ARTICLE

Legislative sanctions and the strategic environment of judicial review

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The independence of the judiciary cannot be assumed. The creation and maintenance of an independent judiciary are difficult political problems, chiefly because independent social and political institutions necessarily make life more difficult for those holding political power. Powerful political actors constantly face the temptation to subvert judicial independence and transform the court system into a more malleable political instrument serving their own immediate needs. Such temptations may be particularly great when the courts become obstructive and the means for overpowering the courts seem readily at hand.

The constitutional response to this difficult problem is to attempt to insulate the courts from political pressure. The U.S. Constitution employs various devices to this end, including giving federal judges lifetime appointments and prohibiting the reduction of their salaries. Of course, there are limits as to how independent the courts can or should be. It must be possible to hold even independent judges accountable for their actions, through impeachment, for example. Given the political power entrusted to judges, it would seem prudent to ensure that they are at least somewhat responsive politically, a goal typically achieved through a political appointment process. Nonetheless, protecting a judge's autonomy is of paramount importance.

In a variety of other ways, the formal protections of the constitutional text are only the first step toward securing effective judicial independence. There remain myriad loopholes that determined elected officials might use to punish the judiciary for its actions and reduce its independence.[1] The American federal judiciary, therefore, may be better understood as "interdependent," rather than truly independent, and the degree of independence that federal judges enjoy is, in fact, a function of the cooperation of elected officials and the degree of judicial independence they are willing to tolerate. Judicial independence is not "grounded so firmly in the Constitution that it cannot be threatened by politicians or interest groups."[2]

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[1] J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721 (1994).

[2] John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 374 (1999).

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The power of judicial review is particularly interesting in this context. Judicial interpretation of statutes can be reversed with relative ease by legislative action, and, unsurprisingly, "separation-of-powers games" have primarily focused on the realm of statutory interpretation.[3] It is in the context of statutory interpretation that the judiciary appears most subject to external constraints and, therefore, might be the most strategic in its own actions. However, "forcing the Court into statutory mode underestimates the Court's freedom to act."[4] Congress cannot readily counter judicial interpretations of the Constitution. Given the difficulty of amending the Constitution, a particular exercise of judicial review is likely to stand unless the Supreme Court itself chooses to back down. In the context of judicial review, the courts seem particularly well positioned to establish their preferred understandings as law. "Constitutional law" is understood to be judicial doctrine, the judge-made gloss on the constitutional text.

In the constitutional context, the possibility of political sanctions being applied against the courts may be more pertinent than the possibility of a political reversal of judicial decisions. The exercise of judicial review may only be strategic, in the sense of adjusting to accommodate external constraints, when the continued institutional integrity of the courts becomes an issue.[5] Courts may avoid confronting the other branches of government when they anticipate that such a confrontation could result in the loss of judicial independence. Apart from that contingency, however, they may feel free to pursue their own understandings of the constitution relatively unhindered by concerns for the policy preferences or constitutional understandings of other political actors.

The purpose of this article is to examine the conditions under which judicial independence, in the exercise of the power of judicial review, might be

[3] *See, e.g.*, Rafael Gely & Pablo T. Spiller, *A Rational Choice Theory of Supreme Court Statutory Decisions with Applications to the* State Farm *and* Grove City *Cases*, 6 J. L., Econ., & Org. 263 (1990); Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relations Decisions, 1949–1988*, 23 RAND J. Econ. 463 (1992); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 Yale L.J. 331 (1991): John Ferejohn & Barry Weingast, *Limitation of Statutes: Strategic Statutory Interpretation*, 80 Geo. L.J. 565 (1992).

[4] Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 Am. Pol. Sci. Rev. 28, 31 (1997).

[5] For strategic models in the context of constitutional cases, see, e.g., Rafael Gely & Pablo T. Spiller, *The Political Economy of Supreme Court Constitutional Decisions: The Case of Roosevelt's Court-Packing Plan*, 12 Int'l Rev. L. & Econ. 45 (1992) [hereinafter *Political Economy*]; Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of* Marbury v. Madison, 38 Am. J. Pol. Sci. 285 (1994); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & Soc'y Rev. 87 (1996); Lee Epstein & Jack Knight, The Choices Justices Make 139–45 (CQ Press 1998); James R. Rogers, *Information and Judicial Review: A Signaling Game of Legislative-Judicial Interaction*, 45 Am. J. Pol. Sci. 84 (2001); Georg Vanberg, *Legislative-Judicial Relations: A Game-Theoretic Approach to Constitutional Review*, 45 Am. J. Pol. Sci. 346 (2001) [hereinafter Vanberg, *Legislative-Judicial Relations*].

threatened. I begin by positing a basic model of political support for judicial independence in the exercise of judicial review. I then consider the circumstances under which elected officials would either accept independent judicial review or seek to punish the Court and reduce its independence. This dynamic is illustrated with empirical examples. In this context, I will also explain the incentives for a purely policy-oriented legislature to maintain an independent judiciary with the power of constitutional review, while indicating the circumstances in which the Court is likely to be constrained by strategic considerations in the exercise of that power.

1. A model of judicial independence

Economic models of political behavior, including game theory, have been used increasingly to examine the rationale for judicial independence. These models have emphasized the fact that courts exist within a political environment, and that political actors have a variety of means at their disposal to sanction and constrain the courts. Judges can only remain independent if other political actors can be convinced that it is in their own interest to tolerate judicial independence, in what may be described as a "dependent independent judiciary."[6] Recent game-theoretic approaches to this problem have put particular emphasis on the strategic interaction of legislatures and courts, and the extent to which the judiciary might respond to the threat of legislative sanction. Although it is not inherent in the game-theoretic structure, it is notable that separation-of-powers games have tended to operate at the level of individual cases.[7] This is not surprising, given the sequential game-theoretic structure of move and response by two players. Such games tend to describe a legislature responding to a particular judicial decision, and, likewise, a court responding to a particular legislative action (or anticipated legislative action). In deciding whether to respond negatively to a judicial decision, the legislature is usually described as weighing the immediate costs and benefits of that decision and the immediate consequences of sanctioning the court. The question is framed in terms of what happens in "the next round" of the game, and so political actors are given a particularly myopic perspective on their constitutional and political situation.[8]

[6] Donald J. Boudreaux & A. C. Pritchard, *Reassessing the Role of the Independent Judiciary in Enforcing Interest-Group Bargains*, 5 Const. Pol. Econ. 1, 7 (1994).

[7] *See, e.g.*, Clinton, *supra* note 5, at 288–94; Knight & Epstein, *On the Struggle for Judicial Supremacy*, *supra* note 5, at 102–12.

[8] By contrast, interest-based explanations of judicial independence often abstract from any given case or set of interactions between the court and the legislature. *See, e.g.*, William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & Econ. 875 (1975); Eli M. Salzberger, *A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?* 13 Int'l Rev. L. & Econ. 349 (1993); Boudreaux & Pritchard, *supra* note 6.

This myopic perspective may be justified under certain circumstances. It is rendered problematic, however, by the kinds of sanctioning mechanisms that are actually available in the American constitutional context (and most others). The political power to sanction the Court is a blunt instrument. Congress cannot easily punish the Court in the case of divergent outcomes, when the Court adopts and enforces constitutional understandings at odds with those of elected officials. The available legislative responses to an assertive Court are not, in general, case specific. Rather, Congress is faced with a starker and weightier choice, whether or not to weaken the independence of the courts.

In response to an unpopular constitutional decision, legislators may attempt to reverse it through constitutional amendment or to sanction the judiciary through a variety of instruments.[9] Although the first option has been used successfully in a handful of cases, legislative reversal in the constitutional context is much less readily available than in the statutory context, and the possibility is unlikely to play a significant role in the exercise of judicial review. The second option—sanctioning—is formally easier, but it is also a blunt instrument that can rarely limit itself to affecting specific cases. Congress may, for example, impeach and remove federal judges, and it can also attempt to pack the judiciary through the creation and expansion of judicial positions. Although Congress may not reduce the salary of judges, it may allow judicial compensation to be eroded over time by inflation. The legislature can, more generally, control the funding of the judicial branch, with consequences for such things as staffing and physical infrastructure. Congress arguably could alter a variety of institutional and procedural features of the judiciary, such as requiring circuit duty by Supreme Court justices or specifying the number of votes needed to exercise the power of judicial review. Congress may also alter the jurisdiction of the courts, either selectively redirecting certain classes of cases or making wholesale changes in the judicial workload. But even the most-targeted congressional responses, such as an alteration of appellate jurisdiction, have larger institutional ramifications and cannot simply substitute congressionally favored outcomes in particular cases for judicially favored outcomes.

What is at issue in any decision to sanction the courts is the judiciary's institutional integrity, not just the outcome of a particular case. In that context, the courts represent a basket of policy outcomes. From the perspective of the legislator weighing the decision of whether to sanction the courts, the crucial question is the value of that basket as a whole. The legislator must not

[9] Depending on the issue, the legislature and executive may also be able to subvert or evade the execution and implementation of a judicial decision. When available, such a political response can be fairly targeted and therefore suggests a different political and judicial calculation. *See also* Vanberg, *Legislative-Judicial Relations, supra* note 5, at 347–48; Gerald Rosenberg, The Hollow Hope 39–169 (Univ. of Chicago Press 1991). I do not consider this alternative, an evasion strategy, here.

only take note of the costs of the immediate policy outcome that diverges from his own preferences but also the costs and potential benefits of a range of future judicial decisions. Although the Court may diverge from the legislature in any given decision, across a set of decisions the Court is likely to have converging as well as diverging preferences. In deciding whether to sanction the Court for an immediate divergent decision, the legislature must weigh the costs of that decision against the discounted present value of various convergent decisions that might be expected in the future (recognizing that the time horizon of elected officials also matters, and that current outcomes have greater weight than future outcomes).

The legislature should only be expected to sanction the judiciary when the value of the basket of outcomes is too low. Specifically, we should expect the legislature to pursue the sanction strategy when the value of an independent judiciary to elected officials drops below zero. This will occur when the utility of independent judicial review plus the political costs of actually imposing sanctions is less than the costs of judicial divergence from the policy preferences of the legislature. Otherwise, the legislature will acquiesce to the independent exercise of judicial review and will merely attempt to influence future judicial decisions through more routine means. The political value of an independent judiciary, exercising the power of judicial review, reflects the degree and importance of the courts' convergence with the legislature minus the degree and importance of the courts' divergence from the legislature, plus a potentially additional political cost that must be paid when actually engaging in court-curbing activities. Put differently, $V = U + C - D$, where V is defined as the value of independent judicial review, U is the utility to political actors of convergent decisions, and C is the political cost of actually imposing sanctions. D is the disutility of the set of divergent decisions, where $D = \sum P_i$, in which P is the political payoff from each issue (i) on which the two institutions are divergent. We should expect the legislature to sanction the courts only if $D > U + C$. Each of these factors should be examined in turn.

2. The utility of judicial convergence

It is not immediately obvious why legislators should value convergent decisions. After all, convergence in the preferences of the judiciary and the legislature simply results in the judiciary upholding (or refraining from nullifying) the legislative decision. To the extent that the judiciary upholds a statute, the legislature would appear to be no better off than if the power of judicial review, or an independent judiciary, did not exist at all.[10] From a

[10] Robert Dahl suggested the possibility of the Court serving a legitimating function in such cases. Robert Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 6 J. Pub. L. 279, 294 (1957). But subsequent research has shown that "[t]he legitimation thesis has many problems." John B. Gates, The Supreme Court and Partisan Realignment 13 (Westview Press 1992).

behavioral perspective, there would appear to be no difference between a convergent but independent judiciary and a dependent or toothless judiciary.[11] If the political utility of a convergent court were zero, then it would be the case that the only consideration restraining political actors from sanctioning courts when they strike down legislation would be the level of public support for judicial independence as an abstract value.[12] Although such public regard for the judiciary may be real, this would seem to be a fairly slim support to bear the weight of maintaining an independent judiciary.

In fact, there are plausible reasons why elected officials would find rationales for attaching a positive value to an independent court. The value arising from these rationales, it should be emphasized, is conditional on particular political circumstances; depending on the political environment, of course, political actors may be expected to attach more or less value to the maintenance of a friendly independent judiciary.[13] Four such rationales will be considered. A convergent judiciary can be a useful agent of the legislature in (1) reducing policy uncertainty, (2) stabilizing policy outcomes, (3) managing electoral uncertainty, and (4) disciplining other political actors.

The independent exercise of judicial review by a friendly court may have value as a result of the position of the judiciary in the policy-making process. James Rogers has recently called attention to the "informational dimension of judicial review."[14] Rogers notes that legislators face uncertainty regarding whether a chosen policy instrument will actually achieve the desired policy results. In this context, the exercise of judicial review can be seen as signaling information to the legislature. The information being signaled is not merely about judicial policy preferences relative to legislative policy preferences but, importantly, it is also about the actual effects of legislation. Although legislators can only predict the effects of proposed legislation, the judiciary in hearing cases can "review laws in light of their realized consequences."[15]

Although Rogers only considers the informational benefits contained in the fact-rich litigation environment enjoyed by the courts in exercising judicial review, judges may also possess an expertise from which the legislature might benefit. Legislators may be uncertain not only about the factual question of whether a given policy will be effective at meeting constitutional goals but they

[11] Rogers, *supra* note 5, at 92.

[12] Rogers, *supra* note 5, at 86; Vanberg, *Legislative-Judicial Relations, supra* note 5, at 348–51.

[13] Admittedly, elected officials are unlikely to attach positive value to a uniformly hostile judiciary that repeatedly reaches (from the legislature's perspective) incorrect results. They may be forced to tolerate such a court, but they are unlikely to value it.

[14] Rogers, *supra* note 5, at 86.

[15] Rogers, *supra* note 5, at 84. Notably, this would only be true for an American-style judicial review of concrete cases, not for the kind of abstract constitutional review that is common in Europe.

may also be uncertain about the precise content and implications of the relevant constitutional rule. Especially when the constitutional law is complex, judges may possess an expertise that legislators lack. Recognizing judicial independence and the power of judicial review may encourage judges to marshal their expertise to make explicit the appropriate constitutional rule. In such circumstances, legislators may want to comply with the constitutional requirements but simply be uncertain as to what those requirements actually are.

As a consequence of these factors, the judiciary can provide additional information to the policy-making process that was unavailable to the legislature at the time of the initial policy decision.[16] Preserving courts with the power to exercise judicial review allows them to signal useful policy information to the legislature. A court may exercise the power of judicial review and nullify a law because it disagrees with the goals of the legislature and finds those legislative goals to be constitutionally impermissible. A court may also nullify a law, however, even though it shares the legislature's policy goals and constitutional understandings, when the law, in practice, is failing to achieve those goals or adhere to those constitutional commitments. From a policy perspective, the legislature benefits from the critical postenactment examination of a friendly court. A well-disposed judiciary might be able to prune what would be universally regarded as failed legislation more effectively than the legislature could acting by itself. Moreover, a legislature that can rely on such a judicial safety net can afford to take greater prospective risks in passing legislation in the first place, resulting in more agreeable policies being put in place than if the legislature were forced to rely only on its own assessments and to shy away from constitutionally riskier policy proposals (some proportion of which would, ex post, have proven to be constitutionally acceptable).[17]

Rogers provides no empirical examples or illustrations to support his formal analysis of informational judicial review. Fortunately, Mark Graber does detail a historical episode that can be readily framed in informational terms.[18] Under John Marshall and Roger Taney, the U.S. Supreme Court heard a number of cases involving congressional land grants in the western territories to individuals. These disputes arose because Congress appeared, in many cases,

[16] It is not clear, however, that the judiciary is the only source of such information, as Rogers seems to assume implicitly. Legislators could also exploit the information-gathering capacity of legislative committees or executive bureaucracies to improve policy outcomes in similar ways. The existence of such alternative information sources could be expected to reduce the informational value of judicial review.

[17] In order to benefit from the informational advantage of the judiciary, however, the legislature must be willing to tolerate judicial independence. Since the legislature cannot be certain whether the judiciary nullifies a given piece of legislation because of divergent preferences or because of informational advantages, the legislature must be willing to accept the probability that some unknown percentage of the nullified laws were, in fact, vetoed by an unfriendly court acting on divergent policy preferences.

[18] Mark A. Graber, *Naked Land Transfers and American Constitutional Development*, 53 VAND. L. REV. 73 (2000).

to have awarded the same parcels of land to more than one claimant in different statutory grants. Although the normal mode of statutory interpretation would dictate that the terms of the later statutes would be controlling over the terms of earlier statutes, in these cases the Court asserted that once the earlier statute was determined to have created vested property rights then the later statute could not abrogate those rights. Effectively, the congressional actions in the later statutes were held to be unconstitutional violations of individual property rights because they sought to transfer (previously granted) property from one individual to another without consent or compensation. Although often announcing and acting on an explicit constitutional rule, the Court in these cases framed its determinations as statutory interpretations rather than as statutory nullifications. Rather than striking down one set of statutory provisions as unconstitutional, the Court creatively reinterpreted those provisions in order to make them consistent with the constitutional requirements. The resulting decisions were exercises in judicial review in all but name.

Although the Court was clearly abrogating the specific intentions (such as they were) of Congress, as embodied in these various land grants, the Court was also clearly advancing constitutional principles that were broadly accepted by Congress. In the congressional rush to open up the territories, and in the jumble of making vast numbers of detailed awards of inadequately surveyed land, mistakes were often made. In some instances, Congress simply overlooked the fact that it had already granted title to a piece of land. In other instances, Congress did not adequately know the property it was attempting to divide and grant. In still other instances, Congress created procedures for awarding title that proved unworkable in practice. When the courts heard the resulting litigation, they were able to sort through the conflicting claims and clean up the mess. Congress frequently, though not always, invited precisely such judicial interventions with statutory reservations specifying that the legislation affected no existing claims.

The land-grant cases described by Graber would seem to fit the model of informational judicial review described by Rogers. These cases involved situations in which Congress faced substantial ex ante uncertainty about the actual effects of its legislation, while the courts possessed substantially greater ex post information about those effects. Both Congress and the courts agreed on the basic constitutional principle at stake, and it is reasonable to think that the legislature would even agree with the judiciary's application of that principle and its policy consequences, given the same information. Congress valued the independent exercise of judicial review in these cases because the legislature was able to rush legislation encouraging western settlement through the door while exploiting the factual record created by litigation to improve the policy outcomes. In an antebellum "state of courts and parties," the judiciary was one of the few institutions with the capacity to develop the information that policy makers needed.[19]

[19] Stephen Skowronek, Building a New American State 24 (Cambridge Univ. Press 1982).

It is possible to imagine similar situations in other policy contexts. For example, a legislature might well adopt a complicated scheme of campaign finance regulation, while recognizing that, in practice, the regulatory regime will create First Amendment complications. A legislature could welcome judicial intervention to resolve the First Amendment complications as they arise in particular applications, even as the larger regulatory structure is preserved intact. Similarly, a legislature might authorize aggressive intelligence gathering activities by law enforcement agencies, believing that such activities can be conducted in a fashion that does not violate constitutional principles. Subsequent practice may indicate that such activities, in fact, create insoluble constitutional difficulties, and independent judicial review may both expose those difficulties and eliminate them by prohibiting the type of activities that the legislature had previously authorized. A legislature might similarly adopt a particular policy, such as compulsory school attendance, without realizing that such a policy would run afoul of some religious practices and that the Constitution might require government accommodation in such circumstances.

A second political rationale for the independent exercise of judicial review by a generally friendly court arises from the electoral instability of the legislature.[20] A politically insulated judiciary that is convergent with the political preferences of one legislature may well be divergent from the preferences of a subsequent legislature. A legislature may well be willing to maintain the independence of the judiciary as an insurance policy against future electoral defeat. Although a generally friendly but independent court armed with the power of judicial review may impose some unwanted restrictions on the current legislature, those costs may be worth bearing in the expectation that the same court would impose even greater restrictions on future legislatures controlled by a divergent party. Entrenching a convergent court can mitigate the consequences of future electoral defeat. Similarly, legislators may refrain from tampering with or subverting the independence of the judiciary, when it rules against them and imposes immediate political costs, in the expectation that partisans on the other side will make the same calculation when they are in power. For a given legislature, a currently convergent court possesses the discounted present value of the more assertive decisions in the future.

There is suggestive, though indirect, empirical evidence for this rationale. The most direct support for the thesis is unfortunately hidden by the nonevent of legislative restraint in the face of judicial provocation. Fortunately,

[20] Variations of this thesis are elaborated in Landes & Posner, *supra* note 8, at 878–79; Ramseyer, *supra* note 1, at 739–46; Robert D. Cooter & Tom Ginsburg, *Comparative Judicial Discretion: An Empirical Test of Economic Models*, 16 Int'l Rev. L. & Econ. 295 (1996); Ran Hirschl, *The Political Origins of Judicial Empowerment through Constitutionalization: Lessons of Four Constitutional Revolutions*, 25 L. & Soc. Inquiry 91 (2000); Thomas Ginsburg, *Economic Analysis and the Design of Constitutional Courts*, 1 Global Jurist Frontiers 1 (2001), *available at* http://www.bepress.com/gj/frontiers/vol1/iss2/art2; Matthew C. Stephenson, *"When the Devil Turns . . . ": The Political Foundations of Independent Judicial Review*, 32 J. Legal Stud. 59 (2003).

more-indirect sources of support for this thesis are available by observing the comparative tendencies of political systems with different levels of electoral uncertainty.[21] Similarly, the initial decision by political leaders to create an independent judiciary armed with the power of constitutional review has often reflected the expectation of future electoral weakness and the prospect of losing political power.[22] In the American context, the actions of the Federalist Congress in rushing passage of the Judiciary Act of 1801, with its reform and expansion of the federal judiciary, explicitly reflected the declining electoral fortunes of the Federalist Party.[23]

A closely related rationale for valuing an independent but convergent court arises from the electoral dynamic and the concomitant uncertainty. Elections are a mechanism for holding government officials, notably legislators, accountable for their policy decisions and actions. From the perspective of the legislator, electoral accountability means professional risk. In a competitive electoral environment, each political decision carries the risk that it could come back to haunt incumbent legislators at election time and cost the incumbent the election. In some electoral contexts, this burden may be borne by party leaders, who must calculate the costs of legislative action to their party's political fortunes. In others, the primary burden may be borne by individual legislators, who may be held individually responsible for their voting record. Unsurprisingly, this electoral threat can lead to risk-averse behavior on the part of incumbents looking to minimize the chances that they will be turned out of office.

One strategy by which legislators can manage this electoral threat is to delegate politically difficult issues to other institutions, including the judiciary. The goal for legislators would be to achieve the desired policy outcome while minimizing their own perceived responsibility for that outcome. This effort at political blame avoidance can sometimes be achieved through purely legislative stratagems. Delegating control over the legislative agenda and procedure to committee chairmen and floor leaders may enable individual legislators to avoid the electoral repercussions of approving politically controversial policies. Tax increases, for example, might be buried in an omnibus legislative package rather than brought to the floor alone as a distinct bill.[24] Similarly, the

[21] *See* Ramseyer, *supra* note 1, at 740–43; Cooter & Ginsburg, *supra* note 20, at 297–99; Stephenson, *supra* note 20. *But see* David O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, *in* Judicial Independence in the Age of Democracy 37 (Peter H. Russell & David M. O'Brien eds., Univ. Press of Virginia 2001) (challenging Ramseyer's explanation of the Japanese case).

[22] *See* Hirschl, *supra* note 20, at 102–5; Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 Int'l Org. 217 (2000); Ginsburg, *supra* note 20, at 29–38.

[23] *See* Keith E. Whittington, Constitutional Construction 41–42 (Harvard Univ. Press 1999); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Wm. & Mary Q. 3 (1965).

[24] *See* R. Douglas Arnold, The Logic of Congressional Action 193–223 (Yale Univ. Press 1990).

legislature may delegate politically touchy decisions to outside institutions. The controversial details of new regulations may be left to be worked out by executive branch administrators rather than decided by legislative vote. Monetary policy and the politically unrewarding task of fighting inflation may be left to an independent central bank.[25] Controversies involving civil rights and liberties may be shifted to independent courts to resolve. Convergent courts may be able to reach the policy outcomes favored by legislators while also saving the legislators from the political repercussions associated with rendering such decisions.[26]

A fourth, and final, rationale for attributing a positive political value to a convergent court lies in the utility of an independent judiciary in correcting other, nonlegislative political actors. The power of judicial review is exercised over the actions of the subnational governments and the national executive branch, as well as over the national legislature. The judiciary is not the only political institution that is potentially independent of congressional control and divergent from its policy preferences. The existence of additional actors beyond the court and the legislature complicates the institutional environment and immediately suggests the possibility of the courts' exploiting the divisions among those other actors.[27] To the extent that the judiciary is largely convergent with legislative preferences, then it can be a useful ally of Congress in constraining the actions of other political actors. In a competitive institutional environment, Congress may value the political independence of a judiciary that can monitor the actions of various institutions. [28]

A national judiciary armed with a power of judicial review may be particularly important in a federal political system. The U.S. Supreme Court nullifies state actions on constitutional grounds far more often than it nullifies federal actions. Creating some form of national veto over state policy decisions was an

[25] *See* Sylvia Maxfield, Gatekeepers of Growth 29 (Princeton Univ. Press 1997).

[26] *See* Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 Stud. Am. Pol. Dev. 35 (1993) [hereinafter Graber, *Non-Majoritarian Difficulty*].

[27] Similarly, the judiciary might exploit divisions within the legislative majority. Mark A. Graber, *Federalist or Friends of Adams: The Marshall Court and Party Politics*, 12 Stud. Am. Pol. Dev. 229 (1998).

[28] A similar logic applies to the national executive. To the extent that the executive branch is independent of the legislature, as in a presidential political system, a politically insulated judiciary may be a useful ally of the legislature in restraining the executive from pursuing divergent policies or aggrandizing its own power at the expense of the legislature. Legislatures are likely to support efforts to wrest the judiciary from undue executive influence, and vice versa. Early congressional impeachments of federal judges were stoked by concerns of excessive judicial-executive entanglements. Whittington, *supra* note 23, at 57–65. Likewise, the German legislature threw its support behind the judiciary's efforts to gain greater independence from the executive branch. Georg Vanberg, *Establishing Judicial Independence in West Germany: The Impact of Opinion Leadership and the Separation of Powers*, 32 Comp. Pol. 333 (2000) [hereinafter Vanberg, *Establishing Judicial Independence*].

important goal of many of those who met in the Philadelphia convention to draft the U.S. Constitution. James Madison was particularly concerned that constitutional reforms include some mechanism for constraining the states.[29] Madison's initial proposal that Congress itself have the power to review and veto state legislation was defeated in the convention, but the power to review state laws for their consistency with the U.S. Constitution and federal legislation was granted to the national judiciary. Some form of national veto over state legislation is probably essential to maintaining the integrity of a federal union and national policy making. The national government must be able to protect itself against state actions designed to subvert national policy. Empowering the courts to fulfill this monitoring role and securing the supremacy of the national constitution and legislature is ultimately more efficient than relying on Congress itself, which has little capacity for or interest in such sustained monitoring.[30] Given that subnational governments are likely to diverge from the policy preferences of the national legislature, a nationally convergent court has political value for the legislature.

It is not obvious, however, that a judiciary that is valued for its capacity for maintaining the national government's supremacy needs to be independent. In order to perform this function, the courts evidently need to be independent only of the state governments. The Federalists distrusted the independence of the state courts, and precisely for this reason Congress immediately authorized the removal of constitutional disputes from the state courts to the U.S. Supreme Court in section 25 of the Judiciary Act of 1789.[31] But courts may not need to be independent of the national legislature in order to maintain national supremacy. Exercising the power of constitutional review over federal legislation, where the national-supremacy rationale is not present, has long been more controversial than exercising the same power over state legislation. Nonetheless, two considerations point to the need for complete judicial independence.

The representative structure of Congress creates the first argument in favor of judicial independence. The national legislature itself is not completely independent of the state governments. Prior to the Seventeenth Amendment, the

[29] *See* LANCE BANNING, THE SACRED FIRE OF LIBERTY 43–75 (Cornell Univ. Press 1995); JACK N. RAKOVE, ORIGINAL MEANINGS 51–53, 197–98 (Vintage 1997).

[30] Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984) (explaining congressional preference for passive monitoring of administrative agencies and the delegation of monitoring tasks to others). The judiciary itself relies on a "fire alarm" model of oversight, responding to litigants who have suffered a harm from illegal or unconstitutional actions and have brought their claims to the courts. This reliance on others to "mobilize the law" has systematic effects, however, on the types of constitutional violations identified. *See, e.g.*, CHARLES R. EPP, THE RIGHTS REVOLUTION (Univ. of Chicago Press 1998) (examining the support system necessary for rights jurisprudence).

[31] 1 U.S. Statutes at Large 85–87 (1845).

state legislatures had direct representation in the Senate, calling into doubt the congressional capacity to serve as a reliable guardian of national supremacy. Even after the Seventeenth Amendment, Congress remains responsive to many of the same political forces that drive state legislatures. In fact, this is a common constitutional pattern. Federal political systems tend to have bicameral national legislatures and to give representation in the national legislature to subnational governments.[32] An abstract interest in preserving national supremacy may lead Congress to tie its own hands (or constitutional draftsmen to tie its hands) so that an independent judiciary can pursue that goal in particular cases, where political pressure might otherwise cause congressional resolve to waver.[33]

The second argument turns more on the dynamic of the delegation to the judiciary than on the logic of the delegation itself. The role of the judiciary as constitutional guardian cannot easily be circumscribed. Federalism, unlike mere decentralized governance, has constitutional foundations. Subnational governments have independent constitutional authority and are not mere dependents of the national legislature and, thus, are unlikely to be accommodating to correction from the national legislature. An independent judiciary may plausibly serve as a neutral arbiter of constitutional disputes involving the state governments and, thereby, aid in the peaceful and efficient resolution of such disputes.[34] Placing both governments under the authority of an independent judiciary may, in effect, reflect a political bargain between state and national political officials.[35] In addition, once national political officials have declared that the judiciary is the appropriate institution for interpreting the Constitution and enforcing it against subnational political officials, it is difficult to reverse course and insist that judicial interpretation is only appropriate in the context of the states. If judges have a special relationship with the Constitution vis-à-vis state officials, then the presumption is likely to be strong that the judges have a similar privileged relationship with the Constitution

[32] *See* Arend Lijphart, Patterns of Democracy 187–88, 213–15 (Yale Univ. Press 1999).

[33] *See also* Jon Elster, Ulysses and the Sirens 36–111 (Cambridge Univ. Press 1984) (examining precommitment strategies).

[34] *See also* Martin Shapiro, *The European Court of Justice, in* Judicial Independence in the Age of Democracy 273, 276 (Peter H. Russell & David M. O'Brien eds., Univ. Press of Virginia 2001).

[35] *See also* Jenna Bednar, William N. Eskridge Jr. & John Ferejohn, *A Political Theory of Federalism, in* Constitutional Culture and Democratic Rule (John Ferejohn et al. eds., Cambridge Univ. Press 2001). The U.S. Supreme Court did not easily establish such a reputation for independence, and the state governments, especially in the South, routinely charged that the Marshall Court was a mere arm of the national government and therefore an inadequate forum for resolving disputes over federalism. *See* Leslie Friedman Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790–1860) and the European Community (1958–1994)*, 11 Stud. Am. Pol. Dev. 149 (1997). In West Germany, judicial independence from the executive branch was achieved, in part, because subnational representatives in the legislature wanted additional checks on the more nationalistic executive cabinet. Vanberg, *Establishing Judicial Independence, supra* note 28.

vis-à-vis other federal officials. Having designated a separate institution as the guardian of the Constitution, Congress necessarily risks appearing self-serving if it seeks to set itself above that guardian.[36]

3. The costs of imposing sanctions

It is unlikely to be costless for the legislature to attempt to sanction the judiciary and reduce its independence. Of course, in reducing judicial independence the legislature suffers the loss of the utility of judicial independence, as described above. The legislature may also suffer a more direct political cost from the sanctioning effort itself. The sources of such costs are various. For example, given limited legislative resources, in pursuing an attack on the courts political officials suffer the opportunity cost of laying aside other legislative priorities. Political capital expended in mobilizing a legislative coalition behind court-curbing activities cannot be used to mobilize a coalition behind substantive policy initiatives.

More important, however, is the risk of a political backlash against the threat to judicial independence. Of course, those political actors who agree with the substantive decisions of the courts are likely to oppose efforts to sanction the courts for those decisions; however, that presumably reflects the cost of mobilizing any legislative coalition. The fact that opposition legislators will oppose the proposals of the legislative majority is not particular to this setting and does not have unusual political consequences for majority legislators. The broad implications of such decisions about basic political institutions are more problematic for those favoring sanctions. Different legislators, with a different set of overall policy preferences, will value the utility of an independent judiciary differently. Among other considerations, discussed in greater detail below, the more convergent the court is with the preferences of a given legislator the more value a court is likely to have to that legislator. Two legislators who are equally displeased by a particular divergent decision by a court may, nonetheless, weight the overall value of the court differently.

The effort to sanction the court, therefore, might mobilize members of the majority's own coalition against the court-curbing efforts, as well as members of the opposition coalition. Indeed, historic court-curbing efforts in the United States, such as President Franklin Roosevelt's "Court-packing plan," in which Roosevelt sought statutory authority to appoint an additional seven justices to the Supreme Court beyond the nine justices then serving, are often blamed for fragmenting the majority's political coalition and derailing its legislative agenda.[37]

[36] This is also consistent with Tom Tyler's findings that, as in the case of individuals, "[i]t is being unfairly treated that disrupts the relationship of legitimacy to compliance, not receiving poor outcomes." Tom R. Tyler, Why People Obey the Law 172 (Yale Univ. Press 1990).

[37] *See, e.g.*, David Adamany, *The Supreme Court's Role in Critical Elections, in* Realignment in American Politics 229, 249 (Bruce A. Campbell & Richard J. Trilling eds., Univ. of Texas Press 1980).

More uniquely, the judiciary may have public support that creates risks for those who would attack the courts. Legislative and political action always risks fragmenting a political coalition since members of the coalition are unlikely to share precisely the same policy preferences.[38] To this extent, the threat of political disunity provoked by court-curbing efforts may be only a more dramatic form of the centrifugal forces that are always present in politics. Unlike other objects of legislative policy making, however, the judiciary may be independently valued by the public and by political actors as a political good in its own right. An attack on the courts may provoke a public backlash against those who seek to subvert a cherished national institution, independent of any calculation about the particular actions that the court has taken or may take in the future. In some cases, the reaction of an international audience may also be relevant to the political calculation.

Before legislators are willing to sanction the court, they must be willing to bear the risks of a public backlash against such sanctioning activity. Public approval of the courts, and, in particular, the diffuse support for the courts as an institution, is often taken as important evidence for the legitimacy of independent judicial action and the entrenchment of judicial independence.[39] The fact that the U.S. Supreme Court, for example, often garners higher public approval in opinion surveys than Congress suggests that Congress would risk a substantial negative public reaction if it were to attack the Court.[40] A crucial question, however, is to what degree is the public's approval of the judiciary independent of the decisions made by the judiciary. If the level of public support for the courts simply reflects the level of public agreement with the courts' actions, then there may be no independent political cost to be paid for attacking the courts. The cost-benefit calculation of the value of judicial decisions may capture the entire logic of support for judicial independence; there may be no residual public support for the abstract value of judicial independence. If so, then C would approach zero, and the decision to sanction would depend simply on the value of the other factors. There is some suggestive evidence in this direction.[41] Public approval of the Supreme Court, for example, appears to track the degree of convergence between the broad ideological preferences of

[38] *See* Stephen Skowronek, The Politics Presidents Make 19–23 (Harvard Univ. Press 1993).

[39] *See* Gregory A. Caldeira, *Neither the Purse Nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 Am. Pol. Sci. Rev. 1209 (1986); Walter F. Murphy & Joseph Tanenhaus, *Publicity, Public Opinion, and the Court*, 84 Nw. U. L. Rev. 985 (1990); James L. Gibson, Gregory A. Caldeira & Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92 Am. Pol. Sci. Rev. 343 (1998).

[40] *See* Jackie Calmes, *American Opinion: A Special Report*, Wall St. J., December 14, 2000, at A9; Thomas R. Marshall, Public Opinion and the Supreme Court 140 (Unwin Hyman 1989).

[41] *See* John A. Clark & Kevin T. McGuire, *Congress, the Supreme Court, and the Flag*, 49 Pol. Res. Q. 771 (1996) (finding no influence of Supreme Court decision on congressional voting behavior).

the Court and those of the general public.[42] The public reaction to the Court's decision in *Bush v. Gore*, settling the 2000 presidential election controversy, reflected such a tendency in members of the public to evaluate the Court in terms of agreement with their own substantive preferences.[43] This is consistent with similar findings on the public response to other cases.[44] Public opinion does not appear to have turned against Roosevelt's Court-packing scheme until the Court itself reversed course and signaled its willingness to acquiesce to popular policies.[45] If the public does not so much value judicial independence per se as it values judicial agreement with its own preferences, then the independent political costs to representative legislators seen engaging in court-curbing activity may be negligible.[46]

4. The costs of judicial divergence

Assessing judicial divergence is more complicated when the institution as a whole must be taken into account and not simply a single decision. The judiciary is unlikely to diverge from the preferences of the legislature on every issue, so the

[42] *See* Robert H. Durr, Andrew D. Martin & Christina Wolbrecht, *Ideological Divergence and Public Support for the Supreme Court*, 44 Am. J. Pol. Sci. 768 (2000). *But see* Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 Am. J. Pol. Sci. 635 (1992) (finding that opinion leaders support the Court on the basis of substantive decisions, but the mass public supports the Court on the basis of broad commitment to social order).

[43] *See* David S. Broder, *Courts Risk Public Image in Election Case*, Wash. Post, December 12, 2000, at A35; Wendy W. Simmons, *Election Controversy Apparently Drove Partisan Wedge Into Attitudes Towards Supreme Court, Gallup Poll Releases*, January 16, 2000, *available at* http://www.gallup.com/poll/releases/pr010116.asp; James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, The Supreme Court and the 2000 Presidential Election, at 10 (unpublished manuscript), *available at* http://artsci.wustl.edu/~legit/legitimacyreport5.pdf.

[44] *See* Anke Grosskopf & Jeffery J. Mondak, *Do Attitudes Toward Specific Supreme Court Decisions Matter? The Impact of* Webster *and* Texas v. Johnson *on Public Confidence in the Supreme Court*, 51 Pol. Res. Q. 633 (1998); Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 Am. Pol. Sci. Rev. 89 (2000).

[45] *See* Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR's Court-Packing Plan*, 81 Am. Pol. Sci. Rev. 1139 (1987).

[46] It is even possible that the public would welcome political attacks on an unresponsive court imposing unpopular policy outcomes. Rather than suffering the risk of a public backlash, a court-attacking elected official may under some circumstances enjoy enhanced public approval. Though not threatening judicial independence, this was clearly Richard Nixon's calculation in running his "law and order" campaign and keeping up subsequent rhetorical attacks on the Court. Similarly, Southern politicians clearly believed there were political gains to be won among their own constituents by attacking the Court after *Brown*. Relatedly, see Tim Groseclose & Nolan McCarty, *The Politics of Blame: Bargaining Before an Audience*, 45 Am. J. Pol. Sci. 100 (2001) (examining efforts to gain political support by casting others as making unpopular decisions in the context of presidential vetoes).

legislature's view of a court or individual judge will always reflect a mix of convergent and divergent decisions. The political utility of convergent preferences between the legislature and the court on any given issue will depend on the conditions discussed above. By contrast, the political disutility or cost of divergent preferences between the two institutions on any given issue simply reflects the loss of the legislature's favored policy outcome. The judicial veto of legislation reestablishes the default outcome of the status quo ante, and the legislature suffers according to the distance between the status quo ante and the legislature's preferred policy.

Over the entire range of political issues, the legislature and the judiciary can have divergent preferences along two dimensions. One dimension is breadth—measuring the number of issues on which there is divergence between the two institutions. At one extreme, the courts could diverge from the legislature on zero percent of relevant policies. In this case, whether through judicial restraint or sincere preference convergence, the court would leave in place every policy outcome reached by the legislature (and the cost of divergence would be zero). At the other extreme, the courts could diverge from the legislature on 100 percent of relevant policies, in which case the courts would nullify every statute reflecting the legislature's preferred policy outcomes. Of course, the actual degree of divergence is likely to fall somewhere in between these two extremes, though almost certainly near the complete convergence end of the continuum. As a practical matter, a court is unlikely to be able to review every policy to emerge from the legislature, and so some policies will be implemented even if the courts might prefer to nullify them.[47] As a jurisdictional matter, most laws do not raise any serious constitutional issues, and so many legislative policy choices will stand regardless of the personal *policy* preferences of the judges. The relevant divergence between the views of the court and the legislature is only on the legal question of constitutionality, not policy per se.[48] Even for those laws that raise recognizable constitutional issues, the range of disagreement between judges and legislators (just as the range of disagreement between opposed political partisans) will be truncated. More often than not, the constitutional understandings of mainstream judges and mainstream legislators will be convergent rather than divergent.[49]

[47] The institutional structure of the constitutional court can be expected to affect this constraint. A specialized court exercising abstract constitutional review at an early stage in the policy process and with relatively open referral rules may have the capacity to consider a larger proportion of the total number of laws. The German constitutional court, for example, has reviewed 20 percent of all federal laws adopted. *See* Alec Stone Sweet, Governing with Judges 64 (Oxford Univ. Press 2000).

[48] Though basic, this point can often be overlooked. *See also* Mark A. Graber, Resolving Political Questions into Judicial Questions: Tocqueville's Thesis Revisited (unpublished paper on file with the author).

[49] Even the German constitutional court, which had reviewed 20 percent of all federal laws, had only rejected 4.6 percent of them. *See* Stone Sweet, *supra* note 47, at 64. Even at the height of the

In terms of the effective number of policy outcomes at stake, the difference between a convergent-type court and a divergent-type court is quite small. Nonetheless, an "activist" court may be a political hindrance and provoke a legislative response even if the quantity of cases at issue is relatively small.

The second dimension of divergence is importance—measuring the intensity of the legislative preferences related to (or the political salience of) the issues about which the two institutions disagree.[50] Although there is often a tendency to assume that every exercise of the power of judicial review is important, many are not. The mere fact that a legislative provision has been struck down as unconstitutional does not mean that the underlying legislative provision was otherwise important or politically valued. Similarly, some legislative decisions may have been politically important at the time they were made and yet lose political salience over time. The underlying facts, or simply the political preferences of the legislature, might change before the issue reaches the court. Some legislative votes are "politically compelling" in that "legislators feel compelled to support certain policy options because the intended effects are popular, irrespective of whether the proposed means will really achieve those ends."[51] In such votes, legislators merely want to be seen taking the popular political position. The eventual nullification of such policies by the courts may have little significance to the legislature. Conversely, the act of judicial review itself may cause an otherwise dormant issue to become politically salient. For example, flag burning was nonexistent as a political issue until the Supreme Court ruled that state law prohibiting the desecration of national flags could not be constitutionally applied to a political protester.[52]

The legislature suffers a political loss every time the judiciary strikes down a policy.[53] The significance of that loss varies, however, depending on the importance of the issue. The overall cost of judicial divergence for the legislature is the sum of those political losses ($D = \sum P_i$). The greater the number of policies

New Deal conflict, the Court only rejected .0059 percent of the laws passed by Congress. Landes & Posner, *supra* note 8, at 896–97. The early *Lochner* Court upheld virtually all the state laws that it was asked to strike down on constitutional grounds, rejecting only .0056 percent of laws reviewed. *See* Charles Warren, *The Progressiveness of the United States Supreme Court*, 13 Col. L. Rev. 294, 295 (1913).

[50] This factor is recognized by Vanberg in his analysis of the legislative decision to evade judicial rulings. *See* Vanberg, *Legislative-Judicial Relations*, *supra* note 5, at 350–51.

[51] Arnold, *supra* note 24, at 77–78.

[52] Texas v. Johnson, 491 U.S. 397 (1989).

[53] This assumes that legislative support for the vetoed policy was sincere, which may not always be the case. In some instances, legislators may support, or refrain from blocking, particular legislation knowing that the courts will ultimately veto the legislation. *See* Mark v. Tushnet, Taking the Constitution Away from the Courts 57–65 (Princeton Univ. Press 1999); Graber, *Non-Majoritarian Difficulty, supra* note 26, at 37; George I. Lovell, *"As Harmless as an Infant": Deference, Denial, and* Adair v. United States, 14 Stud. Am. Pol. Dev. 212 (2000).

rejected by the courts and the greater the importance of those policies to the legislature, the greater the political cost of the independent exercise of judicial review is to the legislature and the more willing the legislature will be to sanction the courts.

5. Implications

Legislative support for judicial independence in the exercise of judicial review depends on a political cost-benefit analysis by legislators. If independent judicial review is more politically costly to legislators than it is beneficial to them, then the legislature is likely to seek to subvert judicial independence and to look for ways to sanction the courts. If judicial review is, on the whole, beneficial to legislators, then they are likely to support, or at least acquiesce in, an independent judiciary.

Separation-of-powers games often assume that legislative sanctions can be applied against the courts on a case-by-case basis. In considering whether to uphold a particular statute, judges are assumed to take into account the likelihood of provoking legislative sanctions if they act against legislative preferences in a given case. Similarly, legislators are assumed to weigh the political costs every time the courts nullify a statute. By isolating the interaction of the courts and the legislature over each case, such accounts may misrepresent the political calculus of judicial review and underestimate the strength of judicial independence. It is often the case that the sanctioning mechanisms available to the legislature do not allow for such fine-grained applications. Sanctioning the courts over one case is likely to have consequences for future cases as well. When the available sanctioning mechanisms are relatively global, consequently reducing the institutional independence of the courts, then the political logic, detailed above, would apply and sanctions would only be imposed if $D > U + C$. Courts may realize that they can make relatively unpopular decisions without provoking legislative sanction. Precisely because the institutional integrity of the courts is at stake, the judiciary may be well situated to take bolder action.

Even when sanctioning mechanisms appear to be precise, their use may, in fact, have larger institutional consequences. The Canadian Constitution, for example, includes a provision for an effective legislative override of judicial constitutional decisions.[54] Although use of the provision does not have, formally, any larger institutional implications for the Canadian courts, regular use of the provision would obviously undermine the significance of constitutional review. Canadian legislators could easily reverse disagreeable judicial

[54] Can. Const. (Constitution Act, 1982), pt. I (Canadian Charter of Rights and Freedoms), § 33(1). ("Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in Section 2 or Section 7 to 15 of this Charter.")

decisions, but they would also, more generally, lose much of the value of independent judicial review. Establishing a norm against using the legislative override provision would help secure the value of judicial review despite the formal constitutional authority of the legislature to override judicial decisions. In fact, the override provision has been rarely used.

On the other hand, the capability of creating special or exceptional courts may alter the political calculus. In some countries, legislatures can establish special courts, separate from the regular judicial system, to hear a specific class of cases. Such special courts are usually given jurisdiction over the most politically sensitive class of cases and are not allowed significant independence. The option of creating such exceptional courts may help preserve the independence of the rest of the judiciary. Once the most politically sensitive cases have been shifted to the special courts, the political costs of the independent exercise of judicial review by the regular courts in a variety of other cases are substantially reduced, and, therefore, the likelihood of legislative sanctions being directed against the regular courts is also reduced.[55] Political practice in a number of developing countries is consistent with this expectation. The creation of special courts has served to relieve the political pressure on the regular courts, which have been otherwise left free to act independently even during fairly repressive regimes.[56] By contrast, similar regimes in countries that have not employed special courts have proven intolerant of any judicial independence.[57]

The political value of judicial independence depends on the interaction of a number of variables, reflecting the potential benefits of independent judicial review to the legislature, the direct political costs of attempting to sanction the courts, and the political costs of the judicial veto being exercised on behalf of political goals that are divergent from the legislature's own. A number of expectations about the effects of these variables can be identified, however.

6. A historical dynamic in the United States

The U.S. Constitution provides a number of protections for an independent judiciary, and the power of judicial review has been long recognized as implicit in the constitutional scheme. Nonetheless, American history is littered with efforts to sanction the courts. Critics of the judiciary have suggested a variety of measures short of constitutional amendment to sanction the courts, including impeachment, the manipulation of the size of the Court, the alteration of

[55] Recall that $D = \sum P_i$. The creation of special courts reduces the number of issues on which the regular courts can diverge from the legislature; $i_r < i_{r+s}$, where r is regular courts and s is special courts.

[56] *See* Christopher Larkins, *The Judiciary and Delegative Democracy in Latin America*, 30 COMP. POL. 423 (1998).

[57] *Id.* at 427–35.

the Court's jurisdiction, and the direct regulation of judicial powers.[58] These efforts have also varied substantially in their seriousness and probability of legislative success, as well as in their apparent success in altering judicial behavior.

The variation in the degree and the success of congressional court-curbing activity is consistent with the expectations of the model elaborated above. Stuart Nagel identified several periods of high-frequency congressional court-curbing activity and also distinguished between more and less successful periods of court-curbing. Nagel identified 165 bills designed to sanction the Court and introduced into Congress between 1789 and 1959. Based on both quantitative and qualitative factors, he identified seven periods, encompassing fifty years, of intensified congressional court-curbing. Together these periods accounted for 87 percent of the total number of bills.[59] Of those seven periods, he judged only four to be relatively successful, in that they satisfied at least two of three criteria, these being "above average on the number of bills reported out of committee [i.e., four or more]; . . . above average on the per cent of successful bills [i.e., 25 percent or above]; and . . . was climaxed by retreat of the Court on the majority of issues involved."[60]

In particular, these court-curbing periods can be used to examine three propositions flowing out of the previous discussion. First, all else being equal and consistent with the informational rationale, we would expect to see independent judicial review lose value, and court-curbing activity increase, when the constitutional views of the Court can be readily identified as divergent from the constitutional views of the Congress. Second, consistent with the electoral-insurance rationale, we would also expect to see court-curbing increase when the majority of legislators are confident of their future electoral prospects and thus have fewer incentives to cooperate with other parties or fewer reasons to anticipate their future electoral defeat. Finally, consistent with the costs of divergence, we would expect court-curbing to increase when the Court nullifies a series of particularly important legislative policies. All three of these factors are present during the four most successful court-curbing periods. Active judicial review in a context in which judicial independence has limited value, and evident costs, to dominant elected officials has resulted in

[58] *See* Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 Vand. L. Rev. 925 (1965); Charles Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 Am. L. Rev. 1 (1913); Louis Fisher, Constitutional Dialogues 200–30 (Princeton Univ. Press 1988).

[59] Nagel relied on the "consensus of historians" as well as purely numerical factors to identify these periods, though the latter alone would probably have led to the same conclusions. Nagel, *supra* note 58, at 926.

[60] Unfortunately, it is difficult to reconstruct Nagel's data on an annual basis, and so Nagel's reported periodized data is used here. *Id.* at 927.

the serious threat of legislative sanctions being directed against the Court. These data cannot provide a sharp test of, or among, these hypotheses, in part, because in the American context these factors tend to move together and point to the same outcomes. The American experience can, however, help illuminate these theoretical expectations and suggest their plausibility for further investigations. Moreover, reexamining these court-curbing episodes in light of the recent judicial independence literature may shed further light on the political substance of these historical events and how they should be interpreted.

The four most successful court-curbing periods in Congress occurred in the early 1800s, the late 1820s, the 1860s, and the mid-1930s. Each of these periods also marked the rise to power of a new majority political party with distinctive political and constitutional commitments. In the early 1800s, the highly organized Jeffersonians triumphed over the Federalists. In the late 1820s, the Jacksonians won control of national government and formed the Democratic Party. In the 1860s, the new Republican Party gained control of Congress and the White House, as the regional base of the Democratic Party attempted to leave the Union. In the 1930s, the Great Depression swept the Republican Party out of the government and swept the New Deal Democratic Party into power.

Evident divergence. The divergent constitutional understandings of Congress and the Court are particularly evident to legislators during these periods. A critical feature of Rogers's informational model of judicial review is that the legislature is uncertain of the preferences of the Court. When the legislature passes legislation that it would itself view as inappropriate if fully informed, "the convergent Court behaviorally 'pools' with the divergent Court in vetoing the legislation. As a result, the Legislature cannot deduce with certainty whether the veto stems from a divergent or convergent Court."[61] To label a court divergent or convergent may be a heroic assumption in many contexts, as the case of the U.S. Supreme Court suggests. The informational rationale for judicial review evaporates as soon as the legislature can be reasonably certain that the court is rejecting its legislation because of the court's divergent preferences rather than because of its informational advantages, however. At these moments of abrupt legislative transition, when new political coalitions with sharply divergent policy preferences come to power, legislators are likely to be quite aware of the hostile intentions of the holdover judges appointed by the previous party. In such circumstances, judicial review carries few informational benefits to the current legislature. The judges will be perceived as mere obstructionists, rather than useful partners in policy making.

The divergence in preferences between the two institutions is well known in the context of rapid electoral transitions. Examining the structure of American political institutions, Robert Dahl argued that federal judges would only be hostile to congressional interests immediately following such electoral

[61] Rogers, *supra* note 5, at 92.

breaks.[62] The regularity of the judicial appointment process would tend to bring judicial inclinations in line with those of stable legislative majorities. When electoral alignments were suddenly destabilized, however, the appointed judges would be the lingering representatives of the deposed political majority and could be expected to obstruct the legislative efforts of the new majority until gradually replaced. Dahl's particular expectations of judicial obstruction were not entirely confirmed, but his institutional insight flowed from common political wisdom.

Elected officials were well aware of the political divergence of the courts during these periods. The Federalists were explicit in turning to the judiciary as an "anchor" against the Jeffersonian storm, and the Jeffersonians easily recognized that the federal courts were hostile territory controlled by their partisan foes.[63] Although the regime prior to the Jacksonian ascendancy was not as well defined, Jackson's supporters were nonetheless fully convinced that the Supreme Court, still dominated by Federalist-appointee John Marshall, was divergent from their own political goals. In many ways, Marshall's Court was highly representative of the constitutional and political values that the Jacksonians opposed.[64] Similarly, Lincoln and the Republicans were not uncertain about the political location of the Taney Court. Lincoln himself had been an articulate lecturer on the common ties between the Democratic Party and the Court that issued the *Dred Scott* decision extending the sphere of slavery in the territories.[65] Finally, Progressive intellectuals and politicians had been denouncing the politics of the *Lochner* Court for years before the victory of the New Deal coalition. In a speech during his first election campaign, Franklin Roosevelt departed from his prepared remarks to assert that "the Republican party was in complete control" of the courts.[66] For presidents with such reconstructive ambitions, the Court's location on the political map is all too obvious and very much a point of concern.[67] The informational benefits of judicial review to legislators in such circumstances are slight.[68]

[62] Dahl, *supra* note 10, at 293.

[63] Turner, *supra* note 23, at 20; Thomas Jefferson, 4 The Writings of Thomas Jefferson 424–25 (H.A. Washington ed., John C. Riker 1854).

[64] *See* Charles Warren, 1 The Supreme Court in United States History 633–85, 729–79 (Little, Brown, & Company 1926) (describing conflicts between Jacksonians and Marshall Court).

[65] *See* Abraham Lincoln, *A House Divided*, *in* Abraham Lincoln 377 (Roy P. Basler ed., Da Capo Press 1990). *See also* Dred Scott v. Sanford, 60 U.S. 393 (1856).

[66] *See* Franklin D. Roosevelt, *I am Waging a War in This Campaign against the "Four Horsemen" of the Present Republican Leadership-Destruction, Delay, Deceit, Despair*, Campaign Address at Baltimore, Maryland, Oct. 25, 1932, *in* 1 The Public papers and Addresses of Franklin D. Roosevelt 831, 837 (Samuel I. Rosenman ed., Random House 1938).

[67] *See* Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 Polity 365 (2001).

[68] By contrast, the political location of the Warren Court of the 1950s, for example, was substantially less certain.

Electoral confidence. These periods also represent moments of great electoral confidence on the part of those in power. Political parties have rarely been as dominant in the United States as they have been in some other countries. Even when a particular party largely defines a political era, the other party is often competitive for control of at least one of the three elected bodies in the national government.[69] Even when political tenure looks secure in hindsight, the elected politicians were often "running scared" at the time and did not feel that security.[70] In the immediate aftermath of such smashing electoral victories as Jefferson's, Jackson's, Lincoln's, and Roosevelt's, however, the near-term threats to the political dominance of the newly empowered majority seem more likely to come from the unelected judiciary than from electoral opponents. Although Jefferson's victory over Adams was somewhat narrow, it was nonetheless decisive. The Federalists were demoralized and effectively driven out of national politics. Jackson's opponents were more durable and coalesced into the Whig Party, but the Jacksonian coalition seemed unstoppable until temporarily derailed by the Panic of 1837. Although long-term prospects were less certain, the Republicans were assured of near-term dominance of the national government with the exclusion of the Democratic South from the electorate. Similarly, the Great Depression meant that intra-party factional strife was the biggest problem for the large Democratic majorities.

These four periods of intensified congressional court-curbing activity were, somewhat uniquely, periods in American history in which the majority party was not faced with serious electoral threats. These parties did not fear imminent electoral defeat, and, as a consequence, were unlikely to see enhanced value in an independent judiciary armed with a power of judicial review that could harass future legislative majorities.[71] The insurance policy of an independent judiciary is less salient in these periods of dramatic electoral success than in periods of more normal political competition.

Heightened stakes. The Court was imposing, and threatened to impose, substantial political costs on these newly empowered political majorities, even as the

[69] *See* Daniel J. Gans, *Persistence of Party Success in American Presidential Elections*, 16 J. INTERDISC. HIST. 221 (1986); Allan J. Lichtman, *The End of Realignment Theory? Toward a New Research Program for American Political History*, 15 HIST. METH. 172, 172–77 (1982).

[70] The phrase is from Gary C. Jacobson, *Running Scared: Elections and Congressional Politics in the 1980s, in* CONGRESS 39 (Mathew D. McCubbins & Terry Sullivan eds., Cambridge Univ. Press 1987).

[71] Moreover, given the particularly tight connections between the opposition party and the Court during these periods, it is unlikely that the new majority party could expect the Court to be much insurance against electoral defeat. Until the Jacksonians were able to install their own partisans on the Court, for example, they would hardly have expected the judiciary to be much of an obstacle to the Whigs in the case of a sudden electoral reversal.

Table 1 Congressional court-curbing periods, 1789–1960

Years	Congressional court-curbing[a]	Judicial activism[b]	New dominant coalition
1789–1801	None	Low	No
1802–1804	High	High	Yes
1805–1822	None	Low	No
1823–1831	High	Low	Yes
1832–1857	None	Low	No
1858–1869	High	High	Yes
1870–1892	None	Low	No
1893–1897	Moderate	Low	No
1898–1921	None	Moderate	No
1922–1924	Moderate	High	No
1925–1934	None	Low	No
1935–1937	High	High	Yes
1938–1954	None	Low	No
1955–1957	Moderate	Moderate	No

[a] This categorization is derived from Nagel, *supra* note 58, with "high" representing his successful periods of intensified court-curbing, "moderate" representing his other periods of intensified court-curbing, and "none" representing the rest.
[b] These categorizations reflect spikes in Supreme Court constitutional invalidations of federal statutes. "High" periods of activism were those in which the yearly average of invalidations was at least twice as high as the average of the previous period and also above the historical average. "Moderate" periods only satisfied one of those criteria. "Low" periods satisfied neither.

Court's obviously divergent preferences and the shift in electoral fortunes reduced the value of independent judicial review for those majorities. As Table 1 indicates, three of these four periods of intensified congressional court-curbing were also periods of heightened judicial activism against Congress. Simply in terms of the incidence of judicial invalidations of federal statutes, these were periods of unusual judicial activity. A seven-year moving average of such invalidations reveals seven spikes in judicial activity between 1789 and 1960, in the early 1800s, the 1860s, the turn of the century, the early 1920s, the mid-1930s, and the late 1950s.[72] Only the Jacksonian court-curbing appears not to match a period of judicial activism. The Jacksonians,

[72] *See also* Gregory A. Caldeira & Donald J. McCrone, *Of Time and Judicial Activism: A Study of the U.S. Supreme Court, 1800–1973, in* Supreme Court Activism and Restraint 103, 112–13 (Stephen C. Halpern & Charles M. Lamb eds., Lexington Books 1982). The first period, of course, marks the *Marbury* case. The second period begins with *Dred Scott* and peaks in 1867. The third (relatively moderate) period peaks in 1908, the fourth in 1923, and the fifth in 1936. The sixth period actually extends beyond the time period under consideration into the 1960s, peaking in 1970. An early surge of this extended period, however, peaked in 1957 and came after an unusually long

however, mounted their court-curbing efforts in response to conflicts between the federal judiciary and the states. A similar analysis of judicial invalidations of state statutes reveals a spike of activity in the early 1820s.[73] Since the Jacksonians actually favored a smaller federal government than the Marshall Court did, it is not surprising that the relevant policy conflict would arise in the context of judicial review of the state governments rather than judicial review of the federal government.[74]

The issues at stake in these cases were more important than the sheer number of laws that the Court struck down during these periods. While the use of the power of judicial review in the *Marbury* case is indicative of the conflict between the Jeffersonians and the Marshall Court, the provision of the Judiciary Act struck down in that case was of no substantive interest to the Jeffersonians and its invalidation actually enabled Marshall to escape a more direct conflict with the administration over the Court's power to mandate executive action.

The myriad political activities of Federalist judges and the general empowerment of the national judiciary in 1801 were of greater concern and were perceived to be directly threatening to the substantive goals of the "Revolution of 1800." The constitutional opinions of the Court in the 1820s ran counter to the constitutional sensibilities of the Jacksonians. Although the Jacksonians were well positioned to prevent the federal government from expanding in the manner that the Marshall Court favored, the Court's restrictions on the states did hamper the substantive policy goals and decentralizing commitments of the Jacksonians. Between 1819 and 1832, the Court struck down five insolvency laws, two laws attacking the Bank of the United States, one land claimant law, two charter infringements, a coastal navigation law, an import license law, a state bill of credit law, and an Indian jurisdiction law, many arising out of Jacksonian strongholds in southern and western states.[75] Although these decisions were not all equally salient politically, several of them involved central issues of western expansion and commercial regulation and the general trend played into Jacksonian concerns about state autonomy. Beginning with *Dred Scott* and extending through the wartime habeas corpus disputes and several cases involving judicial organization, the Court repeatedly threatened Republican policies regarding slavery, the conduct of the Civil War, and Reconstruction, and Congress anticipated additional fundamental judicial

period of post-New Deal quiescence. The seven-year moving average adopted by Caldeira and McCrone as a measure of judicial activism includes three prospective years, which, of course, could not be known to legislators considering sanctions. A three-year lagging average gives essentially the same results, however.

[73] The peak of the seven-year moving average is in 1821, but the Court remained active throughout the decade. Between 1819 and 1832, the Court struck down thirteen state statutes, after having struck down a total of only four state laws prior to 1819. *See also* Warren, *supra* note 58.

[74] *See* Mark A. Graber, *The Jacksonian Origins of Chase Court Activism*, 25 J. Sup. Ct. Hist. 17 (2000).

[75] In addition, while riding circuit in 1823 Justice William Johnson struck down a South Carolina statute regarding the entrance into the state of free blacks. Warren, *supra* note 64, at 1:19–20.

challenges to its actions in such vital policy areas. Most famously, the Hughes Court repeatedly struck down central elements of the New Deal and raised basic constitutional questions about Roosevelt's response to the Great Depression.

There were three less significant periods of court-curbing activity in Congress prior to 1960 (the endpoint of Nagel's data), in the mid-1890s, the early 1920s, and the mid-1950s. During these periods, unusual numbers of court-curbing bills were introduced in Congress, but those proposals were relatively unsuccessful in clearing legislative hurdles or provoking a reaction from the Court. These less successful periods also help illuminate the court-curbing dynamic. In terms of number of invalidations, the Court was fairly active in the 1920s and 1950s, but not unusually active in the 1890s.[76] The 1895 income tax decision was unusually salient, however, and the courts had also made a number of controversial labor and commerce decisions during the period involving judicial powers and statutory interpretation.[77] Likewise, the constitutional decisions of the 1920s and 1950s were of unusual political importance.[78]

None of these three periods involved the rise of a new political coalition. As the heterogeneity of the dominant legislative coalition increases, there are fewer and less intense points of agreement among its members. Under such circumstances, the costs of independent judicial review are less widely shared, and more legislators perceive the potential benefits of judicial independence. Although the legislators advocating court-curbing during these periods recognized that the Court was sharply divergent from their own preferred position, those legislators did not represent dominant coalitions. Instead, the Populists of the 1890s, the Progressive Republicans of the 1920s, and the Conservative Coalition of the 1950s represented factional divisions (at best) within the majority. The substantive policy concerns that motivated such proposals were not widely shared within the legislative majority, and the factional split emphasized the extent to which an independent judiciary could be useful to some legislators even as it was harmful to others. Despite the relative success of Franklin Roosevelt's Court-packing plan, it ultimately lost support for similar reasons, as various legislative interests saw risks to their own distinct goals in increasing presidential influence over the Court.[79]

[76] There were spikes in both state and federal invalidations in the 1920s and 1950s, but both measures were relatively low in the mid-1890s.

[77] *See* Warren, *supra* note 64, at 2:690–707.

[78] *See* William G. Ross, A Muted Fury 179–284 (Princeton Univ. Press 1994) (describing the Court's actions in the early 1920s and the political response); Walter F. Murphy, Congress and the Court 97–123 (Univ. of Chicago Press 1962) (describing the Court's actions in the mid-1950s and the political response).

[79] *See* William E. Leuchtenburg, The Supreme Court Reborn 132–62 (Oxford Univ. Press 1995) (describing battle over the Court-packing plan).

7. Conclusion

Judicial independence requires political maintenance. Courts may be empowered with independence and judicial review by constitutional drafters, but those formal grants of authority are vulnerable to subsequent political manipulation. Apparently strong, formal constitutional guarantees have often proven inadequate in securing a strong and independent judiciary in practice. Other political actors have often proven powerful enough to subvert judicial independence and to discourage judicial activism. Powerful political actors must have a stake in the continuation of the constitutional system; otherwise they will search for ways to escape its strictures. Empowering an independent judiciary is one strategy for securing constitutional commitments, but the ultimate effectiveness of that strategy depends on the size of the challenges that the courts face.

The courts operate within a political environment that places limits on their sphere of action. Those limits are undoubtedly greater in the statutory context, where judicial decisions can be overturned relatively easily. Those limits are also likely to be affected by basic institutional and constitutional features, such as the formal protections offered to the courts and the number of veto players in the policy-making process.[80] The limits will also be affected by the political calculations of other actors in the system. Judges have room to maneuver as long as other actors have reason to refrain from exploiting the vulnerabilities of the courts.

This article has focused on the set of political considerations that must be taken into account by elected officials when evaluating judicial review and weighing the possibility of sanctioning the courts. It elaborates several political rationales that might lead legislators to support independent judicial review, as well as the factors that might lead them to oppose it. The decision to sanction ultimately turns on a calculation of when the costs of continued independent judicial review outweigh the benefits of such an institution and the risks of any political backlash against the sanctioning effort itself. This approach suggests that independent judicial review can be fairly robust when the informational and electoral environments of the legislature are uncertain, the institutional environment is dense, the public independently values the judiciary, and the range and salience of judicial disagreement with the legislature are relatively low. This has been the normal political environment in American history, and it is not surprising, therefore, that the federal judiciary has historically been fairly active and independent in exercising the power of judicial review. The U.S. Supreme Court can generally act "sincerely" on its constitutional understandings because the strategic environment for such actions has been generally favorable. When cohesive political coalitions sweep

[80] *See* George Tsebelis, Veto Players 67–160 (Princeton Univ. Press 2002).

into power with sharply differing constitutional understandings, the Court faces much more serious constraints. Under those conditions, the strategic environment for the active exercise of the power of judicial review is less hospitable.[81] In like fashion, it can be expected that judiciaries in unitary political systems with electorally secure political coalitions will be less likely to develop and maintain the capacity for strongly independent constitutional review.

[81] Existing case studies supporting strategic judicial behavior in exercising constitutional review have been drawn from these historical periods. *See, e.g.*, Gely & Spiller, *Political Economy, supra* note 5; Clinton, *supra* note 5; Knight & Epstein, *On the Struggle for Judicial Supremacy, supra* note 5; Lee Epstein & Thomas G. Walker, *The Role of the Supreme Court in American Society: Playing the Reconstruction Game, in* Contemplating Courts 351 (Lee Epstein ed., CQ Press 1995). *See also* Roger Handberg & Harold F. Hill Jr., *Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress*, 14 L. & Soc'y Rev. 309 (1980) (finding heightened Court support for the federal government's position in all types of litigation after the court-curbing periods). Adequately evaluating those case studies and the extent of the "empirical support for the separation-of-powers model" that they offer requires recognizing the conditions in which such legislative sanctions might be meaningful. Segal, *supra* note 4, at 33. Of course, this paper has not focused on how the Court has responded to these threats of legislative sanction, but simply on the political impetus for the threats themselves.