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The Path to (And From?) Judicial Independence (reviewing Charles Gardner Geyh, When Courts and Congress Collide: The Struggle For Control of America's Judicial System (2006))

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THE PATH TO (AND FROM?) JUDICIAL INDEPENDENCE

Review of *When Courts and Congress Collide: The Struggle for Control of America's Judicial System*, by Charles Gardner Geyh

*Robert C. Power**

INTRODUCTION

Despite a title that evokes the Fox Television perennial “When Animals Attack,” *When Courts & Congress Collide: The Struggle for Control of America's Judicial System*¹ is scholarly, engaging, and timely. The book brings clarity and life to a subject that can be both opaque and dry—the complex relationship between Congress and the federal courts—and, in doing so, expands our understanding of each. Charles Gardner Geyh, Professor of Law and Charles L. Whistler Faculty Fellow at Indiana University at Bloomington, focuses on how the non-textual, but vitally important, constitutional value of judicial independence has survived despite Congress's power to control the judiciary, a phenomenon familiar to any law student having taken Federal Courts.² Though judicial independence has survived thus far, several threats, including partisan politics, judicial hubris, and current trends in legal philosophy, loom.

These ideas provide the bookends for Geyh's thesis: Congress and the courts have developed a “dynamic equilibrium,” which has resulted in judicial independence beyond anything constitutionally mandated.³ The equilibrium stems from *customary* judicial independence, which has usually prevented Congress from using its powers over the courts in ways that interfere with their decisional independence:

[T]he considerable independence federal judges enjoy is attributable less to constitutional structure than to the emergence and entrenchment of insti-

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¹ CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* xii, 332 (2006).

² As suggested at the end of this essay, the book is a valuable addition to the field's literature and might make a good counterweight to the usual case-law-heavy teaching materials in Federal Courts. See *infra* Part IV.

³ See generally GEYH, *supra* note 1.

*tutional norms that shield the federal judiciary from congressional encroachments that could diminish the capacity of judges to follow the "rule of law" without fear or favor. As elaborated in the chapters that follow, the customary independence that these norms foster is in constructive tension with a countervailing impulse to render the judiciary acquiescent to congressional will and has given rise to a state of dynamic equilibrium in the relationship between the legislative and judicial branches of government.*⁴

Customary independence has ramped up the stakes in the judicial confirmation process, because the process represents Congress's primary judicial oversight tool. *When Courts & Congress Collide*, therefore, examines the judicial appointment process and rebuts those critics who claim that the process is a highly partisan attack on judicial independence.⁵ Geyh argues that the partisan nature of both nominations and the confirmation process is not new, is probably inevitable in the two-party system that developed early in our history and, in the end, is to some degree a friend of judicial independence. In fact, the confirmation process itself does not infringe on the judiciary's independence because Congress is not taking action against sitting judges or in specific cases—something the Constitution prohibits—but is rather acting in its constitutionally mandated role of gatekeeper.

Professor Geyh builds his case by exploring different aspects of the Congress-court relationship. He argues that the response of all three branches of government to certain national events has shaped today's judicial independence and will continue to do so. As a result, judicial independence is minimally volatile most of the time, because such cataclysmic national events do not occur regularly, and maximally volatile some of the time. The "dynamic" of Professor Geyh's dynamic equilibrium reflects the volatile aspect of the relationship and "equilibrium" the lack thereof. Though it is arguable that any fluid relationship between two government branches could warrant the term equilibrium, equilibrium is a reasonably close description of the relationship between Congress and the courts and certainly suffices in a legal world guilty of

⁴ GEYH, *supra* note 1, at 1. The Introduction discusses judicial independence from several different perspectives. *Id.* at 10-18.

⁵ See, e.g., Dawn E. Johnsen, *Should Ideology Matter in Selecting Federal Judges?: Ground Rules for the Debate*, 26 CARDOZO L. REV. 463, 463 (2005); William P. Marshall, *Constitutional Law as Political Spoils*, 26 CARDOZO L. REV. 525, 536 (2005); Judith Resnick, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 587 (2005).

oversimplifying the constitutional separation of powers to “rock, paper, scissors.”⁶

Two aspects of the book’s presentation of dynamic equilibrium deserve special mention. First is its use of history. More than most works on the subject, *When Courts & Congress Collide* relies heavily on primary historical materials to illuminate specific controversies. Geyh presents historical data in a manner that gives the flavor of historical context without obscuring or overwhelming the data’s contemporary significance with antiquarianism.⁷ Second is the book’s unusually clear and easy-to-read prose, which is aided by fits of humor and even appropriate informal terminology.⁸ While its ideas make *When Courts & Congress Collide* important, the book is laudably accessible to anyone (including non-lawyers) interested in American government.

This essay surveys the book, pausing to examine the combination of historical, constitutional, and policy analysis, to which Geyh attributes the development of customary judicial independence.⁹ The essay then analyzes the dynamic equilibrium theory, focusing specifically on what it reveals and shrouds about the Congress-court relationship. The essay then concludes with some reflections on the present state of the Congress-court relationship and contemporary politics in general.

I. THE BOOK’S STRUCTURE

When Courts & Congress Collide is organized into six chapters, which largely present the topic chronologically. Chapter One addresses the drafting of the Constitution and the Judiciary Act of 1789, focusing on the framers’ intentions and expectations in delegating to Congress

⁶ Sometimes Congress bests the courts, sometimes the opposite, with a range of partial victories and defeats in the middle. Mixing in additional constitutional players, such as state governments and the executive branch, means that disputes can result in a range of different outcomes depending on the procedural posture of the case and the lineup of the players on the issues.

⁷ See, e.g., GEYH, *supra* note 1, at 38-43 (discussing the ratification debates and Founders’ expectations). Here Professor Geyh acknowledges the contributions of Emily Field Van Tassell, his spouse and an excellent legal historian. *Id.* at ix-x.

⁸ Among the more colorful descriptions in this regard are the metaphorical use of Elmer Fudd’s attempts to hunt down Bugs Bunny, *id.* at 164-65, and the description of a potential fight between Congress and the courts over sentencing reform as an “acrimonious round of finger-pointing and belly-bumping.” *Id.* at 271. There are many equally clear and funny references.

⁹ GEYH, *supra* note 1, ch.2.

the power to establish lower federal courts.¹⁰ The Constitution drafting narrative introduces a central question: does the authority to create lower federal courts empower Congress to punish the judiciary for decisions it disagrees with by manipulating jurisdictions? Two points elucidate the issue. First, Professor Geyh asserts that ability to create lower courts was construed at the time as a federalism provision, not a legislative check on the courts.¹¹ Second, the framers and the first congress apparently intended or at least assumed that the power to establish lower courts was discretionary only as to means, not as to whether some courts would be authorized to hear cases within federal jurisdiction.¹² With this understanding of Congress's potentially balance-tipping power, the occasional battles over depriving the courts of jurisdiction can be seen as an object lesson in the law of unintended consequences.

Chapter Two picks up where Chapter One ends, tracing both the broader aspects of congressional oversight of the courts and the development of customary judicial independence. Historical analysis is as central to Chapter Two as to Chapter One, as the book describes and categorizes congressional-judicial relations over the course of American history.¹³ Chapters Three, Four, and Five branch off from Chapter Two, presenting three major aspects of the book's themes in historical order. Chapter Three focuses on judicial impeachment, tracing the history of impeachments from the early 1800s, when the Jeffersonian Republicans attempted to use impeachment to remake the federal courts, to the present.¹⁴ Professor Geyh explains how that effort failed and how subsequent attempts to use impeachment politically lost trac-

¹⁰ See GEYH, *supra* note 1, at 26-43.

¹¹ See *id.* at 31-33. By reframing the decision to define the structure of the lower federal courts as a congressional decision, the Convention avoided a problem that divided the delegations, and it did so in a fashion that left it possible for Congress to use state courts whenever it was feasible to do so. Professor Geyh sees no evidence that the power was seen as a means to undermine judicial independence or otherwise to constitute a check on the courts. See *id.*

¹² See *id.* at 44-46. This was not a unanimous opinion, then or now, but Professor Geyh convincingly argues that the discretion inherent in the judicial power was to method and not to exercise. He cites Michael Collins's analysis on this point. See *id.* at 45; see also Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39, 43.

¹³ Occasionally the historical analysis verges into over-inclusiveness. For example, the discussion of the Evarts Act, 26 Stat. 826, which created the circuit courts of appeals, see GEYH, *supra* note 1, at 92-102, supports the book's thesis and is valuable in its own right, but might have worked better as a brief summary in Chapter Two and in greater depth in Chapter Five.

¹⁴ See generally GEYH, *supra* note 1, ch.3.

tion over time.¹⁵ Chapter Four turns to what Professor Geyh convincingly argues is the primary contemporary battleground of congressional supervision of judicial decision-making, the Senate confirmation process.¹⁶ Chapter Five focuses on the creation of administrative mechanisms within the judiciary that have effectively, if not officially, served to supplant some of Congress's controls over the courts.¹⁷ Here the book contributes a concise history of those administrative institutions, a topic too often neglected in legal and social science studies of the federal courts. Chapter Six then examines the dynamic equilibrium concept in detail, defending it as an accurate description of the relationship in several senses before concluding with some misgivings about its survival.¹⁸

Throughout, the book tacitly queries whether the dynamic equilibrium will survive. Chapter Two raises the question through its detailed portrait of congressional-judicial conflicts. Based in part on an article that Professor Geyh authored with Professor Van Tassell,¹⁹ Chapter Two argues that the relationship between Congress and the courts has usually been marked by civility, notwithstanding the contrary perception in law school casebooks and news stories. Professor Geyh identifies five periods of spiking conflict between the branches,²⁰ but then asks the reader to focus on events *between* those periods. The conflict spikes include: 1) the efforts by the newly elected Congress in 1801 to threaten the tenure of federalist judges; 2) the battles between the Jackson administration and the Marshall Court; 3) the "slow burn" tension between the courts and the Republican Congress immediately before the Civil War and during the Reconstruction;²¹ 4) the many confrontations over several decades about social and economic legislation that ended in the mid-

¹⁵ This chapter is noteworthy for its clear use of data concerning impeachment moves in different eras. See GEYH, *supra* note 1, at 118-24. This underscores that statistics can reveal historical trends even without regression analysis or other theoretical structures inaccessible to many attorneys or other lay readers.

¹⁶ See generally *id.*, ch.4.

¹⁷ See generally *id.*, ch.5.

¹⁸ See generally *id.*, ch.6.

¹⁹ Compare Charles G. Geyh & Emily F. Van Tassell, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998) with GEYH, *supra* note 1, ch.2.

²⁰ GEYH, *supra* note 1, at 51-52.

²¹ The analysis of the Civil War conflict spike underscores several points about the book. Perhaps most important is Professor Geyh's reexamination of the relationship from the viewpoint of Congress, which seems particularly helpful in this section, because legal histories have not examined this period as well as they have other periods. Geyh also provides the following quotable description of *Ex parte McCordle*, 74 U.S. (7 Wall) 506 (1868): "alone like the proverbial cheese, increasingly aged and malodorous." GEYH, *supra* note 1, at 110.

1930s; and 5) the hostility toward the civil rights and criminal procedure decisions of the Warren Court in the mid-twentieth century.²²

Chapter Two makes several striking points that underscore Geyh's thesis. First, our legal culture is focused on court decisions and (to a lesser extent) legislation, rather than on other governmental actions of legal significance. Many congressional actions, even some that may have no formal legal effect, including judicial appointments, the collateral effects of jurisdictional provisions on workload, budgets, staffing of support functions such as U.S. Marshals and clerks, and judicial management and training, have deep significance to lawyers and courts, though legal education largely ignores them. Second, even within the limited focus of "law," the profession too often overlooks significant federal courts developments outside of the headline conflicts between Congress and the Supreme Court. Thus, the traditional Constitutional Law course begins with *Marbury*²³ and *McCordle*,²⁴ and, until recently, ended with celebrations of the judicial acquiescence in legislative-economic policymaking and the contrasting judicial activism in civil rights.²⁵ While these landmarks of congressional/judicial conflict remain important, the long-term relationship based on cooperation and inter-branch respect that existed between the conflicts for far longer periods of time is arguably equally important.

Chapter Two carefully lays the groundwork for what follows—the chapters on the decline of impeachment as a congressional oversight vehicle, the increased attention to the appointments process, and the growth of the judiciary's own governmental machinery. *When Courts & Congress Collide* successfully does this by presenting the history of congressional-judicial relations in the context of the cycles of spikes and valleys.²⁶ For example, the efforts to impeach judges based on ideology,

²² See also *infra* text accompanying notes 51-55 (concerning doubts that the spike analysis works with respect to the last two cycles).

²³ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

²⁴ *Ex parte McCordle*, 74 U.S. (7 Wall) 506 (1868).

²⁵ *E.g.*, *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483 (1954). Some more recent cases have cut back implications of some of these decisions, such as through federalism limits on congressional power and conflicts over the extent of the right of privacy, thereby changing the ending of some Constitutional Law courses. Still, the underlying cases remain central to study today.

²⁶ *When Courts & Congress Collide* explains that the term cycles should not be taken too literally: "I do not mean to imply that each has washed inexorably on the shore like a wave identical to its predecessors." GEYH, *supra* note 1, at 80. One reason the metaphor works is that

party affiliation, or specific decisions made during the earlier spikes increasingly had little more than rhetorical value for congressional opponents of the judges or decisions in question. Similarly, congressional respect for judicial independence became more secure over time, especially during the valleys, and the growth of the independence norms probably served to dampen congressional fires during conflict spikes. These complementary trends were well-served by the establishment in baby steps of the judiciary as a unified separate branch, illustrated by the creation of bodies such as the Administrative Office of the United States Courts and Judicial Conference of the United States.²⁷

There are minor problems with this spike-valley analysis. Formalistically, for example, the conflict over the court's willingness to defer to congressional economic regulation lasted too many years to be described as a spike. To some extent, it may disturb the symmetry of the book's theory to acknowledge that this conflict spike lingered until fatigue, attrition, and world developments, such as the Depression and the build-up to World War II, forced attention to other matters. In substance, however, the length of this conflict period does not undercut the book's theory. The periods of peaceable co-existence are more important than this thirty-plus year war, and Professor Geyh's reflection on the ways in which the conflict's resolution served the long-term stability of the courts is thought-provoking.²⁸ There is also a disconnect in the argument that the Administrative Office and the Judicial Conference essentially took the place of congressional court supervision. While intra-branch regulation has indeed effectively managed the business of the courts, these entities have never substantively supervised judicial deci-

waves and troughs vary in height and speed, as have the spikes and valleys of congressional-judicial relations. All waves must someday crash, however, which may weaken the metaphor's application to spikes in hostility over the last forty years. *See infra* notes 51-55.

²⁷ *See* GEYH, *supra* note 1, at 91-108, 237-51.

²⁸ Chapter Two contains an analysis of the fourth cycle, in which Geyh draws on William Ross's history of the Court's refusal to acquiesce to reform legislation of the period. *See* GEYH, *supra* note 1, at 80; *see also* WILLIAM G. ROSS, *A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURT, 1890-1937* (1994). He traces a series of developments in the period and concludes that the court-packing plan was likely to fail in any event. GEYH, *supra* note 1, at 87-89. He later emphasizes the importance of judicial deference to congressional policies. *Id.* at 237-43. Judicial review through the lens of standards—such as the rational basis test—is, at bottom, judicial deference that should minimize conflicts between Congress and the courts on most policy issues. But the courts must not apply such standards merely to appease Congress. When Congress chooses to enact extremist laws that transgress clear constitutional lines or even unclear lines redelineated by explicit judicial precedents, more aggressive review is necessary, even if it leads to inter-branch conflict.

sions because these entities were never meant to replace the system of appellate review. On legal questions, judicial independence is necessary even within the judiciary.

When Courts & Congress Collide might be strengthened by a clearer attempt to answer whether we are now in a spike, still in the throes of the preceding (Warren Court) spike, or merely in a period of nasty, demagogic calm.²⁹ If this is a spike, as Geyh suggests, should we even bother searching for the dynamic equilibrium in contemporary congressional-judicial dealings? If not, what are the alternatives—analyzing the temperature of the cold war or waiting for a period of calm, something that would seem most likely to occur when the two political branches and the “center of gravity” of judicial decisions are largely in step? Such a period of quiet seems far off, even though we have a Republican President, a Senate with a Republican veto on most matters, and a seven-ninths Republican-appointed Supreme Court. Each of the spikes Professor Geyh identifies was followed by a period of quiet, however, at least in congressional-judicial relations. If he is correct, this trend will continue.

II. THE DYNAMIC EQUILIBRIUM

As discussed above, Professor Geyh argues that the relationship between Congress and the courts has become a “dynamic equilibrium.”³⁰ His notion is that the relationship is premised on a balance among shifting and at least somewhat opposing forces of several types. The term “dynamic equilibrium” is both descriptive and normative, as it serves several constitutional values, including regulating stability and change, limiting governmental power, and protecting an independent judiciary.³¹

A potential problem is that both the near universality of the term and its level of abstraction threaten to render it unremarkable. If one term can describe so many scientific, artistic and human relationships, the term may have no particular significance for Congress’s relationship with the judiciary. This problem is not necessarily avoided by limiting

²⁹ See GEYH, *supra* note 1, at 3-6, 213-20 (judicial appointments), 264-73 (post-realism). But see *infra* text accompanying note 48 (suggesting that Geyh’s ambiguity on this point strengthens the book).

³⁰ See generally GEYH, *supra* note 1, ch.6.

³¹ See GEYH, *supra* note 1, at 253-54 (noting the term “dynamic equilibrium” exists in numerous disciplines with a fairly consistent meaning).

use of the term in law to meta-constitutional relationships, such as those among the three branches of the federal government. Perhaps *all* relationships of interdependent governmental bodies could be described similarly—for example, the states and Congress, state courts and federal courts, the Federal Bureau of Investigation and the law enforcement agencies within the Department of Homeland Security. If the term simply means that opposing forces end up charting out a fairly stable middle ground, it would not add much to our understanding of the relationship between Congress and the courts.³²

Professor Geyh avoids this problem in two important ways. First, as suggested by the groundwork of the book's first five chapters, the dynamic equilibrium is not only "what we have," but is also a workable set of norms and practices that have developed over time in response to different events to operate important parts of our national legal system efficiently and, on balance, justly. Thus, despite the Constitution's apparent open-ended delegation to Congress of discretion to establish lower courts, Congress learned that it was better to establish a complete system of courts and to give those individual courts the power to decide most cases within the constitutional judicial power than it would be to expend its own energy and resources knocking down and rebuilding the judiciary whenever the courts went out of step with congressional policies.³³ Similarly, Congress found that impeachment was a poor vehicle

³² A somewhat analogous notion in this general area may be the "swing justice," the descriptive tag given to a member of the Supreme Court who tends to be the "middle vote." New swing justices are identified when there is a change on the Court, even sometimes when the old swing justice stays on the Court. This occurs for the prosaic reason that given the types of cases the Court hears, the spectrum of views among justices, and the generally consistent views of individual justices in similar cases, one justice is likely to occupy the "middle seat" on more cases than any other, and enough to be noticed by court watchers. It is not inevitable that there be such a justice, just as it is not inevitable there be a dynamic equilibrium, but it is a reasonably likely event.

³³ Thus, jurisdictional gerrymandering largely became rhetorical. This is well illustrated in the book's treatment of the Evarts Act, 26 Stat. 826, which created the circuit courts of appeals. GEYH, *supra* note 1, at 92-101. Jurisdictional gerrymandering may again be becoming prevalent. In the mid-1990s Congress limited Supreme Court and lower federal court jurisdiction concerning federal habeas corpus and immigration. See Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §§ 101-09, 110 Stat. 1214, 1217-26 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, div.C §306, 110 Stat. 3009-607-12 (1996). The House of Representatives has also passed several bills that would similarly restrict federal judicial review in some controversial areas, including the "under God" portion of the Pledge of Allegiance. See also *infra* notes 39 & 49 (concerning cutback of judicial review by Guantanamo Bay prisoners.).

for overseeing the courts.³⁴ Professor Geyh also emphasizes that government just seems to work a little more smoothly when the courts are a unified self-managed body.³⁵ The cost for these aspects of an independent judiciary—and it is truly a cost for those of us who foolishly wish the courts could remain “above” politics—is partisan appointments and aggressive and sometimes unprincipled conduct of the Senate confirmation process.

Professor Geyh also avoids the problem by emphasizing the values of the particular dynamic equilibrium that now prevails, or at least prevailed in the recent past. It is not just the existence of a workable and flexible, yet sturdy and largely autonomous relationship that matters. The particular dynamic equilibrium that we have has formal attributes of individual protection for judges, such as the tenure and salary protections and the limitation of impeachable offenses to serious misconduct. The system also includes a Congress with power to curtail jurisdiction, cut budgets, and change substantive law. The combination has produced customary judicial independence, which, in turn, has secured the rule of law. As Professor Geyh puts it, judicial independence is an “industrial diamond” rather than a crown jewel.³⁶ The courts retain their independent status in important ways, subject to that status being pulled back or otherwise restrained in extraordinary situations. If “dynamic equilibrium” is an apt description of these varied relationships, it is important to Professor Geyh’s thesis and to our system that the term describes the particular relationship that developed between Congress and the courts and that largely continues to exist.

When Courts & Congress Collide moves directly from defending the dynamic equilibrium to a discussion of signs of its deterioration. Con-

³⁴ See generally GEYH, *supra* note 1, ch.3 (“The Decline and Fall of Impeachment as a Means to Control Judicial Decision Making”). Some members of Congress presumably made principled constitutional interpretations of Article I’s “high crimes and misdemeanors” standard to disallow political use of impeachment, while others probably made the more pragmatic decision that eating up the federal judiciary would be costly to Congress. *Id.*

³⁵ This is addressed in both Chapter Two, as developments in the cycles of congressional-judicial hostility, and Chapter Five, as ways in which the courts took on self-management responsibilities. See *supra* note 27. These entities have been highly successful in many respects. There have been some concerns about their methods, including secrecy. See, e.g., John P. Sahl, *Secret Discipline in the Federal Courts – Democratic Values and Judicial Integrity at Stake*, 70 NOTRE DAME L. REV. 193 (1994).

³⁶ GEYH, *supra* note 1, at 8; see also *id.* at 279 (the importance of the rule of law to the dynamic equilibrium). The industrial diamond reference is one of Professor Geyh’s clear metaphors.

gress has indicated that it intends to become more aggressive in exercising its powers over the courts, which may presage a reduction of congressional support for judicial independence. Professor Geyh identifies several causes for this aggressive congressional stance. First, there is growing public concern about a politicized judiciary.³⁷ Thus, many of the right wing Republican politicians who controlled Congress for most of the Bush Presidency rant against “out of control” or “godless” judges who “abuse judicial power, although, to be fair, some left wing Democrats have employed similar tactics—the Bork confirmation process was an early sign of the *public* politicization of the process.³⁸ Congress also became more aggressive in imposing limitations on jurisdiction in order to prevent outcomes inconsistent with Republican policies. For example, the Detainee Treatment Act of 2005³⁹ was enacted in part out of concern that the federal courts would become involved in reviewing the legality of military actions in Iraq to a greater degree than desired by the Republican majority and President Bush. Another is the series of political actions and judicial proceedings during 2005 involving Terry Schiavo.⁴⁰

³⁷ Professor Geyh addresses an American Bar Association report from 2003 and poll data from 2005 concerning public attitudes about courts. GEYH, *supra* note 1, at 263-64. By and large the evidence is that the public is increasingly skeptical of judges, although the overall ratings remain favorable. *See id.* More research is needed to identify the causes of the public's beliefs. I tend to read Professor Geyh's suggestions that “the public has internalized some post realist thinking,” *id.* at 263, as ducking the question of where the public is getting this notion, as the critical legal studies canon is not accessible to lay readers, a massive understatement. It may be more accurate to say that the public seems to accept oversimplifications about the judicial process and individual cases urged upon them by politicians and the news media. To whatever extent the notion of judges as politicians is the result of press coverage of divisive judicial decisions, that notion is unlikely to change, regardless of who prevails in those cases.

³⁸ GEYH, *supra* note 1, at 272-74 (backlash against liberal judges); *see id.* at 203-04 (Bork confirmation process). The emphasis is on “public.” Judicial appointments have been highly political from the beginning, although the public was not usually involved.

³⁹ 42 U.S.C. § 2000dd (2000 & Supp. IV 2006). This law was signed into law on December 30, 2005, after the final deadline for Geyh's book. The statute led to serious questions in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), about Congress's power to limit Supreme Court jurisdiction, which is relevant to the themes in *When Courts & Congress Collide*. The cost of a timely book is that sometimes events keep moving after publication deadlines.

⁴⁰ *See* GEYH, *supra* note 1, at 272-74 (discussing Schiavo case and resulting political backlash). The result shows that the tension over judicial independence continues. This may have been the most blatant attempt in history by Congress and the President to manipulate the courts and then to attack judicial integrity when the courts applied the law, as they understood it. Congress expanded federal jurisdiction to review the Florida state courts, which had refused to prohibit the removal of Schiavo's feeding tube. The federal trial and appeals judges ignored congressional posturing on the issue, reviewed the reasoning of and evidence before the state

Professor Geyh notes that the judiciary has not always been its own best ally in these and similar conflicts, giving, as examples, the judicial bureaucracy's lobbying activities and "activist" decisions.⁴¹ While these comments are valid, the book strains as it seems to adopt the tone used by a news outlet trying to present multiple viewpoints on a controversial issue. There are at least two credible positions as to whether the judiciary should be as independent of majority preferences as it has traditionally been, and there are multiple positions on issues such as those surrounding the termination of life support. But there are not two differing positions as to whether it is Congress or the courts that have been more at fault for the recent attacks on judicial independence.

Professor Geyh reminds us that the growth of skepticism of the legitimacy of the legal process has played a major role in politicizing congressional-judicial relations, or perhaps simply revealing the politicization that was always there. Judicial independence is justified in large part by the belief that it is necessary to assure the rule of law. If people lose confidence in the reality of the rule of law or the commitment of judges to follow the rule of law, judicial independence will lose much of its exalted status. Geyh's point is straightforward enough. Whether it is primarily as a result of academicians and judges, through a superficial understanding of legal realism, or political spin doctors, who have refined the art of blaming activist judges for all imaginable failings,⁴² skepticism about the ability of judges to define and apply law in a neutral fashion undermines public support for the courts. The recur-

courts, and declined to overrule them. Despite notably demagogic responses from many politicians, no retribution has occurred to date.

⁴¹ GEYH, *supra* note 1, at 245-51 (lobbying); *id.* at 243-45 (activist decisions). Professor Geyh is understandably troubled by instances in which the courts strike down legislation on constitutional grounds that the judiciary had lobbied against on policy or judicial economy grounds. *See id.* Lobbying in such matters creates an appearance of prejudgment. Accepting that judicial participation in the legislative process is valuable enough to be retained, it would seem wise for Supreme Court justices to stay uninvolved. Only the Chief Justice has an official role in the leadership of the judicial bodies that participate, and the Chief Justice could recuse himself from the lobbying or from hearing cases challenging legislation that had been the subject of judicial lobbying.

⁴² To some, war casualties, natural disasters, and eternal damnation may be punishment for political or judicial decisions that find rights for homosexuals or reject religious-based decisions in public education. *See, e.g.,* Paul Duggan, 'God Blew Up the Troops'; *Kan. Church Group Says Homosexuality to Blame for Deaths*, WASH. POST, April 7, 2006, at B4; Lizette Alvarez, *Outrage at Funeral Protests Pushes Lawmakers to Act*, N.Y. TIMES, April 11, 2006, at A14; Laurie Goodstein, *Even Pat Robertson's Friends are Wondering*, N.Y. TIMES, Jan. 8, 2006, § 4, at 4; Lynne Duke, *Preaching with a Vengeance*, WASH. POST, Oct. 15, 2005, at C1.

ring arguments—about whether the realists and their descendants overstate the case for subjectivity and whether aggressive ideological screening of judges is appropriate—are irrelevant. The health of the judiciary, at least as an independent branch in substance as well as in form, depends on public confidence in the courts, and it may not matter how or why that confidence seems to be fading.

When Courts & Congress Collide includes a series of brief discussions of recent practices and events that add to the public skepticism. While the Schiavo matter probably received the most media attention, a longer term development—the increasing infusion of ideology into the selection and confirmation of lower court judges—appears even more troubling. As Professor Geyh notes, while the judicial appointment process has always been political, it has not usually been *ideological*. From the maturity of the federal court system in the 1800s until the 1970s, lower court judges were selected largely based on local politics and personal loyalty to senators or other officeholders of the President's political party.⁴³ Neither the President nor the congressional leadership seemed to have much interest in the belief systems of lower court judges. Perhaps as an unintended consequence of President Carter's efforts to take the judicial appointment process out of the hands of individual senators,⁴⁴ President Reagan found himself with more power as a practical matter over judicial nominations than any president had in many years. He then paid close attention to ideology in selecting nominees, and the Senate leadership of the Democratic Party responded in kind. While the number of "ideological" lower court judges has probably never been very high, especially since this effort has focused on the circuit courts of appeals rather than district courts, there is a symbolic meaning that is hard to dismiss.

⁴³ Chapter Four addresses the judicial appointment process in detail, focusing on history and the development of customs that tended to cabin politics to local or state concerns. See generally GEYH, *supra* note 1, ch.4. Professor Geyh's concise analysis of senatorial courtesy, particularly the blue slip and other informal practices through which senators influenced and often dictated the choice of lower court nominees, is one of the strengths of this chapter. See *id.* at 209-14.

⁴⁴ President Carter sought to wrest control of nominations from individual senators to blue ribbon nominating commissions, such as those used in many states. See *id.* at 211-13. He succeeded only with appellate court nominees, see W. Gary Fowler, *A Comparison of Initial Recommendation Procedures: Judicial Selection under Presidents Reagan and Carter*, 1 YALE L. & POL'Y REV. 299 (1983), but his efforts to depoliticize the process in this fashion may have had the opposite effect in the long term, as they led to centralized decision-making focused on national issues, which are more likely to be ideological than the local politics that previously characterized the process.

The Supreme Court has always had a caseload that invites ideological judging, and the legal profession has accepted that fact as inherent in that Court's responsibilities. Adding ideological judges to the circuit courts of appeals, however, has produced significant changes. The "central casting" court of appeals nominee produced from the senatorial courtesy process tended to be a skilled white male lawyer with political, as opposed to ideological, connections. More recent nominees have been more likely to have had activist careers or connections to ideological organizations such as the Federalist Society.⁴⁵ Placing such persons on lower courts multiplies the number of disputes that *seem* to be resolved by politics rather than by the rule of law, regardless of whether that is in fact the case. And, because cases are decided in three judge panels and in more than a dozen circuits, inconsistent rulings are more common. Inconsistency on technical issues of law may not undercut respect for the rule of law, but inconsistency on questions such as abortion rights, termination of life support, and the war in Iraq can destroy public respect for the courts and the rule of law.

Professor Geyh is appropriately cautious in suggesting the increasing use of angry screeds in judicial opinions as an additional reason for loss of respect for the rule of law. Justice Antonin Scalia, and, to a lesser extent, several other members of the Court, sometimes write in a fashion that challenges the intellectual integrity of those who disagree. Their tone is nothing new or distinctly right-wing,⁴⁶ just as political involvement in the nomination/confirmation process is not limited to one ideology, but it seems to have become louder and more strident in recent years. Of course, since the members of the Court, who are the direct recipients of the abusive characterizations of their decisions, seem to take the vitriol in stride, the problem is probably less important than it appears. The book suggests, however, that as a result of repeatedly reading (or hearing in newscasts) that some justices believe that the analysis in opposing opinions is hopelessly foolish and possibly dishonest, the public increasingly believes the worst, perhaps about both sides. Lawyers know that this sort of bluster is common in law practice and

⁴⁵ The traits differ from administration to administration. President Clinton, the only Democratic president in the post-senatorial courtesy era, emphasized diversity over ideology. See GEYH, *supra* note 1, at 215. His nominees, however, were still more likely to reflect national ideological priorities than Democratic nominees of the preceding era.

⁴⁶ Angry dissenting opinions have been common on the Supreme Court for many years. Justice Brennan sometimes chose to write with his "acid pen." BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 418 (1976).

brief writing, but it is not *our* respect for an independent judiciary that is at stake. When judges treat their *colleagues* who reach different legal interpretations just as members of Congress treat *members of the opposing party*, it should come as no surprise that the public thinks of judges as nothing other than more politicians in a world that already has too many.

III. THE END OF THE INDEPENDENT JUDICIARY, OR JUST ANOTHER SPIKE?

These concerns lead to the following question: is the existing hostility between Congress and the courts (or perhaps between the two political branches and the courts) a sign of real danger to judicial independence? A major change in the dynamic equilibrium could undercut the independence of the courts, perhaps returning the nation to a period of aggressive congressional challenges to judicial authority. On the other hand, Professor Geyh's theory from Chapter Two is that the relationship between the two branches is regularly marked by spikes, with longer valleys between the spikes, and that the valleys more accurately characterize the relationship and have served to strengthen judicial independence.⁴⁷ If the former is true, then *When Courts & Congress Collide* should be taken as a warning of a potentially catastrophic change in the way our government works. If the latter is true, the book is more of a commentary on our system's stability and the fact that it is more rooted in custom and practice than most lawyers recognize.

It is to Professor Geyh's credit that he does not try to answer that question directly,⁴⁸ but instead leaves the reader with a few alternative scenarios. If one takes account of the many examples of conflict in recent years, as the book does in Chapter Six, it is easy to assume that the end is near, that the unholy trinity of the Terry Schiavo controversy, the Bork confirmation process (and its descendants), and the filibuster/nuclear option proposals doom the judiciary. Congress will surely make the courts operate in servitude in deteriorating facilities and with too few resources to decide cases, all in the exercise of sharply narrowed

⁴⁷ See *supra* text accompanying notes 19-22.

⁴⁸ At several places, the text implies that we are in a new spike, but the analysis does not purport to explain the precise nature of the current conflict between Congress and the courts or to otherwise reach a dispositive conclusion. On the contrary, the book identifies the concerns and lets the reader weigh them. *E.g.*, GEYH, *supra* note 1, at 51, 220, 274.

jurisdiction and while having to put up with name-calling and worse from members of Congress.

The worst may happen, but there are other possibilities. One can revisit Professor Geyh's approach and reimagine the present relationship in terms of previous spikes. The deep partisan split within Congress that oozes out into ad hominem conflicts with judges is reminiscent of 1801; the opposition to judicial review of actions taken against terrorism is reminiscent of the post-Civil War period;⁴⁹ the political discord concerning Supreme Court decisions striking down morals legislation is reminiscent of the conflicts about Supreme Court decisions striking down economic legislation prior to the mid-1930s. Perhaps the most intriguing comparisons are to the Jacksonian era, in which nomination fights and Presidential expressions of contempt for the courts endangered peaceful inter-branch relations, and to the Warren Court, which was demonized for rulings at odds with the conventional morality of many Americans. Will President Bush's appointment of John Roberts as Chief Justice "defuse" inter-branch rancor in the same way as Andrew Jackson's appointment of Roger Taney? If that means that there will be a twenty first century version of the *Dred Scott*⁵⁰ decision, we can all hope not. Was William Rehnquist just another Earl Warren? That is a difficult analogy for both the left and the right.

Another possibility is that the relationship at any given time is heavily influenced by chance. The spikes occurred in part for reasons such as the individual personalities of congressional and judicial leaders, party conflicts, and non-legal controversies. A spike that occurs in response to factors such as those can end when such factors cease to play a role. Judicial independence probably had very little to do directly with either the rise or fall of the spikes. The progressive-New Deal spike, for example, was born in a rapidly changing economy and volatile polity and ended with a heavily Democratic Senate, President Roosevelt having nine Supreme Court appointments, a world-wide depression and a looming World War II. The spike could have ended earlier or later depending on attitudinal changes by any of the justices. The controversies of the early twenty-first century can disappear quickly if ideology

⁴⁹ In this respect, *Hamdan* was almost a replay of *McCardle*. Three out of eight of the Justices concluded that Congress had terminated the Supreme Court's jurisdiction to hear this habeas corpus case while it was pending, much as a majority in *McCardle* acquiesced to a more explicit restriction of jurisdiction over the legality of war-related incarceration. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2810 (2006).

⁵⁰ See *Scott v. Sandford*, 60 U.S. 393 (1856).

becomes less important to the political leadership. That could happen through elections, cultural shifts or tragic events that unify the nation, such as additional terrorist attacks.

Finally, one can recharacterize the present animosity as simply a continuation of the Warren Court controversy. From the left, controversy about Judge Bork's nomination and the more recent influence of Justices Scalia and Thomas has largely been about their support for undoing many of the leading decisions of the 1960s and early 1970s.⁵¹ From the right, controversy has centered on *Roe v. Wade*⁵² and the failure of the Burger and Rehnquist Courts to move with sufficient vigor to overturn Warren Court decisions in the criminal procedure, establishment of religion and other culture wars areas. Perhaps that spike never ended, and the constitutional law issues that animated the disagreements of the mid-20th century merely changed shape to fit the new lineup on the Supreme Court and the facts of the cases before it. Under this view, the expansion of conflicts about ideology to the lower courts is more a result of growing recognition by both sides of the importance of lower court judges than one of anger about judicial independence. If that is the case, we should recall that Chapter Two's lesson is one of optimism and simply wait out the storm.

Waiting, however, is easier written than done. If the Warren Court spike is the explanation, then this spike has lasted for more than forty years.⁵³ Since the previous spike, the one that ended in the 1930s, was also several decades long, it would mean that we have been in a high-animosity spike for approximately two-thirds of the last century. Professor Geyh notes that the spikes vary in length and intensity and suggests that there has been a decrease over the years in the strength of Con-

⁵¹ Concerning Justices Scalia and Thomas and the "Warren" Court, see Yale Kamisar, *Willard Pedrick Lecture: Miranda Thirty-Five Years Later: A Close Look at the Majority and Dissenting Opinions in Dickerson*, 33 ARIZ. ST. L. J. 387 (2001); Sanford Levinson, *The Warren Court Has Left the Building: Some Comments on Contemporary Discussions of Equality*, 2002 U. CHI. LEGAL F. 119, Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 953-54 (2005). The "Warren" Court probably ended in a symbolic sense six years after Chief Justice Warren retired, when John Paul Stevens became the fifth new justice appointed after the 1968 presidential election. It is instructive on the sea change at the Supreme Court since that period that the appointments of Justices Blackmun and Stevens moved the Court to the right.

⁵² 410 U.S. 113 (1973).

⁵³ It is forty years if the measuring case is *Miranda v. Arizona*, 384 U.S. 436 (1966), but over fifty if it is *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

gress's will to retaliate against the judiciary for its decisions.⁵⁴ That may well be true and we may be referring here to rhetoric more than to action, but the continued existence of a Warren Court spike would be particularly troubling. To those of us who see the courts, particularly the Supreme Court, as increasingly dominated by the political right, it is hard to see how the story can end well if the political right is *still* attacking the courts in 2007 for being too liberal.⁵⁵

IV. THE FEDERAL COURTS COURSE AND THE COURSE OF JUDICIAL INDEPENDENCE

The law school Federal Courts course serves as a sort of ritual of legal adulthood. It presents the toughest brain teasers in the curriculum; it is virtually mandatory for graduates seeking apprenticeships as federal judicial clerks; and it provides insight into the sorts of problems law professors study on their own. In many respects, the course is an anachronism, as the brain teasers have changed little for fifty years, and the real work of law clerks and professors can be discovered less painfully elsewhere. Still, Federal Courts remains a beloved course, a sort of Latin for Lawyers, and, taught properly, can provide real insights into the nature of law practice, at least at elite levels.⁵⁶ Beneath the brain teaser and "secret world" aspects of the course, however, there is a deeper subtext, and that subtext forms the core of *When Courts & Congress Collide*.

⁵⁴ The latter point may be comforting but seems less significant than the fact that, if we are now in an extended Warren Court spike, the only period of calm in over a hundred years was the period between spikes four and five, just before to just after World War II, hardly an era of good feeling otherwise.

⁵⁵ Professor Geyh describes the conservative opposition to Harriet Miers as "almost explosive." GEYH, *supra* note 1, at 207. It is therefore very unlikely that the right wing will soon acquiesce in presidential attempts to nominate consensus or otherwise compromise candidates. And, given that twelve of the last fourteen nominations were by Republican presidents, it is hard to imagine that a Democratic president would have much success convincing his or her troops to share the spoils.

⁵⁶ The paradigm of the deeply intellectual tone of Federal Courts' analysis is Professor Henry Hart's dialectic, *Further Note on the Power of Congress to Limit the Jurisdiction of the Federal Courts: an Exercise in Dialectic*, reprinted in PAUL M. BATOR, PAUL J. MISHKIN, DAVID L. SHAPIRO & HERBERT WECHSLER, *HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 330 (2d ed. 1973). University of Texas law professor Philip Bobbitt describes this edition of the casebook as the "most influential casebook" in constitutional law and perhaps all of legal education, noting that by 1979 it had been cited by the Supreme Court fifty seven times, and discusses the dialectic at length. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 43 & n.14 (1982).

In many ways, judicial independence remains the most important lesson of the course. Students learn how courts are assigned tasks and how they regulate themselves through enforcement of Article III, statutory limitations and, even more importantly, self-imposed doctrinal limitations. The course can and should be a place for students to observe how judges became fair brokers, who are trusted to enforce limits on their own powers. As such, the course can be an object lesson in one of the key values of the independent judiciary—that it not only protects itself but is also able to discipline itself.

Professor Geyh's book is largely a history of the success of that independent judiciary. What most separates the book from its peers is that it is written from the vantage point of Congress, rather than the courts. That perspective has two major ramifications. First, it avoids the typical problem of being about courts and the Constitution to the near exclusion of other official acts and actors. Understanding the nature of the federal judiciary requires understanding the history and nature of congressional powers over appointments, budget and court structure as much as the typical topics of the Federal Courts course, such as jurisdictional grants and restrictions. With respect to impeachment, for example, the book focuses on the history of congressional attitudes concerning appropriate reasons to impeach, rather than on judicial interpretations of "high crimes and misdemeanors," which is a shorter and much less significant topic.⁵⁷ Second, Geyh's perspective reminds us that whatever the current state of congressional-judicial relations, the greatest part of our nation's history has reaffirmed the value of an independent judiciary. That fact should give pause to the political advocates on both sides who tend to be fair weather friends of an independent judiciary, friendly only to those judges who agree with a particular agenda. As new Supreme Court justices have often revealed to those who nominated them, there are usually at least a few surprising votes to come. Present attitudes may be less respectful of that level of independence, and our system suffers for it.

If the Federal Courts course sometimes makes it seem as if we are talking tricks and illusion as much as content and rigor, then that is part of the price of Legal Realism, which is the direct message of the last portion of the book. Perhaps our skepticism about law and the resulting embrace of legal realism has made us overlook some of the core of the

⁵⁷ The standard for impeachment was determined to be a nonjusticiable political question in *Nixon v. United States*, 506 U.S. 224 (1993). It is, therefore, Congress's opinion that matters.

Federal Courts class, and therefore to miss some of the importance of an independent judiciary. I like to read *When Courts & Congress Collide* as reminding us that the destructive aspects of politicizing the relationship between Congress and the courts are not necessarily dominant, and that each previous spike in animosity has been followed by a period in which judicial independence was strengthened. Let us hope that the members of Congress and the next generation of attorneys justify Professor Geyh's optimism.