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Introduction: Perceived Legitimacy and the State Judiciary

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By and large, judicial authority is a product of perceived validity.[1] Judges lack an independent means of enforcement; they wield "no influence over either the sword or the purse," "neither force nor will."[2] Rather, the judicial branch operates under the auspices of its legitimacy, "a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands."[3] When the public sees the judiciary as legitimate, it accepts and adheres to its rulings even when it may perceive certain decisions to be ideologically opposed or legally incorrect;[4] public perception thus drives the "power" and "prerogative" of the courts.[5] Where public perception sours, the rule of law itself is threatened, "sap[ping] the foundations of public and private

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1. *See* Wolfson v. Concannon, 811 F.3d 1176, 1188 (9th Cir. 2016) (en banc) (Berzon, J., concurring).

2. THE FEDERALIST NO. 78, at 433, 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (capitalization removed); *see also* Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1659 (2015); *Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring). Of course, the judiciary's lack of an independent means of enforcement was noted infamously, if also apocryphally, by President Andrew Jackson. JON MEACHAM, AMERICAN LION: ANDREW JACKSON IN THE WHITE HOUSE 204 (2008) ("John Marshall has made his decision, now let him enforce it.").

3. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992); *accord* Republican Party of Minn. v. White, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) ("The power and the prerogative of a court . . . rest, in the end, upon the respect accorded to its judgments.").

4. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 73 (Princeton Univ. Press 2006) (1990) ("People may believe specific decisions are wrong, even wrongheaded, and individual judges unworthy of their offices and still continue to support the court if they respect it as an institution that is generally impartial, just and competent." (quoting Walter Murphy & Joseph F. Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, *in* FRONTIERS OF JUDICIAL RESEARCH 275 (Joel B. Grossman & Joseph Tanenhaus eds., 1969))).

5. *White*, 536 U.S. at 793 (Kennedy, J., concurring).

confidence, and . . . introduc[ing] in its stead universal distrust and distress."[6]

Given that legitimacy is the lifeblood of the judicial branch, maintaining public respect for the judiciary as an institution driven by legal principles is a structural imperative—"a state interest of the highest order"[7]—on which the rule of law depends.[8] But what steps need be taken to safeguard judicial legitimacy? What does the public demand of the judiciary before recognizing and respecting its authority "to say what the law is?"[9]

Certain principles are beyond dispute. A judiciary possessed of near-complete independence, utmost competence, and absolute probity has been an essential foundation of the Anglo-American system of justice.[10] Empirically, legitimacy has been shown to be heavily influenced by "the *fairness* of the way . . . judges make decisions";[11] normatively, judicial decisions are almost universally seen as appropriate when they call legal "balls and strikes,"[12] although many argue that it is also appropriate for the courts to proactively protect certain rights in the absence of (or perhaps in the face of contrary)

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6. THE FEDERALIST NO. 78, *supra* note 2, at 438; *accord Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring).

7. Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 889 (2009) (quoting *White*, 536 U.S. at 793 (Kennedy, J., concurring)).

8. *Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring).

9. Marbury v. Madison, 5 U.S. 137, 177 (1803).

10. *See* N.Y. State Bd. of Elections v. López Torres, 552 U.S. 196, 212 (2008) (Kennedy, J., concurring). The roots of modern day judicial independence, for example, trace as far back as the Magna Carta, which proclaims, "To no one will we sell, to no one will we refuse or delay, right or justice." Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1666 (2015) (citing MAGNA CARTA cl. 40 (1215), *in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914)). The desire for an independent judiciary was at the forefront of the Declaration of Independence, which charged King George with "obstruct[ing] the Administration of Justice" by making "judges dependent on his Will alone." THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776); *Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring). Following the Revolutionary War, the Founders emphasized the importance of judicial nonpartisanship lest the public "fear that the pestilential breath of faction may poison the fountains of justice [and t]he habit of being continually marshaled on opposite sides will be too apt to stifle the voice both of law and of equity." *Wolfson*, 811 F.3d at 1188 (Berzon, J., concurring) (quoting THE FEDERALIST NO. 81, *supra* note 2, at 452 (Alexander Hamilton)). And the common law judicial oath, like the oath taken by state and federal judges today, bound a judge to "do right to all manner of people . . . without fear or favour, affection or ill-will." *Williams-Yulee*, 135 S. Ct. at 1666 (citing 10 ENCYCLOPAEDIA OF THE LAWS OF ENGLAND 105 (2d ed. 1908)); *see* 28 U.S.C. § 453 (2012) (requiring federal judges to "administer justice without respect to persons, and do equal right to the poor and to the rich").

11. TYLER, *supra* note 4, at 72–74 (emphasis added).

12. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

legislation.[13] And of course, partisan politics is anathema where the judiciary is concerned.[14]

But as one would imagine, the requisite calculation for discerning judicial legitimacy includes within its scope a multitude of additional factors only tangentially alluded to here—factors including, but not limited to, the demographic composition of the judiciary,[15] whether the judiciary achieves distributive justice in decisionmaking by treating all citizens alike,[16] and whether the judiciary is responsive, *vel non*, to external sociocultural influences.[17] Each of the following four Symposium articles builds on the existing literature by examining issues that directly implicate the perceived legitimacy of state courts.

Consider, first, Professors Tracey George and Albert Yoon's article examining the demographics of the state judiciary.[18] At the outset, George and Yoon recognize that the perceived legitimacy of courts is not only conditional on the fairness, independence, and competence of the judiciary but is also heavily influenced by *who* serves as a judge,[19] a proposition that has received normative and empirical support.[20] George and Yoon find, however, that a significant demographic gap exists between many states' benches and their constituent populations; state "courts are not representative of the people whom they serve."[21] They thus bring to the fore an issue that is sure to weigh heavily in the discussion of judicial legitimacy: Will the people accept that the state judiciary is "fit to determine what the . . . law means and to declare what it demands"[22] if it is not representative of their own demographic composition?

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13. *See generally* ERWIN CHEMERINSKY, THE CASE AGAINST THE SUPREME COURT (2014).

14. One need only look to the continued discussion surrounding the Supreme Court's landmark decision in *Bush v. Gore*, 531 U.S. 98 (2000).

15. Tracey E. George & Taylor Grace Weaver, *The Role of Personal Attributes and Social Backgrounds on Judging*, *in* THE OXFORD HANDBOOK OF U.S. JUDICIAL BEHAVIOR (Lee Epstein & Stefanie A. Lindquist eds., 2017).

16. TYLER, *supra* note 4, at 72–74.

17. This final factor was of particular importance during the legal realism movement that dominated the early part of the twentieth century. *See generally* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 822 (1935); Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), *reprinted in* 110 HARV. L. REV. 991 (1997); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

18. Tracey E. George & Albert H. Yoon, *Measuring Justice in State Courts: The Demographics of the State Judiciary*, 70 VAND. L. REV. 1887 (2017).

19. *Id.* at 1891 (citing JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE (2009)).

20. Nancy Scherer, *Diversifying the Federal Bench: Is Universal Legitimacy for the U.S. Justice System Possible?*, 105 NW. U. L. REV. 587 (2011); *see also* George & Weaver, *supra* note 15.

21. George & Yoon, *supra* note 18, at 1894.

22. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).

In a pair of articles, Professors Christina Boyd, Michael Nelson, Michael Fix, and Gbemende Johnson hone in on gender issues within state judiciaries. Boyd and Nelson, for instance, empirically examine whether a trial judge's gender impacts criminal sentencing decisions.[23] Within the confines of their dataset, they find that "[c]ompared to male defendants, female defendants are sentenced significantly more leniently by female judges, while female defendants tend to receive harsher sentences than a similarly situated male defendant when a male judge is behind the bench."[24] This conclusion directly implicates the perceived legitimacy of the state judiciary given the central role that distributive justice plays therein; after all, the "perception of unequal treatment is the single most important source of popular dissatisfaction with the American legal system."[25] Fix and Johnson tackle the issue from a different angle, empirically examining whether gender affects public perception of state court decisions.[26] Although their research finds promising indications that gender stereotypes regarding the role of state judges may be decaying over time,[27] it nonetheless acknowledges that public perceptions of legitimacy are significantly influenced by the gender of the party *affected* by judicial decisions.[28] Like Boyd and Nelson, Fix and Johnson materially advance the discussion regarding how gender interrelates with court legitimacy, challenging the reader to consider whether perceived judicial legitimacy not only requires egalitarian fairness in deliberative and adjudicative process but also demands careful judicial recognition and management of *outcomes*.[29]

Finally, Professor Jonathan Nash provides keen insight on the issue of judicial legitimacy by empirically examining it from an internal perspective.[30] That is, Nash endeavors to track "judicial laterals"—the

23. Christina L. Boyd & Michael J. Nelson, *The Effects of Trial Judge Gender and Public Opinion on Criminal Sentencing Decisions*, 70 VAND. L. REV. 1819 (2017).

24. *Id.* at 1844.

25. Austin Sarat, *Studying American Legal Culture: An Assessment of Survey Evidence*, 11 LAW & SOC'Y REV. 427, 434 (1977); *see also* Jason Sunshine & Tom R. Tyler, *The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing*, 37 LAW & SOC'Y REV. 513, 517 (2003).

26. Michael P. Fix & Gbemende E. Johnson, *Public Perceptions of Gender Bias in the Decisions of Female State Court Judges*, 70 VAND. L. REV. 1845 (2017).

27. *Id.* at 1873.

28. *Id.*

29. Empirical studies have shown that judicial outcomes do indeed relate to the perceived legitimacy of the court. TYLER, *supra* note 4, at 72. However, many would deem an overriding judicial consideration of the practical and socioeconomic impact of a court's decisions a form of legal realism not wholeheartedly endorsed for almost a century. *See generally* Cohen, *supra* note 17; Holmes, *supra* note 17; Pound, *supra* note 17.

30. Jonathan Remy Nash, *Judicial Laterals*, 70 VAND. L. REV. 1911 (2017).

movement of a judge from a position in one judicial system (be it state or federal) to another.[31] Among other significant findings, his research reveals that the overwhelming majority of judicial laterals run from state judiciaries to their federal counterpart and, where judges have moved in the opposite direction, it was usually because they were moving to a comparably "higher" court in a state system (i.e., moving from a federal district court to a state appellate court).[32] Although Nash acknowledges the multitude of factors that might motivate a judicial lateral, an undeniable component of such a decision is the relative prestige of the state and federal judicial systems.[33] Reconciled against the backdrop created by this Symposium's other articles, the reader of Nash's piece must wrestle with an unavoidable question: To what extent, if any, does the near-unidirectional nature of judicial laterals out of the state judicial system influence its perceived legitimacy?

Ultimately, judicial legitimacy is the glue that holds our system of justice together; it is, as noted, a "structural imperative on which the rule of law depends."[34] The following four articles in this *Vanderbilt Law Review* Symposium critically examine issues that directly implicate the perceived legitimacy of the state judiciary.

31. *Id.* at 1911–12.

32. *Id.* at 1927.

33. *Id.* at 1911, 1913.

34. Wolfson v. Concannon, 811 F.3d 1176, 1187 (9th Cir. 2016) (en banc) (Berzon, J., concurring).