Judicial Independence

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Abstract

For analytic clarity, judicial independence is best thought of as a concept that captures a variety of features of a judicial system. One common, and useful, approach is to associate judicial independence with the ability of judges to, in practice, make decisions the outcomes of which are not dictated by extrajudicial pressures. In this spirit, research on judicial independence has examined a number of topics, two of which are (i) the origins and determinants of political support for the judiciary and (ii) the consequences of maintaining judicial independence for economic performance. Original research on political support for the judiciary focused on how a system of separation of powers can constrain judicial independence. Current research is turning the question around, examining the role courts play as a component of a system in which policy is made collectively by political institutions. Research on the relationship between judicial independence and economic performance originally examined whether greater judicial independence is associated with higher levels of economic growth. Current research is expanding the focus to evaluate the conditions under which independent courts reinforce the stability of democratic government. As research on judicial independence moves forward, it should focus on further conceptual clarification, the study of independent courts as complements to other parts of a system of governance (rather than competitors to policy makers), and leveraging current advances for theoretically driven measurement of these concepts.

INTRODUCTION

Judicial independence is a topic of perennial discussion in scholarly research. The exact meaning of this phrase is often unclear, and this has had the particular benefit of encouraging a broad range of perspectives and substantive questions in the literature. However, that richness in analytic perspective has come at the cost of the development of a clear, well-focused research agenda. Judicial independence is not a fixed concept; neither is it an analytic quantity that merits investigation in and of itself. Judicial independence is a characteristic of a judicial system, the relevant features of which are dictated by the research question undertaken—in other words, judicial independence

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is a broad term potentially encompassing a number of institutional design choices. Scholars study institutional choices not simply for the sake of studying the institutions but because of the effects those institutions are predicted to have on individuals' incentives.

More than a decade ago, this theme, as well as others, was examined in a seminal edited volume concerned particularly with judicial independence (Burbank & Friedman, 2002). The contributors' views spanned a range of perspectives, from Burbank and Friedman's view that judicial independence can be clearly and rigorously defined in a way that encompasses a broad array of disciplinary objectives to Kornhauser's view that judicial independence is not even a useful concept. My perspective is somewhere in between. As noted, judicial independence is a term that in common usage captures a variety of institutional features that may or may not characterize a particular set of judicial institutions.

I focus on a particular concept under this larger umbrella—the extent to which judges are able to decide a case in a way that is relatively insulated from external pressure that is irrelevant to the merits of the particular dispute they seek to resolve. This concept of judicial independence is closely related to Cameron's (2002) definition of judicial independence in relation to power analysis. Some may recognize in this conceptualization the more familiar distinction between *de facto* and *de jure* independence. That common distinction refers to the difference between the degree of independence judges have in practice (*de facto*) and the degree of independence judges have from a theoretical perspective in light of the formal institutions that characterize a judiciary (*de jure*). Another example of a similar distinction is the difference Ferejohn (1999) notes between the degree of institutional insulation given to judges as servants in a judiciary and the degree of autonomy given to the judicial institution itself.

In sum, the study of judicial independence has historically been broad, of varied perspectives, and extensive. The normative constitutional theory literature concerned with the countermajoritarian problem (e.g., Bickel, 1962; Ely, 1980) is at its core a literature about judicial independence. So, too, is the vast literature examining the extent to which judges are responsive to changes in public opinion when they decide cases (e.g., Caldarone, Canes-Wrone, & Clark, 2009; Flemming & Wood, 1997; Giles, Blackstone, & Vining, 2008; McGuire & Stimson, 2004; Mishler & Sheehan, 1993). However, I focus here on two literatures related to judicial independence as I described it —the political conditions under which institutional independence can be maintained and the consequences of maintaining judicial independence.

POLITICAL SUPPORT FOR AN INDEPENDENT JUDICIARY

The first literature under the umbrella of judicial independence which I examine is a research agenda concerned with the incentives political actors have to create and maintain an independent judiciary and the types of independence that can be maintained in a political system. Much of this research has focused on the extent to which a paradigmatically independent court—usually, the US Supreme Court—can, in practice, make decisions without any influence from extrajudicial political incentives.

FOUNDATIONAL RESEARCH

In this vein, a body of research on what has come to be known as the separation-of-powers model[1] provides a number of foundational insights. The contemporary literature on institutional confrontations has its roots in a set of papers published roughly 20 years ago. Marks (1989) examined an instance of Supreme Court statutory interpretation regarding Department of Education regulations. His major contribution was the observation that when the Supreme Court anticipates its decision may be revisited by Congress and that the House and Senate can agree to an alternative policy, then the Supreme Court will have an incentive to modify its decision. The Court will do so in order to pick what is, from its own perspective, the best policy from among those that will be immune from congressional override. The following year, Ferejohn and Shipan (1990) made a similar argument in the context of studying congressional control of the bureaucracy. Their insight was that a political system with an independent judiciary can induce a bureaucracy to make policy that more closely reflects the legislative median than a political system without an independent judiciary. The reason is that when a subcommittee of a legislature has gatekeeping power to keep proposals from reaching the floor, a bureaucracy and committee that are aligned together against the median can essentially collude against the legislative median. An independent judiciary, by contrast, can use its power of judicial review to dislodge policy and trigger an incentive for the committee to bring a new proposal to the legislative floor.

The works of Marks and Ferejohn and Shipan both highlight the same feature of a system of separation of powers crosschecking vetoes and veto points can work together to create situations in which institutional independence

1. The literature on judicial politics often discusses a "strategic model" of judicial decision making—presumably in contrast to a model of judicial decision making in which judges are assumed to be myopic and nonstrategic. That label is, in my opinion, not useful, as it describes a set of primitives about judicial rationality, rather than a class of theoretical arguments and structures. For this reason, I employ the term "separation-of-powers model" to refer to a class of models in which judges are modeled as interacting with political actors in other institutions.

is simply a function of whether the alignment of preferences among political actors provides that institution with "wiggle room." For example, can the judiciary leverage disagreement between the House and the Senate in order to make policy that it likes and cannot be overturned because the Senate and the House will not agree on a different policy (even though each may individually prefer to change the policy)? This particular representation of the separation-of-powers model has been a powerful, central source of analysis in the theoretical and empirical literatures ever since, for example, Bergara, Richman, and Spiller, (2003); Epstein and Knight (1998); Gely and Spiller (1992); Martin (2001); and Segal (1997)). What is perhaps most perplexing is that while the model itself has not benefited from broad, systematic empirical support, there have been instances in which scholars have found some systematic evidence in support of the model's dynamics, and anecdotal accounts often lend credence to the general mechanisms contemplated by the separation-of-powers model.

Related to the separation-of-powers model but from a slightly different theoretical perspective, scholars have also argued that maintaining an independent judiciary can be in the interest of elected officials for reasons other than instant policy outcomes. For example, Landes and Posner (1975) and Whittington (2005) both advance arguments about the role that an independent judiciary can play in maintaining intertemporal policy bargains. Judges who outlast their political contemporaries (because they have longer tenures—often, e.g., life tenure) can help entrench political bargains and therefore provide a form of insurance to political actors worried about their policy bargains being undone in the future. At the same time, an independent judiciary can help a contemporary political majority overcome bad political bargains from the past that have outlived their usefulness but are politically immune from reversal. Rogers (2001) makes a similar, although distinct argument, suggesting that independent judges can help provide informational feedback to political majorities about their policies once put into place. Each of these myriad functions cannot be sustained, the work argues, if judges are worried about political reprisal in the event they make an unpopular decision.

CUTTING-EDGE RESEARCH

The study of how judicial independence can be maintained politically has turned in a new direction in recent years, largely motivated by the comparative study of judicial independence. Rather than simply ask why politicians would maintain an independent judiciary, or what kinds of policy choices a judiciary will make when it faces the possibility of political reversal, this research asks how a politically savvy judiciary can work with

the tools it has to build its own degree of power. While it is often claimed that the judiciary has "neither purse nor sword" and therefore must be mindful of what political actors will do in response to its decisions, this vein of research notes that the real source of power in a political society is the mass public. If a court can marshall public support against a political majority, then it may be more able to exercise judicial power—in other words, to act more independently—than when it lacks public backing. Vanberg (2005) advances this argument in the context of studying how different policy areas vary in their salience and transparency to the public. Staton (2010) extends Vanberg's analysis by demonstrating that the judiciary itself may be able to influence public attention to and information about judicial decisions. Clark (2011) contributes to this line of enquiry by arguing that the interaction is complicated by the fact that a legislature has a more direct connection to the public and therefore has better information about who the public supports in a convict between the courts and the legislature. The critical feature of those works is the observation that a court's relative strength *vis-a-vis* a legislature is in part a function of the extent to which the public is willing to side with the judiciary in a policy dispute. With its power to vote political officials out of office, the public can hold politicians' feet to the fire.

These works advance an important line of research concerned with how a court can use a base of support against an elected majority. However, a question remains how a court can build that support and why a political majority would create a court that could possibly evolve into such a powerful institution. Carrubba (2009) addresses this question and makes the argument that initially weak courts have political advantages by enabling cooperation, at the very least by serving as an information clearing house, among sovereign (or semisovereign) entities. However, by facilitating that cooperation, a court demonstrates to the public that the cooperation among the units is valuable and in the public's own interest. That demonstration builds into a base of support for the court that then enables the court to make decisions with which the sovereign units may disagree but will have to abide by for fear of acting against a cooperative arrangement the public has come to believe is valuable. Indeed, the question of how a court can work with its (limited) resources and relatively weak institutional capacity to build itself into a powerful, effective component of a system of democratic governance is one that is central to the understanding of judicial independence and will undoubtedly continue to receive attention in the scholarly literature (e.g., Crowe, 2011).

THE CONSEQUENCES OF AN INDEPENDENT JUDICIARY

Another area of research in the study of judicial independence I want to describe concerns the consequences of maintaining an independent judiciary,

beyond the policy implications that result from individual disputes between institutions. For example, there is a rich literature examining the relationship between judicial independence and political freedom, human rights and economic growth (e.g., La Porta, Lopez-de Silanes, Pop-Eleches, & Shleifer, 2004). Here, I briefly detail some of the contours of this literature.

FOUNDATIONAL RESEARCH

The literature on the effects of maintaining an independent judiciary is as deep as it is rich. It dates to at least Montesquieu and Madison and continues forward through contemporary work by North (1991); Weingast (1997); Barro (1997, 2000); Acemoglu, Johnson, and Robinson (2001); and Frye (2004); among others. The key insight from this literature is that when individuals are given power, the temptation to abuse that power is sufficient that appropriate institutions must be designed in order to constrain governmental power. This research directly implicates judicial independence in that courts that are insulated from the political process have the necessary safeguards to resist the threat of reprisal from those with power. To the extent that courts can effectively constrain political power, then, potential abuses against property rights, human rights, political freedom, and other desirable social outcomes may be curtailed (e.g., Acemoglu & Johnson, 2005). Of course, that proposition is not without controversy, and some have argued that economic growth and freedom is more often due to the policies selected than the institutions used to select those policies (e.g., Glaeser, La Porta, Lopez-de Silanes, & Shleifer, 2004). Of course, it is difficult to distinguish institutions from the substantive outcomes they produce (e.g., Diermeyer & Krehbiel, 2003).

CUTTING-EDGE RESEARCH

In part because of the difficulty of identifying the extent to which institutions and political outcomes cause each other, the research has turned to an analysis of the role that independent courts play as a part of a governing system in which institutions mutually reinforce each other, rather than serve as constraints on each other. Reenock, Staton, and Radean (2013), for example, show that the stability and survival of a democratic order is reinforced by judicial institutions and the protection of property rights. Similarly, North, Wallis, and Weingast (2009) argue that independent courts are important institutions for controlling office holders seeking to maintain power through the use of rent redistribution.

KEY ISSUES FOR FUTURE RESEARCH

Moving forward, the research on judicial independence, especially in the vein of the two broad areas I have described, can benefit from three particular foci. First, the definition of conceptual issues concerning judicial independence should be advanced with an eye toward the development of a more comprehensive model of governance in which courts are embedded into a complete theory of institutions that make policy as complements to each other, rather than forces acting in tension with each other. Second, and related, the literature on judicial independence should shift its focus from seeing courts as competitors to political institutions and instead see them as part of a system of governance. This view of judicial independence requires a focus on the legal functions that courts serve with an eye toward the motivations for, and consequences of, an independent judiciary. Third, theoretically driven measurement should be more central to the literature on judicial independence, making use of rapidly increasing data and computational capacity. I now elaborate on each of these themes.

Conceptual Clarification

One of the themes with which I started this essay and which also emerges from the preceding discussion, is that the idea of judicial independence is a broad, sprawling one that does not necessarily map to a single concept that is implicated by all research concerning "judicial independence." My discussion has focused on one particular concept—the extent to which courts' decisions are not influenced by the preferences of competing political institutions. One might label this type of judicial independence judicial insulation. An alternative aspect of judicial independence refers to the extent to which judicial institutions serve different functions than do legislative institutions. Alternatively, to what extent to judicial institutions act as part of a larger system of governance, as opposed to separate institutions disconnected from the political order. One might label this type of judicial independence judicial autonomy. Still a third variant of judicial independence might tap into the extent to which a court has the institutional resources and capacity to carry out its functions, to collect information on its own, and to functionally operate without daily support from other political institutions. One might label this type of judicial independence judicial integrity. Surely, there are other theoretical conceptualizations of judicial independence that have relevance for myriad research questions. My goal here is simply to encourage a richer conceptualization in the literature that avoids the folding of potentially cross-cutting ideas into one umbrella term, such as judicial independence.

Courts as Legal Complements

To reiterate, one of the defining features of the traditional positive political theory literature on the separation-of-powers model, as well as the literature on judicial independence and economic growth, is that it generally considers courts as simply additional veto points in the political system. This approach to thinking about the role courts play in governance has been fruitful and has taken us very far in understanding the conditions under which independent judiciaries are politically desirable, the consequences of limited judicial independence for policy making in a system of cross-checking vetoes, and the incentives courts have for using their limited institutional capacity in an institutional confrontation. However, it is time to build our theoretical models further, and a promising avenue is to incorporate the substantive differences between judicial decision making and legislative decision making. Legislatures make policy in a very wholesale-level way—they make blanket policy *ex ante*, and they do so with the benefit of particular institutional prerogatives, such as a generally unrestricted agenda, the process of committee hearings, and greater levels of open participation and public lobbying. Courts, by contrast, make policy in a more retail-level way. They decide individual cases *ex post*, and appellate courts do so with an eye toward crafting workable rules that can be implemented by lower courts going forward. Judicial policy is structured by the fact that courts are passive institutions waiting for disputes to be brought to them (rather than having the ability to go out and seek issues to address), and the information and resources they have to do so is very different in nature. This is not to say that courts are inferior policy makers but rather that the benefit from different resources and act in different capacities. As such, we might expect that part of the incentive for maintaining an independent judiciary lies in the complementarities of judicial and legislative policy. Just as the foundational research on political support for judicial independence asked what role courts play in governance, the literature should return to these questions with the intervening lessons in hand and recast courts as complements to the political process rather than strictly competitors to legislatures.

Theoretically Driven Measurement

A third promising avenue for future research is measurement. How best to measure judicial independence is a question that has been long debated in the literature (for a review, see Ríos-Figueroa & Staton, 2014). However, as my opening comments suggest, that broad question is not the right one to be asking. Judicial independence means different things in the context of different analytic settings, and, as a consequence, how best to measure the relevant concept can only be answered in the context of a particular research question. Of course, measurement of latent concepts, such as the degree of institutional

independence a court may have, is a particularly tricky problem, but modern advances in measurement theory and practice may help alleviate some of the thorns in this thicket. For example, as Ríos-Figueroa and Staton show, there are many possible indicators of judicial independence that may tap into common underlying concepts but may also be individually complicated by additional concepts that drive the indicators, at least in part. Linzer and Staton (n.d.) introduce an approach that makes use of myriad indicators to distill the common underlying dimension that explains variation in indicators of judicial independence. While their measure is not necessarily the measure of judicial independence for all research questions, it has the benefit of being fairly easy to interpret and is extensible in the event a researcher wants to employ different indicators to capture alternative conceptualizations of judicial independence.

CONCLUSION

Scholars have studied a number of concepts under the umbrella of "judicial independence." I propose further conceptual clarification and focus on a particular component of this term—the capacity of courts to make decisions that are separate from extrajudicial influences. In this vein, there are two bodies of work that are particularly relevant and experiencing new directions. First, scholars studying political support for independent courts are increasingly turning from a view of courts as competitors to other policy-making institutions to seeing courts as a complementary part of a system of governance. Second, and related, scholars studying the consequences of independent courts for the performance of a system of governance are making considerable progress in advancing our understanding of the relationship between the rule of law and executive constraints on government power. As the literature moves forward, scholars should push for further conceptual clarification; advance the study of courts as part of a system of governance, rather than a constraint on governance; and make use of contemporary tools for theoretically driven measurement of concepts related to these arguments.

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