Judicial Independence: Often Cited, Rarely Understood

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I. INTRODUCTION: JUDICIAL INDEPENDENCE AND ITS MANY FACES

"Judicial independence" is frequently touted as the lynchpin of a democratic society and the rule of law. Governments strive to declare that their countries have "independent" judiciaries and foreign donors provide vast amounts of money to help establish judicial independence in emerging democracies.[1] Despite all this emphasis on "judicial

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1. Governments of many emerging democracies, often with the help of foreign aid donors, draft constitutions or amend constitutions to include provisions explicitly requiring an "independent" judiciary. *See generally* AMERICAN BAR ASSOCIATION,

independence," a concrete or consistent definition of the term is elusive. This raises the question: if judicial independence is really so important, why does it defy definition? Furthermore, why do politicians, legal experts, and political scientists exalt a concept that they cannot define?

Part of the problem with attempting to define judicial independence is that the use of the term is amoebic, changing shape to fit the particular context in which it is used.[2] The question is who or what the judiciary is to be "independent" from. If a politician is discussing corruption, then judicial independence refers to judges who refuse to accept bribes from private parties. If a foreign donor is funding programs to establish judicial independence in a new democracy, he is probably using the term to refer to a judiciary which is free of political influence from other governmental branches that had previously controlled the country or the courts. If an attorney is speaking about judicial independence, he is referring to the ability of an individual judge to decide a case impartially, according to the law, and without personal bias. Political scientists might use the term to mean that independent judges can interpret the law established by the legislature without worrying about their salaries or career prospects.

To get at these various understandings of judicial independence it is necessary to define what exactly is meant by "judicial" and what is meant by "independent."[3] When discussing judicial independence, the term "judicial" has several possible meanings.[4] Judicial could refer to individual judges, courts as a whole, or it could refer to parts of the court system such as lower and higher courts. The possibilities have far reaching implications for this study because it is entirely possible that individual judges are independent, while the courts in which they work

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CENTRAL AND EAST EUROPEAN LAW INITIATIVE, COMPILATION OF INTERNATIONAL STANDARDS ON JUDICIAL REFORM AND JUDICIAL INDEPENDENCE 1 (2004), http://www.abanet.org/ceeli/areas/judicial_reform/compilation_jan04.pdf. Among others, the United Nations' standard for judicial independence states that "[t]he independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country." *Id.* at 2.

2. *But see* Lewis Kornhauser, *Is Judicial Independence a Useful Concept?*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS: AN INTERDISCIPLINARY APPROACH 45, (Stephen B. Burbank & Barry Friedman eds., 2002) (finding the concept of judicial independence utterly unworkable). Kornhauser argues that there is so much confusion surrounding the term that it is not "a useful, analytic concept." *Id.*

3. *See* Peter Russell, *Towards a General Theory of Judicial Independence*, *in* JUDICIAL INDEPENDENCE IN THE AGE OF DEMOCRACY, CRITICAL PERSPECTIVES FROM AROUND THE WORLD 1, 6-8 (Peter H. Russell & David M. O'Brien eds., 2001).

4. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 355 (1999).

are dependent on other branches of government.[5] What complicates this review of definitions is that commentators themselves do not usually specify what they mean by "judicial" and thus use distinct terms such as "judges," "courts," and the "judiciary" interchangeably.

The term "independent" is even more troubling. It is difficult to conceive of anything in this universe that is truly independent. Even a child who reaches the age of maturity is not entirely independent from his parents, and in adulthood, may rely on her parents for financial and psychological support, comfort, and validation. Likewise, courts are never entirely independent. Judges' salaries depend on congressional appropriations. Judges' powers depend on the Constitution and the laws of the land. Furthermore, certain judges, such as some state court judges, are dependent on the electorate for votes. Therefore, to truly understand the concept of independence, it must be defined in relation to something else. In the political context, this generally means independence *from* such things as the legislature, the executive, higher courts, individual litigants, and corruption, to name just a few examples.

In this Article, I propose a new definition of judicial independence. I submit that "judicial independence" can and should be defined as the judiciary's independence *from the executive,*[6] as measured by the amount of discretion that individual judges exercise in particular policy areas. Pursuant to McNollgast,[7] this discretion varies depending on the political interaction between the legislature and the other branches of government. I believe this definition, compared to the others reviewed below, will provide political scientists and legal scholars with a better

5. *Id.* Ferejohn claims that "judicial independence is the idea that a judge ought to be free to decide the case before her without fear or anticipation of (illegitimate) punishments or rewards." *Id.* However, "the federal judiciary is institutionally dependent on Congress and the president, for jurisdiction, rules, and execution of judicial orders." *Id*. Ferejohn classifies the American system as one in which there are "independent judges within a dependent judiciary." *Id.* at 381.

6. The idea that the judiciary should be independent from the executive branch is not new. Legal theorists, known as progressives, believed that law was equated with policy. As far as who should make law, progressives advocated the creation of scientific agencies that were independent from the executive for developing policy. *See* Mathew McCubbins & Daniel Rodriguez, What Statues Mean: Positive Political Theory and the Interpretation of Federal Legislation (manuscript on file with authors) (describing various theories of law including that espoused by the progressives).

7. McNollgast, *Conditions for Judicial Independence*, 15 J. CONTEMP. LEGAL ISSUES 105 (2006). McNollgast refers to Mathew McCubbins, Roger Noll, and Barry Weingast.

analytical tool for measuring and modeling judicial independence in both the United States and abroad.

To better compare the many previous definitions to my proposed definition, this Article is divided into four parts. In Part II, I will present my definition of judicial independence and show why it provides a useful analytical tool for studying the independence of courts and judges. In Part III, I will evaluate the usefulness of three other scholarly approaches to judicial independence and the underlying assumptions about the meaning of law upon which each approach is founded. The three approaches to judicial independence discussed here are as follows: 1) the institutional approach, 2) the judicial rulings against government approach, and 3) the strategic interaction approach. Under the first of these approaches, scholars focus on institutional and structural variables that allegedly enhance or inhibit judicial independence. Scholars using this approach suggest that if a given institution is in place, judges and the judiciary as a whole will be independent from a specific branch of government—be it the executive or legislature or the judiciary in the case of individual judges' independence. Scholars espousing the institutional approach assume that it is the legal process itself that makes law legitimate.[8] A second approach to judicial independence is defined simply by the ability of judges to issue anti-government decisions without retribution. This approach equates law to some specific utilitarian purpose.[9] A third approach to judicial independence is the strategic interaction approach that looks at judicial independence as a strategic game among different branches of government as well as different levels within the judiciary itself. Under this approach, scholars assume that law means politics or political action.[10]

After discussing the positives and negatives of these various approaches, I will explore in Part IV the inherent tension between

8. Legal process scholars define law as process which arises from neutral principles. *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (1958). "'Neutral principles' inform the construction of the legal process to ensure that lawmaking, whether legislative, administrative or judicial is reasonable and serves the common good. In their [legal process scholars'] description, if the design of this system follows certain principles, the policies it produces are in the interest of society and the system is legitimate." McCubbins & Rodriguez, *supra* note 6.

9. For scholars supporting this view, the specific purpose of the law may be to check the other branches of government.

10. Positive political theory of law analyzes the relationship between the judiciary and other government institutions consisting of elected politicians. Under positive political theory, the legislature is supreme in lawmaking powers. *See* McCubbins & Rodriguez, *supra* note 6.

judicial independence and accountability in two ways. First, I will examine whether judges who are "independent" can also be held accountable. Second, I will specifically analyze whether judges can "make law" and in doing so whether they are misbehaving by making law counter to the wishes of lawmakers. With respect to such misbehavior, I will discuss the mechanisms for punishing judges, which tend to be applied in an inconsistent manner. In Part V, I will conclude by examining whether judicial independence may be logically incompatible with traditional conceptions of the rule of law.

II. JUDICIAL INDEPENDENCE DEFINED ANEW

Judicial independence is only a useful term if it allows observers to objectively determine whether it is present or not. If judicial independence has too many facets or requirements, as suggested by many of the definitions reviewed here, then it is difficult to tell whether any of these requirements are necessary for judicial independence to exist. As with the multitude of definitions of "democracy,"[11] judicial independence has often been defined so broadly and with so many requirements that the term becomes meaningless and it is difficult to ascertain what exactly makes a judiciary independent.

To remedy this, I propose a two part definition of judicial independence. First, at a minimum, judicial independence is defined as the judiciary's independence from the executive branch in any given country.[12] I define

11. Democracy has been defined minimally as a competitive struggle for the people's vote. *E.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 269 (1942). Other definitions of democracy include many requirements such as Freedom House's definition of electoral democracy requiring: 1) a competitive multiparty political system, 2) universal adult suffrage, 3) regular contested elections, and 4) public access to political parties. Freedom House, www.freedomhouse.org/template.cfm?page+35&year=2005 (last visited June 1, 2006). Definitions with many requirements make it difficult to determine what threshold a country must pass before being considered a democracy.

12. *See* Matías Iaryczower et al., *Judicial Independence in Unstable Environments, Argentina 1935-1998*, 46 AM. J. POL. SCI. 699, 699-700 (2002) (implying the need for judiciaries to be independent from the executive). These authors discuss how the relationship between the executive and legislature affects judicial independence. Despite the conventional wisdom, Argentine judges act more independently than first thought. *Id.* at 700. Argentine Supreme Court judges increasingly voted against the government, the weaker the executive's control over the legislature. *Id.* In other words, the more presidents control the legislature, the less likely Supreme Court judges will issue anti-government decisions. *Id.* The logic behind this conclusion is that if the executive

it as independence from the executive rather than the legislature because courts can never be completely independent from the legislature that is supreme in making the laws that judges interpret in particular cases and that provides funding for courts and their personnel. Under this minimalist definition, judiciaries are not considered independent when the executive or its agents, such as ministries of justice, have exclusive control over the judiciary, its resources, and judges themselves. Defining judicial independence in this way makes its presence readily ascertainable.

Once the existence of judicial independence has been established, the second step is to further refine the definition. As a result, if the judiciary is independent from the executive, then judicial independence may be measured by the amount of discretion that individual judges may exercise at any particular moment in time, concerning any specific area of the law. Under this proposed second part of the definition, judicial independence is not fixed or stagnant, but is fluid and changeable. This concept is derived from McNollgast,[13] who posit that judicial independence is discretion that fluctuates depending on the political composition of government and strategic interaction between branches of government. The amount of judicial discretion afforded to judges at any particular time also depends on issue area. This second part of the definition is firmly rooted in the positive political theory of law which defines law as politics or strategic interaction.[14] When issues become more politically salient, legislative bodies may either curtail or expand the amount of discretion that judges may exercise in particular areas of the law. Law makers can expand discretion by intentionally making laws vague so that judges have wide latitude in deciding how to apply the law in a specific case.[15] Similarly, lawmakers can curtail discretion

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dominates the legislature, it has more influence in both increasing court size and starting impeachment proceedings that clearly influence judicial independence. *Id.*

13. McNollgast, *supra* note 7.

14. *See* McCubbins & Rodriguez, *supra* note 6.

15. *See* JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY 44-77, 176-83 (2002). Huber and Shipan argue that the number of words present in a statute define how much discretion judges have. For example, statutes with many words are supposed to put more constraints on judges' discretion and statutes with fewer words are supposed to contain fewer constraints. *Id.* at 44-45. While Huber and Shipan correctly assert that the written law guides the amount of discretion that Congress provides judges, making this dependent on the number of words in a given statute is not a measure of this. Some statutes may appear short because they incorporate other, possibly more specific statutes, defining judges' discretion. Likewise, some statutes may be very long because they include many details unrelated to judicial discretion.

by including specific instructions to judges that limit their discretion.[16] In the case of appellate courts, lawmakers may specifically include what type of standard of review should be applied to specific types of appeals. Supreme courts also play a role in either confirming or overturning laws which define judicial discretion for lower courts. Whether lawmakers react to the decisions of supreme courts concerning lower court discretion again depends on the political composition of the branches of government and the salience of the issue.[17]

Defining judicial independence in terms of the amount of discretion afforded to individual judges in particular issue areas has several advantages. First, it acknowledges that courts and court systems may be dependent on other branches of government for funding and personnel choices and certainly on the legislative body for the laws that courts are charged with interpreting. Second, it provides social scientists with the ability to measure judicial independence by comparing the written law (especially in the cases of statutes) to how judges actually decide cases. Social scientists may study judicial decisionmaking by examining how judges make decisions within the range of acceptable discretion granted to them by the lawmaking body. Third, defining judicial independence in terms of the amount of discretion that judges exercise allows social scientists to comparatively analyze the freedom of judges to make decisions despite the wide variety of law and procedures applied within a country or internationally.

III. APPROACHES TO JUDICIAL INDEPENDENCE

In order to ascertain the usefulness of the definition of judicial independence that I have proposed here, I will analyze the other approaches to judicial independence espoused by legal scholars and

16. Sentencing Reform Act, 28 U.S.C. § 991 (1984). Congress passed the Sentencing Reform Act provisions of the Comprehensive Crime Control Act of 1984 in reaction to the growing concern about the disparity of judges' sentencing decisions in federal criminal cases. *Id.* In passing this act, Congress allowed the United States Sentencing Commission, an independent agency of the judicial branch, to establish sentencing guidelines which stated specific ranges of penalties that judges could apply to such cases. *Id.* While judges could diverge from these guidelines in limited instances, the purpose was to curtail the discretion of judges. *Id.*

17. In the Sentencing Guidelines example, *supra* note 16, the Supreme Court in 2005 found that the Sentencing Guidelines were in part unconstitutional and thus were no longer mandatory constraints on federal judges. United States v. Booker, 543 U.S. 220 (2005). Whether Congress will decide to react to this decision remains to be seen.

political scientists. Each of these approaches is based on scholars' underlying assumptions as to: 1) the meaning of law as policy, process, or politics, and 2) the role of judges in society as law-makers or law-appliers. Further, in this part of my analysis, I will indicate the varying usefulness of these approaches to studying judicial independence. I find the strategic interaction approach the most useful and incorporate it into my definition of judicial independence.

A. The Institutional Approach

A significant portion of the literature dealing with courts and judicial independence is derived from "new institutionalism" which holds that certain institutional configurations, or rules of the game, affect the behavior of political actors.[18] Scholars supporting the institutional approach assume that the meaning of law in society is equated to process that is in turn derived from neutral principles.[19] For legal process scholars, outcomes of legal decisions are unimportant and instead the legal process itself is supreme.[20] As a result, the process dictating the configuration of judicial institutions and the institutions themselves provide validity to law. Institutional definitions of judicial independence are all relative and focus on certain rules or institutional arrangements which facilitate independence on the part of judges. Commentators analyzing institutional variation do not define judicial independence explicitly, but simply state what conditions are conducive to its existence. The most emphasized institutional rules ensuring independence are judicial selection either through appointment or elections. However, a few studies indicate that other institutional rules are ripe for study.

1. Judicial Appointment

Many commentators focus on judicial selection methods as an indicator of independence. There are a myriad of methods for selecting judges.[21] One such method is appointment by elected politicians. In the

18. *See generally* Kenneth A. Shepsle, *Studying Institutions: Some Lessons from the Rational Choice Approach*, 1 J. THEORETICAL POL. 131 (1989).

19. *See* McCubbins & Rodriguez, *supra* note 6; *see also* HART & SACKS, *supra* note 8.

20. *See* McCubbins & Rodriguez, *supra* note 6; *see also* HART & SACKS, *supra* note 8.

21. *See* American Judicature Society, *Judicial Selection in the States: Appellate and General Jurisdiction Courts* (2004), http://www.ajs.org/js/JudicialSelectionCharts.pdf; *see also* U.S. Courts, *Frequently Asked Questions* (2005) (see chart entitled, *Initial Selection: Courts of Last Resort*) (last visited June 1, 2006), http://www.uscourts.gov/faq.html. The following is a summary of the various selection methods:

American context, this method is followed in regards to Article III courts by which the President appoints federal judges to these courts with the advice and consent of the Senate.[22] In some U.S. states, by contrast, elected officials appoint judges either with or without the participation of a nominating commission.[23]

Most commentators value appointment of judges over election of judges for enhancing judicial independence.[24] Studies of American courts indicate that appointment methods lead to the selection of judges who are less political because they do not have to campaign for votes in their jurisdictions. Despite this general preference, there is an "inherent

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COMPARING INSTITUTIONAL VARIABLES PURPORTEDLY AFFECTING JUDICIAL INDEPENDENCE: STATE SUPREME COURTS AND FEDERAL JUDICIARIES

INSTITUTIONAL VARIABLE	**LOCATION**
Merit Appointment method with nominating commission	Alaska, Arizona, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Indiana, Iowa, Kansas, Maryland, Massachusetts, Missouri, Nebraska, New Mexico, New York, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Vermont and Wyoming
Appointment by legislature	South Carolina and Virginia
Appointment by chief executive	By the U.S. President for the federal judiciary (Article III) By the governor in California, Maine, New Hampshire, New Jersey
Appointment by U.S. Court of Appeals	U.S. Bankruptcy Court (Article I)
Partisan elections	Alabama, Illinois, Louisiana, Michigan, Ohio, Pennsylvania, Texas, West Virginia
Non-partisan elections	Arkansas, Georgia, Idaho, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Oregon, Washington, and Wisconsin.

Id.

22. U.S. CONST. art. II, § 2. The selection of judges for Article I courts is significantly different from that of Article III courts. Article I bankruptcy judges are selected by the majority of judges of the U.S. Court of Appeals having jurisdiction over a particular bankruptcy district. U.S. Courts, *supra* note 21.

23. American Judicature Society, *supra* note 21. State nominating commissions suggest a list of names from which politicians can choose judges.

24. Andrew Hanssen, *Appointed Courts, Elected Courts and Public Utility Commissions: Judicial Independence and the Energy Crisis*, 1 BUS. & POL. 179 (1999).

tension" between judicial independence and the selection of judges by politicians.[25] Furthermore, the assumption that appointment of judges as compared to election of judges is less political may be called into question when looking at both historic and more recent heated political debates over federal court nominees.[26]

In many civil law countries, there are even more variations in selection methods than found in the United States by which the executive, legislator, judiciary or a combination of the three may be involved in the selection and confirmation of judges. Many countries have separate judicial councils which are autonomous bodies of the judiciary made up of actors from the various branches as well as civil society members who assist in judicial selection.[27] Finally, selection method also varies depending on the level of court involved.[28]

Despite, the wide variation in selection methods, little work outside of the study of American courts has focused on appointment procedures. However, Moreno, Crisp, and Shugart have studied the intersection between the appointment process and independence for a variety of unelected bureaucracies, including courts, in Latin America.[29] According to these authors, variations in appointment processes can be viewed along a continuum. At one extreme, judicial appointment processes in which the legislators play a dominant role curtail judges' independence. Judges appointed by legislators may feel compelled to make decisions that please those legislators who appointed them in order to maintain their careers on the bench.[30] At the other extreme, judicial appointments in which civil society members play a dominant role in deciding which judges to select may enhance independence because members of civil society do not have the same political power to remove

25. Terri Peretti, *Does Judicial Independence Exist? The Lessons of Social Science Research*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 103, 104.

26. Recent debates have focused on a potential Senate rule (i.e., "the nuclear option") that would prevent Democrats from using the filibuster to block President Bush's judicial nominees. *See* Sheryl Gay Stolberg, *As Vote on Filibuster Nears, G.O.P. Senators Face Mounting Pressure*, N.Y. TIMES, Apr. 20, 2005, at A19.

27. Linn Hammergren, *Do Judicial Councils Further Reform? Lessons from Latin America* 2 (Carnegie Endowment for Int'l Peace Rule of Law Series, Working Paper No. 28, 2002), http://www.carnegieendowment.org/files/wp28.pdf.

28. For example, in state courts, the selection method varies depending on whether judges are being selected for state supreme courts, appellate courts or trial courts. American Judicature Society, *supra* note 21.

29. Erika Moreno et al., *The Accountability Deficit in Latin America*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA 79, 102-03 (Scott Mainwaring & Christopher Welna eds., 2003).

30. *Id.* at 102.

judges as elected officials.[31] In some countries, politicians purposefully change the procedures for appointment in order to strengthen or weaken their control over judges.[32] Politicians seem to be motivated to change the methods governing how judges are selected in order to signal either greater or lesser executive and legislative control over the judiciary.[33]

Despite a large amount of scholarship on judicial appointment as well as examples of politicians' attempts to alter the appointment rules to favor their positions, the exact impact of appointment on judicial independence has to date defied rigorous empirical examination. Epstein, Knight, and Shvetsova indicate that scholars who study judicial selection methods focus solely on how selection produces different types of judges or affects their behavior.[34]

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31. *Id.* at 103.

32. Beatriz Magaloni, *Authoritarianism, Democracy and the Supreme Court: Horizontal Exchange and the Rule of Law in Mexico*, *in* DEMOCRATIC ACCOUNTABILITY IN LATIN AMERICA, *supra* note 29, at 266, 285, 287; Pilar Domingo, *Judicial Independence: The Politics of the Supreme Court in Mexico*, 32 J. LATIN AM. STUD. 705, 712 (2000). For example, judicial reforms in Mexico changed the appointment procedure for Mexican Supreme Court judges ostensibly to make them more independent. Under the 1994 Mexican judicial reforms, the President nominates Supreme Court judges, but the Senate is required to approve them by a two-thirds vote.

33. For example, in Venezuela from 1999 until 2004, the legislature could appoint and remove judges by a two-thirds majority vote. *See, e.g.*, Human Rights Watch, *Rigging the Rule of Law: Judicial Independence Under Siege in Venezuela* (Human Rights Watch Publications, Vol. 16, No. 3(B) (2004), http://www.hrw.org/reports/2004/venezuela0604/venezuela0604.pdf. On May 18, 2004, the National Assembly amended the Supreme Court's Organic Law with a highly questionable simple majority rather than constitutionally mandated two-thirds vote by Congress. *Id.* Besides the questionable procedure for passing this law, the law itself undermined judicial independence by modifying the laws regarding the appointment and removal of judges. Under the new law, Congress "packed" the courts by increasing the number of justices from twenty to thirty-two. *Id.* Furthermore, these judges could be selected by a simple majority vote if three prior votes requiring a two-thirds majority failed to result in a judicial selection. *See, e.g.*, Art. 8, Ley Orgánica del Tribunal Supremo de Justicia (2004), *available at* www.tsj.gov.ve/legislacion/Nuevaleytsj.htm. The new law is an extreme example, even in Latin America, of a legislature exercising political dominance over the Supreme Court.

34. Lee Epstein, Jack Knight & Olga Shvetsova, *Selecting Selection Systems*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 191, 194 (citing a plethora of judicial studies dealing with selection method). A cursory review of these studies shows no attempt to relate judicial independence to selection method type. Further, most of the literature fails to shed any light on the reasons that states choose a particular selection method. However, Epstein, Knight, and Shvetsova theorize that "political uncertainty produces selection methods that many scholars associate with judicial

2. Judicial Elections

As opposed to judicial appointment, many state court judges are selected by bipartisan or partisan elections. In fact, eighty-six percent of American judges run for election[35] and state courts where judges sit for election hear the majority of all litigation in the United States.[36] Despite the prevalence of elected judges, at least in the United States, most legal scholars argue that elections compromise the integrity and impartiality of judges because they must actively seek votes to obtain, and in some cases, retain their posts. While elections may make judges more responsive to the needs and desires of the electorate, scholars argue that elections may limit judicial independence if judges are intent on staying in office and voters use information about judicial decisions when they go to the polls.[37] Furthermore, elections may compromise a judge's ability to make decisions on individual cases due to the signals received by voters[38] and election campaign contributors.

Scholars claim that judicial elections may hinder judicial independence because individual judges running for election may be compelled to take positions on social and political issues to solicit both votes and campaign funding. This in turn may compromise their impartiality to render decisions on such issues.[39] This may be cause for concern due to the

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independence" and that as this uncertainty decreases states will be willing to "devise or change their institutions to increase judicial opportunity costs." *Id.* at 195.

35. *See generally* DEBORAH GOLDBERG & SAMANTHA SANCHEZ, THE NEW POLITICS OF JUDICIAL ELECTIONS 2002: HOW THE THREAT TO FAIR AND IMPARTIAL COURTS SPREAD TO MORE STATES IN 2002 (2002), *available at* http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,633 (hyperlink below "Also Available"). For further information on judicial elections and campaign fundraising see the invaluable websites of the Brennan Center for Justice at New York University School of Law, the Justice at Stake Campaign, and the Institute of Money in State Politics. *See* Brennan Center for Justice at NYU School of Law, http://www.brennancenter.org/ (last visited June 1, 2006); Justice at Stake Campaign, http://www.justiceatstake.org/ (last visited June 1, 2006); Institute of Money in State Politics, http://www.followthemoney.org/ (last visited June 1, 2006).

36. The National Center for State Courts, Court Statistics Project, reported the filing of over 100 million cases in American state courts in 2003. The National Center for State Courts, *Examining the Work of State Courts, 2004: A National Perspective from the Courts Statistics Project* (Richard Y. Schauffler et al. eds., 2005), http://www.ncsconline.org/D_Research/csp/2004_Files/EWOverview_final_2.pdf.

37. Charles H. Franklin, *Behavioral Factors Affecting Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 148, 151.

38. Edward Rubin, *Independence as Governance*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 56, 87.

39. JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED 86 (2002) (stating that judges do indeed make decisions based on their political preferences).

explosion in campaign spending in state judicial races in recent years.[40] For example, litigants who appear before a judge to decide a case involving abortion may be concerned about a judge who asserts strong pro-life or pro-choice opinions in his election campaign. The voicing of such political opinions by judges, who traditionally have been viewed as "above" politics, was implicitly approved by the U.S. Supreme Court in a finding that a law prohibiting "a candidate for judicial office" from "announc[ing] his or her views on disputed legal or political issues" violated the First Amendment.[41] The Supreme Court decision signals that the political opinions of judges, once a taboo subject, are now considered legitimate election fodder.

The use of advertising in judicial election races also accentuates the political opinions of judges and weakens the public perception of judges

40. State supreme court candidates raised $45.6 million in 2000, sixty-one percent more than in 1998 and double the amount raised in 1994. *E.g.*, DEBORAH GOLDBERG, ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS: HOW 2000 WAS A WATERSHED YEAR FOR BIG MONEY, SPECIAL INTEREST PRESSURE, AND TV ADVERTISING IN STATE SUPREME COURT CAMPAIGNS 4 (2002), *available at* http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,633 (hyperlink below "Also Available"). While judges raise money for their own campaigns, they receive significant funding from outside sources, and the individuals and organizations providing funding to judges tend to represent a very small percentage of the population. From 2000 to 2002, in state supreme court elections, more than half of campaign funding came from businesses and attorneys who may have cases before the court. GOLDBERG & SANCHEZ, *supra* note 35, at 4. Other significant contributors included special interest groups and the candidates' own political parties, especially in partisan elections. Such contributions raise obvious questions about the impartiality of judges deciding issues important to special interest groups or their constituents. *Id*. at 4-5. The reverse also may be true. Recently Representative Tom DeLay's criminal trial in Texas has exposed the fact that judges who contribute to political campaigns themselves may be prevented from hearing cases involving politicians due to these judges' own campaign contributions. *See Texas: Hearing Set in DeLay Trial*, N.Y. TIMES, Oct. 25, 2005, at A18.

41. Republican Party of Minn. v. White, 536 U.S. 765, 765 (2002) (invalidating 52 MINN. STAT., CODE OF JUD. CONDUCT) Canon 5(A)(d)(1) (2000). In this opinion, however, the Supreme Court did leave room for the possibility that states could fashion judicial conduct codes in a way as to reasonably restrict political statements by judicial candidates and avoid a First Amendment violation. NATIONAL AD HOC ADVISORY COMMITTEE ON JUDICIAL CAMPAIGN CONDUCT, NATIONAL CENTER FOR STATE COURTS, REPUBLICAN PARTY OF MINNESOTA V. WHITE AND THE CANONS REGULATING JUDICIAL ELECTIONS 4 (2002), http://www.judicialcampaignconduct.org/ElectionLawWhiteMemo.pdf. However, recently the Supreme Court closed the door to deciding the issue of using judicial codes of conduct as a method for restricting judicial candidates' campaigns. *See* Dimmick v. Republican Party of Minn., No. 05-566, 2006 WL 152093, *cert. denied sub nom.* Republican Party of Minn. v. White, 416 F.3d 738 (8th Cir. 2005).

as independent free-thinking arbiters of cases. Not surprisingly, hand-in-hand with the increase in state judicial campaign funding, is the increase in contentious election advertisements, which not only air negative campaign messages against opponents, but also tends to focus on three particular political issues: civil justice (tort reform), crime control, and family values.[42] This focus on the political positions of judges on specific issues comes at the expense of objective analysis of the candidates' credentials and professional integrity. Thus, a judicial election has come to appear much as any other political election and the independence and impartiality of judging a quaint notion.[43]

The concern over the effects of judicial elections on judicial independence has led to demands for reform. State and national reform efforts have focused on abandoning judicial elections completely in favor of other selection methods. However, such reform by state legislators would require constitutional amendments to state constitutions, which may in turn require voter approval[44]—a difficult task as most voters arguably would like to retain their rights to influence judicial selection. Other efforts have focused on revising judicial codes of conduct, curbing especially egregious behavior, and on reforming campaign finance and advertisement disclosure laws.

Again, apart from general theorizing on the effect of elections, little empirical work has assessed how elections really affect the ability of judges to act independently. Of the judicial election literature, there are no empirical studies of the election of judges outside of the United States. However, the election of judges outside the United States is indeed very rare and policymakers abroad are often quite critical of the use of elections in American state courts. Elections affect judicial independence, but the magnitude of this effect requires further empirical analysis.

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42. DEBORAH GOLDBERG ET AL., THE NEW POLITICS OF JUDICIAL ELECTIONS 2004: HOW SPECIAL INTEREST PRESSURE ON OUR COURTS HAS REACHED A "TIPPING POINT"—AND HOW TO KEEP OUR COURTS FAIR AND IMPARTIAL vii (2004), *available at* http://www.justiceatstake.org/contentViewer.asp?breadcrumb=3,570,633 (hyperlink below "Also Available"). In 2004 spending in airtime for those seeking elected judicial office "smashes the record." *Id.* at vii. "A total of $24.4 million was spent on TV ads in high court races, obliterating the previous record of $10.6 million in 2000. In 2004, 1 in 4 dollars raised by candidates covered airtime costs."

43. Advertisements may deceive the voting population in another way. Voters often fail to understand who is funding judicial advertisements and what political interests they are advocating since many special interest groups disguise their identities by using loopholes in campaign advertising laws. *Id.* at 36. As a result, voters may be unaware of the influence of special interest at the polls. *Id.*

44. Clay Robison, *Different Chief Justice, But Same Story*, HOUS. CHRON., May 2, 2004, at 2.

3. Judicial Tenure

Scholars further contend that independence is also affected by the length of judicial appointment.[45] As with the selection method, there is wide variation in the judicial tenure variable. Judicial tenure may vary in the length of the initial term and in the number of overall years judges may serve. For example, initial term length for American state supreme court judges varies from one year in several states[46] to life in Rhode Island.[47] In the literature dealing with American courts, long term length is associated with judicial independence.[48] The logic is that the longer judges hold office, the less likely they will be concerned about job security and thus the more likely they will make decisions based on the law rather than on personal career goals. American legal scholars often claim that the federal judiciary is more independent than state judiciaries because federal judges serve for life.[49]

The effect of tenure on judicial independence also has been studied in a number of Latin America countries.[50] Moreno, Crisp and Shugart propose a "term ratio" to analyze tenure, "which is the ratio of the official's term to the term of the elected branch that is involved in appointing."[51] Low term ratios indicate a lack of independence as elected officials can easily remove sitting judges. Higher term ratios signal more independence and also signal that the judicial post has career appeal.

Another approach to tenure is taken by Magaloni who implies that although tenure affects independence it must be analyzed in the context of other institutions.[52] For example, various lengths of judicial tenure in Mexico prior to judicial reform did not have a positive influence on independence as executives were able to easily change the rules making the length of judicial service a meaningless safeguard against removal. Further, prior to the reform, tenure did not safeguard independence

45. Stephen Burbank & Barry Friedman, *Reconsidering Judicial Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 9, 26-27.

46. There is an initial term of one year for State Supreme Court judges in Florida, Iowa, Kansas, Missouri, Oklahoma, and Wyoming. American Judicature Society, *supra* note 21, at 8-10, 12, 14.

47. *Id.* at 12.

48. William Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875, 891 (1975).

49. *Id.*

50. *See* Moreno et al., *supra* note 29, at 103-04; Magaloni, *supra* note 32, at 285-87; Domingo, *supra* note 32, at 712-15.

51. Moreno et al., *supra* note 29, at 103.

52. Magaloni, *supra* note 32, at 286.

because justices "tended to follow *partisan* careers before or after leaving the Court, creating strong incentives to please the leader of the party . . . as a means to further their political ambitions."[53] Magaloni shows that after the judicial reform, tenure may in fact affect the incentives of judges and other officials if the length of service promotes careerism. For example, in Mexico, although tenure was reduced from life to fifteen years, judges are serving significantly longer terms than prior to the reform.[54] Longer terms ensure that judges outstay elected officials (executives and legislators) who appointed them.[55] Terms which are shorter than the terms of politicians charged with appointing judges may make judges more susceptible to outside pressures in order to secure future employment opportunities.

4. Other Institutional Approaches

Although tenure and selection method are the most cited institutions linked to judicial independence, other authors look at such things as: 1) control over administration and budget, 2) constitutional powers granted to courts and judges, and 3) discipline of judges. First, administrative control is important because when "political authorities (who are a party to cases coming before the courts) also control vital aspects of adjudication, judicial independence can be seriously undermined."[56] Control over administrative matters by the judiciary is not unique to American federal and state courts. In fact, many Latin American governments provide the judiciary with ample administrative powers including decisions regarding lower court appointments and the administration of the budget.[57] Judiciaries that control their budgets have greater independence as they can decide judicial salaries (thus promoting careers in the judiciary) and the manner in which resources are allocated.[58]

Second, the specific powers delegated to judges may enhance judicial independence. In respect to American courts, "[t]he most striking evidence of judicial independence is a court's exercise of the power of

53. *Id.* at 290 (emphasis in original).

54. *Id.* at 286.

55. Epstein et al., *supra* note 34, at 205. Like Magaloni, Epstein, Knight, and Shvetsova urge against studies which attempt to isolate term length and its effect on judicial independence. Instead, these authors urge analyzing tenure with other variables such as judicial selection method. *Id.*

56. *See* Russell, *supra* note 3, at 20.

57. Domingo, *supra* note 32, at 715-16.

58. Arguably, however, poor countries in which judiciaries are provided with very small budgets may be more susceptible to outside influences, thus decreasing judicial impartiality and independence.

judicial review."[59] In other countries, judicial reform efforts have focused on providing judges with specific powers to decide certain types of cases which were previously out of the purview of the courts. For example, judicial reform in some former dictatorships, has focused on providing power to civil courts to hear cases once primarily reserved for military courts. In a similar vein, reform efforts have also transferred certain tasks away from courts, such that judges could focus more on judging and less on administrative matters.[60] Comparatively, the institutionalization of power and authority of non-elected officials also may enhance independence.[61]

Judicial power also may reside in judicial councils that are independent bodies attached to judiciaries that provide support in a variety of areas such as budget control, appointments, etc. Such councils, which vary widely in the way they are constituted,[62] exist in many western European

59. SEGAL & SPAETH, *supra* note 39, at 20.

60. The recent criminal law reform in Chile transferred investigation of criminal cases from lower criminal judges to newly-empowered prosecutors. Lydia Tiede, *Committing to Justice: An Analysis of Criminal Law Reforms in Chile* 15-17 (Center for Iberian and Latin American Studies, University of California, San Diego, Working Paper No. 22, 2004), *available at* http://repositories.cdlib.org/cilas/papers/22. In Eastern Europe, reforms focused on transferring notarial duties of judges to specially created agencies to deal with these more mundane administrative tasks.

61. Jodi Finkel, *Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court*, 35 J. LATIN AM. STUD. 777 (2003). Again, the 1994 Mexican judicial reform gave judges significant new powers. Prior to such reform, judges in Mexico could not decide cases regarding political matters. *Id.* at 782. The reform converted the Supreme Court into a constitutional court and gave the court two broad new powers. *Id.* at 783-84. First, the reform allowed judges to decide controversies involving cases between different levels of government and the constitutionality of their actions. *Id.* Second, the reform allowed for judicial review of certain laws passed by Congress, state legislatures, and the legislative assembly of Mexico City if and only if a certain percentage of the members of these legislative bodies petition the court. *Id.* at 784. By institutionalizing the power of judges, the reform provided them with a mandate to act on political matters. Based on an analysis of post-reform Supreme Court decisions in Mexico, Finkel shows that these new powers were not "purely paper changes," but instead powers that judges were not afraid to use. *Id.* at 777.

Although these new powers assist Mexican judges in acting independently, the powers were limited. For example if less than eight of the eleven Supreme Court judges agreed on a case, the decision would only affect the parties involved in the controversy. *Id.* at 785. To have general effects for the entire population, as do decisions by the U.S. Supreme Court, eight or more judges needed to agree. *Id.* Therefore, the powers and limitations on powers of unelected officials provide yet another institutional configuration affecting independence.

62. Council membership may include individuals from the judiciary itself, the

countries and increasingly in Latin America.[63] Judicial councils vary in the types of powers which are delegated to them including nominating judges, monitoring their career development, disciplining them, and providing input into judicial dismissals.[64] Although not discussed in the literature on judicial councils, it could be argued that judicial councils charged with the day to day administration of case loads and court calendars are able to assert their own agenda by prioritizing the way in which information is released about this non-elected branch of government.

Third, although rarely discussed in the literature, another area which affects judicial independence is control over the discipline and removal of judges. Again, there is a wide variation in who can discipline and remove judges. In some countries, the legislature or law-making body is responsible for discipline and removal, and in other countries the judiciary itself is responsible at least in the case of lower court judges. Still in other countries, discipline and removal is directed by multiple branches of government through judicial councils discussed above. For example, in the United States, Congress can impeach, convict, and remove federal judges.[65] Although rarely done, the House has in fact impeached thirteen federal judges and the Senate has convicted and removed seven.[66] As in selection methods and tenure length, there is a wide variety of methods for disciplining state court judges including impeachment, judicial board review, and recall elections.[67] Although judicial discipline and removal are rarely studied empirically, an argument similar to that for judicial selection could be made, in which removal processes involving more than one branch of government make

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legislature, and/or the executive as well as outside civil society members such as lawyers and academics. *See* Hammergren, *supra* note 27, at 2. The independence of these judicial councils in turn depends on the exact composition of these members and how the members themselves are appointed to the post. *Id.*

63. *Id.* at 2-3.

64. *Id.* at 2. Besides variations in their powers, judicial councils also vary as to how members are selected (i.e., by the Supreme Court, legislature, executive, or a combination of these branches) and their terms of office. According to Hammergren, although the judicial councils provide the best alternative mechanism to ensure judicial independence, if the rule of law is lacking in these countries, then the judicial councils are as open to corruption and cronyism as other legal institutions. *Id.* at 3, n.7.

65. AMERICAN BAR ASSOCIATION STANDING COMMISSION, AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997), *available at* http://www.abanet.org/govaffairs/judiciary/rhistory.html.

66. Henry J. Abraham, *The Pillars and Politics of Judicial Independence in the United States*, *in* CRITICAL PERSPECTIVES, *supra* note 3, at 25, 26-28.

67. Hanssen, *supra* note 24.

judges more independent.

The above analysis has emphasized the wide range of institutional variation affecting judicial independence. While many commentators boldly assert that these institutional variables are significant to judicial independence, further analysis must be done in determining the exact effects of particular institutions alone, as well as in combination with other variables. Scholars must first define judicial independence before they state what makes a judiciary more or less independent as there is no way to measure judicial independence unless it is first defined.[68] Furthermore, although scholars advocating this institutional approach suggest that the judiciary must be independent *from* something, they are unclear as to what that something is and often their theories conflict.

While the above studies assert that particular institutions affect judicial independence, there are several scholars that insist that institutions in fact do *not* affect independence. For example, Stephenson asserts that judicial selection, tenure, salary, and budget "are no guarantee of a truly independent judiciary."[69] Cameron asserts that "explicit structural protections" may be only "parchment barriers to an aggressive executive or legislature unconstrained by voters who value judicial independence."[70] As suggested by these skeptics, the institutional approach may not be a useful analytical tool. Further, scholars who point to variations in judicial institutions and their effect fail to define judicial independence. The wide range of variation of institutions suggests that there is no one institution or combination of institutions which make judiciaries independent. Therefore, under the institutional approach, the question of what minimum requirements are needed for judicial independence is left

68. *See* WILLIAM M.K. TROCHIM, THE RESEARCH METHODS KNOWLEDGE BASE 64-65, 69-71 (2001) (concerning construct validity).

69. Pilar Domingo, *Judicial Independence and Judicial Reform in Latin America*, *in* THE SELF-RESTRAINING STATE: POWER AND ACCOUNTABILITY IN NEW DEMOCRACIES (Larry Diamond & Mark Plattner eds., 1999); *see* Peretti, *supra* note 25, at 123 (citing M.C. Stephenson, *When the Devil Turns. . .: The Political Foundations of Independent Judicial Review* 5 (paper presented at the Annual Meeting of the American Political Science Association, San Francisco, CA 2001) (further citing Keith S. Rosenn, *The Protection of Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1 (1987)) (on file with author); Yash Vyas, *The Independence of the Judiciary: A Third World Perspective*, 1992 THIRD WORLD LEGAL STUD. 127 (1992); Jennifer Widner, *Building Judicial Independence in Common Law Africa*, *in* THE SELF RESTRAINING STATE, *supra*, at 177.

70. Charles Cameron, *Judicial Independence: How Can You Tell it When You See It? And Who Cares?*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 134, 139.

unanswered.

B. The Judicial Rulings Against Government Approach

Thus far, this analysis has focused exclusively on how institutional variations affect judicial decisionmaking. The institutional approach, however, is not the only approach for discussing judicial independence. Instead, some scholars define judicial independence in terms of particular judges' ability to act without political manipulation.[71] Under this approach, scholars assume that law is purposive or utilitarian with its main purpose being that of checking other branches of government.

This approach has been adopted by Ramseyer who explicitly defines independent judiciaries as "courts where politicians do not manipulate the careers of sitting judges."[72] Ramseyer and Rasmusen put this definition to test in their analysis of Japanese lower court judges.[73] These authors find that lower court judges in Japan were indeed manipulated by politicians and thus not independent, despite the fact that the constitution guarantees judicial independence. In fact, lower court judges who rule against the leading Liberal Democratic Party are punished by demotions in their career, such as being assigned to undesirable locations and tasks. Ramseyer and Rasmusen hypothesize that politicians may want to constrain judges thus making them less independent in instances when the majority party "can credibly commit to policy through means other than the courts, can detect misbehaving bureaucrats through means other than the courts, and can expect to win elections."[74] The problem with defining judicial independence as a judiciary free from manipulation is that it does not expressly state *from* what the judiciary must be independent. Here, these authors state that in general an independent judiciary is one which should be free from manipulation of some nebulous set of politicians. Furthermore, Japan is a case where the executive and legislative bodies are fused; and as mentioned in my own definition, we would not expect to see judicial independence in this type of system in

71. To address the issue of construct validity, which refers to how well measurements for concepts of one's theory suffice for the concept allegedly measured, many social scientists choose to define their terms so narrowly to ensure that there is an existing empirical measurement. In this Part there are examples of such an approach by authors seeking to measure judicial independence. While defining terms, such as judicial independence narrowly is one way of dealing with construct validity, it is not the most favored way. TROCHIM, *supra* note 68, at 69-70.

72. Mark Ramseyer, *The Puzzling (In)Dependence of the Courts: A Comparative Approach*, 23 J. LEGAL STUD. 721, 721-22 (1994).

73. *See generally* Mark Ramseyer & Eric Rasmusen, *Why are Japanese Judges so Conservative in Politically Charged Cases?*, 95 AM. POL. SCI. REV. 331 (2001).

74. *Id.* at 332.

any event.

Other commentators, using this approach, have defined judicial independence more explicitly as the ability of courts to take a stance against the government. Some American legal commentators hold that independent judiciaries are those that are willing to rule against the state.[75] Under this definition judiciaries are independent or not depending on judges' stance against the regime in specific cases. By looking at the Argentine judiciary, Helmke tests whether there are circumstances in which judiciaries traditionally thought of as dependent would also rule against the state and exhibit signs of independence.[76]

Helmke shows that Argentine judges who were not characterized as independent ruled against the government under certain conditions. Helmke's empirical study shows that "dependent" judges will issue anti-government decisions in proportion to their perception of the government's demise. As it becomes more apparent that the government will not remain in power, Argentine judges increase the number of anti-government decisions and these decisions increasingly tend to involve more controversial political issues.

The approaches presented in this Part assume that judiciaries are independent if judges can not be manipulated and thus are free to make decisions against other branches of the government. However, while evidence that courts have ruled against the government may signal a healthy judiciary, once again, this approach does not explain specifically *from* what the judiciary must be independent in order to issue such anti-

75. Gretchen Helmke, *The Logic of Strategic Defection: Court-Executive Relations in Argentina Under Dictatorship and Democracy*, 96 AM. POL. SCI. REV. 291, 291 (2002) (citing Christopher Larkins, *The Judiciary and Delegative Democracy in Argentina*, 30 COMP. POL. 423 (1998); TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY (Irwin Stotzky ed., 1993); THE FEDERALIST NO. 78 (Alexander Hamilton).

76. Helmke, *supra* note 75, at 299-300. Helmke shows that officials backed policies which at first seemed at odds with their prior policy positions in order to secure their positions in a new government. Helmke shows that Argentine judges in three periods (i.e., the military government of 1976-83, the Alfonsín government of 1983-1989, and the Menem government of 1989-95) "strategically defected" and issued anti-government decisions when it became apparent that the government under which they had ruled had a short time horizon. *Id.* These judges defected in order to show new incoming governments that they did not support the former ruling government. Helmke shows that Argentine judges under dictatorship and democracy "tended to support governments when governments were strong and to desert them when they are weak." *Id.* at 301. Arguably, the recent Ukrainian Supreme Court decision on the 2004 presidential election may be a reflection of this same phenomenon.

government decisions. Furthermore, as demonstrated by Helmke herself, this ability to rule against the government in general depends on the government composition, the policy issue, and the specific time in history. In fact, Helmke's results seem to support one of the main facets of the definition that McNollgast and I propose in part—namely that judicial independence fluctuates with politics.

C. The Strategic Interaction Approach

Thus far, judicial independence has been defined according to two main approaches: the institutional approach and the judicial rulings against government approach. As argued in the above two Parts, these two approaches are neither compelling nor realistic for defining or measuring judicial independence. Instead, an approach, grounded in the positive political theory of law[77] and holding that law is politics, is more useful to this analysis of judicial independence. The logic underlying the strategic interaction approach forms the basis of the second part of my definition of judicial independence and will be discussed more thoroughly in the following Parts.

1. Strategic Interaction Among Branches of Government

The strategic interaction approach to judicial independence has been adopted by a variety of legal scholars and political scientists who have looked at the interaction between different levels of courts as well as the interaction between the judiciary and other branches of government with elected members.[78] According to this approach, judicial independence is better defined as the "strategic interaction" among political actors which is not fixed, but fluctuates.[79] Epstein and Knight explain that "justices are strategic actors" who realize that attainment of their goals depends on their understanding of the preferences of other actors.[80] Scholars espousing the strategic interaction approach generally model Supreme Court decisions regarding statutory interpretation as a game between Congress, the executive, and the Supreme Court jockeying over positions on issues.[81]

Using such a strategic interaction model, McNollgast find that judicial independence "waxes and wanes with changes in the political composition

77. *See* McCubbins & Rodriguez, *supra* note 6.

78. *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 56-111 (1998); Iaryczower et al., *supra* note 12, at 701.

79. McNollgast, *supra* note 7.

80. Epstein & Wright, *supra* note 78, at xiii.

81. EPSTEIN & KNIGHT, *supra* note 78.

of our three branches of government."[82] Unlike other models of judicial independence, these authors do not focus on specific institutional variables or preferences of justices for the best policy outcomes. Instead, McNollgast show that judicial independence is intrinsically linked to the judiciary's need to rely on other branches to enforce its judgments.[83] Political actors in turn can influence the Supreme Court's independence by making it easier or harder for the Supreme Court to make its agents (i.e., agencies or other lower courts) comply with its decisions. For example, when political actors agree on certain policy outcomes, they may expand the federal judiciary to force the Court to "alter doctrine in a way preferred by political officials."[84] As a result, when political branches are more aligned or have greater agreement on issues, then they are more likely to agree on policy outcomes and this in turn "reduces the number of issues on which the court can exercise meaningful independent discretion." The McNollgast model of judicial independence shows that the political composition of the main branches of government affects whether judicial independence waxes or wanes.

Because judicial independence is not static, but variable, it changes depending on whether government is divided or unified. Under divided government, judicial independence is afforded greater protection because opposing chambers of government or the presidency will use or threaten to use a veto when the opposing party wants to overturn court decisions with legislative action.[85] Conversely, under unified government judicial independence is afforded less protection because the executive and legislature can work in a coordinated manner to undermine judicial decisions.[86]

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82. McNollgast, *supra* note 7, at 109.
83. THE FEDERALIST NO. 78 (Alexander Hamilton).
84. McNollgast, *supra* note 7, at 111-12.
85. *Id.*
86. *Id.* This was exemplified in the recent case of Terry Schiavo, in which the executive and legislative branches at both the state and federal level pressured the state and federal courts to change their positions regarding Ms. Schiavo's removal from life support. In 2005, President Bush and law makers interrupted their Easter break in order to pass a law allowing federal courts to intervene in Schiavo's case. Sheryl Stolberg, *The Dangers of Political Theater*, N.Y. TIMES, Mar. 27, 2005, at 43. In the Florida state legislature, a group of moderate Republicans, however, quashed Governor Jeb Bush's attempt to block the removal of the feeding tube, although in 2003, they had agreed to such legislation. *See* Abby Goodnough, *After Florida Legislative Season Ends, Governor Bush Feels Sting of Defeat*, N.Y. TIMES, May 8, 2005, at 124; David Sanger, *Bush Backs his Brother's Decision in Feeding Tube Case*, N.Y. TIMES, Oct. 29, 2003, at A23.

The second part of my definition of judicial independence adopts the McNollgast analysis of judicial independence. Acknowledging that judicial independence is not fixed, but instead fluctuates, is crucial to understanding how courts operate when faced with many different policy questions in many different moments of political history. What exactly fluctuates, as stated explicitly in my definition, is the amount of discretion that judges are allowed to exercise—discretion which fluctuates by policy, point in time, and politics. Such a conception of judicial independence is consistent with the way in which courts and legislative bodies interact. When issues are particularly salient, or the lawmaking body does not trust the judiciary to administer the law as intended, then judicial discretion and independence are curtailed through explicit mandates in the particular law at issue. When issues are less important to the legislature, or the judiciary is trusted to carry out the intent of the legislature, then fewer restrictions are placed on judicial discretion and independence. Again, this depends and thus varies based on the issue and political composition and interaction of other branches of government.

2. Strategic Interaction within the Judiciary

Most studies of judicial independence focus on the judiciary's independence from other branches of government or individuals. However, within the entire judicial branch an issue of independence may arise when analyzing the relationships between higher courts and lower courts. There are a wide variety of ways in which a higher court may influence a lower court's decisions. First, higher court judges may punish lower court judges by failing to promote them due to their work product. In many countries, such as Chile, Supreme Court justices rank all lower court justices based on their decisions and performance as judges.[87] This ranking in turn affects lower court judges' pay and promotion possibilities. Furthermore, in other systems, higher court justices, through judicial councils, have the ability to discipline and remove lower court judges.[88] Supreme Court control over the independence of lower courts is also evident in Japan. In contrast to Ramseyer and Rasmusen's claim that the leading LDP party punishes lower court judges who issue anti-government decisions,[89] O'Brien and Ohkoshi show that because the Japanese Supreme Court and General Secretariat control judicial appointments through rarely challenged recommendations to the government, lower court judges are more the

87. Tiede, *supra* note 60, at 14-15.
88. Hammergren, *supra* note 27, at 9-12.
89. Ramseyer & Rasmusen, *supra* note 73, at 341.

"agents" of the Supreme Court's chief justice and the General Secretariat, than the ruling political party.[90]

Second, higher courts may influence lower courts by reviewing their decisions in substantive cases. Appellate courts may sanction lower courts by reversing lower court decisions and by creating a judicial culture which makes lower judges want to avoid reversal.[91] This of course assumes that judges even care if they are reversed, however. An assumption that may be harder to justify in the case of federal judges with life tenure who do not need to worry about job security when making a decision at odds with a higher court.[92]

Higher courts also may influence lower courts in their choice of which cases to review. For example, in the United States, the Supreme Court's discretion over granting certiorari allows it to choose which lower court cases and which issues to review.[93] These choices in turn send signals to lower courts about what behavior will warrant review and possible reversal and what behavior will not. Cameron, Segal, and Songer find that a conservative higher court is more likely to review liberal decisions of lower courts than conservative lower court decisions.[94] For example, in recent times a conservative majority on the United States Supreme Court has tended to grant review and reverse a larger portion of the reputedly liberal Ninth Circuit's decisions. However, merely sharing an ideology with a higher court may not inoculate a lower court from consequences for egregious conduct. Recently, the arguably conservative Fifth Circuit has come under fire from the Supreme Court for consistently rubber stamping troubling death penalty convictions in Texas despite evidence of prosecutorial misconduct, and worse, for ignoring the explicit rulings in recent Supreme Court decisions.[95]

In a similar vein, the Supreme Court may enforce its own preferences directly influencing the decisions of lower courts. McNollgast show that the interaction between the legislature, Supreme Court, and lower courts

90. David O'Brien & Yasuo Ohkoshi, *Stifling Judicial Independence from Within: The Japanese Judiciary*, *in* JUDICIAL INDEPENDENCE, *supra* note 3, at 37, 59.

91. Charles M. Cameron, Jeffrey A. Segal & David Songer, *Strategic Auditing in a Political Hierarchy: An Informational Model of the Supreme Court's Certiorari Decisions*, 94 AM. POL. SCI. REV. 101, 102 (2000).

92. *See supra* notes Part II.A.3 (discussing judicial tenure).

93. DAVID M. O'BRIEN, 1 CONSTITUTIONAL LAW AND POLITICS: STRUGGLES FOR POWER AND GOVERNMENTAL ACCOUNTABILITY 166-68 (5th ed. 2003).

94. Cameron et al., *supra* note 91, at 112-13.

95. *See* Miller-El v. Dretke, 545 U.S. 231 (2005); Miller-El v. Cockrell, 537 U.S. 322 (2003); Banks v. Dretke, 540 U.S. 668 (2004).

establishes judicial doctrine.[96] Part of their model, deals explicitly with the Supreme Court's interaction with lower courts.[97] McNollgast explain how the Supreme Court "induces" the lower courts to comply with the Supreme Court's own doctrinal choices as follows:

> When the Supreme Court's resources are extensive and most lower courts do not disagree substantially with the Court, the Court can enforce a doctrine that focuses narrowly on its preferred interpretation. In contrast, when most lower courts differ substantially from the preferred doctrine of the Supreme Court, the problem of noncompliance becomes important. Our theory suggests that the Supreme Court will expand the range of lower court decisions that it finds acceptable when faced with substantial noncompliance by the lower courts. By expanding the latitude allowed under its precedents, the Court both cajoles some lower bench jurists to abide by the new precedents and isolates those who do not. The Court can then focus its attention on the most egregiously nonconforming lower court decisions, and on the issues it most cares about.[98]

By cajoling lower courts to comply with Supreme Court doctrine, the higher court is in fact curtailing the independence of lower court judges, who have their own individual preferences and ideology. Thus, within the judiciary, lower court judges are arguably not independent of senior appellate judges or the preferences of these judges. As mentioned in the McNollgast piece and discussed further below, the Supreme Court does not always punish lower courts with reversal. McNollgast suggest that this is due to a lack of resources and the high costs of reviewing decisions.

Finally, within a particular court, certain key judges may affect the independence of other justices through their ability to assign cases and temporarily assign judges to other jurisdictions. For example, chief appellate judges may have considerable influence over other appellate judges in their assignment of cases to particular panels of judges and in the composition of those panels. Atkins and Zavoina studied the actions of the Fifth Circuit's Chief Appellate Judge between 1961 and 1963.[99] These authors found that the Chief Justice structured the panels of judges hearing race relations cases in such a way as to represent the

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96. McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1636-40 (1995).

97. *Id.* McNollgast's model predominantly focuses on the actions taken by elected branches and how these actions shape decisions made by Supreme Court judges in their dealings with lower courts. However, for purposes of this argument, I am only focusing on the higher court/lower court relationship.

98. *Id.* at 1634.

99. Burton M. Atkins & William Zavoina, *Judicial Leadership on the Court of Appeals: A Probability Analysis of Panel Assignment in Race Relations Cases on the Fifth Circuit*, 18 AM. J. POL. SCI. 701 (1974).

Chief Justice's preferences in these cases.[100] By deciding which judges would decide such contentious cases, the Chief Justice was able to structure panels to contain justices with views similar to his own, even though such views represented the minority of this court.

The above studies suggest that within the judiciary itself, higher level judges may influence the decisions of lower courts. In fact, in several instances, the Supreme Court has directly ruled on how much "independence" judges may have by issuing decisions which expand or curtail the amount of discretion lower courts exercise.[101] Interestingly, most of the above authors do not explicitly classify this as an issue of judicial independence. The reason for this is probably because, in their discussion of this phenomenon, they are actually explaining other complex political interactions or assuming that judicial independence only refers to the independence of the entire judicial branch *from some other* elected branch.

IV. JUDICIAL INDEPENDENCE VS. ACCOUNTABILITY

Theoretically, judicial independence and judicial accountability should be mutually exclusive.[102] In other words, a truly independent judiciary is not accountable to anyone or anything and an accountable judiciary is not truly independent from anyone or anything. The tension is explicitly raised by the U.S. Constitution, which provides judges' independence through life tenure during good behavior and undiminished salary while concurrently making the acquisition of a judgeship and impeachment and removal of federal judges as well as the financial integrity of the entire judiciary dependent on the decisions of members of other political branches.[103] Due to this tension between judicial independence and accountability in the United States and other democracies, judicial independence should be viewed as something which is not entirely attainable, but rather is balanced more or less between judges' freedom

100. *Id.* at 708.

101. In 2005, the United States Sentencing Guidelines (which state the range, in years, of sentences which judges must apply to federal criminal defendants) were found unconstitutional under *United States v. Booker*, and thus are no longer binding on district judges. *See* United States v. Booker, 543 U.S. 220 (2005).

102. AMERICAN BAR ASSOCIATION STANDING COMMISSION, *supra* note 65.

103. The ABA, in its report on an independent judiciary, also shows that judges and the judiciary are accountable to political actors due to the political branches' constitutional control over the ability to constitute lower federal courts, regulate their jurisdiction, and make necessary laws for the exercise of such powers. *Id.*

to make decisions under a certain amount of fixed constraints.

The tension between judicial independence and accountability also arises when we consider the role of judges in interpreting laws. While judges have some discretion concerning how they decide cases based on the facts presented to them, they are constrained in how they apply the law to particular cases.[104] This constraint in turn makes them accountable to lawmakers. Because judges are not law makers, their principal role is to apply the law written by the legislature and the executive in the way intended. However, deciphering the intent of the legislature is not always straightforward as seen by the many books and articles written on statutory interpretation.[105]

When judges "make" law rather than just interpret it, are they acting independently or are they instead acting as a dependent body of the law-making branch? Shapiro suggests:

> [L]awmaking and judicial independence are fundamentally incompatible. No regime is likely to allow significant political power to be wielded by an isolated judicial corps free of political restraints. To the extent that courts make law, judges will be incorporated into the governing coalition, the ruling elite, the responsible representatives of the people, or however else the political regime may be expressed. In most societies this presents no problem at all because judging is only one of the many tasks that of the governing cadre. In societies that seek to create independent judiciaries, however, this reintegration will nonetheless occur, even at substantial costs to the proclaimed goal of judicial independence.[106]

For Shapiro, when judges make law, they are not independent because they are simply implementing the will of the "governing coalition." Shapiro implicitly assumes that judges who make law, make law according to the government's desires. In many countries, especially those with weak judiciaries, repressive regimes, or those in which the judiciary is simply part of the Ministry of Justice and the executive branch, this may in fact be true. For example, the judiciary under Pinochet was only an arm of the government and as such did nothing to stop the regime's grave human rights abuses.[107]

Shapiro's assumption that judges who make laws simply are mouth pieces for the governing coalitions finds some support in literature dealing with statutory interpretation in the United States. According to Landes and Posner, judges are spokesman for the government, but not

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104. *See* McCubbins & Rodriguez, *supra* note 6.

105. *See id.* (summarizing the relevant literature).

106. MARTIN SHAPIRO, COURTS, A COMPARATIVE AND POLITICAL ANALYSIS 34 (1981).

107. *See* Jorge Correa Sutil, *The Judiciary and the Political System in Chile: The Dilemmas of Judicial Independence in Democracy*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 75, 89-90.

necessarily the current government. Landes and Posner suggest that courts enforce the "'deals' made by effective interest groups in earlier legislatures."[108] Thus, when laws are made they represent the will of the legislature at the time they were made. To interpret these laws in any other way would violate the intent of the drafting Congress. As shown by Landes and Posner, the legislation is the result of successful lobbying by special interest groups in the legislature. Thus, when courts enforce laws they are enforcing the wishes of these special interests at the time of enactment. For Landes and Posner, this indicates that the judiciary is in fact independent because it is not tied to the whims of the current lawmaking body.

Despite Landes and Posner's support for Shapiro's assumption stating that judges who make law are only asserting the will of a governing coalition, this does not hold true if we prescribe to the view that judges actually make decisions based on their own political preferences and ideologies.[109] Under Segal and Spaeth's Attitudinal Model, if judges make decisions according to their own preferences, then they actually are making law and acting as judicial activists.[110] Segal and Spaeth's position is supported by other studies indicating that judges may intentionally pick and choose legislative history not to gain a clear understanding of the legislative intent, but instead to bolster the position that those judges wish to take when interpreting a statute.[111]

However, judges who decide cases based upon personal preferences without adequate legal foundation may face serious consequences. For example, when the Supreme Court makes decisions which are outside the policy preferences of Congress or the executive, they may be sanctioned. In the United States and other countries, such sanctions have included court packing, reassignment, and the passage of new legislation. When judges are sanctioned, it is obvious that judges are not independent, but must answer to some higher authority.

Despite the ability of Congress to reign in courts by sanctions,[112] Congress does not always punish judges who make law. Why not, and

108. Landes & Posner, *supra* note 48, at 894.
109. SEGAL & SPAETH, *supra* note 39.
110. *Id.*
111. *See* Daniel Rodriguez & Barry R. Weingast, *The Positive Political Theory of Legislative History: New Perspectives on the 1964 Civil Rights Act and Its Interpretation*, 151 U. PA. L. Rev. 1417, 1525-26 (2003).
112. This same argument would also apply to higher courts sanctioning lower courts.

does this failure to punish judges and courts tell us anything more about judicial independence? Without a doubt, Congress could not sanction the judiciary every time that it makes law in violation of the Constitution or decides a case counter to the opinions of the majority of legislators. To do so would require too many resources and be too costly. While this is true, the issue of costs does not explain why Congress sanctions judges in some cases but not in others. The fact that judges are not always sanctioned for being activist shows that judges may make law or decisions according to their own preferences in violation of the Constitution or wishes of the legislature *in certain instances.* Thus, judges who can engage in risky behavior by balancing the costs and benefits of asserting their personal views in particular cases, are more independent than judges who would not even attempt such a cost-benefit analysis. While judiciaries may be dependent on the law made by Congress and other institutional constraints, within the constructs of this relationship, judges may assert their independence by infusing judicial decisions with their own political preferences even though they may be sanctioned in some instances. Whether such fierce "judicial independence" as this, which potentially usurps the power of another branch of government, is better than a dependent and meek judiciary which fears crossing such lines for fear of retribution from the executive or legislature, is not a question addressed here. Perhaps the above argument has shed some light on why many scholars have concluded that judicial independence and accountability are not compatible.[113]

V. JUDICIAL INDEPENDENCE, THE RULE OF LAW, AND DEMOCRACY

The concept of judicial independence is a much discussed topic because scholars, politicians, lawyers and foreign donors assume it is one of the main pillars of democracy and the rule of law. As with judicial independence, the rule of law has many definitions including: law and order,[114] limited government,[115] human rights,[116] and the consistent

113. *See* Charles Gardner Geyh, *Customary Independence*, *in* JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 2, at 160, 161.

114. *See* THOMAS HOBBES, LEVIATHAN (Richard Tuck ed., 1996); *see also* Robert Barros, *Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile*, *in* DEMOCRACY AND THE RULE OF LAW 188 (José Maravall & Adam Przeworski eds., 2003).

115. Barros, *supra* note 114, at 188-90; RONALD A. CASS, THE RULE OF LAW IN AMERICA 23-45 (2001). Similar to this is Weingast's view that the rule of law is best understood as "a set of stable political rules applied impartially to all citizens. *See* Barry Weingast, *The Political Foundations of Democracy and the Rule of Law*, 91 AM. POL. SCI. REV. 245, 245 (1997); *see also* Barry Weingast, *A Postscript to "Political Foundations of Democracy and the Rule of Law," in* DEMOCRACY AND THE RULE OF

and predictable application of the law across similar cases[117] to name just a few of these definitions. Often judicial independence is implied as one part or requirement of these various definitions for the rule of law. Furthermore, foreign donors such as the United States Agency for International Development, the European Union and the World Bank, assisting in judicial reform efforts abroad, claim that "judicial independence" is a major part of their rule of law programs. As a result, judicial independence is conceived as a necessary condition of the rule of law.

Despite a common assumption that judicial independence is required for the rule of law, the two concepts are not always compatible. Many of the positive attributes commonly associated with judicial independence, such as deciding cases without undue influence from individuals or interference from other branches of government and politicians, are incompatible with the positive attributes commonly associated with the rule of law, such as equality and the predictable and consistent application of the law to individuals similarly situated.

Implicit in my definition and other definitions that associate judicial independence with discretion is the assumption that this discretion provides individual judges with a wide range of possible choices for case outcomes and therefore outcomes of similar cases will vary significantly. Implicit in the traditional rule of law definition that refers to the consistent and predictable application of the law to similar cases is the

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LAW, *supra* note 114, at 109.

116. JEAN-JACQUES ROUSSEAU, ÉMILE (Alan Bloom trans., Basic Books 1979); A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (10th ed. 1982); Stephen Holmes, *Lineages of the Rule of Law*, *in* DEMOCRACY AND THE RULE OF LAW, *supra* note 114, at 19, 47-53.

The United States Agency for International Development defines rule of law on its current website as:

> the basic principles of equal treatment of all people before the law, fairness, and both constitutional and actual guarantees of basic human rights; it is founded on a predictable, transparent legal system with fair and effective judicial institutions to protect citizens against the arbitrary use of state authority and lawless acts of both organizations and individuals.

United States Agency for International Development, http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/ (last visited June 1, 2006).

117. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 72 (1944); CASS, *supra* note 115, at 7-12; Holmes, *supra* note 116, at 19; John Ferejohn & Pasquale Pasquino, *Rule of Democracy and Rule of Law*, *in* DEMOCRACY AND THE RULE OF LAW, *supra* note 114, at 242; Guillermo O'Donnell, *Why the Rule of Law Matters*, 15 J. DEMOCRACY 32, 43 (2004).

notion that judges across a jurisdiction or territory will choose the same outcome for all litigants similarly situated. However, when individual judges at the same level of courts (ie. all trial court judges) are given broad discretion (implying fewer constraints), then we should not expect to see similar cases decided similarly because lower court judges do not coordinate their decisions with other judges at the same level in other parts of the country. In other words, as discretion increases, the possibility for inconsistent case outcomes across a territory also increases. Thus, the more discretion (and independence) that judges have, the greater possibility that case outcomes vary and law is applied inconsistently, counter to traditional conceptions of the rule of law. As a result, the conventional wisdom that judicial independence is a necessary condition to the rule of law may indeed be unfounded when judicial independence is given a more meaningful definition as proposed here.

VI. CONCLUSION: TOWARDS A BETTER DEFINITION OF JUDICIAL INDEPENDENCE

The term judicial independence is used with impunity. Most legal commentators praise judicial independence as a normative ideal. However, from this review, it is apparent that the term inspires confusion, and may instead refer to a grab-bag of vague but salutary qualities. Because of this confusion, judicial independence has thus far defied rigorous empirical study. In developing a more workable definition, scholars should clearly specify whether they are speaking of individual judges, courts, or the judicial branch. Further, scholars need to state succinctly from what the judiciary (as defined) is independent.

Defining judicial independence in terms of the judiciary's independence from the executive and judicial discretion that varies with politics, provides a feasible way for understanding and testing this often cited aspiration. Judicial discretion is an explicit part of the judicial decisionmaking process, which fluctuates and varies according to the political composition within and between the various branches of government. In many instances, judicial discretion may be measured by looking at the types of decisions judges may make within the constraints of the law. When lawmakers are less concerned with controlling judges, they will either specifically provide judges with more room to decide cases on certain issues or leave instructions to judges intentionally vague. When lawmakers are more concerned with controlling judges, they will send signals to judges in the form of laws that indicate that judges have little discretion in considering certain factors outside the law when applying the law to the facts in a particular case. Judicial independence in terms of amount of discretion afforded to judges should

help clarify what is meant by judicial independence such that it may be analyzed beyond the realm of the existing definitional battles.