CHARLES GARDNER GEYH

COURTING PERIL

The Political Transformation of the American Judiciary

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For Emily

. . . and the University of Wisconsin coffee machine that

introduced us with a steaming cup of its abysmal sludge

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For the ideas developed in a book such as this, publication is their coming out party: Years of schooling and maturation have culminated in this moment, and they want their corsage, gentleman caller, and debutante ball. The author's temptation to indulge his ideas with a lavish, celebratory parade of acknowledgments is considerable. They are, after all, his children—needy, demanding narcissists though they may be, who acquire a sort of demented sentience when they reach puberty. The perennial challenge is to keep these vainglorious impulses at bay, by giving credit to the people who made the book possible without transforming the acknowledgments into an interminable, self-congratulatory, Oscar-style acceptance speech. Wish me luck.

The catalyst for this project was a conference I hosted at Indiana University in 2009, which brought judges, law professors, and political scientists together to discuss recent research on judicial decision-making and its policy implications. I'd like to thank the participants at that conference, from whom I learned much, as well as Stanford University Press, for publishing an edited volume that emerged out of that conference: *What's Law Got to Do With It? What Judges Do, Why They Do It, and What's at Stake.* I contributed no substantive chapters to that book, but editing it served as a kind of home-schooling that informed my perspective in two later articles published by the Cornell and Florida Law Reviews, pieces of which appear in revised form here.[1]

A bevy of scholars has gone to the time and trouble of reading and commenting on chapters of the manuscript at various stages of development. This book has been markedly improved by the insights of Keith Bybee, Steve Burbank, Paul Carrington, Malcolm Feeley, Barry Friedman, Jim Gibson, Steve Gillers, Mark Graber, Steve Lubet, Dave Pozen, Dana Remus, Judith Resnik, Ron Rotunda, James Sample, the late, great Roy Schotland, Greg Sisk, Brian Tamanaha, and Steve Wasby. Publicly, I take responsibility for any errors that remain, although I am not above pointing fingers in private settings. Thanks likewise to the American Bar Association, the Association of Professional Responsibility Lawyers, the

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C.G.G.

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CHAPTER 1
Introduction

In public discourse on the American judiciary, crisis rhetoric abounds. Many have targeted judicial selection and its accouterment. Former Justice Sandra Day O'Connor, for example, has written that privately funded judicial elections have given rise to a "crisis of confidence," by creating the perception that "justice is for sale."[1] An eminent legal scholar has argued that Supreme Court decisions invalidating state regulation of speech in judicial campaigns have caused a "national crisis."[2] The Minnesota Chief Justice has expressed the fear that public confidence in the courts will be "dramatically undermined" by "nasty" election campaigns.[3] Federal judicial appointments have likewise come under fire, as scholars have alleged a "vacancy crisis"[4] and argued that the confirmation process is "deeply flawed, if not broken," creating a "desperate need" for reform.[5]

Another cadre of commentators has issued alarmist proclamations on matters of judicial administration and oversight: There are chronic claims of "caseload crisis."[6] A 2011 law review symposium addressed a "state court funding crisis" that, participants argued, had jeopardized the judiciary's institutional and decisional independence.[7] Chief Justice John Roberts has opined that inadequate judicial salaries have provoked a "constitutional crisis."[8] And the Massachusetts Chief Justice (among others) has argued that "state courts are in crisis"[9] because of partisan attacks on judges by pundits and public officials[10]—attacks that include threats to remove judges, disestablish courts, curtail jurisdiction, and cut budgets.

Still others have blamed judicial decision-making for impending crises: The results of a 2005 survey found that 56% of respondents agreed with a Republican congressman, who said that "judicial activism seems to have reached a crisis,"[11] and numerous conservative commentators have argued that judges imperil themselves through lack of judicial restraint. A progressive scholar has made a related point from the other end of the ideological continuum, arguing that the absence of a "persuasive case that the

Court's decisions are rational extrapolations of constitutional meaning as opposed to impositions of the political and moral preferences of the individual justices" has created a "legitimacy crisis" that is "increasingly acute for progressives."[12] Still others have asserted that "pleading standards are in crisis"[13] because recent Supreme Court decisions have "destabilized the entire system of civil litigation"[14] by directing judges to dismiss claims they deem implausible, in light of their "personal feel,"[15] which opens the door to more ideologically driven decision-making.[16]

One possible conclusion to draw from all of this is that the judiciary is on the brink, and that the four horsemen are saddling up. Dire predictions of impending catastrophe notwithstanding, the sky has yet to fall, and public support for the state and federal courts remains relatively stable, which fuels the suspicion that such predictions are overstated. And scholars aplenty have lined up to show just that.[17]

An alternate conclusion, then, is that to get attention, the alarmists are making mountains of molehills and should be sent home with a basket of bran muffins. But that prescription overlooks and thereby trivializes common concerns that animate these seemingly disparate crisis claims.

Between the extremes of a judiciary in crisis and business as usual lies a third possibility that this book explores. For generations, if not centuries, the way in which the bench, bar, media, scholars, public, and their elected representatives conceptualize and evaluate the American judiciary has been structured by what I call a "rule of law paradigm." That paradigm posits that if judges are afforded independence from external sources of interference with their decision-making, they will set extralegal influences aside and impartially apply pertinent law to operative facts. Events giving rise to recurring crisis rhetoric evidence an American judiciary in the midst of a transformation that has caused stress fractures in the rule of law paradigm. Developments of the past fifty or more years have subjected state and federal courts to greater scrutiny and thrust them into the political limelight in new and different ways. One consequence has been to highlight, in an often negative light, the discretion and judgment that judges exercise—discretion and judgment that are informed by life experiences that frame judges' policy perspectives on the world. The public has long internalized what scholars have confirmed: When judges decide difficult cases, they are subject to the influence of ideology, strategic considerations, race, gender, religion, emotion, their life experience, and other extralegal factors despite their assertions to the contrary. In recent decades, judges have been called out for this perceived hypocrisy across a proliferating array of venues.

These developments challenge core tenets of the rule of law paradigm. Why should judges be free (code that: "independent") to impose their

policy and other extralegal preferences on the people they serve without fear of consequence, when other public officials are not?

Old paradigms die hard. The realization that the premises underlying the rule of law paradigm are overstated, if not counterfactual, is ancient in origin, and more recent impatience with the paradigm has catalyzed no crisis of confidence in judges or the rule of law. Erosion of the paradigm, however, is another matter, evidence of which can be found in many of the developments that court defenders have exaggerated as crises. With exceptions, the legal community's penchant for Chicken Littling such developments punctuates its increasing dismay with the ways the judiciary is being "politicized" over the legal community's objections, and over its own inability to "depoliticize" the courts by thwarting incursions on the judiciary's autonomy through recourse to the rule of law paradigm.

Over the long term, continued erosion will eventually culminate in a collapse of the paradigm, and with it, the independence and impartiality that the paradigm has promoted. The resulting vacuum will be filled with more aggressive political controls that diminish the distinctiveness of the judge's role relative to that of public officials in the legislative and executive branches. Heightened political control will presumably be for the best, unless a new or revised paradigm emerges to justify, in more defensible terms, a measure of judicial independence from popular and political oversight. This book explores what that new paradigm might look like.

The story begins with the venerable rule of law paradigm. By "paradigm," I mean a model of interaction between law, society, and culture, to which affected communities adhere. Affected communities include: (1) the bench and bar, who implement and explicate the rule of law paradigm; (2) the general public and their elected representatives, who legitimate the paradigm and oversee its implementation by the bench and bar; and (3) the media and scholars who study the paradigm and report on its operation to all affected communities. At its core, the rule of law paradigm posits that the judiciary is rendered distinct from the so-called "political" branches of government by virtue of its independence and impartiality, which enable judges to decide cases on the basis of facts and law, unaffected by "political" and other extralegal influences that color the decision-making of public officials in the executive and legislative branches.

As marketed to other affected communities by the bench and bar, the rule of law paradigm is clear, concise, and unyielding: Independent and impartial judges apply pertinent law to relevant facts—period. Traditional law review scholarship has complemented the rule of law paradigm, with doctrinal work grounded on the premise that understanding why judges do what they do is a matter of parsing legal doctrine—that the decisions

judges make should be understood and critiqued with exclusive reference to applicable law. When judges deviate from applicable law, it is (except for rare instances of corruption or other misconduct) simply a matter of getting it wrong—mistakes appellate review and doctrinal scholarship aim to spot and correct.

Meanwhile, in the aftermath of the legal realism movement of the 1920s and 1930s, political scientists began to explore the role of politics in judicial decision-making. Over the latter half of the twentieth century, a dominant cohort within the political science community became increasingly convinced that judges make decisions by following their ideological predilections, and that applicable law has little, if anything to do with the choices judges make.[18] More recently, a cadre of interdisciplinary scholars began to bridge the law-politics divide with a flurry of empirical projects demonstrating that judicial decision-making is subject to a complex array of influences, including law, ideology, and others.[19] Such findings have led these scholars to conclude that the dichotomy itself is false: Law and policy are so inextricably intertwined that to say judges are influenced by one but not the other is to misunderstand both.[20] In that way, the "law versus policy" debate that has dominated scholarship on judicial decision-making for decades has outlived its usefulness.

For experienced lawyers and judges, these conclusions are intuitive. When the law and facts are clear, so too is the outcome, and judges often allude to cases in which they have ruled contrary to their policy preferences because the law required them to do so. But the adversarial process proceeds on the assumption that there are two or more ways to look at the applicable facts and law, and when the "correct" answer is unclear, judges must look beyond "law," narrowly defined, to decide which answer among plausible alternatives is right or best. That calls upon judges to make a kind of policy choice that can be informed by the judge's upbringing, education, religious convictions, philosophical perspectives, emotions, and experience (including experience arising out of the judge's socioeconomic status, race, and gender). Far from a bad thing, exercising judgment and discretion within the boundaries of applicable law to the end of achieving results the judge deems best may be the very definition of justice.

All of this then begs the question of why the bench and bar hew to the rhetoric of an unyielding rule of law paradigm. The answer is multifaceted. In part, this is the way of paradigms: They structure the world for adherents, who will struggle to explain anomalies in ways consistent with the entrenched schema to the extent they can. Psychological factors are also at work. Judges may sincerely believe that the choices they make are based on applicable law, and yet be influenced subconsciously by ideological and other extralegal factors to favor one legal argument over another.

Moreover, judges (like everyone else) regard their own judgments as objective and unbiased, relative to the judgments of others: Hence, judges tend to credit self-assessments that they are following the law and dismiss their critics' claims to the contrary as subjective and ill-informed. In addition to psychological factors that may lead judges to underestimate the impact of extralegal influences on their decision-making, there is a perceived strategic need to disavow such influences when judges defend their role in the public square. If the bench and bar openly acknowledge that independent judges are subject to legal and extralegal influences, it complicates life for the legal community in the public policy debate, as alluded to earlier. Why should the policy choices that judges make be insulated from political controls to any greater extent than the policy choices of Congress, state legislatures, city councils, presidents, governors, or mayors?

The view that judges are subject to extralegal influences is a ubiquitous suspicion dating back millennia. The pivotal role that judicial independence came to play in the rule of law paradigm, thus evolved against the backdrop of an ancient and pervasive understanding, reflected in folktales, plays, biblical passages, novels, poems, polemics, and historical accounts. This understanding posits that the decisions judges make are subject to myriad influences, from financial conflicts of interest and personal relationships, to political pressures, ideological predispositions, and a range of biases. One scholar has explained this curious state of affairs in terms of an "acceptable hypocrisy":[21] The public understands that judges are not perfectly impartial—that they are subject to political and other extralegal influences. But the public embraces the rule of law paradigm and reconciles the cognitive dissonance created by judges whose conduct is at odds with the premises of the paradigm by embracing judges who pledge their allegiance to unqualified, rule of law rhetoric. In this way, institutionalized hypocrisy operates as a coping strategy that responds to a flaw in the paradigm by looking the other way.

Thus, the point is not that "we are all legal realists now"[22] who have suddenly decided that what judges do and what they say they do are two different things, because we have been legal realists of that sort for centuries. The point is that discomfort with the hypocrisy is on the rise. Maintaining the pretense of an independent judiciary that is impervious to extralegal influence in the teeth of contemporary scholarship and long-standing realist suspicions to the contrary is gradually becoming an unacceptable hypocrisy in the wake of persistent and proliferating challenges. Making the case that the political landscape of the American courts is changing in this way is a challenge because history is littered with politicized attacks upon the courts that seemingly belie claims that we are witnessing something

new or different. Hence, it is critical to distinguish between those political pressure points best described as chronic or cyclical, and those that are more recent, sustained, and arguably transformative.

Many of the most aggressive challenges to the judiciary's independence have arisen during periods of political realignment, when the political leaders of a new regime come into conflict with holdover judges selected by the outgoing regime. During these cyclical storms, the judiciary has been sheltered by a culture of judicial independence attributable to the rule of law paradigm that the legal community has cultivated for a very long time. And it has averted the brunt of political ire with decision-making that is less "counter-majoritarian" than either court critics condemn as a vice, or court defenders hail as a virtue.

Apart from these chronic, episodic pressures, however, a series of developments more than half a century in the making has changed the landscape of judicial politics in new and different ways and compounded the political pressures under which courts operate. Jury trial rates have declined, diminishing the jury's check on judicial power and transforming trial judges into case managers, settlement brokers, and problem solvers, with respect to whom the need for independence from political control is less obvious. Recent changes in pleading standards have added to the managerial judge's considerable pretrial discretion in controversial ways. Judicial selection wars have ramped up: Judicial elections have become "noisier, nastier, and costlier,"[23] and Senate confirmation battles over nominee ideology have migrated to the circuit and sometimes district courts—developments fueled, in part, by a new era of interest group mobilization. The advent of intermediate state appellate courts, coupled with the elimination of mandatory jurisdiction for supreme courts (in the federal system and most states) has reduced supreme court dockets to fewer, more controversial and ideologically charged cases. And rendering intermediate appellate courts the courts of last resort in virtually all cases in these jurisdictions has elevated the political profile of their work as well. Media coverage and criticism of the courts has changed, with shrinkage of traditional news outlets and the ascent of ideologically aligned cable news networks and Internet reportage. Judicial conduct commissions, armed with enforceable codes of conduct, have been installed in every state, creating new venues for judicial accountability and criticism of judicial conduct. A centerpiece of those codes of conduct is a rule that judges avoid not just impropriety, but "the appearance of impropriety." In an age of appearances, when the media reports news via impressionistic sound bites and the general public often suspects the worst of public officials, regulating how the judiciary is perceived has become a new centerpiece in oversight of the courts.

I am not suggesting that the rule of law paradigm is on the brink of collapse. As noted at the outset, perennial crisis claims are premature and overstated. What we see instead is a paradigm eroded by escalating challenges to the assumptions on which it rests. Perceived crises in judicial decision-making derive from the growing suspicion among court critics that independent judges disregard facts and law, and act upon their ideological and other personal predilections, to the detriment of their impartiality. Election battles, appointments showdowns, and partisan attacks seek to curb the independence of judges who make politically unacceptable, ideologically freighted decisions, by controlling judicial selection, removal, and oversight. Caseload pressures beget the judiciary's need for bigger budgets, and inflation begets the need for upward adjustments to judicial salaries, which create institutional vulnerabilities that legislatures can exploit to the potential detriment of the judiciary's independence and impartiality.

To date, the legal community has remained unyielding in its half of the public policy debate. The bench, bar, and organizations that share their concern argue that capable, honest, impartial, and independent judges uphold the rule of law, and that judges' capacity to follow the law is compromised by political interference with their decision-making. For the legal community, the solution lies in "depoliticizing" the judiciary and opposing proposals that court critics advocate,[24] with the future of the rule of law paradigm hanging in the balance.

The legal community has thus placed itself in a seemingly untenable position: It can cling tenaciously to the rule of law paradigm, pledge allegiance to the paradigm's counterfactual premise that independent judges impartially follow facts and law alone, and weather the paradigm's continued erosion. Or it can acknowledge the hypocrisy of the paradigm, concede that independence liberates judges to do more and less than follow the law, and invite the paradigm's collapse.

If an independent judiciary can only be explained and justified with recourse to a paradigm that embraces a hypocrisy widely regarded as unacceptable, then the paradigm will (and should) crumble along with the independent judiciary that the failed paradigm cultivated. But can judicial autonomy only be explained and justified with recourse to the besieged rule of law paradigm? In this book, I propose not so much a paradigm shift as a paradigm tweak that retools judicial independence and accountability for a judiciary that is subject to legal and extralegal influences. In so doing, my objective is to develop a "legal culture paradigm" premised on a positive theory of judicial decision-making that scholars, the public, and their elected representatives can accept, and that the bench and bar can embrace and defend.

The legal culture paradigm begins with the modest proposition that the legal community has a distinct culture. The norms of the legal culture that are inculcated in law school, entrenched in practice, and perpetuated on the bench, take the role of law as a constraint on judicial behavior seriously. At the same time, the business of "learning to think like a lawyer"—a long-standing mission of legal education—entails an appreciation of pervasive legal indeterminacy inherent in the nature of an adversarial system in which opposing lawyers offer competing perspectives on applicable facts and law. In light of such uncertainty, the notion that judges resolve close cases with reference to policy and other considerations influenced by legal and extralegal factors is utterly unremarkable.

That brings us to the critical question of whether a measure of independence from popular and political controls can be justified for judges who "make policy" in some sense of the term. The answer is "yes" for three reasons.

First, judicial independence still promotes government by law, but in more qualified ways. In easy cases, where the law and facts are so clear they leave little room for judicial discretion, independence insulates judges from political pressure to contort the rule of law, as it is traditionally understood. If the plaintiff files a tort claim in an auto accident case two years after the applicable statute of limitations has expired, the judge will dismiss the case, regardless of her ideological predisposition regarding tort claims. In difficult cases, where outcomes are subject to ideological or other extralegal influence, law still limits the range of contestable issues, acceptable outcomes, and methods of analysis, while independence helps to ensure that judges are not pressured by interested participants or observers to exceed those limits.

Moreover, one can define "law" more flexibly to accommodate ideological and other influences. Few lawyers would argue that there is but one "correct" answer to hotly disputed legal questions; most would freely acknowledge that in close cases, outcomes could go "either way." Conservatives and liberals may answer such questions differently—they may disagree, for example, over the extent to which the text, history, and purpose of the Second Amendment guarantee an individual (as opposed to a collective) right to bear arms, but the answers nonetheless fall within the ambit of law, broadly construed. In this way, independence from external interference with their decision-making enables judges to offer their best judgment of what the law—flexibly understood—requires.

Second, judicial independence promotes procedural fairness, by buffering judges from political pressure to reach preferred results by any means necessary. Independence thus better enables judges who are acculturated to take procedural as well as substantive law seriously, to respect

the dictates of fair process required by rules of procedure, rules of evidence, and the due process clauses of the state and federal constitutions. That, in turn, enhances the judiciary's legitimacy in the eyes of litigants, regardless of whether the conclusions of law that judges reach are subject to ideological or other extralegal influences.[25] Hence, for example, in gender discrimination cases, judges who are acculturated to respect rules governing the admissibility of evidence are likelier to abide by those rules in the absence of pressure to reach a result regardless of means, even if liberal judges ultimately tend to be more favorably disposed toward gender discrimination claims than their conservative counterparts.

Third, judicial independence promotes the pursuit of justice. The adversarial process familiarizes judges with the unique circumstances of each case and regulates the manner in which the facts giving rise to those circumstances are presented. That equips judges with a more complete and balanced presentation of the case than is available to outside observers. Independence encourages a pragmatic form of justice by limiting external interference with a judge's capacity to make fact-sensitive decisions she regards as best in the cases before her, regardless of whether ideology and other extralegal factors may affect the judge's assessment of what "best" means.

The default position of the rule of law paradigm is that competent, honest, impartial, and independent judges will set extralegal influences to one side and uphold the law—a position that has proved counterfactual and increasingly difficult to defend. The default position of the legal culture paradigm, in contrast, is that competent, honest, impartial, and independent judges, though subject to extralegal influences, are immersed in a legal culture that takes law, process, and justice seriously enough to constrain judicial behavior.

Independence thus enables judges acculturated to respect law, process, and justice, to protect and promote those objectives, even though their interpretation of those objectives can be colored by their ideological (and other) predilections. By the same token, unchecked independence can liberate judges to stray from the default position and pursue political or other agendas at the expense of the three objectives that independence in the new paradigm aims to further. Hence, a measure of judicial accountability—to the electorate, the public's elected representatives, or other judges—is needed to ensure that independence furthers, rather than thwarts, the purposes it serves.

The legal community's defense of the rule of law paradigm makes room for accountability to guard against the possibility that judges will abuse their independence. Indeed, "independence versus accountability" debates in judicial oversight rival debates over "law versus politics"