdiction*, N.Y. TIMES, Oct. 27, 1996, at E5.

7. Lauren Cohen, *Missing in Action: Interest Groups and Federal Judicial Appointments*, 82 JUDICATURE 119 (Nov./Dec. 1998) (reporting a decline in interest group participation in Supreme Court confirmations since Bork, but an increase in interest group participation in lower court confirmations).

8. Terry Carter, *A Conservative Juggernaut*, 83 A.B.A. J. 32 (June 1997).

9. *Id.*

10. David Broder, *Partisan Sniping on Judicial Vacancies Gets Louder*, WASH. POST, Jan. 3, 1998, at A7.

11. *Remarks of the President at People for the American Way Reception*, Oct. 26, 2000, available at 2000 WL 28277898 at *4.

12. David Greene and Thomas Healy, *Battle Looms Over Judges*, THE BALTIMORE SUN, May

years earlier had lambasted Republican-led confirmation delays, suddenly became considerably more tentative about the need to expedite confirmation of a Republican President's more conservative nominees, thereby creating the unavoidable impression that the confirmation-delay game had become one that both parties were going to play.¹³ The Senate Judiciary Committee subsequently rejected Judge Stephen Pickering's nomination to the United States Court of Appeals for the Fifth Circuit on the grounds that he was too far to the political right, and President Bush offered an unrepentant rejoinder that he would continue to nominate conservative, strict constructionists, leaving little doubt that the shoe was now on the other foot and had acquired cleats.¹⁴

Numerous academic symposia have been devoted to the Supreme Court's recently evolving, if not mutating, Commerce Clause/Fourteenth Amendment/federalism jurisprudence.¹⁵ What distinguishes this Symposium from its predecessors is its orientation toward action. We are gathered for the purpose of looking beyond descriptions of the diminished state of congressional power, predictions of future Supreme Court decisions, and pronouncements on whether recent developments are better characterized as devastating or salutary, to explore what, if anything, Congress can or should do to alter or arrest our current course. Hence the title of this Symposium: "Congressional Power in the Shadow of the Rehnquist Court: Strategies for the Future."

There is a multitude of ways that a motivated Congress could conceivably get the Supreme Court's attention. I have already alluded to some: it could impeach and remove justices who issue offending opinions, or it could defy unacceptable decisions, exclude troublesome categories of cases from the Supreme Court's appellate jurisdiction, pursue constitutional amendments limiting judicial review, or manipulate judicial appointments so as to avoid the confirmation of judges who would perpetuate a narrow view of congressional power. In addition, it could hold the judiciary's budget hostage, or (with the aid of a cooperative President) enlarge the size of the Supreme Court to ensure a sympathetic majority.

With the possible exception of manipulating the appointments process, the foregoing suggestions are likely to elicit an "oh, come now" response. But why? One

6, 2001, at A1, available at 2001 WL 6158754.

13. *Id.* ("Democrats have fresh memories of Republicans' tactics when Clinton tried to get his judicial choices confirmed. . . . Retribution time could be near."); Louise Branson, *Republicans Lose Control Over Appointment of Judges*, THE STRAITS TIMES, June 7, 2001, available at 2001 WL 22287660 (reporting on Republican nominees whose confirmations were placed in jeopardy by return of the Senate to Democratic control).

14. *President Says "Good, Conservative" Judges Needed*, SAN DIEGO UNION-TRIBUNE, Mar. 29, 2002 at A6, available at 2002 WL 4593566; see also, Paul Kane, *Senate Girds for Judicial Battle*, ROLL CALL, April 8, 2002, available at 2002 WL 8125538.

15. See, e.g., Cynthia A. Baker and Jonathan D. Mattingly, *Symposium: National Power and State Autonomy: Calibrating the New "New Federalism"*, 32 IND. L. REV. 1 (1998); Pace Jefferson McConkie, *Civil Rights and Federalism Rights: Is There a "More Perfect Union" for the Heirs to the Promise of Brown?*, 1996 B.Y.U. L. REV. 389 (1996); Daniel L. Rubinfeld, *On Federalism and Economic Development*, 83 VA. L. REV. 1581 (1997); Robert F. Williams, *Looking Back at the New Judicial Federalism's First Generation*, 30 VAL. U. L. REV. xiii (1996).

explanation is that such proposals are thought to violate the independence of the judiciary as guaranteed by Article III of the U.S. Constitution; another is that, regardless of their constitutionality, these proposals are unacceptable because they undermine the spirit of interbranch comity that the political branches seek to preserve. And yet, according to oft-cited lore, the political branches have exploited these devices for judicial control throughout our history, and with rare exception, the judiciary has acquiesced:¹⁶ at the turn of the Nineteenth century, Congress packed and unpacked the lower courts for partisan ends in the “Midnight Judges” affair, and impeached judges for their strident, pro-Federalist sympathies; a generation later, Georgia defied the Supreme Court altogether, and President Andrew Jackson declared that he had the constitutional authority to do likewise; during Reconstruction, a radical Republican Congress stripped the Court of jurisdiction to undo an important piece of Reconstruction legislation, and, the story goes, packed and unpacked the Supreme Court for political purposes. During the populist and progressive period, proposals to curb or eliminate judicial review and end life tenure abounded, culminating in a successful effort by Franklin Delano Roosevelt to intimidate the Supreme Court into changing its pattern of decisionmaking by proposing to pack the Court with New Deal sympathizers. And a generation later, Richard Nixon campaigned to end Warren Court liberalism in the wake of calls to impeach Earl Warren and William O. Douglas, and did so by replacing retiring justices with avowedly more conservative successors.

In this Article, I attempt to offer a more coherent explanation for why some incursions on judicial autonomy are deemed acceptable and others are not. In Part I, I define judicial independence in a way that not only accommodates, but necessitates an approach that is political and developmental in its orientation. Congressional regulation of judges and courts often implicates constitutional questions best characterized as political or quasi-political, because the discretion courts have afforded Congress to answer such questions is vast, and sometimes exclusive. This is not to suggest that the questions at issue are sub-constitutional; rather, it is merely to say that they are questions for Congress rather than the courts to decide. As much as academic lawyers have struggled to make sense of judicial constitutional interpretation, they have devoted comparatively little attention to congressional constitutional interpretation and the body of rules or norms that the first branch has developed over time as the product of comity and custom. To understand judicial independence and its limits, then, we must look beyond “doctrinal” independence as divined by courts, and examine the historical development of “customary” independence as it has emerged in Congress.

The well-documented, cyclical attacks on the courts mentioned above serve to punctuate phases in the relationship between the federal courts and the political branches in ways that justify their use as section headings in Part II, which chronicles the development of customary independence. By themselves, however, these episodic altercations between the judiciary and the political branches tell a story that is woefully incomplete, first because they tend primarily to involve the Supreme Court to the frequent exclusion of the lower courts, and second because they dwell on moments of heightened interbranch tension, while ignoring protracted periods of relative calm

16. For a more detailed discussion of the events described in the remainder of this paragraph, see *infra* Part II.

between crises. When the more complete story is told, we find that while Congress and the President have attacked the Supreme Court in generational cycles, their support for the emergence of an independent judicial branch has been largely uninterrupted over time. In fact, some of the most meaningful steps toward promoting an increasingly strong and independent judiciary have been taken during and immediately after bitter confrontations between the branches over alleged excesses of the Supreme Court. As I intend to demonstrate, there were three primary manifestations of these emerging independence norms: first, a congressional resistance to other than minimalist, incremental reform of the judiciary's basic structure throughout the nineteenth century; second, a congressional commitment to furnishing the judiciary with the tools to govern itself throughout the twentieth century; and third, a gradual decline over the nineteenth and twentieth centuries in the acceptability of holding the judiciary accountable for its decisions by means of impeachment or by changes in court structure, size, or jurisdiction.

The prevailing impression, derived from scholarly obsession with the battles between Congress and the Supreme Court, is that episodic, independence-threatening confrontations are the defining features of the interbranch landscape. When the Supreme Court's cyclical battles with the political branches are superimposed upon the underlying saga of the judiciary's largely uninterrupted progress toward independence, however, a different and more complete story emerges—one which suggests that these episodic battles are better characterized as departures from a deeper and more stable constitutional custom of interbranch comity. Thus, occasional episodes of brinkmanship have periodically served to revalidate the emerging rule of an independent judicial branch.

The story of customary independence as told in Part II, does not translate as well into the language of judicial appointments, where partisan political battles have been the rule rather than the exception. As I discuss in Part III, fights to control the courts are easier for Congress (more precisely, the Senate) to win in the appointments context. Moreover, perhaps for that reason, these appointments battles have historically featured the political branches as principal combatants, with the courts sitting on the sidelines; judicial independence has not, at least until recently, been bandied about as a value that a politicized judicial appointments process can undermine. Indeed, as precedents legitimizing the judicial appointments process as a partisan struggle between political branches became increasingly entrenched, the custom of interbranch restraint—so dominant in other aspects of the relationship between federal courts and the political branches—has remained largely absent.

Which brings us around full circle to our current confrontation, with which I conclude this Article. The political left has often been the most visible beneficiary of an independent judiciary in the post-*Lochner* era, as many of the Supreme Court's landmark decisions have invalidated state and federal laws approved by political majorities, as a means to enforce the criminal and civil rights of political minorities.¹⁷ For that reason, the most aggressive campaigns to constrain the judiciary in recent times have been initiated by the political right—just as the political left led the way with draconian proposals to curb the courts during the hey day of the conservative

17. See, e.g., *infra* Part II. D. (discussing conservative efforts to curb the liberal Warren Court).

Lochner Court.¹⁸ If the Supreme Court's recent decisions signal a longer-term turn to the right, the political left can be expected to become more shrill once again. Even so, it bears emphasis how increasingly unproductive, and hence unrealistic, proposals to curb the courts in significant ways have become in the past century, owing in large part to the ascendance of customary independence. As the opportunities to control the courts via impeachment, defiance, court packing, jurisdiction stripping, and budget slashing have diminished, the appointments process has emerged as the one remaining avenue for influence. Given the dawning realization that a politicized appointments process now stands alone as a viable device for promoting prospective judicial decisionmaking accountability, ongoing efforts to depoliticize the appointments process are likely to be fruitless and may actually be undesirable.

1. DEFINING AND REDEFINING JUDICIAL INDEPENDENCE

"Independence" literally means the absence of dependence, which is to say complete autonomy and insusceptibility to external guidance, influence, or control.¹⁹ If we think of judicial independence in literal terms, however, federal judges are not "independent," at least not as dictionaries define the word. They are not autonomous, because Congress retains ultimate control over their budget, jurisdiction, structure, size, administration, and rulemaking.²⁰ Moreover, they are susceptible to outside influence; if judges engage in behavior (on or off the bench) that the political branches characterize as criminal, they may be prosecuted and imprisoned; if they make politically unacceptable decisions, the President and Senate may decline to appoint them to higher judicial office; if they commit "high crimes and misdemeanors," they may be impeached and removed from office; if they make decisions with which higher courts disagree, their decisions may be reversed; and if they engage in behavior that judicial councils regard as misconduct, they may be disciplined.²¹

Federal judicial independence, however, is not defined by Noah Webster, but by the U.S. Constitution, Article III of which gives federal judges three guarantees: first, they are afforded tenure during "good behaviour;" second, they are assured a "compensation" that may not be diminished; third, they alone are authorized to exercise "the judicial [p]ower."²² Federal judges are thereby rendered autonomous in the limited sense that they have an enforceable monopoly over "the judicial power," and are insulated from two discrete forms of influence or control, namely, threats to their tenure and salary. That much said, it is worth emphasizing how limited these guarantees are. By delegating to the political branches the authority to appoint and remove judges, establish lower federal courts or not, and modify the Supreme Court's appellate jurisdiction, the Constitution not only authorizes encroachments on the absolute independence of federal judges, but circumscribes the independence afforded

18. See *infra* Part II. C. (discussing populist and progressive efforts to curb the conservative *Lochner* era Court).

19. THE AMERICAN HERITAGE DICTIONARY 654 (2d Coll. ed. 1982).

20. See Charles Gardner Geyh, *The Elastic Nature of Judicial Independence and Judicial Accountability*, in THE IMPROVEMENT OF THE ADMINISTRATION OF JUSTICE 167, 168 (7th ed. 2002).

21. *Id.*

22. U.S. CONST. art. III, § 1.

by Article III tenure, salary, and power protections. Judges may enjoy tenure during “good behaviour,” but Congress alone decides when good behavior degenerates into impeachable high crimes and misdemeanors.²³ Judges’ salaries may be beyond congressional control, but not the funds for courtrooms, chambers, clerks, secretaries, court security, office equipment, and supplies.²⁴ Finally, the judiciary may possess exclusive authority to wield judicial power, but the resulting autonomy is diminished by Congress’s powers to establish, and by negative implication, disestablish the lower courts, and to curb the Supreme Court’s jurisdiction.²⁵

The standard explanation for this state of affairs is that the judicial independence the Constitution gives to the third branch is counterbalanced by powers the Constitution delegates to the first branch to promote judicial accountability.²⁶ This, of course, begs the question of where independence properly ends and accountability begins. A stunning volume of ink—first in wells, then on ribbons, and now in cartridges—has been spent mapping the contours of judicial power and the boundaries of congressional control over judges and the courts. The enduring scholarly fascination with federal courts cartography is due in large part to the fact that so much territory remains unexplored. We can only hypothesize as to whether Congress has the power or authority to punish a judge for making an unpopular decision by labeling it a high misdemeanor and removing her on that basis, or by cutting her budget, or abolishing the judgeship she occupies, or by depriving the federal courts of jurisdiction to decide

23. See *Nixon v. United States*, 506 U.S. 224 (1993) (holding that issues relating to impeachment were nonjusticiable political questions).

24. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 45 (1998).

25. *Id.* at 32-33.

26. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962, 975 (2002). Ferejohn and Kramer are absolutely right to look at the relationship between independence and accountability in this light, although the claim that their view stands in novel contrast to that of “[m]any commentators” who regard independence and accountability as “inescapably in conflict,” *id.* at 974, may be overstated. Their point that “[f]inding the right mix” between independence and accountability “surely is not easy, but complexity is not the same as contradiction,” *id.* at 975, is generally recognized and widely shared. See, e.g., REPORT OF THE TASK FORCE ON THE CRITICISM OF JUDGES, UNCERTAIN JUSTICE: POLITICS AND AMERICA’S COURTS 148 (2000) (“To say that judges must be independent enough to render impartial justice and resist intimidation is not to say that they must be so independent as to be unaccountable”); AN INDEP. JUDICIARY: REP. OF THE A.B.A. COMMISSION ON SEPARATION OF POWERS AND JUD. INDEPENDENCE 45 (1997) (“[T]he uneasy balance between independence and accountability is typical of the tensions generated by the system of checks and balances that define our constitutional structure”); Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 339 (describing independence and accountability as “different sides of the same coin”); Frances K. Zemans, *The Accountable Judge: Guardian of Judicial Independence*, 72 S. CAL. L. REV. 625, 630 (“if the public is to continue to grant authority to the courts, it will be on the basis of decisional independence accompanied by accountability”)(emphasis in original omitted); Charles G. Geyh, *supra* note *, at 161 (“independence and accountability are, at least in absolute terms, incompatible. . . Of course, those who profess to support independence and accountability are not speaking in absolutes; rather, they favor some of each. The critical inquiry thus becomes, *how much of each?*”).

such cases in the future, because that sort of thing virtually never happens—at least not anymore. Scholars are thus left to explore isolated, comparatively benign, or inchoate incursions upon judicial autonomy, and speculate as to the point at which Article III might be construed to prohibit them. If, however, we are serious about delineating the zone of the judiciary's *actual* insusceptibility to outside influence and describing where independence *really* ends and accountability *really* begins, to exclude from that zone areas where Congress could *theoretically* go but never does, would seem to understate the scope of the judiciary's actual independence.

Court critics who chronically advocate the imposition of oft-rejected structural restraints on the courts would take issue with the notion that the courts are or ought to be “independent” of controls that the political branches theoretically may but have chosen not to impose. Proposals to curb judges and the judiciary have traditionally been defended by arguing that the scope of judicial independence is limited to the explicit guarantees of Article III. Under this approach, judicial independence would be compromised if Congress retaliated against a judge for making an unpopular decision by cutting her pay (which would violate the compensation clause), but perhaps not the electricity to her chambers (which is subsumed within the power of the purse that is Congress's to control); by removing her from office via deletion from the payroll (which would violate the tenure and compensation clauses), but presumably not via impeachment and conviction (which is a power within Congress's exclusive discretion to exercise); or by rescinding the unpopular ruling (which would violate the judicial power clause), but perhaps not by withdrawing her jurisdiction to decide similar cases in the future (which is incident to Congress's power to establish the lower courts). That Congress has declined to exercise various powers at its disposal to restrain the judiciary does not mean that the courts are “independent” of such controls, critics claim. Rather, it means only that Congress has, as a matter of sloth, benign neglect, interbranch comity, or some other public policy declined to exercise such powers.

Proponents of this view have often defended the limits they impose on the scope of judicial independence in textualist and originalist terms. Those who drafted and ratified Article III, they argue, knew what they were saying when they said it, could have afforded judicial independence more explicit and comprehensive protection had they chosen to do so, but did not.²⁷ The problem with this claim is that it posits the existence of a constitutional scheme so incomplete that the capacity of individual judges to decide cases without intimidation, and of the judicial branch to preserve its institutional integrity, is left to dangle by the thread of legislative sufferance—a state of affairs that is difficult to reconcile with the framers' emphatic support for judicial

27. John C. Yoo, Testimony Before the American Bar Association Commission on Separation of Powers and Judicial Independence 6-7 (Feb. 21, 1997) (on file with author):

Congress enjoys a broad discretion to structure the federal courts as it sees fit. . . .

[A]s long as judges receive their constitutionally-required protections of life tenure, irreducible salary, and removal by impeachment, their independence is protected as a constitutional matter. The framers certainly were familiar with many of the ways in which the legislative or executive branches could subvert the judiciary, if they had seen the need for other mechanisms to protect judicial independence, they would have included them in the Constitution.

See also Martin H. Redish, *Federal Judicial Independence: Constitutional and Political Perspectives*, 46 MERCER L. REV. 697, 702-03 (1995).

independence.

Moreover, if we concede that the constitutional reach of judicial independence is so limited as to enable Congress to circumvent its objectives entirely, it begs the question of why Congress has done so only rarely. Why has the Senate *never* removed a judge by impeachment for making an outrageous decision? Why has it been two hundred years since Congress clearly packed or unpacked the courts for political purposes? Why has Congress *never* slashed the judiciary's budget in retaliation for an unpopular decision? Why has Congress pursued a largely uninterrupted course to create, refine, and maintain a self-governing judicial branch? Why has Congress so rarely manipulated the courts' subject matter jurisdiction to avert unpopular decisions? In short, if Congress possesses the power to manipulate the judiciary at will, why has its disinclination to do so been so stable?

One explanation is that the availability of mechanisms for curbing the courts encourages courts to exercise self-restraint, which makes the actual use of such mechanisms unnecessary. As I argued several years ago, the judiciary is ever aware that Congress may intervene if it is dissatisfied with the way courts administer themselves, which causes the judiciary to govern itself with greater caution and restraint.²⁸ It is more problematic, however, to go further and claim that the specter of institutional retaliation causes individual judges to restrain their judicial (as opposed to administrative) decisions. To be sure, the judiciary has developed a series of justiciability and related doctrines aimed at minimizing confrontations between the judiciary and the political branches, but there is no evidence that such doctrines have evolved in an atmosphere of fear, rather than comity. Moreover, there is no empirical support for the proposition that the gradual decline in congressional resort to these accountability-promoting devices has paralleled a decline in controversial court decision-making generally, which one would presumably expect to see if congressional inertia could be explained as a response to judicial restraint.

Another possible answer is to say that Congress has chosen to let these powers lie fallow because their exercise would be perceived to violate the spirit, even if not the letter, of judicial independence. Such an answer suggests the need to talk about judicial independence in terms of the purposes it serves: to facilitate impartial decisionmaking and preserve the integrity of the judiciary as a separate branch of government. The term "judicial," when joined with "independence," can relate to judges individually, collectively, or as a branch. Thinking about judicial independence with reference to judges individually highlights the role independence plays in case decisionmaking. Judges are asked to decide cases when parties to a dispute disagree as to the applicable facts or law, and resort to a neutral magistrate to resolve their disagreement. If we want judges to "call 'em like they see 'em"—to decide cases on the basis of facts as they find them and law as they construe it to be written—then we must insulate them from external influences that could corrupt their integrity or impartiality. Hence the need for "decisional" or "decisionmaking" independence.

On the other hand, if we think about judicial independence in terms of the judiciary

28. See Charles G. Geyh, *Highlighting a Low Point on a High Court: Some Thoughts on the Removal of Pennsylvania Supreme Court Justice Rolf Larsen and the Limits of Judicial Self-Regulation*, 68 TEMP. L. REV. 1041, 1065-66 (1995); Charles G. Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165, 1223-26 (1996).

as a branch, it changes our focus to the role independence plays in preserving the separation of powers. Unlike many state constitutions, which explicitly mandate the separation of executive, legislative, and judicial power, the U.S. Constitution does so by implication only, delegating "all legislative powers" to Congress in Article I, "the executive power" to the President in Article II, and "the judicial power" to the federal courts in Article III. If the judiciary is to maintain its structural separation from Congress and the President as the Constitution contemplates, it must be able to preserve its institutional integrity and resist encroachments from the political branches. Hence the need for "institutional" or "branch" independence.

Viewed in this light, the structure of judicial independence and accountability arguably becomes more coherent. We want individual judges who are independent enough to resist extraneous influences that could impair their ability to decide cases on the basis of "law."²⁹ Thus, we provide individual judges with considerable decision-making independence by protecting their tenure and salary, constrained only by the blunderbuss of accountability devices, the impeachment process. Conversely, although we want the judiciary to remain a separate and in that sense "independent" branch of government that alone wields judicial power, conventional notions of checks and balances dictate that the three branches, including the judiciary, be interdependent. The judiciary's institutional independence is, therefore, more closely circumscribed by accountability-promoting mechanisms for congressional control of the judiciary's budget, structure, administration and jurisdiction. The net effect, as one pair of scholars has concluded, is a system of (more or less) independent judges, superimposed on a (more or less) dependent judiciary.³⁰

The decisional-institutional independence dichotomy has been widely accepted by scholars, judges, and lawyers as a valuable means to explicate the nature of judicial independence.³¹ It has, however, at least three limitations worthy of note. First, as a natural consequence of the interrelationship between decisional and institutional independence, a range of alleged threats to independence resist easy categorization, which renders the generalization that ours is a system in which we have independent judges but a dependent judiciary, a bit risky. The devices typically thought to constrain the judiciary's institutional independence, such as control over court structure, budget and salary increases, could just as easily be employed in the service of limiting the decision-making independence of the judges themselves. Thus, for example, an angry Congress might seek to make a judge dependent by threatening to deny her a pay raise,

29. Professors Ferejohn and Kramer share the generally accepted view that judicial independence is not an end in itself, but an instrumental value that serves another end. Although the end judicial independence serves is often described as "the rule of law," they rightly note that the term "law" may be too ill-defined to include those conceptions of law that, while competing and controversial, fall within a zone our legal culture accepts, and at the same time exclude those that fall utterly without it. Accordingly, they retool the goal of independence in a helpful way when they observe that "[j]udicial independence seeks first and foremost to foster a decisionmaking process in which cases are decided on the basis of reasons that an existing legal culture recognizes as appropriate." Ferejohn & Kramer, *supra* note 26 at 972.

30. *Id.*

31. See, e.g., AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE 5 (1997); John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

cutting her non-remunerative budget, or abolishing her office altogether.

A second and more serious problem is that this bifurcation differentiates between threats to the courts' decisional and institutional integrity without providing a means to distinguish conduct that represents an unjustified encroachment on judicial independence from that which constitutes a justifiable exercise of judicial accountability. Thus, for example, we could hypothesize that if members of Congress responded to an unpopular ruling in an ongoing case with scathing criticism and threats to slash the judiciary's budget unless the judge reversed herself, both the criticism and the threats of budget cuts could interfere with the judge's capacity to remain impartial and apply the rule of law for the duration of the case. To that extent, both undermine her decisional independence. While many would argue that cutting the judiciary's budget in retaliation for a wrong-headed decision would be inimical to its decisional independence, few would say the same for criticism, which is generally respected as a salutary means to hold judges accountable in the court of public opinion. Regardless of whether the line separating "appropriate" criticism from "inappropriate" threats of budget cuts is conceptually defensible, casting judicial independence in terms of its decisional and institutional variations does little to assist in that line-drawing process.

Third and more serious still, is that while the decisional-institutional independence dichotomy elucidates why judicial independence is an important instrumental value, it is not a principle that binds or limits the political branches in ways that would, in and of itself, explain or justify the history of restraint they have exercised in their regulation of the courts. Thus, it may be overly simplistic to characterize our judiciary as "dependent," when the tools to make it so are unemployed if not unemployable. If we are to define judicial independence so as to distinguish acceptable from unacceptable incursions on judicial autonomy—both descriptively and normatively—we need to dissect judicial independence along fundamentally different lines.

No time like the present, then, to take another crack at unpacking judicial independence. I propose that we do so by differentiating among three sources from which our understanding of judicial independence is derived: doctrinal independence, derived from judicial interpretation; functional independence, derived from nonregulation; and customary independence, derived from congressional interpretation.

By "doctrinal" independence, I mean that slender band of issues resolved by the text of Article III and court interpretations of that text, which together comprise a body of judicial independence doctrine that the political branches must respect. Doctrinal independence thus requires, for example, that Congress not reduce judicial salaries directly or indirectly; not remove judges during good behavior; and not usurp the judicial power by modifying court judgments.

"Functional" independence, in contrast, refers to the freedom from interference that flows naturally from the judicial office in the absence of regulation, or that is a serendipitous by-product of a congressional delegation of authority to the courts. Put another way, in the absence of congressional or intrajudicial regulation, judges have the functional independence to do whatever they are not prohibited from doing; conversely, if for reasons unrelated to judicial independence, Congress gives the judiciary a measure of responsibility or control over a subject that it would not otherwise possess, the judiciary's functional independence is increased commensurately. By definition, functional independence is extraconstitutional in nature, and exists solely as a matter of congressional and intrajudicial sufferance. Thus, for example, judges retained the functional independence to employ their own

standards for recusal until the federal disqualification statute was enacted; by the same token, judges lacked the functional independence to make procedural rules governing the appealability of final district court decisions until Congress gave them that power.

“Customary” independence refers to the zone of independence—norms, if you will—that Congress respects when exercising its constitutional powers over courts and judges. It is derived from time-honored interpretations of the constitutional limits on congressional power as *Congress* has defined them, together with closely related notions of interbranch comity that courts and Congress have traditionally respected as a permanent fixture of government in a system of separated powers. Customary independence differs from functional independence, in that customary independence—like doctrinal independence—is in significant part a product of constitutional interpretation. Unlike doctrinal independence, however, customary independence concerns political or quasi-political constitutional questions in which the interpreter of primary, if not final, resort is Congress rather than the courts. By way of example, the Senate has historically excluded unpopular judicial decisions from the ambit of “high crimes and misdemeanors” that will subject a judge to removal by impeachment, not out of fear that the courts would or could so hold, but out of an evolved understanding—a constitutional norm or custom—that removing judges for making wrong-headed decisions is antithetical to judicial independence.

Recharacterizing judicial independence in this way is important for two related reasons. First, it underscores the important role that Congress plays in defining the contours of judicial independence—despite the fact that legal scholarship to date has focused almost exclusively on court-fashioned, doctrinal independence. Second, if we shift some of our focus from doctrinal to customary independence, we may find that many of the questions that the former leaves unanswered are addressed and sometimes resolved by the latter, which may help to loosen if not break the deadlock over some of the issues in the independence-accountability debate.

This second point warrants elaboration. From the perspective of many accountability aficionados, the independence imponderables raised earlier are easy enough to resolve. It does not threaten judicial independence for Congress to impeach and remove “activist” judges, pack the courts, or strip them of jurisdiction to hear classes of cases interpreting rights Congress would just as soon overlook, etc., because the courts have not held that Article III stands in the way of Congress doing so. Insofar as courts would not hold that such actions run afoul of doctrinal independence, the independence Congress constrains must be functional only, and may therefore be freely regulated. The rejoinder from independence advocates is typically a rather whiney one, to the effect that such actions violate the spirit, but (implicitly) not the letter of Article III independence.

Less ephemeral than the “spirit” of independence, customary independence embodies the constitutional balance struck by the political branches over time between judicial independence and accountability. The political branches have the power to alter that balance, just as the courts have the power to alter the scope of doctrinal independence. Unlike functional independence, however, which is shaped by the vagaries of any given day’s public policy, customary independence—like its doctrinal counterpart—is tethered to constitutional norms.

To the extent that Congress has, as a matter of “constitutional custom,” declined to impeach unpopular judges, to court-pack, or jurisdiction-strip because it has long regarded such practices as antithetical to Article III independence, the stature and stability of Congress’s self-restraint is logically enhanced. While Congress remains

free to overlook or override its customs and precedents, decisions to do so must first overcome the presumption that such action is contrary to the Constitution as Congress has traditionally construed it.

It thus becomes necessary to make the case for the gradual development of the constitutional norms within Congress that gave rise to customary independence. In the section that follows, I seek to chronicle the development of these norms, which emerged sometimes despite, and at other times because of, intense, cyclical bouts of court-directed criticism.

II. THE CYCLES OF COURT CRITICISM AND THEIR INTERSTICES

With the exception of Professor Barry Friedman's superb multipart study of countermajoritarian criticism of the Supreme Court,³² the subjects of court criticism generally, and political branch efforts to control the courts specifically, have not received comprehensive treatment. There have, however, been numerous historical works examining isolated waves of court-directed hostility, that together with Professor Friedman's extraordinary contribution, yield at least six reasonably well defined spikes of varying durations: (1) Court packing, unpacking, and impeachment in the early Nineteenth century; (2) Altercations with the Marshall Court during the Jackson administration; (3) Republican confrontations with the Supreme Court beginning with the *Dred Scott* decision on the eve of the civil war and continuing through Reconstruction; (4) Populist, Progressive, and New Deal criticism of the Supreme Court; (5) the backlash against Warren Court decisions from 1953 to 1969; and (6) the current cycle, involving charges (from left and right) of judicial activism and threats of recrimination, alluded to at the outset of this Article.

As indicated in the introduction, the six cycles of court-directed criticism occurred at more or less regular intervals, and thus provide a useful means to frame an historical study of customary judicial independence. Focusing on these high points in the history of court bashing, however, has at least two key limitations: first, it tends to feature the Supreme Court to the relative exclusion of the lower courts; and second, such a focus on high points overlooks the periods of calm that separate them. To overcome these limitations, I will begin each section by summarizing briefly one or two of these well-documented "spikes" of court-directed hostility. These summaries will serve as bookends for lengthier discussions of the intervening periods and contemporaneous events that contributed to the gradual emergence of customary independence. Over time, these emerging independence norms exhibited themselves in three distinct ways: first, through a gradual decline, spanning the nineteenth and twentieth centuries, in the acceptability of various means for Congress to retaliate against the judiciary for its decisionmaking; second, through increasing congressional reluctance to deviate sharply from the structure of the 1789 Judiciary Act during most of the nineteenth century, out of respect for the stability and autonomy of the judiciary as an institution; and third, through a congressional movement toward promoting intrajudicial

32. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000).

accountability via the establishment of a self-governing, independent judicial branch in the twentieth century.

A. Spikes One and Two: Jeffersonian Anger, Jacksonian Defiance, and the Intervening Period of Calm

The first two sustained waves of criticism directed at the federal courts were humdingers. Viewed in isolation, they represent two serious assaults on the judiciary's independence and institutional legitimacy, occurring in successive generations. In context, however, they might better be characterized as spasms of anger separated by a period of relative calm, in which an ethos of respect for the autonomy of the slowly emerging judicial branch began to take root.

England's 1700 Act of Settlement rendered its courts independent of the Crown, but did not apply in the American colonies, where the colonial courts were dependent on the King for their tenure and compensation. Indeed, repeated confrontations between the colonists and the Crown over the latter's attempts to manipulate colonial judges, ultimately gave rise to one of the grievances in the Declaration of Independence.³³

As the new states began to frame their constitutions in the wake of independence, the generally accepted antidote to judicial dependence on the monarch or executive branch was not judicial independence, but judicial dependence on the legislative branch or the people.³⁴ Over the course of the succeeding decade, legislatures in several states threatened judges with removal, in response to courts exercising the power of judicial review to strike down legislation. These and like episodes gave rise to fear of legislative tyranny, and generated significant support for judicial independence that may have reached its high point on the eve of the federal Constitutional Convention. At the Convention, tenure and salary protections were incorporated into the very first draft of the judiciary article, and were not seriously challenged for the remainder of the proceedings or the Convention and ratification process that followed.³⁵

The one significant disagreement germane to the independence of the judiciary that arose at the Constitutional Convention concerned whether federal judicial power should be vested in Supreme and inferior courts, or a Supreme Court alone. The Federalists favored the former as a means to ensure that the fledgling national government was not undermined by hostile state courts, while the anti-Federalists, who were fearful of federal trial courts usurping the role played by their state counterparts, favored the latter. A compromise forged by Madison in the teeth of a Convention vote against the outright establishment of inferior courts, delegated to Congress the power to establish such courts (or not).³⁶

33. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776) (alleging that King George III had "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries").

34. Although the early state judiciaries were appointed, judges were subject to reappointment in some jurisdictions; in other jurisdictions that provided for tenure during good behavior, they were subject to removal upon a simple address from the legislature, or upon impeachment for "mal-administration." See Geyh & Van Tassel, *supra* note 24, at 35-40.

35. *Id.* at 41-43.

36. *Id.* at 43-48.

In 1789, the first Congress exercised its power to establish inferior courts, by creating two tiers of courts with original jurisdiction: district courts, one to a state, and three regional circuit courts (which, in addition to their original jurisdiction, possessed some appellate jurisdiction over the district courts). While district courts were staffed with separately appointed district judges, no additional judgeships were created to people the circuit courts. Rather, they were staffed by the district court judges in combination with the individual justices of the six-member Supreme Court, who in addition to hearing cases qua Supreme Court were obligated periodically to ride to each judicial district within a regional circuit and convene as circuit courts (hence the phrase "circuit-riding").³⁷

1. Jeffersonian Anger: Court Packing, Unpacking, and Impeachment in the Early Nineteenth Century

The election of Thomas Jefferson ushered in the first sustained wave of national anger directed at federal judges. Although reform of the judicial system had been sought for several years, it was lame duck President John Adams, with the aid of a lame duck Federalist Congress, who created sixteen new federal judgeships (most of which were designated to staff redesigned circuit courts and relieve the Supreme Court of circuit riding responsibilities) and packed them with Federalist partisans. That, in turn, catalyzed a drive by the incoming Jeffersonian Republicans to disestablish the courts the Federalists had created, and then remove by impeachment the Federalist judges whose offices had not been abolished.³⁸ "[T]he only check upon the Judiciary system as it is now organized and filled," wrote Republican Senator William Giles to Thomas Jefferson, "is the removal of all its executive officers indiscriminately."³⁹

The Jeffersonian Republicans succeeded in repealing the judgeships the outgoing Federalist had created, despite profound uncertainty surrounding the constitutionality of circumventing the tenure and salary protections of Article III by removing judges via abolition of their offices. In *Marbury v. Madison*,⁴⁰ the Marshall Court had been willing to assert its power of judicial review to strike down an inconsequential procedural statute enacted years before by the now impotent Federalists. Less than a month later, however, when confronted with a constitutional challenge to the 1802 Act recently passed by the powerful and antagonistic Jeffersonians, the Court upheld the statute in a short, timid opinion that failed even to acknowledge that the issue of the repeal's constitutionality had been briefed and argued.⁴¹

The 1802 repeal qualifies as an episode of court unpacking in which the Supreme Court was intimidated into acquiescence. It may not be an especially good illustration

37. *Id.* at 57-58.

38. *Id.* at 77-79.

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

40. 5 U.S. (1 Cranch) 137 (1803).

41. The Court's constitutional analysis in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803), (such as it was) was confined to upholding the section of the 1802 Act that reinstated circuit riding; arguments attacking the validity of the repeal generally, a summary of which preceded the Court's opinion in the published report of the case, *id.* at 303, were ignored by the Court.

of what Congress can or will do to hold judges accountable for their behavior, however, because the repeal was motivated less by disaffection for the newly appointed judges qua judges, than by anger at the impudence of the outgoing Federalist Congress and President for packing the courts in the first place.

The campaign to impeach and remove Federalist judges was more clearly directed at jurists whom members of Congress wished to rebuke for their behavior on the bench, and culminated in the ouster of District Judge John Pickering and the impeachment of Justice Samuel Chase. The success in removing Pickering, however, must be qualified by the fact that he was not just a strident Federalist, but an insane one. Oddly enough, it was the judge's supporters who asserted that Pickering was "totally deranged," on the theory that insanity was neither a high crime nor misdemeanor, for which reason Congress had no authority to remove him.⁴²

Chase, on the other hand, was undeniably a Federalist ideologue, whose impeachment featured a series of specific accusations pertaining to the justice's behavior while riding circuit in four cases. The alleged misconduct ranged from issuing a prejudicial ruling of law and prohibiting counsel from citing relevant legal authority in one case, to denying a motion to postpone trial and refusing to excuse a juror who had prejudged the case in a second, to manipulating the grand jury in a third proceeding and subjecting a petit jury to a partisan harangue in the fourth. Chase did not dispute the accuracy of the allegations, but argued that they did not rise to the level of high crimes or misdemeanors. He was impeached by the House but acquitted in the Senate.⁴³

Chase's acquittal sucked the life out of the Jeffersonians' antijudiciary campaign. But it did more than that: it set a precedent that no judge would ever be removed for high-handed decisionmaking. This would be so, even though Alexander Hamilton, writing in the *Federalist* No. 81, identified impeachment as the appropriate remedy for judicial usurpations of power, and even though the House would appear free to impeach and the Senate free to remove any judge pursuant to whatever impeachment standard they wish, by virtue of the Constitution delegating the "sole" power of impeachment to Congress.⁴⁴ The next impeachment—that of Judge James Peck in 1830, who was charged with abusing his power for issuing a contempt citation against a lawyer who had criticized him in a local newspaper—would be the last in which a judge was impeached solely on the basis of his rulings from the bench, and Peck's impeachment, like that of Samuel Chase before him, ended in acquittal.⁴⁵ There would

42. EMILY FIELD VAN TASSEL & PAUL FINKELMAN, *IMPEACHABLE OFFENSES* 91-96 (1999). Pickering's supporters appear to have won the battle but lost the war: the Senate did not find him "guilty of high crimes and misdemeanors," which may have reflected its unease over characterizing mental illness as a crime, but was unprepared to allow him to remain in office, and so settled upon the finding "guilty as charged." *Id.*

43. *Id.* at 101-07.

44. *Nixon v. United States*, 506 U.S. 224 (1993).

45. High-handed decisionmaking was included among the articles of impeachment in two subsequent cases: in 1904 and 1905, District Judge Charles Swayne was accused of abusing the contempt power as well as failing to reside in his judicial district as required, overstating travel expense reports, and accepting free travel from railroads. He too was acquitted. VAN TASSEL & FINKELMAN, *supra* note 39, at 123-31. In 1926, District Judge George English was impeached for "willfully, tyrannically, and oppressively" disbaring lawyers and coercing a jury, as well as

be a mere six removals following Pickering's, all involving criminal or ethical misconduct.⁴⁶ Of the three primary manifestations of emerging judicial independence norms within Congress described earlier, this is our first encounter with the first: the gradual decline over time in the acceptability of holding the judiciary accountable for its decisions by extrajudicial means.

2. Jacksonian Defiance: Altercations with the Marshall Court During the 1830s

With the ascendancy of Jacksonian Democracy at the close of the 1820s, came a new wave of antagonism directed at the courts. Jackson's unique brand of majoritarian democracy was very much in tension with an appointed judiciary that imposed limits on the will of the majority. Legislation was introduced in Congress to strip the United States Supreme Court of jurisdiction to hear appeals from the decisions of state courts, and a groundswell of support for elective judiciaries directly challenged the notion of an independent judiciary. Jacksonian Democrat Frederick Robinson made the point bluntly: "Judges should be made responsible to the people by periodical elections. The boast of an independent judiciary is always made to deceive you. We want no part of our government independent of the people."⁴⁷

If disestablishment of courts and the impeachment of Pickering and Chase were the legacies of the first spike of judicial criticism, defiance of Supreme Court rulings was the legacy of the second. Indisputably, the high water mark was Georgia's refusal to submit itself to the jurisdiction of the Supreme Court in a series of cases involving the Cherokee Indian tribe. "Georgia will never so far compromi[se] her sovereignty, as an independent state, as to become a party to the case sought to be made before the Supreme Court of the United States," declared a resolution of the Georgia legislature directed to the Governor, who subsequently executed a Cherokee prisoner in the teeth of a writ of error issued by the Supreme Court.⁴⁸

For his part, Jackson expressed the view that "[t]he opinion of the judges, has no more authority over Congress than the opinion of Congress has over the judges and on that point the President is independent of both."⁴⁹ And in response to another of the Cherokee Indian cases in which the Supreme Court invalidated a Georgia statute,

for manipulating bankruptcy proceedings to ensure that funds were deposited at banks in which English held an interest. He resigned before his impeachment trial. *Id.* at 144-52.

46. District Judge West Humphreys was removed when he abandoned his post in 1862 to join the Confederacy without bothering to resign, *id.* at 14-19; Circuit Judge Robert Archbald used his position as a Commerce Court judge to enter into profitable business dealings with prospective litigants and was removed in 1912, *id.* at 132-44; District Judge Halstead Ritter, who was convicted by the Senate in 1936 for bringing the court into "scandal and disrepute" as a result of allegedly receiving kickbacks, practicing law while in office, evading taxes, and showing favoritism in appointments, *id.* at 157-68; and District Judges Harry Claiborne, Alcee Hastings, and Walter Nixon, all of whom were removed in the 1980s following criminal prosecutions for tax evasion, conspiring to solicit bribery, and perjury, respectively, *id.* at 168-85.

47. MARY L. VOLCASEK & JACQUELINE L. LAFON, *JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 90 (1988) (quoting Frederick Robinson).

48. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part I: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333, 396 (1998).

49. *Id.* at 401.

Jackson is reported to have said, "John Marshall has made his decision, now let him enforce it."⁵⁰

Jackson's antipathy toward the Court must be qualified, however. Apart from the fact that his statement concerning Chief Justice Marshall is likely apocryphal, no showdown with the Supreme Court ever materialized during Jackson's administration. Jackson rejected the extreme views of state sovereignty that animated Georgia's disregard for federal authority, and never acted on his philosophical aversion to judicial supremacy over matters of constitutional interpretation.⁵¹

3. The Intervening Period of Calm: Westward Expansion of the Federal Court System

Although the drafters of the Constitution and those who enacted the Judiciary Act of 1789 shared a rudimentary commitment to the establishment of an independent judicial branch, that commitment was thrown into a cocked hat by the events of 1801 and 1802, as the outgoing Federalists and incoming Jeffersonians packed and unpacked the courts for partisan political ends, with the courts helpless to control their own destiny. Indeed, as of 1808, events of the recent past had emboldened Senator William Giles—a cheerleader for the Jeffersonian Republicans—to dispute the very existence of the judiciary as a separate and independent branch of government, founders' intentions to the contrary notwithstanding. "The theory of three distinct departments in government is, perhaps, not critically correct; although it is obvious that the framers of our Constitution proceeded upon this theory in its formation," Giles posited. An independent branch would have "powers to organize itself and to execute the peculiar functions assigned to it without aid," which "is not in Constitutional character of our judicial Department."⁵²

As the first great cycle of court directed hostility receded into the past, court-related legislation in the early decades of the Nineteenth century began to focus on enlarging the judicial workforce as the nation gradually expanded westward. The struggle to expand the federal courts westward during and between the first two spikes of court-directed animus bears emphasis here, for two reasons. First, it illuminates the emergence of what I described earlier as the second manifestation of judicial independence norms that would dominate Congress's regulation of the courts for the remainder of the Nineteenth century: a preference for conserving the structure of the 1789 Act, which was viewed as an implementation of the constitutional framers' vision for an independent judiciary, and against precipitous court reform of any kind, that might jeopardize the judiciary's fragile independence. Second, and related to the first, it illustrates how Congress preserved and furthered its institutional conservatism through adherence to its own precedent.

As new states entered the Union, new judicial districts were created to service the new states, new district judges were added to staff the new judicial districts, new circuits were added to include the new states, and new Supreme Court Justices were added to oversee the new circuits. Throughout the period, circuit riding—which the

50. *Id.* at 399.

51. *Id.* at 399-404.

52. 17 ANNALS OF CONG. 114 (1808) (statement of William Giles).

1801 Act had abolished and the 1802 Act restored—remained a conceptual lynchpin of the federal courts qua “system.”⁵³ Requiring Supreme Court justices to take their show on the road and preside over circuit courts in tandem with district judges would create points of contact among the Justices and judges themselves, and between the Justices or judges and the lay and legal communities, that—it was thought—would promote a competent, cohesive judiciary.⁵⁴ As inconvenient as interstate travel may have been when the nation was young and small, however, it quickly became insufferable with westward expansion. The 1789 Act sidestepped an initial manifestation of the problem by excluding the territories of Kentucky and Maine from the three circuits that the Justices of the Supreme Court were required to ride, and instead conferred exclusive circuit court jurisdiction on the local district judges in those states.⁵⁵ Once they became coequal sovereign states, however, they began to press for inclusion in the circuit system. Relief was prompt in coming for Maine, by virtue of its geographic proximity to other New England states, but the same could not be said for Kentucky, which was later joined by Tennessee and Ohio, as newly admitted western states excluded from the circuit system. Congress eventually capitulated in 1807, establishing a new circuit comprised of the three new western states, and adding a seventh Supreme Court Justice to staff it.⁵⁶

Along the way, Congress made occasional attempts to ease circuit riding burdens, if only slightly. In 1793 it reduced from two to one the number of Supreme Court Justices who must preside at circuit courts.⁵⁷ In 1802, at the same time as it repealed the 1801 Act and thereby restored circuit riding, Congress authorized circuit courts to be held with only one judge presiding, which made it possible for district judges to hold circuit court without a Supreme Court Justice in attendance.⁵⁸

Between 1812 and 1821, Louisiana, Indiana, Mississippi, Illinois, Alabama, and Missouri joined the union. “From the extent of the country, the number of the states, and the increasing mass of business constantly depending in the circuit courts,” Representative William Plumer explained in 1823, “it was obviously impossible for seven judges to hold two courts annually in each of the twenty-seven judicial districts, into which the United States are now divided.”⁵⁹ Accordingly, upon entering the union, the six new western states were treated as Kentucky had been, by assigning them district judges with circuit court jurisdiction, rather than including them in circuits staffed by Supreme Court Justices. This did not sit well with the newly admitted western states. As Plumer explained in his floor statement on behalf of the House Judiciary Committee, “these States which, under the present arrangements, are deprived of the benefits of a circuit court, are desirous . . . that such alterations should be made in the existing system as would extend to them the advantages enjoyed by the

53. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 32 (1927).

54. Geyh & Van Tassel, *supra* note 24, at 57-58.

55. ERWIN C. SURRENCY, *HISTORY OF THE FEDERAL COURTS* 36 (1987).

56. *Id.*

57. Act of Mar. 2, 1792, ch. 22, § 1, Stat. 333 FRANKFURTER & LANDIS, *supra* note 53, at 22.

58. Act of Apr. 29, 1802, ch. 31, § 4, Stat. 158.

59. 40 ANNALS OF CONG. 1173 (1823).

states where such courts exist.”⁶⁰

To address the western expansion problem, Plumer presented three alternatives on behalf of the House Judiciary Committee:

(1) To establish two additional circuits that would include the new western states, and add two more Supreme Court Justices to ride the two new circuits;

(2) To end circuit riding and establish a new system of circuit courts staffed by judges appointed to serve as circuit judges;

(3) To confine Supreme Court justices’ circuit riding to the eastern circuits and establish two new circuit courts for the western states staffed by circuit judges in lieu of Supreme Court justices.⁶¹

Beginning in 1823, Congress repeatedly debated the relative merits of these three alternatives to no concrete end until 1837, when the first alternative was adopted.⁶² Understanding why the debate was so protracted and fruitless requires an appreciation for the emerging institutional conservatism of Congress when it came to restructuring the courts.

It is well to begin the discussion with Senator Asher Robbins, whose comfort with sweeping reform embodied a minority view that helps to illuminate the majority’s reticence. Robbins was unimpressed with the argument he attributed to Senator Martin Van Buren, “that it is dangerous to change the principle of a judiciary system established by law.” With rhetorical flourish, Robbins asked, “when [was it] that it became dangerous to alter that law? Was it the day after the law was passed? [I]f not, and if it is dangerous now, at what intermediate time did it become dangerous?” As far as Robbins was concerned, it was “ridiculous, to suppose . . . that there was any danger at any time.” Bringing his point to a dismissive close, Robbins concluded: “So much for the danger of amending a law, a thing we are in the daily habit of doing . . .”⁶³

For Robbins, amending the structure of the federal judiciary was no different than amending any other federal law—it was something Congress was “in the daily habit of doing.” But his was not a widely shared view. The prevailing view was that legislation regulating the courts was different, because it altered the structure of an independent branch of government, the longstanding stability of which legislators admired and were desirous of preserving. “[I]t may well excite astonishment,” remarked House Judiciary Committee Chairman Daniel Webster in 1826, that the system which “very able men [enacted in] 1789 has been found to fulfill, so far, so well, and for so long a time, the great purposes which it was designed to accomplish.” Accordingly, he concluded, “[t]he general success of the general system, so far, may well inspire some degree of caution in the minds of those who are called on to alter or amend it.”⁶⁴ Representative Thomas Crawford made the same point four years later, in prose that was positively floral:

60. *Id.*

61. *Id.*

62. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

63. 2 REG. DEB. 502 (1826).

64. *Id.* at 873.

When, therefore a plan has been happily laid in our land, which, in its execution commands the public confidence, and so ensures obedience to its decrees, will prudence, will the careful watchfulness that belongs to our stations, allow us to leave the road we have found so smooth, and fragrant from the flowers that bloomed upon its sides, and to enter upon an unbeaten way that may lead us into miry and swampy grounds?⁶⁵

General acceptance of the view that Congress should approach the task of restructuring the courts with special restraint is apparent from legislators' pervasive recourse to prior enactments in support of or opposition to proposed reforms. Such arguments inevitably strove to reconcile favored proposals with statutory precedent, and to condemn disfavored proposals for departing from such precedent, thereby underscoring Congress's preference for cautious, incremental change when it came to governmental framework legislation of this kind.

Thus, for example, in his defense of a proposal (akin to Alternative 1, presented by Representative Plumer in 1823) to add two new circuits and three Supreme Court Justices to service them, Representative James Buchanon argued that the plan simply expanded on past precedent and professed to be "greatly astonished" by the objection "that the principles contained in this bill were new." To the contrary, he argued:

So far have the committee been from recommending any new project, that, on the contrary, they have but proposed to extend to other portions of the Union, the benefits of a system, the wisdom of which has been already tested by the experience of all the Atlantic States . . . and the question for the committee now to decide is, whether the county shall go on in this prosperous and happy judicial course, extending the present well-tried system to meet the wants of the People, or whether we shall commence a career of new and untried and hazarded experiments.⁶⁶

By the same token, Senator Levi Woodbury opposed a similar proposal in the Senate on grounds that it was, well, unprecedented. He argued that unlike the Judiciary Acts of 1801 and 1802, which added no justices to the Supreme Court, and the Act of 1807 which added only one, expanding the size of the Supreme Court from seven to ten (as then proposed) would alter its quorum and enable the appointing authority to select judges to orchestrate the reversal of unpopular decisions. "But such could not be the effect or tendency of the addition in A.D. 1807," Woodbury concluded. "Where, then, is the precedent?"⁶⁷

Similarly, proponents of proposals to relieve Supreme Court Justices of their circuit riding duties by replacing them with a new tier of circuit court judges (the second alternative presented by Plumer) struggled to distinguish the adverse precedent set by the 1801 Act, which created such a system only to be repealed the next year. Senator Robbins acknowledged "a similar system, that was once adopted, and soon after laid aside," which had caused some to infer "that the system itself is unpopular." He argued, however, that "[t]he inference is incorrect; the men who made that system, made it unpopular, and nothing else." He noted that the circuit courts had been created

65. 6 REG. DEB. 571 (1830).

66. 2 REG. DEB. 916-17 (1826).

67. *Id.* at 475.

in 1801 by outgoing Federalists intent on packing the court and retaining control of the judicial power, and that in 1802 “the system was broken down” in order “to wrest this power out of their hands.” Although an “ostensible objection” to the 1801 Act was to the circuit court system it created, that system “could not be shown to be bad,” Robbins opined; rather, it was simply “called by many bad names . . . and the bad name raised a hue and a cry against it, and not the demerits of the system itself.”⁶⁸

As spot on as Robbins may have been with regard to history, opponents of proposals to reintroduce the circuit courts often regarded the 1802 repeal as adverse precedent so powerful as to stop the proposal dead in its tracks without the need for further elaboration.⁶⁹ For Senator Martin Van Buren and others, the significance of the precedent established by the 1802 repeal went beyond counseling against the reintroduction of a circuit court system with circuit court judges; rather, it counseled against any dramatic departure from precedent in regulating court structure:

If there be a case in which, more than any other, the hand of innovation should be watched with lynx-eyed jealousy, this is surely that case. A total change was made in 1801, but the measure met with a total overthrow in one short year. Strong as the feelings then produced were, time and experience have demonstrated the wisdom of the act of 1802, by which the system of 1789 was restored and improved.⁷⁰

Moreover, the proposal to create permanent circuit courts would obviate the need for Supreme Court Justices to ride circuit, and circuit riding, in the minds of many, was another time-honored practice Congress should not lightly jettison, in part because of the role it played in promoting judicial accountability. Representative Daniel Webster, for example, defended circuit riding on the grounds that having Supreme Court Justices preside over trials would permit them to “see in practice the operation and effect of their own decisions,” which would “prevent theory from running too far[,] inspire Courts with caution,” and make each Justice more “prominent, conspicuous, and responsible” than one who merely “give[s] a vote upon a bench, (especially if it be a numerous bench[.]).”⁷¹

The third alternative presented by Plumer in 1823—which, like the status quo, would have restricted Supreme Court circuit riding to the eastern circuits and conferred circuit court jurisdiction upon inferior courts in the west—was also supported and opposed with reference to statutory precedent. Supporters such as Woodbury defended the differential treatment of eastern and western states in light of the Kentucky and

68. *Id.* at 506-07.

69. In 1823, Representative Plumer effectively rejected the circuit court system alternative in the same breath as he presented it, observing “that a similar system having been once adopted, and subsequently abandoned, its re-enactment would probably be opposed.” 40 ANNALS OF CONG. 117 (1823). Senator Holmes was equally dismissive in 1826: “Another proposition was to restore the old system of 1801. To that there were many objections which it is not necessary to mention; the Senate would not now be disposed to restore that system.” 2 REG. DEB. 487 (1826). See also, EDWIN SURRENCY, HISTORY OF THE FEDERAL COURTS 24 (1987) (“One of the unfortunate results of the repeal of the Act of 1801 was the creation of a precedent against similar reform.”).

70. 2 REG. DEB. 414 (1826).

71. *Id.* at 877-79.

Maine precedents:

[I]f we trace down our judicial history, it will be seen that this part of our system, now the cause of so severe complaint, was afterwards introduced into all other places beside Maine and Kentucky, where the population and territory were similar, and retained not only during their District and Territorial condition, but, in many of them, long after they became sovereign and independent States.⁷²

Conversely, Representative John Wright opposed such an approach on the grounds that unequal treatment of western states “overlooked or changed” longstanding legislative precedent “from 1789 down, some of which may be regarded as a contemporaneous exposition of the Constitution, in relation to this subject.”⁷³

Widespread reliance on statutory precedent for and against court reform proposals reflects a congressional commitment to cautious, incremental reform, born of the desire to preserve the stability of the independent judicial branch and a reverence for the 1789 Act as “a contemporaneous exposition of the Constitution.” This predisposition against significant change helps to explain the ultimate enactment of Alternative 1: adding two new western circuit courts and two new additional Supreme Court Justices to ride them.

Proponents of this approach could legitimately claim that it offered nothing new, but simply extended the existing circuit system to reach newly admitted states, just as Congress had done before in 1807. This does not mean, however, that Congress embraced this option with open arms. To the contrary, the faults of the plan were all too obvious, particularly to legislators able to foresee the precedent it would set for the next round of western states admitted to the union.

As many noted, the proposal would increase the size of the Supreme Court, not because it was necessary to have a larger Supreme Court, but because more Justices were needed to preside over new circuit courts in the western states. Representative Strong, among others, saw this as a case of the tail wagging the dog.

The present court is admitted to be large enough for the business of the bench. Wherefore increase the number of justices? . . . What is this but changing the principle into the incident—thereby making the secondary duties of the old court the main object and excuse for creating the new court.⁷⁴

Webster attempted to counter such arguments by contending that a larger Supreme Court was in fact needed to promote judicial integrity and independence. The Supreme Court addressed issues that while “essentially judicial, partake something of a political character,” he explained, which sometimes required it to strike down Acts of Congress and “control the will of Sovereigns,” exposing it to “the resentment of wounded

72. *Id.* at 469.

73. *Id.* at 2518.

74. 6 REG. DEB. 543 (1830). Senator Woodbury made a similar point four years earlier:

This bill is to be passed mainly for the removal of local evils, now existing in the West . . . Why not then remove those evils . . . without touching the Supreme Court? . . . [A]s a cure for a mere local disease, why should you begin to tamper with parts of the system not disordered?

2 REG. DEB. 465 (1826).

sovereign pride." For that reason, Webster "doubt[ed] the safety of rendering it small in number." A smaller Court, he concluded, could easily become "an object of unpleasant jealousy, and great distrust." And that "the opinions of mankind naturally attach more respect and confidence to the decisions of a Court somewhat more numerous."⁷⁵ Others, however, countered that enlarging the size of the Court could compromise its independence and place it "at the mercy of legislative breath" by enabling Congress to pack the Court for political purposes,⁷⁶ or diminish its accountability by making each justice one of a larger group who "stands out in less bold relief to the public eye,"⁷⁷ and who might thus feel freer to exercise their "high powers" with "less consideration and care."⁷⁸

Notwithstanding disagreement over whether enlarging the Court to nine or ten justices would enhance or damage its independence or diminish its accountability, there was no escaping the conclusion that such a remedy merely deferred rather than solved the problems presented by continued western expansion. In the future, each new state would continue to require new judicial machinery. "[T]he time is coming," warned Senator Robbins, "when this growing defect will call for another supply of Judges," and "having begun with this plan, we must go on with it; and the Supreme Court will become so numerous that the sense of individual responsibility will be lost." Robbins conceded that such a pronouncement was overly apocalyptic, inasmuch as "[n]o man has said . . . that this plan of a Judiciary will do for any length of time," and that "the advocates of the plan content themselves with saying that it will do for the present," but warned that the precedent set by this temporary measure would still "operate as an impediment to" more meaningful reform in the future.⁷⁹ Senator Berrien echoed Robbins's dissatisfaction: "Though the bill under consideration is defective in principle," he complained, "though it affords no remedy for the evils to which the existing system is liable," the "unanswerable argument of its advocates is, that it is the best which can be done."⁸⁰

After three weeks of uninterrupted debate in early 1826, the House passed its variation of Alternative 1, which would have added two new circuits and two new Supreme Court Justices to ride them. The Senate passed the House bill with amendments altering the configuration of the western circuits and imposing a residency requirement on the justices assigned to them.⁸¹ The House refused to accept the Senate's changes and called for a joint conference on the bill.⁸² Although requiring justices to reside in particular circuits was not unprecedented, members of the House were troubled that such a requirement interfered with the independence of the judiciary, which ought to have the latitude to manage its internal affairs to no less an extent than the other branches:

If you require him to reside in his circuit, would his removing out be a crime or

75. 2 REG. DEB. 884 (1826).

76. *Id.* at 464 (statement of Sen. Woodbury).

77. *Id.* at 478 (statement of Sen. Woodbury).

78. 6 REG. DEB. 543 (statement of Rep. Strong).

79. 2 REG. DEB. 497-98 (1826).

80. *Id.* at 526.

81. *Id.* at 2579 (reporting Senate amendment in House).

82. *Id.* at 2585-86.

misdemeanor for which he might be impeached . . . ? Will you progress in the same way, with your limitation, and prescribe his dress, or his size? Have you the power to proceed in a like manner, to prescribe the residence of the President, Vice President, Senators, Representatives?⁸³

More fundamentally, the House was piqued by the Senate's tinkering with its configuration of the circuits and by the apparently ham-handed way in which it sought House acquiescence to its amendments.⁸⁴ The Senate, equally piqued at the House's pique, stood firm and refused the House's request for a joint conference.⁸⁵

This legislation to expand and strengthen the federal courts thereupon died an ignominious, if temporary, death. The bill was reintroduced in successive Congresses, and finally won passage in 1837 after repeated urgings by Andrew Jackson. The implication that the President's serial attacks on the Marshall Court during Spike Two reflected a fundamental hostility to an independent federal judiciary, is thus qualified, if not contradicted, by his ardent support for legislation to expand the federal court system.⁸⁶

Frankfurter and Landis blame congressional indifferences for this decade of legislative failures, but that conclusion is belied by their own observation that the three weeks of discussion the House devoted to the issue in 1826 was "one of the most distinguished debates dealing with judicial organization."⁸⁷ The better explanation may be that developing and sometimes conflicting notions of judicial independence and accountability had put Congress in a box that was difficult to escape.

Respect for the judiciary as a separate and independent branch of government counseled Congress against radical reform, in favor of incremental adjustments that adhered to legislative precedent and preserved the stability of the courts. There were, however, no good incremental alternatives. To jettison circuit riding and revamp the circuit system was not an incremental approach, but would require a radical reversal of legislative precedent that many believed would diminish Supreme Court accountability. To preserve the circuit system but not expand it westward was politically unsalable to the western states that the legislation was intended to accommodate. And extending the circuit system westward was impractical in that it required two moonlighting justices to traverse six states by boat and horse to conduct trials in every judicial district twice a year; it was also shortsighted because Congress could not keep increasing the size of the Supreme Court to staff each new circuit without eventually compromising the Court's decisionmaking integrity.

83. *Id.* at 2515 (statement of Rep. Wright).

84. *Id.* at 2581 (statement of James Johnson).

85. *Id.* at 671.

86. Act of Mar. 3, 1837, ch. 34, 5 Stat. 176. For a discussion of Jackson's efforts to win passage for a bill, see FRANKFURTER & LANDIS, *supra* note 53, at 47.

87. The authors preface their discussion of congressional efforts to cope with westward expansion by observing that "[c]ongressional preoccupation with judicial organization is extremely tenuous all through our history..." FRANKFURTER & LANDIS, *supra* note 53, at 36. They conclude the section by noting that "the need for judicial reorganization was recognized by all parties and its fulfillment was indefinitely postponed" because "[l]egislation affecting judicial structure, unless it calls for wholesale appointments, is without the driving force of a powerful, concentrated economic, political, or social interest." *Id.* at 42.

Weeks of debate in 1826 enabled Congress to winnow the field of ineffective, incremental alternatives to the one least objectionable. No one, however, was deluded enough to suppose that simply adding to the growing pile of circuits and justices offered more than a short-term solution to the westward expansion problem. Support for the proposal was thus understandably tepid, which may be the best explanation for why it was so easily derailed by a junior varsity round of intercameral name calling.

B. Spike Three: Radical Republicans and Less than Radical Reform During the Civil War and Its Aftermath

The death of John Marshall in 1835 and the end of the Jackson Administration in 1837 led to a period of relative calm on the Court, but not elsewhere. The issue of slavery had become increasingly heated in the decades preceding the Supreme Court's 1856 decision in *Scott v. Sandford*. The Missouri Compromise of 1820, the Compromise of 1850, and the Kansas-Nebraska Act of 1854 marked the widening sectional divide over the direction of the nation on the slavery issue.⁸⁸

1. Radical Republicans, *Dred Scott*, the Civil War, and Reconstruction

In *Dred Scott*, the Supreme Court held first, that freed black slaves could not invoke the jurisdiction of the federal courts because they were not citizens of the United States, and second, that because the Constitution acknowledged and protected the right to own slaves as property, Congress lacked the power to prohibit slavery in the territories.⁸⁹ In so holding, the Court simultaneously appeared to manifest a proslavery bias, and crippled congressional moderates in their efforts to preserve any semblance of détente between pro- and antislavery forces, thereby driving the nation inexorably into war.

Reaction to *Dred Scott* was swift and severe. One journalist accused the "five slaveholders and two doughfaces on the bench" of "rush[ing] into politics voluntarily, and without other purpose than to subserve the cause of Slavery."⁹⁰ It was a decision "entitled to just so much moral weight as would be the judgment of a majority of those congregated in any Washington bar-room,"⁹¹ wrote the New York Daily Tribune. "If epithets and denunciation could sink a judicial body, the Supreme Court of the United States would never be heard of again."⁹²

The wounds created by *Dred Scott* had not healed by the time that radical Republicans gained control of Congress after the Civil War and threatened to annihilate judges who interfered with their legislative agenda. The Republican press applied the derisive brand, "Dred Scott II and III" to Supreme Court decisions limiting Congress's virtual monopoly on national power during Reconstruction.⁹³ Whereas

88. Paul Finkelman, *The Dred Scott Case, Slavery and the Politics of Law*, 20 HAMLINE L. REV. 1, 9-10 (1996).

89. *Scott v. Sandford*, 60 U.S. 393, 406, 450-51 (1856).

90. N.Y. DAILY TRIB., Mar. 10, 1857, at 6.

91. N.Y. DAILY TRIB., Mar. 7, 1857, at 4.

92. *Id.* at 5.

93. David P. Currie, *The Constitution in the Supreme Court: Civil War and Reconstruction, 1865-73*, 51 U. CHI. L. REV. 131, 144 (1984).

previous efforts to control the courts featured disestablishment, impeachment, and defiance, this latest wave arguably exploited Congress's power to control Supreme Court size, and undeniably brought its power over the Court's jurisdiction into play. In 1866, with Democrat Andrew Johnson in the White House, the Republican Congress reduced the size of the Supreme Court to seven (after having increased it from nine to ten just three years earlier when Lincoln was in power), thereby depriving Johnson of the opportunity to replace several retiring justices.⁹⁴ It then returned the Court's size to nine after Republican President Ulysses S. Grant took office, which enabled Grant to shift the decisionmaking majority of the Court in the important legal tender cases. In 1867, an angry Congress enacted legislation to deprive the Supreme Court of jurisdiction to hear a pending case that would have presented the Court with an opportunity to limit congressional power to impose military rule in the unreconstructed South; and in *Ex parte McCardle*, the Supreme Court acquiesced to Congress, dismissing the case for want of jurisdiction.⁹⁵

The legacy of this third spike of Court-directed anger is far murkier than the preceding synopsis suggests. *McCardle* is sometimes cited for the general proposition that the Constitution gives Congress carte blanche to deprive the Supreme Court of jurisdiction to hear specific cases or categories of cases.⁹⁶ Barry Friedman argues persuasively, however, that these scholars have divorced *McCardle* from historical context, and that the duress under which the Court decided that case renders its precedential value dubious.⁹⁷ Moreover, uncertainty surrounding the durability of *McCardle* has never been resolved because Congress has rarely attempted to strip the Court of jurisdiction so blatantly in the years since,⁹⁸ which seems to corroborate the gradual ascendance of judicial independence norms that this Article seeks to document.

With respect to the implication that the Republican Congress packed and unpacked the Supreme Court, the legacy is murkier still. From 1789 to 1866, the Supreme Court's size remained firmly soldered to the number of regional circuits Congress created. Thus, when Congress added a tenth circuit and a tenth justice in 1863,⁹⁹ it may have had nothing to do with court packing and everything to do with its longstanding respect for preserving the court system's traditional structure.

In 1866, however, when Congress reduced the number of circuits from ten to nine and decreased the size of the Supreme Court from ten to seven, it looks more suspicious, and raises the specter of court unpacking. Even so, opinions differ as to whether this was in fact the case. Frankfurter and Landis say yes: the move was designed by an overwhelmingly Republican Congress to deprive Democratic President Andrew Johnson of the opportunity to make appointments that could influence the balance of power on the Supreme Court.¹⁰⁰ Charles Fairman concludes no: the

94. See *infra* notes 95-102, and accompanying text, for a discussion of court packing and unpacking during Reconstruction.

95. *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868).

96. ERWIN CHEREMINSKY, *FEDERAL JURISDICTION* 181 (3d ed. 1999) (summarizing the arguments in favor of jurisdiction stripping).

97. Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002).

98. CHEREMINSKY, *supra* note 92, at 177.

99. Act of Mar. 3, 1863, ch. 100, § 1, 12 Stat. 794.

100. FRANKFURTER & LANDIS, *supra* note 53, at 72.

reduction was made at the behest of Chief Justice Salmon Chase, who hoped to trade a drop in Supreme Court workforce for an increase in the remaining justices' salaries.¹⁰¹

The essential point for purposes here, however, is that speculation as to the motivations underlying the 1866 reduction is so open because the legislative record is so spare. Senator Lyman Trumbull introduced the measure on the Senate floor as an amendment to legislation on configuration of the circuits that had originated in the House.¹⁰² The Senate approved the amendment with literally no explanation for the reduction and no debate of its merits.¹⁰³ When the bill returned to the House and the Senate amendment was considered, Representative John Wentworth inquired as to whether it would eliminate a vacancy on the Court for which a nomination was then pending. Representative Wilson replied in the affirmative, adding, "I know that a number of the members of the Supreme Court think it will be a vast improvement."¹⁰⁴ And that is about it. The House accepted the amendment and President Johnson signed the legislation into law.

Unlike every other piece of legislation discussed in this Article, deliberation preceding adoption of the 1866 amendment to reduce the size of the Court from ten to seven was so truncated that no conclusive inferences can be drawn as to Congress's underlying motivations. Although Trumbull must have had his reasons, he proposed the amendment to his colleagues for adoption sans rationale, and given the paucity of discussion it is altogether likely that they obligingly approved it as proposed—sans rationale. The 1866 Supreme Court reduction may thus be better characterized as an example of "sneak" legislation akin to the 1875 creation of general federal question jurisdiction (likewise insinuated into a court improvements bill as an unexplained, undebated, eleventh-hour amendment) than as an example of court-packing legislation akin to the Midnight Judges Act.¹⁰⁵

When the Supreme Court's size was again increased to nine in 1869,¹⁰⁶ it was as part of a court reform package (discussed at greater length below) enacted after a protracted gestation, that restored the traditional parity between the size of the Court and the number of regional circuits—making the move at least as easy to explain as a product of convention as one of court packing. With respect to this adjustment to the size of the Court and the two that preceded it earlier in the decade, Friedman offers a finely nuanced analysis that concedes the viability of claims that these enactments were bona fide reforms, but demonstrates that they can likewise be explained in terms of their consonance with the political agenda of the Reconstruction Congress.¹⁰⁷ If Court packing was its dominant motivation, however, Congress took great pains to conceal it behind alternating veneers of silence and professed commitment to incremental, apolitical court improvement. Given the Reconstruction Republicans' penchant for threatening the Supreme Court with annihilation whenever it suited their mood—a

101. CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE, 167-68 (Paul A. Freund ed., 1971).

102. CONG. GLOBE, 39th Cong., 1st Sess. 3698 (1866).

103. *Id.*

104. FAIRMAN, *supra* note 101, at 169.

105. James H. Chadbourn & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942) (characterizing the 1875 Act as "sneak" legislation).

106. Act of Apr. 10, 1869, ch. 22, § 1, 16 Stat. 44.

107. Friedman, *supra* note 97.

point Professor Friedman underscores—I find it curious that they would feel constrained to conceal their Court-packing motives. Either Court packing was not their dominant motivation, or Congressional Republicans recognized that their plans to court-pack ran counter to norms against such a practice and so needed to be obscured. Professor Friedman presents a persuasive case that the unparalleled chutzpah of the Reconstruction Congress makes it conceivable that Reconstruction legislators did indeed pack and unpack the courts. If they did, however, it may be better characterized either as an exception to an emerging rule against Court packing, or as a tacit acknowledgment that such a rule had already emerged and needed to be quietly sidestepped. This emerging norm in opposition to Court packing as a means to retaliate against the judiciary for its decisionmaking follows naturally from Congress's continuing reluctance to restructure the judicial branch in potentially disruptive ways, as discussed below.

2. Less Than Radical Reform of the Lower Federal Courts During Reconstruction

Accounts of the relationship between the political branches and the courts during Reconstruction dwell upon the Republican Congress's attempts to dominate and suppress the Supreme Court, which gave rise to the third cycle of confrontations between the courts and the political branches. Congressional antipathy toward the Supreme Court notwithstanding, the Republican Congress turned to the courts for implementation of the Reconstruction agenda, greatly expanding federal court jurisdiction and thereby adding to the docket of the Supreme Court, which had increased from 310 cases pending in 1860 to 636 cases pending in 1870.¹⁰⁸

In other words, notwithstanding its occasional bullying of the Supreme Court, the Reconstruction era Congress had a vested interest in preserving and promoting a strong, stable, and expanded federal judiciary that would enforce the statutes that Congress enacted in the teeth of regional resistance. Ironically, then, the high-profile episodes of Court bashing that dominate contemporary discussions of courts-Congress relations during Reconstruction did nothing to destabilize established norms respecting the institutional independence of the federal judiciary. Nowhere is that more evident than in the debates on the 1869 expansion of the federal courts, which manifest Congress's support for a larger, stronger judiciary and its continued opposition to radical reforms that could disrupt the judiciary as an institution.

In the 1850s and again in the 1860s, Senator Douglas and Senate Judiciary Committee Chair Lyman Trumbull, respectively, sponsored legislation that would have reintroduced intermediate courts of appeals, proposals that Frankfurter and Landis rightly characterize as "premature," given Congress's entrenched preference for incremental change.¹⁰⁹ In 1869, Trumbull took a different tack, introducing legislation that would establish nine circuit judgeships, add one Justice to the Supreme Court, and reduce the circuit riding responsibilities of Supreme Court Justices to one tour of duty every two years.¹¹⁰ The bill raced through Congress, being introduced in the Senate on January 18,¹¹¹ approved by the Senate Judiciary Committee on February 3,¹¹² passed

108. FRANKFURTER & LANDIS, *supra* note 53, at 60.

109. *Id.* at 70-71.

110. CONG. GLOBE, 40th Cong., 3d Sess. 1366 (1869).

111. *Id.* at 414.

by the Senate on February 23, and passed by the House on March 3—the last day of the 40th Congress—only to be inadvertently pocket-vetoed by President Johnson.¹¹³

Trumbull reintroduced his bill at the beginning of the next Congress. “[T]he Supreme Court of the United States is overloaded with business,” and “[t]he district courts throughout the United States are also overloaded,” Trumbull declared.¹¹⁴ The problem was perceived to be especially acute in the South, where efforts to enforce Reconstruction legislation hinged on the availability of judicial machinery to enforce recently adopted laws.¹¹⁵ By creating nine permanent circuit judgeships, he explained, the bill would reduce (though not eliminate) the circuit court duties of Supreme Court Justices and district judges alike, thus enabling each to devote more time to their primary responsibilities.¹¹⁶

Trumbull effectively conceded the ultimate inadequacy of the bill, acknowledging that

[t]here are many other provisions in regard to the judicial system which it would be desirable to enact into a law, but it was thought . . . that the simpler we could make this bill the better, and we could supply the other defects afterward. It leaves the judicial system of the United States just as we found it.¹¹⁷

In an earlier round of debates on the measure, Senator Stewart echoed the same pragmatic sentiments: “This system appears to be about the only one we can get. If we spend all our time in discussing different methods we shall agree upon nothing.”¹¹⁸

The Senate’s inability to pursue more significant reform may be attributable to a tension between “two things” that, in Senator Casserly’s view, “seem[ed] to be conceded.”

[F]irst, that in the remarkable growth of the country for the last twenty years an accession to the judicial force of the Union is required. I think it will also be conceded that such accession should be made at the expense of as little disturbance as possible of the existing system. . . .¹¹⁹

Given the dual desire to increase the judicial workforce without changing the existing court structure, adding more judges may have been the only viable option. That explanation, however, begs the question: why was the Senate so reluctant to

112. *Id.* at 813.

113. FRANKFURTER & LANDIS, *supra* note 53, at 74.

114. CONG. GLOBE, 41 Cong., 1st Sess. 208 (1869).

115. *Id.*, 40th Cong., 3d Sess. 1486 (statement of Sen. Stewart) (“[I]f we give to the South a judiciary who can perform the duties devolving upon them it will do more to settle that country, do more to establish law, order, and peace, than anything else.”); *id.*, 41st Cong., 1st Sess. 208 (statement of Sen. Trumbull) (“It was important also . . . that we should have circuit courts held throughout the reconstructed [s]tates of the South and those still unreconstructed by a circuit judge, who should go from [s]tate to [s]tate . . . administering and enforcing the laws of the United States.”).

116. *Id.*, 41st Cong., 3d Sess. 208 (1870).

117. *Id.*

118. *Id.*, 40th Cong., 3d Sess. 1486 (1869).

119. *Id.*, 41st Cong., 1st Sess. 213.

disturb the existing system? There are several related answers.

First, some legislators regarded the longstanding judicial structure with even greater reverence than their counterparts in the 1820s and 1830s. They did not want to change it, because as Casserly argued, “[I]t is a system under which the country has grown up and under which its jurisprudence has been formed. . . .”¹²⁰ Representative Kerr was more impassioned in the House:

[A]ny changes to be made in [our judicial] system . . . should be made with very great deliberation and with the utmost degree of caution, to the end that hasty legislation upon this grave and important subject shall not be indulged in. If there is one institution in our country which more than any other should challenge the vigilant and affectionate solicitude of every citizen for its integrity and protection, it is our [f]ederal judiciary. In that department, if its absolute purity and independence be properly maintained, is the surest anchorage of our system of [g]overnment against the encroachments of the other departments. In it is the highest safety of the citizen against the invasions of power upon the rights of property and the liberties of the people. We should look with distrust upon any proposition materially to change it.¹²¹

Second, many noted that any significant restructuring of the courts would effectively be permanent, so that any mistakes Congress made would, for all practical purposes, be irreversible. For some, the point was simply that if Congress made any changes that authorized the appointment of additional federal judges, life tenure would preclude—or at least ought to preclude—Congress from abolishing those positions any time soon.¹²² A lively exchange occurred between Senator Trumbull, a sponsor of the 1869 legislation, and Senator Edmunds, who favored an amendment that would double the size of the Supreme Court, on the issue of whose scheme would be easier to fix “if you find it does not work.”¹²³ Trumbull argued that Congress could later abolish the circuit court offices that he proposed (echoes of the 1802 repeal of judgeships created by the 1801 judiciary act), but could not eliminate the Supreme Court justices that Edmunds would add. Edmunds replied that “you can diminish the number of judges on your Supreme bench any day you please by the operation of nature,” to which Trumbull inquired, “Do they die daily?” Undaunted, Edmunds retorted:

They do die daily, almost . . . It is much better to diminish the number of judges by letting them die daily, or as often as they get an opportunity . . . than it is to undertake to create a legislative revolution, and fly in the face of the substance and spirit of the Constitution by legislating bodily out of existence nine men whom you have appointed and who the Constitution declares shall hold their offices

120. *Id.*

121. *Id.* at 341.

122. Senator Buckalew, for example, noted that “[t]here is force in the observation . . . that after these judges are once appointed you cannot reduce the number. Their tenure of office is during good behavior—substantially a life tenure—and you cannot reduce the number and thus retrace the step which you have taken. Therefore an increase in the number of these judges ought to be made upon great deliberation.” *Id.*, 40th Cong., 3d Sess. 1487.

123. *Id.*, 41st Cong., 1st Sess. 216 (statement of Sen. Edmunds).

during good behavior.¹²⁴

For others, however, retooling court structure was by its very nature a semi-permanent undertaking. "In amending the judiciary system of the United States," observed Senator Williams, "it is necessary . . . to proceed with great deliberation, for the reason that whenever we do agree to any amendment the system which that amendment establishes is fastened upon the country and is entirely beyond our reach."¹²⁵ Senator Conkling made the similar point that "[t]his bill becoming a law, during the lifetime of men now living no great change is likely to occur in the judicial system and the judicial staff of the United States. Therefore it is, in the present and in the future, a subject of very grave importance . . ."¹²⁶ And again, Senator Edmunds urged that:

[W]e ought not make haste to adopt this new method, this new system, but rather, if there be a difference of opinion upon it, take time to reflect, so that a system which when adopted under our Constitution is a final one, at least for many years, may be thoroughly considered before it is put into operation.¹²⁷

Against this backdrop of persistent resistance to fundamental change, the biggest hurdle that the 1869 legislation had to overcome was the objection that it did indeed effect a significant alteration in court structure, notwithstanding Senator Trumbull's representation that it "leaves the judicial system of the United States just as we found it."¹²⁸ Although the Act did not eliminate but only reduced the Supreme Court Justices' circuit riding duties to biannual events, some objected to the bill on the grounds that it constituted circuit riding's death knell.¹²⁹ Circuit riding, they argued, remained critically important. Said Edmunds:

We have found ever since the Government was founded that the administration of national justice . . . has been serenely and successfully carried on, on the whole, by a system which carried to the remotest corners of the Union the highest judges of the land to try causes at *nisi prius*, to mingle with the people, to hear witnesses, to see the jurors, to charge grand juries, and to dignify and make holy . . . justice at the very doors of the people; and then bringing from the people . . . that practical knowledge, that practical experience, that knowledge of men and things, which is just as essential to the decision of causes in the last resort as it is to the trial of causes at *nisi prius*.¹³⁰

124. *Id.*

125. *Id.* at 208.

126. *Id.* at 211.

127. *Id.* at 214.

128. *Id.* at 208.

129. True, Edmunds conceded, the bill did perpetuate circuit riding, "but that is a mere formal matter." *Id.* at 209. Buckalew agreed that "the practical effect of this measure will be . . . to separate the judges of the Supreme Court altogether from circuit court duty." *Id.*, 40th Cong., 3d Sess. 1487.

130. *Id.*, 41st Cong., 1st Sess. 214. Buckalew likewise favored the Justices traveling into different sections of the country, and becoming to some extent

Without circuit riding, argued Senator Buckalew, the justices of the Supreme Court “will become a court of error . . . separated altogether from the people of the country with no travel imposed upon them. They will not be brought in contact with the great mass of the community, as they now are”¹³¹ Williams was more hyperbolic: The Court would become “a fossilized institution, and the judges will know nothing about the business of the circuits.”¹³² It would be “a kind of Star Chamber that never sees or knows of the people.”¹³³

Trumbull defended the bill against these objections by acknowledging widespread congressional support for circuit riding, arguing that he too was a great friend of the tradition, and underscoring that the proposed legislation preserved circuit riding to the maximum extent practicable.¹³⁴ Senator Conkling, on the other hand, saw this as a problem. He noted that under existing law, the justices were supposed to be riding circuit regularly but were not doing so. To the contrary, he asserted, “as a rule the judges of the Supreme Court do not devote as much time to *nisi prius* sitting in truth as they would be obliged to do in order substantially and fairly to comply” with the diminished circuit riding duties provided for in Trumbull’s bill.¹³⁵ Given that the bill would thus saddle Supreme Court justices with *more* circuit duty than before, “[w]here is the relief . . . that the Supreme Court is to have under this bill?”¹³⁶

Conkling’s argument opened the door for Senators Edmunds and Williams to revisit an amendment to double the size of the Supreme Court to eighteen justices, of whom only nine would serve on the Supreme Court at any given time, with the remainder riding circuit.¹³⁷ Trumbull opposed the amendment on the grounds that the Supreme Court would declare it unconstitutional: “The Constitution establishes the Supreme Court, and you provide how many judges shall constitute it,” he opined, “but you have no right to say that half of those judges shall take no part in the adjudications of that court;” and if the Court struck the law down “you would have eighteen judges of your

acquainted with local facts, the character of [the] people, and the various interests in different parts of the country, all of which is of great service even to a dignified judge of the Supreme Court when he comes to perform the duties of his office.

Id., 40th Cong., 3d Sess. 1487.

131. *Id.*, 40th Cong., 3d Sess. 1487.

132. *Id.*, 41st Cong., 1st Sess. 209.

133. *Id.* at 214 (statement of Sen. Edmunds).

134.

The Senator from Vermont regards it as a great desideratum to have the justices of the highest court in the country hold circuit courts and become familiar with the practice in the different parts of the country; and so the Senator from Missouri thinks, and I agree. . . . [T]he trouble is that the country is so large and the business has so increased that it is impossible that the justices of the Supreme Court should be able to perform the necessary circuit duties throughout the different [s]tates. . . . Still it was desirable to connect them as far as practically it could be done with the circuit system; and hence the bill . . . requires the justices of the Supreme Court at least once in two years to go into each district in their respective circuits.

Id., 40th Cong., 3d Sess. 1484 (statement of Sen. Trumbull).

135. *Id.*, 41st Cong., 1st Sess. 211 (emphasis in original).

136. *Id.*

137. *Id.* at 212-14 (statement of Sen. Williams).

Supreme Court of the United States . . . Does anybody want such a court as that?"¹³⁸

Senator Casserly shared Trumbull's view that the amendment raised some "constitutional questions of a very grave character."¹³⁹ His core concern, however, was not that the nation would wind up with too many justices if the Court declared the law unconstitutional, but that it was irresponsible for Congress to "vex posterity" by provoking a constitutional crisis that tested the limits of its power over the Court: "[I]n so delicate a matter as the construction of the highest tribunal in the country," he asked rhetorically, is it "the part of wise men to leave a fundamental question of constitutional power to be a trouble and an obstruction to the members of that court and to the validity of its decisions for all time?"¹⁴⁰

The 1869 debates evidence a nuanced interplay of concerns. There appears to have been almost unanimous agreement that the courts had fallen behind in their work and were in immediate need of assistance. The judiciary that the 1869 Congress sought to reform had many more judges among its ranks, many more cases on its dockets, many more states within its geographical scope, and many more matters within its jurisdictional reach than the judiciary that the 1789 Congress had established. And yet Congress was clearly hesitant to make significant changes. The legislators were acutely aware of the fact that they were legislating in the long shadow of the 1789 Act, which had implemented the constitutional structure of the third branch eighty years before and remained essentially intact in the interim. They were thus understandably reluctant to entertain proposals that would alter the judicial system in fundamental ways, because of their reverence for the longstanding structure that the 1789 Act established, and because the 1789 Act served as a powerful precedent for the proposition that any structural changes they made—for worse as well as better—would likewise be longstanding.

Nowhere was the tension between tradition and exigency more evident than in Congress's uneasy resolution of the circuit riding problem. In 1789, one could debate the potential for circuit riding to unify the judiciary and to keep the justices in touch with local laws, legal communities, and citizens when there were only three circuits spanning thirteen geographically compressed states to traverse annually. But it is difficult to imagine that many in Congress were fatuous enough to suppose that these objectives could still be achieved eighty years later by having the justices sit once every other year in three times as many circuits spanning three times as many states covering half a continent. Indeed, proponents of circuit riding spoke of its virtues in such sweeping and abstract terms as to betray an awareness that its value was largely symbolic—a conclusion bolstered by the fact that the Act preserved circuit riding only in vestigial form. Were Congress truly committed to a functional circuit riding system, it presumably would have taken more seriously proposals to enlarge the stable of circuit riding justices. It did not go there because whatever good might have resulted from reenergizing the circuit riding process would have come at the price of provoking a constitutional crisis with the Supreme Court over the limits of congressional power to restructure the separate and independent third branch and dictate its responsibilities. This was a price that Congress was unwilling to pay.

138. *Id.* at 215.

139. *Id.* at 214.

140. *Id.*

It may be that by 1869, circuit riding had lost practical significance, but there is no denying that it retained symbolic significance. As a symbol, circuit riding remained a subtle but important means to preserve the appearance of judicial accountability: the judges of the nation's highest court may have been appointed for life, and may have been isolated in Washington most of the time, but every now and again they had to come down from their perch and face the people. Whatever its perceived value, Congress was not so committed to circuit riding that it was prepared to jeopardize the structural integrity of the courts and brave a constitutional showdown to make it work, but it was not prepared to jettison circuit riding altogether merely as a means to achieve docket relief for the Supreme Court.

C. Spike Four: Populist, Progressive, and New Deal Disaffection with the Courts, and the Contemporaneous Emergence of an Independent, Self-Regulating Judiciary

1. Populist, Progressive, and New Deal Disaffection with the Courts

The Populist period at the end of the nineteenth century, and the progressive era in the early twentieth century, ushered in another wave of resentment directed at the courts. As progressive reformers sought to address social ills through legislation, they came into conflict with state courts and a national Supreme Court that read the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution as imposing distinct limits on the power of state and federal legislatures to regulate business and industry—typified by the Supreme Court's decision in *Lochner v. New York*.¹⁴¹ Senator George Norris declared that federal judges on the trial and appellate levels were “not responsive to the pulsations of humanity [because] the security of a life position and a life salary makes them forget too often the toiling masses who are struggling for an existence.”¹⁴² Accordingly, as one scholar observed, “the Populist-Progressives during the early decades of the century sought to infuse federal judicial institutions with elements of popular democracy, to alter the substance of judicial decisions, to change the selection of federal judges, and to circumscribe their power and the jurisdiction of their courts.”¹⁴³

Although the various attempts to end life tenure and control or manipulate the courts are too numerous to discuss each in detail, two are worthy of separate mention because of their apparent success. The first was Congress's abolition of the unpopular Commerce Court in 1913; and the second was Franklin Delano Roosevelt's intimidation of the Supreme Court by means of his proposed Court-packing plan.

In 1910, Congress created the Commerce Court, comprised of Article III judges with circuit court jurisdiction, to hear appeals from railroad rate decisions of the Interstate Commerce Commission (“ICC”). It was thought that a single, specialized appellate court would be better able than the regional circuit courts to decide ICC appeals expeditiously, wisely, and without risk of intercircuit conflicts.¹⁴⁴ In the inaugural year of its nasty, brutish, and short existence, the Commerce Court

141. 198 U.S. 45 (1905).

142. PETER G. FISH, *THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION* 18 (1973).

143. *Id.* (footnotes omitted).

144. WILLIAM S. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 81 (1918).

succeeded in alienating just about everyone with an interest in its business: Congress and consumers were put off by the extent to which the Commerce Court overturned decisions of the popular ICC;¹⁴⁵ shippers lost interest when the Supreme Court declared that the Commerce Court lacked jurisdiction to hear their appeals from “negative” ICC orders dismissing ratemaking petitions;¹⁴⁶ and the railroads preferred the ICC devil they knew to the Commerce Court they did not.¹⁴⁷ Seemingly alone among the court’s true supporters was President Taft, who had lobbied for its creation and vetoed legislation providing for its abolition, on the grounds that he could not find “a single reason why the court should be abolished except that those who propose to abolish it object to certain of its decisions,” which he likened to “a recall of the judiciary” that he “utterly opposed.”¹⁴⁸ By 1913, however, Taft was out of the White House. Congress again passed legislation to kill the Commerce Court, and pushed the judgeships (specifically created to staff the court) to the brink of obliteration, with the House voting their elimination and the Senate declining to do so by a 25-23 margin.¹⁴⁹ The Senate’s position prevailed in the joint conference, and the legislation President Wilson ultimately signed abolished the court, but reassigned its judges to the regional circuits.¹⁵⁰ These events appear to signal a return to the ashes of the 1802 repeal from which Congress had more or less steadily risen over the course of the intervening century. Indeed, when measured in terms of the relative threat to judicial independence, the more recent episode seems at first blush to be even more troubling, insofar as it involved the obliteration of a tribunal in retaliation for its decisions.

Attacks on the Supreme Court accelerated after Franklin Roosevelt took office, when the Court continued in its *laissez faire* role by striking down New Deal legislation, greatly frustrating the President.¹⁵¹ On the disingenuous pretext that many federal judges were old and falling behind in their work, Roosevelt settled upon a proposal originally developed in 1913 by then Attorney General James McReynolds, who a quarter of a century later—as an aging Supreme Court Justice who often voted against New Deal legislation—would be hoisted on the petard of his own invention. Roosevelt proposed that whenever a federal judge remained on the bench past the age of seventy, the President be authorized to make an additional appointment. With respect to the Supreme Court, that would have enabled F.D.R. to nominate six new Justices. Congress held hearings. Justice Roberts, who had been one of the Court’s five-member majority that invalidated New Deal legislation, switched sides. Congress dropped the plan, and Justice Robert’s change of heart was dubbed the “switch in time

145. George Dix, *Death of the Commerce Court: A Study in Institutional Weakness*, 8 AM. J. LEGAL HIST. 238, 251-52 (1964).

146. *Id.* at 248.

147. *Id.* at 244-45 (“Faced with the inevitability of restrictions of some sort, the roads seemed to have accepted regulation by the Commission as preferable to regulation by the individual states or the federal judiciary.”).

148. 50 CONG. REC. 4206 (1913) (statement of Rep. Murdock quoting President Taft).

149. FRANKFURTER & LANDIS, *supra* note 53, at 172-73.

150. *See id.* at 173.

151. For an exhaustive discussion of the events leading up to the court-packing plan, including those summarized below, see Stephen O. Kline, *Revisiting FDR’s Court Packing Plan: Are the Current Attacks on Judicial Independence so Bad?*, 30 MCGEORGE L. REV. 863 (1999).

that saved nine.”

2. Populist, Progressive, and New Deal Disaffection with the Courts Reconsidered

In his superb study of the period, Professor William Ross documents the myriad attacks on the courts, which he describes as a “muted fury.”¹⁵² Despite widespread frustration with the courts for invalidating populist, progressive, and New Deal legislation, Ross finds a contrasting and even more widespread appreciation for the central role that the judiciary played in enforcing rights created by legislation that the courts upheld. Thus, proposals to end life tenure, curb judicial review, and so on, were often given rhetorical support, but were otherwise pursued less than enthusiastically by leading populists and progressives, were actively opposed by conservatives, and ultimately went nowhere.

This protracted period of disenchantment with the courts qualifies as the fourth cycle in the historical pattern of court-directed criticism chronicled here. However, by characterizing these episodes of heightened court criticism as “cycles,” I do not mean to imply that each has crashed inexorably upon the shore like a wave identical to its predecessors. To the contrary, although the level of criticism across the cycles may have been comparably shrill, the political branch response to such criticism has diminished over time. Cycle One—the Jeffersonian Republican purge of the Federalist judiciary—featured a wholesale, partisan manipulation of congressional power to create and destroy inferior courts, coupled with an equally partisan and partially successful effort to impeach and remove Federalist judges. The impact of Cycle Two was less extreme: some states did indeed defy the Supreme Court’s constitutional authority, and President Jackson threatened to follow suit, but those threats never materialized. Cycle Three was earmarked by the extraordinary anger of a Reconstruction Congress that ultimately came to comparatively little: yes, Congress deprived the Court of jurisdiction in *McCordle*, but in doing so, made a backhanded concession to judicial supremacy by opting to circumscribe rather than defy the Court’s authority as the states had done in Cycle Two; and yes, Congress increased and decreased the size of the Supreme Court, but either did not do so for partisan political purposes, or felt constrained to conceal its true motives. Cycle Four, in turn, featured a series of proposals to curb the courts that culminated in nothing, save perhaps the destruction of the fledgling Commerce Court and a change of heart by an isolated Justice on the Supreme Court who, besieged by the Court-packing plan proposal, may have undergone a foxhole conversion. And even these two developments must be further qualified.

a. Abolition of the Commerce Court Reconsidered

Although Congress held its nose, followed the President’s lead, and established the Commerce Court in 1910, it bears emphasis that opposition to its creation was intense, and support tepid. Frankfurter and Landis go so far as to conclude that “[t]he fate of this proposal would have been doubtful” had it been voted upon as a free-standing bill,

152. WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937* (1994).

but that it won passage solely by virtue of its attachment as a rider to a larger piece of legislation “to which all parties were committed.”¹⁵³ Indeed, Representative William Adamson later explained that “[t]he creation of this Commerce Court was a great mistake . . . caused by the absence of our colleagues at a baseball game,” whose presence on the House floor would have broken a tie vote on an amendment to delete the Commerce Court proposal from the legislative package to which it was affixed.¹⁵⁴

To the extent that the Commerce Court’s decisions contributed to its fate, it is not because those decisions caused a fickle Congress to annihilate a tribunal that it had welcomed into existence just three years before; rather, it was because those decisions made prescient the objections of those opposed to creation of the court in the first place. Congress acted to repeal the Commerce Court in 1912, and as noted above, President Taft vetoed that legislation. The next year, Congress tried again. Representative William Adamson took offense at President Taft’s veto message, and “emphatically . . . dissent[ed] from any statement . . . that the only argument urged against this court is that some of the decisions of the judges are wrong.”¹⁵⁵ To support his point, Adamson republished his original remarks in opposition to creation of the Commerce Court. Among his earlier arguments: (1) there were “so few cases in the past as to create no necessity for the court”; (2) the special expertise of the court is overstated because “[i]t is not insisted by anybody that circuit judges will know any more while sitting in Commerce Court than when presiding on circuit”; and (3) if judges are appointed with an eye to their special expertise, it “will be men who know more about . . . consolidation of railroads, destruction of competition, and disregard of public right, through long training as corporation lawyers. . . . If anybody doubts this, let him wait and see.”¹⁵⁶

In the minds of Commerce Court critics, experience with the court in operation validated these three concerns. As to the court’s inconsequential docket, “[d]ecisions of the Supreme Court [depriving the Commerce Court of jurisdiction to hear appeals from “negative” ICC orders, for example] . . . have clarified the situation,” Adamson noted, which ensured that “business of that character will be much less in the future than in the past.”¹⁵⁷ Skepticism of the Commerce Court’s special expertise and capacity to eliminate intercircuit conflicts was heightened by Supreme Court reversals in ten of its first twelve cases on appeal from the Commerce Court, which prompted Representative Sims to observe derisively that “they have had uniformity of decision, I am ready to admit, but it is uniformity of error.”¹⁵⁸ And as to the prediction that the Commerce Court would be biased in favor of the railroads, the suspicion appeared to be confirmed by a 1911 ICC report finding that “[o]ut of 27 cases passed upon by the Commerce Court, preliminary restraining orders or final decrees have been issued in favor of the railroads in all but seven cases, and of these only three are of any magnitude.”¹⁵⁹ These developments—occurring as they did against the backdrop of an ongoing impeachment investigation of Commerce Court Judge Robert Archbald on

153. FRANKFURTER & LANDIS, *supra* note 53, at 159.

154. 50 CONG. REC., 4541 (1913).

155. 50 CONG. REC., 4208 (1913).

156. *Id.* at 4208-09.

157. *Id.* at 4208.

158. *Id.* at 2147.

159. 25 I.C.C. 59 (1911).

corruption charges—served to validate preexisting congressional concern that the court was, by its very nature, less than impartial. By 1913, Taft was gone from the White House, Congress acted to abolish the Commerce Court a second time, and President Wilson signed the bill into law.

Although one could argue that Congress unpacked the Commerce Court in much the same way as the Jeffersonian Republicans unpacked the circuit courts in 1802, there are three significant differences. First, there was more to the explanation for eliminating the Commerce Court than the political reality that the balance of decisionmaking power in Congress had shifted. Unlike the circuit courts of 1801, which never heard a case, it was the Commerce Court's performance on the job that confirmed preexisting suspicions and sealed its fate. While one could argue that this difference simply makes the abolition of the Commerce Court all the more independence-threatening, such a conclusion needs to be qualified: yes, the court was, in some sense, abolished because its decisions were unpopular. But the reasons offered to abolish the court (with its decisions being introduced as evidence) were that the court was unnecessary, that it lacked the special expertise that was its *raison d'être*, and that a specialized tribunal designed to second-guess the ICC would possess an inherent antiregulatory bias—reasons that linked abolition directly to improving judicial administration and arguably removed it from the definitional scope of court unpacking altogether.

A second difference is that, unlike the circuit courts of 1801, Congress never really conceptualized the Commerce Court as integral to the Article III judiciary. Historian George Dix argues persuasively that Congress thought of it instead as a sort of adjunct to the Interstate Commerce Commission that could be regulated out of existence without regard to the congressional ethic of restraint that the federal judiciary generally had come to enjoy over the course of the preceding century.¹⁶⁰ Insofar as abolition of the Commerce Court politicized federal court disestablishment in ways unprecedented since 1802, it was not because Congress abandoned well-developed norms against politicizing federal court structure and size, but because those norms were deemed less than fully applicable to this new, hybrid tribunal.

Third, and most important of all, despite the hybrid status of the Commerce Court itself, Congress recognized that the court was constituted of Article III judges, and unlike its 1802 predecessor, resisted the temptation to decommission the judges when it closed down the court. In the House, momentum to abolish the judgeships along with the court was considerable. "If the creation of these judgeships was a mistake, their continuance now will be equally a mistake,"¹⁶¹ declared Representative Melville Kelly, who quoted Thomas Jefferson for the proposition that "[t]he judiciary is a subtle corps of sappers and miners, constantly working underground to undermine the foundations of our confederated fabric," who "consider themselves secure" after "[h]aving found from experience that impeachment is an impracticable thing, a mere scarecrow."¹⁶²

With the exception of this oblique reference, the relationship between the push to abolish judgeships in 1913 and 1802 went unappreciated in the House, which voted to expel the judges along with the Commerce Court. The Senate debates, however, were a

160. Dix, *supra* note 145, at 254-58.

161. 50 CONG. REC. 4540 (1913).

162. *Id.* at 4541.

different matter. Senator Hoke Smith, like Kelly in the House, favored eliminating the excess judges caused by abolition of the Commerce Court, and saw no constitutional impediment to doing so: "Congress was given the power to say what inferior courts we should have, how many judges should be upon them . . . decreasing the number if Congress saw fit."¹⁶³ Senator William Borah disagreed, suggesting that if Smith were right, legislators searching for an easy way to remove judges could bypass impeachment and simply abolish their stations. Smith denied that a legislator could "vote simply for the abolition of a particular circuit or of a particular district because his object was in that way simply to remove a judge," because "[s]uch conduct would be highly improper," and "would be violative of the spirit of the Constitution." In the end, however, Smith stuck by his guns that Congress had the power to eliminate judgeships at will. "Exactly," Borah retorted:

Then we come back to the proposition . . . that the country will be glad to know, in view of this urgent propaganda for the recall of judges, that they need not wait for the slow process of impeachment or recall, but that they can call upon their Senators and Representatives to eliminate any man from the bench that they want off the bench. They can simply abolish his circuit, get him out, and re-create the circuit.¹⁶⁴

The debate then took a turn for the historical. For the framers, observed Senator Thomas Walsh, "independence of the judges was something which all parties at that time deemed of the very first consequence," which led him to conclude that "the legality of . . . this method of getting rid of obnoxious judges, is open to the most serious doubt on constitutional grounds."¹⁶⁵ In defense of abolishing the judgeships, Senator Smith pointed to the 1802 repeal of the "Midnight Judges" Act as precedent, noting that "Congress proceeded to abolish . . . those inferior courts that had been established, and with their abolition went out of office the men who had filled them . . . [s]o . . . it is clear that power is with Congress."¹⁶⁶ Senator John Shields, however, regarded the 1802 Act as an exception to a different rule of considerably longer standing: "with . . . [the 1802 Act] exception, for more than 100 years until this [A]ct was introduced and passed by the House, it was never attempted to substitute a statute for the mode pointed out by the Constitution of removing judges by impeachment."¹⁶⁷ Walsh agreed, adopting Justice Story's analysis of the 1802 Act as his own:

The act may be asserted, without fear of contradiction, to have been against the opinion of a great majority of the ablest lawyers at the time; and probably now,

163. *Id.* at 5410.

164. *Id.* at 5411-12.

165. *Id.* at 5414.

166. *Id.* at 5410. Senator Williams concurred with Smith to the extent of adding that Chief Justice Marshall himself conceded the validity of the repeal in private conversations. *Id.* Williams was more cautious than Smith, however, noting that Congress's authority to abolish judgeships derived from its power to abolish the court to which the judges were appointed; in this case the judges had technically been appointed as circuit judges, not Commerce Court judges per se, which led Williams to doubt whether Congress could eliminate a circuit judgeship without abolishing the circuit court. *Id.*

167. *Id.* at 5415.

when the passions of the day have subsided, few lawyers will be found to maintain the constitutionality of the act. No one can doubt the perfect authority of Congress to remodel their courts, or to confer or withdraw their jurisdiction at their pleasure, but the question is, whether they can deprive judges of the tenure of their office and their salaries after they have once become constitutionally vested in them.¹⁶⁸

The Senate voted against elimination of the judgeships. The House concurred, the Commerce Court was abolished, its judges were assigned to the circuit courts of appeal, and the norm against court unpacking was respected.

b. Roosevelt's Court-Packing Plan Reconsidered

Without disputing that the Court-packing plan may have influenced Justice Roberts' epiphany (even though Roberts denied it to his grave), which in turn made implementation of the plan unnecessary, it is misleading to suggest that the plan would have been enacted had it not been for Roberts' change in vote. "The switch in time that saved the President a humiliating defeat in Congress" may be less memorable, but what it lacks in pithiness it may make up for in accuracy. Despite Roosevelt's popularity and the Supreme Court's unpopularity, the Court packing plan lacked majority public approval,¹⁶⁹ had the support of surprisingly few Court critics,¹⁷⁰ and received a tepid welcome in Congress. Professor William Ross offers an explanation for the demise of the court packing plan that resonates nicely with the theme of this paper:

[The court packing plan] ultimately failed because it contravened the respect for the judiciary so deeply engrained in the American character. . . . Roosevelt's calm and frequently repeated assertion that "the people are with me" underestimated the profound esteem that "the people" accord to the Supreme Court as long as its decisions do not diverge too radically from popular opinion. As an Idaho farmer wrote to Roosevelt, the Supreme Court "is a judicial body . . . and is not a plow horse for or with anyone."¹⁷¹

The incompatibility of the plan with what were by then well-established norms against court packing specifically and against precipitous, independence-threatening court reform generally was recognized at the time by scholars who testified before Congress in opposition to the plan. Professor Erwin Griswold began his testimony with the "dull but instructive subject of precedents," and after surveying the history of congressional adjustments to the size of the Supreme Court, concluded that:

At their most they do not hold a candle to the present proposal. No one of them added more than two judges, and only once have as many as two places been added to the Court. And it cannot be shown that the dominant purpose in increasing the size of the Court was ever the desire to influence or control the

168. *Id.*

169. Ross, *supra* note 152, at 302.

170. *See id.* at 309.

171. *Id.* at 302 (footnotes omitted).

results of its decisions.¹⁷²

Even more striking were the extraordinary remarks of Raymond Moley, Newsweek Editor and Professor of Public Law at Columbia University:

[A] deliberate attempt by one branch of Government to weaken another branch has very few parallels in our history. And none of them is creditable. . . .

That way has always been open to the purposes of any dominant Executive and congressional majority. But the very fact that it has not been employed, except in one or two cases of which we are not very proud, has established an inhibition upon the use of this method—an inhibition based upon custom and tradition. In other words, a custom has been established that fundamental changes should not be so attained—a custom of the Constitution, or a doctrine of political stare decisis, if you will, which is as binding upon public officials as a written provision of the Constitution itself. . . . The maintenance of the custom of the Constitution is essential to the preservation of a stable Government under which people are able to plan their lives and direct their actions. It is true that the custom of the Constitution changes, but it changes slowly and its existence is an indispensable element in a democratic government.¹⁷³

3. The Contemporaneous Emergence of an Independent, Self-Regulating Judiciary

The periods of calm separating the first three spikes of court-directed anger serve to contextualize and qualify those spikes, enabling us to recharacterize the independence-threatening actions of the political branches during those episodes as exceptions to an emerging rule of political branch respect for the judiciary's autonomy. A similar point can be made here. The populist, progressive, and New Deal assaults on the federal courts spanned over forty years, from the 1890s to the 1930s—the longest period of sustained and intense frustration with the federal courts in our history. And yet, during that same period, the modern, independent, self-regulating judiciary was established by Congress and approving Presidents, in a remarkable series of legislative measures. As discussed below, Congress passed legislation in 1891 creating intermediate courts of appeals, which enabled the federal courts to hold themselves more systematically accountable to each other for their decisions. In 1922, Congress authorized the judiciary to govern itself through the establishment of a Conference of Senior Circuit Judges (later renamed the Judicial Conference of the United States). In 1934, Congress empowered the judiciary to promulgate its own procedural rules. And in 1939, Congress transferred budgetary control of the courts from the Department of Justice to the judiciary itself, and created an Administrative Office of United States Courts to facilitate judicial self-administration.

This movement toward a self-regulating judiciary marks the third great manifestation of customary independence described at the beginning of this part of the

172. *Reorganization of the Fed. Judiciary: Hearings on S. 1392 Before the Senate Comm. on the Judiciary*, 75th Cong. 760, 763 (1937).

173. *Id.* at 539, 546.

Article. The question is: why was Congress driven to expand judicial autonomy amid a period of intense disaffection with the courts? Although Congress sometimes acted despite such criticism (as explained below), the movement toward a self-regulating judiciary is often better understood as a reaction to it.

a. Efforts to Establish a Circuit Court of Appeals

Congress painted itself into a corner during the first three-quarters of the nineteenth century. In that time, Congress had come around to the view that it could best respect the structural integrity and independence of the judiciary by resisting proposals to amend the Judiciary Act of 1789 in significant ways. This was all fine and well, as long as incremental reforms such as simply increasing the number of judges—as was done in 1869—were adequate to enable the judiciary to manage its expanding docket. The 1869 legislation, however, did no better at easing the workload of the Supreme Court than its critics predicted.¹⁷⁴ In 1882, Senator David Davis noted that the 636 cases pending before the Supreme Court in 1870 had very nearly doubled to 1202 by 1880.¹⁷⁵ The push to reestablish intermediate courts of appeals resumed in earnest.

The decade of travail, culminating in the passage of the Evarts Act in 1891 (which created the intermediate appeals courts and was named after its Senate sponsor, William Evarts), has been ably described elsewhere and does not warrant detailed recapitulation.¹⁷⁶ What does bear a second look, however, are the circumstances enabling the controversial legislation to pass after eight decades of failure.

One obvious impetus for the reform, emphasized by Frankfurter & Landis, was that the docket of the Supreme Court had reached a crisis point.¹⁷⁷ Yet this is only a partial explanation because caseload crisis rhetoric, invoked time and again throughout the century, had not previously budged Congress from its longstanding disinclination to make significant change.

Three related developments help to explain why Congress finally abandoned a century-long strategy of incremental reform. First, significant segments of Congress, particularly southern legislators, nonplused by Reconstruction, had become openly hostile to federal judges and what they perceived to be runaway judicial power and independence. Second, and closely related to the first, proponents of the court of appeals proposal won over court critics by characterizing it as a means to promote the accountability of megalomaniacal trial judges. Third, friends of the courts recast their debt of respect to the framers of the judiciary, from one that emphasized the duty to minimize departures from the system the founders established, to one that emphasized the importance of providing for a judiciary that achieved the objectives the founders envisioned.

Hostility Toward the Federal Courts: Notwithstanding widespread hostility toward the Supreme Court during the Jacksonian era and Reconstruction, the lower court reform debates of the 1820s and 1860s were typified by excessive reverence for the judiciary generally. By the 1880s, however, that had changed, as southern legislators spewed venom at lower court Reconstruction judges, and populist sentiments in

174. See *supra* note 131 and accompanying text.

175. 13 CONG. REC. 3464 (1882).

176. See generally FRANKFURTER & LANDIS, *supra* note 53.

177. *Id.* at 93-102.

opposition to a seemingly aristocratic judiciary began to take hold and give rise to Spike 4.

Some thought federal judges were too political or partisan. The Act of 1869 had established new circuit judgeships, at least in part for the explicit purpose of enforcing Reconstruction laws in the South. As far as many southern legislators were concerned, the results had been disastrous. "We have nine circuit judges in the United States . . . some of [whom] were appointed in times of high political excitement and seem to feel that it is a part of their judicial duty," complained Senator John Morgan of Alabama.¹⁷⁸ To make matters worse, he continued, "more of the district judges have been appointed in consideration of their extreme party bias than of the circuit judges,"¹⁷⁹ and have committed acts "which an American ought to blush to be compelled to recite."¹⁸⁰

Others expressed the related concern that federal judges were too high-handed. Florida Senator Williston Call opined that "[t]he public opinion of the country regards some of the judges . . . as men capable of any prostitution of judicial power,"¹⁸¹ who "would not hesitate to convict innocent men for their own purposes."¹⁸² Because the federal judiciary "has generally been on the side of tyranny and against the liberties of the people," he urged the passage of an amendment that would automatically stay trial court judgments in all criminal cases pending appeal.¹⁸³ Senator Benjamin Jonas pointed to an 1860 case in which the Supreme Court first authorized federal courts to grant writs of mandamus against state tribunals. "[W]e can well doubt whether this latent power would have been allowed to slumber for seventy years if it had been generally believed to exist[.]"¹⁸⁴ he observed accusingly. Alabama Senator John Morgan later concluded that "the [f]ederal tribunals have usurped all the judicial power that now belongs to the [s]tates and that has heretofore been exercised by them. The march in that direction is so rapid that it amounts to a crusade against the tribunals of the [s]tates."¹⁸⁵

For still others, the problem was that federal judges were lazy or incompetent. "State judges . . . open court in the morning at 9 o'clock, some of them at 8, hold court until 12 or 1, meet again at 2, and hold court again until 6, and then have a night session,"¹⁸⁶ observed Senator George Vest, while "[a] Federal [sic] judge would think his life was in danger if he did such work as that."¹⁸⁷ Senator Matthew Butler of South Carolina conditioned his support for a proposal to convert the circuit courts to courts of appeal, on the adoption of an amendment that would require the judges to rotate among the courts, because the South Carolina circuit judge was "utterly unfit" and more specifically, "worthless[] and infamous."¹⁸⁸ Accordingly, Butler would not consent to giving his court "additional power unless there is a prospect of getting rid of

178. 13 CONG. REC. 3504 (1882).

179. *Id.*

180. *Id.*

181. *Id.* at 3598.

182. *Id.*

183. *Id.* at 3597-98.

184. *Id.* at 3604.

185. *Id.* at 3697.

186. 21 CONG. REC. 10,224 (1890).

187. *Id.*

188. 13 Cong. Rec. 3546 (1882).

him and having his presence certainly not more than once in nine years.”¹⁸⁹ James Ingalls of Kansas did not support Butler’s amendment, but agreed that the alleged acts of the circuit judge in question were “a much greater disgrace to justice and to liberty than has ever before been perpetrated on this continent.”¹⁹⁰ And Benjamin Jonas of Louisiana concurred that “[t]here are incompetent judges on the bench in [the South] and who will remain on the bench if this bill passes, and who will form part of the court of appeals.”¹⁹¹

The independence that came with life tenure was a common thread that wove these perceived problems together. “The life tenure of office in federal judges is abhorrent to the people,”¹⁹² argued George Vest, as evidenced by the fact that all of the western states had “taken the power of appointing judges away from the governors of the states and vested it in the people.”¹⁹³ “[W]hen you put a man into an office with life tenure, and . . . put him on a sort of pedestal above the rest of the people,”¹⁹⁴ he later observed, “he then thinks that leisure is the first element of his new position. You may take the hardest-working lawyer in this country and make a Federal [sic] judge of him and he will quit. . . . [h]e will immediately become a *dilettante*.”¹⁹⁵ Senator Call noted that “a court holding power by life tenure”¹⁹⁶ is “separated from the sympathies and feelings which animate the great body of the country”¹⁹⁷ and “take their color and tone from the political party in control of the Government.”¹⁹⁸ Senator Morgan went a step further: “[W]hen you put [a judge] in for a life position and nobody to scrutinize his acts,”¹⁹⁹ he argued, “how can we expect a man of that sort not to drift off in the line of his convictions or his friendships or his enmities?”²⁰⁰

Perhaps the most telling indication of mounting hostility toward the federal courts was the increasing frequency with which members of Congress introduced constitutional amendments to end good behavior tenure for federal judges. During the first century of the Republic, only about twenty amendments limiting the terms of federal judges were introduced. In contrast, between 1889 and 1929, such amendments were introduced at the rate of approximately one per year.²⁰¹ Many additional resolutions, such as those calling for the popular election of federal judges, were likewise introduced.²⁰²

Promoting Judicial Accountability Through the Establishment of Intermediate Appellate Courts: For those legislators who saw federal judges as high-handed, lazy, and overly politicized, the argument that we needed to relieve overworked federal

189. *Id.*

190. *Id.*

191. 13 CONG. REC. 3605 (1882).

192. 21 CONG. REC. 10,305 (1890).

193. *Id.*

194. *Id.* at 10,223.

195. *Id.* at 10,223-24 (emphasis in original).

196. 13 CONG. REC. 3788 (1882).

197. *Id.*

198. *Id.*

199. 21 CONG. REC. 10,231 (1890).

200. *Id.*

201. See M.A. MUSMANNO, PROPOSED AMENDMENTS TO THE CONSTITUTION 82 (1929).

202. See *id.* at 86.

judges by creating a new tier of appellate courts staffed with even more federal judges was greeted with an understandable lack of enthusiasm. Skeptical legislators looked more smilingly on proposals to restrict the courts' subject matter jurisdiction. The sentiments expressed by Florida Senator Charles Jones are illustrative:

Why has the number of cases increased so greatly in the Federal [sic] courts, while in the state [sic] courts . . . no such increase is perceptible? . . . [I]t is because the courts of the United States have been by degrees usurping powers that the framers of the Constitution never intended they should exercise. . . .

And now instead of attempting to cut down on that jurisdiction, instead of beginning at the right end and bringing back this authority to the confines that originally bounded it, we are asked to pervert the entire scheme of the fathers of the Constitution and undertake to establish nine appellate courts instead of one.²⁰³

With rare exception, however, states' rights advocates who sought to limit the subject matter jurisdiction of the federal courts suffered one humiliating defeat after another throughout the latter half of the nineteenth century. In the aftermath of the Civil War, Congress enacted a plethora of statutes that expanded the jurisdiction of the federal courts, including the National Bank Acts of the 1860s, the Bankruptcy Act of 1867, and the Federal Enforcement Act of 1870.²⁰⁴ Adoption of the Fourteenth Amendment likewise flooded the federal courts with new cases and claims.²⁰⁵ And in the 1877 decision of *Ex parte Schollenberger*, the Supreme Court construed the federal removal statute to permit corporations sued in state court to remove their cases to a federal forum, which effectively expanded the scope of the federal judiciary's diversity of citizenship jurisdiction.²⁰⁶

The high water mark, however, was the Removal Act of 1875.²⁰⁷ Prior to 1875, federal trial courts were granted jurisdiction to hear cases rising under particular federal laws on an ad hoc basis only. In one of the last gasps of the Reconstruction era, a relatively innocuous bill that the House passed to clarify the circumstances under which federal courts could hear diversity cases removed from state courts was quietly amended in the Senate to give the lower federal courts original jurisdiction over all questions arising under federal law. The amendment was passed by the Senate and, following a joint conference, accepted by both chambers without any meaningful explanation, discussion, or dissent—leading one pair of commentators to suspect it of being “sneak legislation.”²⁰⁸

Despite the best efforts of states' rights proponents to capitalize on the ensuing increase in federal court docket congestion by introducing proposals to curtail subject matter jurisdiction, they rarely came closer than close.²⁰⁹ A bill to overturn

203. 13 CONG. REC. 3830 (1882).

204. See FRANKFURTER & LANDIS, *supra* note 53, at 61-65 & 64 n.28.

205. See *id.* at 64.

206. 96 U.S. 369 (1877).

207. See Removal Act of 1875, ch. 137, 18 Stat. 470.

208. James Chadbourne & A. Leo Levin, *Original Jurisdiction of Federal Questions*, 90 U. PA. L. REV. 639, 642-43 (1942) (quotation marks omitted).

209. One notable exception is legislation passed in 1887, which withdrew the federal courts' diversity of citizenship jurisdiction over litigation involving national banks, by declaring such

Scollenberger and limit the scope of the federal courts' removal jurisdiction passed the House in three consecutive Congresses, but failed each time in the Senate. Opponents of the measure, many from the Northeast, were unshakable in their view that only independent federal judges could be trusted to litigate interstate commercial disputes impartially. Massachusetts Representative George Robinson explained:

Capital is needed to restore the waste places of the South and build up the undeveloped west; it must flow largely from the old states of the east and from foreign lands. But it will not be risked in the perils of sectional bitterness, narrow prejudices, or local indifference to integrity and honor. I say then, let us stand by the national courts; let us preserve their power.²¹⁰

Legislators who supported a strong federal judiciary may have defeated proposals to strip the courts of jurisdiction, but those disgruntled with federal judges remained a force with which to reckon. The passage of the Evarts Act may have ultimately turned on its proponents' ability to position the establishment of an intermediate court of appeals as a means not only to relieve docket congestion, but also to promote the accountability of rogue trial judges.²¹¹

Under the proposal finally adopted, new courts of appeals were to be established in each of the nine circuits. Judges comprising each circuit's three-member court of appeals were to be drawn from the ranks of the circuit's district judges, its two circuit judges (one newly established, the other previously established by the Act of 1869), and circuit riding justices. Although the proposal sat uneasily with legislators such as South Carolina Senator Matthew Butler, who was loathe to promote despised trial judges to the courts of appeals, his objection was deflected by Senator Augustus Garland, who professed to "sympathize, from [his] heart"²¹² with Butler's concern, but noted that "[i]f the Senator from South Carolina will reflect that we get an additional force upon such a judge there to hold him in check or to review or examine his acts, he will see that with that addition he has a safeguard which he did not have before."²¹³

The notion that courts of appeals would serve to restrain bad federal judges struck a responsive chord among some of the same legislators who favored restricting the federal courts' subject matter jurisdiction. Alabama Senator James Pugh believed that "a large portion of jurisdiction conferred upon Federal courts . . . can be safely restored to and made exclusive in the State courts, and thereby relieve the existing pressure,"²¹⁴ and expressed regret at "[t]he failure to secure this desirable reformation in the bill before the Senate."²¹⁵ He nevertheless favored establishing intermediate courts of appeals. In response to fellow Alabama Senator John Morgan's complaints about their home state's district judge, John Bruce, Pugh commented that if "Bruce and those like him are members of the new court of appeals,"²¹⁶ then "they would have to obtain the

banks to be citizens of every state in which they were located. Ferejohn & Kramer, *supra* note 26.

210. 10 CONG. REC. 850 (1880).

211. See generally FRANKFURTER & LANDIS, *supra* note 53, at 98-102.

212. 13 CONG. REC. 3546 (1882).

213. *Id.*

214. *Id.* at 3867.

215. *Id.*

216. *Id.* at 3868.

concurrence of two circuit judges . . . before they could secure affirmance of their judgments . . .”²¹⁷ On the other hand, “[i]f there is no court of appeals, Judge Bruce . . . can laugh at your criticisms and crinations in the Senate or elsewhere, and indulge himself at his own will and pleasure, without restraint or interruption in the scope of his own jurisdiction.”²¹⁸

In the House, David Culberson of Texas—who had thrice led the losing charge to restrict the federal courts’ removal jurisdiction—was likewise a convert to the court of appeals proposal:

If this measure can be enacted into law an end will be put summarily to the judicial despotism exercised by circuit and district judges in many localities. . . . I have a supreme desire to witness during my time in Congress the overthrow of the kingly power of district and circuit judges.

It is a fact established by actual examination that one judge alone presides in eight-ninths of all the cases tried in the circuit and district courts of the United States, and in more than half of them he is the final arbiter.²¹⁹

Consistent with the views of Representative Culberson, the House Judiciary Committee Report catalogued the advantages of the bill, and listed second (behind “[t]o unload the docket of the Supreme Court”), that it “destroys the ‘judicial despotism’ of the present system by creating an intermediate appellate court, with power to revise the final judgments of the district courts.”²²⁰

Rethinking Incremental Reform: Throughout the first three-quarters of the nineteenth century, a sticking point to establishing courts of appeals had been a fundamental resistance to significant change, born of a deep respect for the stability and independence of the judicial branch and the structure that the framers of the Constitution and the 1789 Act had implemented. Indeed, reluctance to abandon the familiar remained a weight in the balance of the Evarts Act of 1891. The House bill would have combined circuit and district courts, added eighteen new circuit judges to staff the courts of appeals, eliminated all direct review to the Supreme Court from the trial courts, and ended Supreme Court circuit riding.²²¹ Frankfurter and Landis credit Senator Evarts for making enactment of the legislation possible by amending the House bill in ways that “satisfied traditionalists.”²²² Evarts kept the district and circuit courts as they were; cut the proposed infusion of new circuit judges in half; preserved direct review to the Supreme Court in limited instances; and let sleeping circuit riding lie.²²³

Notwithstanding these modest genuflections to preexisting court structure, the fact remained that the 1891 Evarts Act transformed the judiciary in fundamental ways that

217. *Id.*

218. *Id.*

219. 21 CONG. REC. 3404 (1890).

220. JURISDICTION OF THE COURTS OF THE UNITED STATES, H.R. REP. NO. 50-942, at 3-4 (1888).

221. See FRANKFURTER & LANDIS, *supra* note 53, at 99-100.

222. *Id.* at 100.

223. *Id.*

had theretofore been politically unsalable. Ever-escalating caseloads and the reinvention of the court of appeals proposal as a means to keep increasingly unpopular federal trial judges in check partially explained congressional willingness to abandon a longstanding preference for incremental reform. In addition, however, there was a subtle but significant transformation in the role that Congress perceived itself playing in court reform.

During the first eighty years of the century, the prevailing sentiment among congressional leaders had been that Congress had a duty to preserve and protect the judicial system by respecting the structure that the Founders had established—a duty best discharged by changing court structure as little as possible. In the waning years of the nineteenth century, legislators remained no less committed to protecting the judiciary and paying homage to the Founders, but began to interpret that commitment differently. The nation had outgrown the system implemented by the Judiciary Act of 1789, these legislators now argued, and Congress's responsibility to preserve the well-being of the judicial branch could best be fulfilled by adopting reforms enabling the courts to serve the ends that the founders intended.

In the House, David Culberson—who served as a leading spokesman in the successful effort to win House acquiescence to the Senate version of the bill—made his case on the House floor:

The prophetic wisdom of the illustrious statesmen who framed the Constitution is nowhere more clearly shown than in the organic provisions upon which the Federal judicial system should be constructed by Congress. . . .

. . . As the business and population of the country increase, litigation embraced within and covered by the judicial power of the United States correspondingly increases, and it is the unquestioned duty of Congress to provide the necessary courts and judicial force to meet the increased demands of the country upon the judiciary.

The framers of the Constitution did not construct it for their day and time, but for all time.

They foresaw the coming greatness and grandeur of the United States and looked onward to the time when this Government would outstrip all other nations in empire, in wealth, and population.

The authority vested in Congress to make exceptions to and regulate the appellate jurisdiction of the Supreme Court was granted for the purpose of enabling the Congress to adapt the appellate jurisdiction of the court to the varying demands of the business, trade and commerce of the country, and to protect and shield that great tribunal from the conditions which exist to-day [sic].²²⁴

While Culberson argued that Congress had not only the constitutional power, but a constitutional duty to implement comprehensive reform, in the Senate, Evarts took pains to explain why such reform showed no disrespect to the authors of the first Judiciary Act:

The encomium upon the famous statute drawn by Chief-Justice Ellsworth is

224. 21 CONG. REC. 3403-04 (1890).

recognized by every lawyer and by every judge. The only thing that has happened to that statute has not been in the nature of man nor in the wisdom of jurisprudence nor in the credit of a judicial establishment; it has been the growth of the United States. . . . [Y]ou can not [sic] alter the fact that what was wise and what was sufficient, what was noble and generous and maintained its supremacy for the great growth of this nation has now outlived that purpose. . . .²²⁵

The 1891 Act, then, was groundbreaking for several different reasons. First, it represented a significant change in Congress's attitude toward court reform. The longstanding disinclination to alter the judicial system in significant ways was suppressed in favor of a new desire to perfect a constitutional structure that Congress was duty-bound to implement—a sentiment harkening back to that animating the Judiciary Act of 1789.

Second, it was the first congressional enactment consciously designed to rein in the perceived excesses of federal trial courts, and the first step in the direction of making the judiciary more accountable to itself since the Judiciary Act of 1789. In 1805, Congress tried and failed to remove the high-handed Samuel Chase by impeachment. In the 1880s, Congress had repeatedly tried and failed to strip the courts of subject matter jurisdiction. With increasing frequency toward the end of the century, legislators had tried and failed to end life tenure by constitutional amendment. Unlike this string of legislative failures, however, which sought to hold judges more accountable to Congress or the people, the 1891 Act sought to make judges more accountable to each other through improved judicial review.

b. The Conference of Senior Circuit Judges

The Evarts Act marked the beginning of a subtle but profound transformation of Congress's conceptualization of an independent, yet accountable judiciary. This would be the third great manifestation of emerging independence norms in Congress: the gradual establishment of an independent self-governing judicial branch, beginning in 1891, and continuing throughout the twentieth century. Curtailing judicial despotism was one of (albeit one of the secondary) goals of that legislation. Unlike contemporaneous proposals with similar aims—ending life tenure, constraining judicial review, or narrowing subject matter jurisdiction, which sought to promote judicial accountability by weakening the judicial institution—the Evarts Act undertook to hold the courts accountable to themselves by strengthening the judiciary's structural framework.

As the twentieth century arrived, the Evarts Act did little to quiet the criticism of Populists and Progressives, who remained incensed by both the law's delay brought about by deficiencies in judicial practice, procedure, and administration, and by the insolence of office, as reflected in court decisions that flouted the popular will by invalidating legislation regulating business and industry. Although it was the latter that weighed more heavily on the populist and progressive mind, conservative reformers such as Roscoe Pound and William Howard Taft strove to redefine the "problem" as beginning and ending with practice, procedure, and administration.

In 1906, Roscoe Pound delivered an address to the American Bar Association in

225. *Id.* at 10,306.

which he isolated four “[c]auses of [p]opular [d]issatisfaction with the [a]dministration of [j]ustice:”²²⁶ (1) those common to all legal systems; (2) those attributable to the “peculiarities” of the Anglo-American legal system; (3) those relating to the American judiciary’s organization and procedure; and (4) those relating to a transitory “environment” typified by public apathy and ignorance, commercialization of the legal profession, and politicization of the courts, among other things.²²⁷ In Pound’s view, the third cause alone merited attention:

Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; and some inhere in the circumstances of an age of transition and are the penalty we pay for freedom of thought and universal education. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times.²²⁸

By acknowledging “more than the normal amount of dissatisfaction with the present-day administration of justice,”²²⁹ and urging that its causes be heeded, Pound was no apologist for the status quo. At the same time, by characterizing antiquated court organization and procedure as the only legitimate cause of dissatisfaction, Pound simultaneously deflected populist-progressive attacks on the substance of the courts’ decisions as the price we pay for our system of justice, and redirected reform efforts toward empowering the judiciary to solve its own problems through improved self-administration.²³⁰ In that regard, Pound’s critique and the objectives of the Evarts Act shared common ground.

Consistent with Pound’s outlook, in 1921, William Howard Taft—then Chief Justice—proposed that Congress establish an annual Conference of Senior Circuit Judges to address the perception that some federal judges were underutilized (make that “lazy” in the vernacular of court critics). Comprised of the senior-most circuit judges from each federal circuit and chaired by the Chief Justice, the judges of the Conference would assemble in Washington, D.C., once a year, where they would “report as to the condition of the dockets in their circuits . . . and submit recommendations as to the needs thereof and advise as to the improvement or expedition of the administration of justice in the courts.”²³¹ The Conference was directed to make a “comprehensive survey of the conditions of business in the courts . . . and prepare plans and schedules for the assignment and transfer of judges to or from circuits or districts where the state of the docket . . . indicates the need therefore.”²³²

226. Roscoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 46 J. AM. JUDICATURE SOC’Y 55, 55 (August 1962) (originally published in 1906).

227. *Id.* at 56.

228. *Id.* at 66.

229. *Id.* at 56.

230. *See id.* at 55-66.

231. 62 CONG. REC. 200 (1921).

232. *Id.*

Given the seeming innocuousness of Taft's Conference plan, opposition was surprisingly shrill. Some, such as Representative Ewin Davis of Tennessee, felt that the legislation did not go far enough. He sought to include in the legislation a requirement that the judges specify the precise number of days and hours each was in court, because "while many of our Federal judges render faithful, conscientious service and work a sufficient period of time, yet many of them do not,"²³³ and he did not want the latter to "be given an assistant in order that they may loaf still further on the job."²³⁴ Representative Thomas Walsh successfully countered the Davis amendment, explaining that it was not intended that "a judge shall work by a stop watch,"²³⁵ and that "[t]his proposal was made by the Chief Justice of the United States,"²³⁶ for which reason "it would hardly seem necessary for the Congress to lay down any narrow restricted limits within which this conference should operate."²³⁷

More serious was the objection that making court administrators of federal judges was poor policy at best and unconstitutional at worst. Representative Clarence Lea of California objected that the proposal "assigns to the judges legislative and political functions,"²³⁸ which "places the judiciary of the country in a self-seeking position"²³⁹ that could "easily deteriorate into a publicity-seeking propaganda effort."²⁴⁰ Senator John Shields was even more dubious. "The power given the Chief Justice to call conferences of the circuit judges, adopt plans, and ultimately himself assign judges is a dangerous innovation of doubtful constitutionality," he argued.²⁴¹ His constitutional objections were two-fold: first, the Chief Justice has "no right to interfere in any manner or to control the proceedings of [district] courts by moral or other influence,"²⁴² and to do so would "enter [a] wedge with regard to the independence of the judiciary";²⁴³ and second, the "bill confers upon the Chief Justice executive power"²⁴⁴ by granting him "administrative or other powers nonjudicial in their character [which] can not be conferred upon the judges of courts."²⁴⁵

In hearings before the Senate Judiciary Committee, the Chief Justice himself responded to Shields's first objection, by agreeing with the latter's observation that "trial courts ought to be just as independent as the higher courts," but adding that "the mere fact of the ascertainment and determination of how much business is in one district and how much in another is not a limitation of the independence of a judge."²⁴⁶

233. *Id.* at 201.

234. *Id.*

235. *Id.*

236. *Id.* at 202.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. 62 CONG. REC. 4863 (1922).

242. *Id.*

243. *Additional Judges, United States Dist. Courts: Hearings on S.2432, S.2433, and S.2523 Before the Senate Comm. on the Judiciary*, 67 Cong. 14 (1921).

244. 62 CONG. REC. 4863.

245. *Id.* at 4864.

246. *Additional Judges, United States Dist. Courts: Hearings on S.2432, S.2433, and S.2523 Before the Senate Comm. on the Judiciary*, 67th Cong. 14 (1921).

As to the second objection, Senator Albert Cummins inquired of Shields how it was that, under existing law, the Constitution authorized judges to appoint their clerks—a seemingly executive function.²⁴⁷ Shields obligingly opined that “our constitutions, both Federal and State, do not follow that strict division of power. . . .”²⁴⁸ As to the appointment of clerks by federal judges, Shields continued, “[i]t is executive but it is constitutional,” which supplied Cummins with all the support he needed to conclude that the quasi-executive responsibilities imposed on federal judges by the pending legislation would likewise pass constitutional muster.²⁴⁹

Throughout the nineteenth century, as the judiciary expanded westward with the nation, federal trial judges enjoyed the functional independence that came with geographical isolation, the lack of an effective means of appellate review, and the absence of an administrative hierarchy. The prodigious reproductive powers of the pioneers, together with technological improvements in communications and transportation, gradually eliminated the autonomy born of isolation. At the same time, the newly established courts of appeals and the Conference of Senior Circuit Judges circumscribed district court decisionmaking and administrative autonomy, respectively. In other words, in 1891 and again in 1922, Congress, with the cooperation of the courts, elected to trade a measure of the judiciary’s functional independence for a measure of intrajudicial accountability. In the process, a more truly independent, self-regulating judicial branch was born.

Opposition to this emerging notion of a self-regulating judiciary becomes more understandable when one appreciates the significance of the break it made from the past. Given Congress’s perennial preference for proceeding incrementally when it came to issues of court structure and operation, qualms provoked by morphing the judiciary from a scattered array of autonomous judges into an organized, administrative hierarchy are surprising only when viewed through a twenty-first century lens that has come to accept the development as a defining feature of an independent judicial branch, rather than as an independence-constraining imposition on the autonomy of individual judges.

c. The Rules Enabling Act of 1934

The Rules Enabling Act, which authorized the federal courts to devise their own rules of procedure, does not fit as squarely within the judicial independence and accountability story line as other reforms detailed in this section. Passage of the Act was fueled by dissatisfaction with the hodge-podge of procedural rules in the federal system and the perception that the federal judiciary was better able than Congress to supply the time, interest, and expertise needed to promulgate procedural rules intelligently. Establishing a more independent judiciary was not, strictly speaking, a primary goal. Rather, members of Congress took pains to emphasize that they were simply making an efficient delegation of authority from Congress to courts, in which congressional authority to second-guess judicial rulemaking was carefully preserved.

Even so, the Act bears notice for two reasons. First, the Act is another in a series of

247. 62 CONG. REC. 4853.

248. *Id.*

249. *Id.*

congressional efforts beginning in the late nineteenth century to make the judiciary a more self-regulating branch of government, which served to enhance its institutional autonomy and its intrabranch accountability.

Second, although judicial independence may not have occupied a position of prominence in legislative debates on the Act, it was not altogether absent. Thus, for example, one early minority Senate Judiciary Committee Report, which supported the bill in the teeth of a majority vote against it, characterized the legislation as “a belated recognition of the true balance between the legislative and judicial departments; a tardy correction of a situation that would not be tolerated in the reverse.”²⁵⁰ Another early Committee report made the related point that “the trouble with the procedure of the courts is due to the fact that coordination between these two departments of government has been destroyed by exclusive legislative control.”²⁵¹ Characterizing “the true balance” between courts and Congress in procedural rulemaking as one in which the judiciary has a cooperative if not primary role to play, indicates at the very least that Congress adopted the Rules Enabling Act with the perceived need to respect the judiciary’s autonomy in mind.

d. The Administrative Office of United States Courts

In 1937, even as it lobbied to pack the courts, the Roosevelt administration began an active campaign in support of legislation that would transfer financial control of the lower federal courts from the Department of Justice to an Administrative Office of United States Courts under the control of the Chief Justice and the Conference of Senior Circuit Judges (later renamed the Judicial Conference of the United States), which would assume primary responsibility for the administration of the federal judiciary. Over the course of the preceding fifty years, the concept of a self-regulating judicial branch had been born, matured, and was now poised to win acceptance as a cornerstone of judicial independence. In his testimony before the Senate Judiciary Committee in 1938, Attorney General Cummings observed that “[t]he Constitution, of course, contemplates that the judiciary shall be an independent, coordinate branch of the Government, and yet, administratively, it is in large part connected with the Department of Justice. I think that system grew up as Topsy grew up. It ‘just grewed.’”²⁵²

As of 1922, advocates of the proposed Conference of Senior Circuit Judges had defended their proposal against the charge that any delegation of administrative (i.e., “executive”) powers to the judicial branch was a dangerous, if not unconstitutional innovation; now, just fifteen years later, administrative autonomy was being characterized as a defining feature of judicial independence, the longstanding absence of which could not be justified but only explained as a kind of historical accident. A colloquy between the members of the Senate Judiciary Committee and Attorney General Cummings at the Senate hearing on the bill reveals their shared objectives:

Senator O’Mahoney. The administrative office of the judiciary would be, in effect,

250. S. REP. NO. 70-440, pt. 2, at 9 (1928) (minority views).

251. S. REP. NO. 69-1174, at 12 (1926).

252. *Admin. Office of the United States Courts: Hearings on S.3212 Before the Senate Comm. on the Judiciary, 75th Cong., 3d Sess. 8* (1938).

the budget office for the whole judicial system, and would make its report direct to Congress, which thereupon would reject or approve the recommendations?

Attorney General Cummings. Absolutely. They would have to justify their budget the same as the rest of them.

Senator Hatch. It takes it out of the hands of the Justice Department and places it in the hands of the administrative office.

Senator O'Mahoney. This is upon the theory that the courts are an independent branch of the Government, and should be.

Senator Norris. Yes.

Senator O'Mahoney. Subject only to the control of Congress as to the total amount that should be expended.²⁵³

During floor deliberations on the bill, Senator Henry Ashurst echoed the view that "giving of the judiciary the right to arrange their own budget, is a great advance and a great reform, making the judiciary more nearly independent."²⁵⁴ In the House, Representative Walter Chandler concurred with the position of "[s]everal of the Attorneys General of the United States, [who] have considered it 'anomalous and potentially threatening to the independence of the courts' for the chief litigant before them to have control of the financing of the courts. . . ."²⁵⁵

Clearly, then, the Administrative Office Act was advocated to enhance the judiciary's institutional independence; but just as clearly, it was advocated as a means to promote intrajudicial accountability as well. As far as Attorney General Cummings was concerned, the Act was designed so that the courts "may not only be independent, but that there may be a concentration of responsibility, so that if the business of the judiciary gets behind . . . they won't have someone else to blame for it."²⁵⁶ On the House floor, Representative Chandler explained that "[a]nother purpose of the bill is to secure an improved supervision of the work of the Federal courts through an organization under judicial control." In Chandler's view:

This measure places the responsibility for judicial administration where it belongs—with the judiciary—and it will be an urge to the avoidance of the evil of judicial delays that the citizens of the country know that the courts have in their power the prompt and adequate disposition of pending cases.²⁵⁷

The Administrative Office Act is an important part of the independence and accountability story for two reasons. First, it represents another step toward the creation of a more independent judiciary increasingly accountable to itself. Second, it serves as counterpoint to the contemporaneous, seemingly thuggish efforts of the FDR White House to gain control of the Supreme Court by packing it with FDR loyalists. The Roosevelt administration may have been willing to run roughshod over the Supreme Court's customary independence when the survival of the New Deal hung in the balance, but was nonetheless an active participant in the larger and more enduring movement to create an independent, self-regulating, corporate judiciary.

253. *Id.* at 10-11.

254. 84 CONG. REC. 9807 (1939).

255. *Id.* at 9309.

256. *Administrative Office of the United States Courts: Hearings on S. 3212*, at 11.

257. 84 CONG. REC. at 9310.

D. Spike Five: Attacks on the Warren Court, and the Triumph of Customary Independence, Sort of

After devoting considerable attention to each of the previous four spikes of court-directed animus, my abbreviated treatment of this, the fifth and final spike preceding the current round of anticourt sentiment, may strike readers as short shrift. And it is. But for purposes of this Article it will suffice because the developments that transpired during the Warren Court era simply followed the trajectory of customary independence firmly established during the preceding century, and were in that sense quite anticlimactic.

In the 1950s and 1960s, the Warren Court's decisions invalidating racial segregation of public institutions, disallowing prayer in public schools, and affording criminal defendants a range of previously unrecognized procedural protections, provoked sharp criticism in some quarters. The John Birch Society accused Warren of "voting 92 percent in favor of Communists," and "sanction[ing] treason."²⁵⁸ Congress received a torrent of letters calling for Warren's impeachment, a sentiment echoed on billboards across the country.²⁵⁹ Warren was not the only target. Then Congressman Gerald Ford called for the impeachment of Justice William O. Douglas because of Douglas's leftward leanings. In so doing, Ford argued for a reinterpretation of the phrase "impeachable offense" to mean "whatever a majority of the House of Representatives considers [it] to be at a given moment in history. . . ."²⁶⁰ And several members of Congress repeatedly introduced legislation to deprive the Supreme Court of jurisdiction to hear school prayer cases.²⁶¹

These efforts to curb the Warren Court failed miserably. No serious impeachment investigation was undertaken. Norms against resort to the impeachment process as a remedy for unpopular decisions had become so engrained that cries of "impeachment" amounted to little more than expletives intended to display the depths of the speaker's dissatisfaction. And uninterrupted expansion of federal court jurisdiction spanning the previous century, coupled with the persistent failure of states' rights advocates to recapture federal jurisdiction after it had been ceded, revealed a high degree of congressional respect for and reliance on the federal courts that a few unpopular decisions simply could not erode. *McCardle* could still be cited for the proposition that Congress possessed the power to strip the federal courts of jurisdiction to hear unpopular cases, but it stood alone like the proverbial cheese, increasingly aged and malodorous.

As with previous spikes of disenchantment with the courts, contemporaneous and subsequent developments reconfirm Congress's continuing commitment to an independent judiciary in which accountability was best promoted via intrajudicial mechanisms. In 1966, for example, Congress established the Federal Judicial Center ("FJC"), to serve three purposes: to conduct research on the operation of the courts; to provide judicial education; and to study ways in which improved data processing might

258. BERNARD SCHWARTZ, *SUPER CHIEF* 280 (1983).

259. *Id.* at 280-81.

260. 116 CONG. REC. 11,913 (1970), reprinted in VAN TASSEL & FINKELMAN, *supra* note 42, at 59.

261. Paul Brest, *Congress as Constitutional Decisionmaker and Its Power to Counter Judicial Doctrine*, 21 GA. L. REV. 57, 79 (1986).

improve judicial administration.²⁶² As the movement toward promoting intrajudicial accountability through self-administration matured, the judiciary's need for research support became increasingly obvious. Russell Wheeler thus describes the creation of the Federal Judicial Center as the next step in the longstanding "contest for control over how courts should be structured and operated," a contest in which judicial self-governance again emerged victorious.²⁶³

A little over a decade later, Congress enacted the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, which established an administrative structure within the judicial branch, enabling judges to discipline themselves.²⁶⁴ Some federal judges objected that the Act was antithetical to judicial independence, because Congress subjected individual judges to an unjustifiable form of control by their brethren.²⁶⁵ When viewed in the larger context of the movement toward the creation of a self-regulating judicial branch, however, the Act is better understood as a congressional effort to promote judicial accountability by transferring disciplinary power to the courts, thereby enhancing the judiciary's independence as an institution and reducing the need for congressional intrusions via the impeachment process.²⁶⁶

All of this may imply that critics of the Warren Court suffered a defeat at the hands of judicial independence champions, who rebuffed petitions to impeach unpopular judges, killed bills to strip the courts of jurisdiction, and resumed their victorious crusade for the creation of an independent judicial branch. But that would be inaccurate. The perceived excesses of the Warren Court were among the campaign issues that swept Richard Nixon into office in 1968.²⁶⁷ The retirement of Earl Warren in 1969 and the resignation of Justice Abe Fortas that same year enabled Nixon to appoint Chief Justice Warren Burger and Justice Harry Blackmun, thereby closing the book on the Warren Court and the attendant period of criticism. In short, while the opportunities to hold judges accountable for their decisions by means of political branch control of court size, jurisdiction, and impeachment had gradually diminished as respect for an independent judiciary took hold, the power to control courts via the appointments process proceeded along a fundamentally different track, a track that merits separate attention.

262. 28 U.S.C. §§ 620, 623 (2000); see also Russel Wheeler, *Empirical Research and the Politics of Judicial Administration: Creating the Federal Judicial Center*, 51 LAW & CONTEMP. PROBS. 31, 41-43 (1988).

263. *Id.* at 33.

264. 28 U.S.C. § 372 (2000 & Supp. 2002).

265. See Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 699-700 (1980).

266. For a definitive history of the Act and the reasons for its passage, see Stephen Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283 (1982). See also THE NATIONAL COMMISSION REPORT ON JUDICIAL DISCIPLINE & REMOVAL 14 (1993) ("The Commission believes that a power in the judiciary to deal with certain kinds of misconduct furthers both the smooth functioning of the judicial branch and the broad goal of judicial independence.").

267. JACK HARRISON POLLACK, *EARL WARREN: THE JUDGE WHO CHANGED AMERICA* 289 (1979) (discussing "Nixon's campaign fulminations over the need to replace 'Warrenite' justices with 'law-and-order' appointees").

III. CUSTOMARY INDEPENDENCE AND JUDICIAL APPOINTMENTS

The process by which judges are appointed can have an obvious impact on judicial independence and accountability. If we insist that nominees sign blood oaths that they will decide particular cases in particular ways as a condition precedent to appointment, their independence will be undermined. By the same token, if we hold nominees' feet to the fire and extract assurances that they will not deviate from the majoritarian mainstream, it provides a measure of prospective accountability by increasing the likelihood that the nominees are and will remain acceptable to the public. In the last fifteen years, the relationship between the appointments process and judicial independence and accountability has been widely publicized. Presidents and senators are routinely accused of undermining judicial nominees' independence by subjecting them to ideological "litmus tests," while the presidents and senators just as routinely reply that inquiring into nominees' "judicial philosophy" is an important means to ensure their present and future acceptability.

At the beginning of this Article, I listed a variety of means by which the President or Congress could influence judicial decisionmaking, and made the impressionistic observation that among them, changing the makeup of the Court via new judicial appointments alone seemed politically viable. The bulk of this Article has been devoted to chronicling the emergence of judicial independence norms in Congress that gave rise to a custom of restraint that impedes political branch resort to other mechanisms for holding judges accountable for their decisions, such as impeachment, or adjustments to court structure, size, administration, and jurisdiction. Yet, when it comes to judicial appointments, this custom of restraint seems altogether lacking. Why?

In attempting to divine congressional norms or customs, I have looked for patterns of congressional decisionmaking behavior over time, aided by contemporaneous explanations from members of Congress for the choices they have made. In the context of impeachment and conventional legislation, a culture of decisionmaking restraint is fostered by the need for bicameral agreement before a law curbing the courts is passed or before a judge is impeached and removed. In the Senate, cloture rules often prevent controversial legislation from becoming law unless it receives the sixty percent majority support needed to overcome a filibuster,²⁶⁸ while the Constitution conditions removal by impeachment upon the agreement of a two-thirds majority. Thus, congressional decisions to diminish the courts and remove judges must receive supermajority congressional support before they become "precedent" adverse to customary independence, while decisions *not* to curb the courts add to the culture of customary independence, notwithstanding the fact that such decisions may have been supported only by a congressional minority.

In the appointments context, on the other hand, only the Senate must act. Moreover, it is the "restrained" alternative of approving the President's nominee that must always have at least majority Senate support. Ideologically motivated rejections aimed at manipulating judicial decisionmaking, in contrast, can be accomplished by a Senate

268. COMMITTEE ON RULES AND ADMINISTRATION, 103RD CONG., Senate Manual Containing the Standing Rules, Orders, Laws, and Regulations Affecting the Business of the United States Senate 22 (1993).

minority wielding a filibuster, or by a bare majority of the Senate Judiciary Committee that declines to report the nominee for floor action.

Over and above differences in the way votes are taken, the appointments process involves an interbranch dynamic that is quite different from that brought to bear in the ordinary course of federal court governance. To use a dreaded sports metaphor, federal court governance ordinarily features two key “players”: Congress as regulator and the courts as regulatee, with the President relegated to standing on the sidelines and occasionally making a proposal or grabbing for his veto power, as if a clipboard. Over time, a variety of norms have emerged to mediate the relationship between courts and Congress, including a norm of congressional respect for the judiciary’s autonomy that I have characterized as customary independence.

Unlike the powers to impeach, to establish inferior courts, and to modify Supreme Court jurisdiction, however, the power to appoint federal judges is not delegated to Congress but is shared between the President, who nominates, and the Senate, which consents. The net effect of this power-sharing arrangement is to invite a perennial contest between the political branches, in which the nominee is not so much another player, as the ball. Moreover, it is not only would-be judges but executive branch nominees as well who are routinely cast in the role of political football in the appointments game,²⁶⁹ which may help explain why otherwise pervasive judicial independence norms have found no comparable place in the appointments context, and why partisan political considerations have dominated the appointments process from the earliest days of the Union.

A. Appointment of Supreme Court Justices

During the first century of the Republic, partisan political considerations influenced Supreme Court confirmations in several ways. First, the Senate rejected several nominees in retaliation for their views on discrete political issues that bore no necessary relationship to the nominees’ prospective performance on the bench. Thus, for example, George Washington’s 1795 nomination of John Rutledge to be Chief Justice was rejected by the Senate in the wake of a speech Rutledge made denouncing the Jay Treaty, which offended Senate Federalists.²⁷⁰ In 1811, the Senate rejected

269. In a related vein, in his recent study of the appointments power, Professor Michael Gerhardt argues that to understand the political process at work in the nomination and confirmation of judges, judicial appointments would not be studied in isolation, but in the larger context of the appointments process as a whole. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS* 44-69 (2000). A similar point would be made with respect to impeachment, which is likewise a political process that applies to civil officers in the second and third branches, if not the first as well; and yet, because the only officials removed from office via impeachment in over 220 years have been judges, it is understandable that a different dynamic would have emerged there, one in which Congress developed particular sensitivity for the impact of impeachment on the independence of judges and the judiciary.

270. *Id.* at 52; see also SENATOR PAUL SIMON, *ADVICE AND CONSENT: CLARENCE THOMAS, ROBERT BORK, AND THE INTRIGUING HISTORY OF THE SUPREME COURT’S NOMINATION BATTLES 166-68* (1992). In an attempt to link Rutledge’s position on the Jay Treaty to his qualifications for Chief Justice, some went so far as to suggest that his views were so extreme as to be

James Madison's nomination of Alexander Wolcott to the Supreme Court, in part because of Wolcott's support for the unpopular Embargo and Non-Intercourse Acts when he was U.S. collector of customs in Connecticut.²⁷¹ In 1835, the Senate postponed and thereby killed the initial Supreme Court nomination of Roger Taney, who as Acting Treasury Secretary had angered Senate Whigs by implementing President Jackson's antibank policies. (Taney was renominated and confirmed the next session.)²⁷²

Second, at various times during the nineteenth century, the Senate rejected Supreme Court nominees as a display of political opposition, less to the would-be judge than to the President who named him. In 1844, for instance, the Senate rejected John Spencer, Reuben Walworth, and Edward King, all nominees of the uniquely unpopular President John Tyler, who had alienated Senate Democrats by bolting their party for the Whigs, with whom Tyler had likewise parted company (and likewise alienated) after becoming an unelected President upon the death of William Henry Harrison.²⁷³ And in 1866, Henry Stanbery's nomination was shelved by a radical Republican Congress that did its best to make life miserable for Andrew Johnson, the Democratic President who had nominated Stanbery.²⁷⁴

Third, and on a related front, there were several episodes in which the Senate killed nominations made late in a president's term, so as to preserve the nomination for a more politically palatable presidential successor. John Quincy Adams's nomination of John Crittenden in 1828,²⁷⁵ President Millard Fillmore's nominations of Edward Bradford, William Micou, and George Badger in 1852 and 1853,²⁷⁶ and James Buchanan's nomination of Jeremiah Black in 1861²⁷⁷ were rejected or tabled all or in part because a new president would soon take office.

Fourth, in still other examples from the 1800s, rejection was predicated upon the President's failure to consult adequately with key senators before making a nomination. In 1845, George Woodward—who was nominated by James Polk without first consulting Senator Simon Cameron who had defeated Woodward in a controversial U.S. Senate race—was rejected following Cameron's successful campaign against the nomination.²⁷⁸ In 1870, the Senate rejected Ulysses S. Grant's nomination of Ebenezer Hoar, in a variation on this same theme (which might likewise qualify as a rejection based upon the nominee's political views). Hoar, as Grant's

indicative of mental illness. *Id.*

271. HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT* 41 (3d ed. 1992).

272. *Id.* at 100; SIMON, *supra* note 270, at 174-75.

273. See JOSEPH P. HARRIS, *THE ADVICE AND CONSENT OF THE SENATE: A STUDY OF THE CONFIRMATION OF APPOINTMENTS BY THE UNITED STATES SENATE* 66-67 (1953); see also ABRAHAM, *supra* note 271, at 106; SIMON, *supra* note 270, at 182-83.

274. ABRAHAM, *supra* note 271, at 124-25. For a discussion of whether Congress was intent on "unpacking" the Supreme Court when it reduced the size of the Court and thereby effectively killed Stanbery's appointment, see *supra* notes 100-03 and accompanying text.

275. ABRAHAM, *supra* note 271, at 39-40.

276. *Id.* at 40; see also HARRIS, *supra* note 273, at 70-71; SIMON, *supra* note 270, at 186-87.

277. SIMON, *supra* note 270, at 192-94 (noting that rejection was likewise attributable to the nominee's views on abolition and to the withdrawal of secessionist Democrats).

278. GERHARDT, *supra* note 269, at 146.

Attorney General, had persuaded the President to fill judgeships created by the 1869 Act with nominees that Hoar—rather than home-state senators—recommended, which provoked Senate ire and led to Hoar's defeat.²⁷⁹ And in 1893 and 1894, New York Senator David Hill led successful campaigns to reject William Hornblower and Wheeler Peckham, whom President Grover Cleveland had nominated; the nominees were named to fill the "New York vacancy" on the Court, and Hill regarded it as a matter of Senatorial courtesy that Cleveland name someone Hill found acceptable, which Cleveland had failed to do.²⁸⁰

To say that the appointments process has always been partisan and political is not to imply that the partisan political considerations that influence the appointments process have remained static over time. The foregoing review of rejected Supreme Court nominees reveals that throughout most of the nineteenth century, such issues as the nominee's allegiance to the Senate's pet political causes, the President's popularity within the Senate, his respect for the Senate's advisory role, and the timing of a vacancy within a presidential term, dominated political explanations for Senate action. Beginning in the late nineteenth century, however, there began a subtle yet detectable shift toward rejecting nominees who appeared likely to make decisions as judges that would be objectionable to the Senate and its constituency.

In 1881, President Rutherford B. Hayes nominated former U.S. Senator Stanley Matthews to the Supreme Court. Matthews's nomination was attacked for various reasons, including his enforcement of the Fugitive Slave Act as a U.S. Attorney in the 1850s, and his lack of knowledge and judgment as a Senator.²⁸¹ But the "most telling accusation" against him was that he had been closely allied with corporate interests, including the railroads, and had been working indirectly for Jay Gould at the time of his nomination.²⁸² As one commentator reports:

The Senate Judiciary Committee received bitter protests against "Mr. Corporation Standby" Matthews from eight hundred firms represented in the New York Board of Trade and Transportation, from thirty thousand farmers of the Pennsylvania State Grange, and from the membership of the National Anti-Monopoly League, all depicting grave dangers to the country that would follow Justice Matthews' elevation to the Supreme Court.²⁸³

Henry Abraham adds that "[t]he Senate exploded in anger, its Committee on the Judiciary flatly refusing to report the nomination out for floor action. It was perhaps the first clear instance of concerted, patent opposition to a nominee on the grounds of economic affiliation."²⁸⁴ Although Matthews was later renominated by James Garfield and confirmed, his was the first ideologically motivated rejection.

If we bracket out the Senate's rejections of Hornblower and Peckham in 1893 and 1894, as products of an essentially private power struggle between President Grover

279. ABRAHAM, *supra* note 271, at 127.

280. SIMON, *supra* note 2670, at 219.

281. Harold M. Helfman, *The Contested Confirmation of Stanley Matthews to the United States Supreme Court*, 8 BULL. HIST. PHIL. SOC'Y OHIO 155, 160 (1950).

282. *Id.* at 162.

283. *Id.* at 162-63 (footnotes omitted).

284. ABRAHAM, *supra* note 271, at 136.

Cleveland and Senator David Hill,²⁸⁵ the next confirmation battle of consequence after Matthews, was that of Louis Brandeis. Like Matthews, the core of the opposition to the Brandeis nomination was obfuscated by a range of proffered justifications, some more defensible than others.²⁸⁶ Some accused Brandeis of being dishonest and untrustworthy, which may well have been anti-Semitic code, or an attack upon Brandeis's record of representing both corporate clients and progressive causes.²⁸⁷ Joseph Harris concludes, however, that "[t]he opposition to Brandeis was due chiefly to the fact that his opponents regarded him as a dangerous radical . . . [who was] unfit to sit on the Supreme Court, which they regarded as the bulwark of conservatism."²⁸⁸ Brandeis was confirmed, but the shift toward greater emphasis on ideology in confirmation proceedings that began with Matthews continued unabated.

After the Brandeis confirmation, the next appointments conflagration enveloped Circuit Court Judge John J. Parker, whom Herbert Hoover nominated to the Supreme Court in 1930. There, the Senate reprised its role as spoiler of a nomination in which the nominee's past behavior called into question the political acceptability of the judicial decisions he would make in the future. As with Matthews and Brandeis, opposition to the Parker nomination was cluttered with ancillary explanations; Senator Henry Ashurst, for example, thought the nominee unfit because he had "neither great character nor great courage nor great learning."²⁸⁹ The focus, however, was indisputably on ideology. The NAACP opposed Parker's appointment in light of racist remarks he had made as a Republican gubernatorial candidate ten years earlier, that in the NAACP's view, displayed "open, shameless flouting of the [F]ourteenth and [F]ifteenth amendments to the Federal Constitution."²⁹⁰ Organized labor opposed Parker's nomination on the basis of an injunction he had issued in a case as a district judge, upholding a so-called "yellow dog" antiunion contract.²⁹¹ Newspaper editorials complained that "[t]he presence of Judge Parker on the bench would increase, rather than lessen, the top heavily conservative bias of the Supreme Court."²⁹² And Senator George Norris defended the relevance of Senate inquiries into such matters:

So we are down to this one thing. When we are passing on a judge, therefore, we not only ought to know whether he is a good lawyer, not only whether he is honest—and I admit that this nominee possesses both of those qualifications—but we ought to know how he approaches these great questions of human liberty.²⁹³

Parker was rejected on a vote of 41 to 39, in what might fairly be characterized as a turning point in the development of customary independence. Leading the defense of

285. See SIMON, *supra* note 270, at 219; *supra* text accompanying note 280.

286. HARRIS, *supra* note 273, at 105-06.

287. *Id.* at 100, 105, 113.

288. *Id.* at 113.

289. 72 CONG. REC. 7950 (1970).

290. *Confirmation of Hon. John J. Parker to be an Associate Justice of the Supreme Court of the United States: Hearing Before the Subcomm. of the Senate Comm. on the Judiciary*, 71st Cong. 75 (1930) (statement of Walter White, Secretary, NAACP).

291. ABRAHAM, *supra* note 271, at 42; HARRIS, *supra* note 273, at 128.

292. SIMON, *supra* note 270, at 248-49.

293. 72 CONG. REC. 8192 (1930).

Parker had been Senator Simeon Fess, who argued for confirmation on the grounds that ideological attacks against Parker and the conservative Supreme Court were another manifestation of “legislative proposals urged to curb the power of the Supreme Court,” that had been advanced from the earliest days of the nation.²⁹⁴ Previous court-curbing proposals “[a]ll failed of favorable action,” Fess noted, and so too should the effort to reject the Parker nomination, which he regarded as a direct assault on the independence of the Court.²⁹⁵

Senator William Borah, in contrast, was among the leading opponents of the Parker nomination. Borah, recall, was a champion of judicial independence earlier in his career, when he successfully led the campaign to retain the judges of the Commerce Court after the court itself was dissolved. For Borah, however, the confirmation process was governed by a body of congressional precedent entirely distinct from that applicable to other forms of court curbing. In Borah’s view, there was ample precedent for the Senate rejecting nominees on the grounds that they had previously taken action contrary to the Constitution, and that was the precedent of relevance here.²⁹⁶ In this regard, the Parker nomination marks a critical point of departure, in which the judicial independence norms that had come to pervade court governance generally were deemed inapplicable to Senate confirmation proceedings.

It would be almost forty years until the Senate’s next series of rejections, and they picked up where the Matthews, Brandeis, and Parker nominations left off. Earl Warren indicated his intention to resign once his replacement was appointed; Lyndon Johnson nominated Justice Abe Fortas to take Warren’s slot as Chief Justice, and Judge Homer Thornberry to fill the seat Fortas would vacate upon becoming Chief.²⁹⁷ But Senate resistance was intense and Johnson withdrew the nomination in the wake of a filibuster.²⁹⁸ There are several possible explanations for the Senate’s reaction to the Fortas nomination: for one, Johnson was a weakened Democratic President in the final year of his Presidency, with a possible Republican successor; also, as a sitting Justice, Fortas continued to serve as a political advisor to Johnson, which some regarded as improper; in addition, Fortas was accused of accepting exorbitant speaking fees.²⁹⁹

Overshadowing these explanations in the minds of contemporary scholars, however, is that Fortas became a lightning rod for a backlash against the Warren Court. Fortas’s withdrawal followed hearings before the Senate Judiciary Committee in which the nominee was questioned at length on decisions he had made in cases concerning the constitutional rights of criminal defendants. Professor Henry Abraham attributes the defeat of the Fortas nomination to “accumulated hostility to the Warren Court.”³⁰⁰ Professor Michael Gerhardt reaches a similar conclusion, noting that Fortas’s withdrawal was “compelled by some Republican and southern Democratic senators in retaliation against the liberalism of the Warren Court.”³⁰¹ In sum, although the explanation for the Senate’s objections to Fortas is clouded by a mix of issues, the

294. *Id.* at 7950.

295. *Id.* at 7949-50.

296. *Id.* at 7951.

297. ABRAHAM, *supra* note 271, at 290.

298. *Id.* at 291.

299. *Id.* at 287-91; GERHARDT, *supra* note 269, at 126-27.

300. ABRAHAM, *supra* note 271, at 291.

301. GERHARDT, *supra* note 269, at 85.

movement toward greater emphasis on the nominee's ideology, begun with Matthews and continued with Brandeis and Parker, had gained momentum with Fortas.

After President Richard Nixon took office, the Supreme Court nominee's ideology remained on the Senate's front burner in its rejections of Fourth Circuit Judge Clement Haynsworth and Florida Judge G. Harrold Carswell in 1968 and 1969.³⁰² There is ample evidence for the unsurprising proposition that Presidents have tended to pick Supreme Court nominees whose views on key issues appear compatible with their own.³⁰³ President Nixon went further, however, by making a campaign pledge to dismantle the Warren Court by appointing "strict constructionists" who would further his "law and order" agenda.³⁰⁴ This served to heighten the political profile of his nominees' judicial philosophy and political ideology.³⁰⁵ Haynsworth's confirmation, like that of Fortas's, presented a mixed bag of issues: conflict of interest allegations surfaced alongside objections to the nominee's ideology in light of his earlier stands on civil rights and labor, and Haynsworth was rejected 55-45.³⁰⁶

Nixon was convinced that the Senate's rejection of Haynsworth had been driven by an "anti-Southern, anti-conservative, and anti-[strict] constructionist' prejudice,"³⁰⁷ and as if to spite the Senate, nominated another southern conservative, G. Harrold Carswell. At bottom, Carswell was simply unqualified to serve on the Supreme Court,³⁰⁸ which, like the ethical problems that confronted Haynsworth and Fortas, provided a nonpartisan justification for rejection. Even so, Carswell had left a very long and public paper trail revealing him to be a white supremacist, which contributed to his Senate downfall.³⁰⁹ Although a dispassionate observer might conclude that Senate rejection of a sub-par racist added little to the snowballing relevance of the nominee's political ideology in Senate confirmation proceedings, Nixon refused to let the episode be so dismissed. In a speech to the Nation, Nixon criticized the "vicious assaults" on Haynsworth and Carswell, and concluded that, "when all the hypocrisy is stripped away, the real issue was their philosophy of strict construction of the Constitution—a philosophy that I share."³¹⁰

Almost twenty years later, Ronald Reagan went out of his way to emphasize Robert Bork's conservative ideology as the justification for his nomination to the Supreme

302. SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 198-99* (1997).

303. See generally, HENRY J. ABRAHAM, *JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 65-68* (2d ed. 1985).

304. See GOLDMAN, *supra* note 302, at 198.

305. *Id.*

306. See ABRAHAM, *supra* note 271, at 15.

307. *Id.*

308. Yale Law School Dean Louis Pollak characterized Carswell's credentials as "more slender" than "any Supreme Court nominee put forth this century," while conservative Professor William Van Alstyne declared that there was "nothing in the quality of the nominee's work to warrant any expectation whatever that he could serve with distinction on the Supreme Court. . . ." *Id.* at 17. That prompted Roman Hruska, one of Carswell's staunchest Senate supporters, to offer the timeless defense, that "even if he is mediocre," the mediocre of the world "are entitled to a little representation" because "we can't have all Brandeises, Cardozos, and Frankfurters and stuff like that there." *Id.* at 16-17.

309. ABRAHAM, *supra* note 271, at 16; SIMON, *supra* note 270, at 291-92.

310. ABRAHAM, *supra* note 271, at 18.

Court in 1987, and a confirmation battle ensued over whether he was too conservative to be acceptable.³¹¹ The Bork confirmation fight may fairly be characterized as a watershed, not because it signaled a major departure from past practice, but because it served as the culmination of developments that were very nearly a century in the making. Interest groups had come to play an increasingly significant role in the Senate's rejections of Parker, Haynsworth, and Carswell, a role that in Bork's case would arguably be decisive in turning the tide of public opinion against the nominee.³¹² Senate and public interest in the appointments process had likewise increased over time, as confirmation hearings and the nominee's participation in those hearings gradually became an expected part of the process, leading to televised gavel-to-gavel coverage of Bork's testimony before the Senate Judiciary Committee.³¹³ Finally, the nominee's ideology and its relevance to his acceptability as a justice had become a more prominent issue over the course of the four previous Senate rejections of Supreme Court nominees, and was all the more salient in Bork's case because his confirmation proceedings were uncluttered by other issues.

As with the Parker nomination, Bork defenders argued that conditioning a Supreme Court nominee's confirmation on whether his or her future decisions would be ideologically compatible with the political views of the Senate majority, compromised judicial independence. Senator Orrin Hatch alluded to "the precedents of the Senate" and bemoaned those Supreme Court nominations that had been "chopped off by a dull political axe."³¹⁴ In those instances, Hatch opined, "it was the Court that was left bleeding. It was the Court that suffered a loss of independence, integrity and institutional individuality."³¹⁵ Clearly, however, Hatch was fighting an uphill battle, given the adverse precedent that he himself was obliged to concede, and Bork's nomination was defeated by a vote of 58 to 42, the largest vote against a Supreme Court nominee in history.

*B. Appointment of Lower Court Judges*³¹⁶

With the exception of Franklin Roosevelt, who saw the appointment of economic liberals to the lower courts as indispensable to the establishment and success of the New Deal,³¹⁷ the ideology of lower court nominees has not historically been a high priority of either the Executive or the Senate. Rarely attracting public notice, selection in the lower courts has been driven mostly by patronage and partisan politics. This began to change, at first subtly during the Nixon administration, and then more dramatically after the Senate's rejection of Robert Bork's nomination to the United States Supreme Court in 1987.

The modern emphasis on ideology in lower court appointments began in the twilight of the Warren Court, with Richard Nixon's campaign pledge to appoint only "strict

311. ROBERT KATZMANN, *COURTS & CONGRESS* 28 (1997).

312. *Id.* at 34-35.

313. *See id.* at 18-19.

314. 133 CONG. REC. 21, 697 (1987).

315. *Id.*

316. Special thanks to Dave Giampetroni for his help in drafting this subsection on the appointment of lower court judges.

317. GOLDMAN, *supra* note 302, at 30-38.

constructionists” to the federal bench. As Sheldon Goldman has observed, however, it appears that Nixon’s interest in the ideology of lower court nominees “was more a potent campaign issue than a high-priority agenda item for judicial selection.”³¹⁸ And while Jimmy Carter’s efforts to transform the judiciary brought to the lower courts unprecedented Senate and public scrutiny, his program to diversify the federal bench through affirmative action was, as a means to achieve ideological results, decidedly indirect.

It was not until candidate, and then President, Ronald Reagan openly declared his determination to turn back liberal judicial activism by appointing ideological conservatives who would practice “judicial restraint,” that ideology as a judicial selection criterion began its distillation down to the pure and volatile form on display in the Bork hearings. From that point forward, scrutiny of lower court nominees began to intensify. G. Calvin MacKenzie notes that the fallout from the Bork rejection, “quickly seeped down to the lower courts . . . Areas once regarded as inappropriate for Senate scrutiny—especially nominees’ views on specific issues—became the central topics at many confirmation hearings.”³¹⁹ Indeed, one of Bill Clinton’s district court nominees was questioned as to how she had voted, as a private citizen, on all of the 160 initiatives on the California ballot in the preceding decade.³²⁰ Senator Orrin Hatch later confirmed that he and others in the Senate were doing rigorous background checks of President Clinton’s nominees, to weed out “liberal activists.”³²¹ G. Calvin MacKenzie thus rightly describes judicial nominations today as “one of the principal ideological battlegrounds of American politics.”³²²

Perhaps not coincidentally, greater focus on the ideology of lower court nominees has been accompanied by changes in the traditional interactions between the President and the Senate in the appointments process. There has been a decline in the long-standing custom of executive deference to the recommendations of home-state senators,³²³ as well as an erosion, since the Reagan administration, of customary cooperation between same-state Senators of different parties.³²⁴ By the late 1990s, the use of tactical maneuvers such as the hold, the filibuster, and plain inaction in the appointments arena, were being used more aggressively than ever before.³²⁵ And the

318. *Id.* at 208.

319. G. Calvin MacKenzie, *Starting Over: The Presidential Appointment Process in 1997*, The Century Foundation (1998) at http://tcf.org/Task_Force/Nominations/MacKenzie/Starting_Over.html.

320. *Id.*

321. David G. Savage, *Rehnquist Chides GOP for Judicial Stalling*, L.A. TIMES, Jan. 1, 1998, at A1.

322. MacKenzie, *supra* note 319.

323. For example, Lyndon Johnson curtly dismissed a memorandum of recommendation for a lower court vacancy submitted by a member of his staff with the notation: “Senators make the choice.” GOLDMAN, *supra* note 302, at 173 (quoting a notation on memo from Moyers to Johnson, Ex FG 530/ST 33-ST 39, WHCF (Aug. 9, 1965)). In contrast, the Reagan administration instituted the practice of requesting home-state Republican senators to submit a list of from three to five acceptable candidates, sending the unmistakable message that, while the Senator might make the list, the Executive makes the choice. *Id.*

324. *See, e.g.*, C.K. ROWLAND & ROBERT A. CARP, POLITICS AND JUDGMENT IN THE FEDERAL DISTRICT COURTS 101 (1996); *see also*, MacKenzie, *supra* note 319.

325. MacKenzie, *supra* note 319.

blue slip, an obscure but venerated custom originally intended to institutionalize senatorial courtesy, has evolved "into an offensive, not a defensive, weapon" to be used against the President.³²⁶ One commentator has characterized these developments as "the disintegration of the confirmation process," and notes the "unbelievably rancorous confirmation battles that marked the Clinton years, and which are now occurring in the Bush administration. . . ."³²⁷ One result has of course been delay. The delay in lower court appointments between referral and confirmation increased from an average of 25.4 days during the Nixon administration, to an average of 73 days by 1997,³²⁸ when Chief Justice Rehnquist delivered a rare rebuke of both the Senate and the President.³²⁹

In sum, the gradual acceptance of customary independence and the norms of congressional restraint that now dominate the relationship between the first and third branches in most areas of court governance has coincided with a different trend in the appointments arena, toward increasingly transparent efforts by the U.S. Senate to reject judicial nominees whose political ideology is perceived to be too extreme. The ascendance of interbranch battles over the political ideology of Supreme Court nominees was inaugurated with the Senate rejection of Stanley Matthews, who fell victim to populist sentiments on the eve of the populist, progressive, and New Deal eras that would be the first of the great anticourt movements to yield no significant external curbs on the federal judiciary.

Coincidence? I do not think so. The rise of customary judicial independence has been accompanied by a corresponding decline in extrajudicial accountability that has resulted from the gradual rejection of various means of congressional control over judicial decisionmaking: impeachment, court packing and unpacking, and jurisdictional manipulation. The appointments process, by virtue of its unique interbranch dynamic, and the relative ease with which ideologically motivated rejections can be accomplished, has evolved separately, unencumbered by the same judicial independence norms, and has thus become the last best hope for legislators seeking to preserve some measure of extrajudicial accountability.

CONCLUSION

Returning to the theme of the Symposium for which this Article was prepared, if Congress is to reclaim ground lost to the Supreme Court in recent decisions transferring power from the national legislature to the states, it will be via the appointments process. Alternate routes for controlling the courts have been systematically closed. To be sure, there will continue to be isolated calls for impeachment of unpopular judges, but there is no reason to believe they will be more fruitful than in the past. Congress may enjoy somewhat greater success when tinkering

326. Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218, 220, 225 (2002).

327. *Id.* at 218; see also Brannon P. Denning, *Reforming the New Confirmation Process: Replacing "Despise and Resent" with "Advice and Consent"*, 53 ADMIN. L. REV. 1, 11 (2001).

328. Roger E. Hartley & Lisa M. Holmes, *Increasing Senate Scrutiny of Lower Federal Court Nominees*, 80 JUDICATURE 274, 278 (1997).

329. See WILLIAM H. REHNQUIST, *The 1997 Year-End Report of the Federal Judiciary*, The Third Branch (Admin. Office of the United States Courts, Washington D.C.), Jan. 1998 at 1, 3.

with jurisdiction, as it did with habeas corpus reform, immigration reform, and the Prison Litigation Reform Act,³³⁰ but the extent to which those enactments limited federal jurisdiction was sufficiently modest that they could be (and were) peddled as acceptable means to reduce frivolous litigation and conserve judicial resources at the expense of marginalized constituencies (criminals and immigrants), rather than as verboten jurisdiction-strippers.³³¹ And members of Congress may likewise seek to disguise court-packing motives as simple judicial improvements, as has been done with bills to split the Ninth Circuit introduced by legislators keen on manipulating the circuit's decisionmaking majority; but again, their true motives must remain disguised, lest they run afoul of judicial independence norms and trigger a backlash.³³²

Openly tweaking the course of judicial decisionmaking by means of the appointments process, on the other hand, has become increasingly viable. It is safe to anticipate that Senate defenders of the President's nominees will continue to make the case that when it comes to appointments, the President's prerogatives ought to be respected, that partisan politics ought not to influence Senate confirmations, and that a nominee's ideology ought to be irrelevant. It is equally safe to anticipate, however, that such arguments will go unheeded.

Rather than resist these developments as unwelcome, the better course may be to embrace and accommodate them as an established part of our constitutional culture. Struggling to breathe political life into moribund mechanisms for control of the courts is both a waste of time and a threat to an independent judiciary, whose role in American government we, through our elected representatives, have come to understand and appreciate. By the same token, struggling to depoliticize judicial appointments would be equally futile, and likewise undesirable insofar as it would remove the one remaining means to promote external decisionmaking accountability (albeit prospectively) in the federal system.

330. See Susan N. Herman, *Slashing and Burning Prisoners' Rights: Congress and the Supreme Court in Dialogue*, 77 OR. L. REV. 1229, 1230 n.7 (1998).

331. See *id.* at 1229-30.

332. Geyh, *supra* note *, at 184.