Rethinking Judicial Independence

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Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 **Vand. L. Rev.** (forthcoming 2018), available at SSRN.

It is an extraordinary time when the following sentence—"it is hard to underestimate the importance of [X]"—has a plethora of topics all credibly vying for the position of "X." Appreciating the competition, one would be hard-pressed not to include the independence of the judiciary as a prime candidate. When the eventual President calls into question the impartiality of a judge based on the judge's "heritage" or when a court's ruling on the administration's travel ban might not be heeded, at least two conclusions can be drawn. First, the independence of the judiciary is presently being tested. Second, the independence of the judiciary may well be needed more than ever. Against such a backdrop, it is vital for current scholarship to provide a way to think through and assess that independence.

Enter Tara Leigh Grove's thoughtful new article, *The Origins (and Fragility) of Judicial Independence*.

Drawing in part from her own (excellent) past work, Grove undertakes a significant examination of the independence of the federal judiciary. She traces the historical arcs of several key contestations between the judicial branch and one of its sibling branches, including the failure to comply with a court order, the potential removal of a judicial officer outside the impeachment process, and court packing. Though these contestations have received scholarly attention before, Grove brings them together in a new way. In so doing, she provides a persuasive account of how these various attempts to curb the courts were not only not verboten, but were embraced in the early days of the judiciary—and how political actors ultimately reversed their course.

To focus on one key interbranch standoff, Grove provides an important analysis of the history of court packing. Contrary to its current "off-the-wall" status (to use a Jack Balkinism), Grove points out that in the nineteenth century, Congress several times packed and unpacked the Supreme Court, at least in part for partisan gain. The article then examines FDR's infamous 1937 proposal to increase the size of the Court and the debates surrounding that plan. (Here, Grove keeps good company. Others, such as my colleagues Curt Bradley and Neil Siegel, have also done important work identifying the constitutional conventions surrounding court packing.) For Grove, the point is that although there was some pushback against the President's plan when first proposed, it was not until the late 1950s that court packing came to be viewed as a "negative precedent," based on the way political actors publicly spoke about the ill-fated attempt. That treatment continues even to this day. Grove points to comments made in the context of now-Justice Gorsuch's nomination to the Supreme Court to show that the convention against court packing is alive and well.

Grove ultimately draws together this and other episodes to make a larger statement about the independence of the judiciary. To use the author's words, what we may today take for granted—specifically, the existence of certain norms or conventions against various court-curbing measures—we may need to reconsider. The text and structure of our Constitution do not put them in place. And Grove's careful rendering of the past informs us that none of the attempts to encroach upon the judiciary's power had to be resolved as each was. Those of us playing at home should keep in mind the contingent nature of the courts' trajectory, and that what has been done can be undone in the

future.This article makes a substantial contribution to the existing literature on judicial independence and simultaneously prompts several important questions. For one, might there be other ways of gauging judicial independence beyond the clearly significant ones Grove investigates? For example, in the early 2000s Congress contemplated requiring courts of appeals to publish all of their opinions, contrary to the courts' own decision(s) to dispose a majority of cases via "unpublished" orders. This led to a confrontation between Congress and the judiciary and a question about the extent to which the courts' own power to decide the form of its decisions could be curbed. I mention this point not to begin a game of everyone-pull-out-their-favorite-interbranch-contestation (that should be reserved strictly for social gatherings), but to question how we know we are looking at the "right" moments between the judiciary and its sibling branches and whether it might be worth including others in the canon.

Another question looks beyond the federal courts to their state counterparts. To again focus on court packing, it is remarkable how this court-curbing measure is "off the wall" with respect to the former, but is apparently on-the-wall with respect to the latter. A new report by Alicia Bannon and Nathaniel Sobel at the Brennan Center documents an increased politicization of state courts through various legislative measures, including recent attempts to increase or decrease the size of state appellate courts across the country. We might wonder more broadly to what extent conventions within the federal judiciary translate to the states. If the answer is "not much," we should ask why this is so, and what this means for the independence of our state courts.

These questions further underscore the importance of what Grove has hit upon. *The Origins (and Fragility) of Judicial Independence* provides a careful and persuasive account of a vital topic, making a substantial contribution to an already robust literature. Such a contribution is critical now. One can only hope that her conclusion about the judiciary's fragile independence is not tested any time soon.

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