



User Name: Tyler Cooper

Date and Time: Monday, May 20, 2019 6:05:00 PM EDT

Job Number: 89258756

Document (1)

1. [*SYMPOSIUM:JUROCACY AND DISTRUST:RECONSIDERING THE FEDERAL JUDICIAL APPOINTMENTS PROCESS:JUDICIAL SELECTION AND DEMOCRATIC THEORY: DEMAND, SUPPLY, AND LIFE TENURE, 26 Cardozo L. Rev. 579*](#)

Client/Matter: -None-

**SYMPOSIUM: JUROCRACY AND DISTRUST: RECONSIDERING THE
FEDERAL JUDICIAL APPOINTMENTS PROCESS: JUDICIAL SELECTION
AND DEMOCRATIC THEORY: DEMAND, SUPPLY, AND LIFE TENURE**

January, 2005

Reporter

26 Cardozo L. Rev. 579 *

Length: 27441 words

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* Arthur Liman Professor of Law, Yale Law School. © Judith Resnik 2005. This article stems from presentations at the Symposium, Jurocracy, at the Benjamin N. Cardozo School of Law in March of 2004 and at the Symposium, Judicial Appointments in a Free and Democratic Society, at the University of Toronto Law School in April of 2004, and builds on my articles "Uncle Sam Modernizes his Justice System": Inventing the District Courts of the Twentieth Century, [90 Geo. L.J. 607 \(2002\)](#), Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III, [113 Harv. L. Rev. 924 \(2000\)](#), and Changing Criteria for Judging Judges, [84 Nw. U. L. Rev. 889 \(1990\)](#), as well as on testimony that I submitted to subcommittees of the United States Senate and of the Canadian House of Commons on the topic of judicial nominations. I benefited from comments of other participants, the exchanges at these symposia and hearings, and from discussions with Seyla Benhabib and Deborah Hensler. My thanks to Joseph Blocher, Andrew Goldstein, Paige Herwig, Johanna Kalb, Alison Mackenzie, Jennifer Peresie, Bertrall Ross, Kirby Smith, Laura Smolowe, and Steven Wu for research assistance, to Gene Coakley for all his efforts to locate relevant materials, and to Denny Curtis, Vicki Jackson, Roy Mersky, Roberta Romano, and Albert Yoon for helpful comments on earlier drafts.

Text

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I. The Appropriately High Price of Article III Judgeships

The immediate problem prompting this Symposium is the conflict about federal judicial appointments that occurred between 2002 and 2004, when Republicans held the Presidency and by a slim margin also controlled the Senate. The President nominated a series of individuals whom the Democrats opposed for lower court judgeships. (That problem has survived the election of 2004, as the Republicans kept the Presidency and gained some Senate seats but not the sixty now required to end filibusters.) The saliency of the conflict has been heightened by three facts: a keen appreciation of the amount of interpretative power held by judges, the opportunities to fill a relatively small number of life-tenured federal judgeships (particularly at the appellate level with Supreme Court nominations in the offing), and the longstanding role that the federal judiciary has played in American policymaking.

But the underlying issues go beyond the conflict in the United States. Countries around the world are considering the relationship between the idea of democratic government and judicial selection. Who should select judges? How much public scrutiny ought to accompany the selection of judges? With what form of information provided to whom? What do calls for "transparency" and "accountability" mean in relationship to judicial selection? These questions are not unique to the United States, as is evident from contemporary proposals in Canada ¹ and in the United Kingdom ² to change selection methods for their [*583] judiciaries.

¹ See, e.g., Kirk Makin, High-Court Reform Proposals Imminent: Questioning of Nominees Could be Among Recommendations Made by Committee, *Globe & Mail*, April 20, 2004, at A6; Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, Report: Improving the Supreme Court of Canada Appointments Process (House of Commons, Canada, May 2004), available at

Because some of the critics of current processes make claims that "democratic values" require change, Part II of this Article discusses the relationship between democratic theory and judicial appointments. As I explain, the fact that a country is a democracy tells one a good deal about rights to justice and equality but less than might be expected about how to select judges. Unless one is of the view that all officials in a democracy ought to be elected, it is difficult to derive one specific process for judicial selection from the fact that a country is a democracy. One may, however, be able to rule out certain criteria or kinds of procedures for judicial selection - such as by inheritance or by excluding persons based on their identity as members of certain groups.

I turn in Part III to the details of judicial selection in the federal system in the United States. Contemporary debates assume that the term "federal judge" equates with life tenure. But that form of judgeship is in fact held by a numerical minority of those who now have the power of adjudication in the federal system. The changing expectations of justice - as women and men of all colors gained juridical status - have required the production of a larger supply of judges. Today, the number of non-life-tenured trial judges (magistrate and bankruptcy judges) in the federal courts roughly equals the number of life-tenured trial judges. Moreover, the bulk of federal adjudication occurs inside federal agencies, also staffed by tens of hundreds of judges lacking lifetime commissions.

Each form of federal judgeship has its own method of selection. The variety came into being in response to the demand for judging, spawned in part by democratic commitments to accessible justice. In terms of the various selection processes, appointment to serve in the administrative judiciary depends on success in competitive exams (enhanced by a few preference points for veterans). Article III judges at the trial level select the magistrate judges who join their bench, district by district. Article III appellate judges in each circuit choose bankruptcy judges, with more than three hundred individuals currently serving. And, as is familiar, with the advice and consent of the Senate, the President nominates the Article III judiciary. Below, I explain how [*584] the authority of Article III judges to augment so significantly the ranks of federal judges raises questions for democratic theory. Similarly, the length of tenure currently enjoyed by Article III judges also poses a challenge to democratic principles of diffused power.

As I detail in Part IV, the form that the life-tenured judgeship has taken in the United States is anomalous when compared with those created by other democracies which, like the United States, are committed to judicial independence. Most countries provide mandatory ages for retirement or for fixed, non-renewable terms of office.³ In contrast, in the United States, those who do have life-tenured positions serve relatively long terms - often of more than twenty years. Not only do such persons hold the power of judgment for long periods of time, they also control the timing of their resignations, enabling them to give political benefits to a particular party.

<http://www.parl.gc.ca/committee/CommitteePublication.aspx?SourceId=84157>; Jacob S. Ziegel, Merits Selection and Democratization of Appointments to the Supreme Court of Canada, 5 Choices IRPP 2 (June 1999). In the fall of 2004, two vacancies were filled by an "interim process" that included an accounting by the Prime Minister before the House of Commons of the process, with mention of more changes in the future. See Department of Justice, Speaking Notes for Irwin Cotler, Minister of Justice and Attorney General of Canada on the Occasion of a Presentation to the Ad Hoc Committee on Supreme Court of Canada Appointments, Aug. 25, 2004, available at http://canada.justice.gc.ca/en/news/sp/2004/doc_3121.html.

² In the summer of 2003, the Department of Constitutional Affairs issued a series of consultation papers, proposing the abolition of the office of Lord Chancellor, the creation of a Supreme Court for England as a free-standing institution to separate the Law Lords from Parliament, and different methods of appointing judges. See Department for Constitutional Affairs, Constitutional Reform: A New Way of Appointing Judges (CP10/03 July 2003). Part of the reform was prompted by concern that the English judiciary's role in the country's parliament did not satisfy the principles of separation of powers embodied in the European Convention for Human Rights.

In February of 2004, after receiving comments, revisions were made to a bill to create a Supreme Court. That court was to have twelve justices, initially assigned by transferring the current Law Lords and subsequently by appointment through a newly-created Supreme Court Nominations Commission. See <http://www.dca.gov.uk/consult/supremecourt/sresp.htm>. The Constitutional Reform Bill was introduced in the House of Lords that month and hearings have since been held. See United Kingdom Parliament, Constitutional Reform Bill (second reading) <http://bills.ais.co.uk/AC.asp>. See generally Constitutional Innovation: The Creation of a Supreme Court for the United Kingdom; Domestic, Comparative, and International Reflections, Legal Studies: The Journal of the Society of Legal Scholars (Derek Morgan ed., 2004) [hereinafter Constitutional Innovation]; see also Sally J. Kenney, Britain Appoints First Woman Law Lord, 87 Judicature 189 (2004) (describing the criticism of the nomination process in England stemming in part from the absence of women on its highest bench). As of this writing, some believe that changes will be made in 2005. See William Goodhart, The Last Lord Chancellor? Legal Aff., Jan./Feb. 2005, at 34-35.

³ See Lee Epstein, Jack C. Knight, Jr., & Olga Shvetsova, Comparing Judicial Selection Systems, 10 Wm. & Mary Bill of Rts. J. 7, 23 (2001) (surveying twenty-seven European countries and finding compulsory term limits and/or mandatory retirement in most).

I argue that both features are problematic for a democracy but are remediable. Given the flexibility with which the Supreme Court has approached Article III in the last decades and found constitutional the devolution of judicial power to non-life-tenured judgeships, Article III could also be reread to permit fixed times for retirement. Further, Congress could create incentives such as pension benefits or penalties to encourage judges to step aside after a set number of years.

In Parts V and VI, I offer an analysis of the process of appointments in the United States and suggest that a less apologetic stance towards conflict is appropriate. The political scrutiny of individuals nominated to hold life-tenured judgeships is an understandable response to the particular shape, history, and place of national judgeships in this federation. Given that Article III judges are at the top of a large judicial hierarchy and hold a rare form of power for an unusually long period of time, and given that the Constitution mandates that such judges must be selected through the political decisions of both the President and the Senate, such judgeships ought to be doled out sparingly.

That attention is appropriately paid does not mean that the form taken by the current controversies is optimal. My concern is that the Senate often does too little rather than too much. Despite all the hoopla, most persons nominated to be Article III judges are confirmed by large majorities. Further, much of the political manoeuvring occurs pre-nomination in an eclectic fashion with less rationality across candidates than might be hoped. I suggest that, as a means of expressing how unique life-tenured jobs are in democracies and how deep the political consensus about the propriety of appointing persons to such positions [*585] ought to be, the Senate should rely on a practice of requiring sixty votes for approval. Knowing that most confirmation votes currently exceed that number, I do not imagine that this form of structural intervention would have a great impact on the number of judges confirmed but rather that it would underscore the normative peculiarity of life tenure and help to reduce the sense of entitlement that presidents have about the selection power.

Of course, other proposals aspiring to reduce the judgeships battles have appeal, as is illustrated by the many calls for bi-partisan selection processes⁴ as well as by the use of merit selection commissions in other countries.⁵ But underappreciated in current discussions of federal appointments is that controversy about individuals to serve as jurists is both a longstanding feature of American politics and reflective of the role that law itself plays in American politics. From the nomination of John Rutledge in 1795 to the nomination of Melvin Fuller in 1888 to the nomination of Robert Bork in 1987 to the debates during the last four years, partisans have used individual nominations to make political arguments about what they hope United States law will be.

Contestation is not a recent artifact of televised Senate hearings or the conflicts over Robert Bork and Clarence Thomas. Since this country's founding, the institution of the federal courts has been understood as a means of creating or limiting national power.⁶ Further, since the Federalists' creation of judgeships and selection of judges that gave rise to the 1803 decision of *Marbury v. Madison*,⁷ the identity and political affiliations of individuals serving as federal judges has been [*586] seen as relevant to the

⁴ For example, in the spring of 2003, Senator Charles E. Schumer proposed that the Administration and the Senate "agree to the creation of nominating commissions" (comprised of "an equal number of Republicans and Democrats") to be convened in each state and circuit to propose individual candidates to fill vacancies. See Letter from Senator Charles E. Schumer to President George W. Bush (April 30, 2003), available at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PRO1655.html [hereinafter Schumer Proposal]; see also Report to Chief Judge Judith Kaye (of the Court of Appeals of New York) of the Commission to Promote Public Confidence in Judicial Elections 7-10 (June 2004) (calling for the establishment of independent judicial qualification commissions, with membership that reflects "the state's great diversity" to recruit candidates, publish lists of well qualified candidates, and apply consistent and public criteria to all candidates, as well as proposing non-competitive and non-partisan retention elections, voter education programs, a committee to deal with judicial campaign conduct, public financing of elections, and in the interim, requirements for disclosure of financial support), available at <http://www.law.fordham.edu/commission/judicialections/images/jud-freport.pdf>.

⁵ See, e.g., Hugh Corder, *Judicial Authority in a Changing South Africa*, in *Constitutional Innovation*, supra note 2, at 253-74.

⁶ See Maeva Marcus, *Is the Supreme Court a Political Institution?*, *72 Geo. Wash. L. Rev.* 95, 97 (2003) (answering emphatically in the affirmative and describing how Chief Justice John Jay used his charges to grand juries as occasions to explain the national government).

⁷ *5 U.S. (1 Cranch) 137 (1803)*. Given that decision's two hundredth anniversary, a wave of new discussions about the originality of its holding and the plausibility of its analyses have been published. See, e.g., Philip Hamberger, *Law and Judicial Duty*, *72 Geo. Wash. L. Rev.* 1 (2003) (arguing that judicial review was a feature of English, colonial, and state law before *Marbury*).

shape that legal doctrine takes.⁸ Moreover, debates about individuals seeking confirmation have been repeatedly used as a means of articulating legal norms. From the legality of the Jay Treaty in the eighteenth century to the role of railroads and unions in the nineteenth century to the rights of women in the twentieth century and gay marriage in the twenty-first, conflict over nominations has helped to identify certain issues as powerfully divisive and others as so settled as to be seen as nonpolitical.⁹

What has changed in the United States is that, with the growth in the number of life-tenured judgeships at the lower ranks and with the innovations in information technology, parties in power have gained the ability to fill many seats with individuals identified with certain approaches to American law. Life-tenured appointments were always an opportunity for patronage. But, when the slots were few, they could be used less successfully as a means of setting long term agendas. As a consequence, the creation of new judgeships is of political moment, as can be seen from the fact that Congress is more likely to do so when it is dominated by the same party that holds the Presidency.¹⁰ And, with [*587] the swelling ranks and information technologies making visible both the attitudes of nominees and voting patterns of appointees, politicians have come to see seats on the federal judiciary as an opportunity for what Professors Jack Balkin and Sanford Levinson call "partisan entrenchment," by which they mean that a particular party can use its power of judicial selection to extend temporally that party's authority to change the governing legal regime.¹¹

Such efforts to capture judiciaries stem not only from elected politicians but also now from "repeat players," such as the Chamber of Commerce, the Federalist Society, the American Trial Lawyers' Association, and the Alliance for Justice, all eager to influence the selection processes on the state and federal level. Technology has also facilitated new means of doing combat about judgeships and has increased the funds needed to wage effective battles over nominations. Although state judicial elections have drawn much of the fire on the issue of financing campaigns,¹² federal judicial appointments are also expensive processes, with partisans investing significant sums to promote or to block particular individuals.

In light of the function and history of life-tenured judgeships in the United States, the intensification of politics around judicial selection in this country is understandable. Whatever the drafters of the Constitution intended from their decision to allocate the

⁸ See, e.g., Marcus, *supra* note 6, at 99-100 (describing the rationales for President Washington's appointment of particular men, coming from state judiciaries, to the federal judiciary as an effort to "lessen any jealousy the state judiciaries would feel for the new national ... system" and commenting on the awareness of federal jurists of the "political repercussions" of some of their decisions).

A growing academic literature addresses the relationship between individual judges' party affiliation, race, gender, and religion to examine correlations and voting patterns of judges. See, e.g., Sean Farhang & Gregory Wawro, Institutional Dynamics on the U.S. Court of Appeals: Minority Representation under Panel Decision Making, 20 *J.L. & Econ. Org.* 299, 321 (2004) (summarizing studies and concluding that in addition to an individual judge's gender, race, and ideological position, the composition of a panel of judges influences how judges rule); Gregory C. Sisk, Michael Heise, & Andrew P. Morriss, Searching for the Soul of Judicial Decisionmaking: An Empirical Study of Religious Freedom Decisions, 65 *Ohio St. L.J.* 491, 492 (2004) (concluding that the most "prominent, salient, and consistent influence on judicial decisionmaking was religion" in cases involving that issue); David C. Nixon, Separation of Powers and Appointee Ideology, 20 *J.L. & Econ. Org.* 438, 438 (2004) (analyzing nominees to executive agencies and concluding that the ideology of that set of nominees is affected by the "ideological tilt in Congress"); Cass R. Sunstein, David Schkade & Lisa Michelle Ellman, Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation, 90 *Va. L. Rev.* 301 (2004) (finding that, depending on the kind of case, the political party of the appointing president is a fairly good predictor of an individual judge's vote as is the political party of the president appointing the other judges on a panel); Frank B. Cross, Decisionmaking in the U.S. Circuit Courts of Appeals, 91 *Cal. L. Rev.* 1457, 1459 (2003) (arguing that "legal and political factors" have greater impact than "strategic and litigant-driven factors"). See generally Gregory C. Sisk & Michael Heise, Judges and Ideology: Public and Academic Debates about Statistical Measures, 99 *Nw. U. L. Rev.* (forthcoming 2004), available at http://papers.ssrn.com/sol2/papers.cfm?abstract_id=521822.

⁹ See Judith Resnik, Changing Criteria for Judging Judges, 84 *Nw. U. L. Rev.* 889 (1990) [hereinafter Resnik, Changing Criteria for Judging Judges].

¹⁰ See John M. DeFigueredo & Emerson H. Tiller, Congressional Control of the Courts: A Theoretical and Empirical Analysis of the Expansion of the Federal Judiciary, 39 *J.L. & Econ.* 435 (1996).

power of appointment between the two other branches,¹³ the shape of the contemporary conflict is an artifact of changes over two centuries in the structure of Senate committees and staff, in the bureaucratization of the [*588] Presidency, in the expansion of federal law, in the kinds and numbers of federal judges, and in the technology of information.

Further, while a shift to a less contentious process with bi-partisan selection commissions has a great deal of appeal, such a change requires bi-partisan commitment to a very different idea of the import of a federal judgeship. Attitudes in the United States towards judging assume the political dimensions of legal decisions and that professional "legal" judgments are not insulated and discrete from their "political" consequences. Who the life-tenured judges are is a matter of great political moment for this nation, and to alter the level of conflict would require a change in the underlying political dynamics of which nomination fights are expressive.

But identifying that decisions on judgeships as events of political moment does not result in a conclusion that current processes produce a particularly useful form of political exchange.¹⁴ Thus, I outline a few changes that could be made, including trying to increase senatorial involvement by reliance on supermajority approval rules. Revisiting the format of judicial office-holding is also necessary because of democratic commitments to constrained and diffused power, with norm production generated through dialogic processes. No one person (judges included) ought to hold too much power for too long. To reduce the power now held by the life-tenured, one could cushion the impact of each individual selected, either by adding many more life-tenured judgeships and/or by shortening the terms of service. To alter the import of life tenure, Congress could create incentives for judges to shorten their length of service and the Court could reread the meaning of "good behavior" to sanction a term limit.

In Part VII, I consider the relevance of the experiences of the United States to other countries. The U.S. federal system has developed a very public politicized system with input from a range of constituencies. In some Commonwealth countries, commentators decry the lack of popular input into judicial selection. But when democracies have other techniques for making appointments, or better specification of the judicial role, or legal pre-commitments to certain kinds of judicial selection processes¹⁵ and other means of debating legal norms, one would be hard pressed to advocate that they adopt practices like those for the life-tenured judiciary in the United States. Turning individuals - who have not yet taken their seats nor faced the particular [*589] legal and factual questions as they emerge through litigation - into vehicles for debating the shape of social values is not the only nor necessarily a good way to have such debates. Both the people and the ideas become caricatures, and the peculiar decisionmaking processes of adjudication, with its fact-full specificity, become lost.

My suggestion is that, when claims for change in selection methods are made, one needs to focus on what kinds of problems are prompting calls for change. For example, is the issue a lack of diversity on a bench, as contrasted with a general malaise about government power, as contrasted with a hope of gaining influence over nominations to block individuals identified with certain

¹¹ See Jack M. Balkin & Sanford Levinson, Understanding the Constitutional Revolution, *87 Va. L. Rev.* 1045, 1066-77 (2001).

¹² See William C. Singleton III, The High Price of Justice: Alabama Leads the Nation in High Court Race Spending, Birmingham Post-Herald, June 16, 2004 (listing judicial campaign fundraising state by state, and noting that between 1993 and 2002, Alabama Supreme Court judicial candidates raised some \$ 34 million dollars). Recent analyses of financing of judicial election campaigns indicate that certain private organizations, such as the Chamber of Commerce, account for contributions of many millions of dollars to campaigns for judges in different states across the United States. The interest of that group was sparked by views that state courts were not sufficiently attentive to the interests of the business community, particularly in relationship to "tort reform." See Anthony Champagne, The Politics of Judicial Selection, 31 *Pol'y Stud. J.* 413 (2003); Anthony Champagne, The Cycle of Judicial Elections, Texas as a Case Study, *29 Fordham Urb. L.J.* 907 (2002); Anthony Champagne, Modern Judicial Campaigns, 41 *Judges J.* 17 (2002); see also *Republican Party of Minnesota v. White*, 536 U.S. 765, 788 (2002) (O'Connor, J., concurring) (discussing problems of financing judicial elections). For discussion of the rise of interest group participation in federal nominations, see Robert A. Katzmann, Courts and Congress 18-19 (1997). Efforts to analyze decisionmaking of state supreme courts suggest that the form of selection of judges can affect outcomes in certain kinds of cases, when policy choices present conflicts between identifiable interests. See Daniel R. Pinello, The Impact of Judicial Selection Method on State-Supreme-Court Policy: Innovation, Reaction, and Atrophy (1995).

¹³ A review of that period can be found in Michael J. Gerhardt, The Federal Appointments Process 17-29 (2000), as well as in many essays devoted to the meaning of the phrase "advice and consent." See notes 39 and 184 *infra*.

¹⁴ A summary of various proposals can be found in Gerhardt, *supra* note 13, at 290-339.

¹⁵ For example, the South African Constitution provides for a process for selection for the constitutional court judges, in which a "judicial service commission" prepares lists of nominees from which the president must appoint a person or obtain a supplemental submission from that commission; the Constitution also specifies how commission members are to be selected. See S. Afr. Const. ch. 8, 174, 178 (adopted 1996).

visions of constitutional rights? Revisions in procedures need to be driven by specific problems and provided through tailored solutions. If concentrated prime ministerial power is the problem, then the creation of commissions to diffuse the screening and appointing powers may be useful. If a lack of diversity is the basis for critique, then a commission to make selections ought similarly to have obligations to look for diverse candidates and itself be constituted to include diverse segments of a polity.¹⁶

Generic calls for "transparency" and "accountability" sound appealing but the application of those values in the context of judicial appointments is cumbersome and often in tension with the very charter to be a judge. Demands for "accountability" can result in worrisome incursions on the aspirations for adjudication - that judges form decisions based on a particular and peculiar process focused on specific problems and influenced by a specific intersection of law, fact, and context.

Indeed, the point of judicial independence is to render judges immune from certain forms of political accountability. Moreover, given that judges are insulated deliberately and often have charters longer than the terms of office for most elected positions,¹⁷ the electorate has a [*590] challenging task of holding the appointing politicians "accountable." At best, politicians seeking reelection can be challenged for appointing jurists who are themselves unlikely to suffer any direct consequences. Even if the issue of a politician's vote on a particular judge has sufficient saliency to result in defeating that politician, the jurist often remains in office. And, in those jurisdictions that do require judges to stand for reelection or be subject to a reappointment process that entails popular input, those processes are criticized precisely because they permit popular retaliation against judges.

In contrast, understanding democracy as requiring that judicial power be exercised in a transparent and dialogic manner is both possible and useful. With the pressure from heavy dockets and the privatization of process, judging in democracies is at risk of losing its public dimension.¹⁸ Over the past decades, adjudication in the United States has become less transparent, as appellate courts deem a significant percentage of their decisions "not for publication" and specify that a ruling not be used as precedent, as more cases end through private contracts divesting courts of jurisdiction, and as some courts permit records to be sealed and agreements to be confidential.¹⁹ Other countries and transnational courts have taken steps - including televised court hearings - to help ensure access to knowledge about the work of judges.²⁰ The need for change within the United States is acute.

¹⁶ See Judith Resnik, *Composing a Judiciary: Reflections on Proposed Reforms in the United Kingdom on How to Change the Voices and the Constituencies for Judging*, in *Constitutional Innovation*, supra note 2, at 228-53.

¹⁷ In the United States, the Constitution guarantees both life tenure to Article III judges and that their salaries cannot be diminished during their term of service. Such judges may be removed only through impeachment, a device that is rarely used. See Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, *78 Ind. L.J.* 153 (2003). The only other formal statutory mechanism - aside from appellate review of lower court judgments - is to file a complaint against a judge, handled through confidential processes within the federal judiciary. See *Judicial Conduct and Disability Act of 1980*, *28 U.S.C.* 372 et seq. (2000). See generally Richard L. Marcus, *Who Should Discipline Federal Judges, and How?*, *149 F.R.D.* 375 (1993) and notes 220-21 infra.

In addition, judges may be asked to recuse themselves from ruling on individual cases. In 2003, discussion of judicial disqualification and self-regulation became intense when Justice Antonin Scalia participated in a case, *Cheney v. United States District for the District of Columbia*, challenging Vice President Richard Cheney's refusal to produce discovery on the contacts that he had while involved in the National Energy Policy Group. The recusal request turned on the contacts between Justice Scalia and the Vice President. See *Cheney v. United States District Court for the District of Columbia*, *124 S. Ct.* 1391 (2004) (providing the ruling of Justice Scalia, sitting solely, and denying the motion). As an oblique response, Chief Justice Rehnquist appointed a commission to study that system. See Mike Allen & Brian Faler, *Judicial Discipline to be Examined: Rehnquist Names Panel in Response to Ethics Inquiries*, Wash. Post, May 26, 2004, at A2.

¹⁸ See generally Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, *1 J. Empirical Leg. Stud.* 783 (2004) [hereinafter Resnik, *Migrating, Morphing, and Vanishing*].

¹⁹ See generally Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, *56 Stan. L. Rev.* 1435 (2004); Symposium, *Court Enforced Secrecy: Formation, Debate, and Application of South Carolina's New Secrecy Rules*, *55 S.C. L. Rev.* 711 et seq. (2004); *Hartford Courant Co. v. Pellegrino*, *371 F.3d 49 (2d Cir. 2004)* (holding that the public and the press possess a qualified First Amendment right of access to docket sheets of courts).

²⁰ Further, some jurists have suggested revisiting the practices of opinion writing itself to make courts' written rulings intelligible to a wider audience than those technically proficient in legal terms. See Brenda Hale, *A Supreme Court for the United Kingdom?*, in *Constitutional Innovation*, supra note 2, at 36, 44.

While democratic ordering does not impose a singular method for judicial selection, being a judge within democratic governments ought to entail a set of practices distinct from that of judging in nondemocratic polities. Imposing obligations on judges to do much of their work in venues accessible to the public and to describe their reasons to the [*591] public links the concepts of transparency and accountability to the acts of power by the judge, duly selected.

II. Theorizing Judicial Selection in Democracies

A. Adjudication and Democracies

Consider first the idea of a democracy, a thick and rich concept plainly capable of expression through a host of different institutional mechanisms and designs. Democracy relies on core commitments to governance by consent of the people whose voices are heard, to governance respectful of the dignity of individuals, to governance constrained by prior commitments to the rule of law, and to governance made accountable by the openness of its processes. The translation of those general commitments into practices has produced an array of institutions, variously designed. Plainly, choices exist about the methods by which to organize governments that preserve democratic commitments to accountability, separated and limited powers, transparent governance, and the protection of human rights.

A general presumption that runs through democratic countries is that senior government officials are selected through elections with procedures that vary in parliamentary and presidential systems. But to date, the premise that a country is a democracy has not been equated with a requirement that all senior government officials derive authority through popular election. Rather, popular participation is often attenuated, as elected representatives have the power (theorized as delegated) to select many kinds of officials such as senior ministers or cabinet officials, ambassadors, heads of agencies or other organs of government, and judges. Constraint on that appointment authority comes from the possibility that holders of that power will, through periodic elections, obtain either the renewal or recall of their mandates.

Adjudication, a form of decisionmaking that antedated modern democracies, is a regular feature of all contemporary democratic systems. More than that, the fact that a country is a democracy drives rights of access to courts and to the legal profession as well as rights to judicial transparency and government accountability.²¹ Democracies spawn needs for adjudication as well as requirements that judges be independent, impartial, and protected from retribution by public and private actors.²²

[*592] But judges sit in an odd relationship to democracies' ordinary dependence on periodic electoral approval to validate the continuing exercise of power. Judges once served at the pleasure of the Crown and lost their commissions with the demise of a ruler.²³ Today the opposite presumption has taken hold: that judges often have terms of office longer than those of other governmental officials. The rationale for providing judges with an unusual temporal charter rests on a particular conception of their role. A judge is not understood as a delegatee of a specific political administration but rather as a uniquely-charged government

²¹ See Judith Resnik, Procedure's Projects, 23 Civ. Just. Q. 273 (Adrian Zuckerman ed., Sweet and Maxwell Nov. 2004).

²² See Robert M. Howard & Henry F. Carey, Is an Independent Judiciary Necessary for Democracy?, 87 *Judicature* 284 (2004) (describing a multi-national study finding correlations between judicial independence and political rights). Theories of the utility of independent judges come not only from those interested in the flourishing of human rights but also from those concerned with the flourishing of markets. The World Bank, for example, has many programs devoted to the rule of law as a mechanism for enabling economic development, and economists have modeled how independent judges serve to mediate between conflicting interest groups. See Maria Dakolias, Legal and Judicial Development: The Rule of Law in the Reform Process, 24 *Fordham Int'l L.J.* 526 (2000); Legal and Judicial Sector Assessment Manual: Issues on Legal and Judicial Reform (The World Bank, Legal Vice Presidency, July 2002), available at http://www4.worldbank.org/legal/legr/publications_manual.htm.

²³ See David Lemmings, The Independence of the Judiciary in Eighteenth Century England, *The Life of the Law: Proceedings of the Tenth British Legal History Conference* 125 (1991) (discussing how, with parliamentary control, judges became increasingly involved in seeking "supplementary places and honours"). By examining which individuals were actually selected in Hanoverian England, Lemmings concluded that after the Act of Settlement, more senior judges had closer ties to the governing party than had judges in earlier periods, and that through such "politicisation," a good deal of control was imposed.

official given the license to sit in judgment of the government itself. Judges are supposed neither to be partisan nor loyal in the conventional sense to the individuals or political party that empowered them or to the government that pays their salaries.²⁴

Democracies rely on the independence of their judiciaries as a consequence of democratic commitments (often but not always embodied in written constitutions) to the rule of law, the protection of individual liberties and to rights that, while agreed upon at very general levels (such as human dignity, equality or forms of freedom), inspire significant conflicts in practice. Thus, democracies require that judges make rulings that are often unpopular in a variety of ways. One measure of unpopularity is that a court's judgment would not likely be approved by a vote of the people, were the issue put on a ballot at the same time as the judicial decision is made.²⁵ Another measure of a judgment's unpopularity is that neither the executive nor the legislature [*593] would be willing to take the political heat entailed in making it, for persons identified with such a judgment would not likely retain office. Unpopularity can also be gauged by whether an issue is of sufficient moment that it can be used by politicians, as well as members of corporate, religious, ethnic, or other kinds of groups, as grounds for protest and mobilization.

In addition, adjudication is intrinsically unpopular - at least at a very local level, for it determines which disputants prevail, in fact and in law, against opponents. While many judgments are also nuanced compromises, they enlist the exercise of state power to impose remedies ranging from the provision of money to the conferral of forms of status to the confinement of individuals. Long ago, Professor Robert Cover captured the force of juridical lawmaking by entitling an essay *Violence and the Word*,²⁶ and his shorthand remains apt.

As this elaboration of the ways in which judgments can be controversial suggests, adjudication is a specially-situated aspect of functioning democracies. Adjudication's ability to sit inside democratic theory - sometimes functioning to override popular preferences and will - depends in part on judicial fidelity to the constraints imposed through adjudication's peculiar and specific methods. Adjudication's oddly powerful effects are limited - again at the theoretical level²⁷ - by a set of decisional processes requiring fact-based, record-contained specificity, coupled with transparency and explanation. Further, adjudication has a means of revision, for each judgment can be reconsidered either through appellate processes or as doctrine is reinterpreted or reversed in subsequent cases.

B. Selecting Judges in Democracies: Appointments and Elections

Democracies need adjudication to be legitimate, which in turn requires that mechanisms for selecting judges be understood to be legitimate. Some democracies have specified methods of judicial selection in constitutions. The United States is an obvious example, as Article III of the Constitution provides expressly for the President, with the advice and consent of the Senate, to nominate federal judges.²⁸ [*594] Judges so selected are guaranteed office "during good behavior" and salaries that cannot be diminished.²⁹ An explanation from democratic theory for this particular technique is that, by splitting the nomination and confirmation

²⁴ See Robert M. Cover, *The Folktales of Justice: Tales of Jurisdiction*, 14 *Cap. U. L. Rev.* 179 (1984) (analyzing the conflicts between judges and those who endow them with the power to judge); Rosalie Silberman Abella, *The Judicial Role in a Democratic State*, 26 *Queen's L.J.* 573 (2001).

²⁵ As we in the United States have seen many times, what is at one time unpopular (at least in some parts of the country) but pronounced required by constitutional right becomes, in later years, understood as intrinsic to the values and identity of the United States. Examples include the role played by courts in changing views on the propriety and legality of subordination based on race and sex.

²⁶ Robert M. Cover, *Violence and the Word*, *95 Yale L.J.* 1601 (1986).

²⁷ See Judith Resnik, *Procedure as Contract*, 80 *Notre Dame L. Rev.* (forthcoming 2005); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, *113 Harv. L. Rev.* 924 (2000) [hereinafter Resnik, *Trial as Error*]; Judith Resnik, *Managerial Judges*, *96 Harv. L. Rev.* 374 (1982) (all describing the increasingly informal modes of judicial action).

²⁸ See *U.S. Const. art. II, 2, cl. 2* (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other offices of the United States").

²⁹ See *U.S. Const. art. III, 1* (providing that the "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office").

authority across two political branches, judges so appointed gain their legitimacy through being twice vetted and validated by those whose authority stems from popular election.³⁰

Given democratic preferences for empowerment of leaders through the popular will, judicial election - used in many states within the United States - also nests easily inside democratic principles. However, not only is election now unusual as a method of selecting judges but a good deal of criticism centers on that technique. The fear is that the quest for office distorts the job of a judge either because of the need to make campaign promises or to seek campaign funds.³¹

Yet historians of judicial elections trace the origins of that practice to efforts to depoliticize the process. Leaders in many states opted for elections because of concerns about the role that political patronage played in judicial appointments. The shift to direct election was an effort to escape the "politics" of appointments and to improve the quality of those serving as judges,³² just as the shift away from election is also argued as a necessary response to the "politics" of elections and a quest for the qualified. As discussed above, while democracies generally rely on politic expressions of support for legitimacy, they seek to fence judges off - to make them "independent" from - certain forms of politics. The anxiety occasioned by overt judicial engagement in "the political" seeps over to judicial selection. The reliance on [*595] appointment and on election of judges in democracies have both been justified as techniques limiting politicalization, just as both techniques are criticized for being too political. What I will argue below is that when selecting life-tenured judges who are long-tenured (as in the United States), a "political" appointment process is sensible and ought to be embraced unapologetically but that other jurisdictions need not emulate that approach.

Further, "politics" resides in all techniques but the form that politics takes varies. As Professor Andrew Hanssen has identified, the waves of reform can be understood as successive responses to ongoing (and possibly unresolvable) agency problems.³³ At the country's founding, state legislators (then seen as "heroes of the American Revolution") were vested with significant power over judicial appointments.³⁴ When legislators lost some of that sheen, interest in insulating judges from legislative control grew. Direct election was one response, illustrative of the commitment to popular sovereignty,³⁵ while nonpartisan elections and merit plans (both developments of the later part of the nineteenth and twentieth centuries) reflected an enthusiasm for "scientific" or "expert" opinion.³⁶

Moreover, although appointment and election are often portrayed as alternatives, both rubrics include significant variations and some overlap. In some democracies, a prime minister or governor may hold an exclusive power of appointment, while in other instances that power is shared in law and fact by many political actors. Sometimes, the power is delegated - more or less completely

³⁰ More challenging for democratic theory is the exclusive investment of the power in Article III judges to appoint other judges. As I detail below, Congress has given life-tenured constitutional judges the authority to appoint statutory judges who serve for fixed and renewable terms and whose numbers parallel those of the life-tenured trial bench. See *infra* Part III and Judith Resnik, "Uncle Sam Modernizes His Justice": Inventing the District Courts for the District of Columbia and the Nation, *90 Geo. L.J.* 607 (2002) [hereinafter Resnik, Inventing the District Courts].

³¹ See Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, *62 U. Chi. L. Rev.* 689 (1995). Some states have attempted to structure the ways in which judges run for office. In 2002, the United States Supreme Court, in a decision divided five to four, found one such regulation to be unconstitutionally restrictive of the freedom of speech. See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

³² See Kermit Hall, Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920, 1984 A.B.A. Res. F.J. 345, 347-48 (1984) (concluding that the turn to elections for judges was driven by "constitutionally moderate lawyers and judges," some of whom saw elections as a means of enabling judiciaries to have legitimacy that would enhance their independence); see also Jed Handelsman Shugerman, *The People's Court: Party, Race, Class and the Rise of the American Elected Judiciary* (2004) (unpublished manuscript, on file with the author).

³³ See F. Andrew Hanssen, Learning about Judicial Independence: Institutional Change in the State Courts, *33 J. Leg. Stud.* 431 (2004).

³⁴ *Id.* at 440.

³⁵ *Id.* at 445-49.

³⁶ *Id.* at 449-53.

- to special boards or commissions, constituted by political or by professional organizations.³⁷ Similarly, judicial elections vary as to whether they are non-partisan, whether campaign financing and campaign speech are circumscribed, and whether election comes as a confirmation or retention of a particular jurist, serving initially through appointment.³⁸ The length of [*596] time for which judges serve is another important variable.

This brief overview of the practices of different systems and the changes over time within systems illustrates the array of techniques for selection in countries all styled as democratic. One could embrace such variation as all fair expressions of democratic values but also make critical assessments as to how particular processes are used in a given country. For example, the United States Constitution obliges presidential nomination and senatorial confirmation but specifies no more, spawning debates about what degree of "advice" the President should seek and how substantive the Senate's role should be.³⁹ One could reason that the constitutional designation of a two-branch exercise should oblige a cooperative sharing of the power of judicial selection. Alternatively, one could claim a greater presidential power in law or fact, derived from the agenda-setting power of nomination. Or, as Mark Tushnet proposed in an exchange before a Senate subcommittee, because the Senate's electoral mandate is renewed when some of its members are elected during the four-year interval when a president is in office, deference to the Senate could be, in theory, more democratically appropriate.⁴⁰

In contrast to the various theoretical options for using the power constitutionally specified, the history of actual selections of life-tenured judges in the United States is one of presidential supremacy and regular conflict. Since this country's inception, people in the United States have disagreed about the scope of national powers and about the desirability of an expansive role for federal adjudication. In the United States, the two dominant parties (now and in earlier eras) have been distinguished (in part) by their differing views about the meaning of constitutional guarantees and of constitutional allocations of powers to different institutions of government. States' rights, federal power, and judicial selection are interrelated sites of contestation. One way to display disagreement is through judicial selections. Politicians have [*597] learned to use judicial nominations - and the names of particular nominees or sitting jurists - as signals to constituencies about their stances on a range of issues.

C. New Democratic Concerns and New Legitimizing Practices: Diversity and Constraints on Judicial Power

Over recent decades in the United States and elsewhere, judicial selection processes have begun to intersect with an emergent theme in democratic theory - that all kinds of people are entitled to participate as political equals and that access to judgeships ought to be more fairly distributed across groups of aspirants. In eras when only men had juridical authority and in countries in which only whites had legal standing, judges were drawn exclusively from those pools. In the contemporary world, where democratic

³⁷ See American Judicature Society, *Judicial Selection in the States*, at <http://www.ajs.org/js>. For discussion of the system in place and changes proposed in England, see Kate Malleson, *Modernising the Constitution: Completing the Unfinished Business*, in *Constitutional Innovation*, supra note 2, at 119-33.

³⁸ See generally Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 Sw. L.J. 31 (1986). An interesting example comes from Alaska which, as a late-entering state, could craft its processes after gaining information about those of other states. Under the current rules, justices of the Supreme Court are appointed through a process discussed infra notes 171-172. Thereafter they need to be confirmed or rejected in the first "general election held more than three years after the judicial appointment," and then subject to approval or rejection every tenth year. Canons and commentary detail the kind of information that may be provided and that justices may only engage in "overt political activity" if "active opposition" to their candidacy exists. See *Alaska Stat. 15.35.030*; Alaska Code of Judicial Conduct, Canon 5(c)(3) (2004-2005).

³⁹ See Charles L. Black, Jr., *A Note on Senatorial Consideration of Supreme Court Nominees*, 79 Yale L.J. 657, 664 (1970); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, *101 Yale L.J. 1491 (1992)*; infra note 184 and accompanying text.

⁴⁰ See *The Senate's Role in the Nomination and Confirmation Process: Whose Burden?*, Hearings Before the Subcomm. on Admin. Oversight and the Courts, Senate Comm. on the Judiciary, 107th Cong. 197, 198 (2001) (statement of Mark Tushnet, Professor, Georgetown University School of Law) [hereinafter *Tushnet Testimony*, 2001] (arguing that the President "presumptively has the support of the people ... as a whole, having been chosen by a majority of them. Senators can reasonably respond that they too were chosen by a majority of the American people taken as a whole. Indeed, they can note that [unlike the single moment in time of a presidential election], Senators were chosen in a series of elections that, taken together, might better capture the more enduring values of the American people"), available at <http://judiciary.senate.gov/oldsite/te090401so-tushnet.htm>.

commitments oblige equal access to power by persons of all colors whatever their identities, the composition of a judiciary - if all-white or all-male or all-upper class - becomes a problem of equality and legitimacy.⁴¹ In short, that democracy does not impose a particular selection system on a country does not decide the legitimacy of particular processes if proven to be systematically unfair to identifiable segments of a polity.

Given the history of exclusion, diversity has recently become a dimension of contemporary selection concerns, worldwide. Judicial selection processes have come to address various demographic characteristics of a polity as they focus on individuals to serve as judges. For example, by statute, Canada has a set-aside to ensure that its highest court includes three justices from Quebec and hence has experts on the civil law, as well as some justices likely to be francophones.⁴² Conventions have also developed in Canada that assume some geographical diversity, with more justices coming from the provinces with the highest populations than from other provinces.⁴³

Similarly, the Treaty of Rome that created the International [*598] Criminal Court calls for countries nominating judges to "take into account" that among the judges serving should be individuals expert in either criminal law or relevant bodies of international law, that those selected provide "representation of the principal legal systems of the world," "equitable geographical representation," and "a fair representation of female and male judges."⁴⁴ Moving inside the United States, the Constitution of Alaska requires that a Judicial Council solicit and screen applicants and that consideration be given to "area representation."⁴⁵

Concerns about a judiciary's demographics can also focus on a particular court at a particular moment in time and prompt a search for individuals who add to the skill set of those already sitting. For example, some commentators believe the United States Supreme Court would benefit from the addition of jurists whose professional backgrounds include service in elected national or state political offices or as trial attorneys, while others believe that all candidates should be culled from lower court benches.⁴⁶

Specifying criteria for judges in addition to diversity would also seem a helpful step to guide decisionmakers. Some countries, for example, require that candidates for judgeships be of a certain age or have had specific kinds of professional training. But, in

⁴¹ Jane Mansbridge, *The Descriptive Political Representation of Gender: An Anti-Essentialist Argument*, in *Has Liberalism Failed Women?: Assuring Equal Representation in Europe and the United States 19-38* (Jytte Klausen & Charles S. Maier eds., 2001).

⁴² See Supreme Court Act, R.S.C., ch. S-19, 6 (1985) (Can.).

⁴³ The expectation is that three of the Supreme Court judges come from the Province of Ontario, with one coming from the Western and Northern Provinces and the other from the Maritimes. On the current court, with the appointments made in August of 2004, two judges from Ontario - Rosalie Abella and Louise Charron - were appointed to replace two - Frank Iacobucci and Louise Arbour - departing from Ontario. Coming from Quebec are Morris Fish, Marie Deschamps, and Louis LeBel. The Right Honorable Beverly McLachlin comes from British Columbia, Justice John Major from Alberta, Justice Michel Basarache from New Brunswick, and Justice William Ian Cornell Binnie from Ontario. See *About the Supreme Court of Canada*, available at http://www.scc.gc.ca/AboutCourt/judges/cnrjudges_e.asp.

⁴⁴ See Art. 36(8)(a) of the Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (entered into force July 1, 2002). The Treaty requires that the Court consist of at least eighteen judges, see *id.* at Art. 36(1), with no two being "nationals of the same State." *Id.* at Art. 36(7). Article 36(3) calls on state parties to nominate persons either with "established competence in criminal law and procedure" or with "established competence in relevant areas of international law such as humanitarian law and the law of human rights." Nominees are then put onto two lists, representing criminal law and international law (a nominee can be listed on both). *Id.* at Art. 36(5). Then, the "Assembly of State Parties" makes selections through secret ballots. *Id.* at Art. 36(6). In addition to calling on state parties to take into account the need for "fair representation of female and male judges," the Treaty also calls for taking into account the need for judges with "legal expertise on ... violence against women or children." But no enforcement mechanism is specified. See generally Cate Steins, *Gender Issues*, in *The International Criminal Court: The Making of the Rome Statute 357-90* (Roy S. Lee ed., 1999).

⁴⁵ Alaska Const. art. 4, 5, 8.

⁴⁶ See Tushnet *Testimony*, 2001, *supra* note 40. As a factual matter, political scientists have mapped the increased role that holding a circuit judgeship plays. See Epstein, Knight, & Shvetsova, *supra* note 3, at 21, tbl. 2 (Prior Legal Experience of Associate Justices of the U.S. Supreme Court, 1900-2001); Lee Epstein, Jack Knight & Andrew D. Martin, *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, *91 Cal. L. Rev. 903 (2003)*. The need for what he terms "career diversity" is discussed by James Julius Brudney in *Foreseeing Greatness? Measurable Performance Criteria and the Selection of Supreme Court Justices*, 32 Fla. St. U. L. Rev. (forthcoming 2005), available at <http://papers.ssrn.com/paper/abstract?id=62581>.

practice, many criteria are either at a level of generality rendering them minimally illuminating and constraining (i.e., professional experience, competence, integrity) or at a level of specificity making them plainly political (i.e., adherence to beliefs supportive or hostile to a particular [*599] right, such as abortion). The challenge of describing criteria stems in part because, as "with any job, the job description logically precedes the determination of the qualification."⁴⁷ The conflict over who should judge, the criteria for judges, and how to pick judges mirrors the conflict over what the job of the judge should be.

Another question is whether the nature of judicial power in a particular country affects analyses of or preferences for kinds of judicial selection or, conversely, whether given particular kinds of selection processes, judicial authority ought to be circumscribed. Courts vary in terms of the breadth of their jurisdiction. In addition, in those countries with courts having the power of judicial review of legislation, practices also vary in terms of the import of the exercise of that authority. For example, in Canada, the 1982 Charter of Rights and Freedoms provides for the possibility of a parliamentary or a provincial legislative override of certain judicial decisions, albeit with a five-year sunset clause absent re-enactment of that override.⁴⁸ Such a limitation on judicial power may both generate a more cooperative relationship between branches of government and provides a buffer to the impact of judicial selection decisions.

In contrast, in the United States, a legislative override is not seen as generally available,⁴⁹ and the scope of legislative power is itself a current subject of debate.⁵⁰ Further, some complain that the democratic imprimatur of selection through the two political branches is insufficient to support innovative exercises of federal judicial power. A shorthand sometimes used is the phrase "the counter-majoritarian difficulty."⁵¹

[*600] Although the impulse might then be to require majoritarian approval of judicial decisions, as John Hart Ely explained in *Democracy and Distrust*, "a majority with untrammelled power to set government policy is in a position to deal itself benefits at the expense of the remaining minority even when there is no relevant difference between the two groups."⁵² Constitutional precommitments serve "those situations where representative government cannot be trusted, not those where we know it can."⁵³ Underlying challenges to judicial authority rest less on how judges are selected and more on the fact that they are judges - rendering decisions on major questions of legal, political, economic, and social policy in the context of individual cases.

⁴⁷ Frederick Schauer, *Judging in a Corner*, *61 S. Cal. L. Rev.* 1717, 1732 (1988).

⁴⁸ See Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 33 (providing that either the Parliament or a legislature of a province "may expressly declare in an Act of Parliament or of the legislature ... that the Act or a provision ... shall operate notwithstanding" the other rights guaranteed under section 2 ("Fundamental Freedoms"), sections 7-15 (Legal Rights and Equality Rights) of the Charter). Thus, implicitly, a court's declaration of invalidity would be trumped for five-year periods, that could be extended through affirmative reenactment of legislation. This override does not apply to certain Charter Rights, including "Democratic Rights," "Mobility Rights," and language and educational rights.

⁴⁹ See, e.g., *City of Boerne v. Flores*, *521 U.S.* 507 (1997); Larry Kramer, *The Supreme Court 2000 Term: Foreword, We the Court*, *115 Harv. L. Rev.* 4 (2001).

⁵⁰ See generally Robert C. Post & Reva Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretations of the Family and Medical Leave Act*, *112 Yale L.J.* 1943 (2003); Judith Resnik, *Tribes, Wars, and the Federal Courts: Applying the Myths and Methods of Marbury v. Madison to Tribal Courts' Criminal Jurisdiction*, *36 Ariz. St. L.J.* 77 (2004); Henry P. Monaghan, *The Supreme Court, 1974 Term - Foreword: Constitutional Common Law*, *89 Harv. L. Rev.* 1 (1975).

⁵¹ See generally Alexander M. Bickel, *The Least Dangerous Branch* (1986); Barry Friedman, *The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty, Part Five: The Birth of an Academic Obsession*, *112 Yale L.J.* 153 (2002); Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy*, *73 N.Y.U. L. Rev.* 333 (1998); Louis Michael Seidman, *Ambivalence and Accountability*, *61 S. Cal. L. Rev.* 1571 (1988).

⁵² John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 7 (1980).

⁵³ *Id.* at 183. Professor Ely there proceeded to develop a theory of judicial review limited to "representation reinforcing" judgments, such that the check provided by the Supreme Court when considering the "Constitution's open-ended provisions" would be to "concern itself only with questions of participation, and not with the substantive merits of the political choice under attack." *Id.* at 181.

As I hope this discussion has made plain, skepticism about universal answers to questions of judicial selection is in order, both in terms of prescriptions that cross the borders of different countries and those that purport to endure for long periods of time within one country. While the need for independent judges has become a universal artifact of democracies and concerns about the role and accountability of judges are similarly shared, the ways to choose judges vary considerably.⁵⁴ Contexts - countries' cultures, histories, legal commitments, institutional arrangements, and political party structure - may prompt different answers both across jurisdictions and over time.⁵⁵ While a democracy may exclude certain selection methods - such as inheritance or selection of judges exclusively under the control of unelected individuals - being a democracy dictates less than might be expected about methodologies for judicial selection.

[*601]

III. Supplying New Kinds of Judges to Meet the Demand

A. A Singular Form of Federal Judgeship: The Article III Judge

Moving from theory to the context of the United States, in this section I examine the different methods of judicial selection that have developed over the last century within the federal system. Although popular debate often assumes Presidential nomination on the federal side and elections on the states' side, the techniques for appointment are more varied.

Some federal judges get their charters through the constitutional processes that compel so much attention. But hundreds of other federal judges are appointed through different kinds of selection processes. Indeed, given the proliferation of kinds of federal judgeships and methods of selection, the use of some common terms needs clarification. The first, and most visible in and outside of the United States, are Article III judges or constitutional judges, so described because it is Article III of the United States Constitution that protects judicial independence through guarantees of life tenure and of salaries that cannot be diminished.

About one hundred years ago, in 1901, one could have stopped the discussion of methods of federal judicial selection there. About one hundred life-tenured judges sat working on behalf of the national government in the entire United States. For those familiar with the current landscape of federal adjudication, with more than thirty trial-level federal judges sitting in some districts, it may be hard to imagine a federal court system in which a single district judge served an entire state. But in 1901, in states such as Indiana, Maryland, and Massachusetts, one federal judge did just that.⁵⁶

The picture is very different today, as Congress has repeatedly authorized new life-tenured judgeships. As of 2001, Congress had created more than 850 slots, resulting in an eightfold increase. The expansion of the ranks of the life-tenured (illustrated below in Chart 1, Article III Authorized Judgeships: District, Circuit, and Supreme Courts, 1901, 1950, 2001)⁵⁷ presents new strategic opportunities for **[*602]** presidents seeking to make a long-term mark on the interpretation of federal law.

⁵⁴ See Ruth Gavison, *The Implications of Jurisprudential Theories for Judicial Election, Selection, and Accountability*, [61 S. Cal. L. Rev. 1617, 1661 \(1988\)](#). Professor Louis Michael Seidman argued the utility of a diversity of arrangements. "Elected judges will behave differently from judges who are appointed but subject to popular recall, and both will behave differently from judges appointed with life tenure. . . . These techniques create different contexts that bring to the fore different values, all of which 'we' adhere to in the appropriate setting." Seidman, *supra* note 51, at 1599-1600.

⁵⁵ As the history of selection of judges at the state level illustrates, an appointment process was replaced by electoral processes to divest parties of the powers of patronage, and then electoral processes were replaced by appointment processes to divest sophisticated repeat players from dominating electoral results. See Hall, *Progressive Reform and the Decline of Democratic Accountability*, *supra* note 32; see also Hanssen, *supra* note 33, at 465 (concluding that "each new procedure developed in attempt to shelter state judges from the influence of incumbent political officials in the other branches (and the forces they represent) and were inspired in large part by revisions in understandings of the agency problems involved"). Professor Hanssen also noted that those interested in changing state selection practices have not embraced the life-tenured model of the federal system. He speculated that state bar associations, a major source of change, had little interest in a process that would so diminish their influence. *Id.* at 467-69.

⁵⁶ See, e.g., 220 F. v-vii (1915) (listing the district judges and their assignments).

⁵⁷ Note that this is a count of "authorized judgeships" rather than of persons currently sitting as judges. Under United States law, Article III judges may take "senior status" after a certain age or a certain number of years in service, receive their salary, and reduce their case load. See *28 U.S.C. 371* (2000). In addition, they receive favorable tax treatment. See *28 U.S.C. 3121* (2000). According to recent data, about forty percent of all current

Chart 1 Article III Authorized Judgeships: District, Circuit and Supreme Courts, 1901, 1950, and 2001

[SEE FIGURE IN ORIGINAL]

B. Pressures for More: Demanding Justice

The federal district courts as we think of them today are an artifact of the twentieth century, during which ideas about who had what rights to courts changed radically. The increase in Article III judgeships is one of several examples of efforts to respond to the growing demand for judges. During the twentieth century, different political conceptions of people, of governments, and of markets, working in combination with changing technologies, altered the expectations about when courts ought to be made available and about who ought to be able to use them. Simply put, the prospect of adjudication became plausible for whole new sets of claimants.

Four factors are central to the rising demand for adjudication that has in turn changed the context in which judging takes place and driven the need to multiply the methods used to select judges. First, [*603] individuals gained new rights to use litigation to call state officials to account and to hold government to its own promises.⁵⁸ The idea that certain forms of government activities bestowed "mere privileges" gave way to a broader understanding that obligations of government specified in the Constitution and programs instituted by government were themselves sources of individual rights. Some claims, such as those involving constitutional rights, are highly visible, prompting press coverage and social conflict about the judgments rendered. Many more involve ordinary transactions. For example, the United States government has waived its immunity for many kinds of tort actions⁵⁹ and for a variety of contract claims.⁶⁰ The government has also set up adjudicatory mechanisms by which individuals can contest the amount of benefits provided to them under various programs, such as those for veterans and social security recipients.⁶¹

Further, Congress has authorized individuals or entities aggrieved by agency action to bring claims against federal agencies.⁶² To process more disputes, Congress revamped the Court of Federal Claims,⁶³ created other adjudicatory structures, and expanded the Article III judiciary. Through such legislation, the government has obligated itself to make good on its own contracts, to pay for certain tortious injuries, to enable people to disagree with its award of federal benefits and, in some instances, to challenge decisions made by regulators.⁶⁴

sitting federal judges are such senior status judges. See Albert Yoon, As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure, 2 J. Empirical Legal Stud. (forthcoming 2005) (on file with author) [hereinafter Yoon, Senior Federal Judges].

⁵⁸ See generally Vicki C. Jackson, Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence, *35 Geo. Wash. Int'l. L. Rev.* 521 (2003); Judith Resnik & Julie Chi-hye Suk, Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty, *55 Stan. L. Rev.* 1921 (2003).

⁵⁹ See Federal Torts Claims Act, *28 U.S.C. 1346*, 2671 et seq. (2000) (enacted in 1946). The statute includes some specific requirements (such as exhausting administrative remedies and limiting attorneys fees and forms of damages) and exempts certain kinds of conduct from forming the basis for liability. On the history and legal bases for federal immunity from suit, see Jackson, Suing the Federal Government, supra note 58.

⁶⁰ The creation of a mechanism to sue the federal government in contract stems from practices developed during the nineteenth century. See Act of Feb. 24, 1855, ch. 122, *10 Stat. 612 (1855)* (codified as the Tucker Act, at *28 U.S.C. 1491* (2000)) (providing for what was then called the Court of Claims and is now called the Court of Federal Claims).

⁶¹ See generally Social Security Act of 1935, Pub. L. No. 76-379, *53 Stat. 1360* (codified at *42 U.S.C. 405* (2000)); Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, *105 Stat. 378 (1991)* (codified at *38 U.S.C. 511* (2000)).

⁶² See Administrative Procedure Act, *5 U.S.C. 551-559; 701-709* (2000) (enacted in 1946).

⁶³ See generally Steven L. Schooner, The Future: Scrutinizing the Empirical Case for the Court of Federal Claims, *71 Geo. Wash. L. Rev.* 714 (2003); Judith Resnik, Of Courts, Agencies and the Federal Court of Claims: Happily Outliving One's Anomalous Character, *71 Geo. Wash. L. Rev.* 798 (2003).

⁶⁴ In other countries, some provisions for remedies against governments exceed those of the United States. See James E. Pfander, Government Accountability in Europe: A Comparative Assessment, *35 Geo. Wash. Int'l L. Rev.* 611 (2003).

Second, increasing demand comes from the private sector through its reliance on the rule of law. Aided by information technologies that were developed during the twentieth century, the networking across [*604] physical boundaries has enlarged the scope of operations of both public and private entities. Many forms of injury became identifiable as suffered by large numbers of individuals. When made visible, such patterns of connected events (such as the harms from toxic chemicals, from mismanaged funds, or from segregated schools) prompted interest in aggregate means to process claims of wrongdoing and to remedy them. While once the presumption had been that a lawsuit involved two individuals in conflict, current dockets are dotted with aggregate claims, sometimes through class actions or other formal mechanisms (such as statutes providing for consolidation of multi-district cases) and other times through informal means.⁶⁵

This second factor interacted with a third - the growth of the legal profession, which has provided the personnel to generate regulations and responses to the many claims of right.⁶⁶ Law as an organizing premise in the United States is now so well entrenched that we sometimes forget that most of the prominent institutions of the law in the United States were created during the end of the nineteenth and in the twentieth century. Formal legal education in the United States took its current shape only within the last hundred years.⁶⁷ The American Bar Association dates from the late nineteenth century,⁶⁸ and the American Law Institute from the 1920s.⁶⁹ Government support for financing some lawyers to enable access to courts is yet more recent, coming in 1974 through federal legislation creating the Legal Services Corporation.⁷⁰ Until relatively recently, the legal profession itself was closed to persons of different religions, ethnicities, races, and gender. For example, not until the 1970s did law schools begin to admit women in significant numbers (i.e., more than twenty percent of entering classes).⁷¹

A fourth factor, one often under-appreciated in the literature of courts, is the change in the understanding of which persons can be [*605] rightsholders. Women only gained juridical voice in the last century, and the radical reconception of women as rights-holders (both inside and outside of their families)⁷² has driven up the volume of disputes. When one adds women of all colors to other persons now recognized as rights-holders - children, prisoners, the disabled, persons of various colors and ethnicities - one can see the many bases that have caused the demand side for justice to grow, as democratic principles mandate transparency in government interactions to enable accountability and also require forms of regulation over privately-held power to ensure its constraint.

New rights to adjudication necessarily affect the question of judicial selection. More judges - of different types - are needed to staff a growing number of courts. Democratic principles both produce rights of access of all persons to courts and endow all persons with rights to participate in different roles within courts - from litigant to lawyer to witness to juror to security staff, administrative clerk, and judge. Not surprisingly, governments around the world have responded by multiplying both the number of judges and the venues for adjudication and by reviewing their means of appointing jurists. These new demands for judging have prompted new questions about how to organize, how to staff, and how to appoint judiciaries.

⁶⁵ See generally Judith Resnik, From "Cases" to "Litigation," 54 *Law & Contemp. Prob.* 5 (1991).

⁶⁶ See generally Richard L. Abel & Phillip S.C. Lewis, *Lawyers in Society: An Overview* (1995); Stephen C. Yeazell, Re-Financing Civil Litigation, 51 *DePaul L. Rev.* 183 (2001).

⁶⁷ Robert Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1990).

⁶⁸ The ABA was founded in 1878. See History of the ABA, at <http://www.abanet.org/media/profile.html>.

⁶⁹ The ALI was founded in 1923. See About the American Law Institute, at <http://www.ali.org/ali/thisali.htm>.

⁷⁰ Legal Services Corporation Act of 1974, Pub. L. No. 93-355, 88 *Stat.* 378 (codified as amended at 42 *U.S.C.* 2996 et seq. (2000)).

⁷¹ See generally Deborah R. Hensler & Judith Resnik, Contested Identities: Task Forces on Gender, Race, and Ethnic Bias and the Obligations of the Legal Profession, in *The Ethics in Practice: Lawyers' Roles, Responsibilities, and Regulation* (Deborah L. Rhode ed., 2000).

⁷² See, e.g., Judith Resnik, Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction, 14 *Yale J.L. & Feminism* 393 (2002); Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 *Harv. L. Rev.* 947 (2002); Rosa Ehrenreich Brooks, Feminism and International Law: An Opportunity for Transformation, 14 *Yale J.L. & Feminism* 345 (2002); Vicki C. Jackson, Gender and Transnational Discourse, 14 *Yale J.L. & Feminism* 377 (2002).

C. More Federal Judges, Differently Selected: Magistrate, Bankruptcy, and Administrative Law Judges

In the United States, those questions have been answered by augmenting the ranks of federal jurists through creating judgeships beyond those described in Article III of the United States Constitution and through methods other than those specified in Articles II and III. As a result, even with an eightfold increase in life-tenured federal judges over a century, Article III judges comprise only about a quarter of the federal judicial workforce. Three other sets of judges, some in Article III courts and others in administrative agencies, complete the picture of federal adjudicators.

Consider first magistrate and bankruptcy judges, who also sit in the more than 550 federal courthouses in the United States. These judges do not have life tenure. Rather, through enactments in 1968 and in [*606] 1984, Congress created these new categories of what I term statutory judges and stipulated their method of selection and their terms of office. Article III judges at the trial level, district by district, appoint magistrate judges who serve for eight-year renewable terms. The number of magistrate slots is decided by the Judicial Conference of the United States (consisting of twenty-seven Article III judges and serving as the policy-making body of the federal courts⁷³), as long as it can allocate funds to pay for their judgeships. The twelve appellate courts that govern geographically-delineated circuits have the power to appoint bankruptcy judges, who serve for fourteen-year renewable terms. Congress has retained its power to decide directly the number of such judgeships, just as it does for life-tenured district and appellate judgeships.

Turn then to Chart 2, Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide, 2001, below.

Chart 2 Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide, 2001

[SEE FIGURE IN ORIGINAL] [*607] As the bar graphs illustrate, more than 450 full-time magistrate and about 325 bankruptcy judges join district judges at the trial level. As a consequence, the statutory federal judgeships now outnumber the judgeships allotted for their constitutional, Article III siblings.⁷⁴ Indeed, as of 2000, in six district courts, the number of authorized positions for magistrate judges was greater than that for life-tenured judges.⁷⁵ In another sixteen, their numbers were equal.

Constitutional judges are thus responsible for the selection, appointment, and reappointment of more than 700 statutory judges. Those chosen to be constitutional judges therefore not only shape the law through adjudication; they also shape the law by deciding who will serve as our statutory judges. As to the methods of selection, the authorizing statute for magistrate judges does specify a few requirements when district judges make appointments, whereas the statute providing for circuit courts to appoint bankruptcy judges does not.⁷⁶ For example, Congress has required that candidates for magistrate judgeships have a certain number of years of lawyering experience. Further, district courts are to use "merit selection panels," to be "composed of residents of the individual districts, to assist the courts in identifying and recommending persons best qualified to fill such positions."⁷⁷ In 1979, Congress also called for the merit selection panels to give "due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities."⁷⁸

⁷³ See *28 U.S.C. 331* (2000); Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, *78 Ind. L.J.* 223, 272-91 (2003) (discussing the history of the Judicial Conference and its practices over the past eighty years) [hereinafter Resnik, *Constricting Remedies*].

⁷⁴ As noted, the counting is made more complex through the role played by senior judges as well as by vacancies in the authorized judgeships slots. See Yoon, *Senior Federal Judges*, *supra* note 57. Similarly, bankruptcy and magistrate judges may be "recalled" to serve, so that the number of persons actually working generally exceeds the number of officially-allocated lines.

⁷⁵ As of January 2000, those districts were the Middle and Southern Districts of Alabama, the Western District of New York, the Eastern and Southern Districts of California, and the Western District of Texas. Telephone interview with staff, Magistrates Division, Administrative Office of the U.S. Courts (Jan. 9, 2001).

⁷⁶ Compare *28 U.S.C. 631* (2000) (magistrate judicial selection) with *28 U.S.C. 152* (2000) (bankruptcy judicial selection).

⁷⁷ See *28 U.S.C. 631(b)* (2000).

⁷⁸ See Federal Magistrates Act of 1979, Pub. L. No. 96-82, 3(c), (e), *93 Stat. 643, 644-45*.

In addition, the Judicial Conference of the United States has promulgated guidelines for both the appointment and the reappointment of magistrate judges.⁷⁹ Nonetheless, the structure varies somewhat from district to district, and the final decision on selection rests with the life-tenured judges of each district court. A large percentage of magistrate judges are reappointed, again by virtue of decisionmaking by the life-tenured judges with whom magistrate judges work in their particular districts. Courts of appeals, statutorily-charged to select bankruptcy judges, do so without a requirement of using any particular screening [*608] device.⁸⁰ Again, the Judicial Conference has provided some guidelines,⁸¹ and again, some variation exists across the twelve circuits that make such selections.

These statutory innovations have enlarged the pool of prospective federal judges in two respects. First, Article III judges sometimes select individuals to serve as magistrate and bankruptcy judges who, as a political matter, would not have been promoted by any particular senator, nominated by a President, nor approved by the Senate. Second, a career ladder has developed, in that some individuals first serve in the position of a statutory judge and are then able to obtain an Article III judgeship.

Moreover, some argue that life-tenured judges have done a better job than the politicians have in designing a selection process that is more substantive and less onerous.⁸² For example, Judicial Conference regulations include a commitment to confidentiality of materials submitted when individuals are considered for magistrate judgeships and provide for public solicitation of nominees but not for public hearings vetting those nominated. This selection process has attracted a pool of many individuals interested in serving as judges, and the result has been bankruptcy and magistrate benches replete with individuals of great ability.

But this kind of selection process - vesting exclusive final authority in life-tenured judges - is also problematic. While the career ladder that has developed is not the equivalent of the European system, it has started to have some parallels, raising concerns about the "bench climber." Analysts of career judiciaries note that judges who sit at lower levels and seek promotion or reappointment have incentives to conform and to defer, that they tend to be cautious in an atmosphere in which collegiality is a virtue and retaliation is feared.⁸³ Whether judges would use published opinions as a technique of identifying themselves as candidates for promotion is a part of the concern.⁸⁴

Further, although life-tenured judges always had some powers of [*609] appointment (for clerks, clerical staff, and special masters), the recent years are the first in which life-tenured judges play a pivotal institutional role in choosing a large number of people to serve as the initial adjudicators within the federal system. Given concerns about democratic input, this system is troubling, as the statutes do not systematize methods for public input nor require deference to the views of any non-judges when appointments and reappointments are made. An alternative would be to give judges ("experts" on the needs and nature of the job) a role in but not exclusive control over the appointments of other judges.

The exclusivity of control is of concern from other perspectives. The more that judges have power over an array of decisions, the more complex their role becomes. Economists and public choice theorists have begun to spawn a literature exploring judicial self-

⁷⁹ See Administrative Office of the United States Courts - Magistrate Judges Division, *The Selection and Appointment of United States Magistrate Judges* (2002).

⁸⁰ See *28 U.S.C. 152* (2000).

⁸¹ Regulations of the Judicial Conference of the United States for the Selection, Appointment, and Reappointment of United States Bankruptcy Judges (as amended, September 2000 and again in August of 2001). Some revisions were made after 2000 in light of objections (including two lawsuits) from bankruptcy judges who felt mistreated during the reappointment process.

⁸² As one local legal paper has opined, "the Bankruptcy Court now has the best bench, top to bottom, of any court in the City of Chicago." See In the *Matter of Grabill*, 967 F.2d 1152, 1160 (7th Cir. 1992) (Posner, J., dissenting) (citing Chi. L. Bulletin, Jan 13, 1992, at 2).

⁸³ See, e.g., Nicholas L. Georgakopoulos, *Discretion in the Career and Recognition Judiciary*, 7 U. of Chi. L. S. Roundtable 205 (2000).

⁸⁴ See, e.g., Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 Sup. Ct. Econ. Rev. (forthcoming 2005) (reviewing decisions on the constitutionality of sentencing guidelines to identify whether judges use publication of opinions strategically when opportunities for promotion exist).

interest.⁸⁵ Judges may feel the need for more staff and resources in their capacity as jurists. When they also serve as employers, administrators, and planners, they have yet other incentives to establish need for growth. In addition, when judges have the power of appointment, they also have the ability to bestow benefits, such as salaries, staff support, courtrooms, chambers, committee assignments, and pensions. Applicants and their supporters therefore have new reasons to court judges. Historically, judicial patronage has been a problem, often solved by moving powers of appointment from individual jurists or the judiciary as a whole to public officials or committees.

Deciding how promotions and reappointments are made poses yet harder questions about judicial independence, and the problems are not limited to judges who need to get reappointed to the same position. In the United States, appellate judges (of both the intermediate and highest courts) are increasingly drawn from the ranks of lower court judges. For example, of about 1,200 judges listed in a 2001 "almanac" of federal judges, about one hundred had served in a lower federal judicial position and then "moved up."⁸⁶ To the extent we value independent judges, unafraid of encountering popular disapproval and free from needing collegial approval, the possibility of promotion may undercut the ability of judges to feel unfettered by personal interest when rendering judgments.⁸⁷

[*610] Further, when evaluating the records of sitting judges, what should be taken into account? Should assessment be made of the track records - for example, by soliciting information from litigants or by reviewing decisions and reversal rates? Will lower level judges respond by searching for supporters, by publishing little, and by keeping low profiles? Automatic reappointment avoids those problems but then results in a de facto tenured set of judges. A presumption, rather than a promise, of reappointment - arguably in place in the United States for our statutory federal judges - may mitigate the problems, but the bases for rebutting that presumption have yet to be clearly articulated.

Moreover, some statutory judges report that they feel constrained "to please" their superiors in order for that presumption to apply.⁸⁸ Conflicts over these questions have emerged in the last few years, as the numbers of judges eligible for reappointment has grown. One bankruptcy judge has a pending lawsuit against a circuit for not reappointing him,⁸⁹ and the Judicial Conference of the United States has revised its guidelines as a buffer against such claims.

Some might argue that, while statutory judgeships are interesting examples in the discussion of federal judicial selection, the judges themselves ought not to be counted as "federal judges" because they serve under the authority of Article III judges. That claim had more power in the early part of the twentieth century, when the Supreme Court was loath to permit too much devolution to administrative hearing officers of what it termed the "essential attributes of judicial power" and insisted on access to life-tenured jurists to reevaluate "jurisdictional facts."⁹⁰ But by that century's end, the Court had read the provisions of Article III to enable the shift of significant amounts of federal adjudicatory power to non-Article III judges.⁹¹

⁸⁵ See Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, *68 U. Cinn. L. Rev.* 615 (2000) (bemoaning the lack of empiricism on judicial self-interest); Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. Leg. Stud. 627 (1994); Richard A. Posner, What Do Judges Maximize? (The Same Thing Everyone Else Does), 3 Sup. Ct. Econ. Rev. 1 (1994).

⁸⁶ See *Resnik, Inventing the District Courts, supra* note 30, at 671, n.281; see also Lee Epstein, Knight, & Martin, *supra* note 46, at 903 (detailing the reliance on appellate courts as pools for Supreme Court nominees).

⁸⁷ Similarly, proposals to use criteria such as citation rates as indicators of "merit" create significant opportunities for promoting oneself and others. See generally Steven Gey & Jim Rossi, Empirical Measures of Judicial Performance: An Introduction to the Symposium, 32 Fla. St. U. L. Rev. (forthcoming 2005).

⁸⁸ *Resnik, Inventing the District Courts, supra* note 30, at 671-75.

⁸⁹ See *Scholl v. United States*, 61 Fed. Cl. 322 (2004) (denying a renewed motion by the United States to dismiss for lack of subject matter jurisdiction and holding that judicial review is not foreclosed).

⁹⁰ *Crowell v. Benson*, 285 U.S. 22 (1932).

⁹¹ See, e.g., *Commodities Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). See generally *Resnik, Inventing the District Courts, supra* note 30, at 622-44.

The powers of the two sets of judges - constitutional and statutory - are not yet identical but the trend over the decades is clear. More and more devolution of power to statutory judges has been upheld as the lines blur between statutory and constitutional judges serving within Article III courts. Article III judges continue to have more authority, in terms of finality of decision. Yet, in practice, magistrate and bankruptcy judges make many decisions that are functionally final. **[*611]** Further, statutory judges share forms of authority that previously been assumed to be the exclusive prerogatives of life-tenured constitutional judges. For example, magistrates can preside, with parties' consent, at civil trials. Both magistrate and bankruptcy judges have forms of contempt powers, and bankruptcy judges sit in panels to provide appellate review. When the quality of the power is coupled with the volume of decisions (the bankruptcy docket exceeds a million filings per year, and magistrate judges deal with thousands of matters, both civil and criminal, annually), the authority of statutory judges becomes clear. The reliance on bankruptcy and magistrate judgeships results in the provision of significant federal adjudicatory resources outside the constraints of the life-tenured, presidential nomination system.

My description of the federal judicial system in the United States is not yet complete. In addition to the Article III courts, populated by judges with and without life tenure, we have specially-created courts, such as the Tax Court and the Court of Federal Claims,⁹² that are often called "Article I" courts because they are purely creatures of Congress. Judges sitting on such courts are often presidential appointees but serve for fixed terms, such as fifteen years.

Yet other judges who play an important role in federal adjudication sit within federal agencies. Some of those decisionmakers, called "administrative law judges" (ALJs) are commissioned under the Administrative Procedure Act (APA).⁹³ They are selected via a merit selection board that reviews scores on competitive exams as well as other factors, including a preference for veterans.⁹⁴ Once in office, ALJs have some degree of protection because firing them is made difficult through procedures requiring findings of cause. As Chart 3 (Authorized Federal Judgeships, Including Article I Courts and Administrative Law Judges, Nationwide, Fall 2001) shows, more than 2000 individuals held such positions.

[*612]

Chart 3 Authorized Federal Judgeships, Including Article I Courts and Administrative Law Judges, Nationwide, Fall 2001

[SEE CHART 3 IN ORIGINAL]

That picture does not include all who might be counted, in that one more set of adjudicators (called "administrative judges" or "hearing officers") needs to be mentioned. These judges are not directly chartered under the APA but rather are regular agency employees who are assigned the job of judging.⁹⁵

⁹² A symposium, prompted by the twentieth anniversary of the current version of this Court, and devoted to analysis of it, can be found at [71 Geo. Wash. L. Rev. 529-824 \(2003\)](#).

⁹³ Administrative Procedure Act, 551-559, 701-709 (2000) (enacted in 1946).

⁹⁴ Conflicts have arisen about this process. See [Meeker v. Merit Systems Protection Board, 319 F.3d 1368 \(Fed. Cir. 2003\)](#).

⁹⁵ See John H. Frye, III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 Admin. L. Rev. 261, 349 (1992), as updated by Raymond Limon, Office of Administrative Law Judges, The Federal Administrative Judiciary, Then and Now: A Decade of Change (Dec. 23, 2002). Professor Paul Verkuil calls such hearing officers the "real hidden judiciary." See Paul R. Verkuil, Reflections on the Administrative Judiciary, [39 UCLA L. Rev. 1341, 1345 \(1992\)](#). Given their status as line employees, concerns about their independence have been raised repeatedly, including for example, when Attorney General Ashcroft proposed to transfer some immigration judges to other positions and to reduce the number of judges on the Board of Immigration Appeals from eighteen to eleven. See Attorney General John Ashcroft, Remarks at a News Conference on Administrative Change to Board of Immigration Appeals (Feb. 6, 2002). Objections were made that such a move undercut the independence of those judges. See Role of Immigration in the Department of Homeland Security Pursuant to H.R. 5005, The Homeland Security Act of 2002: Hearing before the Subcomm. on Immigration, Border Security, House Comm. on the Judiciary 107th Cong. 57 (2002) (statement of Dana Marks Keener, on behalf of the National Association of Immigration Judges); Dana Marks Keener & Denise Noonan Slavin, An Independent Immigration Court: An Idea Whose Time Has Come (Position Paper, 2003).

In terms of caseloads, about one third of a million cases are filed [*613] annually in the federal trial courts.⁹⁶ Estimates are that the docket of federal agencies (such as those dealing with veterans, social security beneficiaries, immigrants, and discrimination claimants) include about the same number of cases,⁹⁷ and, as noted, bankruptcy judges have a docket in excess of one million filings a year. In terms of adversarial hearings and trials, federal agencies hold many more such proceedings than do federal courts. About 10,000 civil and criminal trials are begun annually in the federal courts.⁹⁸ In contrast, I estimate that about three-quarters of a million adversarial hearings are held annually in the four federal agencies with high volume.⁹⁹ One should further note that all of the adjudication in the federal system is dwarfed by that occurring in the states. Depending on how one counts and what is included, the numbers range from 30 to 96 million case filings annually.¹⁰⁰ About 30,000 judges sit in the state courts, with about 350 serving on the highest courts.¹⁰¹

IV. On Top of the Hierarchy - For Life

With all of these venues for adjudication, all of these cases, and all of these judges, the people about whom one hears the most are those who sit on top of this federal judicial hierarchy: Article III judges and Supreme Court justices in particular. I hope that my thick description of [*614] the contemporary federal judicial structure has begun to make plain how unusual Article III judges are in the United States. Below, I examine aspects of the distinctive nature of their authority.

A. Length of Service

One defining characteristic of an Article III judge is life tenure. The purpose for this special charter is obvious. Current as well as historical examples make plain that the drafters of the United States Constitution were right to worry about the independence of judges and to craft mechanisms for insulation. Whether the United States has done enough is a matter of debate. For example, the American Bar Association and some judges have repeatedly complained (and sometimes brought lawsuits) arguing that federal judicial salaries are too low and that the failure to raise salaries to meet increases in cost of living is unlawful, punitive, and/or unwise.¹⁰² Similar concerns have been raised about judicial budgets, both state and federal.¹⁰³ Moreover, as I have just mapped, many persons holding federal adjudicatory power are not, under current doctrine, sheltered by the protections of Article III.¹⁰⁴

⁹⁶ See generally Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 20 (2003), available at <http://www.uscourts.gov/judbus2003.contents.html> [hereinafter *Judicial Business of the United States Courts*, 2003].

⁹⁷ See Verkuil, *supra* note 95.

⁹⁸ Counting is not straightforward because the Administrative Office of the United States Courts codes as trials both those "proceedings resulting in jury verdicts or other final judgments by the courts, as well as other contested hearings at which evidence is presented." See *Judicial Business of the United States Courts*, 2003, *supra* note 96, at 20. Further, it is not clear whether that database includes proceedings before magistrate judges as well as Article III judges. See Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal Courts*, 1 *J. Empirical Legal Stud.* 459, 461, 474-76 (2004). Galanter concluded that magistrate judges conducted 959 civil trials and bankruptcy judges 3,179 trials in 2002. *Id.* at 541, tbl. A-8, 559, tbl. A-21.

⁹⁹ See Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 19, at 800 fig. 2 (providing a chart detailing those filings).

¹⁰⁰ Counting questions emerge when considering whether or not to include traffic cases, civil tort and contract disputes, and family law or juvenile cases. See National Center for State Courts, *Examining the Work of State Courts* (2003), available at http://www.ncsconline.org/D_Research/csp/2003_Files/2003_Overview.pdf. Sixty percent of the filings in the 96 million figure involved traffic cases. *Id.*

¹⁰¹ In addition to the more than 350 judges on the courts of last resort, almost one thousand judges serve on intermediate appellate courts, more than 11,000 on courts of general jurisdiction, and almost 18,000 on courts of limited jurisdiction. See National Center for State Courts, *Jurisdiction and State Court Reporting Practices*, at 36, available at http://www.ncsconline.org/D_Research/csp/2003_files/2003_SCCS_Figures.pdf.

¹⁰² See American Bar Association and the Federal Bar Association, *Federal Judicial Pay Erosion: A Report on the Need for Reform* (2001); *Williams v. United States*, 535 U.S. 911 (2002) (Breyer, J., joined by Justice Scalia and Kennedy, dissenting) (arguing in a class action filed by judges that federal legislation that prevented automatic adjustments to increase pay for judges in relationship to the cost of living violated Article III's non-diminution clause); see also Patricia Manson, *ABA to Study Ways to Protect Court Budgets*, *Chi. Daily L. Bull.*, Nov. 13, 2003, at A1 (describing the formation of a commission to protect state judiciaries from funding cuts limiting their capacity to resolve cases).

Further, the form of life tenure provided in the United States may itself be a part of why selection of judges has become such a battleground. Other democracies - seeking to achieve the same goal of making judges secure in their service - have selected different means, such as providing that their high court justices retire at a fixed age or [*615] that they serve for a fixed period of time.¹⁰⁵ Both Australia and Israel require retirement at age seventy.¹⁰⁶ In Canada, the age of mandatory retirement is seventy-five.¹⁰⁷ The constitutional courts of Germany and France rely on another system: fixed terms. In Germany, judges serve for a twelve-year, non-renewable term.¹⁰⁸ On France's special constitutional body, members serve for a nine-year, non-renewable term.¹⁰⁹ The new International Criminal Court has adopted that model, providing for a nine-year, non-renewable term.¹¹⁰ Further, within the United States, Massachusetts, Vermont, and New Hampshire authorize lifetime judgeships yet also require retirement at age seventy.¹¹¹

In contrast, Article III judges do not have a defined term of office, and they do not have an age for mandatory retirement. Therefore, Article III judges make their own decisions about when to vacate a seat to permit a new appointment - which enables judges to engage in [*616] opportunistic political behavior to time their retirements to maximize the power of a particular party. Discussions about Supreme Court justices assume that decisions about leaving are driven by these considerations, and studies of turnover on the lower courts also suggest such opportunistic behavior, although the most recent work concludes that the availability of receiving funds from pensions is the key variable.¹¹²

How long do people actually sit as life-tenured jurists? For the first twenty years of the life of the United States, between 1789 and 1809, the sixteen justices who served on the Supreme Court sat for an average of fourteen years apiece. Turning to the lower courts, where forty-seven judges served during that twenty year period, their time in office averaged sixteen years but the lengths of service were uneven across that group. Just under half (twenty-two) served fewer than ten years and seven served more than forty years.

Moving centuries forward to the period from 1983 to 2003 and having to deal with a larger group of people coming and going, the average term for the six Supreme Court justices whose service finished during that time period nearly doubled - to about twenty-four years. The current Chief Justice has had a seat on the Court for more than thirty years. For the lower courts (again on average

In contrast, the Canadian Supreme Court has concluded that the setting of compensation must occur through methods less dependent on the will of a sitting parliament. See *Reference on Remuneration of Judges of the Provincial Court*, 1997 Carswell Nat. 3038 (1997); see also G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 *Judicature* 12 (2004) (describing an expanding doctrine of judicial inherent power to require financing for its processes and describing a 2002 Kansas Supreme Court order requiring an increase in fees to provide funds).

¹⁰³ See *Hearings Before the House Subcomm. on Commerce, Justice, State, the Judiciary, and Related Agencies*, House Comm. on Appropriations, 108th Cong. (2004) (statement of Hon. John G. Heyburn, II, Chair, Committee on the Budget of the Judicial Conference of the United States) (raising concern about the "crisis" facing the federal courts and about the levels of appropriations planned).

¹⁰⁴ See also Judith Resnik, *Judicial Independence and Article III - Too Little and Too Much*, [72 S. Cal. L. Rev. 657 \(1999\)](#).

¹⁰⁵ See Epstein, Knight & Shvetsova, *Comparing Judicial Selection Systems*, *supra* note 3, at 18, 23.

¹⁰⁶ Until 1977, when the Constitution was amended by a referendum, judges were appointed by life; judges appointed after the date of that amendment serve until seventy. See Austl. Const. ch. III, 72 ("The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has obtained that age") (also providing that judges of "other courts created by the Parliament," that is the federal courts, must also retire at that age). Israel's basic law has a similar requirement. See Israel, *Basic Law: The Judiciary, Courts Law [Consolidated Version]*, 5744-1984, 1-24, at <http://www.oefre.unibe.ch/law/icj/is03000.html> (providing for the term to end at the age of seventy, upon removal through specified means including that a person's health makes continuation of service impossible).

¹⁰⁷ Supreme Court Act, R.S.C., ch. S-26, 9(2) (1985) (Can.) ("A judge shall cease to hold office on attaining the age of seventy-five years.").

¹⁰⁸ Article 4, Law of the Federal Constitutional Court of Germany (as amended 1998), available at <http://www.inscomp.org/gla/statutes/BVerfGG.htm>.

¹⁰⁹ See France Const. tit. VII, art. 56 (adopted 1958) ("The Constitutional Conseil shall consist of nine members, whose term of office shall last nine years and shall not be renewable.").

and again with some judgments about how to calculate the relevant intervals),¹¹³ Article III judges served twenty to twenty-five years before opening a seat for another life-tenured appointment.¹¹⁴

[*617] Of course, measuring these two time periods provides snapshots of judiciaries of very different sizes. While forty-seven people were in our database of lower court judges serving between 1789 and 1809, 530 were in the set we considered in the late twentieth century. Further, to capture a sense of the difference between those whose commissions dated from 1789 and those who served in the last twentieth century, we looked at the first twenty years, beginning in 1789 and then chose a group whose commissions ended by 2003. To check to see if the two different techniques of assembling a group of judges altered significantly the conclusion that judges are now serving for longer periods of time, we then assembled a third set of judges from the earlier period by using a termination date (of between 1833 and 1853), which is the same technique for selection as in the 1983-2003 set. Of that group of nine justices whose service ended between 1833 and 1853, the average length of service on the Supreme Court was twenty years. Of the group of thirty-six lower court judges falling within that time frame, the length of service averaged fourteen years.

In other words, given the very small numbers of people serving on the Supreme Court, the length of service on that Court is erratic. In the current era, justices serve for relatively long periods. On the lower courts, one can conclude that the smaller number of jurists who held life tenure in the nineteenth century did so for shorter periods of time than do the larger number of individuals now holding that position. Chart 4, Lengths of Service of Article III Judges: Contrasting Snapshots, 1800s/2000s, provides a summary, while details of the methodology can be found in the Appendix.

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Chart 4 Lengths of Service of Article III Judges: Contrasting Snapshots, 1800s/2000s

[SEE TABLE IN ORIGINAL]

¹¹⁰ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, Art. 36, para. 9(a) (1998), available at <http://www.un.org/law/icc/statute/rome.htm> (describing the initial election of judges with staggered terms and prohibiting the service in office of more than nine years, with no judge eligible to reelection).

¹¹¹ Massachusetts's 1780 constitution was amended in 1972 to include a retirement provision. See Mass. Const. pt. 2, ch. 3, art. 1 (1780), as amended by art. XCVIII, 1973 (2003). This provision has been upheld by jurists in state and federal court). In New Hampshire, its constitution, N.H. Const. art. 73, 78, has, since 1792, required judges to retire at the age of seventy. In New Jersey, judges and justices serve for a seven-year term and once reappointed, obtain life tenure with mandatory retirement at seventy. See N.J. Const. art. VI, III. In Vermont, after selection by appointment, the mandatory retirement age is "not less than seventy years of age, as the General Assembly may prescribe by law, or if the General Assembly has not so provided by law, at the end of the calendar year" in which the judge becomes seventy. Retired judges may serve by appointment for special assignments. See Vt. Const. 35. Rhode Island is a state in which the term of service continues to be unbounded by age. See R.I. Const. art. X, 5 (providing that justices of the Supreme Court may hold office "during good behavior"); see also R.I. Gen. Laws 8-16, 1-7 (2004) (providing that judges may continue to hold office "during good behavior"). Retirement is provided for all judges who are incapacitated. See *R.I. GEN. LAWS 8-16-9* (2004). See also Jon C. Blue, *Judicial Tenure in Connecticut: How It Was Gained and How It Was Lost - 1818-1863*, *20 Quinnipiac L. Rev.* 125 (2000).

¹¹² See Deborah Barrow & Gary Zuk, *An Institutional Analysis of Turnover in Lower Federal Courts, 1900-1987*, 52 *J. Pol.* 457-76 (1990). But see Albert Yoon, *The End of the Rainbow: Understanding Turnover Among Federal Judges*, 7 *Am. J.L. & Econ. Rev.* (forthcoming 2005) (on file with author) (arguing that the study did not sufficiently control for the role played by the availability of pensions and, with different and more data, concluding that pensions play a pivotal role in determining when lower court judges shift from "active" to "senior" status) [hereinafter Yoon, *Understanding Turnover*].

¹¹³ See Appendix, Judith Resnik & Steven Wu, *Methodological Note on Assessing the Lengths of Judicial Service, 1800s/2000s*, *infra*. The average length of service in the first period is skewed upward by a few lower court judges who served for unusually long periods of time - including Henry Potter, who spent fifty-seven years on the federal bench, and William Cranch, who served for fifty-five years. As is detailed in the Appendix, for the earlier time period, we began with judges who started their service in 1789, and then in a second set of nineteenth century judges, we considered a group of judges by identifying individuals whose service terminated between 1833 and 1853. For the third interval in the twentieth

[*619] Many factors account for the growing length of service. More people are appointed as judges and life spans have lengthened.¹¹⁵ Further, a trend has emerged in which judges serving at a lower court are promoted to a higher court - making for a career ladder in judging that helps to produce more years in office.¹¹⁶ Moreover, judges understand the heavy workload of their colleagues, and while many take "senior status," they continue to shoulder a large proportion of the work.¹¹⁷ And being a federal judge may correlate with longevity and even be good for one's health.¹¹⁸

In sum, in the United States, life tenure translates into a very long term of service. Having long ago refused to have a Queen, this democracy does not offer many government officials guaranteed jobs for life. Members of Congress and the Executive can stay in power only as long as they can convince voters to reelect them. Further, term limits exist in both the federal system (for presidents) and in some states (for elected officials) to ensure turnover for certain kinds of jobs. Yet in the United States, as we currently read our constitutional provisions, Article III judges can hold their positions indefinitely. As I explain below, an alternative reading of the constitutional provision is possible that would permit "life tenure" to include a fixed retirement age or a term of service sufficiently long that it could be understood to meet the constitutional criterion of service during "good Behaviour." (Too short a term would run afoul of that requirement, as is illustrated by rulings outside the United States concluding that temporary judges, dependent for reappointment on prosecuting authorities, do not enjoy the kind of independence requisite to impartial justice.)¹¹⁹

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B. Forms of Power

Turn now to the forms of power that Article III judges hold. I have already adverted to the fact that over the twentieth century, life-tenured judges in the lower courts gained the authority to pick large numbers of other federal judges. At the Supreme Court level, our justices have other new powers, also coming to them only during the twentieth century. One is the authority to make national procedural rules. Beginning in the 1930s, Congress authorized the Supreme Court to promulgate federal rules of civil procedure, and then of criminal procedure, of evidence, of bankruptcy, of admiralty, and of appellate procedure.¹²⁰ Congress also

century, we worked back from 2003 looking only at the length of service of those judges who had stopped serving (as we defined it) during the twenty prior years.

¹¹⁴ Government databases provide information on each judge and their length of service. See Members of the Supreme Court of the United States, at <http://www.supremecourtus.gov/about/members.pdf>; Federal Judges Biographical Database, at <http://www.fjc.gov/newweb/jnetweb.nsf/hisj>. These estimates are drawn from those sources and informed by those made by Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Lower Federal Court Judges: 1945-2000*, *91 Cal. L. Rev.* 1029 (2003). As detailed in the Appendix, choices exist about how to analyze the information. Another compilation of data can be found in an unpublished manuscript proposing term limits for the Supreme Court justices. See Steven G. Calabresi, *Life Tenure Reconsidered: Term Limits for the Supreme Court* (2004) (on file with the author).

¹¹⁵ See Yoon, *Understanding Turnover*, *supra* note 112, at 13-14 (the percentage of younger judges, categorized by looking at those appointed when under fifty-five, has grown in the last half of the twentieth century, as has the life-expectancy of men, from sixty-five to seventy-five years).

¹¹⁶ See Appendix, *Methodological Note on Assessing the Lengths of Service, 1800s/2000s*, *infra* (using for estimates of the length of judges' careers their service on the lower courts of whatever kind but counting separately the years of service on the Supreme Court).

¹¹⁷ Albert Yoon, *Senior Federal Judges*, *supra* note 57 (estimating that senior judges comprise forty percent of all sitting Article III judges and that they preside in about thirty percent of the cases). For analysis of departures from the bench for reasons other than age or health, see Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service - and Disservice, 1789-1992*, *142 U. Pa. L. Rev.* 333, 345-49 (1993).

¹¹⁸ Some commentators, in contrast, worry that some jurists stay on beyond their ability to do the job. See David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, *67 U. Chi. L. Rev.* 995 (2000); see also Epstein, Knight, & Shvetsova, *supra* note 3, at 26-27 (analyzing the retirement dates of sitting American justices on the Supreme Court and the role several justices of advanced age played on the Court).

¹¹⁹ See, e.g., *Starrs v. Ruxton*, 2000 S.L.T. 42, 2000 SC(JC) 208 (High Court of Justiciary, Scotland) (relying on Article 6 of the European Convention on Human Rights and Fundamental Freedoms to conclude that too short a term of office and a term dependent upon the prosecution for reappointment is a violation). Some Canadian cases address a comparable concern. See Reference re: Territorial Court Act (N.W.T.) S.6(2)

gave the Chief Justice control over the administrative apparatus of the federal courts through his authority over the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Federal Judicial Center.¹²¹

Further, during the twentieth century, the Supreme Court gained the power to pick virtually all of its cases, for its docket has become almost completely discretionary.¹²² With the small exception of certain redistricting cases¹²³ and of a few original jurisdiction cases involving certain controversies between two states,¹²⁴ the Court has unfettered discretion to decide what it will hear.¹²⁵ Moreover, unlike the practices in some countries, no requests for review are heard orally, and no explanations for refusing to grant certiorari are required.

The impact of the power of choice can be seen by considering the declining number of cases decided by the Supreme Court in recent years. About one hundred years ago, the Court heard an average of 330 cases per term and had a backlog. When discussion was had in the 1920s about moving to a discretionary docket, the Solicitor General then estimated that the Court could likely decide between 400 and 500 [*621] cases of import annually.¹²⁶ Once armed with increased discretion to choose its cases, the Court's caseload declined. Academic commentary discussed the change and assumed that about 150 cases a year was what the Court could reasonably do well,¹²⁷ which fit what the Court did for a period of time. For example, during the early 1980s, the Court received about 2,200 fee-paid petitions for certiorari and about 6,000 in forma pauperis filings, and it issued about 160 written decisions per year. More recently, the Court has received about 1,900 fee-paid certiorari petitions and about 6,000 in forma pauperis petitions,¹²⁸ but renders on average some eighty to eighty-five written opinions a year.¹²⁹

The Supreme Court's ability to set all of its own agenda affects not only the perception of a court as a political branch of government but also the experience of the justices who sit on it. That level of freedom changes the job from one more confined and responsive to the obligations of rendering judgment to a form of decisionmaking that, with its great discretion, inevitably takes on a character termed "political," in the sense of having opportunities to develop - or to decline to develop - certain areas of law.

Another consequence of the United States system is that power has devolved to lower tier Article III judges. The intermediate appellate courts are the functional end-point for almost all cases.¹³⁰ In 2003, about 60,000 appeals were filed and a roughly

(1997), 152 D.L.R. (4th) 132 (N.W.T. Sup. Ct.). This approach raises questions, founded on due process and Article III that are different from those generally made about the constitutionality of "recess appointments" made by President Bush. See note 177-178 infra.

¹²⁰ See [28 U.S.C. 2071-77](#) (2000) (describing generally the processes of rulemaking); [28 U.S.C. 2072](#) (2002) (authorizing appellate, evidence, civil, criminal, and admiralty procedural rules); [28 U.S.C. 2075](#) (2002) (authorizing bankruptcy rulemaking).

¹²¹ See Resnik, *Constricting Remedies*, supra note 73, at 272-95

¹²² See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, [100 Colum. L. Rev. 1643 \(2000\)](#).

¹²³ See [28 USC 1257](#) (2000) (providing jurisdiction, by appeal, from rulings determined by a three-judge court created through an act of Congress); [28 U.S.C. 2284](#) (2000) (requiring a three-judge court for actions challenging "the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body"). In the last five years, for example, the Court considered fewer than forty cases through this route, with opinions issued in eleven and summary decisions in twenty-seven.

¹²⁴ [28 U.S.C. 1251\(a\)](#) (2000). In the last five years, for example, the Court has considered fewer than fifteen cases filed under its original jurisdiction docket. See, e.g., [New Jersey v. New York, 526 U.S. 589 \(1999\)](#) (addressing the ownership of landfill portions of Ellis Island).

¹²⁵ See [28 U.S.C. 1254](#), 1257 (2000).

¹²⁶ Hartnett, supra note 122, at 1646 n.14 (citing testimony from the 1922 Hearings on proposed legislation for more discretion in caseload selection).

¹²⁷ Id. at 1646.

¹²⁸ See Statistical Recap of the Supreme Court's Workload During the Last Three Terms, 52 U.S.L.W. 3025 (July 26, 1983); Statistical Recap of the Supreme Court's Workload During the Last Three Terms, 73 U.S.L.W. 3044 (July 13, 2004). The averages come from filings during the 1980-1981 through 1982-1983 terms and those from the 2001-2002 through 2003-2004 terms. Because lawyers prepare most of the paid filings, the

comparable number terminated in the federal circuit courts - many without written decision.¹³¹ In turn, life-tenured trial judges are the functional end-point [*622] for most litigants. Of the roughly 325,000 filings every year (both criminal and civil) at the trial level,¹³² fewer than one in four is seen by an appellate court.¹³³

Meanwhile those trial level judges, sitting singly, also gained more power over the last century. Under the current procedures in use in almost all the federal district courts, a case is assigned from filing to disposition to a specific judge. Procedural reforms have shifted the focus to pre-trial activities, which gives more discretion to trial judges.¹³⁴ Trials are now anomalous, as fewer than two percent of pending civil cases begin a trial.¹³⁵

V. Judicial Appointments as a Form of and Forum for Politics

As becomes clear from this review of the demand on, the constitutional structure for, and the power of Article III judges, being an Article III judge in the United States is a big deal, a long deal, and a rare deal. This overview also explains why battles over judgeships are not surprising. Life-tenured judgeships of the U.S. kind provide opportunities for a president desirous of making a longstanding mark on the law¹³⁶ or of changing the demography of those who serve as life-time judges.¹³⁷ Moreover, as the process for selection has evolved, with its inclusion of a public inquiry by the Senate, judicial appointments are [*623] frequently used as a means to speak to various constituencies.

I turn therefore to explore the culture around federal judicial appointments. And again, context is needed. Over the past 200 years, some 140 individuals have been nominated to the Supreme Court.¹³⁸ Information about nominations became generally available in 1916, when the Senate Judiciary Committee held public hearings and published a report on the nomination of Louis D. Brandeis, the first Jewish justice on the Supreme Court.¹³⁹ While public hearings occurred for that nomination, Brandeis himself did not testify. In 1925, Harlan F. Stone was the first to speak on his own behalf before the Senate's Committee on the Judiciary.¹⁴⁰ According to the Committee notes, the invitation was extended at 10:00 a.m., and Mr. Stone, then Attorney General, appeared at 11:30; "he was interrogated by a number of the members of the Committee. The proceedings are in the form of transcript, taken by a stenographer."¹⁴¹ After a six-hour debate open to the public, seventy-one Senators voted to confirm.¹⁴² In the decade

assumption is that they screen out cases and that more of those filings as compared with the filings in forma pauperis are likely to meet the eligibility criteria for selection.

¹²⁹ See Statistical Recap of the Supreme Court's Workload During the Last Three Terms, 52 U.S.L.W. 3025 (July 26, 1983); Statistical Recap of the Supreme Court's Workload During the Last Three Terms, 72 U.S.L.W. 3044 (July 13, 2004); see also Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth & Thomas G. Walker, *The Supreme Court Compendium: Data, Decisions & Developments* tbl. 2-2, tbl. 2-8 (2003).

¹³⁰ Further, one of the criterion for Supreme Court selection of cases is disagreements among the circuits - giving judges on the circuit courts important roles as dispatchers to the Supreme Court. See Sup. Ct. R. 10(c). On occasion, opinions filed by those judges expressly or implicitly call for Supreme Court review.

¹³¹ Publication rates also vary by circuits. See *Judicial Business of the United States Courts*, 2003, *supra* note 96, at tbl. S-3 (Appeals Commenced, Terminated and Pending, and Types of Opinions or Orders Filed During the Period Ending Sept. 30, 2003). Controversy has arisen around circuits that prohibited the citation of decisions that judges had designated as not for citation, and proposed new rules would permit all decisions written to be cited by litigants. Implementation of those rules was postponed because the Standing Committee on Rules of Practice and Procedure called for more study. See *Appellate Rule Revision Postponed*, 72 U.S.L.W. 2766, 2767 (June 22, 2004).

¹³² In 2003, about 250,000 civil cases and 70,000 criminal proceedings were brought. See *Judicial Business of the United States Courts*, 2003, *supra* note 96, at tpls. C, D (Civil and Criminal Cases Commenced, Terminated and Pending During the 12-Month Period Ending September 30, 2003).

¹³³ *Id.* at tbl. S-3 (U.S. Court of Appeals, Commenced, Terminated, and Pending cases during the twelve-month period ending September 30, 2003) (filings of about 60,000 cases).

¹³⁴ Stephen C. Yeazell, *The Misunderstood Consequences of Modern Process*, [1994 Wis. L. Rev. 631](#); Resnik, *Trial As Error*, *supra* note 27.

¹³⁵ See Galanter, *supra* note 98, at 459. His article is part of a symposium focused on that fact and produced under the auspices of the Litigation Section of the American Bar Association. See also Resnik, *Migrating, Morphing, and Vanishing*, *supra* note 18. The data are also provided annually. See, e.g., *Judicial Business of the United States Courts*, 2003, *supra* note 96, at tbl. T-1 (U.S. District Courts, Civil and Criminal Trials by District During the Twelve Month Period Ending September 30, 2003).

thereafter, "all of the New Deal appointees from Senator Black to Attorney General Murphy [were] present at the Committee hearings and available to testify" but only Felix Frankfurter was questioned.¹⁴³

The public process in the United States is often assumed to be the [*624] source of contestation. But as political scientists Charles Cameron and Jeffrey Segal detail, battles over appointments predate the practice of the Senate's Judiciary Committee holding open hearings on individual nominees. According to an 1888 New York Times article, discussing the nomination of Melville Fuller to be Chief Justice, "the Judiciary Committee ... began a rousing search into all the dark abodes of scandal and tattle, to hunt for something against the character of the President's nominee."¹⁴⁴ As Cameron and Segal characterize the eighty nominations made to the Supreme Court between 1877 and 1994,¹⁴⁵ seventy succeeded, but twenty-four were controversial.¹⁴⁶

Further, Professors Cameron and Segal argue that, although the political grounds for opposition in the Senate have varied (as I will also detail below), the tactics used have remained "remarkably consistent." Opponents relied heavily on delay to find what Cameron and Segal term "scandal," which they use to denote claims (even if erroneous) of "ethical or financial lapses, illegalities, misconduct, or allegations of unprofessional or unethical conduct as an attorney or judge."¹⁴⁷ As their review indicates, a key variable of a nominee's success is the position taken by those presidents who have the power to set the agenda and use the nomination process to send messages to constituencies.

The constitutionally-created selection process permits purposeful presidents to use it for a variety of different goals. As an important recent article by Professor Dawn Johnsen documents, the Department of Justice under Ronald Reagan decided to focus on lower court and Supreme Court nominations as a means of changing legal doctrines.¹⁴⁸ The Office of Legal Counsel in the Department of Justice developed white papers, guidelines, and directives that identified areas of law to be reshaped through litigation, legislation, and judicial selection.¹⁴⁹ For example, one report, *The Constitution in the Year 2000*,¹⁵⁰ argued that:

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few factors ... are more critical to determining the course of the Nation, and yet more often overlooked, than the values and philosophies of the men and women who populate the third co-equal branch of the national government - the federal judiciary.¹⁵¹

Some judges have become concerned about the rarity of trials. For example, the Honorable Patrick Higginbotham of the Fifth Circuit calculated that, on average, a federal district judge has 14 trials per year. See Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, [55 SMU L. Rev. 1405, 1405 \(2002\)](#).

¹³⁶ See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, [78 Ind. L.J. 363 \(2003\)](#); Sheldon Goldman, Elliot Slotnick, Gerard Gryski, Gary Zuk, & Sara Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 *Judicature* 282 (2003).

¹³⁷ See Mary L. Clark, *Carter's Groundbreaking Appointment of Women to the Federal Bench: His Other "Human Rights" Record*, [11 Am. U.J. Gender Soc. Pol'y & L. 1131 \(2003\)](#).

¹³⁸ See *The Oxford Companion to the Supreme Court of the United States* 965-71 (Kermit L. Hall ed., 1992). Many books have been written detailing appointment processes and the histories of particular appointees. See, e.g., Gerhardt, *supra* note 13; Herman Schwartz, *Right Wing Justice: The Conservative Campaign to Take Over the Courts* (2004); David A. Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (1999).

¹³⁹ See Roy M. Mersky & J. Myron Jacobstein, *Preface to Volume I, The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Nominations of Supreme Court Justices by the Senate Judiciary Committee 1916-1972* (Hein 1977 & supp.) (nineteen volumes compiled by Mersky and Jacobstein). For an understanding of the confirmation process during the nineteenth century, the records of which can be found in the National Archives, see John P. Frank, *The Appointment of Supreme Court Justices: Prestige, Principles, and Politics*, 1941 *Wis. L. Rev.* 172 (Part I), 343 (Part II), and 461 (Part III) (addressing late nineteenth as well as twentieth century appointments and detailing the controversies over many).

¹⁴⁰ Frank, *supra* note 139, at 492 ("On January 28th, the Committee examined Stone for four hours.").

¹⁴¹ Special Meeting of the Full Committee on Stone Nomination, Jan. 28, 1925, Committee on the Judiciary, U.S. Senate, Minutes, 1923-25, 68th Cong., Records of the U.S. Senate, Record Group 46, National Archives (Washington, D.C.). The testimony is not reproduced in the Mersky and

The Administration's goals included a rereading of the United States Constitution to diminish federal authority and leave more control in state government. Efforts focused on reducing congressional authority under the Commerce Clause, limiting rights to abortion, and circumscribing the possibility of affirmative action. As Professor Johnsen explains, President Reagan's greatest influence on the development of constitutional meaning came not through litigation successes at the time but through judicial appointments, especially to the United States Supreme Court.¹⁵² Further, as Professor Yalof details, President Reagan's approach was very disciplined:

At no time was President Reagan tempted to choose nominees whom he knew personally This was a criteria-driven selection framework [and] the most important criteria were ideological... . The Reagan administration wanted to sponsor ardently conservative candidates for the high court.¹⁵³

The strategy forged under President Reagan has been pursued by subsequent Republican administrations. For example, in 1990, the counsel to President George H.W. Bush commented that the aim of that administration's judicial selection was "to shift the courts in a more conservative direction."¹⁵⁴ Of course, success depends on other factors, including the timing and order in which nominees are put forth,¹⁵⁵ whether the Senate is dominated at the time by the same party as that of the President¹⁵⁶ and, if so, whether those Senators are in conflict or in accord with that President. Yet, on most accounts, the Nixon, Reagan, and Bush agendas have been successful in putting on the federal bench individuals who have changed constitutional doctrine and have limited the equitable powers of federal judges.¹⁵⁷ And the efforts continue. As **[*626]** the White House Counsel to the current President Bush explained, the President has nominated a "record number of federal judges ... almost double the nominations that any of the past six presidents submitted in the first year"; that record "perhaps represents the President's longest lasting legacy."¹⁵⁸

Today's judicial appointment process is also deeply affected by organized activity outside of government. One group - the American Bar Association - has served since 1952 as a subcontractor to gather information, initially at the behest of the presidency and more recently at the request of some members of the Senate. Describing its role as "nonpartisan," the ABA ranks individuals on the basis of what the ABA terms "professional qualifications."¹⁵⁹ The ABA does so through a Standing Committee on the Federal Judiciary, working separately from other parts of the ABA and evaluating what it terms professional qualities including integrity, "intellectual

Jacobstein compilation, *supra* note 140, but it is detailed by John Frank. See Frank, *supra* note 139, at 493-94. As Frank explained, President Coolidge had been reelected but, because of the strong vote for the La Follette-Wheeler Progressive ticket, "Senate committee assignments were withheld from Republican Progressives, and President Coolidge undertook to discriminate against them in patronage distribution." *Id.* at 489. Therefore a group of Senators opposed to Coolidge "opposed anything he did," including making charges against his nominee, Harlan Fiske Stone for harassing Senator Wheeler with a prosecution aimed at smearing Progressives, for unethical behavior while in practice, and for being affiliated with special interests. *Id.* at 490-97.

¹⁴² Frank, *supra* note 139, at 497.

¹⁴³ *Id.* at 491 n.111.

¹⁴⁴ Charles M. Cameron & Jeffrey A. Segal, *The Politics of Scandals: The Case of Supreme Court Nominations, 1877-1994*, at 1, available at http://www.yale.edu/isps/seminars/american_pol/cameron.pdf (manuscript on file with the author).

¹⁴⁵ *Id.* at 2. They picked those dates to permit time for the reemergence of partisan politics after the Civil War.

¹⁴⁶ Their methodology was to read all discussion of nominees in articles published in the *New York Times* during the time period they studied. *Id.* at 10. They classified twenty-four as controversial but twenty-three as scandalous by distinguishing one case as controversial but not involving what they categorize as "scandal." *Id.* at 2.

¹⁴⁷ *Id.* at 10. They excluded four instances - the first nomination of Stanley Mathews, which expired as a Congress went out of session, the withdrawn nomination of Abe Fortas, the mooted one of Homer Thornberry, and the quickly repudiated one of Douglas Ginsburg. *Id.* at 11.

¹⁴⁸ Johnsen, *supra* note 136, at 367; see also Schwartz, *supra* note 138 (mapping the use by the Reagan Administration and the Bush presidencies of nominations to change the meaning of federal law).

¹⁴⁹ Johnsen, *supra* note 136, at 384-97.

¹⁵⁰ Office of Legal Policy, United States Department of Justice, Report to the Attorney General, *The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (1988) [hereinafter *Constitution in Year 2000*]; see also Office of Legal Policy, United States Department of Justice, *Guidelines on Constitutional Litigation* (1988).

¹⁵¹ Johnsen, *supra* note 136, at 397 (quoting *Constitution in Year 2000*, *supra* note 150, at v).

capacity, judgment, writing and analytic ability, knowledge of the law and breadth of professional experience" but not a candidate's "philosophy or ideology."¹⁶⁰ To do so, committee members review a nominee's answers to a Department of Justice questionnaire as well as conduct confidential interviews with candidates (if willing) and with others and then rate a candidate as "well qualified," "qualified," or "not qualified." In addition, members testified about the ABA views at hearings on nominations.¹⁶¹

From 1952 until 2001, sitting presidents had a practice of consulting the ABA and obtaining its judgment before sending individual nominations to the Senate. Until 1997, members of the ABA served as advisors at the Judiciary Committee's hearings. In that year, the chair of the Senate Judiciary Committee, Orrin Hatch, terminated that relationship. According to one analyst, that decision resulted from the ABA committee's rating of Robert Bork. While a majority of the ABA committee found him "well qualified" for the Supreme Court, a minority found Judge Bork "not qualified."¹⁶² In 2001, the White House announced that it would no longer submit names of prospective nominees to the ABA. As of this writing, members of the Senate [*627] Judiciary Committee request the ABA's evaluation, and that evaluation occurs after (rather than before) a candidate's nomination.¹⁶³

But the ABA is not the only organization relevant to judicial nominations. The Reagan/Bush focused search for nominees who believed in certain interpretations of the United States Constitution turned frequently to those affiliated with a group, the Federalist Society, formed in 1982 to help to propagate commitments to its vision of what American legal order entailed.¹⁶⁴ Moreover, the Federalist Society has itself attempted to curb the involvement of the ABA by attempting to position that organization as too liberal and "political" a voice to represent "the profession." One technique used by the Federalist Society is a special newsletter, called The ABA Watch, to describe ABA positions in an effort to mark it as partisan.¹⁶⁵ On the other side of the fence, the Alliance for Justice and the Brennan Center have both created newsletters and websites to disseminate information to those concerned about judicial nominations and to enlist support for opposing or supporting individual nominees.¹⁶⁶

In terms of activities in the states, two other organizations - the Chamber of Commerce and the American Trial Lawyers Association - have poured money into judicial elections in several instances.¹⁶⁷ These battles, in turn, spark new legal issues, including the degree to which [*628] judicial campaigning and the financing of elections can be regulated. A judicial candidate

¹⁶² Id.

¹⁶³ Yalof, *supra* note 138, at 134.

¹⁶⁴ Id. at 401 n.212.

¹⁶⁵ See, e.g., Cameron & Segal, *supra* note 144, at 5 (quoting a memo to President Nixon that counseled him to put a more conservative nominee up for the first of two openings so as to avoid giving senators the opportunity to make a "public case against a man") (citation omitted).

¹⁶⁶ Senate norms also play a role, including courtesy (sometimes extended) towards senators from the state of the nominee. See Sarah A. Binder, *Origins of the Senate "Blue Slip": The Politics of Creating Senate Norms* (April 2004) (manuscript on file with the author) (presented at the annual meeting of the Midwest Political Science Association) [hereinafter Binder, Blue Slip].

¹⁶⁷ See Resnik, *Constricting Remedies*, *supra* note 73, at 231-71.

¹⁶⁸ See Alberto Gonzales, Editorial, *The Crisis in Our Courts*, *Wall St. J.*, Jan. 25 2002, at A18; see also Frances A. McMorris, *Bush Successful in Appointing Activist Judges*, *Women's e-News*, June 25, 2004, available at <http://www.womensnews.org/article.cfm/dyn/aid/1883/context/archive>; The White House, *Judicial Nominations*, available at <http://www.whitehouse.gov/infocus/judicialnominees>.

¹⁶⁹ See The ABA Standing Committee on Federal Judiciary: What It Is and How It Works, available at <http://www.abanet.org/scfedjud/backgrounder.html>.

¹⁶⁰ Id. The committee is comprised of a small number of persons from each of the federal circuits who, upon joining, agree not to be involved in federal electoral campaigns through public fundraising.

¹⁶¹ Id.

¹⁶² Gerhardt, *supra* note 13, at 230 (describing that finding as based on the view that Judge Bork lacked a temperament appropriate for the role).

¹⁶³ ABA Standing Committee on Federal Judiciary, *supra* note 160, at n.1. The Senate Judiciary Committee also asks that nominees fill out questionnaires providing information on employment, education, published writings, congressional testimony, health, public office and political

succeeded in persuading a bare majority of the United States Supreme Court that a state ethics regulation violated his free speech rights.¹⁶⁸

Several states continue to seek to constrain judgeship campaigns. For example, in the fall of 2004, the Wisconsin Supreme Court adopted new rules guiding campaign activities of judges.¹⁶⁹ The Court limited solicitation of funds by candidates for judgeships and prohibited candidates and sitting judges from making "pledges, promises, or commitments" on issues likely to come before them.¹⁷⁰ Alaska, which had the advantage of crafting a system relatively recently, has attempted to minimize political influences through a constitutional provision requiring that a Judicial Council solicit and screen applicants "without regard to political affiliation."¹⁷¹ Its code of conduct for judges places limits on contributions to retention election campaigns.¹⁷²

But in many states, contributions for campaigns have increased, significant funds come from outside the state, and spending has proven to be an effective means of obtaining a judgeship.¹⁷³ The result is distress about judicial selection. That concern, coupled with insufficient funding for state judiciaries, prompted a blue ribbon commission of the American Bar Association to title its recent report Justice in Jeopardy.¹⁷⁴

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VI. The Utility of Conflict

That the United States Constitution specifies that both electoral branches of government have a role to play in selecting life-tenured judges does not require that battles occur or that the job be seen as political. Rather, it is theoretically possible for the constitutional process to work in a way seen as minimally political. For example, a president could ask that the Department of Justice, the Senate, or a bi-partisan commission propose a short list of individuals, all of whom would be selected based on criteria other than political party affiliation, campaign donations, membership in organizations such as the Federalist Society or the American Civil Liberties Union, social policy views, and the like. Alternatively, a president could develop a pattern of sharing the selection process with the opposition in the Senate such that partisans of both parties partake equally in identifying candidates.

activities and affiliations, legal career, involvement in other activities, sources of income and net worth, as well as whether a selection commission exists in the jurisdiction from which the candidate comes. See Questionnaire for Nominees Before the Committee on the Judiciary, United States Senate (marked Confidential) (unpublished questionnaire on file with the author).

¹⁶⁴ See David McIntosh, Introduction to the Federalist Society 2002 Symposium on Law and Truth, 26 Harv. J.L. Pub. Pol'y ix (2002). Further, the Federalist Society describes its mission as "reforming the current legal order." See The Federalist Society for Law and Public Policy, Our Background (2001), available at <http://www.fed-soc.org/ourbackground.htm>.

¹⁶⁵ The publication comes out periodically. See, e.g., The Federal Society for Law and Public Policy Studies, The ABA Watch (Aug. 2004) available at <http://www.fed-soc.org/Publication/ABAwatch/jul04.pdf>.

¹⁶⁶ See, e.g., Home Page of the Independent Judiciary, available at <http://www.independentjudiciary.org/nominees>; The Justice at Stake Campaign: A National Partnership Working for Fair and Impartial Courts, available at <http://www.faircourts.org>.

¹⁶⁷ Judicial elections in states have become more expensive because of the entry of such national participants. Further, analyses of the "market" in advertisements demonstrate that funders focus on particular races. See Anthony Champagne, Interest Groups and Judicial Elections, *34 Loy. L.A. L. Rev.* 1391 (2001). As Champagne explained:

The continuing nationalization of state judicial elections is further shown by the U.S. Chamber of Commerce's recent efforts through the Institute for Legal Reform to support the election of pro-business judges in Alabama, Illinois, Michigan, Mississippi, and Ohio. The goal is both to make direct campaign contributions and to pay for issue advertising.

Id. at 1399; see also William G. Kelly, Selection of Judges, ABA Judicial Division Record 3 (Winter, 2000) (describing efforts by the Chamber of Commerce and the Trial Lawyers and "other interest groups ... raking the candidates over the coals.")

¹⁶⁸ See *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

Potentially, a culture could develop that focuses on individuals' legal acumen, personal humanity, contributions to public service, and the like.¹⁷⁵

Such has not been the experience during virtually any of the history of the United States. Further, as described above, the last several Republican presidents have specifically targeted nominations as the means by which to do a certain form of politics.¹⁷⁶ The current President ran on a platform that he would select judges identified with particular political and social world views, and he has in fact done so. Repeatedly, he has used judicial nominations of individuals, particularly for appellate level positions, as a vehicle to speak to sectors of his constituency. Further, relying on claimed powers to make "recess" appointments¹⁷⁷ during intervals when the Senate is out of session, [*630] President Bush placed on the federal bench two individuals who had been the subject of hearings but who had prompted objections sufficiently intense as to have occasioned filibusters of their nominations.¹⁷⁸

Moreover, interest in filling vacancies and adding judgeships also varies with party power. For example, only a few years ago when the number of vacancies was higher and President Clinton was in office, the Honorable J. Harvie Wilkinson III, an appointee of a Republican Administration and serving on the Fourth Circuit, argued against filling vacant seats.¹⁷⁹ In contrast, once the Republicans took control of the White House, the Administration took the position that a "crisis" existed, and posted such a message on the website of the Department of Justice.¹⁸⁰ But despite the drumbeat about a "crisis," the pace of dispositions was both reasonable¹⁸¹ and not much different than it had been in the years when Republicans had claimed that vacancies need not [*631] be filled.¹⁸² And, as noted, repeat players from outside government are now central figures in these conflicts in both the federal and state systems.

I have just given a description of the current highly politicized process. But I do not share the popular view that politicizing federal judicial selection is intrinsically abhorrent. It is neither surprising nor wrong that conflict over decisions to appoint particular individuals has emerged. Life tenure is a rare event in any democracy, and those selected and confirmed to serve must, therefore, be individuals in whom confidence is shared. Further, as Charles Geyh has pointed out, given how few judges are impeached, the only moment for popular input is at the time of selection.¹⁸³ And, as Professor Charles Black explained several decades ago, no reason

¹⁶⁹ Supreme Court of Wisconsin, No. 00-07, In the Matter of the Amendment of Supreme Court Rules: SCR Chapter 60, Code of Judicial Conduct - *Campaigns, Elections, Political Activity* (filed Oct. 29, 2004) 2004 WI 134. The rules were adopted by a divided court, with three of the seven justices objecting that they were not sufficiently respectful of candidates' First Amendment rights. See Jenny Price, Court Divided on Rules for Judicial Candidates, Duluth News Trib., Nov. 4, 2004, available at <http://www.duluthsuperior.com/mlid/duluthsuperior/news/politics/10101416.htm>.

¹⁷⁰ The rules were developed after the Supreme Court of Wisconsin created a Judicial Elections and Ethics Commission in the late 1990s. See supra note 169.

¹⁷¹ See Alaska Const. art. 4, 8. The Constitution specifies that the Commission include three non-lawyers appointed by the governor and confirmed by the legislature sitting in a joint session, three lawyers appointed by the governing board of the Alaska Bar Association, and the Chief Justice of the Supreme Court of Alaska, serving ex officio as the chair. Members serve for staggered six-year terms. See American Judicature Society, Judicial Selection in the States, Alaska, available at http://www.ajs.org/js/AK_methods.htm [hereinafter Judicial Selection].

¹⁷² Individuals may donate only \$ 1,000; Political Action Committees (PACs) are limited to \$ 2,000 per candidate and regulated industries, corporations, and labor unions may not donate. See *Alaska Stat. 15.13.010*, 15.13.070-074 (2004); see also *Judicial Selection*, supra note 171; *Alaska v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), cert. denied, **528 U.S. 1153 (2000)**; *Libertarian Party of Alaska, Inc. v. Alaska*, 101 P.3d 616 (Alaska 2004) (both upholding aspects of state laws regulating campaign funding and disclosure).

¹⁷³ See Andrew Goldstein, Money Talks, Legal Aff., Jan./Feb. 2005, at 50, 52 (describing the three "Democratic candidates for the Ohio Supreme Court," all of whom lost, as having been "outspent by more than 9 to 1").

¹⁷⁴ American Bar Association, Justice in Jeopardy: Report of the American Bar Association Commission on the 21st Century Judiciary (July 2003), available at <http://www.manning productions.com/ABA263/finalreport.pdf>.

¹⁷⁵ A recent spate of law review articles seeks to identify other forms of "merit" - with criteria such as productivity, citation rates, and reversal rates (for individuals already on lower courts) that others challenge as neither necessarily objective or wise. See, e.g., Stephen Choi & Mitu Galati, A Tournament of Judges?, *92 Cal. L. Rev.* 299 (2004); David C. Vladeck, Keeping Score: The Utility of Empirical Measurements of Judicial Selection, *32 Fla. St. L. Rev.* (forthcoming 2005), available at <http://ssrn.com/abstract=616944>.

- "textual," "structural," "prudential," or "historical" - exists for objecting to reading the Constitution's words "advise and consent" to authorize members of the Senate to take an active role in shaping the federal judiciary.¹⁸⁴

In short, no apologies are needed when either the President or the Senate carefully scrutinizes individuals and spends time analyzing their records.¹⁸⁵ Moreover, as I detail below, the nominations process has become a useful venue for identifying conflicts about what tenets are central to American law.

A. A Venue for Debating Norms

When attitudes are widely shared, they are not perceived to be "ideology." Only when norms and values are contested do we think of a set of questions as touching on ideology. The question of the role and rights of women provides one example. By reviewing the transcripts of nominations to the United States Supreme Court over the last several [*632] decades, one can see how attitudes about women's rights changed.¹⁸⁶ Up until 1970, women were invisible in the hearings. In the 1980s, however, conflict about constitutional guarantees of the equal protection of women became a central aspect of debate about the propriety of the confirmation of nominees.

Specifically, the first question about attitudes of a nominee towards women emerged in 1970, when George Harrold Carswell was questioned.¹⁸⁷ Congresswoman Patsy Mink from Hawaii had raised concerns about that nomination, which she described as "an affront to the women of America" because of Judge Carswell's role in a case upholding the refusal to employ women with children of pre-school age, although men with children of pre-school were so employed.¹⁸⁸ At the confirmation hearing, Senator Birch Bayh of Indiana asked Judge Carswell to address "the impression that [Carswell was] not in favor of equal rights for women." Carswell responded that he was committed to the enforcement of the "law of the land."¹⁸⁹

The Carswell nomination was rejected but not because of Carswell's views on women's role in society.¹⁹⁰ The following year, [*633] when William Rehnquist and Lewis Powell were nominated to be associate justices, several witnesses objected to both nominees' attitudes towards women's rights.¹⁹¹ While such testimony prompted Senator Bayh to ask William Rehnquist about his views on equal rights for women,¹⁹² no such questions were addressed to Lewis Powell.¹⁹³ A nominee's attitudes toward

¹⁸⁶ See Yalof, *supra* note 138, at 190-207. Yalof contrasted President Clinton's "interest in a quick and painless confirmation process [that] quickly turned into an obsession, infiltrating nearly every stage of his decisionmaking process," *id.* at 190, with the approach of the first President Bush, who focused on ideology and "confirmability" by looking for candidates about whom little was known. *Id.* at 190-91.

¹⁸⁷ See *U.S. Const. art. II, 2, cl. 3* (authorizing the President "to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session"). The constitutionality of using such appointments during brief recesses is explored in several recent articles. See generally William T. Mayton, *Recess Appointments and an Independent Judiciary*, *20 Const. Comm.* 515 (2004); Edward A. Hartnett, *Recess Appointments of Article III Judges*, *26 Cardozo L. Rev.* 377 (2004). In addition to the issues addressed in those articles (primarily focused on Article II), challenges to the legality of temporary judgeships can be based on the view that judges dependent on renomination by the Executive in a relatively short time frame lack the kind of independence guaranteed by both the Due Process Clause and Article III.

¹⁸⁸ Under current practices, sixty votes are needed to break a filibuster in the Senate. Specifically, President Bush appointed William Pryor to the Eleventh Circuit and Charles Pickering to the Fifth Circuit. In the winter of 2004, Judge Pickering announced his retirement. See Adam Liptak, *Judge Appointed by Bush After Impasse in Senate Retires*, *N.Y. Times*, Dec. 10, 2004, at A3.

In the spring of 2004, Senator Edward Kennedy challenged the legality of these appointments. See Letter from Edward Kennedy to the United States Court of Appeals for the Eleventh Circuit Regarding the Recess Appointment of William H. Pryor, Jr. (March 5, 2004), available at http://www.kennedy.senate.gov/index_bjhb.html. Thereafter, Senator Kennedy filed a Motion to Submit an Amicus Brief in support of efforts by a set of appellees in *Stephens v. Evans*, No. 02-16424 (11th Cir. 2004), to disqualify Judge Pryor on the grounds that his appointment was illegal. The Eleventh Circuit rejected that filing as time-barred. See Jonathan Ringel, *Kennedy's Last-Ditch Effort to Block Pryor Fails* (June 11, 2004), available at <http://www.law.com/jsp/article.jsp?id=1086706010561>. The Eleventh Circuit rejected the challenge on the merits in *Evans v. United States*, *387 F.3d 1220 (11th Cir. 2004)* (en banc). Two judges dissented.

Senator Kennedy also submitted an amicus brief in support of a certiorari petition that raised the question of the constitutionality of an intra-session recess appointment. See *Miller v. United States*, No. 04-38 (docketed July 8, 2004) (pending as of Jan. 3, 2005).

women's rights played a minor role in the hearings and did not become a subject of analysis by those commenting on the nomination process.¹⁹⁴

[*634] The hearings on the nomination of Robert Bork, in 1987, were the first in which women's issues moved to center stage and became relevant to the outcome.¹⁹⁵ Many witnesses questioned Judge Bork's interpretations of constitutional doctrine to exclude women from heightened protection under the Fourteenth Amendment,¹⁹⁶ as well as his decisions in non-constitutional cases. While many factors contributed to Judge Bork's rejection, his belief that discrimination against women was not directly prohibited by the Equal Protection Clause of the Fourteenth Amendment,¹⁹⁷ his opposition to the Equal Rights Amendment,¹⁹⁸ and his narrow construction of statutory rights for women played an important part.

Nominations thereafter took a different turn and so has the constitutional law, at least somewhat. Discussions in Justices Kennedy, Scalia, and Souter's hearings addressed specifically the topic of women's rights.¹⁹⁹ Justice Ginsburg was praised for her role as a **[*635]** women's rights advocate,²⁰⁰ and Justice Breyer expressed his support for women's equality.²⁰¹ And, as is familiar, attitudes toward women more generally played a role in Justice Thomas's nomination hearings.²⁰²

This review of some of the questions put to Supreme Court nominees over the past two decades shows that senatorial inquiry into "ideology" or "judicial philosophy" of nominees can play a useful role. Up until 1970, the issues related to women's status were invisible in the hearings. During the 1970s and through most of the 1980s, women were but a minor footnote. The change came in the late 1980s. Nomination hearings were one space in which the Senate helped women to become equal rights-holders under the United States Constitution. Of course, that work intersected with important legislative efforts - including the Pregnancy Discrimination Act, the Family and Medical Leave Act, and the Violence Against Women Act²⁰³ - that generated substantive rights. Moreover, the substance of those rights remains in dispute. Some of the nominees who come before the Senate have supported women's rights at only a very general level of abstraction, with some of those confirmed voting in cases against positions supported by women's rights advocates.²⁰⁴

¹⁷⁹ See J. Harvie Wilkinson III, *We Don't Need More Federal Judges*, *Wall St. J.*, Feb. 9, 1998, at A19; J. Harvie Wilkinson III, *The Drawbacks of Growth in the Federal Judiciary*, *43 Emory L.J.* 1147 (1994). See generally *Conserving Judicial Resources: Considering the Appropriate Allocation of Judgeships in the U.S. Courts of Appeals for the Fourth, Fifth, and Eleventh Circuits: Hearings before the Subcomm. on Administrative Oversight and the Courts of the Senate Comm. the Judiciary*, 105th Cong. 13-18 (1997) (statement of Hon. Harvie Wilkinson III).

¹⁸⁰ See Gonzales, *supra* note 158, at A18. For a time, a similar message was posted on the website of the Department of Justice. See U.S. Dep't of Justice, Office of Legal Policy, *Judicial Nominations*, 108th Cong., at 4 ("White House Counsel Alberto Gonzales Discusses the Crisis in Our Courts"), at <http://www.usdoj.gov/olp/judicialnominations.htm>.

¹⁸¹ The median time to disposition for district court criminal and civil cases that are not tried ranges from six to nine months; for cases on appeal, dispositions occur, again at the median, in about eleven months. See *Judicial Business of the United States Courts*, 2003, *supra* note 96, at tbls. B-4, C-5, D-6. For those cases that proceed through decision to appeal, the median time from filing a complaint to disposition on appeal is about twenty-six months. *Id.* at tbl. B-4. Further, as noted, the federal judicial system is one in which trials are rare.

¹⁸² Moreover, to the extent that the focus has been on the growing docket of the appellate courts, those courts have come to rely on active or senior district judges or on senior circuit judges who sit "by designation." As of a few years ago, in about a quarter of the published appellate opinions, the panel of judges on the case included a judge sitting by designation. The practice of using such judges varies by circuit, with some relying more heavily on them than others.

¹⁸³ Geyh, *supra* note 17, at 220.

¹⁸⁴ See Black, *supra* note 0, at 664. See generally Paul Simon, *Advice & Consent: Clarence Thomas, Robert Bork, and the Intriguing History of the Supreme Court Nomination Battles* (1992); Strauss & Sunstein, *supra* note 0; Robert F. Nagel, *Advice, Consent, and Influence*, *84 Nw. U. L. Rev.*

To identify some utility in the exchanges in the Senate is not to say the Senate is always right, that the inquiry is pleasant, or that it is effective. Indeed, despite the high profile conflict and the many [*636] hearings over the last decade, the Senate rarely rejects a nominee. Far more often, the Senate not only confirms but does so by a wide margin - as is illustrated by Chart 5, Margins of Support for Confirmations, 1993-2003 below.

Chart 5 Margins of Support for Confirmations, 1993-2003

[SEE TABLE IN ORIGINAL]

These data could be read to demonstrate the power of the presidency to set agendas that are difficult to counteract. That reading [*637] is a fair one for both of the Bush presidencies. If one knows some of the recent history under the Clinton administration, however, one can also read these numbers to indicate that a good deal of the negotiation between the President and the Senate occurs before any nomination is made.²⁰⁵ Many individuals drop out during this phase of the process, and those whose nominations survive to make it formally to the floor provide a skewed sample from which to assess the level of conflict. Moreover, a history of the "blue slip" process - whereby a senator from a home state can veto a nominee - also suggests that intra-party conflict has played a role, with Senators seeking to affect their own party's agenda as well as that of the opposition party.²⁰⁶ And "insider" accounts detail idiosyncratic dealmaking, sometimes with bi-partisan accords and other times over vehement objections.²⁰⁷ Given current practices, two goals emerge: how to obtain and sustain senatorial interest in less high profile nominations so as to generate serious consideration of each nominee for a life-time appointment and how to lower the stakes of some appointments by altering the political capital of life-tenured judgeships.

B. Useful Interventions

In earlier essays, I proposed that the Senate turn to a supermajority rule, requiring sixty votes as a threshold for a nomination to be confirmed.²⁰⁸ I argued that while the Constitution does not impose that requirement,²⁰⁹ the Senate could do so in an effort to mark the import of a life-tenured position - at all levels of the federal judicial system.

[858 \(1990\)](#); Resnik, *Changing Criteria for Judging Judges*, supra note 9; Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, [101 Harv. L. Rev. 1146 \(1988\)](#).

¹⁸⁵ I have so stated as a participant in Senate hearings. See 'The Senate's Role in the Nomination and Confirmation Process: Whose Burden?: Hearings before the Subcomm. on Admin. Oversight and the Courts, Sen. Comm. on the Judiciary, 107th Cong. 179, 181 (2001) (statement of Judith Resnik), reprinted in [50 Drake L. Rev. 511 \(2002\)](#).

¹⁸⁶ See Judith Resnik, *From the Senate Judiciary Committee to the County Courthouse: The Relevance of Gender, Race, and Ethnicity to Adjudication*, in *Race, Gender and Power in America 177-87* (Anita Faye Hill & Emma Coleman Jordan eds., 1995).

¹⁸⁷ See *Nomination of George Harrold Carswell of Florida, to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 91st Cong. (1970)* [hereinafter *Carswell Hearings*]. One caveat: according to Mersky and Jacobstein, supra note 140, at Preface to Vol. I, not all of the Senate Judiciary Committee proceedings during that era have been made public.

¹⁸⁸ *Carswell Hearings*, supra note 187, at 81-82. Carswell's role in that case was quite limited; he was a member of an en banc panel that denied rehearing in *Phillips v. Martin Marietta Corp.*, [416 F.2d 1257 \(5th Cir. 1969\)](#) (en banc), in which Ida Phillips claimed that the company had violated her Title VII rights by declining to give her, a mother of pre-school age children, a job not denied to men with pre-school age children. The Fifth Circuit concluded that the policy did not discriminate against women but was based upon "the differences between the normal relationships of working fathers and working mothers to their pre-school age children." *Phillips v. Martin Marietta Corp.*, [411 F.2d 1, 4 \(5th Cir. 1969\)](#). That decision was vacated and remanded by the *Supreme Court. Phillips v. Martin Marietta Corp.*, [400 U.S. 542, 544 \(1971\)](#).

¹⁸⁹ *Carswell Hearings*, supra note 187, at 40-41.

¹⁹⁰ According to one historian of the proceeding, criticism of Carswell centered on his general lack of distinction as well as his 1948 pro-segregation stance, later repudiated. See, e.g., John P. Frank, *Clement Haynsworth, The Senate, and The Supreme Court 103-06* (1991). Frank noted Congresswoman Mink's opposition, but in his view, the "real sticking points were civil rights and competence." *Id.* at 113. Frank also discussed the political context, a democratically-controlled Senate distressed at the forced resignation of Abe Fortas, which animated the unsuccessful nomination of Clement Haynsworth (in Frank's view, unfortunately rejected) as well as that of Carswell (in Frank's view, appropriately rejected). *Id.* at xiv, 19, 28, 44, 94-95, 102-03.

As Chart 5 above indicates, however, such a rule would not (were other factors constant) have produced radically different results in the last decade. During the two terms of President Clinton and up until June of 2003 of the first term of President Bush, six persons - three Clinton and three Bush nominees - were seated on the lower federal [*638] courts by votes of fewer than sixty. More recently, in several instances, opponents of a few nominees have used a filibuster, but two of those judges were then seated as recess appointments. While these vivid conflicts have dominated the press in recent years, more than ninety percent of those nominated in the last decade for the lower courts have been confirmed with support of ninety or more senators. Hence, my concern is that the Senate has been too accommodating, approving too many candidates, too quickly.

A supermajority rule of sixty could nonetheless have some use. Such a requirement could create incentives for the President to put forth individuals about whom a broad consensus of approval exists. The rule would have its most powerful impact at the Supreme Court level, where the stakes are the highest. Further, this relatively modest "supermajority" would not over-empower a senatorial "fringe" (as forty senators represent a significant part of American political opinion) but would likely generate movement towards a middle ground. Also, a supermajority rule would underscore senatorial commitment to the constitutional role of "Advice and Consent."²¹⁰

Another option is for the President and Senate to work together by relying on bi-partisan merit selection procedures. In addition to models from other countries, many states use forms of merit selection.²¹¹ Further, regulations governing the selection of federal magistrate judges require that screening panels, composed of a variety of kinds of persons, play a role in vetting nominees. In the spring of 2003, Senator Charles Schumer, a Democrat from New York, made such a proposal. He suggested that the Senate and President create nominating commissions for each state and each federal circuit, to be composed of an equal number of members chosen by the President and by the opposition party's Senate leader. The nominating commissions would have the power to propose a single candidate for each vacancy that the President was obliged to nominate absent "evidence" that a candidate was "unfit for judicial service."²¹² The White House objected that such a process would "transfer the nomination power of the President and the confirmation power of the Senate to a group of unelected and unaccountable private citizens."²¹³

n May 1970, the Senate approved, with ninety-four affirmative votes (and six absentees), the nomination of Harry Blackmun as an associate justice. *Id.* at 124. No questions were addressed to Blackmun about his views on women's rights during the brief one-day hearing. *Nomination of Harry A. Blackmun to be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 91st Cong. (1970).*

¹⁹¹ See *Nominations of William H. Rehnquist, of Arizona, and Lewis F. Powell, Jr., of Virginia, to Be Associate Justices of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 92nd Cong. (1971)* [hereinafter *Rehnquist and Powell Hearings*]. Objections were raised about William Rehnquist's testimony while he was in the Justice Department on the Equal Rights Amendment (ERA) and the Women's Equality Act, *id.* at 428-29, and about Lewis Powell's failure, as a leader of the American Bar Association, to take stands on issues affecting women. *Id.* at 423-25, 428-36; see also *id.* at 457-60 (testimony of Catherine G. Roraback, President of the National Lawyers' Guild, testifying that, under Powell's leadership, the ABA was silent on the question of equal rights for women). Barbara Greene Kilberg of the National Women's Political Caucus testified not about the nominees but about the absence of a female nominee, *id.* at 421-23, a topic that had been in the news, prompted in part because of President Nixon's statements that "qualified women" should be considered for the two vacancies. James M. Naughton, *Harlan Retires*, *N.Y. Times*, Sept. 24, 1971, at 1.

¹⁹² In 1971, when he was Assistant Attorney General in the Nixon administration, Rehnquist testified before the House Judiciary Committee somewhat ambiguously but in some respects supported the ERA. See *Equal Rights for Men and Women 1971: Hearings before Subcomm. No. Four of the House Comm. on the Judiciary, 92d Cong. 323 (1971)* (statement by Rep. Charles Wiggins) (noting that while the "administration is positively committed to the support of this constitutional amendment," it also said that the amendment was "not necessary").

When testifying as a nominee to be an associate justice before the Senate Judiciary Committee, William Rehnquist declined to state his personal view on the ERA. When asked his view on the rights of women under the Fourteenth Amendment, he responded that it protects "women just as it protects other discrete minorities, if one could call women a minority." *Rehnquist and Powell Hearings*, *supra* note 191, at 163. Thereafter, noting that some of the issues were pending before the Court, he declined to address additional questions on women's rights. *Id.* at 164.

[*639] As this exchange suggests, independent commissions have appeal precisely because they devolve powers of appointment that are held directly by political branches to another level. To do so - as some states have in their "merit selection" mechanisms - requires placing faith either in experts or in group-based processes to generate a search for qualities in prospective judges that may make them wise judges but not necessarily attractive to more politically-engaged appointing bodies. The very devolution, however, also can be criticized for producing a selection process less "democratic" than is the appointment of judges by elected officials. Moreover, what power is in fact delegated turns on the details of particular nomination commissions, which vary in their compositions and their ability to constrain the range of options of the elected branches. Yet another dimension is the degree of publicity surrounding nominations, as the lobbyists now attuned to the President and Senate could aim their persuasive efforts in other directions or attempt to affect the reputations of individuals under consideration.

Another way to try to lower the political heat in the United States would be to increase the number of life-tenured judgeships. The very small number of positions makes an appointment a real "political plum" that vests significant power in relatively few individuals. The appellate courts are now both the end point for most cases and the pool from which Supreme Court nominees are drawn. Were hundreds more selected for life-tenured slots,²¹⁴ the power of life tenure would be shared by more people and each individual appointment would become less significant.

Of course, the more judgeships with life tenure, the less unique the job. The job might lose some of its cachet and therefore attract a somewhat different pool. But the tradeoff could enable a shift in the understanding of a judge's job away from the glamour of policymaking and towards the more mundane, record-driven activity of applying law to fact. When done properly, adjudication is a labor-intensive job, requiring a kind of work that is time-consuming and sometimes tedious. We want candidates for judgeships to be committed to doing that form of work - much of it without high visibility yet having profound effects on specific litigants.

Yet another tack is to the return to the text of Article III, stating that the "judicial Power of the United States" shall vest in courts with judges holding "their Offices during good Behaviour."²¹⁵ The Constitution does not directly address the question of what "good **[*640]** Behaviour" means. Commentators, however, have. Professor Raoul Berger traced the phrase "hold their Offices during good Behaviour" to the Act of Settlement of 1701 (which protected the independence of English judges by granting them

¹⁹³ According to a biography of Justice Powell, when confronted by "a group of women's rights activists," he responded: "Ladies, I've been married for thirty-five years and have three daughters. I've got to be for you." John C. Jeffries, Jr., Justice Lewis F. Powell, Jr. 233 (1994). As Professor Jeffries describes it, the "crucial issue was not gender but race." Id. While Justice Powell had resigned his memberships in all-white clubs, concern was raised about his role in the "(non)desegregation of the Richmond schools." Id. at 233-34. Justice Powell's defense was to rely on endorsements by a variety of individuals attesting to his efforts to respond calmly to the complex problems of school integration, his work with the all-black National Bar Association, and his commitment to fairness. Id. at 235-36.

¹⁹⁴ See, e.g., Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* 20-22 (3d ed. 1992) (discussing the hearings without mention of women's rights); *Nomination of John Paul Stevens to Be a Justice of the Supreme Court: Hearings before the Senate Comm. on the Judiciary, 94th Cong.* (1975); *Nomination of Judge Antonin Scalia, to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 99th Cong.* (1986) [hereinafter *Scalia Hearings*]; *Nomination of Justice William H. Rehnquist to Be Confirmed as Chief Justice of the U.S. Supreme Court: Hearings before the Senate Comm. on the Judiciary, 99th Cong.* 114 (1986).

The nominees did not respond with detailed defenses or point to their efforts to enhance women's participation in the political, economic, and social life of the country. Indeed, Justice Scalia defended his membership in an all-male club on the grounds that although the club did discriminate by excluding women, that form of discrimination was not "invidious." See *Scalia Hearings*, supra, at 91 (commenting that a judge should not belong to a club that "practices invidious discrimination"). Justice Scalia resigned his membership in that club; he explained that several factors influenced his decision, including that "I was uncomfortable at doing something which, although I thought it was perfectly OK, was offensive to friends whose feelings I am concerned about." Id. at 105.

¹⁹⁵ See generally Ethan Bronner, *Battle for Justice: How the Bork Nomination Shook America* (Norton, 1989); Martin Shapiro, *Interest Groups and Supreme Court Appointments*, *84 Nw. U. L. Rev.* 935 (1990).

¹⁹⁶ *Nomination of Robert H. Bork to Be Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 100th Cong.* 160-61 (1987) [hereinafter *Bork Hearings*]. One case that received attention was *Griswold v. Connecticut*, 381 U.S. 479 (1965), which involved a challenge to a statute making it a crime to prescribe contraceptives. Robert Bork had called the statute a "nutty law," and then, at the hearings, described the case as an "academic exercise." *Bork Hearings*, supra, at 196, 240-43; Stuart Taylor, Jr., *The Bork Hearings: Bork Tells Panel He Is Not Liberal, Not Conservative*, N.Y. Times, Sept. 16, 1987, at A1. See generally Andi Rierdon, *Griswold v. Connecticut: Landmark*

tenure "as long as they conducted themselves well, and provided for termination" only through a formal request by the Crown of the two Houses of Parliament) and to earlier English traditions. ²¹⁶ Prompted by efforts in the 1960s to oust Justice William O'Douglas from his seat on the United States Supreme Court, academic commentary of that era focused on the kind of activity that would justify removal of a sitting judge. ²¹⁷ Professor Berger argued that Congress had the power to define a breach of "good behavior" to include more than "high Crimes and Misdemeanors," ²¹⁸ while others disagreed. A similar debate about the flexibility of Article III's text took place in the late 1970s, when members of Congress considered how to impose sanctions short of impeachment on Article III judges and how to facilitate the retirement or removal of judges too disabled to work. ²¹⁹ A statute, the Judicial Conduct and Disability Act of 1980, followed thereafter and has survived a few challenges to its constitutionality. ²²⁰

The doctrinal issue of interest to me, in contrast, is to revisit Article III to consider whether, were Congress to provide a fixed term for all sitting federal judges, such a provision could be read to be constitutional. The answer depends in part on the form of constitutional analysis that one embraces. One could, for example, quest after the original understanding of some of the framers about the length of tenure assumed to be comprehended. One inquiry would be whether "good behavior" ever had a temporal limit. ²²¹ One might also look for other instances in English law when the phrase "holding office during good behavior" was used. Alternatively, one could attempt to use the average length of service of judges and justices over the early years as a [*641] benchmark of what length of tenure in fact flowed.

The existence of the statutory federal judiciary (with magistrate and bankruptcy judges sitting inside Article III but lacking life tenure) is evidence that this part of the Constitution is not one in which forms of originalism or textualism have had much sway. Rather, a majority of the Court has been decidedly functionalist as it has read Article III to permit devolution of judicial power in a manner unthinkable only decades ago. Thus, just as over this past century reinterpretation has permitted much of the "judicial Power of the United States" that the words of the Constitution appear to mandate vesting in courts with life-tenured judges to be delegated to non-life-tenured jurists in courts and in agencies, ²²² Article III could similarly be reinterpreted to require guaranteed terms yet also to permit a mandatory, statutorily-fixed retirement age. Congress could enact such a statute with prospective application, such that current judges would not lose their seats, thereby avoiding any arguments that it would diminish the salary or otherwise impair the independence of sitting jurists.

Case Remembered, N.Y. Times, May 28, 1989, at [12CN](#) (describing the efforts of Estelle Griswold and Charles Lee Buxton to lobby the Connecticut legislature to repeal that law and their subsequent arrest for operating a clinic that openly dispensed contraceptives to poor women; Yale law professor Thomas Emerson, who had argued the case, explained its import as one of the early recognitions of a constitutionally-based right to privacy).

¹⁹⁷ Judge Bork argued that the Fourteenth Amendment was addressed to race and ethnicity, not to gender, and that rules relating to race should not and could not be transposed to gender, because "our society feels very strongly that relevant differences exist and should be respected by government" (referring to single-sex bathrooms and women in combat). See Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* 328-31 (1990).

¹⁹⁸ Bork Hearings, *supra* note 196, at 161-62 (Bork explained that his opposition was not heated; he had not "campaigned" against the ERA, but he did believe it would be inappropriate to "put all the relationships between the sexes in the hand of judges.").

¹⁹⁹ See Nomination of Anthony M. Kennedy to Be an Associate Justice of the Supreme Court of the United States, Hearings Before the Senate Comm. on the Judiciary, 100th Cong. 23, 104-11 (1987); Scalia Hearings, *supra* note 194, at 168-85, 207-23, 250-75; Nomination of David H. Souter to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 101st Cong. 53-57, 362-406, 569-604, 684-701 (1990).

²⁰⁰ See Nomination of Ruth Bader Ginsburg to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 103d Cong., 10-11, 27, 40, 228 (1993).

²⁰¹ See Nomination of Stephen G. Breyer to Be an Associate Justice of the Supreme Court of the United States: Hearings before the Senate Comm. on the Judiciary, 103d Cong. 178, 269 (1994).

²⁰² See Nomination of Judge Clarence Thomas to Be an Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary, 102nd Cong. 5-26, 157-189 (testimony of Clarence Thomas); 31-157 (testimony of Anita Hill) (1991).

²⁰³ Pregnancy Discrimination Act, Pub. L. No. 95-555, 1, [92 Stat. 2076 \(1978\)](#) (codified at [42 U.S.C. 2000e\(k\)](#) (2000)); Family and Medical Leave Act, Pub. L. No. 103-3, [107 Stat. 6 \(1993\)](#) (codified at [29 U.S.C. 2601-2654](#) (2000 & Supp. 2002)); Violence Against Women Act, Pub. L. No. 103-322, tit. IV, [108 Stat. 1796, 1903 \(1994\)](#) (codified in various sections of Titles 18, 28, and 42 (2000)).

An alternative is to enact legislation creating great incentives for judges to serve shorter terms. As Professor Yoon has detailed,²²³ the current federal judicial pension system prompts some judges to take "senior status" but to continue to serve. Congress could do more by providing significantly better pension benefits to those judges who sit no longer than fifteen years. Economic models could assist in how to fashion an optimal intervention, just as some universities have offered packages of benefits and salary that have prompted tenured professors to take early retirement. My suggestions join many others,²²⁴ all concerned that the federal system's life tenure, while initially attractive for its protection of judicial independence, has been shown to place stress on democratic premises of limited charters to government officials.

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VII. American Exceptionalism, One Hopes

This description of the United States system has, I hope, shown its cultural specificity. Questions then remain about what lessons are to be drawn abroad. A first is that one can (if one wants) use the judicial appointments process as a platform to score points with constituencies in a democracy. Indeed, given the import of the work of judiciaries in democracies, the potential to exploit the political dimensions of judicial appointments and to generate conflict is high. The form that conflicts take will vary, depending on the concerns of the participants, the technology for dissemination of information, and the particular topics prompting normative debate.

A second lesson is that a decision to revise selection methods is itself a political moment. For example, academics had for some time criticized the appointments process in Canada for having a "democratic deficit" stemming from a lack of "transparency" in the process and from the centralization of authority.²²⁵ But it was not until the spring of 2004, as a Prime Minister of Canada faced reelection in the wake of attacks about his party's policies and as some of his opponents hoped to use opposition to gay marriage as way to garner votes,²²⁶ that a modicum of change occurred.²²⁷ Instead of simply announcing the [*643] appointment of a new justice to the Supreme Court, the Attorney General appeared before Parliament to explain the process and then the choices made. This revision was a means of responding to concerns about problems in the administration not directly related to the judiciary, just as the debate about judicial selection was a means of questioning the Prime Minister.²²⁸

²⁰⁴ Compare *Nevada Dep't. of Human Res. v. Hibbs*, 538 U.S. 721 (2001) (upholding congressional power to permit private lawsuits against states for monetary remedies for violations of the Family and Medical Leave Act) with *United States v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacked power under either the Commerce Clause or the Equal Protection Clause to enact 42 U.S.C. 13891, the Civil Rights Remedy of the Violence Against Women Act (VAWA)). While that section has been invalidated, the rest of VAWA remains in force, and in 2000, Congress appropriated additional funds. See the Victims of Trafficking and Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000). In another decision, the Court upheld, 5-4, the constitutionality of differential treatment of children depending on whether their mother or their father is a citizen of the United States. See *Nguyen v. INS*, 533 U.S. 53 (2001). See generally Post & Siegel, supra note 50; Judith Resnik, Categorical Federalism: Jurisdiction, Gender, and the Globe, 111 *Yale L.J.* 619 (2001).

²⁰⁵ See Yalof, supra note 138, at 191-202.

²⁰⁶ See Binder, Blue Slip, supra note 156, at 10-15 (focusing on the period around 1913).

²⁰⁷ See Sarah Wilson, Appellate Judicial Appointments During the Clinton Presidency: An Inside Perspective, 5 *J. App. P. & Process* 29 (2003).

²⁰⁸ See Judith Resnik, Supermajority Rule, *N.Y. Times*, June 11, 2003, at A34; Judith Resnik, Judicial Selection, Independent Jurists and Life Tenure, in Symposium, The Judicial Confirmations Process: Selecting Federal Judges in the Twenty-First Century, at <http://jurist.law.pitt.edu/forum/symposium-jc/resnik.php>; see also John O. McGinnis & Michael B. Rappaport, Supermajority Rules and the Judicial Confirmation Process, 26 *Cardozo L. Rev.* 543 (2004) (arguing that an express supermajority rule for Supreme Court nominations, if made through a bi-partisan process binding future presidents, would be more desirable than one for judges nominated to serve on the lower courts and that the Senate Judiciary ought to use a supermajority rule if declining to forward a nominee to the Senate).

²⁰⁹ See also Gerhardt, supra note 13, at 41 (detailing the other instances in which "stiffer procedural requirements" are imposed by the Constitution).

²¹⁰ Bruce Ackerman has also suggested supermajority rules, as well as that staggered and fixed terms be used, with two appointments to be made at a time. See Bruce Ackerman, The Future of Liberal Revolution 104-12 (1992) (relying heavily on examples from selection procedures for Germany's constitutional court).

Thus, whenever pressures are mounting for changing techniques of selection, one needs to analyze the politics prompting movements for reform. Who is calling for change and what is the problem that needs to be remediated? In England, Wales, and Canada, criticism has been aimed at the degree of power held by the Prime Minister who, under the current system, appoints the judges in each country.²²⁹ But, as detailed above, what fueled a small change in Canada were the political needs of a party in power. Similarly, in England, pressures on methods of judicial selection come from a variety of sources. Some are concerned about the lack of diversity of the judiciary,²³⁰ challenged for being less legitimate because its members came from too narrow a slice of society to have the knowledge and experience sufficient to render wise judgment on the wide array of claims brought. Others worry that the English system of Law Lords does not fit within European principles of separated powers.²³¹

But again, one cannot explain how particular changes come into [*644] being only by reference to such concerns. The proposal for a new method of appointment of judges was coupled with a proposal to abolish the Office of Lord Chancellor and to create a Supreme Court for England. Many attribute the timing of the proposals to the governing party's interest in shifting attention away from yet other controversial decisions. Similarly, opposition to these changes are based on eclectic arguments from whether an appointing commission will be more "political" than decisions made through the office of the prime minister²³² to suggestions that the assent of sitting judges depended upon being given a new court building suitable to their needs.²³³ In short, reforming

²¹¹ See, e.g., Conn. Gen. Stat. 51-44(a) (2004); Connecticut General Assembly Legislative Program Review & Investigations Committee, Staff Briefing: Judicial Selection (Sept. 14, 2000) (summarizing the history of the creation of a judicial selection commission, and the selection process through a twelve-person committee including six lawyers and six non-lawyers, who generate lists of recommended candidates).

²¹² Schumer Proposal, *supra* note 4, at 2.

²¹³ Letter from Counsel to the President Alberto R. Gonzales to Senator Charles E. Schumer Regarding the Judicial Nomination Process (May 6, 2003), available at <http://www.usdoj.gov/olp/judicialnominations.htm>.

²¹⁴ For example, the seven hundred magistrate and bankruptcy judge positions could be turned into life-tenured jobs, with an accompanying expansion of appellate judgeships.

²¹⁵ *U.S. Const. art. III, 1.*

²¹⁶ Raoul Berger, Impeachment of Judges and "Good Behavior" Tenure, 79 Yale L.J. 1475, 1478 (1970).

judicial selection is a political event that may - or may not - be centrally "about" judicial selection. Only by insisting on an articulation of the reasons behind reform pressures can one understand why changes occur and can one assess whether to be enthusiastic about them.

A third lesson is that as principles of democracies themselves evolve, methods for selection of judges that were once perceived to be legitimate may need to be revisited. Increased demands for deliberative representation within democracies have prompted insistence - in many countries - that not all judges be white or male or of a certain class. When the content and import of equality changes, processes once seen as unproblematic become questionable.

Fourth, democratic premises are relevant not only to the question of selection but also to the length of service enjoyed by judges and the range of choice that judges have over their own workload. I have argued that judges in the United States who have life tenure and who hold the power to make so much law for so long have too much power. Built into adjudication is the capacity for revision through the case law method. As the composition of judiciaries change, the wisdom of a particular rule of law can be tested, in that new members of high courts may not adhere to its premises. But that very capacity to generate change depends on limiting the length of service of powerful judges.

Furthermore, the obligatory quality of adjudication is another source of constraint - making me leery of supreme courts that have unfettered discretion to pick all their cases. When high courts have broad jurisdictional mandates rather than exclusive devotion to constitutional cases, judges are required to hear the "dull" or "ordinary" private and public disputes as well as more vivid moments of norm [*645] development. A mixed docket both informs those who sit on a high court about workings of law in a range of situations and insulates a court from being understood only through its high profile constitutional work.

Fifth, to the extent that "transparency" has become a buzzword in debates in England, Canada, and the United States, comparing the current rules and practices of the different countries illuminates various ways in which that aspiration can be materialized in judiciaries. For example, one can watch through televised broadcasts the arguments before the Supreme Court of Canada. England is starting to experiment with televised court proceedings.²³⁴ In Australia, the current practice is to allow many appellants petitioning for High Court review to have twenty minutes of oral arguments to a panel of the Court to explain why the Court

²¹⁷ Id. at 1475-77.

²¹⁸ Id. at 1530; see also Burke Shartel, *Federal Judges - Appointment, Supervision, and Removal - Some Possibilities Under the Constitution*, 28 Mich. L. Rev. 870 (1930); Note, *Removal of Federal Judges: A Proposed Plan*, 31 Ill. L. Rev. 631 (1937).

²¹⁹ See The National Commission on Judicial Discipline and Removal Report (1993). See generally Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, [131 U. Pa. L. Rev. 283 \(1982\)](#); Symposium, *Disciplining the Federal Judiciary*, [142 U. Pa. L. Rev. 1-1430 \(1993\)](#).

²²⁰ See The Judicial Conduct and Disability Act of 1980, Pub. L. No. 96-458 (codified at various sections of Title 28 and, as amended, at **28 U.S.C. 372** (2000)); see [Hastings v. Judicial Conference of the United States](#), 657 F. Supp. 672 (D.D.C. 1986), aff'd in part and rev'd in part, [829 F.2d 91 \(D.C. Cir. 1987\)](#), cert. denied, **485 U.S. 1014 (1988)**; [Hastings v. United States](#), 837 F. Supp. 3 (D.D.C. 1993).

²²¹ See, e.g., Berger, *supra* note 216, at 1478 (suggesting that seventeenth century sources assumed the holding of a position for life if the office holder behaved himself).

²²² I map the doctrinal revision in [Resnik, *Inventing the District Courts*](#), *supra* note 30, at 625-48.

²²³ See Yoon, *Understanding Turnover*, *supra* note 112 (finding that the availability of pension rights is a key variable in a lower court judge's decision to take senior status).

²²⁴ See, e.g., Garrow, *supra* note 118 (arguing that, given a number of justices who served on the Supreme Court but were ill, a requirement for retirement is appropriate). Another suggestion, proposed by Professors Paul Carrington and Roger Cramton, would be a legislative provision that endowed each Congress, every two years, with the power to appoint justices who would rotate on the Court that would sit as a body of nine. See Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles* (Jan. 2, 2005) (memorandum, on file with author).

²²⁵ See, e.g., Peter H. Russell, *A Parliamentary Approach to Reforming the Process of Filling Vacancies on the Supreme Court of Canada*, Submission to the Standing Committee on Justice, Human Rights, Public Safety, and Emergency Preparedness (March 23, 2004), available at

should take the case. ²³⁵ Further, in the Canadian system, the possibility of a legislative override on judicial decisionmaking puts democracy back into play in a way that ought to reduce anxiety about judicial decisionmaking. ²³⁶ In contrast, in the United States, nominees are questioned in public but once seated, the justices make their own rules on practice and procedure and have, thus far, refused to permit televised proceedings for oral arguments.

Sixth, judicial legitimacy and independence is an artifact of culture as much as of text. In the United States, the constitutional guarantees of life tenure, salary protections, and due process have developed a presumption of an independent and impartial judiciary. Yet, in the United States, judges have often been attacked for their decisions and legislators have frequently proposed curbing their powers. While some [*646] proponents of American-style constitutionalism claim that Article III is the paragon and paradigm of judicial independence, the kind of aggression against judges in the United States comes as a surprise to judges and lawyers in other common law countries. Specifically, the last ten years have been a period of particularly energetic efforts by Congress to restrain judicial action. In 1996, Congress limited judicial review of certain kinds of cases involving immigrants ²³⁷ and constrained judges' powers when dealing with cases about conditions in prisons. ²³⁸ In 2003, Congress reduced judicial discretion on sentencing. ²³⁹

In 2004, members of Congress proposed bills to take jurisdiction away from federal courts in disputes involving God, the Ten Commandments, and the Pledge of Allegiance. ²⁴⁰ Another proposal was to instruct federal judges not to employ foreign law, ²⁴¹ and yet another was to provide for congressional override, through supermajorities, of judicial decisions. ²⁴² In addition, members of Congress have regularly called for redesigning the boundaries of circuits and reorganizing courts to alter the composition of the group of judges sitting and thereby affect outcomes. ²⁴³ While most of these bills are not likely to pass and some are not likely to be constitutional, they are introduced not for their legal merit but for their political content. They are also aimed at inhibiting judges, and some of the life-tenured judges in turn complain that they are under siege. ²⁴⁴ In some states, a similar pattern of hostility has emerged as courts issue controversial [*647] rulings and legislators object. ²⁴⁵

<http://www.churchillsociety.org/A%20Parliamentary%20Approach.htm>; Jacob Ziegel, Merit Selection and Democratization of Appointments to the Supreme Court of Canada, 5 *Choices: Cts. & Legis.* 3 (1999), available at <http://www.irpp.org/choices/archive/vol5no.2.pdf>.

²²⁶ Several of the provincial courts have found the denial of marriage for same-sex couples to violate the Canadian Charter of Rights. See, e.g., *Dunbar v. Yukon Territory* [2004] Y.J. No. 61 (Y.T.S.C.); *EGALE Canada, Inc. v. Canada (Attorney General)*, [2003] B.C.J. 1582; *Halpern v. Toronto (City)*, [2003] D.L.R. 529. The Government drafted a same-sex marriage provision that it sent to the Supreme Court. See Tonda MacCharles, Same-Sex Bill Stalled, *Toronto Star*, Oct. 2, 2004, at A1.

In December 2004, the Canadian Supreme Court upheld in principle the right of individuals of the same sex to marry each other but did not specifically address how Parliament was to implement it. See *Reference re Same-Sex Marriage* [2004] S.C.C. 79. By that time, "six of the provinces and one territory, representing 85 percent of the population, had already decided" that limiting marriage to a man and a woman was unconstitutional. See Clifford Krassu, *Canada's Supreme Court Clears Way for Same-Sex Marriage Law*, *N.Y. Times*, Dec. 10, 2004, at A7.

²²⁷ The May 2004 House of Commons Report suggested interim alterations for the then two pending nominations. See Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, *Improving the Supreme Court of Canada Appointments Process*, House of Commons, Canada (May, 2004), available at <http://www.parl.gc.ca/committee/Committee/Publications.aspx?SourceId+84157>. The report called for the Minister of Justice to appear in public to "explain the process" and for the government to "publish a document setting out the current process" for Supreme Court justice appointments. As to the longer term, the Report proposed the establishment of an advisory committee to compile lists of candidates and to forward "in confidence" a list of three to five candidates to the Minister of Justice who would retain authority to decide. *Id.* at 6-8. Thereafter, a public session would be held to explain the reasons for the persons selected.

One dissenting Report proposed "public review of a short list of nominees before a parliamentary committee." *Id.* at 15-16. Another dissent from the "Bloc Quebecois" called for making the process "more democratic" by having provinces or regions submit lists of potential candidates; also requested was the establishment of an advisory committee and the imposition of limits on prime ministerial authority by requiring selection from short lists. *Id.* at 17-20. The New Democratic Party, also dissenting focused on "enhancing the open, transparent and democratic nature of the

process" by calling for the Minister of Justice to appear before an appointment was made and for further specification of the membership and role of the Advisory Committee proposed. *Id.* at 21-23.

²²⁸ See Kathleen Harris, PM Is "Mad as Hell": Scandal Sends Liberals Spiralling in Polls, *Toronto Sun*, Feb. 15, 2004, at 4 (discussing Prime Minister Martin's response to the "sponsorship scandal" claimed to have sent one hundred million dollars to advertising firms supportive of the Liberal party); see also Kim Lunman, MPs Working on Hearings for Top-Court Nominees, *Globe & Mail*, Aug. 23, 2004, at A4 (noting that the pressure was to fill appointments in time for the hearing in the fall on "the controversial same-sex marriage issue").

²²⁹ Technically, the appointments come from the Queen through her Governor General, who follows the Prime Minister's advice. See Supreme Court Act, R.S.C., ch. S-26, 4(2) (1985) (Can.) (specifying that justices are to be appointed "by the Governor in Council by letters patent under the Great Seal").

²³⁰ See Kenney, *supra* note 2 (discussing the appointment of Brenda Hale, the first woman to be a Law Lord); House of Lords Select Committee on the Constitutional Reform Bill, Constitutional Reform Bill [HL], Vol. 1, Report 82-85 (HL Paper 125-I) (July 2, 2004).

²³¹ Concern about separation of powers predates this particular issue. See Robert Stevens, *The Independence of the Judiciary: The View From the Lord Chancellor's Office* (1993).

²³² See Robert Stevens, Reform in Haste and Repent at Leisure: Iolanthe, the Lord High Executioner, and Brave New World, in *Constitutional Innovation*, *supra* note 2, at 1, 28-35.

²³³ See, for example, the discussion and exchange between two members of the House of Commons, Vera Baird, and Alan James Beith, in Hansard, House of Commons, Westminster Hall, Vol. 421, Column 499WH, at Columns 503-505WH (May 27, 2004), available at <http://www.publications.parliament.uk>.

²³⁴ Patrick E. Tyler, World Briefing-Europe: Britain: Court to Let in Cameras As a Test, *N.Y. Times*, Sept. 1, 2004, at A10.

²³⁵ Before the winter of 2000, that opportunity was universal. See Austl. High Ct. R. 41.1 (providing that two justices may determine an application for leave to appeal without listing the case for oral argument but that when an application is listed for argument, each side has arguments of about twenty minutes). In the summer of 2004, some members of the Court proposed reconsidering this practice as a means of conserving time. Revisions, to take effect in January of 2005, give the High Court discretion (exercised through agreement by two justices of the seven sitting on the High Court) to deny leave without oral argument. See *id.* at 41.11.1 ("Any two Justices may determine an application without listing it for hearing ..."). As of this writing, the expectation is that many litigants will continue to be able to argue the application orally but that applications that lack merit on their face will be denied on the papers. E-mail from the Hon. Justice Michael Kirby to Professor Judith Resnik, Jan. 5, 2005 (on file with author). About 730 "special leave applications" (which are not the exclusive route to the High Court) were filed in 2003-2004, which constituted an increase of about 120 petitions from the year before. See High Court of Australia, Annual Report 2003-2004, Part VII, Annexure B (Tables of Judicial Workload) at Chart 2 (Categories of Matters Filed in All Jurisdictions); High Court of Australia Act, 1979. The High Court rendered more than 460 full court decisions related to a variety of matters. *Id.* at Chart 14 (Categories of Full Court Decisions Related to Matters Filed in All Jurisdictions).

²³⁶ Can. Const. (Constitution Act, 1982) pt. I (Charter of Rights and Freedoms), 33, discussed *supra* note 48.

²³⁷ See the Illegal Immigration and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, *110 Stat. 3009-546* (codified in scattered sections of Titles 8, 18, and 42 U.S.C. (2000)). A divided Court found that this act limited the Supreme Court's jurisdiction less than its drafters may have thought. See *INS v. St. Cyr*, *533 U.S. 289* (2001).

²³⁸ See Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, *110 Stat. 1321*, (1996) (codified at scattered sections of 18, 28, and 42 U.S.C. (2000))

²³⁹ See Protect Act of 2003, Pub. L. No. 108-201, *117 Stat. 650* (2003). The provision so doing was called the "Feeney Amendment" after its sponsor, who added it as a rider to the bill.

²⁴⁰ See, e.g., the Constitutional Restoration Act of 2004, H.R. 3799, 108th Cong. (2004). One such bill, The Pledge Protection Act of 2004, H.R. 2028, 108th Cong. (2004), was passed by the House of Representatives on September 23, 2004. See 150 Cong. Rec. D940-01, D940.

²⁴¹ See The Reaffirmation of American Independence Resolution, H. R. Res. 568, 108th Cong. (2004).

²⁴² See Congressional Accountability for Judicial Activism Act of 2004, H.R. 3920, 108th Cong. (2004).

²⁴³ See, e.g., Ninth Circuit Judgeships and Reorganization Act of 2004, S. 2278, 108th Congress (April 1, 2004) (proposed by Senators Ensign and Craig).

I began this article with a call for context, and I must end with one as well. Judicial legitimacy rests on practices that promote and cherish fair judgment, that respect individual judgments when rendered after deliberation, that accord judges sufficient discretion to make particularized decisions, that oblige judges to take responsibility for their decisions through explanation and publication, and that constrain judges when they move outside their role of adjudication. That culture is currently at risk in the United States in part but by no means exclusively through efforts to put individuals into judgeships because of their views on specific rights and the role of government.

Courts are institutions very much expressive of the social orders in which they sit. Efforts to change courts need always to be appreciated for the many agendas accompanying them. As I explained at the outset, democracy is at work in requiring access to justice and in seeking a justice system populated by independent judges constrained by the rule of law and committed to individual rights. Democratic principles render the right to hold public judgeships through inheritance or solely because of one's skin color or sex intolerable. But, as I have also argued, democratic theory alone does not get one to a requirement to change any particular system for selecting judges. Moreover, while interest in changing selection systems may come from those concerned about the structure of authority more generally, the energy to make changes usually comes from those who hope that through changed processes come changes in the people selected to judge and therefore in the judgments made.

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Appendix: Methodological Note on Assessing the Lengths of Judicial Service, 1800s/2000s*

A. Overview

The data in Chart 4 are drawn entirely from an online database, Federal Judicial History Office of the Federal Judicial Center. Federal Judges Biographical Database, available at <http://www.fjc.gov>. These data have been used by others, including Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, *91 Cal. L. Rev. 1029 (2003)*.

Chart 4 compares three periods in American history: January 1, 1789 to December 31, 1809; January 1, 1833 to December 31, 1853; and January 1, 1983 to December 31, 2003. For the first period, 1789-1809, we looked at the length of service of sixteen Supreme Court justices and forty-seven lower court judges. For the second period, 1833-1853, we looked at the length of service of nine Supreme Court justices and thirty-six lower court judges. For the third period, 1983-2003, we looked at the length of service of six Supreme Court justices and 530 lower court judges.

For the period between January 1, 1789 and December 31, 1809, Chart 4 includes all judges who received their commissions after having been confirmed as well as all judges who took their seats through recess appointments between those two dates. Excluded, as is explained below, are judges who served for one year on special courts established in 1801 and abolished in 1802. For the other two periods, Chart 4 includes all judges whose service was terminated between the dates specified.

We began by using two different selection methods because we wanted to see the change from the country's beginnings to the most recent time. Whereas we have a fixed point of entry for the first two decades of the country's existence, we have no similar metric for the more recent years because individuals are continually being appointed to the bench and many appointed in the last decades are still sitting. By using the date of the termination of service within these twenty years, we were able to collect a sample of judges whose terms had starting and stopping points.

Because of these two different forms of assembling groups of judges, a concern exists that the results stem from the variation in methodology. To respond, we assembled a third set of judges in the early years by using the same technique that we used to assemble the twentieth century pool. We looked at any judge whose service had **[*649]** ended, either between 1833 and 1853 or

²⁴⁴ See William H. Rehnquist, 2003 Year-End Report on the Federal Judiciary, 35 Third Branch 1, 4 (Special Issue, Jan. 2004) (raising concerns about an "unwarranted and ill-considered effort to intimidate independent judges in the performance of their judicial duties"); see also Mary Ann Vial Lemmon, Chair's Column Federal Trial News 18-19 (ABA Judicial Division Fall, 2004). Judge Lemmon commented: "Judicial independence is in danger on many fronts... . Judge-bashing has become an acceptable means of attracting public attention to some elected officials, both state and federal, irrespective of the fairness of the criticism."

²⁴⁵ See, e.g., Mark C. Miller, Court-Legislative Conflict in Massachusetts, 88 Judicature 97, 99 (2004) (arguing that after decades of a "cooperative relationship" between the Supreme Judicial Court of Massachusetts and that state's legislature, a more contentious relationship has emerged, in part because the court has become less "subservient" and more "independent").

between 1983 and 2003. We selected the 1833 to 1853 period to have an early twenty-year span that pre-dated the Civil War. Of course, the major factor - that a radically different number of individuals served during the nineteenth and the twentieth centuries - remains.

For all sets of judges selected for analysis, the length of tenure was calculated as the amount of time between when a judge received his or her commission or was appointed during a recess and when his or her service was terminated. Our interest is to understand how long individuals hold the power of federal judgment at the trial and appellate levels. Therefore, for this chart, we treated "termination" of a judge's service as a term of art. With the few exceptions noted below (mostly for multiple, continuous, or discontinuous terms), "termination" means that the judge's service was ended for any of a number of reasons including death, resignation, retirement, impeachment or conviction, failure to be confirmed after a recess appointment had been made, or promotion to the Supreme Court.

We do not consider a judge's service to have been terminated if that judge was promoted from a district court to a court of appeals or if a judge on either a district or circuit court changed his or her status from active to senior. Because research on the work of federal judges who take senior status indicates that a substantial proportion of them continues to have relatively full dockets, we included as part of their overall term any time they spent as "senior" judges as well as the time they spent as "active" judges. Given this definition, our database does not include sixty-three judges who, during the period 1983-2003, were promoted from the district court to the court of appeals where they are currently sitting.¹ Therefore, our analysis differs from that of the Federal Judicial Center database, which considers these judges to have had their district court terms "terminated."

Albert Yoon, who has also looked at judicial tenure, used a different measure for termination. Professor Yoon considered a federal [*650] judge to have "terminated" a term if he or she "permanently leaves one level of the court after being elevated to a higher court (for example, district court to circuit court)."² However, Professor Yoon's article was not concerned with the length of judicial tenure; rather, Yoon sought to explain why judges chose to leave the bench, either for non-judicial activities or for a higher judicial office. Our definition of "termination" more closely aligns with Chart 4's goal of describing the length of time during which judges hold and exercise judicial power.

In our methodology, Supreme Court justices are governed by slightly different rules with regard to the meaning of "termination." A lower court judge's promotion to the Supreme Court constitutes a termination of that judge's lower court service. The rationale for counting a switch from the lower court to the Supreme Court as a termination of the lower-court term is that the two jobs are significantly different. When measuring the length of service of justices on the Supreme Court, we counted the taking of senior status to constitute termination. The rationale for including the taking of senior status is that Supreme Court justices who assume senior status no longer exercise power on the Supreme Court.

Finally, given that length of service could be related to the age at which an individual is appointed and/or the length of a person's life, we also learned about the average age of appointments as well as the average longevity of the group of people we assessed. As Chart 4 makes plain, individuals have been appointed to serve at the lower courts at relatively young ages, ranging from an average of 43 years of age in 1789-1809 to an average of 52 years between 1983-2003. The average length of life has grown as well, from 64 years (1789-1809) to 75 years (1983-2003). One other note is in order. In a few instances, we did not know a date of birth but knew the year; we used July 1 as the midpoint of the year to make the calculation. In one instance, we knew no information about the age of a judge (Philip Kissick Lawrence) and excluded him from the analysis. Of course, judges now living but who stopped serving as

¹ Those sixty-three judges are: Bobby Ray Baldock, Maryanne Trump Barry, Alice Moore Batchelder, C. Arlen Beam, Michael Boudin, Jose Cabranes, Edith Brown Clement, Robert E. Cowen, Emmett Ripley Cox, Conrad Keefe Cyr, W. Eugene Davis, Joel Frederick Dubina, John Malcolm Duhe Jr., Terence Thomas Evans, Ferdinand Francis Fernandez, Joel Martin Flaum, Emilio M. Garza, Julia Smith Gibbons, Ralph B. Guy, Jr., Cynthia Hall, Clyde H. Hamilton, David Rasmussen Hansen, Karen LeCraft Henderson, Frank M. Hull, Michael Stephen Kanne, Andrew Jay Kleinfeld, Edward Leavey, Pierre Leval, Stanley Marcus, Joseph Michael McLaughlin, Herbert Theodore Milburn, Roger Jeffrey Miner, Diana E. Murphy, Paul Victor Niemeyer, Donald Eugene O'Brien, Richard A. Paez, Barrington Daniels Parker, Jr., Rosemary S. Pooler, John Carbone Porfilio, Edward Charles Prado, Reena Raggi, Johnnie Rawlinson, Marjorie O. Rendell, Jane Richards Roth, Ilana Rovner, Pamela Rymer, Anthony Scirica, Bruce Selya, David Sentelle, Dennis Shedd, Eugene Edward Siler Jr., D. Brooks Smith, Sonia Sotomayor, Norman H. Stahl, Walter King Stapleton, Richard Fred Suhrheinrich, A. Wallace Tashima, Juan Torruella, William Traxler, John Mercer Walker, Jr., Kim Wardlaw, William Walter Wilkins, Anne Claire Williams.

² Albert Yoon, *Love's Labor Lost? Judicial Tenure Among Federal Court Judges: 1945-2000*, [91 Cal. L. Rev. 1029, 1043 n.64 \(2003\)](#).

of 2003 are not part of the average of the length of life for that period. Thus, of some 530 individuals, about 100 were not included in the average on longevity. If a judge served on both the lower and the Supreme Court, we included that person twice for the "average age at death" calculation as we measured each of those services independently.

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B. Applications and Examples

In order for readers to see how the above methodological decisions affect the data, we provide a few examples below of the specific choices we made.

1. For judges who served terms on different or reorganized courts at the same level, who assumed chief judge positions, or who served terms on both district and appellate courts, we added the length of the various terms. This group included: (a) judges who moved from one court to another court at the same level; (b) judges who assumed a chief judgeship of a court; (c) judges whose courts were reconfigured during their term of service; and (d) judges who moved from the district court to the court of appeals.

a.

1789-1809

Example: William Cranch served as a circuit court judge from 3/3/1801 to 2/24/1806, then as chief judge of that circuit from 2/24/1806 to 9/1/1855. These two periods are counted together for purposes of this database, so Cranch is considered to have served between 3/3/1801 and 9/1/1855 (54.53 years).

Example: John McNairy served as a district court judge in the District of Tennessee from 2/20/1797 to 4/29/1802, when his service was terminated and he was reassigned to be a district judge on the Eastern and Western Districts of Tennessee, where he served from 4/29/1802 to 9/1/1833. Judge McNairy's term is counted as running from 2/20/1797 to 9/1/1833 (36.55 years).

b.

1983-2003

Example: For the period 1983-2003, many judges were reassigned due to the split of the Fifth Circuit into the Fifth and Eleventh Circuits: the judges involved in that split do not have their terms counted separately.

Example: Bailey Aldrich served as a district judge from 4/27/1954 to 9/14/1959, and then was promoted to the circuit court where he served until 9/25/2002. For this database, Judge Aldrich's tenure on two levels of the federal judiciary is counted as running together from 4/27/1954 to 9/25/2002, or 48.45 years.

2. If a judge served discontinuous terms or served several consecutive terms, each of which ended in termination, we also added these different terms together.

[*652] Example: Dominic Augustin Hall served three discontinuous terms: 12/11/1804 to 4/30/1812, 6/1/1812 to 2/22/1813, and 6/1/1813 to 12/19/1820. Rather than counting each of his terms separately, for the purposes of this database, Judge Hall is counted as serving 15.7 years, the sum of his three discontinuous terms.

Example: Roy Winfield Harper was appointed during a recess several times and was not confirmed by the Senate (8/7/1947-12/19/1947, 12/20/1947-6/22/1948); the lack of a senatorial confirmation automatically led to the termination of Judge Harper's recess appointment each time, but he was immediately re-appointed to the bench. Judge Harper was ultimately confirmed after his third recess appointment on 6/22/1948 and served thereafter for several decades. For the purposes of this database, Judge Harper's three continuous terms are counted as one single term.

3. If a judge was promoted to the Supreme Court within the relevant time periods, then his service on each court is counted separately: that is, the service on all lower courts is counted as one tenure length, and the service on the Supreme Court (starting from when that judge receives a commission to serve on the Supreme Court and ending when his service at the Supreme Court is terminated) is measured separately.

Example: Harry Blackmun served as a circuit court judge from 8/18/1959 to 6/8/1970, then served as a Supreme Court justice from 5/14/1970 to 3/4/1999. Rather than counting his two tenures together, his service as a Supreme Court justice is counted separately. Therefore, the database only includes Justice Blackmun's tenure on the Supreme Court - 5/14/1970 to 3/4/1999. Because his service on the appellate court terminated prior to 1983, it is not counted.

Example: Ruth Bader Ginsburg served as a circuit court judge from 6/18/1980 to 8/9/1993, and has served as a Supreme Court justice since then. Rather than counting her two terms together, her service as a Supreme Court justice is counted separately. Therefore, the database only includes Justice Ginsburg's tenure on the circuit court - 6/18/1980 to 8/9/1993. Because she continues to serve on the Supreme Court, her service is not included.

4. The termination date of Supreme Court justices is determined by either the time they take senior status or the time their service is terminated, whichever is earlier.

Example: Thurgood Marshall took senior status on 10/1/1991, but his service was only terminated (due to death) on 1/24/1993. Because **[*653]** Justice Marshall neither authored nor joined any opinions after 10/1/1991 (he joined his last opinion on 6/27/1991), this database counts his service as terminating on 10/1/1991. Clarence Thomas, the successor to Justice Marshall's seat, began his service on 10/17/1991.

Example: As a result of this rule, Potter Stewart is not included in the database even though his service was terminated between 1983 and 2003. Justice Stewart's service was terminated on 12/7/1985; however, he took senior status on 7/3/1981, which falls outside of the 1983-2003 range. Because the database only includes judges or justices whose terms effectively end between 1983-2003, Justice Stewart is not included.

C. Methodological Issues Specific to a Time Period

1. 1789-1809. As is familiar to those involved with the federal courts, special legislation in 1801 created special federal courts that were abolished the year afterward.³ Because the inclusion of that group of fifteen judges⁴ with their one-year terms would considerably skew the average length of tenure of federal judges between 1789 and 1809, our data set does not include judges who only served on the 1801-1802 courts. Furthermore, if a federal judge sitting elsewhere was reassigned to an 1801-1802 court, that year of service is not counted toward his overall length of service as a federal judge.

Example: Philip Barton Key served from 2/20/1801 to 7/1/1802 on one of these special courts. His one-year term is not included in our data set.

Example: Samuel Hitchcock served from 9/3/1793 to 2/20/1801 on a district court, then was reassigned to one of the 1801-1802 courts. However, for this database, Hitchcock's length of service is only measured by the amount of time he spent on the district court, from 9/3/1793 to 2/20/1801, or 7.47 years.

[*654] 2. 1983-2003. In considering the lower federal courts, a special issue was raised due to the creation of a new federal court in 1982: the Federal Circuit. Many judges who sat on the Federal Circuit at its outset had previously served as judges on the non-Article III predecessors of the Federal Circuit, such as the United States Court of Customs and Patent Appeals. However, because these judges only received Article III, life-tenure commissions when they began serving on the Federal Circuit on 10/1/1982, we counted their length of service from that date, even though some of them may have sat on other federal non-Article III courts before then.

³ Judiciary Act of 1801, ch. 4, § 3, 6-7, [2 Stat. 89-90](#); see also Larry D. Kramer, The Pace and Cause of Change, [37 J. Marshall L. Rev. 357, 363-64 \(2004\)](#) ("The main feature of the Judiciary Act of 1801 consisted of relieving the Supreme Court Justices of circuit-riding duties by creating six new circuit courts staffed by sixteen new judges."). Kramer states that sixteen new judges were created, but the Federal Judicial Center database includes only fifteen judges. See *infra* note 4.

⁴ Those fifteen judges are: Richard Bassett, Egbert Benson, Benjamin Bourne, Joseph Clay Jr., William Griffith, Dominic Austin Hall, Edward Harris, Samuel Hitchcock, Philip Barton Key, Charles Magill, William McClung, Jeremiah Smith, George Keith Taylor, William Tilghman, and Oliver Wolcott.

More generally, for this later period, we are only including federal judges' Article III, life-tenure service. We did not include the length of service of any time spent as a magistrate or bankruptcy judge. Arguably, however, those terms would be important to evaluate in a later project as these judgeships permit an individual to hold significant forms of judicial power.

D. List of Judges Included in Our Database

To enable others to review the data, we provide a list of judges for each period and court.

[SEE TABLE IN ORIGINAL]

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Cardozo Law Review
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