THE SIX MYTHS OF JUDICIAL INDEPENDENCE

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This article argues that our understanding of judicial independence is beset with a range of false myths that distort our use of that concept—both in its scope and its limits—in a way that is potentially dangerous to the good administration of justice. The continuance of these myths allows other actors to deploy the rhetorical force of 'judicial independence' to cloak the collateral values they seek to advance. By directly exposing the mythical nature of these ideas, this article shows that behind the apparent neutrality of concepts of independence, accountability and judicial method, are highly contested issues of political power and control that are better directly acknowledged. In establishing the six myths of judicial independence, this article draws upon the founding events in the evolution of our modern concept of judicial independence from early 17th century England. It then proposes a counter narrative for how we can better understand judicial independence as a manifestation of structural judicial impartiality. In the final section of the article, I use this framework to help identify potential threats to judicial independence in contemporary Australia, and potential responses available to the judiciary.

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I INTRODUCTION

There is perhaps more mythology around judicial independence than around any other concept in judicial studies. That mythology swirls around the concept in

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a beguiling manner, disguising uncomfortable truths behind a glamour. The problem with such a system is that the very nature of myths mean they are liable to be co-opted for ulterior purposes, and the longer we hold to the comfort of the glamour the less control we have.

If we see judicial independence as a relevant contemporary virtue in our constitutional settlement,[1] it is necessary that we be willing to unveil these myths and confront the, often harsh, truths behind the glamour.

This article argues that there are six dominant myths that actively distort contemporary discourse regarding judicial independence: the myths of supremacy, purity, safety, methodology, neutrality, and inevitability. These myths arise, in part, from the long history of judicial independence in the common law tradition, and the way in which related concepts of judicial power, control and accountability have been interwoven with that concept of independence in its long 400-year discourse. This article argues, however, that it is by going back to the origin of the concept of judicial independence in early 17th century England that we are provided with the tools to disaggregate these separate discourses, by highlighting the countervailing values and interests that lie behind these myths. The article argues that, since the very origins of the modern concept of judicial independence, actors opposed to the interests of the judiciary as an independent locus of social power have attempted to co-opt the language of independence to disguise attempts to control the judiciary. The modern myths of independence have their origin in this deception, and the continuance of these myths allows other actors to deploy the rhetorical force of 'judicial independence' to cloak the collateral values they seek to advance.

By directly exposing the *mythical* nature of these ideas, this article argues that behind the apparent neutrality of concepts of independence, accountability, and judicial method are highly contested issues of political power and control that are better directly acknowledged. However, the article is not antagonistic to the concept of judicial independence. Quite the opposite. In the third section of the article, after highlighting the dangers of the dominant myths, it sets out to provide a rigorous foundation for a contemporary understanding of judicial independence as a vital, yet limited and derivative, objective of judicial governance. In doing so it proposes a counter narrative for how we can better understand judicial independence by locating independence as a manifestation of structural judicial impartiality. It argues that this approach allows a more responsive understanding of the nature, scope, and limits of judicial independence.

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[1] The focus of this article is on judicial independence in the Anglo-Australian context. The history and authorities are principally drawn from that context. However, the same issues surrounding the concept of judicial independence are found in most modern liberal democratic countries that aspire to the rule of law, and the arguments made in this context should resonate with the position in those other contexts.

By abandoning the six myths of judicial independence, we are liberated to better understand how our judiciary can be improperly pressured by external (and internal) forces, and particularly how the language of good administration of justice can be co-opted to disguise ulterior motives. Because ultimately, these myths—or something like them—do pervade and distort our discussions and conceptions of judicial independence in modern Australia (and beyond). And it is necessary that we confront them if we are to properly understand how this vital judicial virtue may be potentially threatened in our society, and how the judiciary can respond to contribute to the protection and enhancement of it.

We should be in no doubt that—like all the conceptual foundations of democracy—judicial independence is an institution that requires regular maintenance and vigilance. Where the creeping myth of inevitability becomes too invasive, we can quickly become blind to potential threats.

But first, it is necessary to examine the origins of these myths, and to provide a conceptually sound justification for, and shape of, judicial independence that exists independently of these myths.

II THE SIX MYTHS OF JUDICIAL INDEPENDENCE

The concept of judicial independence is one of those ideas that has 'great resonance and rhetorical value but little agreement about its meaning and requirements'.[2] Judicial independence as a concept is subject to an immense literature,[3] which unfortunately can overwhelm any analysis of the concept. Like familiar ideals such as 'democratic governance' and 'the rule of law', it is an idea easy to appeal to yet difficult to define. A concept—as Stephens notes—'more easily acclaimed than understood'.[4]

The idea of having a disinterested decision-maker—one who is independent and impartial—long pre-dates the Judeo-Christian era. As Marshall notes, '[a]ncient Biblical references attest to, and Roman law clearly places, a high value on [such] independence'.[5] However, seeing the value in having an independent triadic decision-maker[6] is not the same as recognising an independent *judge*, at

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[2] Diana Woodhouse, 'Judges and the Lord Chancellor in the changing United Kingdom Constitution: Independence and accountability' (2005) 16 *Public Law Review* 227, 229.

[3] For a selection of some of this literature, see Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff, 1985); Shimon Shetreet and Christopher Forsyth (eds), *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff, 2012); Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016).

[4] Sir Ninian Stephen, 'Judicial Independence: A Fragile Bastion' in Shimon Shetreet and Jules Deschenes (eds), *Judicial Independence: The Contemporary Debate* (Martinus Nijhoff, 1985) 529.

[5] T David Marshall, *Judicial Conduct and Accountability* (Carswell, 1995) 7.

[6] Joe McIntyre, *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 36; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford University Press, 2000) 11.

least as we understand that concept. When we speak of 'judicial independence' we are referring to a particular term of art, a loaded term that speaks to its particular legal history, institutional structures and responses, as well as the idea of separation. It is as a result of this particular confluence of history, conceptualisation and discrete manifestations that, as Pimentel notes, 'attempts to define "judicial independence" have met with limited success, yielding formulations that are hopelessly vague'.[7]

A useful starting point is the definition offered by Green, whereby judicial independence is defined as

> the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions, including, in particular, the executive arm of government, over which they do not exercise direct control.[8]

At this point in the article, it is not necessary for me to attempt to refine this further, as the discussion of mythology arises from the very imprecisions of concept and usage. Green's definition gives a useful ambit claim of the scope and purpose of judicial independence. There is an immediate intuitive understanding of the domain of the discussion as soon as the language of 'judicial independence' is deployed.

However, the very fact of an assumed shared domain of discussion is precisely what creates the space in which the *mythology* of judicial independence flourishes. In drawing together half-understood snippets of legal and constitutional history, an assumption of shared meaning, and the ready affirmation of associated ideals—such as legality, rule of law, and justice—a space is created for latent ambiguities to emerge. In turn, this creates the opportunity for vested interests to co-opt the authority and rhetorical force of judicial independence to advance collateral values.

Providing yet another definition of judicial independence does not counter this threat. As most jurists have a decent working definition of the concept, and the assumed space of common understanding is commonly sufficient, mere definition is unlikely to displace the latent ambiguities and will have marginal clarifying force. A different approach is needed. This requires that we first draw out the myths and ambiguities that are behind these shared domains of discussion, making the latent explicit. This in turn allows the explicit myths to be exposed and examined and, in at least these cases, shown to be false.

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[7] David Pimentel, 'Reframing the Independence v Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity' (2009) 57(1) *Cleveland State Law Review* 1, 4.

[8] Sir Guy Green, 'The Rationale and Some Aspects of Judicial Independence' (1985) 59 *Australian Law Journal* 135, 135.

What then are these myths? I think they can usefully be framed as six principal concepts, distinct but interrelated commonly held myths:

1. The Supremacy Myth: The first myth is the idea that judicial independence represents a primary and supreme judicial virtue, and that it should be protected against all other virtues. On this view, judicial independence is commonly 'regarded as the very definition of the "rule of law"',[9] as a pillar (with impartiality) 'on which justice according to the law stands'.[10] In this vein, Warren observed that '[t]alking about judicial independence is akin to talking about the rule of law'.[11] This role is seen as a particularly 'vital constitutional safeguard' in a federal context.[12] As the High Court of Australia has observed, 'in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive'.[13]

This conception is particularly strong in Canada, where judicial independence has been implied as a core constitutional principle that requires that the courts be 'completely separate in authority and function from *all* other participants in the justice system'.[14] The absolutism of this view is seen in the insistence of 'complete liberty' in the articulation of the concept of judicial independence by the Supreme Court of Canada in *The Queen v Beauregard:*

> Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: *no outsider—be it government, pressure group, individual or even another judge*—should interfere in fact, or attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision.[15]

On this view, judicial independence is a stand-alone value/objective for the administration of justice, and it is inappropriate to attempt to balance this against other values.

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[9] Ralf Dahrendorf, 'A Confusion of Powers: Politics and the Rule of Law' (1977) 40 *Modern Law Review* 1, 9.

[10] New Zealand Law Commission, *Towards a New Courts Act: A Register of Judges' Pecuniary Interests?* (Issues Paper No 21, 2011) 4. See also Judicial Integrity Group, *Commentary on the Bangalore Principles of Judicial Conduct* (United Nations Office on Drugs and Crime, Commission on Crime Prevention and Criminal Justice, September 2007) 5.

[11] Hon Marilyn Warren AC, 'Does judicial independence matter?' (2011) 85(8) *Australian Law Journal* 481, 481.

[12] *Attorney General (Cth) v The Queen* (1957) 95 CLR 529 (PC), 540–541 (Viscount Simonds).

[13] Ibid.

[14] *The Queen v Beauregard* [1986] 2 SCR 56, 73 (Dickson CJ, emphasis in original). See also *Reference re Remuneration of Judges of the Provincial Court* [1997] 3 SCR 3.

[15] *The Queen v Beauregard* (n 14) 69 (Dickson CJ, emphasis added). In a similar vein, King described the undoubted kernel of judicial independence in Australia as 'the freedom of the judge from pressure or influence in the making of his decisions': Hon Justice Len King, 'Minimum Standards of Judicial Independence' (1984) 58 *Australian Law Journal* 340, 341 as cited in *Judicial Officer v Judicial Conduct Commissioner* [2022] SASCA 42, (2022) 368 FLR 462, 475 [55] (Livesey P).

2. The Purity Myth: The second, and related myth, is that judicial independence can and should be manifest in a pure and unadulterated form, and that there is a single ideal model of judicial independence that ought to be realised in every jurisdiction. The broad convergence of principles in the many international statements on judicial independence[16] tends to support this view: *this* is how we protect judges.[17] Even where there is recognition of some responsiveness to local conditions, there seems to be a belief that this is a departure from an ideal conception of tenure, appointment, or pay.

3. The Safety Myth: Third is the idea that judicial independence is such an accepted and necessary part of our constitutional settlement that its pursuit is 'safe', and that it does not threaten any part of society. This view—consistent with the ready acclaim Stephens talks about—understands judicial independence as such a universally regarded 'good' that its pursuit could not possibly threaten or undermine any interest in society.

4. The Methodology Myth: That safety is seen to emanate from a conception of judicial methodology that emphasises formalism/legalism over judicial discretion—the myth of judicial methodology. On this traditional view, because we want judges to be able to 'say what the law is, rather than what others in a position to control the judge want the law to be', it becomes necessary that 'judges should possess a measure of independence from the other branches'.[18] The isolation of the judiciary is justified as the role of the individual judge is minimised. Even relatively sophisticated articulations of judicial independence seek to minimise the role of judicial discretion as a corollary of the institutional isolation of the principles. For example, White is at pains to stress the role of law when she observes:

> Judicial independence is not the freedom of a judge to decide cases based on personal whim or caprice, nor is it the freedom of a judge to decide cases based on personal viewpoints of what the law ought to require.[19]

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[16] See, eg, *Universal Declaration on the Independence of Justice,* unanimously adopted on 10 June 1983, 2.02 ('the Montreal Declaration'); *Basic Principles on the Independence of the Judiciary,* UN Doc ST/DPI/958 (1985); *The Burgh House Principles On The Independence Of The International Judiciary* (2005) 1.1; *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (1995, amended 28 August 1997); *Bangalore Principles of Judicial Conduct*, UN Doc E/RES/2006/23 (27 July 2006) 4, Value 1 'Independence'.

[17] I note that most of these statements actually allow the nuance and responsiveness that is necessary for specific jurisdictions, and I am not here criticising their scope of ambition. Rather what I argue is that there is such convergence between their content as to support an inference that there is a single model of independence.

[18] Charles Gardner Geyh, 'Straddling the Fence Between Truth and Pretense: The Role of Law and Preference in Judicial Decision Making and the Future of Judicial Independence' (2008) 22 *Notre Dame Journal of Law, Ethics and Public Policy* 435, 436.

[19] Penny White, 'Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations' (2002) 29(3) *Fordham Law Review* 1053, 1060.

While White is, of course, correct that whim and caprice have no place in judicial decision-making, this framing is indicative of a mindset that minimises judicial evaluative discretion in the context of judicial independence.

5. The Neutrality Myth: Taken together, these myths promote a conception of judicial independence that presents it as a logical, pure, unavoidable, and unobjectionable value. This in turn supports a myth that judicial independence is a politically neutral concept—that it can be pursued in a manner that is neutral as to the vision of the society we want. This myth promotes a view that, because judicial independence protects only the impartial formalist application of law (with law-making the proper domain of the political class), judicial independence poses no threat to any political viewpoint. Where a critique of the judiciary may otherwise be obviously (politically) partisan, this neutrality myth diminishes the visibility of such partisanship. If judges are only applying the law, then their actions (and critique of them) cannot be promoting the agenda of any given political party or ideology.

6. The Inevitability Myth: Finally, there is a belief that each of these myths reinforces judicial independence to such a degree that it becomes an inevitable aspect of contemporary constitutionalism, and that it does not require constant maintenance. As Warren notes, judicial independence tends to be taken for granted.[20] If—the myth goes—judicial independence is safe, neutral, and manifest in a clear and conventionally certain form, then its existence requires no ongoing refinement; there is an agreed upon manifestation that threatens no one, so it is therefore an ongoing certainty in our constitutional settlement.

One of the problems of judicial independence is, of course, that it is a diffuse concept. Not everyone will subscribe to all, or indeed any, of the above myths. In my experience, these myths are more widespread in practice and in social and political discourse than in academic discourse, but even there these myths persist. My intention here is not the definitive confirmation of these myths, but the prior threshold of recognition. My hope is that we can recognise the way in which they can underlie discussions of judicial independence and the role of courts. In setting them out, I wish to highlight the way in which these myths resonate with an initial intuitive response to this virtue of judicial independence.

III THE ORIGIN STORY OF JUDICIAL INDEPENDENCE

Like all good myths, judicial independence has a compelling origin story—one that continues to shape how we think about this concept today. My purpose in unpacking this origin story is not to provide a historical description of the concept, replete with microscopic detail and voluminous footnotes. Not only is such an

[20] Warren (n 11) 481.

approach liable to bore the reader, it misses the purpose of this discussion. Myths thrive not on detail, but on powerful and relatable images; on the captivating story we can share and recount.

Judicial independence—perhaps more than any other juridical value—has, through its development in the 17th century, an origin that lends itself to this form of myth-making: lives on the line, great heroes and towering villains, Kings, wars, and the shining just resolution that persists through the ages. That these stories can be told in a way that is understandable and captivating to the lay public, resonating with such a compelling intuitive sense of justice, perhaps contributes to the cache this value has with the broader public.

But like with all myths, there is always value in unpacking them carefully to understand the layers within the narrative.

What, then, is the narratively compelling moment, when we can say 'here—here is when the story of Judicial independence truly began'? There are perhaps three key moments:

The Solution: The first option is the enactment of the first clear solution to the problem of interference with judicial independence, the *Act of Settlement 1701* (UK), and the embedded protection of judicial tenure *quamdiu se bene gesserint*[21] (during good behaviour).[22]

The Problem: The second option is to focus on the action of the Stuart Kings in the 17th century, where the problem first became unavoidably apparent. We can tell the story of cases like *Godden v Hales*[23]—where Sir Thomas Jones, Chief Justice of Common Pleas, Chief Baron of Exchequer, and two other judges were dismissed before James II found a sufficiently compliant bench willing to decide the case as he desired. When Jones was told he must either change his opinion or give up his place he responded:

> 'For my place,' he answered, 'I care little. I am old and worn out in the service of the crown; but I am mortified to find that your Majesty thinks me capable of giving a judgment which none but an ignorant or a dishonest man could give.' 'I am determined,' said the King, 'to have twelve Judges who will be all of my mind as to this matter.' 'Your Majesty,' answered Jones, 'may find twelve Judges of your mind, but hardly twelve lawyers.'[24]

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[21] Act of Settlement 1701 (UK) Art III.

[22] Kiefel CJ has, for example, stated that the 'traditional starting point for a discussion of the independence of the judiciary is the political struggles, involving the Stuarts and their overthrow, culminating in the Bill of Rights and the Act of Settlement of 1701.' Susan Kiefel, 'Judicial Independence' (Paper delivered to North Queensland Law Association Conference, 30 May 2008) <https://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2008-05-30.rtf>.

[23] Godden v Hales (1686) 11 St Tr 1165; 2 Show KB 475; 89 ER 1050.

[24] Baron Thomas Babington Macaulay, *History of England from the Accession of James II* (CH Firth ed, 1914) Vol 2, 735. The exchange is also discussed in A W Bradley, 'Relations between Executive, Judiciary and Parliament: An Evolving Saga?' [2008] *Public Law* 470, 471.

The Source: The third option is to go back to the source of the issue: to try to identify the moment when the shifting sands of constitutional development settled into a new foundational state, where the judicial and executive powers began consciously to bifurcate.

For me, the third option is the critical moment, for with this division between loci of power the latent problem of executive interference with the judiciary became inevitable, and the need for an eventual solution irresistible. Within this moment, the focus for me is the *Case of Prohibitions* (*Prohibitions del Roy*),[25] and the conflict between two juridical titans and lifelong enemies—Edward Coke and Francis Bacon. While the administration of justice had, from the Norman era, been regarded as the pre-eminent function of the Crown,[26] the issue of the independence of the judiciary had been on the agenda from as early as the time of Edward I, 'a period in which the mixed-balanced constitution idea held sway and long before there was any thought of the separation of powers'.[27] Writing in the 13th century, Bracton memorably stated that 'the king must not to be under man, but under God and under the law, because the law makes the king'.[28] A century later, Sir John Fortescue wrote of independence: '[T]he justice shall swear among other things that he will do justice without favour, to all men pleading before him, friends and foe alike, and that he will not delay to do so even though the king should command him by his letters or by word of mouth to the contrary.'[29] By 1406, Gascoigne CJ was able to declare that 'the king has committed all his judicial powers to the various courts'.[30] These sources show the increasing recognition that even the Crown was bound by the law, and that the law was to be administered by the judiciary. However, it was not until the late Elizabethan era that it was recognised that judicial power had come to be exclusively vested in the courts.[31]

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[25] *Prohibitions Del Roy* (1607) 12 Co Rep 64, 77 ER 1342. See Edwardo Coke, *Fourth Part of the Institutes of the Laws of England, Concerning the Jurisdiction of Courts* (E and R Brooke, 1797) ch VII [71].

[26] William Hearn, *The Government of England: Its Structures and Development* (Longman 1867) 65–6. Hearn, after quoting Bracton ('It is for this end that the King has been created and elected, that he may do justice to all': see n 28), proceeds, 'It is therefore from the Crown that all jurisdictions in the kingdom emanate' before continuing '… the Crown is and always has been the fountain of justice'.

[27] David Gwynn Morgan, *The Separation of Powers in the Irish Constitution* (Round Hall Sweet & Maxwell, 1997) 10.

[28] Bracton [Henry of Bratton] (Thorne translation), *De Legibus Et Consuetudinibus Angliæ (Bracton on the Laws and Customs of England*) Volume 2 (1210–1268, Harvard University Press 1968–1977 ed) 33.

[29] Sir John Fortescue (S B Chrimes ed & Trans) *De Laudibus Legum Anglie: Edited and Translated with Introduction and Notes* (1468–1471, Cambridge University Press, 1942, 2011) 127.

[30] *Chedder v Savage* (1406) YB Mich 8 Hen IV fo 13, l13 as cited in John Baker, *An Introduction to English Legal History* (Butterworths, 3rd ed, 1990) 112.

[31] See, eg, *Jentelmen's Case* (1583) 6 Co 11a, [77 ER 269].

A The 17th Century Origins of the Myths

The full implications of this exclusive vestment became manifest in the early Stuart years. In 1607 in the *Case of Prohibitions* (*Prohibitions del Roy*), a matter came before the Court of Common Pleas following an attempt by James I to directly sit in judgment on a land dispute. The King argued that he 'himself may decide it in his Royal person…[as] the Judges are but the Delegates of the King'.[32] In rejecting this approach, Lord Coke held that while the Crown is conceptually present in every court proceeding,[33] this does not mean the King can directly decide matters:

> The King in his own person cannot adjudge any case, either criminal or betwixt party and party; but it ought to be determined and adjudged in some Court of Justice, according to the law and custom of England.[34]

In doing so, Lord Coke articulated an emergent constitutional conception of a distinct judicial function, where the resolution of disputes according to law is the exclusive province of the courts. Moreover, Lord Coke immediately set out that such a function involved deciding matters according to a particular method. In rejecting the King's proposition that 'the Law was founded upon reason, and that he and others had reason, as well as the Judges',[35] Lord Coke set out his seminal statement of the judge's commitment to the 'golden metwand' of law:

> [Cases]…are not to be decided by naturall reason, but by the artificiall reason and judgment of Law, which Law is an art which requires long study and experience, before that a man can attain to the cognizance of it; And that the Law was the golden metwand and measure to try the Causes of the Subjects; and which protected his Majesty in safety and peace…[36]

So, from the very beginning of the tumultuous Stuart era, Lord Coke flexes the muscle of the judiciary as a distinct source of power within the polity, beyond the direct control of the Crown.

It is only at this point that the concept of judicial independence begins to become coherent; only once the judiciary assumes a constitutional status as a distinct pole of power does the concept of improper interference make any sense. And it is remarkable how quickly one of the most significant weapons of such interference was created.

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[32] *Prohibitions Del Roy* (n 25) 1342.
[33] 'And it is commonly said in our Books, that the King is alwayes present in Court in the Judgement of Law': ibid 1343.
[34] Ibid 1342.
[35] Ibid 1343.
[36] Ibid 1343. Coke subsequently argues that all causes were 'to be measured by the golden and straight met-wand of the law, and not to the uncertain and crooked cord of discretion': Coke (n 25) ch I [41].

Enter Francis Bacon, the English philosopher and statesman who served as Attorney General and Lord Chancellor of England. In contrast to his enemy Lord Coke, Bacon saw the path to glory through alignment with the King. Where Lord Coke sought to expand judicial power, Bacon saw the benefit of promoting a constitutional conception that limited the judicial role. In a profoundly influential approach, Bacon sought such constraints in a highly artificial, yet politically attractive, conception of the judicial method. In 1612, just a handful of years after the *Case of Prohibitions*, Bacon argued that:

> Judges ought to remember that their office is *jus dicere*, and not *jus dare*; to interpret law, and not to make law, or give law; else will it be like the authority claimed by the Church of Rome.[37]

The power of the judge was through this means constrained by pre-existing and objective law, which they would merely interpret and apply.[38] Judges were to be controlled indirectly—by controlling the narrative of the underlying methodology. This formalist conception of judicial method has been extraordinarily effective. We see it in the oracular view[39] of Blackstone, who defined the common law as 'immemorial custom...*declared* in the decisions [of] courts'.[40]

But we should make no mistake—Bacon was not trying to protect the authority of courts or enhance their legitimacy; he was trying to exert control. And that control involved a method that allowed the potential involvement of the King in every act of judicial decision-making:

> Judges ought, above all, to remember the conclusion of the Roman Twelve Tables… therefore it is a happy thing in a state, when kings and states do often consult with judges; and again, when judges do often consult with the king and state.[41]

If the King cannot decide directly, he can of course control indirectly: through narratives on method and through back-room pressure. It is at this point that the need for principles of judicial independence becomes inevitable.

B The History and the Myths

So, what are the lessons of this origin story for our myths of judicial independence?

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[37] Francis Bacon, *The Essays of Sir Francis Bacon* (first published 1625, Clark Sutherland Northup (ed) 1908) *On Judicature* 165.

[38] As Hon Michael Kirby observes (Michael Kirby, *The Hamlyn Lectures 2003: Judicial Activism: Authority, Principle and Policy in the Judicial Method* (Sweet & Maxwell, 2004) 5), Bacon saw in the role of the judge reflections of post-Reformation England: the new Bishops were expected to find their authority in the text of the Holy Scriptures, the English judge was expected to find theirs in the text of the law.

[39] William Blackstone, *Commentaries on the Laws of England in four Books: Vol I* (1765, William Draper Lewis (ed) 1922) 69 [58], describing the judges as 'living oracles'.

[40] Ibid 73 [62] (emphasis added). See also *Willis v Baddeley* [1892] 2 QB 324, 326.

[41] Bacon (n 377) 169.

Firstly, while the devolution of power over 'justice' from the King to the Court evolved over the course of the preceding centuries, it was only with the ascent of James I, and the Divine Right of Kings,[42] that it became necessary to articulate this distinction. In the *Case of Prohibitions*, Lord Coke recognised explicitly this bifurcation of power. The solution to the 'problem' of independent courts favoured by the Stuart Kings[43] was simple:

1. Judges exercise independent power;
2. Thus, judges can't be directly controlled by the executive;
3. But judges can be *indirectly* controlled by the executive (eg by attacking tenure);
4. So it's OK that judges exercise 'independent' power.

The security of tenure provided by the *Act of Settlement 1701* (UK) represents the most visible refutation of this 'solution', but only after a century of constitutional conflict. What this history of turmoil illustrates vividly, however, is that the *Myth of Supremacy* is ahistorical—it is the independent judicial function that is primary, and the mechanisms of judicial independence are derivative. Mechanisms of judicial independence exist only for the instrumental purpose of protecting that distinct judicial function. Likewise, the *Myth of Purity* disguises the contingent and evolving nature of social mechanisms which is necessary to protect judicial independence.

Secondly, the *Myths of Neutrality, Safety* and *Inevitability* arise only through the comforting patina of history that sits atop our conceptions of judicial independence. Power is rarely ceded freely, and the fight for the independence of the courts was part of a broader 'struggle for power between the Crown and parliament'[44] that required a bloody civil war and a revolution to resolve. When Parliament did eventually legislate to limit royal interference in the judiciary, it was—it must be remembered—not 'for philosophical reasons of judicial independence, but rather, as part of their actions to curb royal power'.[45] This was an intense struggle for power, a conflict over the shape and form of society. There was nothing safe, inevitable, or neutral about it. The very ideals of judicial independence that emerged from it were, at their time, deeply revolutionary. Their

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[42] Most famously espoused by James I and VI: see James VI, *The True Law of Free Monarchies: Or, The Reciprocal and Mutual Duty Between a Free King and His Natural Subjects* (Edinburgh, 1598); James I (Speech, Banqueting Chamber, 21 March 1610) (UK National Archive catalogue ref: SP 14/53 f. 43r) <https://www.nationalarchives.gov.uk/education/resources/james-i/divine-right/>.

[43] See eg *Godden v Hales* (n 21). Note though that this form of indirect pressure continued after the Stuart Kings. For example, Chief Justice Holt was summoned to the House of Lords in 1698 to explain a decision, refused, and was supported by the public: Marshall (n 5) 7.

[44] Susan Denham, 'The Diamond in a Democracy: An Independent, Accountable Judiciary' (2001) 5 *The Judicial Review* 31, 33.

[45] Ibid 34.

continuance represents an ongoing commitment to those revolutionary ideals and an ongoing threat to those who seek to concentrate power. The realisation and maintenance of judicial independence is about power and the proper governance of society—it is an inherently political ideal. And it is one that demands that the public care about it. Apathy is its enemy.

Finally, and perhaps most subtly, the history helps to illustrate the dangers of the *Myth of Methodology*. The origins of legal formalism lie deep within Bacon's alternative, more subtle solution to the 'problem' of independent courts, which might be paraphrased as follows:

1. Judges exercise independent power;
2. Thus, judges can't be directly controlled by the executive;
3. But formalist method saves us—judges only apply law, no discretion;
4. Thus, judges are under 'effective control' through this method, so are 'safe';
5. So it's OK that judges exercise 'independent' power.

This myth has been particularly pervasive, and in many ways is the most dangerous of the myths because it co-opts the judiciary in their own policing. Judges have the benefit of being shielded from scrutiny as they are simply the mouthpiece for the law.[46] But it must not be forgotten that this 'solution' was provided as a means of currying royal favour—it may look neutral, but it remains an attempt to control the judiciary. And the dark beauty of this solution is that it sets itself up as a false binary: either judges are mere formalist mouthpieces, or they possess an unaccountable arbitrary power.

C Rejecting the Myths

Taken together, the six myths of judicial independence present an appealing, safe, and deeply comforting image: a judiciary protected by an unobjectionable set of mechanisms that are now inevitable and which require no personal responsibility or risk on our part to maintain. Of course, these myths are attractive. But as history shows us, they are—each of them—false.

The *Supremacy Myth*, that judicial independence represents a primary and supreme judicial virtue, flounders when we realise that such independence is but a means to an end. As Burbank and Friedman note eloquently, when 'the mists of rhetoric have parted, in no modern political society … is judicial independence itself a goal of government'.[47] What often remains more controversial is that 'it is

[46] See below n 112 and accompanying text.

[47] Stephen B Burbank and Barry Friedman, 'Reconsidering Judicial Independence' in Stephen B Burbank and Barry Friedman (eds), *Judicial Independence at the Crossroads: An Interdisciplinary Approach* (Sage Publications, 2002) 9, 10.

not always clear what the "end" should be'.[48] In the failure to confront that gap, the supremacy myth continues in the popular imagination.

The contingent and evolutionary way in which mechanisms of judicial independence have ultimately become manifest—mechanisms crystalising in response to specific threats—highlights the falsity of the *Purity Myth*. As Gleeson CJ of the High Court of Australia recognised in *North Australian Aboriginal Legal Aid Service Inc v Bradley*,[49] there 'are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration' because

> there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.[50]

Yet international statements on judicial independence persist in implying that there is some pure, unadulterated form of independence—despite the ahistorical nature of such a claim.

That the modern foundations of those mechanisms are contained in a statute entitled the *Act of Settlement* highlights that judicial independence is an inherently dangerous idea, contrary to a *Myth of Safety*. Following war and revolution, a settlement was reached that unequivocally curtailed royal power. Judicial independence (and the separate judicial power which it supports) inherently threatens competing sources of political power in the polity. The labelling of the United Kingdom Court of Appeal as 'Enemies of the People'[51] following the decision in *Miller No 1*[52] illustrates the anger when that threat is realised.[53] An independent and legitimate judiciary is *necessarily* a threat to a populist and powerful executive (or those otherwise in a position to improperly influence judges)—it is a locus of power outside their control.

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[48] Pimentel (n 7) 7.
[49] (2004) 218 CLR 146.
[50] Ibid 152 [3].
[51] Claire Phipps, 'British newspapers react to judges' Brexit ruling: "Enemies of the people"' *The Guardian* (online, 4 November 2016) <https://www.theguardian.com/politics/2016/nov/04/enemies-of-the-people-british-newspapers-react-judges-brexit-ruling>.
[52] *R (Miller) v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), upheld in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017), [2018] AC 61.
[53] This phrase was used in reporting on the decision of the High Court in *Miller* (n 52), concerning whether Article 50—the provision starting the formal withdrawal of the United Kingdom from the European Union—could be 'triggered' by the government, without Parliamentary consent. When the decision against the government was handed down it was met with howls of dissent—the judges were personally attacked, labelled 'enemies of the people', and the government refused to defend the judges against these extraordinary attacks. See further Patrick O'Brien, '"Enemies of the People": Judges, the media, and the mythic Lord Chancellor' [2017] *Public Law* 135.

As shown by Bacon's approach, one of the most powerful responses to this is to seek to bypass the threat by indirectly exercising control via reframing the method by which judges ought to decide their cases: to reinforce the *Methodology Myth*. In many respects this has been the most persistent and successful of the counter independence initiatives. From the work of Bacon and Blackstone[54] emerged the formalist paradigm that dominated common law jurisprudence for over two hundred years. As will be seen, this oracular view of the judicial function reached its zenith at the end of the 19th century, when Lord Esher MR in *Willis v Baddeley*[55] felt no hesitation in saying there is 'no such thing as judge-made law, for the judges do not make the law'.[56] Yet as the 20th century approached, theorists such as Holmes[57] and Gény[58] began the movement on both sides of the Atlantic to honestly acknowledge the evaluative discretion inherent in the exercise of the judicial function.[59]

By the 1970s the rejection seemed complete. Lord Reid delivered his '*coup de grace*'[60] to the doctrine of legal formalism when he famously stated '…we do not believe in fairy tales anymore'.[61] Yet the underlying political power of the methodology myth persists. Judges liberated were judges dangerous. A counter-reformation[62] was soon launched in the United States under the guise of 'originalism'. Decisions such as *Brown v Board of Education*[63] provided the impetus for the politically (and racially) charged doctrine of originalism.[64] It was no coincidence that originalism has been championed by conservative jurists such as Antonin Scalia;[65] it has always been a movement designed to advance a *political* not *jurisprudential* agenda. Perhaps more than any other, this myth of methodology

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[54] Blackstone (n 39) 73 [62].
[55] *Willis v Baddeley* (n 40).
[56] Ibid 326. It should be noted that this was a political stance in light of the more activist role of Parliament, especially in the 1820s. Lord Esher did acknowledge that judges 'frequently have to apply existing law to circumstances as to which it has not previously been authoritatively laid down that such law is applicable', while maintaining that such application was not law-making.
[57] Oliver Wendell Holmes, 'The Path of the Law' (1897) 10(8) *Harvard Law Review* 457, 466.
[58] François Gény, *Méthode D'Interprétation Et Sources en Droit Prive Positif: Vol II*, (Librairie Générale de Droit & de Jurisprudence, 1919) 93, s 159; 142 s 168.
[59] See eg Benjamin N Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921) 43; Jerome Frank, *Law and the Modern Mind* (Brentano's, 1931) 100; Joseph C Hutcheson, 'The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision' (1929) 14 *Cornell Law Quarterly* 274, 285.
[60] Kirby (n 38) 43.
[61] Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.
[62] See, eg, Kirby (n 38) 13. Similar terminology is utilised by Lucy (William Lucy, *Understanding and Explaining Adjudication* (Oxford University Press, 1999) 1–16) when he describes the competing accounts of 'orthodoxy' and 'heresy', though he addresses different movements under these labels.
[63] 347 US 483 (1954).
[64] Calvin Terbeek, '"Clocks Must Always Be Turned Back": *Brown v Board of Education* and the Racial Origins of Constitutional Originalism' (2021) 115(3) *American Political Science Review* 821.
[65] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 25.

persists and distorts contemporary thinking about the judicial role and judicial independence. Yet (dangerous) myth it is, and (dangerous) myth it has always been.

This myth helps disguise the fact that, so often, attacks on the decisions and decision-making methods of judges are nothing more than blatant political grandstanding. As the *Methodology Myth* has its origin with Bacon's apologism for the King—and continues to provide cover for apologists for executive (and other related) sources of power—the *Neutrality Myth* provides both a sword and a shield for activism. This view of judicial independence as a politically neutral concept (logical, pure, unavoidable, and unobjectionable) permits critics to attack judges *under the guise* of defending the judiciary. Yet judicial independence is not a politically neutral idea—it supports a conception of society where power is diffused, and the powerful are accountable. For the Cavaliers this is intolerable.[66] So judges who promote this constitutional settlement are attacked as being 'activist judges'—a term that is mere politics under the label of jurisprudence.[67] Campaigns such as the highly political Judicial Power Project in the United Kingdom[68]—funded by a right-wing think tank[69]—use this language of neutrality to critique judges[70] who deviate from some mythical ideal.[71] The neutrality myth gives a veneer of legitimacy to these attacks: we are simply protecting the judiciary from deviant judges. The instances of right-wing attacks on 'progressive' judges are legion.[72] This is not about the politics of the judge (or the perceptions of their

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[66] I use the evocative term 'Cavaliers' (referencing the Royalists in the English civil war) to highlight that attacks on the judiciary in this way are almost entirely an act of pure political posturing—a calculated intervention in favour of a preferred political settlement.

[67] For a superb history of the use of this term see Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

[68] See 'About the Judicial Power Project' (Web Page) <https://judicialpowerproject.org.uk/about/>. The Judicial Power Project ('JPP') describes its task in the following terms: 'The focus of this project is on the proper scope of the judicial power within the constitution. Judicial overreach increasingly threatens the rule of law and effective, democratic government. The project aims to address this problem—restoring balance to the Westminster constitution—by articulating the good sense of separating judicial and political authority.' See further Richard Ekins and Graham Gee, 'Putting Judicial Power in its Place' (2017) 36(2) *University of Queensland Law Journal* 375.

[69] The JPP is a project of Policy Exchange (see <https://policyexchange.org.uk/>), a leading conservative think tank. Policy Exchange holds itself out as the 'leading think tank' in the United Kingdom and it is certainly one of the most influential on the political right.

[70] See eg John Finnis, 'The unconstitutionality of the Supreme Court's prorogation judgment', *Judicial Power Project* (online, 2 October 2019) <https://judicialpowerproject.org.uk/the-unconstitutionality-of-the-supreme-courts-prorogation-judgment-john-finnis/>.

[71] For an excellent overview of the way in which the JPP selectively approaches the task of criticising judicial power, see Paul Craig, 'Judicial Power, the Judicial Power Project and the UK' (2017) 36(2) *University of Queensland Law Journal* 356, 357-60.

[72] As just one example, following the High Court of Australia's decision in *Love v Commonwealth* [2020] HCA 3, (2020) 270 CLR 152, the Home Affairs Minister immediately described the decision as a 'very bad thing' that would be exploited by lawyers: Evan Young, '"A very bad thing": Peter Dutton slams High Court's Aboriginal "aliens" ruling', *SBS News* (online, 13 February 2020) <https://www.sbs.com.au/news/article/a-very-bad-thing-peter-dutton-slams-high-courts-aboriginal-aliens-ruling/nzysxl9ha>.

decision); it is about the politics of the critic. An independent judiciary—exercising a publicly supported and legitimate judicial power—is beyond the control of factions used to exercising undue influence in society. Bacon's bargain is a powerful retaliatory weapon, and as nakedly political now as it was then.

Similarly, where a judge does inappropriately engage in patently political decision-making—for example the United States Supreme Court in *Dobbs v Jackson Women's Health Organization*[73]—this myth (and the methodology myth) can be used as a shield to protect one's chosen judges. Ultimately, once we accept that judicial independence is a derivative concept that exists to protect the distinct judicial function, it becomes apparent that it *cannot* be pursued in a manner that is neutral as to the vision of the society we want. Such a diffusion of power, and the endorsement of public, accountable and rational decision-making, is a profoundly political position—and can only be protected by recognising this.

Finally, then, we are forced to confront the *Inevitability Myth*. Judicial independence exists to protect a political vision of society that is inherently opposed to centralised and autocratic power. The greater the ascendency of autocracy and/or populism, then the greater the pressure to walk back independence. Powerful populists will denigrate any judge who dares oppose their agenda[74]—a point made far too familiar in the recent Politics of the United States,[75]

For typical illustrations of the vehement criticism of the decision, see Morgan Begg, 'Courting Controversy' (Winter 2020) *IPA Review* <https://ipa.org.au/ipa-review-articles/courting-calamity>; Chris Merritt, 'Lunacy Protects Foreigners Over Us', *The Australian* (online, 12 February 2020) <https://www.theaustralian.com.au/business/legal-affairs/lunacy-protects-foreigners-over-us/news-story/274e7b2c2690ecc9023beb021ac40b26>. For an example of how cases like this are treated as extraordinary acts of judicial activism by certain parts of the academy, see Johnny M Sakr and Augusto Zimmermann, 'Judicial Activism And Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119, 122, where the authors hold the case up as a 'dangerous' case where 'unelected judges' have improperly sought to 'evolve the law in the light of contemporary values'. For an excellent review of how this case led to attacks on the judiciary, see Kieran Pender, 'Immigration case raises concerns over High Court politicisation', *The Saturday Paper* (online, 9 April 2022) <https://www.thesaturdaypaper.com.au/news/politics/2022/04/09/immigration-case-raises-concerns-over-high-court-politicisation#hrd>.

[73] 597 US 215 (2022).

[74] In her recent commentary, McMillan noted that there is a growing trend of populist political leaders attacking the independence of the judiciary, thereby undermining fundamental aspects of democracy and civilised society: Anne McMillan, 'The global assault on rule of law', *International Bar Association* (online, 14 September 2022) <https://www.ibanet.org/The-global-assault-on-rule-of-law>.

[75] The examples from the first Trump administration are many, but one clear example was the attack on the 'so-called judge' who temporarily blocked his travel ban in 2017: Matt Ford, 'Trump's Attack on a Judge for Staying His Travel Ban', *The Atlantic* (online, 4 February 2017) <https://www.theatlantic.com/politics/archive/2017/02/trump-washington-judge/515709/>.

United Kingdom,[76] Hungary,[77] and Israel.[78] Of course they will. This is a fundamental clash of political visions. But this means that judicial independence, and the distinct judicial function, require constant maintenance and vigilance. Judicial independence cannot be seen as an inevitable aspect of contemporary constitutionalism.

Even where there is some alertness to this fact, there can be a tendency to shy away from the exposed myths for fear of diminishing independence. Geyh notes, for example, that if we ascribe to a traditional conception of method, then 'once it is conceded that independent judges do not simply follow the law, the rationale for judicial independence is diminished or obliterated'.[79] The cry rises: 'If judges exercise discretion, then they can't be independent; but we need them independent, so they cannot have discretion.' This, of course, reverses the causality and buys straight into the *Methodology Myth*. This is not a pick and choose. Each of the six myths is false, and their abandonment is cumulative. But it does reveal a yearning for a coherent and consistent model of judicial independence to replace the inherently unstable structure which is based on those myths.

IV A NEW CONCEPTUAL FRAMEWORK FOR JUDICIAL INDEPENDENCE

So, what are we left with, after the myths are blown away? Is there a way to understand and justify judicial independence that is more intellectually honest?

In the following section, I set out a vision of judicial independence that maintains the central importance of the concept in our modern political settlement but rests it on a rigorous and coherent foundation of judicial theory. Despite the reams that are written on judicial independence, this type of theoretical exposition remains rare. Writing in 2000, Parker considered that:

> Australia is currently ill-equipped to discuss judicial independence in an informed way…[a]s a society, we have not grappled sufficiently in theoretical terms with the nature and purpose of judicial independence, and consequently we lack a conceptual model that will help…to formulate policies, explain them, and know how to response

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[76] See discussion above nn 51–3.

[77] Over the last decade, populist governments in Hungary have mounted an increasingly active campaign against the judiciary in that country. See Flora Garamvolgyi and Jennifer Rankin, 'Viktor Orbán's grip on Hungary's courts threatens rule of law, warns judge', *The Guardian* (online, 14 August 2022) <https://www.theguardian.com/world/2022/aug/14/viktor-orban-grip-on-hungary-courts-threatens-rule-of-law-warns-judge>; International Bar Association Human Rights Institute, *Still under threat: the independence of the judiciary and the rule of law in Hungary* (Report, October 2015); Peter Čuroš, 'Attack or reform: Systemic interventions in the judiciary in Hungary, Poland, and Slovakia' (2023) 13(2) *Oñati Socio-Legal Series* 626.

[78] A series of protests and mass rallies occurred in early 2023 in Israel over the Netanyahu government's plan to enact a series of reforms to the judiciary, reforms widely seen as an attempt to undermine judicial independence: Patrick Kingsley, 'Netanyahu Surges Ahead With Judicial Overhaul, Prompting Fury in Israel', *New York Times* (online, 12 January 2023) <https://www.nytimes.com/2023/01/12/world/middleeast/netanyahu-israel-judicial-reform.html>.

[79] Geyh (n 18) 446.

> to issues as they arise. This may seem paradoxical. Generally judicial independence commands almost universal approval.[80]

In the 20 years since this statement, no authoritative or widely accepted vision of judicial independence has emerged to displace this lacuna. This section offers a summary of my attempt to address this plea. This section draws upon my earlier work,[81] but reframes key ideas in it in light of the context of the mythology of independence discussed in this article. It argues that we can have a coherent and theoretically satisfying vision of judicial independence, absent the six myths.

The starting point is the inversion of the *Supremacy Myth*. Judicial independence is not a supreme and ultimate virtue, but an inherently derivative and dependant concept. Once we accept that independence may need tempering in any given circumstance, we are making 'a tacit admission that there are other purposes or ideals to be served'.[82] Most obviously, such independence exists to support impartiality: as Marshall notes, 'judicial independence is an underlying condition of judicial impartiality'.[83] As the Canadian Supreme Court held in *R v Lippé*:

> The overall objective of guaranteeing judicial independence is to ensure a reasonable perception of impartiality; judicial independence is but a 'means' to this 'end'. If judges could be perceived as 'impartial' without judicial 'independence', the requirement of 'independence' would be unnecessary.[84]

While the dependence of judicial independence upon impartiality may be the most obvious derivation, once we accept that we should be looking for a higher order value it should be immediately apparent that we cannot stop there. Why do we want impartial judges? What does this mean, and why are they valuable? Impartiality is no more an end than independence. What is a foundation that securely supports the superstructure that ultimately manifests as judicial independence?

For me the answer to these questions is to honour Lord Coke's invitation and to explore what it means to have a distinct judicial function in society. Judicial independence cannot be understood in the abstract; its content, standards and procedural safeguards emerge from related aspects of the judicial role. The core relationships between these various roles can be conceived of in the following manner:[85]

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[80] Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 62–3.
[81] This theory is developed more exhaustively in McIntyre (n 6).
[82] Pimentel (n 7) 5.
[83] Marshall (n 5) 28.
[84] *R v Lippé* [1991] 2 SCR 114, 139.
[85] This framework is derived from conception of the nature and implication of the judicial function. See McIntyre (n 6) 14–6.

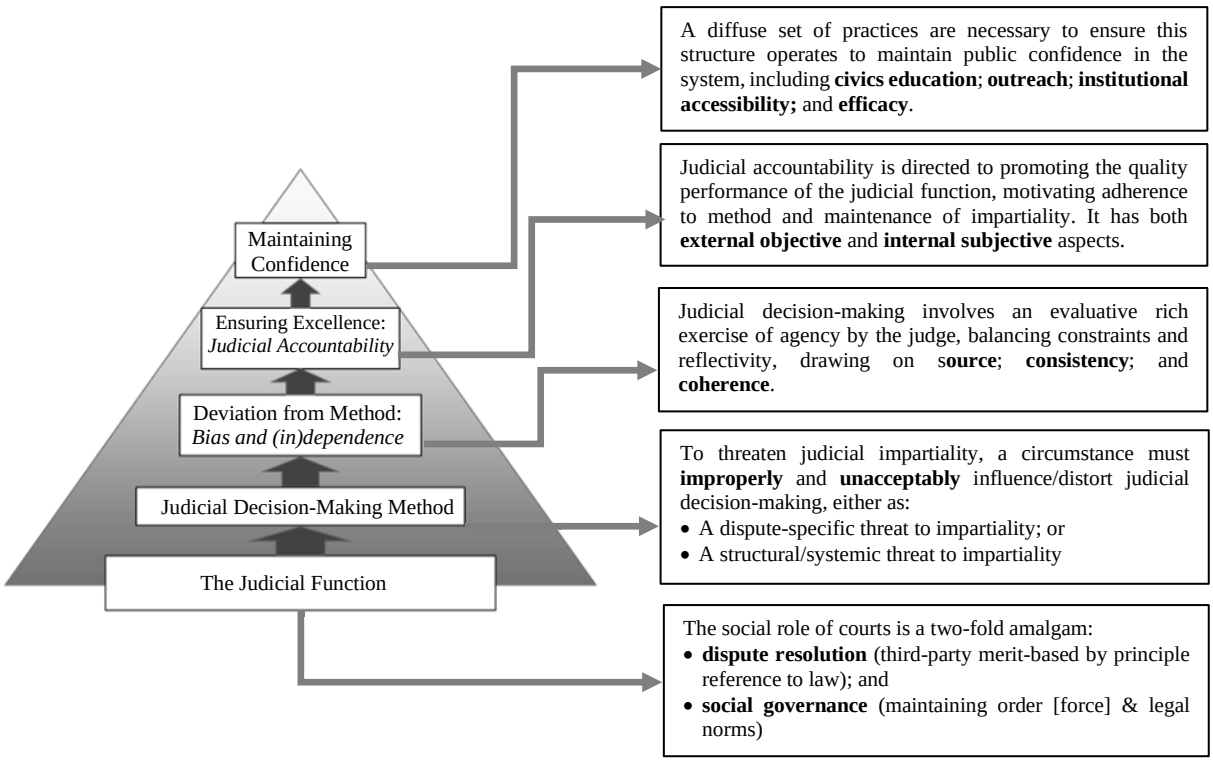

Figure 1: Conceptual Relationship of Judicial Bias to Related Aspects of the Judicial Role

In this vision of the judicial role, the foundational concept is provided by the distinct and independent judicial function—a social/legal/political function that is performed by judges separately and distinctly from the executive. It is this distinct function that—I argue—is the key proposition to emerge from Lord Coke's decision in *The Case of Prohibitions*.

Once we recognise that judges are performing a distinct social role, then a series of questions follows: What is the scope of that role? How is it performed? What represents a deviation from that method? How do we ensure that role is performed with excellence? How do we maintain confidence in—and support for—that distinct role?

The integrated vision of judicial theory I develop more expansively in *The Judicial Function*[86] seeks to provide a systematic and internally coherent answer to these questions. The discussion in this article summarises that answer through the frame of the myths of independence, and through it articulates a vision of judicial independence that exists independent of the myths.

[86] McIntyre (n 6).

The schema outlined in Figure 1 highlights the progression and dependencies of these different concepts. Crucially, it highlights the folly of undertaking an exposition of any one of those concepts in isolation from the rest. Arguably, the insufficient theoretical engagement with judicial independence that Parker bemoans arises, in no small part, from the unwillingness to place it in its larger context.

I have sometimes described judicial independence as a 'fourth order derivative concept' to highlight that its role is dependent upon those underlying functions and methods and is limited by them. This is the liberty gained by abandoning the *Myth of Supremacy*: it allows us to conceive of judicial independence as the structural component of the concept of judicial impartiality. Like 'impartiality', the pursuit of judicial independence may undermine those higher values where it is too vigorously undertaken. But more so, it highlights that where we attempt to focus too tightly upon independence our thinking may be distorted by concerns better dealt with through higher order concepts. We should not conflate discussion of methodology or accountability with independence—of course they are related, but by disaggregating them we can more appropriately focus on the concerns and difficulties of each distinct concept.

Ultimately, this vision of an integrated judicial theory allows us to vigilantly and vigorously defend judicial independence, not for its own right, but because of the visions of society it supports. Ideals of legality, public rationality, and governance by the rule of law depend upon a healthy judiciary that is appropriately independent so as to perform the core judicial function. This is a political vision worthy of support.

Yet before we can turn to the implications of such a vision, it is necessary to first expand upon the core judicial theory outlined above.

A The Foundational Judicial Function

What then is the core function of the judge? To understand the nature of the judicial function it is necessary to understand the *judicial* form of its two related, yet discrete, social roles: (1) the resolution of particular disputes; and (2) the governance of society more generally.

1 The Judicial Resolution of Disputes

The starting point in understanding the judicial function must be the basic proposition that the judiciary is involved in resolving disputes.[87] The idea of the 'judge' resolving disputes is ancient. This very familiarity, though, makes it critical to delineate the judicial from other forms of dispute resolution.

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[87] See Aharon Barak, 'On Society, Law and Judging' (2011) 47(2) *Tulsa Law Review* 297, 299; John Doyle, 'The Judicial Role in a New Millennium' (2001) 10 *Journal of Judicial Administration* 133, 136.

In my other work[88] I develop a taxonomy for the characterisation of different systems of dispute resolution, that draws upon fundamental substantive criteria by which the dispute is resolved (might, merit, or chance) and two foundational procedural categories by which the method operates (inter-partes ('dyadic'[89]) and third-party ('triadic'[90])). The combination of these substantive and procedural elements creates six categories for the characterisation of dispute-resolution methods:

		Substantive Criteria		
		'Might'	**'Merit'**	**'Chance'**
Procedural Criteria	**Inter-Party**	(1) Inter-Party Might	(3) Inter-Party Merit	(5) Inter-Party Chance
	Third-Party	(2) Third-Party Might	(4) Third-Party Merit	(6) Third-Party Chance

Figure 2: Species of Dispute Resolution Methods

Within this matrix, judicial resolution sits in category 4: a judge is a disinterested third party, finally and authoritatively determining a dispute on its merits without any need for subsequent agreement/adoption by the disputants. The judicial form is, though, only of third-party merit-based resolution. Merit is principally determined by reference to 'law', which means that only a small aspect of the broader 'dispute' (and underlying conflict of interests) is directly considered by the judge. The court possesses an institutional character and judges are, essentially, state actors.[91] The judicial form has a peculiar formal and visible process, conducted in public and governed by a determinate decision-making method. This supports a reputation for personal judicial and institutional integrity that in turn promotes the finality of judicial resolutions.

2 Judicial Social Governance

Dispute resolution is, though, an insufficient (if necessary) description of the judicial role. A court is not 'simply a publicly funded dispute resolution centre',[92] but a core 'institution of governance'[93] that affects the governance and regulation

[88] McIntyre (n 6) 35–45.
[89] Stone Sweet (n 6) 12.
[90] Ibid 15.
[91] Carl Baar, 'The Emergence of the Judiciary as an Institution' (1999) 8 *Journal of Judicial Administration* 216, 217. As Rose notes, the judiciary is 'as much a part of government as the executive and the legislature': Alan Rose, 'The Model Judiciary: Fitting in with Modern Government' (1999) 4 *The Judicial Review* 323, 323.
[92] J J Spigelman, 'Judicial Accountability and Performance Indicators' (2002) 21 *Civil Justice Quarterly* 18, 26.
[93] P N Bhagwati, 'Role of the Judiciary in Developing Societies: New Challenges' in Tun Mohamed Salleh Abas and Dato' Visu Sinnadurai (eds), *Law, Justice and the Judiciary: Transnational Trends* (Professional Law Books, 1988) 25, 38.

of society as a whole.[94] There should be no mistake: *the judicial function involves a core form of social governance in a modern democratic society*.

While I develop this aspect more fully, if abstractly, in *The Judicial Function*, it is worth lingering over this idea here, as it pushes back against the vision of the court put forward by Bacon. As soon as we see the courts conceiving of their role as distinct and separate from the Crown, it becomes apparent that the courts are engaging in an independent governance role. Courts become loci of *governance power* outside the direct control of the Crown. It is exactly this aspect of the judicial function that motivated the diminution of judicial legitimacy as seen in the myth. Mere dispute resolution is safe. It is only when it is integrated into the systems of power of the state, and able to actively contribute to the governance of that state, that it becomes threatening. To understand the nature of this threat, it is necessary to appreciate that judicial governance has two forms: (1) governance through the exercise of power; and (2) governance through the regulation of rules.

Firstly, courts operate as *the principal* formal dispute resolution system of the modern democratic society,[95] reducing inter-party conflict in a manner that significantly contributes to the maintenance of social order.[96] As Couture forcefully argued:

> The first impulse of a rudimentary soul is to do justice by his own hand. Only at the cost of mighty historical efforts has it been possible to supplant in the human soul the idea of self-obtained justice by the idea of justice entrusted to authorities.
>
> A civil action, in final analysis, then, is civilization's substitute for vengeance.[97]

The principal resolution role substantially arises from the fact that compliance with judicial decisions is ensured through the enforcement abilities of the state:[98] courts possessing a unique ability to directly call upon the state to utilise force to enforce their decisions.[99] Moreover, it has increasingly been seen to be the case that direct application of state force—such as punitive detention—can *only* occur through judicial processes.[100] The courts have become the gatekeepers of the socially legitimate exercise of state force.

Secondly, judicial decisions profoundly affect the legal normative order. *Every* judicial application of legal rules directly impacts upon that law, strengthening,

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[94] As Doyle notes, the 'judiciary is the means by which the State resolves issues that arise under the law, and the means by which the rule of law is maintained': Doyle (n 87) 134.
[95] See McIntyre (n 6) 57–8.
[96] As Devlin notes, in resolving disputes, the judiciary 'secures us from comparable disorders within the nation': Patrick Devlin, *The Judge* (Oxford University Press, 1979) 4.
[97] Eduardo J Couture, 'The Nature of Judicial Process' (1950) 25 *Tulane Law Review* 1, 7.
[98] See Holmes (n 57) 457. See also Ronald Dworkin, *Law's Empire* (Hart Publishing, 1986, 1998 reprint) 93.
[99] See Dworkin (n 98) 93.
[100] *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37; 415 ALR 254.

maintaining, and reforming it. This active process of alteration helps to ensure the law gives concrete meaning to social values,[101] diminishes legal uncertainty, and enhances the possibility of settlement.[102] The judicial form of normative governance can be better understood by reference to the four forms of 'rule-based' governance:

	Mode of Governance	Description
(1)	**Reinforcing Social Rules Through Application**	The act of applying a rule to resolve a dispute reinforces that rule, affirming its ongoing validity.[103]
(2)	**Increasing the Predictability of Rules**	Each application of a rule helps make the substantive content of that rule clearer and its operation more predictable.[104]
(3)	**Maintaining Coherence Between Rules**	The application of rules can clarify the relationships *between* rules, making the operation of the broader normative regime clearer, more coherent and more predictable.[105]
(4)	**Altering the Substantive Rule**	Finally, dispute resolution mechanisms can provide a quick and flexible means of altering the substantive content of the rules. [106]

Figure 3: Modes of Judicial Governance through Rules

Law-making (in the use described above) is an unavoidable aspect of both the dispute resolution and governance aspects of the judicial role and is inherent—to a greater or lesser degree—in every judicial decision.[107] This role is an inevitable aspect of the public and authoritative application of law, with each decision—whether very weakly or very strongly—changing the law.[108]

Taken together, this dual aspect role of dispute resolution and social governance is a profoundly important mode of regulating society.

When seen in the historical context of the early Stuart era, the emergence of a distinct judicial function, recognised in the *Case of Prohibitions*, was—and was seen to be—a profound threat to centralised royal executive power. The emergent constraining role of the judicial supervision of *legitimate* state force became particularly apparent in contrast to the arbitrary and ultimately repugnant powers

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[101] Owen M Fiss, 'Foreword: The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 12. Indeed, Fiss argues that the core social purpose or function of the judge 'is not to resolve disputes, but to give the proper meaning to our public values', with the resolution of the dispute a mere consequence of this decision: 30.

[102] Devlin (n 96) 89.

[103] McIntyre (n 6) 59.

[104] Ibid 59–61.

[105] Ibid 61.

[106] Ibid 62–3.

[107] As Dworkin argues, judges 'unquestionably 'make new law' every time they decide [a]...case': Dworkin (n 98) 6.

[108] As Barak notes, '*the meaning of the law before and after a judicial decision is not the same.* Before the ruling, there were…several possible solutions. After the ruling, the law is what the ruling says it is. The meaning of the law has changed. New law has been created': Aharon Barak, 'Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(1) *Harvard Law Review* 19, 23 (emphasis added).

of the Star Chamber under Charles I.[109] But it has been the normative governance role of the court that has come to be seen as the most significant role—as constitutional governance through law became the accepted norm, the capacity to determine lawfulness became paramount. With Coke, the independent role of the court in determining and defining lawfulness became concrete and irrefutable. At that point, the courts became, unambiguously, a direct competitor to the amorphous power of the Crown. Once a distinct function emerged, an imperative to minimise that power was created for a Crown whose power was correspondingly diminished.

The judicial function I articulate in the above section has evolved beyond that envisaged by Lord Coke, but the core components are recognisable—as is the threat of this function to all those seeking to monopolise State power.

B The Constrained Evaluation of the Judicial Method

This distinct judicial function is intimately interwoven with the decision-making processes of the judge. As we saw with the *Methodology Myth* that began with Bacon, the first sustained models of judicial decision-making only started to emerge once the distinct judicial power was asserted. Bacon sought to use method to limit the role of the judge to interpretation rather than creation, in a manner akin to the constrained role of the post-Reformation Bishops.[110] In drawing a sharp and fundamental line between the act of *creating* law and the act of *declaring* (or applying) law, we see the origin of the first great judicial archetype: *judge as machine*. Under this conception, the law was taken to exist and the judge's role merely to find and mechanistically apply it. As Kirby notes, this conception of the role of the judge was 'basically one of verbal analysis and application'.[111] Indeed, as foreshadowed above, Montesquieu would describe judges as simply the mouthpiece for the law, a '*bouche de la loi*'.[112]

This doctrine was particularly effective at providing a clear answer to the political question of how to limit judicial *power*. Unfortunately, it bore no meaningful relationship to the task of explaining or guiding the actual decision-making of judges. Indeed, it obscured, if not outright denied, all aspects of discretion and judgement in deciding cases.

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[109] Michael Stuckey, 'A Consideration of the Emergence and Exercise of Judicial Authority in the Star Chamber' (1993) 19(1) *Monash University Law Review* 117.

[110] As Kirby observes, Bacon saw in the role of the judge reflections of post-Reformation England: 'Whereas the new Bishops were expected to find their authority in the text of the Holy Scriptures, the English judge was expected to find their authority in the text of the law': Kirby (n 38) 5.

[111] Kirby (n 38) 6. As Traynor noted, it was as if the legal profession had come 'under the spell of Blackstone's vision of the common law as a completed formal landscape graced with springs of wisdom that judges needed only to discover to refresh their minds for the instant case': Hon Roger J Traynor, 'Statutes Revolving in Common-Law Orbits' (1968) 17 *Catholic University Law Review* 401, 402.

[112] Baron de Montesquieu (Cohler et al (trans)), *The Spirit of the Laws* (Cambridge University Press, 1750, 1989 ed) XI 6. See also Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (Routledge, 2009) 48.

Beginning in the late 19th century, however, jurists began to critically expose the delusions of the old orthodox. Oliver Wendell Holmes set about attacking the core of the orthodoxy, challenging the great 'fallacy' of formalism, the notion that 'the only force at work in the development of the law is logic'.[113] For François Gény, this element of choice negated the core ambition of the great codification projects, and made the personal character of the judge critically important, indeed unavoidable: the 'personal measure of the interpreter' could not be eliminated from any system of judicial interpretation.[114]

Over the next fifty years, jurists engaged in a search for a theoretical framework to legitimise extra-legal influences.[115] The acknowledgement of the subjectivity of the process was taken to an extreme position in the work of the Legal (or American) Realists, led by Jerome Frank. To the realist, judicial decision-making is a largely intuitive process, with deliberative reasoning only relevant to later rationalisation.[116] This emphasis on subjectivity evolved to support the second great archetype of judicial methodology: *judge as Solomon.*

To see why it is necessary to understand the nature of judicial method before one can analyse the nature of judicial independence, it is critical to appreciate the appeal—and fundamental limitations—of these two paradigmatic judicial archetypes that have haunted Western legal thinking for the last four hundred years. These existing archetypes can be thought of in the following terms:

Justice Machine: The archetypal judge of the orthodox formalism sees the judge as a highly complex computer or 'a giant syllogism machine'.[117] The judge has no freedom, and merely 'echoes the words of the law';[118] the law, externally mandated and determinate, provides the major premise, with the minor premise provided by objectively 'true' pre-existing facts. The judge logically and objectively applies the law to the facts, in a process free of discretion, creativity or normative consequences. The ideal judge takes the 'inputs' of the dispute and infallibly 'outputs' the legal victor.

Justice Solomon: The archetypal judge of the post-formalist/realist can be conceived as the wise, contemplative, and benevolent Justice Solomon. These kindly disposed judges[119] determine the dispute according to lofty ethical

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[113] Holmes (n 57) 465.
[114] See Gény (n 58) 93 s 159; 142 s 168.
[115] See, eg, Cardozo's attempt to set out a more frank and forthright exposition of judicial method directive forces at play: Cardozo (n 59) 30–1.
[116] Chris Guthrie, Jeffrey J Rachlinski and Andrew J Wistrich, 'Blinking on the Bench: How Judges Decide Cases' (2007) 93(1) *Cornell Law Review* 1, 2.
[117] Burt Neuborne, 'Of Sausage Factories and Syllogism Machines: Formalism, Realism, and Exclusionary Selection Techniques' (1992) 67(2) *New York University Law Review* 419, 421.
[118] H J M Boukema, *Judging: Towards a Rational Judicial Process* (WEJ Tjeenk Willink, Zwolle, 1980) 76.
[119] Reminiscent of Gény's *président Magnaud et les bons juge du Château-Thierry*: Gény (n 58) 289 s 196.

principles and vague notions such as 'justice'. The semi-divine Justice Solomon has such wisdom, learning and foresight that not even the constraint of 'law' is required.

Both these archetypes have aspects that are attractive and aspects that are repulsive. Judge Machine appeals to those who seek to limit judicial power. Yet the machine is entirely unresponsive to the specific circumstances and implications of the instant dispute. The archetype of Justice Solomon illustrates the opposite extreme: the perfect dispute resolution mechanism, ideally and absolutely responsive to the individual needs of the disputants, yet dependent upon a divinely wise, benevolent, and omniscient judge. Moreover, there is no predictability, as mortal disputants could not anticipate the divine judgment.

Ultimately, both archetypes are unacceptable: the Justice Machine image is ill adapted to human disputes, the Justice Solomon image is ill adapted to human judges. Yet in the context of myths of judicial independence, the attraction of these archetypes becomes apparent. Justice Machine is Bacon's progeny—a construct designed to deny judicial power. Justice Solomon is, like the biblical counterpart, power personified.

A satisfactory theory of judicial decision-making method must seek to strike an acceptable balance between the absolutes of the archetypes. Rather than being either logic or choice, the judicial decision-making process should be seen as composed of non-arbitrary discretions, directed and guided by reasoning yet dependent upon an act of will. This requires the embrace of the irresolvable tension between both Justice Machine and Justice Solomon, an embrace—as Fuller would say—of the 'antinomy of reason and fiat'.[120] This suggests a new archetypal judge that rejects false certainty. I argue that a better archetype sees the judge as an essentially human agent, forced to take responsibility for his or her choices. The interests and imperatives of Justice Solomon and Justice Machine act like the proverbial angel on one shoulder and devil on the other. The human judge is unable to determine which is devil or angel, and must respect both to find balance. The calls of the angel and devil force the judge to alertness as to implications and alternatives; the choice and the responsibility ultimately come back to the agency of the judge.

This embrace of inherent tensions provides the judge with spaces of genuine evaluative choice and deliberative freedom, with those spaces in turn guided and constrained by a series of limits. Taken together these constraints meaningfully fetter the discretion of the judge to the degree that the decision is not arbitrary, yet no limit is absolute.

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[120] Lon L Fuller, 'Reason and Fiat in Case Law' (1946) 59(3) *Harvard Law Review* 376, 377.

1 The Interplay of Reason and Fiat in Judicial Decision-Making

Once this conception of the judicial role is articulated, the question becomes *how* the judge is constrained and guided in the processes of judicial reasoning. I argue that the judge utilises three main forms of legal reasoning:

	Form of Reasoning	Description
1	***'Source-Based' Reasoning***	The judge identifies and interprets the existing source-norms that provide the raw material of the dispute-norm, prioritising them by assessing their pedigree, provenance and hierarchal authority.
2	***Analogical Reasoning***	The judge refines these source-norms by placing them within a historical continuum. Demands of consistency require the judge to assess the similarities and differences between dispute and previous decisions and, by analogy, either expand or constrict the operation of those norms.
3	***'Principle-Based' Reasoning***	The judge examines the substantive content of source-norms, extracting underlying principles that shape and direct the development of the law. Through this 'inductive' or 'principle-based' reasoning the judge will extrapolate legal principles that promote systemic normative consistency and coherence.

Figure 4: Forms of Judicial Reasoning

The progression between these aspects of judicial reasoning is not linear, and the judge will shift backwards and forwards between them. In this manner, these modes of reasoning have both a constraining and generative aspect:[121]

	'Source'	'Consistency'	'Coherence'
Restrictive Aspect	Source as Constraint	Consistency as Constraint	Coherence as Constraint
Generative Aspect	Source-Based Reasoning	Analogical Reasoning	Principle-Based Reasoning

Figure 5: Component Forms of Judicial Reasoning

Critically, each stage of this process manifests Fuller's tension between 'reason and fiat', in that the judge is meaningfully constrained and limited in constructing the law, but nevertheless possesses a genuine and irreducible evaluative discretion.

This same tension is present in the judicial assessment of the factual circumstances of the dispute. As I outline elsewhere, the judge is unavoidably constrained in the construction of an 'accurate' assessment of the underlying facts.[122] As with the judicial assessment of law, the judicial assessment of fact is genuinely constrained by the circumstances of the 'true' facts but is also utterly dependent upon exercises of discretion by the judge in every case.

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[121] See McIntyre (n 6) 102.

[122] I conceive these as four fundamental 'problems' that force the exercise of judicial discretion in any assessment of fact, namely: (1) The Problem of Relevance; (2) The Problem of Frame of Reference; (3) The Problem of 'Truth' and Sufficiency; and (4) The Problem of Practical Process: ibid 129.

Ultimately, the judge is faced with a reflective and iterative process of applying determined law to assessed fact to reach a resolution in the case. As with the above phases of decision-making, the judge is forced to exercise a genuine yet constrained discretion in this process. In this phase, however, the underlying objectives of the core judicial function come to the fore to influence the choices of the judge. Firstly, the dispute-resolution aspect of the judicial function provides key influences on judicial choice, favouring the most effective, efficient, and final resolution of the dispute. The 'best' alternative for each particular dispute must be assessed with respect to values such as equity, justice, morality, efficiency, and acceptability.[123] Secondly, the judge must consider the broader social impact of the resolution beyond the particular dispute. These considerations are necessary to discharge the governance aspects of the judicial function, maintaining and regulating the legal norms of a society, promoting their coherence, accessibility, and certainty. To perform the social (normative) governance objectives of the judicial function, the judge must consider these broader implications of the instant decision.[124] In the final reckoning, the judge applies law as determined to facts as found in a process that may, at first blush, appear to be inevitable and mechanistic, but that in fact involves numerous and iterative exercises of discretion.

The simplicity and passivity of Bacon's *Methodology Myth* bears no relationship to this nuanced process, whereby the dispute resolution and social governance objectives of the judicial function are made manifest in the determination of a concrete case. The many evaluative choices unavoidably made by the judge mean that the *Neutrality Myth* is entirely unsubstantial; active exercises of discretion shape the evolution of society in a manner that is neither socially nor morally neutral. However, while the judicial methodology may be irreducibly complex it does not collapse into arbitrariness or unfettered discretion; it prescribes a meaningfully distinct and knowable 'proper' judicial method, departure from which can be clearly identified.

In this way the boundaries of the proper judicial decision-making method can be meaningfully patrolled, through systemic and specific mechanisms designed to ensure the judge remains appropriately and relevantly impartial. And it is only at this point that it finally becomes possible to understand a conception of judicial independence that exists on a firm and secure footing, avoiding the pitfalls of the six myths.

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[123] Ibid 146–7. As I argue there, these immediate considerations can be broken down into three broad categories: (1) Morality and justice in the resolution of the dispute; (2) Recognition of the interests and arguments of the disputants; and (3) Other considerations affecting the instant dispute.

[124] I argue that there are four principal influences regarding social (normative) governance: (1) Attaining certainty & clarity in the law; (2) Maintaining normative consistency & coherence in the law; (3) Ensuring the appropriateness & acceptability of legal norms; and (4) Institutional considerations on the implications for the court: ibid 147–9.

C The Derivative Concepts of Judicial Impartiality and Independence

To understand *what* judicial independence is, we must first examine *why* it matters. Even if one recognises that judicial independence is 'only a means to an end', the more difficult question is often 'what the 'end' should be'.[125] As I argue elsewhere, judicial independence must be understood in the sense that the Canadian Supreme Court describes in *R v Lippé*: as a means to an end of promoting judicial impartiality.[126] Yet I go further: judicial impartiality is itself simply a means to the end of furthering the adherence to judicial method and the fulsome performance of the judicial function.

The true nature of judicial independence rests upon a foundation of judicial impartiality, which in turn depends upon a substratum of function and method. Understood in this way the two great, yet surprisingly distinct, discursive arcs of judicial independence and judicial impartiality can be unified in an instrumental framework.

This conception of judicial impartiality is, by its nature, a derivative instrumental concept: the analysis of 'improper' partiality at the heart of the concept demands first an articulation of 'proper' and legitimate influences. Judicial impartiality is not an absolute impartiality. As the Canadian Judicial Council observes:

> True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind. To keep that mind truly open, the judge, more than most, must respond to the challenge of self-examination.[127]

It is inherent in the judicial form that the *resolution* will necessarily be unequal and must *prefer* the more meritorious position. Rather, judicial impartiality strives to make the judge free from *improper* influences on decision-making. It is not a self-contained concept. This requires an inquiry into *how* that issue may influence the judge, *how* this may constitute a deviance from method, and *whether* that influence is nonetheless acceptable:

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[125] Pimentel (n 7) 7.
[126] *R v Lippé* (n 84) 139.
[127] Canadian Judicial Council, *Commentaries on Judicial Conduct* (1991) 12.

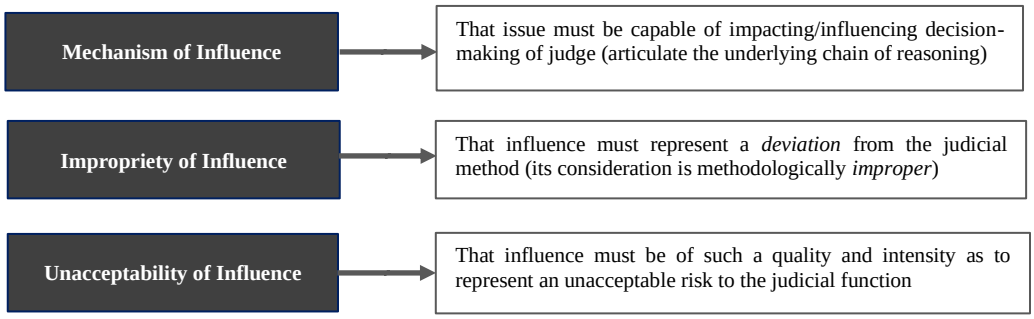

Figure 6: Conceptual Test for Judicial Impartiality

The derivative concepts of 'judicial independence' and 'impartiality' refer to particular subsets or species of that broader concept of judicial impartiality, yet both remain, fundamentally, dual embodiments of this common principle of judicial impartiality—which in turn depends upon conceptions of function and method to give it concrete meaning:

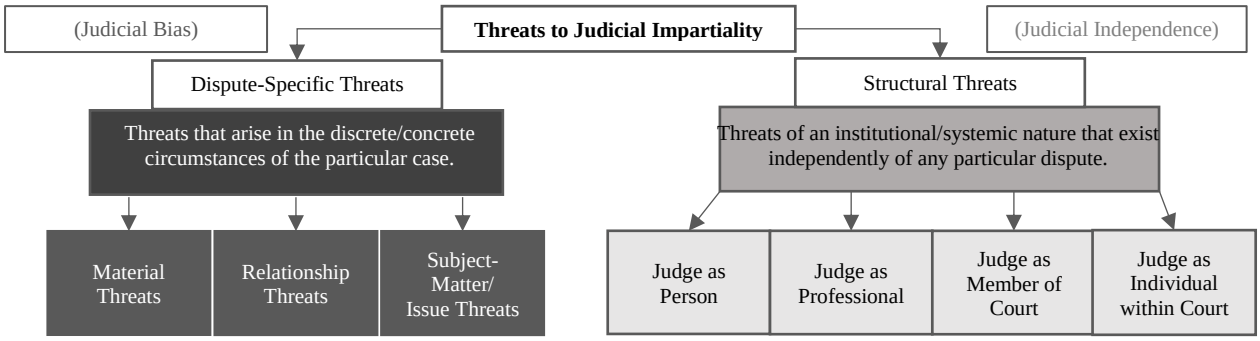

Figure 7: Species of Threats to Judicial Impartiality

This framework usefully characterises particular manifestations of threats to judicial impartiality, so that threats to 'judicial independence' represent external and often institutional threats, while 'impartiality' refers to discrete threats arising in the circumstances of a discrete dispute. Threats to 'judicial independence' have a systemic nature, existing in the abstract, independent of the particular dispute. Such threats are 'essentially relational', arising from the structural relationships of the judges, whether external relationships or internal.[128] In contrast, threats to 'impartiality' arise from the concrete circumstances of a particular case, through

[128] Malleson notes that 'judicial independence' is primarily concerned with the 'relationships between the judges and external bodies—the political branches of government, the media, the public or interest groups—as well as the internal relationships between judges within the judicial hierarchy': Kate Malleson, 'Promoting Judicial Independence in the International Courts: Lessons from the Caribbean' (2009) 58 *International and Comparative Law Quarterly* 671, 671, citing Peter H Russell, 'Toward a General Theory of Independence' in Peter H Russell & David M O'Brien (eds), *Judicial Independence in the Age of Democracy: Critical Perspectives from Around the World* (University Press of Virginia, 2001) 1, 8.

the real or apparent concurrence, or co-identification, of interests between the judge and one of the parties or their position.

1 Judicial Independence as Structural Threats to Judicial Impartiality

Understood in this way, judicial independence represents an institutional response to potential structural threats to judicial impartiality. The concern of judicial independence is to pre-empt threats that may undermine impartiality and minimise their occurrence through responsive structural designs and procedures.

Like a diligent doctor, we do not wait for 'diseased' circumstances, or a concrete threat to arise, but utilise a regime of preventative structures in an attempt to immunise institutions. The principles of judicial independence aim to protect the institutional health of the judiciary by minimising the potential for concrete threats to impartiality from arising in a particular dispute. Yet these principles do more than act as a prophylactic; they promote broad public confidence in the integrity and impartiality of the institution by reassuring all that, should such a threat crystallise, it will be treated as unacceptable. This relationship was highlighted by the High Court of Australia in *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs*[129] when it observed:

> The separation of judicial function from the political functions of government is a further constitutional imperative that is designed to achieve the same end, not only by avoiding the occasions when political influence might affect judicial independence but by proscribing occasions that might sap public confidence in the independence of the Judiciary.[130]

In this way, the principles of judicial independence (structural impartiality) focus on the systemic protection of the integrity of the judicial institution, drawing on a diverse range of structures and practices to minimise the occurrence and intensity of concrete threats to judicial impartiality. Understood in this way, the principles of judicial independence can be seen to emanate from different 'identities' the judge possesses, each of which can create structural focal points upon which improper and unacceptable influences may be exerted:

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[129] (1996) 189 CLR 1.

[130] Ibid 12 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ). See also *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1.

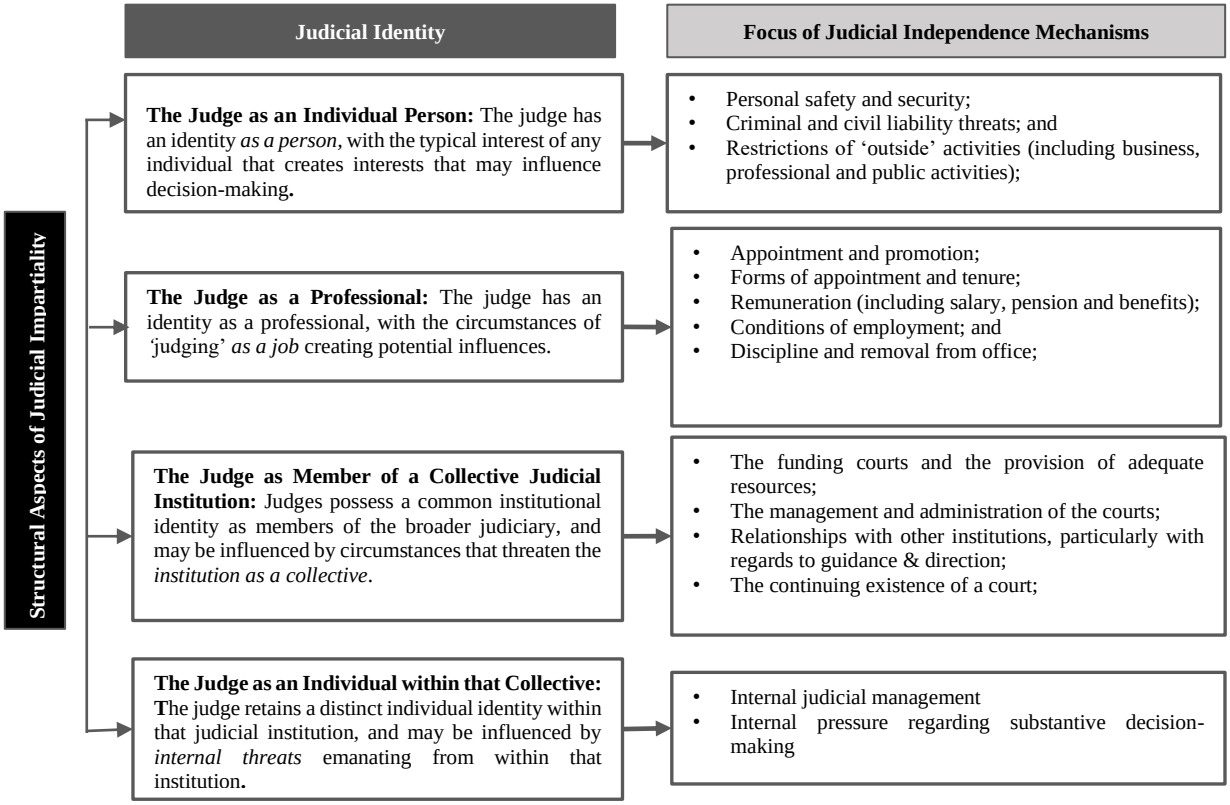

Figure 8: Mechanisms of Judicial Independence as Responses to Structural Impartiality Concerns[131]

These categories seek to capture the commonly recognised mechanisms by which unacceptable partialities may be introduced into the judicial process and, therefore, different opportunities for preventative actions to be taken.

This conception of judicial independence allows a substantive and rich protection of the judiciary—and thereby the judicial function they perform—without falling into the traps posed by the myths of judicial independence. As a functionally derivative concept, the *Supremacy Myth* is entirely bypassed. Similarly, the *Purity Myth* of an ideal and perfect model of judicial independence is resisted: there can be no static notion of judicial independence, as such stasis would increasingly isolate the judiciary from both other branches of government,[132] and society more generally. This dynamic nature of the concept focuses the question not on *whether* the principles apply, but on *what* they

[131] The categories are drawn from the taxonomy in ch 12 of McIntyre (n 6).
[132] Anja Seibert-Fohr, 'European Comparatives Perspective on the Rule of Law and Independent Court' (Conference Proceedings, 6th Vienna Workshop on International Constitutional Law, 2010) 9–10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1652598>.

require,[133] with the result that judicial impartiality requires the court to be *sufficiently* impartial to effectively perform its core function. The false safety of the *Methodology Myth* is rejected for an honest and open approach that recognises that judges are humans, with multiple identities that may influence them—properly and improperly—and that our institutions are stronger when they acknowledge and respond to these influences rather than deny their existence. This approach also allows honest recognition that the performance of the judicial function in a manner consistent with the judicial method is not politically safe or neutral—it promotes a particular conception of society that can alienate the powerful. The *Myths of Safety and Neutrality* act as fetters that blind us to the many ways structures can be distorted to improperly influence judges. Taken together, this very human and responsive conception of instrumental judicial independence stands in stark contrast to the *Inevitability Myth*: judicial independence requires constant maintenance and refinement to respond to the particular social context in which it operates.

Judicial independence can exist in a conceptually sound manner, even when all of the myths of independence are rejected. Understood in this way, this vital institution is intellectually honest, yet it is also fragile.

D Judicial Accountability and the Promotion of Excellence

This conception of judicial independence abandons the safety and neutrality of the mechanistic mythological version. Judges make discretion-rich evaluations in every aspect of their role, and are protected and isolated to avoid improper influence on their decisions. Yet judges also exercise public power, in both their dispute resolution and social governance roles. It is vital, then, that appropriate safeguards are in place to support judges in exercising their power to ensure the function is discharged with excellence and without deviation from method. The corollary of the significant freedom and discretion inherent in the judicial role is an elaborate system of judicial accountability. And it is only by understanding the interplay between judicial accountability and judicial independence that a complete understanding of the latter concept is possible.

Underlying much of the mythological conception of judicial independence, and particularly the *Methodology Myth*, is a fear that if that understanding is abandoned then judges will be left dangerously unconstrained. This fear is comprehensively countered by the extensive accountability mechanisms within which contemporary judges operate. The key to understanding these accountability mechanisms is to appreciate that—like judicial impartiality—they must be

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[133] See discussion of *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, above nn 49–50 and accompanying text.

approached as derivative, instrumental responses that operate in the broader framework of the judicial function.

This approach to judicial accountability means it cannot be understood in the abstract; its content, standards and processes emerge from related aspects of the judicial role. Rather than depending upon 'audit' concepts of accountability (*to* someone, *for* some particular activity, assessed against some *standard*[134]), judicial accountability imports concepts such as 'personal responsibility' and 'integrity' that shift the focus from an external 'account' to an internalised ethical and aspirational conception. At its core, this form of accountability is about creating and supporting a judicial imperative to 'do the right thing', to achieve the excellent performance of the judicial function in the proper manner. In this way judicial accountability should be as a *derivative functional concept* that operates:

1. To promote conformity with the judicial decision-making method; and
2. To promote the excellent performance of the judicial function.[135]

As I have previously written, this concept of judicial accountability possesses a twofold nature, promoting the judicial function by maintaining both the actuality of, and reputation for, integrity—in essence providing for 'internal' and 'external' elements of accountability:[136]

> Judicial accountability promotes [the objectives of the judicial function] though a combination of 'internal' and 'external' mechanisms. The 'internal' aspect promotes actual judicial integrity, developing in each judge a professional habitus that drives them to a virtuous and habitual compliance with the demands of their office. The 'external' aspect focuses on the appearance of, and confidence in, that institutional integrity. It invites public scrutiny of the judiciary and acts as both a 'deterrent' and a reassurance against deviance. Judicial accountability enlivens the judicial function by motivating judges both to act with authentic integrity and to demonstrate such integrity.[137]

Our courts rely upon a broad range of mechanisms to achieve these ends of internal and external accountability. Many of these mechanisms will have an impact on both the internal element of judicial integrity and the external appreciation of that integrity. These mechanisms can be thought of as occurring within a number of distinct 'species', as outlined in the figure below:[138]

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[134] Elizabeth Handsley, 'Can Public Sector Approaches to Accountability be Applied to the Judiciary?' (2001) 18(1) *Law in Context* 62, 68. See also McIntyre (n 6) 235.
[135] McIntyre (n 6) 237–41.
[136] Ibid 237.
[137] Ibid 246.
[138] For an overview of these mechanisms of accountability, with relevant references and examples, see ibid ch 14.

	Species of Accountability	Mechanism of Accountability
(1)	**Personal Conduct and Behaviour of the Individual Judge**	• Professional disciplining of judges • Civil and criminal liability • Informal mechanisms and social pressures
(2)	**Substantive Accountability for Performance of the Judicial Role**	• *'Open justice'*—Accountability through process • *Judicial reasons*—Accountability through justification • *Judicial review and appeal*—Consistency, correctness, & accountability • *Internal processes*—Accountability through internal mechanisms • *Criticism and critique*—Testing the merit of judicial determinations • *Judicial education*—Refining the skills and knowledge of the judiciary
(3)	**Institutional Accountability for the Administration & Operation of Courts**	• Financial & economic accountability • Judicial management and performance standards • Institutional reporting mechanisms

Figure 9: Species and Mechanisms of Judicial Accountability

The division in this taxonomy between the mechanism of accountability and the objective of accountability is vital. Some forms of accountability, such as the substantive performance of the judicial role and institutional accountability, are collectivised, while others are individualised. This highlights that judicial accountability cannot be understood only by focusing on one single category of accountability mechanism. As I have previously stated:

> Each of these categories speak to different interests of the judge and aspects of the judicial role, and within each category is a range of responsive mechanism. Together, these mechanisms can provide a comprehensive and well-adjusted system of judicial accountability.[139]

As opposed to the Cavalier intellectual descendants of Bacon, who seek to *control* judges through artificial judicial methods, this conception of judicial accountability seeks to support (and indeed liberate) judges to perform their function with excellence. It recognises and honours the expansive discretion judges possess as a necessary implication of their role yet provides a range of carefully calibrated guardrails to ensure that judicial power is not abused. Taken as a whole, the broad suite of mechanisms that ensure individual and collective judicial accountability create an extraordinary interlocking system of accountability. Arguably, our judges are the most accountable of all public decision-makers.

[139] McIntyre (n 6) 288.

Judicial accountability, approached in this way, provides a resonant counterpoint to judicial independence. Together each contributes to an institutional harmony that is not possible without the other. Judicial independence is not only not opposed to judicial accountability, but in fact depends upon—and is liberated by—it.

Taken together, concepts of function, method, and accountability create the space—and necessity—for a conception of judicial independence as a derivative functional value that represents a vital aspect of a healthy modern judiciary. Approached in this way, we can understand the nature (and limits) of judicial independence in a manner entirely independent of the six myths.

V CONCLUSIONS: REJECTING THE MYTHS IN CONTEMPORARY JUDICIAL THEORY

The thing about any good myth is that it is deeply comforting. Myths follow a narrative pathway that appeal to the human psyche, a familiarity that lulls the anxious mind.

There should be no doubt that the six myths about judicial independence outlined in this article follow this path—the myths provide a comforting blanket of protection as to the value, safety, and inevitability of judicial independence. In this conception, judges do not threaten the political order and have minimal personal responsibility, either in exercising the discretions of their judgment or in defending their institutions. The myths can lull the mind.

Yet these are not innocent myths. They are more properly conceived of as a highly successful *propaganda campaign* that adopts the forma of mythology to co-opt the judiciary and the public in the propagation of its ideas. The myths operate to defang the judiciary and to sideline the vital public governance role judges perform. Bacon's gambit has been extraordinarily successful, endorsed and extended by generations of Cavaliers.

The time for myths is over.

We live in an age where we are far better served by an intellectually honest and rigorous defence of our courts, and of the need for their independence. And we can defend the judicial role and judicial independence without resort to such myths. Our courts provide a vital public good, resolving disputes and enlivening our law in a critical act of social governance. This function is performed through a constraining—yet generative—judicial method that is rich in discretionary moments. That method is counterbalanced by interrelating norms of judicial impartiality that provide specific and structural protections for the integrity of the method. This entire edifice is then supported by a multifaceted and multifactorial system of judicial accountability that ensures that members of our judiciary are the most accountable of all public officials. Within this framework, judicial

independence is a vital, yet responsive pillar of support—it is a derivative functional concept supporting the broader edifice, but no less important for that.

This conception may lack the comforting familiarity and beguiling simplicity of the mythology framework. But it has the attractive attributes of not being demonstrably false or ahistorical. And it has the advantage of being responsive to the needs of our evolving society.

For we cannot take our courts and their ongoing independence for granted, particularly as we appear to be going through a period of social, political, and technological upheaval. We should not shy away from this point. In the coming decades we are likely to see profound, perhaps existential, challenges to our courts: issues of access to justice and the alienation of the public from effective engagement with courts have become acute; justice technology is rapidly changing how we experience judicial processes, and AI threatens to overshadow all changes so far; and as experiences in the US and UK have demonstrated so clearly, there can be significant threats to courts when political expediency leads to interfering with, and indeed attacking, judicial independence and impartiality.

For our courts to resist such pressures, and indeed for them to thrive in the coming century, it is necessary that those of us committed to the judicial system unflinchingly and confidently assert the worth to society of a strong and fair judicial system. It is critical that we clearly establish, for the public, that the judicial function is one that is worth retaining.

And that means we must abandon comforting myths; we can no longer believe in fairy tales.