Introduction

The Two Faces of Judicial Power

Keith J. Bybee

WELL OVER TWO HUNDRED YEARS AGO, during the ratification debates over the Constitution, Alexander Hamilton argued that the "complete independence of the courts of justice is peculiarly essential" for American government. Judicial independence protects constitutional guarantees from overreaching "legislative encroachments" as well as from the "ill humors" of "designing men." Hamilton insisted that without independent judges to police the polity "all the reservations of particular rights or privileges [in the Constitution] would amount to nothing."[1]

Hamilton's view has long been the conventional one, endorsed by the American Bar Association and extolled at confirmation hearings and Constitution Day celebrations. Even so, Hamilton's view has not gone uncontested. Indeed, his claims about the glories of judicial independence were questioned in his own day. The Anti-federalist opponents of the Constitution feared the power of a politically insulated judiciary: "independent of the people, of the legislature, and of every power under heaven," judges were ultimately bound to "feel themselves independent of heaven itself."[2] Rather than guaranteeing the protection of individual rights, judicial independence threatened to create vast opportunities for judicial elites to pursue their own interests under the guise of unbiased adjudication. The only solution, according to the Anti-federalists, was to constrain judicial power by somehow rendering it accountable to the people.

Associate Professor of Political Science and Michael O. Sawyer Chair of Constitutional Law and Politics at Syracuse University's Maxwell School of Citizenship and Public Affairs

The disagreement between Hamilton and his opponents is not merely of historical interest. Recent poll results indicate that the conventional understanding of judicial independence as a prerequisite for the protection of rights is locked in close competition with a contrary understanding of judicial independence as an opportunity for judges to advance their political goals. In many respects, the public seems just as likely to celebrate the virtues of an impartial and independent judiciary as it is to believe that judicial decision making is simply the pursuit of partisan politics by other means.

What can be made of these two competing views of the judiciary? How does the mix of legal principle and political skepticism that surrounds the bench affect judicial independence and the role of courts in our democracy? Scholars have explored these questions, yet they have typically done so in isolation from the practitioners and professionals that participate in and report about the American judiciary. In a first-of-its-kind effort, this volume brings together academics and practitioners to assess questions of judicial independence and judicial legitimacy from a variety of viewpoints. The essays collected here examine the current status of the American courts from the perspective of the legal academy and political science, from the perspective of sitting judges at the federal and state level, and from the perspective of working journalists. In the pages that follow, readers will find judges reflecting on the methods of selection that put them on the bench, reporters critiquing the media in which they operate, and scholars charting large-scale changes in the ways in which the judiciary is staffed and perceived. The end result is a series of different conclusions about how and whether a consensus understanding of the American courts can be achieved.

In this introduction, I begin with a discussion of the poll results illustrating the public's conflicting understandings of judicial power. As we shall see, the poll results not only illuminate the contradictory contours of public opinion but also suggest that the public's beliefs are closely related to the way in which the media covers the courts. After my discussion of the poll results, I provide an overview of the essays that make up this volume.

The Maxwell Poll

To begin, consider the idea that judges use their independence to advance political agendas. In the fall of 2005, Syracuse University's Maxwell Poll posed a battery of court-related questions as part of a nationwide survey.[3] According

to the Maxwell Poll, an astounding 82 percent of those surveyed believe that the partisan background of judges influences court decision making either some or a lot. This view is shared by very different groups. An overwhelming majority of liberals, conservatives, people who attend religious services several times a week, and people who never attend religious services all agree that partisanship does not switch off when judicial robes are put on.[4]

For many, belief in the political nature of judicial decisions translates directly into doubts about the sincerity of judicial pronouncements. A majority of poll respondents agree that even though judges always say that their decisions flow from the law and the Constitution, many judges are in fact basing their decisions on their own personal beliefs. Judges may consistently "talk law," but most Americans suspect that judges are simply "doing politics."

Given the widespread agreement that partisanship skews judicial decision making, one would expect large segments of the public to view judicial selection in political terms. The Maxwell Poll confirms this expectation. Among those surveyed, Republicans are eight times more likely than Democrats to trust the president and Senate to pick good federal judges. Moreover, three-fourths of respondents reject the idea that fewer judges should be subject to popular election. Clearly, most Americans understand judicial selection to be a political process and think it makes sense to organize judicial selection in a political way.

What are the sources of the public's political perception of the courts? For many Americans, the media seems to play a critical role. According to the Maxwell Poll, 68 percent of those surveyed agree that media coverage of the courts pays more attention to partisan affiliation than to the reasoning that judges use to justify their decisions. Indeed, the poll results suggest that the greatest consumers of media coverage are the most likely to view the courts as political actors.[5] Those respondents who watch television news every day are far more likely than those who never watch television news to see partisan factors at work in judicial decision making (a similar, albeit weaker, relationship holds when those who read a newspaper every day are compared to those who never read a newspaper).[6] Daily television news watchers are also far more likely to say that the number of judicial elections should be increased and somewhat more likely to assert that judges base their decisions on personal belief rather than on the law and the Constitution (again, the story is similar with daily newspaper readers).[7]

What of the idea that independent judges are impartial guardians of our

constitutional rights? In spite of the widely shared belief that judging is influenced by politics (a belief that is coupled with the commonly held opinion that judges often merely pretend their decisions are derived from the law and the Constitution), most Americans do not think that the rule of law is simply the rule of men. Next to the finding that an overwhelming majority of Americans believe partisanship affects judicial decision making, the most lopsided majority tapped by the Maxwell Poll came in response to a question about the value of judicial independence. When asked whether judges should be shielded from outside pressure and allowed to make decisions based on their own independent reading of the law, a remarkable 73 percent of those surveyed agreed.

The majority in favor of shielding judges from politics holds straight across party lines: three-fourths or more of Democrats and Republicans agree that the courts should be independent. The same is true of self-described liberals, moderates, and conservatives. And the results are also no different when responses are broken down according to frequency of church attendance. Americans who go to church several times a week support the ideal of judicial independence in the same large numbers as Americans who never attend church at all. Similar results hold for daily television news watchers and daily newspaper readers—two groups that are otherwise inclined to see judging in political terms. In fact, even among those respondents who *disagreed* with the statement "you can generally trust public officials to do the right thing," the idea that judges should be insulated from outside pressure received a high level of support.[8]

The widely shared desire to preserve judicial independence clearly reflects a popular aspiration—and it also reflects a broad-based recognition that, whatever else might be said about the politics of judging, a wide variety of citizens rely on the courts to resolve disputes. When asked why so many conflicts end up in the courts, only a small percentage of Americans blamed politicians for failing to deal with the controversies in the first place and an even smaller percentage blamed judges for actively reaching out to decide hot-button issues.[9] Instead, almost half of those surveyed say that courts are at the center of so many conflicts because the people themselves demand that the judiciary get involved.[10] Many Americans believe, in other words, that the courts respond to the demands of the citizenry as a whole. Given this belief, judicial independence makes good sense: it is by allowing judges to make decisions without pressure from specific groups or parties that the judiciary is able to preserve the trust and interests of its broad public.

In sum, the overall picture painted by the Maxwell Poll is decidedly mixed.

On one hand, large majorities of Americans see the influence of partisanship on the judicial process. On the other hand, large majorities of Americans believe that the courts are special venues in which political pressure and partisan squabbling have no place. The Hamiltonian faith in the importance of judicial independence and impartial decision making is alive and well, but so too is the suspicion that judges are advancing political goals under the cover of legal principle.

Essays in this Volume

What, then, is the significance of the public's conflicting views? In the fall of 2005, Syracuse University organized a conference in Washington, DC, to discuss the Maxwell Poll and the issues its results raised.[11] The conference was a collaborative effort involving the College of Law, the Maxwell School of Citizenship and Public Affairs, and the S.I. Newhouse School of Public Communications. Participants were drawn from the ranks of legal scholars, political scientists, judges, and journalists. The result was a wide-ranging discussion about the state of judicial independence and the larger context in which public perception of the courts has been formed.

The collection of essays in this volume grew directly out of the conference. Part I features two essays that examine historical background and trends. In the first essay, the legal scholar Charles Gardner Geyh charts the rise of efforts to ensure public confidence in the courts by regulating the appearance of judicial impropriety. Geyh argues that the preoccupation with judicial appearance began in the early twentieth century. With image-based, media-generated impressions central to the public understanding of government affairs and with successive waves of anti-court criticism emanating from both ends of the political spectrum, regulators became increasingly concerned with ensuring that judges project the right public persona. As consequence, the Canons of Judicial Ethics, enforced in all fifty states, now require judges to avoid the appearance of impropriety in all their activities.

As well-established as the regulation of judicial appearances is today, Geyh notes that it is also under serious assault. Many claim that it is better to allow judges to speak and to act however they please. Judges will benefit, the argument goes, because their rights of free speech and free association will be liberated from the restrictive shackles of current law. The public will benefit, too. When judges say what they really think and behave as they truly wish, then

the public will know exactly what kind of judges it is getting. If a specific litigant believes that a judge's past statements and acts will bias the judge's handling of a case, then the litigant can petition to have the judge disqualified. In this way, good judges will be rewarded and bad judges will be punished. Public confidence in the courts will be sustained precisely because judges will be given ample opportunity to express their political views and personal beliefs.

Although Geyh seriously doubts that any regulatory regime in which judges are encouraged to air their prejudices will actually work, he worries that such a regime is on the horizon. In the second essay of Part I, the political scientist G. Alan Tarr suggests that Geyh has good reason to be concerned, at least at the level of state courts. Tarr examines the "hyper-politization" of state judicial elections that has taken place in recent years as races for judicial seats have grown as costly and as contentious as campaigns for ordinary political office.[12] Canvassing judicial elections around the country, Tarr details the growing reliance on television advertising, the intense pressure for fund-raising, and the heightened involvement of single-issue interest groups and political parties. Tarr argues that the trend toward more aggressively political judicial elections is driven in part by the spread of two-party competition throughout the nation, and in part by the increasing involvement of state supreme courts in highly controversial issues like tort reform, abortion, and same-sex marriage. Opposing political groups recognize the importance of state court decision making and are all too willing to battle for control of the state bench.

At root, Tarr links the politicization of state judicial elections to shifts in public opinion. The argument for insulating judges from politics rests on the notion that judges ought to be made responsive to the law rather than to partisan pressure. "Implicit in this rule-of-law argument," Tarr writes, "are two key assumptions, namely, that the law provides a standard that can guide judicial decisions and that it is possible to assess judicial fidelity to law."[13] Unfortunately, the public increasingly doubts that judicial decisions flow from the law in a concrete, verifiable fashion. As public skepticism about the constraints of legal principle continues to grow, it makes more and more sense to select judges purely on the basis of political preference.

Taken together, the essays by Geyh and Tarr sound a note of alarm, warning that judicial independence and impartiality are under pressure and, perhaps, on the verge of collapse. The two essays identify powerful new political forces that threaten to change the judiciary in unprecedented and dangerous ways.

The next four essays in Part II, written by sitting judges, strike a different

tone. Even as they acknowledge that many people see the judiciary as being in a state of crisis, the judges are generally confident that the integrity and stature of the judiciary can be maintained by working with existing institutions. Of course, a cynic might give little weight to such views on the grounds that sitting judges are bound to be satisfied with the status quo rules that put the judges on the bench in the first place. But this cynical conclusion is surely too quick. Although people may have a natural tendency to favor the rules under which they have succeeded, that does not mean that the reasons any given individual offers in favor of an existing practice must therefore be dismissed out of hand. As Hamilton once noted, in public debate what ultimately matters is that arguments "be open to all and may be judged of by all" regardless of what motives may be alleged.[14]

In the first essay of Part II, Harold See, a member of the Alabama Supreme Court, provides a general taxonomy of judicial selection processes in the United States. In order to evaluate the merits of each selection process, See argues that one must consider the position that the courts are expected to occupy in American government. More specifically, See argues that we should seek a judiciary that is capable of holding its ground against the encroachments of other branches. Thus, we should value judicial selection processes that create courts with enough independence to fend off the executive and the legislature, with enough popular legitimacy to have genuine power, and with enough knowledge and character not to abuse the power bestowed by legitimacy.

See finds that the popular election of judges actually looks quite good when measured against the appropriate criteria of judicial strength. Examining some of the same events and trends that Geyh and Tarr find alarming, See argues that the condemnation of judicial elections has overlooked the connections between elections and a vigorous judiciary. It is true, as critics charge, that judicial election campaigns can become expensive and contentious when competing interests have a stake in the race. But See contends that the involvement of competing interests will inject financial resources and heated disagreement into any judicial selection process. The real question, then, is not whether money and mudslinging can be expunged from judicial selection, but whether the courts are ultimately made stronger with these factors exposed by the publicity of an election or concealed by the behind-the-scenes maneuvers of an appointment. See maintains that the long-run vitality and power of the courts are well served when the public knows what is going on.

In the next essay, James E. Graves, Jr., a member of the Mississippi

Supreme Court, reflects on his experiences being appointed to the bench and running for judicial office. Graves, like See, argues that regardless of whether judges are selected by election or appointment the process will be fraught with politics. Although Graves prefers elections (in his view elections, unlike appointments, tend to avoid the problem of allowing a small minority to select judges), his recognition that politics is pervasive leads Graves to worry less about the nature of any given judicial selection process than about whether judicial candidates have made conscious choices to set aside personal views in the interests of justice. The key to judicial independence and impartiality is not how judges get onto the bench, but whether they choose the common good over individual preference once in office.

Graves argues that legal history is filled with examples of judges making the right choice, as the nine members of the Supreme Court did when they decided *Brown v. Board of Education* on the basis of "what was good for those plaintiffs, what was good for those schools, and, ultimately, what was good for our democracy."[15] Judges today can make the same choice as the justices who decided *Brown*. In fact, judges today have the additional benefit of being able to use the media to educate the public about the judiciary's appropriate role, thereby making it easier to make the right choice. Some judges may resist talking to reporters out of fear of being misrepresented in the press. But judges and reporters should be able to work together because "[t]he fact is both the media and the courts need each other."[16] The media can improve their coverage of the courts by developing relationships with judges; in turn, judges can improve the public's understanding of what courts actually do by using the media to disseminate accurate information.

In his essay, John M. Walker, Jr., Chief Judge of the United States Court of Appeals for the Second Circuit, examines the federal judicial selection process. Like Graves, Walker argues not only that judges must subordinate their judgment to impersonal legal principles and processes, but that properly constrained judicial behavior must be effectively communicated to the public. Thus, Walker, like Graves, contends that other actors must be enlisted to help judges broadcast undistorted information about how courts actually function. We need a "new partnership between a press that works hard to understand the difference between a judge's political views and the legal tools that he or she employs to decide a case, and politicians who not only recognize this difference but refrain from capitalizing on the public perception that judging is just politics by another name."[17]

Walker does not, however, believe that the good offices of sympathetic politicians and a hard-working press corps are completely sufficient to the task. Examining the confirmation hearings of Supreme Court nominees John Roberts and Samuel Alito, Walker argues that the unmediated voices of the nominees themselves play a major role in communicating the proper understanding of the judicial process. Federal court nominees have a chance to speak directly to the public and the chance should not be squandered. "One might reasonably expect," Walker writes, "that a few clear sentences from a nominee carry more weight than ten minutes of senatorial oration."[18]

In the final essay of Part II, Joanne F. Alper, a judge on the Virginia Circuit Court, surveys some of the same concerns that trouble Graves and Walker. She finds the judiciary is often "caught in the middle of a highly politicized and emotional atmosphere" advanced by a sensationalist media and self-interested politicians. Moreover, Alper claims that the politicized atmosphere persists because the citizenry remains "uninformed about the role of the judge as impartial arbiter with the responsibility of enforcing the laws."[19] For Alper, as for Graves and Walker, the basic problem is one of helping the public to recognize the true value of keeping the courts independent of politics.

Alper draws her solution from the existing process of judicial selection in her state of Virginia. Unlike almost any other state in the country, Virginia allows the state legislature to directly select state judges. The legislature is obviously a political institution and Alper identifies instances in which "raw partisan politics" have determined who will sit on the bench.[20] But, based on her own experience, Alper argues that it is highly unusual for results-oriented politicking to play a role in Virginia's judicial selections. When she went through the process, legislators did not ask about her political views or about how she would handle particular issues. Instead, the legislators were most concerned about her intellect, patience, and sense of fairness. For her own part, Alper was freed from the burdens of public campaign and did not have to worry about "fund-raising and the specter of bias that attends to any judge who must rely on the bar and other interest groups to raise money, only to have those same individuals and groups appear before him or her."[21] According to Alper, then, the crucial lesson of the Virginia process is not that the election of judges per se is to be avoided. After all, elections help confer legitimacy on judges and work to ensure that those on the bench are in touch with their communities. The lesson of the Virginia system is that public campaigns in the context of popular elections are to be avoided. Legislative elections give the people an

indirect voice in the process, permit judicial candidates to state their positions, and allow for public debate of candidates' qualifications—all the while maintaining a level of dignity and professionalism that is impossible to reach in the hurly-burly of elections open to the people.

How can one adjudicate between the pessimistic analyses of the essays in Part I and the general optimism of the essays in Part II? One approach is to examine the role of the media more carefully. The essays in Part II all suggest the problems plaguing the judiciary can be alleviated by effective communication: if the public is given a more accurate picture of judicial behavior, then citizens will learn that courts are not to be pressured to achieve particular results, but rather are to be valued for their independence and impartiality. See and Alper argue that right method of judicial selection will itself broadcast the right message to the public (though See and Alper do not agree on what the right method of judicial selection is). But the concern in effective communication does not stop there. Because the public understanding of the judicial selection process is inevitably shaped by the media, one must also be concerned with the content of media coverage (in this vein, recall that the Maxwell Poll shows that large majorities of Americans blame the media for distorting the operation of the courts by overemphasizing the partisan background of judges). Thus, it is with an eye toward the media's influence that Graves and Walker call for a collaborative relationship between reporters and judges.

The essays in Part I arguably cast doubt on both the prospects for and the benefits of a collaboration between the courts and the media. Geyh and Tarr link the assault on judicial independence to larger political forces—forces that shape the context in which the media operates. From this perspective, it seems unrealistic to expect media reform to take place; even if such reform did occur, it seems unlikely to alter the basic dynamics at work.

Is the media is really doing a bad job covering the courts, as most Americans and many commentators seem to believe? If so, then how might media coverage be improved? And what sort of difference should we expect improved coverage to make? The essays in Part III, written by working journalists, offer a range of answers to these questions.

In the first essay, Mark Obbie, a seasoned legal reporter and current professor of journalism, systematically considers the kind of coverage the media gives the courts. In particular, Obbie undertakes an empirical study of news articles about Samuel Alito's Supreme Court nomination that appeared in the *New York Times* and the *Washington Post*. Obbie's goal is to determine

whether the newspapers engaged in "results-oriented legal journalism," defined as "reporting on the outcome of a court case without acknowledging the legal authority that the court cited in reaching that outcome." To the extent that it exists, results-oriented legal journalism is a problem, Obbie argues, not because all judges scrupulously rule on the basis of legal principle but because the failure to mention the law at all "strips legal news of much of its meaning and likely leads citizens to the belief, fair or not, that their courts dictate policy."[22] Whether a given judge is in fact an exemplar of impartiality or a partisan hack, results-oriented legal journalism does not give readers the information necessary to make a genuinely informed evaluation. Instead, readers are simply left with the impression that judges reach whatever legal result they want.

Obbie finds that results-oriented journalism prevailed in roughly half of the *New York Times* and the *Washington Post* stories on the Alito nomination. Given the resources and importance of the two newspapers, as well as the salience of the nomination itself, the frequent failure to supply a complete record of the relevant facts and context is troubling. Even so, Obbie remains hopeful that legal reporting can be improved. He concludes with a list of recommendations, ranging from a call to hire more reporters with legal expertise to an admonition to avoid the "sad and false assumption that there is no appetite for the news about the law beyond tabloid-style 'trials of the century'."[23]

In her essay, Dahlia Lithwick, senior editor and legal correspondent for Slate.com, assesses the quality of legal reporting on the Internet. Unlike the world of newspapers examined by Obbie, Internet coverage of the courts is not dominated by a few hierarchically organized players. Primary legal resources are readily available on a number of websites, many of them run by courts themselves. Commentators feed on these easily accessible resources and then disseminate their legal analyses on hundreds of online news sites and legal blogs. The loose structure, freedom, and speed of the Internet not only make it different from print journalism but also make it different from the courts. As Lithwick writes, the "Internet looks forward, courts face backward. The Internet celebrates "edginess" and opinion, the courts reify wisdom. The Internet is informal, open and democratic, the courts operate under the most rigid of rules and hierarchical constraints."[24]

The great promise of the Internet is that it will inject its best qualities into popular discourse, significantly democratizing legal discussion and stripping away the unnecessary mystification that obscures what judges do. And

Lithwick argues that this promise is already being realized: the extraordinary online availability of case law, statutes, law review articles, and expert commentary have made it possible "to peel the oak paneling off the courthouses and show the public that this isn't just politics in black robes."

At the same time, however, the Internet also threatens to debase popular discourse, allowing "citizens to believe themselves well-informed and well-educated, even while they read hundreds, even thousands, of sources that merely reflect back their own, ferociously held views." Rather than being presented with a straightforward opportunity to learn more, the Internet-reading public finds itself awash in unmediated information, left to sort out accurate accounts from "hysterical conclusions about activist judges who fabricate the law from spun sugar and rampant ideology."[25]

What will be the ultimate impact of the Internet on public understanding of the courts? Like Obbie, Lithwick is hopeful that the story will have a happy ending. Although there is no editorial staff in place to police the Web, the public itself can alter the mix of information on the Internet by consistently choosing balance and accuracy over bias and partisan exaggeration.

The final essay in Part III, written by the veteran reporter and journalism professor Tom Goldstein, is somewhat more skeptical about the prospects for brokering a positive relationship between the courts and the news media. There are, Goldstein agrees, steps that reporters and judges can take to improve the level of mutual understanding. But Goldstein's broader point is that the estrangement between the media and the courts is sustained by many factors and, as a consequence, may never be fully overcome.

Drawing on his own experience covering the courts, Goldstein describes how we have come to live in a "culture of disclosure" that has been generally promoted by journalists and largely resisted by judges. This is not to say that judges are altogether opposed to media coverage; on the contrary, many judges are willing to work with reporters so long as the judges can be assured they will be given media coverage that is appropriately focused. Goldstein argues that this desire to dictate the terms of media coverage is rooted in a misunderstanding of how the news works. "News involves novelty, conflict, and finding out what others wish to keep secret," Goldstein writes. Journalists "feel that their goal is to keep those in power accountable, and this alone can make those in power feel uncomfortable."[26] Better news coverage means more exposure. It does not mean that journalists will faithfully transmit the image and self-understanding that a judge wishes to present.

In the end, the contributors to this volume seem to agree that the American courts are at a crossroads. On one side, there is an understanding of judges as independent and impartial guardians of the Constitution. This understanding is supported by well-established convention as well as by current public opinion. On the other side, there is a conflicting understanding of judges as partisan actors committed to political goals. This second understanding is articulated by politicians, expressed in news coverage, and endorsed by a large majority of Americans.

In the Afterword, the former *New York Times* columnist Anthony Lewis argues that the courts cannot remain at this crossroads; inevitably, one understanding of judicial power must be chosen over the other. Lewis identifies several powerful factors pushing the country toward a political view of the courts. Court dockets are crammed with "agitated issues that touch the emotions of Americans." On such issues it is easy for people "to care only about the results judges reach rather than the quality of their reasoning."[27] Moreover, the chorus calling for preferred judicial outcomes has many elected officials in its ranks. Members of Congress will endlessly debate whether a given nominee to the federal bench will decide a case in a particular direction, but they will rarely consider whether the nominee has the temperament to sort through conflicting arguments in a dispassionate, fair-minded way.

Yet even as Lewis recognizes that most Americans seize on specific legal results, he also notes that most Americans still believe in judicial independence. Lewis hopes that this belief in judicial independence will ultimately determine the direction in which the country moves. He suggests that the courts have become mired in politics because the public is unaware of the degree to which the federal courts have become infected with politics, not because the public has embraced a model of political judging. Like several of the other contributors to this volume, Lewis argues that the basic problem is one of public ignorance, not public opinion. "If Americans come to know what is at stake," Lewis concludes, "I cannot believe they will choose a system like that in China, where political officials tell judges how to decide cases. I cannot believe that we are willing to give up the independent courts that guarantee our rights."[28]

In which direction will the courts move? What role will the judges, politicians, the media, methods of judicial selection, public opinion, and larger political forces play? In the end, will an understanding of the courts as impartial guarantors of individual rights triumph over the contrary understanding of the courts as partisan actors?

In closing, I would suggest that it is not only important to reflect on the range of answers to these questions given by the essays collected here but also worth considering a response that is not found in the following chapters. As Judith Shklar once argued, contradictory perceptions of the judiciary may never be resolved into a single internally consistent understanding because we expect our courts to perform contradictory functions: we constantly ask them to be guided by general principles and to be responsive to political needs.[29] Shklar's old insight is supported by the Maxwell Poll findings and reinforced by research on popular legal consciousness performed by Patricia Ewick and Susan Silbey.[30] Drawing on a series of in-depth interviews with 430 individuals, Ewick and Silbey argue that ordinary Americans typically define, use, and understand law in conflicting ways: on one hand, law "is imagined and treated as an objective realm of disinterested action . . . operating by known and fixed rules," and, on the other hand, law "is depicted as a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals."[31] The same people hold these contradictory conceptions at the same time. Law is popularly understood to be "both sacred and profane, God and gimmick, interested and disinterested" all at once.[32]

As a number of the authors in this volume suggest, we may be in the middle of an important struggle between competing ways of thinking about the courts, a struggle that existing institutions may or may not be able to contain. Alternatively, as the work of Shklar, Ewick, and Sibley suggest, we may be living in a period when the contradictions bound up together in one enduring perspective on the judiciary are simply becoming more plain. We should attend to all these possibilities as the debate over the status and future of judicial independence continues to unfold.

Notes

1. THE FEDERALIST NO. 78, at 466, 69 (Hamilton) (Clinton Rossiter, ed., 1961). On the Federalists generally, *see* Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787 (1972).

2. "Essays of Brutus" in THE ANTI-FEDERALIST 183 (Herbert Storing, ed., University of Chicago Press, 1985). On the Anti-federalists generally, see CECELIA KENYON, INTRODUCTION, THE ANTI-FEDERALISTS (Cecelia Kenyon, ed., Bobbs-Merrill, 1966); and HERBERT J. STORING (with the editorial assistance of Murray Dry), WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (University of Chicago Press, 1981).

3. Campbell Public Affairs Institute, Maxwell Poll on Civic Engagement and Inequality, at 5 (Oct. 2005) (margin of error ± 5 percent), *available at* http://www.maxwell.syr.edu/campbell/Poll/CitizenshipPoll.htm. Last visited August 14, 2006.

4. Here are the percentages of each group that agree the partisan background of judges influences court decisions either some or a lot: Liberals (88 percent), Conservatives (83 percent), Frequent Church Goers (84 percent), and Church Abstainers (88 percent).

5. Partisanship also plays a role: 44 percent of Democrats—as compared to 33 percent of Republicans—believe that the partisan background of judges influences court decisions a lot; and 52 percent of Democrats—as compared to 33 percent of Republicans—say that the number of judicial elections should be increased. Yet Democrats (60 percent) and Republicans (59 percent) alike agree that judges base their decisions on personal belief rather than on the law and the Constitution. Because attention to media has consistent effects across all three questions measuring the political nature of the judicial process (see notes 6 and 7), it is reasonable to emphasize media consumption over partisanship in the text.

6. TV News: Percent of those watching local-national television news daily who believe the partisan background of judges influences court decisions a lot: 42. Percent of those that never watch local-national television who believe the partisan background of judges influences court decisions a lot: 14. Newspapers: Percent of daily newspaper readers who believe the partisan background of judges influences court decisions a lot: 41. Percent of non-newspaper readers who believe the partisan background of judges influences court decisions a lot: 34.

7. TV News: Percent of those watching local-national television news daily who believe more judges should be subject to popular election: 46. Percent of those that never watch local-national television news who believe more judges should be subject to popular election: 25. Percent of those watching local-national television news daily who believe judicial decisions are based on the judge's own personal beliefs in spite of what the judge actually says: 62. Percent of those that never watch local-national television news who believe judicial decisions are based on the judge's own personal beliefs in spite of what the judge actually says: 54. Newspapers: Percent of those daily newspaper readers who believe more judges should be subject to popular election: 42. Percent of non-newspaper readers who believe more judges should be subject to popular election: 34. Percent of daily newspaper readers who believe judicial decisions are based on the judge's own personal beliefs in spite of what the judge actually says: 57. Percent of non-newspaper readers who believe judicial decisions are based on the judge's own personal beliefs in spite of what the judge actually says: 46.

8. Liberals (77 percent), Moderates (82 percent), Conservatives (77 percent), Frequent Church Goers (78 percent), Non-church Goers (83 percent), Daily TV News Watchers (77 percent), Daily Newspaper Readers (80 percent), and "Distrusting" Respondents (73 percent).

9. People demand judicial involvement (47 percent), Elected officials fail to deal with the controversies themselves (21 percent), Activist judges (11 percent). The

political ideology of respondents does play a role here. Conservatives (19 percent) are more likely than Liberals (8 percent) to say that many conflicts end up in court because judges actively involve themselves in controversies. Given the amount of conservative rhetoric about the errant ways of "activist judges," it is not surprising to find a difference of opinion between Conservatives and Liberals on this question. Even so, it is worth noting that the most common response of both Conservatives (46 percent) and Liberals (52 percent) was to say that many conflicts end up in court because most people want to get the courts involved. Thus, in spite of the steady conservative criticism targeting judicial activism, a large plurality of conservatives nonetheless believe that crowded, controversial court dockets are the result of popular demand.

10. As these results suggest, public perceptions are by no means a prisoner of media coverage. A majority may believe that the media overemphasizes the political determinants of judicial decisionmaking, but the public can see beyond media representations. In fact, 57 percent of those surveyed think that the media coverage of the courts does not do a good job of explaining why judges make the decisions they do. The Maxwell Poll also illustrates the point that individual views are not wholly dictated by the media in another way: it seems that the more one keeps up with the courts, the more likely one is to believe that judges are influenced by politics *and* that judges should be treated as impartial arbiters. According to the poll, 93 percent of those who said they "follow news about court decisions a lot" believe that the partisan background of judges influences court decisions either some or a lot, while only 74 percent of those who said they do not follow court news believed that judges were driven by partisan influence. At the same time, 79 percent of those who follow news about court decisions a lot thought that judges should be shielded from outside pressure and allowed to make their decisions based on an independent reading of the law, while only 70 percent of those who do not follow court news shared the same view. It would appear those individuals who attend to the available court-related information, from all sources including the media, end up endorsing the media's message along with the opposite of that message.

11. "Bench Press: The Collision of Media, Politics, Public Pressure, and an Independent Judiciary," Washington, D.C. (Oct. 17, 2005).

12. Tarr, *Politicizing the Process: The New Politics of State Judicial Elections*, in this volume at 53.

13. *Id.*, 66.

14. THE FEDERALIST NO. 1, at 36 (Hamilton).

15. Brown v. Board of Education, 347 U.S. 483 (1954). James E. Graves, Jr., *Judicial Independence: The Courts and the Media* in this volume at 116.

16. Graves, *supra note* 16 at 118.

17. John M. Walker, Jr., *Politics and the Confirmation Process: Thoughts on the Roberts and Alito Hearings*, in this volume at 125.

18. *Id.* at 127.

19. Joanne F. Alper, *Selecting the Judiciary: Who Should Be the Judge?*, in this volume at 132.

20. *Id.* at 150, footnote 57.

21. *Id.* at 143.

22. Mark Obbie, *Winners and Losers*, in this volume at 159, 160.

23. *Id.* at 172.

24. Dahlia Lithwick, *The Internet and the Judiciary: We Are All Experts Now*, in this volume at 177.

25. *Id.* at 178, 181, 183.

26. Tom Goldstein, *The Distance between Judges and Journalists*, in this volume at 183, 191.

27. Anthony Lewis, *The State of Judicial Independence*, in this volume at 199.

28. Id. at 200–201.

29. JUDITH N. SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS (1964).

30. PATRICIA EWICK & SUSAN SILBEY, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998).

31. *Id.* at 28.

32. *Id.* at 223.