

Safeguarding Society?

The Theory and Practice of Judicial Autonomy and Judicial Independence

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Abstract

This study offers a new way to conceive of judicial independence and judicial autonomy. I take autonomy in the broadest sense as autonomy from all external and internal influences upon judges besides the law and, where relevant, the constitution. Judicial independence is the degree to which judges strike a balance between competing parties and classes of parties rather than consistently siding with one type of party upon whom the judiciary is dependent. Judicial autonomy is a blanket term I use to cover institutions designed to achieve judicial independence. I discuss the nature of judicial autonomy: what the judiciary is autonomous from, why it is autonomous, and how it is autonomous. Suggestions follow as to how to operationalize and test judicial autonomy and its relation to judicial independence.

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The British have long praised their isle as the birthplace of judicial independence.¹ Since the Act of Settlement of 1701, British judges have been free from the need for continued good relations with the monarch. And yet British judges have no capacity to review governmental actions or laws for their constitutionality.

Britain's lack of a written constitution is no barrier to judicial review, as Israel shows us. Israel's judges lack autonomy in the English sense. Their autonomy from the executive is guaranteed by neither written law nor ancient tradition, yet Israeli judges have asserted the constitutional nature of the country's Basic Laws, foiling attempts to change them in ways that would limit the judiciary.²

Indian judges, perhaps following the example of the imperial Privy Council's review of Indian domestic law, have even gone so far as to rule constitutional amendments unconstitutional. When the government attempted to limit the courts' jurisdiction in matters of judicial review, the Indian Supreme Court ruled that the basic structure of the constitution

¹ Significant semantic confusion reigns in the literature due to the confusion of judicial independence as a goal with judicial independence as a means. I will, somewhat unconventionally, restrict the phrase "judicial independence" to the outcome of institutions that create "judicial autonomy." If efforts to achieve autonomy are successful, then a judiciary is independent in the sense that it does not consistently side with any particular type or types of parties to disputes. This is especially important because I will be using judicial independence – the balance of judicial decisions – as a dependent variable in tests where various institutions that create judicial autonomy in order to foster judicial independence are the explanatory variables. I am occasionally forced when referring to the existing literature to use "judicial independence" where I would prefer "judicial autonomy."

² Martin Edelman, "The Changing Role of the Israeli Supreme Court," chapter 5 in John R. Schmidhauser, editor, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, London: Butterworths, 1987. "In his opinion for all five Justices who participated in the case, Justice Landau agreed that the Financing Law was in conflict with the equality required by section 4 of the Basic Law: The Knesset. The absolute denial of funds to a new list constituted a major violation of equal opportunity in the democratic electoral process. Justice Landau acknowledged the absence of any provision in Israel's law which expressly authorized the Court to construe statutes in terms of the natural justice principle of the equality of all before the law. 'Nevertheless, this principle that is nowhere inscribed breathes the breath of life into our whole constitutional system.' (*Bergman v. Minister of Finance*, 1969: 562-3)" (pp. 101-2)

could not be changed even by a legitimately passed amendment.³ One wonders if even the American judiciary could manage such a feat.⁴

Despite reforms in the Egyptian judiciary that have permitted the growth of opposition parties and the questioning of electoral law, the judiciary has acquiesced to almost all of the government's economic reform programs.⁵ Austrian judges may sit as members of parliament or serve as cabinet ministers without resigning their judicial commissions, yet Austrian courts have proven themselves quite effective in constitutional review.⁶ Australian judges may chair commissions of inquiry into sensitive political matters at the behest of the executive, and Australia's legislature has occasionally renamed courts and refused to appoint the members of the old court to the new, yet Australia's judicial independence is not in serious doubt.⁷

May we conclude that the institutions designed to foster judicial independence in the United Kingdom, Israel and India are more effective than those in Egypt, Austria and

³ George H. Gadbois, Jr., "The Institutionalization of the Supreme Court of India," chapter 6 in John R. Schmidhauser, editor, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, London: Butterworths, 1987. Indira Gandhi attempted during the 1975-77 Emergency and via constitutional amendments to limit the Court's power of judicial review. But in the *Kesavananda* and *Minerva Mills* decisions of 1973 and 1981, respectively, the Court ruled that "judicial review is a basic feature of the Constitution, and that the court will not tolerate its diminution beyond limits it finds acceptable." (p. 116)

⁴ It's worth noting that in both Israel and India, constitutional amendments require the approval only of the legislature. One reason that it's difficult to imagine the American courts resisting a constitutional amendment is that any amendment to the American Constitution requires massive political support across a very large number of separate legislative bodies.

⁵ Tamir Moustafa, "The Impact of Economic Liberalization upon Executive-Judicial Relations: Theoretical Insights from the Egyptian Case," unpublished manuscript presented at the Western Political Science Association's 1999 annual meeting in Seattle, Washington. While the Supreme Constitutional Court now has life tenure instead of three-year terms and the Court nominates its own candidates for open positions, "the judiciary has become the main engine of democratization in Egypt and this role has paradoxically been facilitated by the executive branch of the government itself." (p. 2) The evidence that Moustafa subsequently provides suggests that, for whatever reason, the government knows that the preferences of the judges match its own and that allowing the court some independence provides the government a means of abdicating responsibility for unpopular actions aimed toward economic liberalization.

⁶ Hans W. Fasching, "Austria," chapter 3 in Shimon Shetreet and Jules Deschênes, editors, *The Judicial Independence Debate*, Dordrecht: Martinus Nijhoff Publishers, 1985. Supreme Court justices are barred from the cabinet, but may serve as members of parliament. All other judges may serve in the cabinet as well as the parliament.

Australia? Egypt's method of appointing judges certainly seems quite favorable to independence: the Supreme Constitutional Court itself nominates candidates and the President chooses which nominee gets a tenured appointment. Yet the Court consistently sides with the government's economic reforms.⁸ Austria and Australia seem less autonomous, but more dependent. It seems that institutions alone – as expressed in constitutions or in law – do not explain the differences in judicial independence between countries.

Nor do institutions alone seem to explain the differences in the achievement of the ostensible goals of judicial autonomy. Scholars have argued that judicial autonomy should foster the protection of minority rights, the protection of property rights and the sanctity of fair trial. Yet foreign investment has not suffered in Britain, Austria or Australia due to a lack of autonomy. Human rights have suffered in Egypt despite a great deal of institutional insulation.

Actual use of institutions captures a part of the differences. Argentine judges technically have life tenure, but there have been numerous purges of the highest court to accompany the numerous violations of human rights. Kenyan judges have guaranteed tenure, but are sometimes chased from the country for unpopular opinions and are often supplemented by expatriate “contract judges” whose tenure is not secure.⁹ Canada's constitution allows for judicial review of the constitutionality of law, yet Canadian judges scarcely ever exercise this power. In many countries, the use of temporary judges, ouster clauses to remove cases from ordinary courts, unrepresentative appointments and other

⁷ Roman Tomasic, “The Courts in Australia,” chapter 3 in Jerold L. Waltman and Kenneth M. Holland, editors, *The Political Role of Law Courts in Modern Democracies*, Houndsmills: Macmillan Press, 1988.

⁸ See Moustafa, cited above.

means allow the executive and legislature to control the judiciary despite apparent constitutional protections. The opposite is also true: Israeli judges may be removed by address, but scarcely ever are; the lack of a written guarantee seems not to have unduly frightened judges. British and Canadian judges are even less frequently removed from office. But the British and Canadian judiciaries have no capacity for judicial review. Hence the differences between countries are only partly attributable to actual use of institutions of judicial autonomy or limitation.

There have been remarkably few studies of whether any particular strategies of judicial autonomy are more effective than others in terms of achieving independence. The general assumption appears to be, judging by the literature and especially by the international standards of judicial autonomy, that the greater the number and prevalence of particular factors of judicial autonomy, the more likely judicial independence will be achieved. But since the goals of judicial autonomy are usually unspecified, and the effectiveness of particular institutions intended to achieve judicial independence unstudied, the question of how to go about attaining those goals by means of certain institutions is very complicated. Neither the ends nor the means – neither the dependent variables nor the independent – are ready-made.

Moreover, the studies of this question that do exist rarely draw upon empirical evidence to verify their theories of the effects of particular institutions. To take a typical example of this very rare genre (which is not by any means sloppy but nevertheless exhibits the shortcomings of the existing literature), Webster's comparison of the likely effects of different methods of judicial appointment in the American states classifies the existing

⁹ Abraham Kiapi, "Prolegomena on Judicial Independence in Kenya, Tanzania and Uganda," pp. 40-51 in International Commission of Jurists, editor, *The Independence of the Judiciary and the Legal Profession in*

methods according to their supposed effectiveness in achieving independence and accountability rather than concretely evaluating their success.¹⁰ He argues that election, whether partisan or not, provides great accountability but little independence. Appointment, on the other hand, provides independence from political pressures but little accountability. Merit plans, often accompanied by retention elections, attempt to balance the two goals. He provides no explicit operationalization of independence or accountability, and fails to specify what judges might and do achieve by means of being independent.

Webster's study suffers from another serious problem typical of the genre. Like the other studies referred to above, Webster fails to clarify what the autonomous judiciary is autonomous from. Without comment, he takes the unusual tack of defining independence as autonomy from popular political pressures.¹¹ Looked at in this way, of course election affords less independence to judges than appointment. But if we were to use the usual definition of autonomy – insulation from the other branches of government – then election would seem to offer more independence to judges. Aside from the need for elected judges to raise funds and work with a party, their need to appeal to particular politicians in order to reach the bench is far less immediate when judges are elected. Appointed judges, on the other hand, must ingratiate themselves with politicians to earn their position, and may have residual debts after appointment.

There are, then, four significant problems with the existing literature on judicial independence. First, scholars have not clearly identified what an autonomous judiciary should be autonomous from. Second, scholars have not often addressed the issue of what an

English-Speaking Africa, Geneva: International Commission of Jurists, 1988.

¹⁰ Peter D. Webster, "Selection and Retention of Judges: Is There One 'Best' Method?" *Florida State University Law Review*, Summer 1995.

autonomous judiciary might accomplish by virtue of its autonomy. Third, scholars have not looked into all the ways in which a judiciary might lack autonomy. Fourth, scholars have not compared the various ways in which a judiciary might lack autonomy for their effectiveness in destroying judicial independence.¹²

In this study, I will offer a new way of conceiving of judicial autonomy and judicial independence. Then I will discuss the issues of what an autonomous judiciary is autonomous from, why autonomy is desirable, and how judiciaries maintain autonomy. After the opening theoretical sections, I will describe how I intend to operationalize judicial autonomy and judicial independence and discuss the tests that will follow.

A New Way of Studying Judicial Autonomy and Judicial Independence

Part of the problem with current studies stems from the general lack of comparative studies of judicial autonomy and judicial independence. The typical volume assembles articles by several country experts that describe the state of judicial autonomy in each country. Though authors such as Shetreet have made admirable efforts to draw together the strands of thinking on judicial independence in their concluding chapters to such volumes,¹³ these works have not proved sufficient for rigorous comparison. Data must be gathered in a

¹¹ Shetreet and others do mention the importance of judicial autonomy from popular opinion, but insulation from the other branches of government remains their primary concern.

¹² I will forgo the customary diatribe on the excessive attention still paid to highest courts, especially the American Supreme Court, and constitutional judicial review thirty years after Becker. For excellent discussion of this topic, see Martin Shapiro, "Public Law and Judicial Politics," chapter 14 in Ada W. Finifter, editor, *Political Science: The State of the Discipline II*, Washington, DC: American Political Science Association, 1993, and C. Neal Tate, "Judicial Institutions in Cross-National Perspective: Toward Integrating Courts into the Comparative Study of Politics," chapter 1 in John R. Schmidhauser, editor, *Comparative Judicial Systems: Challenging Frontiers in Conceptual and Empirical Analysis*, London: Butterworths, 1987. Shapiro and Tate also share some of my concerns, though neither of them address the issue of the effectiveness of particular methods of achieving judicial independence.

¹³ Shimon Shetreet, "Judicial Independence: New Conceptual Dimensions and Contemporary Challenges," chapter 52 in Shimon Shetreet and Jules Deschênes, editors, *The Judicial Independence Debate*, Dordrecht: Martinus Nijhoff Publishers, 1985.

way that facilitates comparison, then the comparison must actually be done. Even the data in side-by-side case studies of countries may not be appropriate for comparison, and few of the volumes which assemble such case studies have endeavored to make such systematic comparisons. However, the problems anticipated by scholars in the exercise of comparative studies pale in comparison to the problem of having no studies at all.

Constitutional judicial review is not the only area of law in which we should see variation between states and countries depending on their degree of judicial autonomy. While the existence and scope of rights and the maintenance of constitutional prerogatives against the efforts of the legislature and executive have important effects upon legal and political affairs, judges in most countries spend little time making new law. Even though judicial review has increased in importance around the world, the typical behavior of almost all courts in the world remains the application of existing laws to disputes between parties, without any consideration of constitutional review of those laws.¹⁴

Judicial autonomy should have a bearing on the balance of these ordinary judicial decisions as well. Using the broader definition of independence developed below,¹⁵ an independent judiciary should not excessively side with any recurrent party to judicial proceedings. In criminal law, the state should not always win. Though the accuracy of criminal investigation surely varies from state to state and country to country, the prosecution can't always be right. In civil law, employees should not always lose in disputes with their employers, nor should investors always lose to the companies in which they invest. Wealthier neighbors should not always prevail over poorer, and member of ethnic minorities should not

¹⁴ An aside: Locke's separation of powers merely separated the legislature from the executive. The judiciary remained a legitimate part of the executive, and there was little separation in his ideal system of the power of criminal investigation from the power of trial and sentencing. In a sense, the separation of the judiciary has made each and every criminal case a judicial review of administrative action.

always lose to members of the majority. Though such outcomes are as dependent upon the state of the law as the autonomy of the judiciary, the legal deck is not so stacked in most states and countries that the judiciary has no discretion to be even-handed.

Essentially, I am arguing that if an institutionally insulated judiciary consistently sides with, for example, the government, then we should carefully examine other ways in which it might be dependent. Perhaps the judges come from a very restricted part of the citizenry, or perhaps the legal education required of judges either makes them loyal to the government or only allows as students those who are already loyal to the government. Dependence may not be solely an institutional matter, nor may the prevention of extrajudicial attachments, press coverage, and other factors that interfere with judgment be sufficient to ensure that judges rely only upon the law to make their decisions.¹⁶

Successful independence may also be a goal whose attainment is impossible to measure. Scholars have no better claim to objective truth than do judges. Realistically speaking, we should not expect that we will always be able to tell when judges have relied solely upon the law and when they have used the law as a tool to exercise their biases. Such interpretation might be affected not only by the fact the judge may not even recognize the transgression, but also by the likelihood that our own biases and predispositions may color our understanding of whether the law or sentiment or both has prevailed in a particular case.

What we can study – with some degree of objectivity – is whether judges consistently favor certain parties or classes of parties. If we control for such country-to-country

¹⁵ Briefly: that the judiciary must be independent not only from the government, but from other potential constituencies as well, including business, the church, ethnic groups, and so on.

¹⁶ At an even deeper level, one might argue that judges will always have room for interpretation. Even with the most detailed civil code, not subject to judicial review, judges still have substantial freedom to choose among laws and rules that might apply to a particular case. In fact, it is likely that the more detailed the law is, the more freedom the judge will have within its bounds to choose laws that allow the judge's predispositions to affect the

differences as ideology, the level of professionalization of the judiciary and the identity of the party responsible for the burden of proof, then the level and type of judicial autonomy ought to correspond to the degree to which judges find for certain types of parties.

Autonomy from What?

From what should the judiciary be autonomous?¹⁷ Most advocates have concerned themselves with judicial autonomy from the other branches of government. That is to say – the individual judge should not receive binding instruction in particular cases from the minister of justice or a legislator. More recently, scholars have begun to concern themselves with the collective and internal autonomy of the judiciary.¹⁸ Collectively, the judiciary should not face undue administrative oversight from the overseers of the budget or from the ministers of justice. Internally, the chief justice and more senior judges should not have excessive influence upon less senior judges.

The international standards and academic work on the subject also focus upon the impartiality of judges. Insulation from the balance of the government is, after all, important only as a means of assuring impartiality. Judges may be partial for non-political reasons as

judge's decision. Hence the goal of judges relying solely upon the law to make their decisions may be an unrealistic one.

¹⁷ The types of autonomy discussed here parallel the discussions of judicial independence in more than a few other works. See, e.g., Becker, Shetreet (both cited above), and Eli M. Salzberger, "A Positive Analysis of the Doctrine of Separation of Powers, or: Why Do We Have an Independent Judiciary?" *International Review of Law and Economics*, December 1993. Becker opened the modern, relatively clear discussion of the institutional aspects of judicial independence. Shetreet's article strikes me as the most general in terms of covering the broad range of types of judicial independence now thought by advocates and judges to be important. Insofar as this article is positivistic in orientation and not entirely unfriendly to the rational choice paradigm, I have also found Salzberger's article very useful. Though I found his discussion of the grammar of independence – that independence implies a subject, an object and a nature – unduly verbose and conceptually incomplete, I have adopted a similar structure here in order to emphasize the lack of clarity as to whom or what judges should be independent from in most works on judicial independence.

¹⁸ Shetreet (cited above) is notable for emphasizing the importance of internal autonomy. It's worth noting that very few legal systems prevent the chief justice from influencing the decisions of other judges. Whether the

well. Thus the international standards often address the extracurricular activities of judges, the role of the media, and the background of candidates for the judiciary.

The earliest calls for international standards of judicial autonomy date from the 1950s, but the most concentrated period of pressure for the development of norms of independence fell during the early 1980s. Culminating in the United Nations' *Basic Principles on the Independence of the Judiciary* in 1985, this broad movement involved several bar, bench, non-governmental and academic organizations. The International Association of Penal Law and the International Commission of Jurists produced the *Syracuse Draft Principles on the Independence of the Judiciary* in 1981. In 1982, the Law Association for Asia and the Western Pacific (LAWASIA) published the *Tokyo Principles on the Independence of the Judiciary in the LAWASIA Region*. The International Bar Association met in Lisbon (1981), Jerusalem (1982) and New Delhi (1983) to prepare the *International Bar Association Code of Minimum Standards on Judicial Independence*. Several Canadian bar, bench and academic associations worked in cooperation with the Canadian chapter of the International Commission of Jurists in 1983 to create the *Universal Declaration on the Independence of the Judiciary* (the Montreal declaration). All of this activity led, as mentioned above, to the adoption by the United Nations General Assembly of the *Basic Principles on the Independence of the Judiciary* in 1985. A United Nations Congress adopted the *Basic Principles on the Role of Lawyers* in 1990 to extend certain protections to lawyers as well as judges. Various regional legal associations and conferences have endorsed the UN bench and bar principles, as in, for example, LAWASIA's *Preamble to Statement of Principles of the Independence of the Judiciary* of 1995 and *Beijing Statement of Principles*

chief justice reviews decision prior to pronouncement or chooses judges to hear particular cases, chief justices often have influence that Shetreet would find desirable.

of the Independence of the Judiciary in the LAWASIA Region in 1997, and the African Bar Association's (*et alia*) *Conclusions and Recommendations of the Lusaka Seminar on the Independence of Judges and Lawyers* in 1986 and *Conclusions and Recommendations of the Bujhal Seminar on the Independence of Judges and Lawyers* in 1987. The regional statements have often presented themselves as global standards, but generally pay very close attention to the specific shortcomings of judicial independence in their home regions and less attention to shortcomings elsewhere.

Incidentally, the fact that so many of these statements resulted from cooperation between academic and professional organizations suggests the degree to which the political science literature on judicial independence has been normative as well as positive. While normative entanglements don't necessarily pose a threat to scientific objectivity, they do indicate that political scientists have been paying very close attention to the specific professional complaints of judges and lawyers, rather than examining the evidence on the actual effects of particular methods of achieving judicial independence from a more removed vantage.

Though these statements and declarations generally tend to the same conclusion, they vary in specific content in ways that reflect different understandings of the critical components of judicial autonomy. Table I presents a collection of characteristics believed by the drafters of at least one of the statements to conduce to effective judicial independence.

All of the standards, with one exception, deal directly with collective autonomy of the judiciary from the executive and legislature. All of the standards that recognize individual autonomy also recognize internal autonomy of judges from one another. Shetreet's concern with internal autonomy, rare among academic treatments, is not at all rare in the international

Category	Feature	Syracuse	Tokyo	Jerusalem	Montreal	UN Bench	Lusaka	Banjul	Beijing
Independence	Individual Independence	✓	X	✓	✓	X	X	X	✓
	Collective Independence	✓	✓	✓	✓	✓	✓	✓	✓
	Internal Independence	✓	X	✓	✓	X	X	X	✓
Appointment	Appointment by the Judiciary	✓	✓	✓	✓	X	✓	✓	✓
	Selection on Merit Only	✓	✓	✓	✓	✓	✓	✓	✓
	No Temporary Judges	X	X	✓	✓	X	✓	X	X
Term	Appointment for Life to Retirement	✓	✓	✓	✓	✓	✓	✓	✓
	No Retirement Age Changes	X	X	✓	X	X	X	✓	X
Removal	Removal by the Judiciary	✓	✓	✓	✓	✓	✓	✓	✓
	Removal for Criminal Activity or Incapacity Only	✓	✓	✓	✓	✓	✓	X	✓
Administration	Adequate Resources	✓	✓	✓	✓	X	✓	X	✓
	Administration by the Judiciary	X	X	✓	✓	X	✓	✓	✓
	Calendaring by the Judiciary	✓	X	✓	✓	✓	✓	X	✓
Compensation	Adequate Pay	✓	✓	✓	✓	✓	✓	✓	✓
	Automatic Wage Increases	X	X	✓	✓	X	X	X	X
	No Wage Decreases	✓	✓	✓	✓	X	X	X	✓
	Adequate Pension	✓	X	X	✓	✓	✓	✓	X
Outside Influences	Minimal Pardon	X	X	✓	X	X	X	X	X
	No Retroactive Reversal	X	X	✓	X	✓	X	X	X
	No Press on Pending Cases	X	X	✓	X	X	X	X	X
Outside Positions	No Political Position for Judges	X	X	✓	✓	X	X	X	X
	No Party Position for Judges	X	X	✓	✓	X	X	✓	X
	No Law Practice for Judges	X	X	✓	✓	X	X	X	X
	No Business Position for Judges	X	X	✓	✓	X	✓	X	X
Outside Risks	Collective Organization of Judges Allowed	✓	X	✓	✓	✓	✓	✓	X
	Immunity for Official Acts	✓	X	✓	✓	✓	✓	✓	✓
	Executive Must Protect Judges	✓	✓	X	X	X	X	X	✓
Equal Access	Equality of Access to Judicial Office	✓	X	X	✓	✓	X	✓	✓
Legend						✓	Characteristic is recommended.		
						X	Characteristic is not discussed.		

standards (to which, I should note, he has contributed). Interestingly, the UN bench standard, which is arguably the most important in terms of real-world impact, does not deal with individual or internal autonomy. This despite the fact that the Syracuse standard, the earliest of the standards described here, recognized the importance of such autonomy from the beginning. This omission in the UN bench standard follows the general trend of the UN document. Despite the fact that the Syracuse, Jerusalem and UN standards are more or less equally global in their design and intent, the UN standard tends not to call for aspects of judicial autonomy that would require existing governments to change their structure or practice. This is not surprising given the fact that the United Nations is a representative body of governments. The Jerusalem standard, crafted largely by judges, lawyers and academics, represents the wishes of a group less concerned with the maintenance of the status quo and more concerned with the position of judges and lawyers regardless of what changes might be required to improve their lot.

The Jerusalem and Montreal statements are the most comprehensive of the lot. They have only one major omission each from the concerns of the others: the Jerusalem standard

fails to require equality of access to judicial office and education, while the Montreal declaration fails to deal with the outside influences of pardon, retroactive reversal and the press. The former omission is interesting considering the representativeness of the body designing the document, while the latter is easy to understand given that the problem of external influences is hardly grave in Canada. The Syracuse standard omits both outside influences and outside positions such as extracurricular practice or party position; it is also the only standard that fails to require civil immunity for judges. The omission of extracurricular positions stands to reason given the nature of the drafting body: judges and lawyers that already held such outside positions. The neglect of civil immunity is surprising, however. The other documents similarly fail to address issues that might offend some portion of the authoring group.

Academics have taken these standards quite seriously, which is not surprising since often they have participated in the design of them. But again the entanglement of academic and professional motivations in the crafting of these documents seems to have blinded many academics in this area from impartially evaluating which means of achieving judicial independence work best in which contexts. The behaviorialism still prevalent in judicial political science may well have the effect of encouraging scholars to pay a great deal of attention to what judges and lawyers want, rather than looking more objectively at the institutions and cultural features that actually prove empirically effective. Not that what judges want is irrelevant. An important part of effective judicial autonomy is surely judges who believe that their position is unthreatened should they find against the view of their government, party or public.

Why Autonomy?

Nobody disagrees that judicial autonomy is important. But what is it important for? The benefits of judicial autonomy are often simply assumed. The standards discussed in the previous section rarely include “whereas” clauses. The fact that judicial independence rings so charmingly in our democratic ears suggests that we should look to the past for the beginnings of the case made for a separate and secure judiciary.

Judges began dependent. From the popular juries of ancient Greece to the English common law magistrates answerable to the king to the bureaucratic judges of China and Japan, judges were either subject to the popular will or the executive will. Even where judges strove to keep the social fabric intact, such a goal often required the suppression of the complaining minority rather than its recognition against the interests of the state.

Judicial independence arose at about the same time that separation of powers itself arose in England. When the parliament of the landed classes asserted its prerogatives against those of the monarch, the allegiance of the judiciary almost immediately became an issue. The English magistrates and circuit judges had little authority over the parliamentary classes. Trial by a jury of peers meant at the time, of course, trial by a jury of peers of the realm – in other words, trial by the landed. The peasants continued to lose their trials, in which they had usually offended their landlord, and the landed continued to win theirs, in which they had usually offended the monarch. Hence the innovation of star chambers to try nobles under the monarch’s justice without a jury. In any event, neither of these types of courts could fairly be said to be independent.

The American founders, crafting their Constitution and Federalist Papers a bit later than this dispute but with it relatively fresh in mind, recognized that in order to avoid partial

justice they had to go to great lengths to ensure not only an independent judiciary, but a separation and balance of powers within which an independent judiciary served the role of keeping the separation intact. Though the concept of judicial review was not explicitly recognized until *Marbury v. Madison* in 1803, the extrapolation from the constitution's plain language to *Marbury* is not radical. The Constitution reigns as supreme law over all federal and state legislative enactments and executive actions, and the courts are responsible for enforcing the Constitution.

The French Revolution and Napoleonic Code similarly created an independent role for the judiciary in order to overcome the inequities of executive justice and the inadequacy of the aristocratic *parlements*, which had primarily served to protect the interests of the wealthy against the king (much as juries had in England).

The French example prevailed in Europe with the conquests of Napoleon, and the British and French examples followed colonization worldwide. Most of the former British colonies adopted constitutions along American lines upon independence, while the former French colonies looked to America and France for instruction. Either way, the result was a worldwide movement toward increased judicial autonomy and separation of powers.

Another important factor driving this movement was the expansion of trade. Despite my impending argument that increased judicial autonomy is not enough to ensure fair trade, I recognize that much of the demand for legal standardization and administrative procedural predictability follows from trading needs. Nevertheless, judicial autonomy alone is not sufficient for fair trade.

The academic literature on judicial independence is, as I have mentioned, normally descriptive, and normative when not descriptive.¹⁹ When arguments for judicial autonomy are presented, they tend to run as follows. Courts must be autonomous in order to be able to resolve private disputes without suspicion of partiality toward government, business, their own interests, and so on. In criminal matters, courts must confirm that the executive has acted appropriately in prosecution; otherwise the public might lack confidence in the government's (collectively speaking) ability to find the truth of crimes. In administrative matters, judges must prevent administrative agencies from overstepping their bounds as stated in the law. The legislature is ill-equipped to monitor the activities of executive agencies, hence courts must assist by providing an avenue of appeal more final than that provided by calls for help from legislative assistants. The effect of the judiciary with regard to economic affairs lies mostly in civil and administrative affairs, while the effect of courts on human rights is mostly a matter of criminal and administrative law.

Digression: Autonomy Distinguished from the Rule of Law

The arguments for judicial autonomy sound strikingly similar to those for the rule of law. Ensuring the "rule of law" is the primary goal of advocates ranging from academics to human rights activists to international investors concerned about nationalization of their investments.

Barro and Sala-i-Martin have studied the relationship of rule of law to economic growth,²⁰ and determined that rule of law significantly promotes economic growth. However,

¹⁹ I have already cited the principle sources for arguments in favor of judicial autonomy, including Becker and Shetreet's conclusion to Shetreet and Deschenes. Salzberger's article, mentioned above, provides a more modern approach.

²⁰ Robert J. Barro and Xavier Sala-i-Martin, *Economic Growth*, New York: McGraw-Hill, 1995.

their data comes from the *International Country Risk Guide*, where rule of law is operationalized by asking investment and country experts to compare countries in terms of the likelihood of expropriation of property, repudiation of contracts, general corruption, and so on. Aside from the manifest statistical problems with Barro and Sala-i-Martin's enquiry,²¹ such an approach to measuring rule of law is more suited for investors than academics. Since the polled experts knew that they were being asked for an estimation of rule of law that might shed light upon the risk of investing in a country, it would be foolish to regress the resulting measure of rule of law upon actual investment success or expropriation. The two may as well have been one.

Barro and Sala-i-Martin also suggest that the way to achieve rule of law is by means of increased judicial autonomy. This assumes two things. First, that an autonomous judiciary will necessarily be in favor of protecting international investment. Second, that the autonomy of the judiciary is essentially equivalent to rule of law. Barro and Sala-i-Martin are not alone in the latter assumption, but many theorists have questioned the necessity of the liberalness of an autonomous judiciary. An autonomous judiciary may hail from a socialist legal profession, or more threateningly, it may be staffed with holdovers from a no-longer-active authoritarian regime. Either way, an autonomous judiciary may serve to funnel foreign investors' capital into government projects or private hands.

As for the second assumption, many advocates of judicial autonomy have explicitly or implicitly assumed that judicial autonomy is the best route to rule of law. And yet judicial autonomy and the rule of law are clearly not the same thing. An independent judiciary, impartially enforcing the law of the land, may not be at all favorable to foreign investors, if the law itself is not.

²¹ At a minimum: no checks for multicollinearity of their vast array of independent variables.

Though international businesses have generally focused more directly on ensuring property rights in the form of treaties and other agreements with governments and private domestic interests, investors have occasionally found autonomous judiciaries useful in the enforcement of such treaties and contracts. If investors do join the movement for judicial autonomy in large numbers, they may have a direct effect on the livelihood of judges and lawyers. If this is the case, then we might expect to see, down the road, a change in the relationship of judicial autonomy and protection of property rights. Grateful judges and lawyers may work harder to protect international interests, even at the expense of domestic interests, so long as doing so doesn't imperil their domestic political support. Nevertheless, such a groundswell of business support for judicial independence has yet to come to light. Even if it does, the relationship between independence and investment will not be a necessary one; rather, it will be contingent upon the continued cooperation between judges and investors.

Even aside from the safety of investments, judicial autonomy and rule of law may not serve the same purposes. Since rule of law means many things to many people (much like judicial independence), it's important to be clear about the goals and meaning of each. There are authoritarian countries where foreign investments are quite safe, despite a lack of judicial autonomy.²² And there are democratic countries where human rights are unsafe, despite significant judicial autonomy in most senses.²³ Judicial autonomy should have an influence

²² For example: Egypt (see Moustafa, cited above) and Singapore (see Philippe Regnier, *Singapore: City-State in South-East Asia*, Honolulu: University of Hawaii Press, 1987).

²³ Many would argue that the treatment of native American treaty rights in the United States and Canada reflects a lack of safety of human rights. Others argue that capital punishment is a violation of human rights, and though many countries with independent judiciaries do not allow capital punishment at all, there are notable exceptions. Since economic ideology is less disputed than political nowadays, the ideas of what rule of law means for the economy are somewhat more fixed than for political matters.

on the balance of judicial decisions, but it may not have any particular legal result since the law itself may have a bias.

Autonomy How?

Past theoretical, empirical and descriptive work has identified numerous characteristics that seem to contribute to judicial independence. Though very few of these studies have attempted to comparatively establish which factors are most effective, they have usefully listed and described many institutions and cultural factors that may be worth further study.²⁴

AUTONOMY GENERALLY. Judicial autonomy isn't as simple as it might seem. Scholars have identified three types of autonomy, not just one. Judges should be individually autonomous in terms of their work conditions and ability to follow the dictates of law and conscience, internally autonomous in terms of their freedom from the dictates of other judges, and collectively autonomous in terms of the judiciary's relationships with the legislature and executive.

Collective autonomy is the most widely studied topic, especially historically. Advocates believe that the judiciary should be, insofar as it is possible, free from the interference of other governmental bodies. While some scholars and statements go so far as to recommend that judiciaries select and discipline their own judges, that legislatures should never overturn judicial decisions, and that executive clemency should be used sparingly if at all, the lowest common denominator seems to be that the judiciary as a unit should be free from outside instruction in particular cases and have substantial administrative independence

in terms of control over resources, employees and facilities. Many scholars also suggest that the judiciary should be free to form collective associations of judges for the purposes of judicial organization and collective bargaining. Calls for collective independence tend to sound like the typical arguments for separation of powers in general. The other branches of government should have no direct or indirect means of coercing the judiciary to interpret the law and handle cases in any particular way.

Individual autonomy requires that judges should, even if politically appointed, be free from claims upon their judicial functions due to past and present nonjudicial associations. Judges should be adequately remunerated, removed only for reasons of criminal conduct or manifest incapacity, and immune from sanction for official acts taken in good faith. Many believe that judges should receive automatic wage increases with inflation, and no wage decreases during their tenure. Some theorists go so far as to require that judges hold no political, party, business or legal position whatsoever during their terms of office.

Internal autonomy is a somewhat less common concern among advocates for judicial independence. Most agree that judges should not be bound by the legal understanding and conclusions of their fellow jurists. But some believe that the internal business of courts, whether administrative or related to the management of cases, should be handled democratically by all of the judges, rather than authoritatively by the chief justice or an administrative employee. The role of the chief justice is especially problematic if the selection of the chief justice is the prerogative of the executive branch. Others suggest that administration and calendaring should be handled by automated and strictly regulated processes to avoid conflict of interest and undue influence from the executive and legislature.

²⁴ The methods of achieving independence listed below correspond to the types of autonomy covered by the international minimum standards and academic treatises. I will provide some citations to especially useful texts

APPOINTMENT. All those who argue for greater judicial autonomy believe that the selection of judges should take place according to established standards of juridical merit, rather than political or social criteria. Many believe that judges should form the majority of any panel devoted to the nomination of candidates for judicial office, and some believe that political bodies should play no role whatsoever in the nomination or appointment of judges.²⁵ Some scholars are concerned with the increasing use of part-time and temporary judges appointed through less strict processes and subject to removal at the whim of the appointing body.²⁶

TERM OF OFFICE. There is unanimous agreement that judges should be appointed for life, or at least until a set retirement age that cannot be changed for judges currently in office. Judges should not be subject to reappointment or reelection.²⁷

REMOVAL. Judges should be removed for proven criminal activity or manifest incapacity only. Furthermore, most scholars believe that judges should be removed by purely judicial processes only. Courts should handle the discipline of judges, not legislatures or bureaucrats. In some cases, a separate disciplinary court may be preferable.

ADMINISTRATION. Courts should receive adequate resources to complete their tasks, including sufficient courtroom space and equipment for judges to handle all of the cases that come before the courts. The judiciary should have substantial freedom to allocate its budget,

in each area, but I will not attempt to mention everyone who has worked in each area.

²⁵ Merit or nomination panels with a majority of judges or at least of legal professionals are not as rare as one might imagine. Even in the American states, often controversially, lawyers have dominated merit panels (see Webster, cited above). Countries as diverse as Egypt (see Moustafa, cited above), the United States and Austria have followed this approach.

²⁶ Temporary judges and expatriate contract judges are especially a problem in Africa. The International Commission of Jurists' publication *The Independence of the Judiciary and the Legal Profession in English-Speaking Africa*, Geneva: International Commission of Jurists, 1988, covers this problem in a number of African countries.

²⁷ The United States especially has resorted to reappointment and reelection of state judges. Only three states allow their judges life terms or terms until retirement. The other forty-seven require either reappointment, retention elections or straight reelection.

once set by other agencies, and should have their input as to the budgetary needs of the judiciary honored. Internal calendaring of cases and proceedings should be entirely within the control of judges or an automated process established, approved and reviewed by judges.²⁸

COMPENSATION. Scholars pay more attention to the adequacy of present income than to the adequacy of future pensions. Most believe that judicial salaries should not be cut except as part of a general reduction of public compensation that does not treat judges especially harshly, and some believe that judges' wages should never be cut to avoid any possibility of blackmail. Some argue that judges should receive automatic wage increases according to an impartial index of inflation. Judges in Canada have even threatened to sue to retain the real value of their wages.²⁹

OUTSIDE INFLUENCES. Executive agencies should use their power of pardon sparingly to protect the integrity of sentencing. Legislatures should refrain from retroactively reversing the decisions of jurists, and a few scholars believe that legislatures should avoid proactive decisions that appear to disparage judicial decisions. Some argue that the press should avoid comment on pending cases, or at least refrain from inflaming the public mood against parties in cases whom the judiciary may be forced to favor by the dictates of law and conscience.

²⁸ An excellent pamphlet on the perils of judicial administration for judicial autonomy is Russell Wheeler, *Judicial Administration: Its Relation to Judicial Independence*, Williamsburg: National Center for State Courts, 1988. Though the pamphlet primarily concerns judicial administration in the American state courts, where some of the more invidious forms of administrative blackmail tend not to take place, its lessons apply to foreign courts as well.

²⁹ Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Ottawa: Canadian Judicial Council, 1995, especially pages 58-62. Although one judge did actually sue, he lost his case, but dicta in the case specified that wages should periodically be indexed to inflation to ensure independence during economic downturns. This is harder to deal with in countries that face significant hyperinflation, of course. But even in such dire times, the government can at least not reduce the real value of judges' wages more than those of other government employees.

OUTSIDE POSITIONS. Most legal scholars agree that judges should not hold political position off the bench, nor retain obvious party ties or position, nor practice law, nor hold a position as director or officer of a business. Some legal scholars (and countries) even limit the after-hours social activities of judges, requiring them to hold no leadership position and to avoid activities that might cast doubt upon the integrity and probity of the judiciary.

OUTSIDE RISKS. Judges should be allowed to organize collectively for the purposes of bargaining or professional consultation. The executive should ensure that judges are protected from physical and mental abuse that might bear upon decisions. Finally, judges should enjoy immunity from civil action for disputes over official actions, and some believe that judges should enjoy complete civil and criminal immunity to avoid the risk of spurious accusation and resulting loss of independence. As noted above, if judges do lack immunity, their trial and punishment should be handled solely by judges and not by legislative, executive or popular bodies.

EQUAL ACCESS. A few advocates of judicial independence have argued that any national should be able to receive legal education and attain judicial office in order to ensure that the judiciary, collectively and individually, pays heed to the various groups and divisions within society. A very few have argued that the judiciary should be proportionally or equally representative of important ethnic, religious and other divisions within society.

OMISSIONS. A few scholars have recognized that many countries long hailed for the independence of their judiciaries have few of the above-mentioned characteristics of judicial autonomy. The United Kingdom guarantees nothing besides life tenure to its jurists, yet has long been recognized as a paragon of judicial independence. Hence, legal culture, or at least legal practice and tradition, may be as important as legal institutions.

Many of the other factors mentioned may have differential effects depending on the particular characteristics of legal systems. A guarantee of automatic wage indexation is unnecessary if wage increases are regular and long-established. A calendaring plan designed by an executive agency and never reviewed or approved by judges may be innocuous if it handles case management to the jurists' satisfaction. Appointment with the input of the judiciary may be unnecessary where otherwise knowledgeable legal professionals participate in a process geared to recognize merit in potential judges. Retroactive or proactive reversal may even sometimes prove necessary if judges manifestly ignore the wishes of the populace, and yet not ultimately threaten independence due to the unusual nature of the judicial dereliction. Hence it's important to look at the context of institutions in each country's legal and political setting.

As noted above, more attention has been paid to individual and collective autonomy than to internal autonomy, yet the influence of other jurists may be critically important. Often, even where associate justices are appointed by merit, chief justices are selected through a political process. If the chief justice has absolute authority over judicial administration and calendaring, which is often the case, then the chief justice will be able to exercise significant discretion at the behest of his political masters. Assigning judges with known preferences to important cases is a dangerous capacity to allow to a politically

motivated judge. Hence, the calls for democratic or automatic calendaring and administration should receive more attention than they do.

A surprising number of countries allow judges to hold legislative or executive office. Even more allow judges to retain open partisan ties and business connections. Though in most cases judges recuse themselves from cases in which their financial interests are directly affected, it is difficult to see how a judge can recess himself from all issues related to his legislative activity, or how a legislator can recess himself from everything that follows from his judicial activity. Also perilous is the magistrate who holds judicial office; as a judge his actions as magistrate may have undue influence on other judges, while as a magistrate his decisions as judge may unduly affect other magistrates (aside from the risk that he might be involved with the review of his own magisterial decisions). Connections of these types at least cast doubt upon the impartiality of jurists.

Equal access to legal education and judicial position is also an understudied topic. If the judiciary in a manifestly divided society is not representative, impartiality may be hard to achieve. As to human rights, this is the primary sense in which the judiciary of South Africa during the apartheid period was not independent from the wishes of the ruling party, though it had substantial formal independence. But even if the judges of a country manage to achieve impartiality, the public's dissatisfaction with the representativeness of the judiciary may threaten the independence of judges.

One aspect of judicial autonomy almost entirely ignored in the existing literature is popular participation in judicial selection. Though doing so is quite rare globally speaking, many of the American states have a popular component to judicial selection. Several require popular retention elections after executive and legislative appointment. Many more simply

have popular elections for state judicial office, and nine states even have partisan elections. Clearly, partisan elections at least cast some doubt on the independence of the resulting judges. Even nonpartisan elections surely require judges to take heed of public sentiment, at least in general terms. Elected judges in liberal states should rarely find abortion constitutionally objectionable, regardless of their private sentiment or understanding of the law.

Finally, the recent growth of judicial review of legislative and executive action around the world has led to a few tentative calls for judicial review as a necessary component of judicial autonomy.

Some have argued that only judicial review can properly secure the autonomy of the judiciary from the rest of the government. While it is doubtless true that only judicial review can ensure that judges will have the capacity to challenge laws as unjust, in most cases judicial independence without judicial review is enough to ensure that judges may enforce the legally established wishes of the legislature and executive rather than bowing to every passing governmental demand. The desire to have a judiciary that upholds constitutional or normative principles against the law and the desire to have a judiciary that impartially enforces the stated law are quite separable.

Nevertheless, there is little doubt that judiciaries that have effective judicial review necessarily have a greater degree of autonomy from the immediate whims of the government. Even if such judges are politically appointed in the most manifestly biased way imaginable and removed at will, they have a powerful institutional weapon that they may find a chance to use. Since most judges aren't appointed and removed so readily, judicial review strengthens the position of most judges who have it.

Judicial review comes in a wide variety of forms. Simple court review of administrative agency action constitutes a simple form of judicial review that doesn't bring constitutional issues into play. Courts merely act to ensure that administrative agencies do not behave capriciously or unlawfully. Constitutional review of legislative action is a more notorious sort of judicial review. Rarely discussed in the comparative literature, though of great note in studies of the countries concerned, is judicial review of constitutional amendments. In both India and Israel, for example, the courts have successfully ruled that constitutional amendments intended to limit the purview of judicial review were themselves subject to such review and in fact unconstitutional – an impermissible alteration of the basic

structure of the countries' constitutions, despite the fact that in both cases the amendments passed through all the required stages of constitutional change.

However, we should keep in mind that constitutional judicial review has been, if anything, overstudied. Those scholars who have looked at judicial review at all have generally focused tightly upon judicial review, especially in American political science and public law. Administrative judicial review is, on a day-to-day basis, far more important to the workings of politics as they affect individual citizens and international investors. Political scientists working in regulatory administration as well as urban politics, both in and out of the United States, have commented upon the pervasive influence of courts in these local, small-scale political situations. Even when courts do not act, the threat that they might encourages compliance with the law.

Despite its growing theoretical and empirical importance, judicial review nevertheless has yet to appear as a minimum requirement for judicial independence in any international standard.

Operationalization of Judicial Autonomy and Judicial Independence

JUDICIAL AUTONOMY. I have argued above that we need to isolate the effectiveness of particular aspects of judicial autonomy. Hence an index of judicial autonomy, which is the typical approach to comparison, is inappropriate. Take Barro and Sala-i-Martin's rule of law variable. First, expert opinion is questionable as a means to comparing countries. Presumably, none of the experts polled are intimately familiar with more than one or two countries. Combining the scores of many experts who provide scores only for a few countries each may result in problems of scale definition. Second, even if the index were based upon

the presence or absence of concrete factors that lead to judicial independence, we would be assuming precisely what is in question: the relative importance of the various factors. An additive index of elements of autonomy gives each equal weight – and that may not be appropriate. The method of appointment may be far more important than the method of removal, or the prohibition of extracurricular political activity may not be as significant as the prohibition of extracurricular business activity. We cannot know without looking, and we cannot look without treating each aspect of autonomy separately.

The general approach, then, will be to fully control for other explanations of each dependent variable, then to add, serially and in combination, the various aspects of judicial autonomy. To overcome the evident small *n* problem, my tests will work in several ways, including time series and the use of several levels of courts within each country. I will begin with simple cross-sectional data on countries, then add the other levels of complexity as I look at the data. Prior to the tests, I will explore the relation of the various factors to one another; some may be quite collinear with others.

The aspects of judicial autonomy used will vary from test to test, depending on the dependent variable and the presence of a conceivable connection between the particular aspect and the dependent variable. Most of the institutional aspects of judicial insulation are binary, either present or absent, while most of the empirical aspects modify the institutional aspects and hence are also binary, either effective or ineffective.

The formal institutional aspects include such factors as whether appointment is political or merit-based, whether removal is political or judicial, whether there is a law of contempt regarding media coverage, whether judges may serve as politicians, whether judges may run a business, whether judges may review administrative actions, and so on. The

empirical aspects of judicial autonomy primarily look at whether the above institutions are effective, hence I will introduce them into the tests as interactive effects with the corresponding institutional factors, including whether judges are actually removed according to the official process, whether judges have actually served as politicians, whether media coverage has actually threatened independence, and so forth. Other empirical issues include whether judges have been removed through extraconstitutional means and whether judges broadly represent the divisions within society.

While this approach to measuring the effects of judicial autonomy may seem unwieldy, it is the only way to identify the separate effects of different methods of achieving judicial independence. It may be the case that the same aspects have completely different effects in different legal systems, but it is likely that, on the average, similar institutions function similarly when other aspects of the legal system are controlled for. Certain institutions have theoretically likely effects, but it may be possible to detect those effects only by controlling for other important aspects of judicial autonomy and other factors that affect the dependent variable.

DEPENDENT VARIABLES OTHER THAN JUDICIAL INDEPENDENCE. As I have argued above, judicial autonomy seems unlikely to have any particular relationship with the protection of particular constituencies. Though an autonomous judiciary generally adds a point of entry into government protection for constituents, there's no reason to suppose that the constituency protected will always be foreign investors or a minority. On balance, it is more likely that a government with greater separation of powers will be more inclusive of multiple constituencies. But a correlation between judicial autonomy and, say, protection of human

rights would not be conclusive in light of the possibility that the legislature might be the protector of human rights and the judiciary their scourge.

Nevertheless, to establish this point empirically as well as theoretically, I will conduct some simple tests that explore the connection of judicial autonomy to the use of capital punishment and the protection of foreign investors in the American states. I will operationalize capital punishment as a binary variable – whether capital punishment has been used in each state between 1977 and the present. I could use a count of actual executions, but there is good reason to believe that regional and ethnic differences account for most of the variance in the raw number of executions. Nonetheless, whether a state has executed anyone at all says something important about that state’s legal system. Hence a binary that indicates any executions at all seems appropriate. For the second test, I will make a significant assumption about foreign investors – that they invest at least in part according to the attractiveness of the legal system of each state. Given this assumption, I can use the actual level of foreign investment as a proxy for its protection.

JUDICIAL INDEPENDENCE. My principal independent variable is judicial independence, or the effectiveness of judicial autonomy. That is to say, how well do the various aspects of judicial autonomy noted above help judges strike a balance between the interests of parties that come before the courts. To simplify the measurement of this balance, I will separate various types of trials. By doing so, I make it possible to operationalize each type of dispute as a simple percentage; for example, the percentage of criminal cases won by the state and the percentage of business-related civil cases won by corporations. Since different types of

independence may in any event depend on different types of autonomy,³⁰ it is appropriate to separate types of trials for other reasons as well.

In some countries, this information is already available. In others, I will have to sample cases to assemble measures of victory by each type of party.

Tests of the Effects of Judicial Autonomy

After the preliminary analysis of the data on judicial autonomy, I will conduct four sets of tests of the effects of judicial autonomy. First, as a sort of feasibility test, I will use comparative cross-sectional data on the American states. Second, I will use cross-sectional data on countries in several time periods. Third, I will use time series data on countries. Fourth, I will combine the above approaches within a time series framework to look at multiple levels of courts within countries (where there are differences) and multiple regions within countries (in federal systems).

AMERICAN TESTS. I've already mentioned the preliminary tests on capital punishment and foreign investment in the American states. Though in most important senses, there is (nowadays) little variation in the protection of human rights and the protection of property rights in the American states, there is nevertheless some variation. Capital punishment is legal in some states and not in others, and actually used in some states where it is legal and not in others. I will not assume that the courts are responsible for the bare legality of capital punishment, but they are certainly at least partly responsible for its actual use. Of course, I will control for typical explanations of the use of capital punishment, including the violent

³⁰ For example, in constitutional rights cases it may not be relevant whether judges are allowed to have business interests.

crime rate and the partisan identity of the state attorney general.³¹ As for foreign investment, I will follow Barro and Sala-i-Martin's lead in choosing my control variables, though I will work a bit harder at regression diagnostics.

Thirdly, I will relate the American states' profiles of characteristics of judicial autonomy to judicial independence in each state, as described above. The methods of appointment and removal are the most relevant indicators of judicial autonomy in the states, since in most cases the language of the state constitutions has actually been effective. In earlier periods, though, the courts were often consistently opposed to the claims of certain ethnic and religious groups, so I will pay attention to actual practice as well as institutional norms in earlier cross-sections.

CROSS-SECTIONAL CROSS-COUNTRY TESTS. I will conduct similar tests across countries. Here I will not be able to make the pleasant assumption that the levels of judicial autonomy and independence are roughly similar across areas. The actual effectiveness of institutional norms will be a more important issue. The measure of effectiveness suggested above also has an advantage for cross-country studies. Where language barriers might impede in-depth content analysis of cases, it's easy enough to determine the types of parties and the victor without encountering overly high costs of translation.

TIME SERIES CROSS-COUNTRY TESTS. Judicial institutions tend not to change much over time, but times series tests will allow me to explore the changes in effectiveness when they do. This will provide further confirmation of the effectiveness of particular aspects of judicial autonomy, while controlling for the country's history and culture. Moreover, even when the

³¹ For other likely controls and a glimpse of the literature upon which I will rely, see, among other articles of theirs, Paul Brace and Melinda Gann Hall, "The Vicissitudes of Death by Decree: Forces Influencing Capital Punishment Decisionmaking in State Supreme Courts," *Political Research Quarterly*, March 1995, and "Party,

constitution does not change, the actual use or lack of use of particular institutions frequently does. Argentina's constitution didn't change much from independence to 1993, but the political circumstances changed wildly.

TIME SERIES CROSS-LEVEL CROSS-SUB-COUNTRY TESTS. Since some countries have specialized courts of review, or different levels of government with different judicial powers, a full analysis of the effectiveness of institutions designed to achieve judicial independence requires that the unit of analysis be defined somewhat differently than a country. Rather, the appropriate unit of analysis is the court. Some countries have four or more levels of courts, with varying jurisdictions and methods of appointment and removal. We can maximize our ability to test combinations of aspects of judicial autonomy by looking at each of these levels of court over time.

Conclusion

After getting a clear, comparative picture of the state of judicial autonomy and judicial independence around the world, the tests I propose will yield a useful comparison of the strategies of autonomy used by courts and governments around the world. We will know something that we didn't before: which institutions of judicial autonomy should receive the bulk of our attention. Furthermore, we will know which methods of autonomy conduce to which kinds of independence, both theoretically and empirically. This empirical knowledge should allow more systematic comparison of the autonomy and independence of legal systems in the future.