JUDICIAL INDEPENDENCE IN EXCESS: REVIVING THE JUDICIAL DUTY OF THE SUPREME COURT

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Independence from extrinsic influence is, we know, indispensable to public trust in the integrity of professional judges who share the duty to decide cases according to preexisting law. But such independence is less appropriate for those expected to make new law to govern future events. Indeed, in a democratic government those who make new law are expected to be accountable to their constituents, not independent of their interests and unresponsive to their desires. The Supreme Court of the United States has in the last century largely forsaken responsibility for the homely task of deciding cases in accord with preexisting law and has settled into the role of a superlegislature devoted to making new law to govern future events. Citizens who see our judges as primarily engaged in this political role are understandably less tolerant of their claim to independence and are more intent on holding them to account for unwelcome decisions. Such popular dissatisfaction, or even unrest, with our judiciary is a source of prudent concern expressed by Justices, among others. This Article responds to that shared concern with a proposal to restore the Supreme Court to a more purely judicial role by reviving the duty of Justices to decide cases. It would require the Court to decide numerous cases certified by a group of experienced lower federal court judges as the cases most in need of their judicial attention. This proposal is intended not only to strengthen the claim to independence of the Supreme Court, but also that of other courts subject to its leadership.

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INTRODUCTION

In 2006, Justices Sandra Day O'Connor and Stephen Breyer initiated a campaign to elevate public concern for the independence of our judiciary.[1] In 2006–07, they presided at two law school conferences,[2] and Justice O'Connor made a presentation to the Conference on the Public Good held by the American Academy of Arts and Sciences.[3] Their efforts resulted in a worthy symposium in the *Georgetown Law Journal* celebrating the need to protect our judges from improper incentives.[4]

Justices Breyer and O'Connor are of course correct that judicial independence is indispensable to public trust in the integrity of government. Judges must be required and helped to maintain personal disinterest in the cases they decide. The Justices are also correct that the American public has in recent years manifested growing mistrust of its judiciary.[5] United States

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1 Press Release, S. Methodist Univ. Dedman Sch. of Law, Justices O'Connor, Breyer Host Conference at Dedman School of Law (Apr. 4, 2007), *available at* http://www.law.smu.edu/news/04-04-07.aspx.

2 *Id.*; Press Release, Georgetown Univ. Law Center, Fair and Independent Courts: A Conference on the State of the Judiciary (Sept. 28, 2006), *available at* http://www.law.georgetown.edu/news/events/conference_story.html.

3 Justice Sandra Day O'Connor, Panel Discussion at the American Academy of Arts & Sciences Conference: The Public Good, The Independence of the Courts (Apr. 28, 2007) (audio recording available at http://www.amacad.org/audio/publicgood.aspx).

4 Symposium, *Fair and Independent Courts: A Conference on the State of the Judiciary*, 95 GEO. L.J. 895 (2007). Other journals have also held conferences and symposia and published multiple articles on the subject. *See, e.g.*, James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683 (2002); William V. Dorsaneo, III, *Judicial Independence and Democratic Accountability in Highest State Courts*, 53 SMU L. REV. 255 (2000); Symposium, *Judicial Elections: Selecting Judges in the 21st Century*, 30 CAP. U. L. REV. 437 (2002); Symposium, *Judicial Independence and Accountability*, 72 S. CAL. L. REV. 311 (1999); Symposium, *Judicial Independence and Accountability*, LAW & CONTEMP. PROBS., Summer 1998.

5 *See generally* CHARLES GARDNER GEYH, WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006). For expressions of the hostility, see ROBERT H. DIERKER JR., THE TYRANNY OF TOLERANCE: A SITTING JUDGE BREAKS THE CODE OF SILENCE TO EXPOSE THE LIBERAL JUDICIAL ASSAULT (2006); EDWIN VIEIRA, HOW TO DETHRONE THE IMPERIAL JUDICIARY (2004); JUDICIAL TYRANNY: THE NEW KINGS OF AMERICA (Mark I. Sutherland ed., 2005). For other recent observations, see Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 127 (Roger C. Cramton & Paul D. Carrington eds., 2006); Berle M. Schiller, *Reducing Conflict Between Congress and the Judiciary*, JUDGES' J., Summer 2005, at 26. For earlier observations, see AMERICAN BAR ASSOCIATION, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE, at vii (1997); N. Lee Cooper, President, Am. Bar Ass'n, Remarks at Opening Session of the American Law Institute (May 19, 1997), *in* THE AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES 21, 24–28 (1997); Herbert M. Kritzer & John Voelker, *Familiarity Breeds Respect: How Wisconsin Citizens View Their Courts*, 82 JUDICATURE 59, 60 (1998). *But see* John M. Scheb II & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 JUDICATURE 66, 66 (1998) (stating that surveys from 1994 and 1997 show that the public has a positive perception of the Court). For a recent empirical measurement, see Kathleen Hall Jamieson & Michael Hen-

Senators[6] as well as local politicians[7] have expressed this sentiment and other Justices have observed it.[8] It was brightly displayed in the 2005 congressional effort to reverse the judicial judgment allowing termination of the life of Terri Schiavo,[9] in the academic defense of that legislation,[10] and also in the rhetoric of evangelist Pat Robertson, who reportedly said that liberal judges are a greater threat to America than a few bearded terrorists.[11] Mistrust of the judiciary is also highly visible in the vigor of controversies over the nomination and confirmation of Justices and judges,[12] in serious proposals to remove judges who make decisions that legislators disapprove of,[13] and in judicial politics at the state level.[14]

But, there is a measure of irony in the role of Supreme Court Justices as leaders of this cause for independence. It is unlikely that any judge ever sat on a law court enjoying more independence than the present Justices themselves have enjoyed. The present Court's lawmaking decisions have evoked many of the reactions underlying

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nessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 GEO. L.J. 899 (2007).

6 Charles Babington, *Senator Links Violence to "Political" Decisions: "Unaccountable" Judiciary Raises Ire*, WASH. POST, Apr. 5, 2005, at A7 (quoting Sen. John Cornyn).

7 The extreme referendum proposed to the voters in South Dakota in 2006 would have stripped judges of their immunity from liability for decisions deemed to be incorrect. Bob von Sternberg, *Campaign 2006: South Dakota State's Abortion Ban Only One Issue on a Crowded Ballot*, STAR TRIB. (Minneapolis), Nov. 1, 2006, at 14A, LexisNexis Academic.

8 *See, e.g.*, Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 7–8 (2006); Adam Liptak, *Public Comments by Justices Veer Toward the Political*, N.Y. TIMES, Mar. 19, 2006, at 22.

9 Act of March 21, 2005, Pub. L. No. 109-3, 119 Stat. 15. The ultimate decision was reported in *Schiavo* ex rel. *Schindler v. Schiavo*, 404 F.3d 1270 (11th Cir. 2005), and the court quite properly held that Congress was not constitutionally empowered to reverse a judicial decision denying federal jurisdiction over the matter of medical care. *Id.* at 1280–82. Edward A. Hartnett suggests that Congress may have been sending the federal courts a message in enacting the Schiavo legislation. *See* Edward A. Hartnett, *Congress Clears Its Throat*, 22 CONST. COMMENT. 553, 584 (2005)

10 *See* Steven G. Calabresi, *The Terri Schiavo Case: In Defense of the Special Law Enacted by Congress and President Bush,* 100 NW. U. L. REV. 151 (2006). *But see* George J. Annas, *"I Want to Live": Medicine Betrayed by Ideology in the Political Debate over Terri Schiavo,* 35 STETSON L. REV. 49 (2005); Kathy L. Cerminara, *Collateral Damage: The Aftermath of the Political Culture Wars in* Schiavo, 29 W. NEW ENG. L. REV. 279 (2007).

11 Pamela A. MacLean, *Fearing Backlash, Judges Go Public: Nasty Campaigns and the Gay Marriage Ruling Lead to First Forum*, NAT'L L.J., July 14, 2008, at 5.

12 *See* BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006).

13 *See, e.g.*, Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006); *see also* James E. Pfander, *Removing Federal Judges*, 74 U. CHI. L. REV. 1227 (2007) (responding to Prakash and Smith); Martin H. Redish, *Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139 (2006) (same).

14 *See* David Rottman, *The State Courts in 2005: A Year of Living Dangerously*, 38 THE BOOK OF THE STATES 237 (Keon S. Chi ed., 2006).

the mistrust that the Justices now propose to correct.[15] To add to the irony, as we briefly note below, the Justices have indulged their independence to make law that has seriously impaired the independence of the many judges sitting on state courts.[16]

We here advance a proposal to amend laws, enacted by Congress from 1891 to 1988, that give the Court virtually absolute control over its docket.[17] The current measure of control has transformed the Court so that it is no longer a traditional law court structured to decide disputes, but, as Judge Richard Posner has described it, a "superlegislature" that sits chiefly to proclaim new law to govern future transactions and relations.[18] It is therefore no wonder that there is unrest among citizens mindful of the large political role that the Court has come to perform and has led other courts to replicate. Although this unrest has centered on the Court's proclamation of a woman's right to abort a fetus, the Court has in recent times made new law on many other important topics of deep concern to citizens, with minimal regard for preexisting constitutional or statutory texts. A very recent example of superlegislation is the Court's decision invalidating the gun-control law enacted by the elected government of the

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15 A balanced assessment drawing on empirical work is DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS (7th ed. 2005). A less qualified account is ROBERT E. RIGGS, CORRUPTED BY POWER: THE SUPREME COURT AND THE CONSTITUTION (2004).

16 *See infra* Part II.

17 The idea of discretionary review was first introduced by an 1891 Act. *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826, 827–28. This early enactment limited discretionary review to appeals from decisions of the courts of appeals that did not present a constitutional issue, the interpretation of a treaty, an admiralty prize, a serious crime, or a question of federal jurisdiction. *Id.* These limitations left scant room for discretionary appellate jurisdiction. The discretion was extended by the Judiciary Act of 1916, ch. 448, 39 Stat. 726, and again by the Judiciary Act of 1925, ch. 229, 43 Stat. 936. By these stages, Congress extended appellate discretion to all cases. *See* 39 Stat. at 727–28; 43 Stat. at 937–39. And so with trivial exceptions, the Court now decides only those cases it chooses to decide, and indeed only those issues raised in those cases that it deems worthy of its attention. *See* 28 U.S.C. §§ 1251, 1253–54, 1258–59 (2006). On the legislative history of the 1925 Act, see FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 86–102 (Transaction Publishers 2007) (1928); Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649–1704 (2000); Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1 (2008). Hartnett, *supra*, also records later revisions expanding the power. Opposition to the idea was forcefully expressed by eminent Senator Thomas J. Walsh (D.–Mont.). *See* Thomas J. Walsh, *The Overburdened Supreme Court*, *in* PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION 216 *passim* (John B. Minor ed., 1922). On the remnant of mandatory jurisdiction, see Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 752–53 (2001); *see also* Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 97 (1989).

18 Richard A. Posner, *The Supreme Court 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 35–39, 60 (2005) (describing the way in which the Supreme Court is in the process of becoming a political court).

District of Columbia.[19] Judge Posner[20] and Judge Harvie Wilkinson[21] have both recognized the decision as one no more rooted in a preexisting constitutional text than was the Court's work on a woman's right to choose. It is an offense to those many citizens who strongly favor gun control laws.

A significant element in the Court's role as superlegislature is legislation allowing Justices to decide only those few legal and political issues that they choose to decide. Staffs of respectful young law clerks support the Justices and bear much of the workload of identifying the considerations to be weighed in choosing cases and of crafting their proclamations of law.[22] Many of those young law clerks have since matured into professors of constitutional law, tending to nourish the idolatry of the Court, expressed by Chief Justice Rehnquist who was himself a former law clerk, when he identified his Court as a "crown jewel" of our profession and our law.[23]

We here propose to assign veteran circuit judges to replace some of the young law clerks and to empower those judges to independently designate a substantial, fixed number of cases that the Justices would be obliged to decide each year.[24] Our proposal is intended as a

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19 District of Columbia v. Heller, 128 S. Ct. 1695 (2008).

20 Richard A. Posner, *In Defense of Looseness: The Supreme Court and Gun Control*, NEW REPUBLIC, Aug. 27, 2008, at 32.

21 J. Harvie Winkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming Apr. 2009).

22 For an illustrative analysis of the substantive influence of law clerks in one case, see Helen J, Knowles, *Clerkish Control of Recent Supreme Court Opinions? A Case Study of Justice Kennedy's Opinion in* Gonzales vs. Carhart, 10 GEO. J. GENDER & L. (forthcoming 2009).

23 William H. Rehnquist, Remarks of the Chief Justice at Washington College of Law Centennial Celebration at American University: The Future of the Federal Courts (Apr. 9, 1996) (transcript available at http://supct.law.cornell.edu/supct/justices/rehnau96.htm) [hereinafter Remarks on the Future of Federal Courts]; *cf.* William H. Rehnquist, *The Notion of A Living Constitution*, 54 TEX. L. REV. 693, 698 (1976) (stating that if the authority to declare laws unconstitutional is not strictly tied to the language of the Constitution, judges would be a "a small group of fortunately situated people with a roving commission to second-guess Congress").

24 The present authors have elsewhere advanced, or will advance, two other proposals to reform the Supreme Court to moderate the supremacy of Justices without impairing their independence. One would limit them to long terms in office. *See* Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURTS JUSTICES, *supra* note 5, at 467. An eminent group of law professors, bar leaders, and former chief justices of state supreme courts who approved the scheme "in principle" is listed in Paul D. Carrington & Roger C. Cramton, *Reforming the Supreme Court: An Introduction* to REFORMING THE COURT: TERM LIMITS FOR SUPREME COURTS JUSTICES, *supra* note 5, at 3, 5–7. The second would extend to Supreme Court Justices the system of accountability for breaches of professional responsibility that is imposed on all other Article III judges. *See* Paul D. Carrington & Roger C. Cramton, *Original Sin and Judicial Independence: Providing Accountability for Justices*, 50 WM. & MARY L. REV. (forthcoming Mar. 2009), *available at* http://ssrn.com/abstract=1099397. Our three proposals are not interdependent and are not here presented together for consideration as a new judiciary act. But if Congress adopted all three proposals, it would not have in the least impaired the independence of the Justices in their judicial role of decid-

constructive response to the situation presently concerning Justices Breyer and O'Connor. It would remind the Justices that *elected* legislators are our primary lawmakers and would moderate the office of Supreme Court Justice to a more human, less divine, scale.[25] We would hope that it might help to induce the Court to accept a more modest political role, one more fitting to the constitutional schemes of separation of powers and federalism. Our proposal might also help to restore the public sense that the Justices, and other law judges as well, are bound by the laws they have been chosen to administer.

I
A Very Brief History of the Court's Ascension

Before considering the present proposal in greater detail, a brief reminder of its historical context is in order. In 1891, Congress enacted a Judiciary Act[26] that Senator William Evarts and Congressman David Culberson advanced and that Culberson explained as aiming to "overthrow . . . the kingly power" of federal district and circuit judges.[27] At the time of the enactment, Congress was concerned with the excesses of judicial discretion vested in federal trial judges that had resulted from the weakness of a system of appellate review that depended entirely on the Supreme Court. The new act created the courts of appeals to provide needed review of district courts and thereby reduce dependence on a Supreme Court burdened by an overloaded docket.[28]

As Justice Felix Frankfurter and James Landis observed in their salute to the 1891 Act, "great judiciary acts, unlike great poems, are not written for all time."[29] The system of discretionary review by the Supreme Court that was established in 1891 was substantially extended in 1925 to cover most of the Court's docket.[30] By this technique, the objectionable "kingly power" was, over the ensuing decades, relocated to the crest of the federal appellate system. The Supreme Court increasingly proclaims constitutional law with extended social and political consequences, while it delegates to others more onerous or less glamorous duties, such as the correction of mere

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ing contested cases; Congress would have instead fulfilled its duty to provide "checks and balances."

25 On the independent importance of that aim, see Nagel, *supra* note 5, *passim*; Robert F. Bauer, *A Court Too Supreme for Our Good*, Wash. Post., Aug. 7, 2005, at B3.

26 Act of Mar. 3, 1891, ch. 517, 26 Stat. 826; *see* Frankfurter & Landis, *supra* note 17, at 220–94 (explaining the story behind the enactment).

27 21 Cong. Rec. 3404 (1890).

28 *See* 26 Stat. at 826–30.

29 Frankfurter & Landis, *supra* note 17, at 107 ("It is enough if the designers of new judicial machinery meet the chief needs of their generation.").

30 *See id.* at 220–94.

errors, that the Justices prefer not to perform. The Court has thus emerged as the "ascendant branch" of the national government,[31] and the courts of appeals are similarly freed to imagine themselves as regional semi-superlegislatures, making "the law of the circuit." Important judicial duties have been increasingly delegated down the chain of command, and the transparency of the judicial process has substantially declined at all levels.

The present times therefore call again for the sort of leadership that Senator Evarts and Congressman Culberson provided in 1891. Congress has long neglected its duty to check and balance the judicial branch. This is not a new observation. There have been no fewer than five independent studies over the last four decades by eminent professional groups that have each unanimously concluded that the relationship of the Supreme Court to the lower courts is in need of repair.[32] We have drawn on those studies in fashioning our more modest proposal to make the power of Justices less "kingly." We pray that the time has at last come for the successors to Senator Evarts and Congressman Culberson to emerge and respond to an enduring problem. If Congress does not consider our more modest proposal, then perhaps it might reconsider one of those earlier advanced.

The difference between a law court and a legislature was more clearly drawn and maintained in the eighteenth century, when American legal institutions took form. In that time, appellate judges did not write opinions of the court proclaiming the law but orally expressed their reactions to legal arguments and thereby acknowledged what they perceived to be the preexisting law. They left it to a reporter and his readers to derive any legal principles that they might have expressed in their diverse and unrehearsed utterances, a system Tennyson depicted as "a lawless science," a "codeless myriad of precedent,"

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31 *Court Is the "Ascendant" Branch, for Now*, NAT'L L.J., Aug. 6, 2001, at C7 (quoting ex–Solicitor General Seth Waxman).

32 AM. BAR FOUND., ACCOMMODATING THE WORKLOAD OF THE UNITED STATES COURTS OF APPEALS (1968) (Carrington served as director of this study); Comm'n on Revision of the Fed. Court Appellate Sys., *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 204–08 (1975) (Cramton was a member of this Commission); Study Group on the Caseload of the Supreme Court, *Report*, 57 F.R.D. 573, 577–84 (1972) (prepared for the Federal Judicial Center); *see also* FED. JUDICIAL CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993); Comm'n on Structural Alternatives for the Fed. Courts of Appeals, *Final Report* (1998), *available at* http://www.library.unt.edu/gpo/csafca/final/appstruc.pdf (discussing the ways in which courts of appeals can adapt to transform in this new environment). Our three proposals are less dramatic than any of those five earlier proposals, each of which had the unanimous support of eminent groups that included presidents of the American Bar Association, distinguished scholars, federal judges, a chair of the Senate Judiciary Committee, and a former Supreme Court Justice. Despite this support, none of their proposals for reform have gained the serious attention of Congress.

and a mere "wilderness of single instances."[33] This expectation of a restrained judicial role supplied the basis on which the virtue of judicial independence was recognized and proclaimed. To gain the acceptance of unsuccessful disputants, the judges deciding their cases need to appear to be personally disinterested in the outcomes.[34] But, no theory of politics or law enables elected legislators to *make* law advancing the future interests and relationships of constituents and to maintain a similar disinterest in the consequences of the laws they make. When judges assume the role of lawmakers, as when they impart principles into the Constitution that have scant textual basis, or when they choose to disregard or stretch the text of valid legislation, they invite political accountability of the sort to which we subject our legislators. The absence of such accountability is, we perceive, a cause of the unrest exciting the attention of Justices Breyer and O'Connor. Excessive independence for Justices in a position of lawmaking is taken by many as an offense against the traditions of democratic self-government.[35]

Although some Anti-federalists suspected that Supreme Court Justices might become too independent,[36] the Federalist Founders who wrote Article III of the Constitution evidently did not foresee the Supreme Court as a superlegislature. The judges they knew merely decided contested cases in the common law tradition familiar to them. True, judges in colonial and most state courts made a little law, but they did so unself-consciously as they tried to apply precedent.[37] So long as they made law only in that modest common law way, they

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33 ALFRED LORD TENNYSON, *Aylmer's Field*, (1793), *in* THE POETIC AND DRAMATIC WORKS OF ALFRED LORD TENNYSON 240, 246 (Houghton Mifflin 1898) (see lines 435–37 specifically).

34 *See* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007), *available at* http://www.abanet.org/judicialethics/ABA_MCJC_approved.pdf ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

35 *See* ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 152–54 (2d ed. 2003) (arguing that when a court deals with issues of fundamental rights, its actions carries legitimacy with it, but if it moves outside of this realm its actions become more dubious); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 123–39 (2006). For a highly partisan expression of substantive grievances against the Court, see THE MOST DANGEROUS BRANCH: THE JUDICIAL ASSAULT ON AMERICAN CULTURE (Edward B. McLean ed., 2008).

36 One pamphlet protested: "There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven." Essays of Brutus No. XV, Mar. 20, 1788, *in* 2 THE COMPLETE ANTI-FEDERALIST 437, 438 (Herbert J. Storing ed., 1981).

37 *See generally* DANIEL J. BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW 52–53 (1941) (arguing that there was little law for judges to make because of the existence of a natural law that a person could follow simply by following his self-interest). The common law doctrine of precedent was thus addressed to judges as users rather than as makers of law. As Edmund Burke explained: "We ought to understand [the law] according to our mea-

were indeed, as Alexander Hamilton assured us, "the least dangerous" branch.[38] One might fear or resent their power over disputants, but they were not viewed as makers of potentially unwelcome social policy governing the future.

That began to change at the federal level in 1801 with the appointment of John Marshall as Chief Justice. Chief Justice Marshall's first decision came in the form of a written opinion of the Court signed by all the Justices.[39] Writing such an opinion is a deliberate legislative act quite different from what those who created the Court had envisioned. The importance of the device in elevating the judicial power was confirmed by its immediate adoption by all state courts and, before long, by courts of other nations, including England.[40] Combined with the unquestioned constitutional power to invalidate legislation, the opinions of the Court became *the* source of constitutional doctrine, making the Justices the authors and sometime amenders of a constitution that is an extension of the text written in 1787. The constitution that the Supreme Court expresses in its opinions is almost impossible to amend by the democratic process set forth in Article V if the Court's decision bears on an issue on which significant

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sure; and to venerate where we are not able presently to comprehend." EDMUND BURKE, AN APPEAL FROM THE NEW TO THE OLD WHIGS 116 (London, Pall-Mall, 2d ed. 1791).

38 THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (stating that "the judiciary is beyond comparison the weakest of the three departments of power"); *see also* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 1 (1962) (arguing that the supposed "least dangerous branch" is in fact "the most extraordinarily powerful court of law the world has ever known"). Montesquieu put it most strongly: "Of the three powers above-mentioned, the judiciary is in some measure next to nothing." MONTESQUIEU, 1 THE SPIRIT OF LAWS 221 (Thomas Nugent trans., London, J. Nourse & P. Vaillant, 3d ed. 1758).

39 A Supreme Court opinion first appeared in *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801). *See generally* GEORGE LEE HASKINS & HERBERT A. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL, 1801–15, *in* 2 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES 207–45 (Paul E. Freund ed., 1981) (explaining the political situation surrounding the federal judiciary during the time John Marshall was appointed Chief Justice). The device had been in use in the highest court in the Commonwealth of Virginia for about a decade, but no other state or federal court employed it before 1801. The idea was derived from the practice of the Privy Council that had long advised the King on the propriety of the decisions of the colonial judges that the parties asked him to correct. *See generally* John P. Dawson, *The Privy Council and Private Law in the Tudor and Stewart Periods: I*, 48 MICH. L. REV. 393 (1950).

40 Official reporters of judicial decisions were in place in most American jurisdictions in 1815, decades before such a function was known to England. An official reporter was not appointed in England until 1865. *See* CARLETON KEMP ALLEN, LAW IN THE MAKING 207–08 (7th ed. 1964); JOHN P. DAWSON, THE ORACLES OF THE LAW 82–83 (1968); *see also* J.H. Baker, *Records, Reports and the Origins of Case-Law in England*, *in* JUDICIAL RECORDS, LAW REPORTS, AND THE GROWTH OF CASE LAW 15, 15–16 (John H. Baker ed., 1989). French case law was made regularly accessible by private reporters in the 1830s. *See* DAWSON, *supra*, at 402. Regular annual reports commenced in Prussia in 1847. *See id.* at 438.

political division exists.[41] This transformation of the Court was recognized and decried by Jeffersonians as an illegitimate seizure of legislative powers.[42]

Chief Justice John Marshall emphasized the distinction between a law court and a *superlegislature* in his most celebrated opinion in *Marbury v. Madison*.[43] He disclaimed the power to make law except as required to decide those cases that he could not lawfully refuse to decide.[44] His opinion for the Court begged the public's pardon for making a bold political decision that the Justices were compelled to make in order to correctly decide a case in which their jurisdiction had been irresistibly invoked.[45] That apology garnered in the profession and the public acceptance of the idea that even constitutional law might be made by judges interpreting the preexisting text and adhering to precedent when making decisions that they had an official duty to decide.

Chief Justice Marshall's proposition of inescapable judicial duty had been seriously qualified by the time of Chief Justice Rehnquist's remark depicting the Court as a crown jewel.[46] Congressional legislation extending the authority of the Justices to deny review to many or most of the cases appellants placed on their docket had transformed

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41 *See* U.S. CONST. art. V; Thomas E. Baker, *Exercising the Amendment Power to Disapprove of Supreme Court Decisions: A Proposal for a "Republican Veto"*, 22 HASTINGS CONST. L.Q. 325 (1995) ("Thirty-four Senators, or 146 Representatives, or any combination of thirteen state legislative chambers can defeat a 'republican veto,' [a type of amendment to disapprove a Supreme Court decision] for good, bad, or no reason at all.").

42 *See* JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 194–96 (Richmond, Va., Shepherd & Pollard 1820) (advocating strict adherence to the constitution and avoidance of "fluctuating precedents"); Letter from Thomas Jefferson to William Johnson (Oct. 27, 1822), *in* 10 THE WRITINGS OF THOMAS JEFFERSON: 1816–1826, at 222, 223–25 (Paul Leicester Ford ed., New York, G.P. Putnam's Sons 1899) (bemoaning that the Court had begun to issue a single unanimous opinion, instead of allowing each member of the Court to write his own opinion and provide his own reasons for that decision). *But see* Letter from James Madison to Thomas Jefferson (Jan. 15, 1823), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 1816–1828, at 291 (Philadelphia, J.B. Lippincott & Co. 1867).

43 5 U.S. (1 Cranch) 137 (1803).

44 *Id.* at 176–78. On Marshall's exercise of self-restraint, see JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 296–308 (1996) (arguing that "[i]f Marshall had wanted to embarrass Jefferson, or if he had shared the partisan Federalist view," he could have used his power on the Court to do so, but he declined to venture into the political fray).

45 *See Marbury*, 5 U.S. at 169–70 ("The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."); *see also id.* at 144 (allowing Mr. Levi Lincoln, Attorney General for President Jefferson, time to consider how to answer certain questions in light of his duty to the Executive and to the Court, so as to avoid confrontation between the political branches).

46 *See* Remarks on the Future of Federal Courts, *supra* note 23.

the institution.[47] Indeed, by 1988,[48] Congress had conferred such a measure of freedom on Justices to choose the questions they decide that no citizen has a right to present her case or argument to the Court. And the Court has largely forsaken the humble task of correcting errors of lower courts other than those errors connected to the issues that it chooses to consider, leaving that hard disciplinary work to the courts of appeals.[49] Thus, it no longer sits as a mere law court with its specific duties defined by others but is indeed now a self-defining superlegislature, or even a constitutional convention in black robes.

In the first half of the nineteenth century, as the force of Chief Justice Marshall's proposition gained acceptance, and its political consequences were recognized, state courts were established as political institutions subject to the oversight of democratic legislatures.[50] State constitutions were revised to assure some form of rotation in high judicial offices, to provide other means of constraining judges of courts of last resort or correcting bad law made by such judges, or both.[51] Frederick Grimké, a justice of the Ohio Supreme Court, expressed the view increasingly shared in antebellum times and later associated with Legal Realism[52]—that high court judges are making big political decisions.[53] Grimké concluded that "[i]f then the judges are appointed for life, they may have the ability to act upon society, both inwardly and outwardly, to a greater degree than the other departments."[54]

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47 *See supra* note 17 and accompanying text.

48 Congress took the last step in extending the 1925 empowerment in 1988. *See* Act of June 27, 1988, Pub. L. No. 100-352, §§ 1, 2(c), 5(a), 102 Stat. 662, 662–63 (codified as amended in scattered sections of 28 U.S.C.).

49 *See* Comm'n on Structural Alternatives for the Fed. Courts of Appeals, *supra* note 32, at 12 (finding that "the courts of appeals have become the only federal error-correcting courts" and the "federal appellate courts of last resort").

50 For example, a Federalist legislature in New Hampshire in 1813 expelled two of the three judges, for insufficient cause, from the state's superior court of judicature when it reconstructed the court as the supreme judicial court. EDWIN D. SANBORN, HISTORY OF NEW HAMPSHIRE: FROM ITS FIRST DISCOVERY TO THE YEAR 1830, at 261–62 (Manchester, N.H., John B. Clarke 1875). The Democratic legislature elected in Kentucky in 1824 fired all members of their highest court, all of whom were Whigs, and replaced them as punishment for decisions that had an unwelcome impact on tenants and debtors. ARNDT M. STICKLES, THE CRITICAL COURT STRUGGLE IN KENTUCKY, 1819–1829, at 43–64 (1929).

51 For a review of issues and literature in later times, see Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, LAW & CONTEMP. PROBS., Summer 1998, at 79, 87–99.

52 For a recent account of legal realism, see Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915, 1918 (2005) (defending the realist theory of law to show that, although it can be criticized, it is also plausibly correct).

53 *See* FREDERICK GRIMKE, THE NATURE AND TENDENCY OF FREE INSTITUTIONS 438 (John William Ward ed., Harv. Univ. Press 1968) (1848) ("The judiciary does not deal so directly nor so frequently with political questions as do the other departments. But it does sometimes deal with them, and that too definitively . . . .").

54 *Id.* at 438–39.

And, he added, the legislative functions that judges perform "is a fact entirely hidden from the great majority of the community."[55] It was his reasoning that led most states to implement popular election of judges for limited terms.[56] And the reality of judicial lawmaking in the twenty-first century is no longer hidden from the great majority. For that reason, proposals to end the practice of electing judges have little prospect of gaining the support of voters.

Although few of his contemporaries expressed disagreement with Grimké, Congress did nothing in his time to constrain the role of Justices sitting on the Supreme Court of the United States in the basement of the Capitol.[57] One reason was that the Supreme Court was an organ of a weak national government, and the public therefore held it in limited regard.[58] As Keith Whittington recently observed:

> In the nineteenth century, the task of the Court within the constitutional regime was fairly straightforward. The issues that came before the Court were relatively few, and when the Court was asked to say what the Constitution meant and recognized in its authority to do so, the imperatives of the task were fairly clear.[59]

Other officials acted on their presumed authority to read the Constitution for themselves. Thus, when the Court proclaimed the rights of the Cherokee to remain in Georgia,[60] President Andrew Jackson simply disregarded its decision and allowed federal officers to send them on "the Trail of Tears" to Oklahoma.[61] When the Court unconstitutionally declared itself to be the premier authority on the nation's *private* law governing contracts and property,[62] the state supreme courts

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55 *Id.* at 452.

56 *See id.* at 448, 448–62 ("An election for a term of years may be necessary to enable the mind of the judge to keep pace with the general progress of knowledge and more especially to make him acquainted with the diversified working of the institutions under which he lives . . . ."); *see also* Caleb Nelson, *A Re-Evaluation of Scholarly Explanations for the Rise of the Elective Judiciary in Antebellum America*, 37 AM. J. LEGAL HIST. 190, 217–19 (1993). For accounts of elected judges, see Kermit L. Hall, *Constitutional Machinery and Judicial Professionalism: The Careers of Midwestern State Appellate Court Judges, 1861–1899*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST–CIVIL WAR AMERICA 29 *passim* (Gerard W. Gawalt ed., 1984); Kermit L. Hall, *The "Route to Hell" Retraced: The Impact of Popular Election on the Southern Appellate Judiciary, 1832–1920*, *in* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH 229 *passim* (David J. Bodenhamer & James W. Ely, Jr. eds., 1984).

57 *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY 284 (2007).

58 *See id.* at 230.

59 *Id.* at 284.

60 *See* Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 560–63 (1832); JILL NORGREN, THE CHEROKEE CASES: THE CONFRONTATION OF LAW AND POLITICS 117–22 (1996).

61 For an account, see Edwin A. Miles, *After John Marshall's Decision:* Worcester v. Georgia *and the Nullification Crisis*, 39 J. S. HIST. 519 (1973).

62 *See* Swift v. Tyson, 41 U.S. (16 Pet.) 1, 8–9 (1842), *overruled by* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). *Erie* held in part that by applying the doctrine from *Swift* "this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states." 304 U.S. at 80.

disregarded it. When a minor war arose between political factions in Rhode Island, the Court timidly disowned the constitutional authority to decide which was the legitimate government of the state, notwithstanding the Federal Constitution's explicit "guarantee[ ] to each [state] a republican form of government."[63]

The Court took a more aggressive step in 1857 when it declared that Americans of African ancestry had no rights.[64] The nation, led by President Lincoln, fought a war in part to overrule the *Dred Scott* decision. When President Lincoln and Congress were concerned that the Court might impede the war effort, they appointed a tenth justice to ensure that the Court would not be able to marshal the votes to do so.[65] When the Chief Justice issued a writ of habeas corpus to free a citizen who was organizing resistance to the military draft, Lincoln ordered the Army to defy the writ.[66] When it later seemed that the Court might invalidate Reconstruction legislation, Congress foreclosed its jurisdiction.[67] And when the Court later invalidated the federal income tax,[68] a constitutional amendment reversed its decision.[69] Almost no contested policy of substantial national concern that the Court announced in the nineteenth century was effectively maintained.

To the extent that the Court successfully exercised significant political power in the nineteenth century, its authority generally resulted from applying the Federal Constitution to constrain allegedly miscreant state legislatures. Thomas Cooley's great nineteenth-century text on American constitutional law was largely an account and synthesis of the law of the states and not that of the nation.[70] He singled out, as inappropriate judicial overreaching, the decision of the Marshall Court denying New Hampshire the power to restructure a corporate

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63 Luther v. Borden, 48 U.S. (7 How.) 1, 32 (1849).

64 Scott v. Sandford, 60 U.S. (19 How.) 393, 396–97 (1857). President Buchanan and leading Senators encouraged the *Scott* decision. On its subsequent history, see 3 MARTIN SIEGEL, THE SUPREME COURT IN AMERICAN LIFE: THE TANEY COURT, 1836–1864, at 66–68 (1987); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 307–14 (1978).

65 On Lincoln's appointment of Stephen Field, see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE 95–97 (1997).

66 *See Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 134 (1866). The President's action was ratified by Congress. *See* Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. His message is recorded in 6 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS: 1789–1908, at 19 (James D. Richardson ed., Wash., D.C., Bureau of Nat'l Literature & Art 1908).

67 *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506, 515, 518 (1868).

68 *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 601 (1895), *vacated* 158 U.S. 601 (1895).

69 *See* ROBERT STANLEY, DIMENSIONS OF LAW IN THE SERVICE OF ORDER: ORIGINS OF THE FEDERAL INCOME TAX, 1861–1913, at 225–29 (1993).

70 THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION (Walter Carrington ed., Boston, Little, Brown & Co., 8th ed. 1927) (1868).

entity, Dartmouth College, as a violation of the provision of the Federal Constitution forbidding states to "impair[ ] the obligation of the charter."[71]

James Bradley Thayer, the most thoughtful constitutional scholar of the time, cautioned the Court against an apparently growing tendency to invoke the Constitution to invalidate state legislation that it disapproved. He also stressed the importance of deference to the political judgment of elected representatives. Thayer emphasized that constitutional interpretation is primarily a task for legislators, not judges.[72] Another leading constitutional scholar of the late nineteenth century, Christopher Tiedemann, reassured the nation that it need not worry about the modest authority of the Court:

> Congress [has] the power to increase the number of the Supreme Court judges, and thus, with the aid of the President, to change the composition and tendencies of the Court. If at any time the Supreme Court should too persistently withstand any popular demand in a case in which the people will not submit to the judicial negative, by an increase in the number of the judges . . . the popular will may be realized.[73]

The first congressional enactments[74] substantially enlarging the Court's discretionary power over its docket were each a reasonable response to the overload on the docket of a still modest Supreme Court then sitting in the basement of the Capitol. The reforms were not presented as changes in the political role of the Court, nor were those secondary consequences foreseen. The most important reform, the 1925 statute known as the "Judges' Bill,"[75] was the handiwork of Chief Justice Taft, who had returned to judicial office after an unsatisfying experience as President.[76]

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71 Tr. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 596–601 (1819). Cooley's criticism of this case appears in his treatise, 1 COOLEY, *supra* note 70, at 554–601.

72 James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 135 (1893); *see* James B. Thayer, *Professor Thayer's Address*, *in* JOHN MARSHALL: THE TRIBUTE OF MASSACHUSETTS 25, 68 (Marquis F. Dickinson ed., 1901).

73 CHRISTOPHER G. TIEDEMAN, THE UNWRITTEN CONSTITUTION OF THE UNITED STATES 162 (New York, G.P. Putnam's Sons 1890).

74 *See supra* note 17.

75 So termed because judges lobbied for it. *See* Richard G. Stevens, *Introduction* to FRANKFURTER & LANDIS, *supra* note 17, at ix, ix; CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS 7 (6th ed. 2002).

76 Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1364 (2006). After losing the presidency in 1912, he moved to Yale and wrote about constitutional law, chiefly about how constitutional law serves to constrain his successors in the White House. WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS *passim* (H. Jefferson Powell ed., Carolina Academic Press 2002) (1916). On Taft's leadership on the Court, see generally Robert Post, *Judicial Management and Judicial Disinterest: The Achievements and Perils of Chief Justice William Howard Taft* 1 J. SUP. CT. HIST. 50 (1998); Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court*, 85 MINN. L. REV. 1267,

As Chief Justice, Taft also authored the Judiciary Act of 1922, creating the Judicial Conference of the United States[77] that would play a growing role in the governance of the federal judiciary. He also secured construction of the Greek temple in which the Supreme Court sits.[78] These developments reflected a view that Taft had expressed while campaigning for the presidency. "I love judges and I love courts," he told the voters. "They are my ideals, that typify on earth what we shall meet hereafter in heaven under a just God."[79] Justices sitting in their Taftian temple do indeed maintain a heavenly aura about their work. As Judge Posner cautioned: "Cocooned in their marble palace, attended by sycophantic staff, and treated with extreme deference wherever they go, Supreme Court Justices are at risk of acquiring exaggerated opinions of their ability and character."[80]

The Taft era was followed by a series of political triumphs for the Court that encouraged Justices to exercise more fully their power as the superlegislature. First, while many viewed the Court-packing events of 1936–37 as a capitulation by Justice Owen Roberts "to save nine," the organized bar and others saw the later response of Congress in refusing to enlarge the Court as a triumph for the cause of judicial independence.[81] Then, in 1952, the Court prevailed over the President in the *Youngstown* Steel Seizure case,[82] notwithstanding concerns that its decree invalidating an executive order would, and perhaps did, impede the effort to provide arms for troops in combat in Korea. That event may have helped build the Court's self-confidence that belatedly enabled it to enforce the Equal Protection Clause of the

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1271–74 (2001); Kenneth W. Starr, *William Howard Taft: The Chief Justice as Judicial Architect*, 60 U. CIN. L. REV. 963, 965–68 (1992). On the formation of the Federal Judicial Conference under Taft, see generally PETER GRAHAM FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 40–90 (1973) (discussing the development of major regional and national institutions of federal judicial administration).

77 One of Taft's first acts as Chief Justice was to abandon the practice of abstaining from any effort to influence legislation in Congress, a practice established by John Marshall and followed by all of Taft's predecessors. Taft lobbied and soon secured enactment of the Judiciary Act of 1922, ch. 305, 42 Stat. 837.

78 Justice Brandeis protested that it made his colleagues into the "nine black beetles in the temple of Karnak" and would cause them to have an inflated vision of themselves. Pnina Lahav, *History in Journalism and Journalism in History: Anthony Lewis and the Watergate Crisis*, 29 J. SUP. CT. HIST. 163, 163 (2004) (quoting Anthony Lewis, *Echoes of History Heard in a Pillared Courtroom*, N.Y. TIMES, July 9, 1974, § 1, at 26).

79 Jeffrey B. Morris, *What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921–30*, *in* YEARBOOK 1983: SUPREME COURT HISTORICAL SOCIETY 80, 80 (William F. Swindler ed., 1983). While President, Taft published an article on judicial administration. *See* William H. Taft, *The Delays of the Law*, 18 YALE L.J. 28 (1908).

80 Posner, *supra* note 18, at 77.

81 *See* WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT *passim* (1995); *see also* BARRY CUSHMAN, RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION *passim* (1998).

82 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

Fourteenth Amendment: in 1954 it ordered public schools to be desegregated, albeit only "with all deliberate speed."[83]

That cautious decision led to the confrontation in Little Rock in 1956 when President Eisenhower sent the 101st Airborne Division to secure the place of nine African-American students in Central High School.[84] Although the decisions of both the Court and the President were praiseworthy, the response of the Court in proclaiming its authority in *Cooper v. Aaron*[85] was breathtaking. In a papal manner, the Court declared that mere state officials were not entitled to read the Constitution for themselves to justify their protests, but were bound to accept whatever meaning the Justices might give to the constitutional text, and that a failure of state officials to do so would violate their oaths of office.[86] The Court thus implied that state officials should be impeached and removed from office merely for their public disagreement with the Court. The general language of the opinion applied equally to the President, members of Congress, and other federal government officials, whom the Court cautioned against reading the Constitution for themselves. Contrary to the Court's implication, this was a fairly novel idea at the time.[87] Philip Kurland plausibly asked,[88] if an opinion of the Court is so immutable, how could the Court defy its own dictum in *Plessy v. Ferguson*?[89]

Desegregation inspired a generation of young lawyers to think of constitutional law as a great instrument for social reform, better even than Congress or any other legislative body bound to respect the opinions of an electorate.[90] That the Court and the lower federal judiciary played an important role in the two decades of civil rights struggles cannot be doubted and should not be disparaged.[91] But many others played important roles in the cause, most notably Martin Luther King, Jr. and his Southern Christian Leadership Conference who success-

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83 Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483 (1954); *see also* Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955).

84 *See* TONY FREYER, THE LITTLE ROCK CRISIS: A CONSTITUTIONAL INTERPRETATION 108 (1984).

85 358 U.S. 1 (1958); *see generally* FREYER, *supra* note 84.

86 *See Cooper*, 358 U.S. at 18; *see also id.* at 24 (Frankfurter, J., concurring).

87 *See* WHITTINGTON, *supra* note 57, at 285.

88 Philip B. Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19, 31 (1969). Other government officials generally accept the Court's interpretations of the Constitution, however debatable those interpretations may be. *See* Daniel A. Farber, *The Importance of Being Final*, 20 CONST. COMMENT. 359, 364 (2003); *see also* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1377 (1997) (arguing that *Cooper* reflects the reason for the Constitution as law—it allows one interpretation to become authoritative).

89 163 U.S. 537 (1896).

90 Laura Kalman refers to a generation of lawyers as "the children of the Warren Court." LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 52 (1996).

91 *See generally* JACK BASS, UNLIKELY HEROES (1981) (discussing the Fifth Circuit's desegregation jurisprudence).

fully altered the moral judgment of many fellow citizens.[92] Congress also played a decisive role in enacting the Civil Rights Act of 1964,[93] and the Department of Justice brought force to bear where it was needed.[94] The Courts' legal opinions had changed few minds, but segregation could not, in the end, stand up to Congress and the Executive Branch.[95]

By 1961, the Court, with self-confidence enlarged by the consequences of the several judiciary acts, its semi-divine surroundings, its access to an airborne division to enforce its decisions, and its then-recent history in achieving social change, was prepared to take on numerous other assignments. Under the intellectual and political leadership of Justice William Brennan,[96] the Court took on the job of making America more humane by proclaiming new constitutional rights that would "shap[e] a way of life for the American people."[97] To justify this aim, Justice Brennan explained that "[t]he choice of issues for decision largely determines the image that the American people have of their Supreme Court."[98]

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92 *See generally* DAVID J. GARROW, BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE (1986) (detailing Martin Luther King, Jr.'s development as the foremost spokesperson of the civil rights movement). Indeed, the Black Power Movement's threats of violence against racists and racist institutions may also have played a role in changing the public mind. *See* TIMOTHY B. TYSON, BLOOD DONE SIGN MY NAME 197–219 (2004).

93 Act of July 2, 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. § 2000 (2006)).

94 *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 363 (2004) (arguing that the intervention of the Department of Justice and Congress achieved desegregation that the federal judiciary alone was powerless to accomplish).

95 *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 52 (2d ed. 2008) ("The numbers show that the Supreme Court contributed virtually *nothing* to ending segregation of the public schools in the Southern states in the decade following *Brown*. The entrance of Congress and the executive branch . . . changed this. . . . In the first year of the [Civil Rights Act of 1964], nearly as much desegregation was achieved as during all the preceding years of Supreme Court action."); *see also* Melvin I. Urofsky, *"Among the Most Humane Moments in All Our History":* Brown v. Board of Education *in Historical Perspective*, *in* BLACK, WHITE AND *BROWN*: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT 1, 34–38 (Clare Cushman & Melvin I. Urofsky eds., 2004) (discussing southern states' opposition to the Court's decision in *Brown* and their attempts to thwart desegregation).

96 *See generally* KIM ISAAC EISLER, A JUSTICE FOR ALL: WILLIAM J. BRENNAN, JR., AND THE DECISIONS THAT TRANSFORMED AMERICA (1993) (outlining Justice Brennan's career and the extent of his influence on Supreme Court's direction and ideology); FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY (1999) (discussing Justice Brennan's ideas on constitutional democracy and democratic liberalism).

97 DAVID E. MARION, THE JURISPRUDENCE OF JUSTICE: WILLIAM J. BRENNAN, JR., THE LAW AND POLITICS OF "LIBERTARIAN DIGNITY" 161–62 (1997). For contemporaneous criticism of this change, see Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

98 William J. Brennan, Jr., *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 483 (1973). In defense of this expanded view of his role, Justice Brennan

The Justices did not find some of those rights in the explicit text of the Constitution but discerned and elaborated upon them in their opinions for the Court.[99] Sanford Levinson has aptly observed that during this time many lawyers and legal scholars increasingly thought of the constitutional text in the way that the Catholic Church has traditionally thought of scripture: as a text truly understood only by those high clergymen professionally invested in its interpretation.[100] Prior to the 1960s the Justices had not presented themselves as Cardinals of a secular faith.[101] Since that time, the Court's conduct has solidly reflected the conviction, increasingly widespread among lawyers as well as academic theorists, that they are a primary framer of what the law *ought* to be, and not merely a reporter of what it *is*.[102] The Court thus became, it has been said, a mobilizer of an elite group[103] and a primary source of major political change, and thus "the crown jewel" of American law. Perhaps it was but coincidental that the entire legal profession gained status from its identification with the jewel.[104]

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adopted Justice Goldberg's statement that the "power to decide cases presupposes the power to determine what cases will be decided." *Id.* at 484 (footnote omitted). In responses to Paul Freund's questioning of this principle's origin, Professor Hartnett confirms that it was an idea first advanced in 1925 as a result of the Judges' Bill, which gave the Court the power to control its own docket. Hartnett, *supra* note 17, at 1736.

99 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) ("The[ ] right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government."); Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."); Furman v. Georgia, 408 U.S. 238, 269–82 (1972) (Brennan, J., concurring) (discussing whether the application of death penalty would violate Eighth Amendment's ban on "cruel and unusual punishment").

100 *See* SANFORD LEVINSON, CONSTITUTIONAL FAITH 46–50 (1988). This form of judicial supremacy was also expressed by Lord Coke; he explained it to King James as a subject accessible only to initiates and quite beyond the understanding of a mere royal. CATHERINE DRINKER BOWEN, THE LION AND THE THRONE: THE LIFE AND TIMES OF SIR EDWARD COKE (1552–1634), at 304–06 (1957). Chief Justice Taft expressed the thought as follows: "[T]he people at the polls no more than kings upon the throne are fit to pass upon questions involving the judicial interpretation of the law." GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE 213 (1994) (footnote omitted).

101 That its intellectual leader, Justice Brennan, celebrated the Catholic faith may have been more significant than was recognized at the time.

102 This vision was not so new. As noted above, concern over judicial activism had motivated many amendments of state constitutions in the nineteenth century. *See supra* notes 50–52 and accompanying text. Duncan Kennedy attributes this vision to other developments in western thought. Duncan Kennedy, *The Disenchantment of Logically Formal Legal Rationality, or Max Weber's Sociology in the Genealogy of the Contemporary Mode of Western Legal Thought*, 55 HASTINGS L.J. 1031, 1065 (2004).

103 Alexander Bickel was among the first to recognize that this is the role the Court has assigned itself. Alexander M. Bickel, *The Supreme Court 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41–42 (1961).

104 *See generally* ROBERT F. NAGEL, UNRESTRAINED: JUDICIAL EXCESS AND THE MIND OF THE AMERICAN LAWYER (2008).

In 2005, Justice Breyer made a valiant and honorable effort to explain the Court's political role as responsive to what he denotes as a democratic tradition of "active liberty."[105] He sees himself as a member of a small elite commissioned by the people to interpret the Constitution as a guide to the best practical solutions for the problems of the day.[106] He does not acknowledge, and perhaps does not recognize, that his assessments of problems and their solutions necessarily reflect unarticulated value choices that many citizens may and do vigorously dispute.[107] To be sure, Justice Breyer does advocate a measure of modesty in the exercise of judicial power that distinguishes him from Justice Brennan,[108] but the values he brings to the task are similar to those of Justice Brennan, and they may be disputed and rejected by many citizens.

This expansion of the Court's political responsibility obviously encroaches upon the responsibility of elected officials but is not necessarily an offense to these elected officials. Clearly, many elected politicians welcome the opportunity to leave the duty of making unwelcome decisions to "life-tenured" judges.[109] The politicians are free to denounce such decisions without bearing accountability to voters or campaign contributors.[110]

The power to decide what to decide was a major factor in the transformation of the Court in the last century as the Justices became noticeably less constrained in making political decisions. But the Court can no longer invoke John Marshall's justification that it is per-

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105 *See* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 3–12 (2005). A more recent depiction of the modest role of the Justices is DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLE AND POLITICS IN CONSTITUTIONAL LAW (2009).

106 *See id.* at 18 ("Since law is connected to life, judges, in applying [the Constitution] in light of its purpose, should look to *consequences*, including 'contemporary conditions, social, industrial, and political, of the community to be affected.'").

107 For an extended critique, see Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U. CHI. L. REV. 759 (2006) (reviewing BREYER, *supra* note 105).

108 *See* BREYER, *supra* note 105, at 18–19. In this respect, Justice Breyer sides with CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT, at xiv (1999) (arguing that judicial minimalism promotes, rather than undermines, democratic processes). Jeffrey Rosen describes Justice Breyer as "cautious, incremental, pragmatic, respectful of historical arguments, and suspicious of sweeping claims about fundamental values." Jeffrey Rosen, *Two Cheers for the Rehnquist Court*, 1 NEXUS 37, 39 (1996).

109 *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1352 (2006) ("[T]oday's lawmakers do not place a high value on their power to independently interpret the Constitution. . . . Over the past thirty years, the percent of hearings raising significant constitutional issues has declined throughout Congress.").

110 *See* WHITTINGTON, *supra* note 57, at 282 ("Rather than bearing the political cost of casting votes against popular positions for the sake of abstract constitutional principles, elected officials on both sides of the political aisle are willing to accept judicial supremacy." (footnote omitted)).

forming an unavoidable duty.[111] The Court generally exercises its power to choose cases without any of the amenities of a judicial process, that is "without collegial deliberation, well-defined rules, precedential constraint, or public accountability."[112] It is widely observed that the process of case selection is "hopelessly indeterminate and unilluminating."[113] This unrestrained power is exercised largely in the privacy of chambers; ideological and strategic considerations abound.[114] For all these reasons, the process bears scant resemblance to the traditional judicial task of actually deciding cases on their merits.

The question of whether the social and political reforms imposed by the judicial superlegislature have been as beneficial as once hoped is often raised when secondary consequences are considered.[115] Whether the diverse political judgments that the Court imposed on the states were benign has been warmly debated;[116] all of us would agree with some of the policies that the Court favors and disagree with others.[117] Justice John Harlan was among those striving to diminish

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111 *See* Hartnett, *supra* note 17, at 1717 ("A court that can simply refuse to hear a case can no longer credibly say that it had to decide it.").

112 Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389, 452 (2004).

113 Samuel Estreicher & John E. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. REV. 681, 790 (1984); *see also* Editorial, *The Supreme Court and Certiorari: What Determines the Agenda?*, 84 JUDICATURE 112, 112 (2000).

114 *See* Cordray & Cordray, *supra* note 112 at 410–15 (reviewing research finding that judges choose to grant certiorari based on ideological or strategic reasons). The data tends to confirm that Justices are often looking for a case that would be a "good vehicle" for developing the political policy they favor. H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 265 (1991).

115 *See, e.g.*, KLARMAN, *supra* note 94 at 454–68 (arguing that the Court's decision in *Brown* spurred social reform but created enforceability problems and violent southern reactions); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (2d ed. 2004); ROSENBERG, *supra* note 95, at 420–29 (arguing that Supreme Court decisions often provide reformers symbolic victories and the illusion of substantive change); Gerald N. Rosenberg, *African-American Rights After* Brown, *in* BLACK, WHITE AND *BROWN*: THE LANDMARK SCHOOL DESEGREGATION CASE IN RETROSPECT, *supra* note 95, at 203, 231 ("[C]ourts may serve an ideological function of luring movements for social reform to an institution that is structurally constrained from serving their needs, providing only an illusion of change."); *see also* David J. Garrow, *Bad Behavior Makes Big Law: Southern Malfeasance and the Expansion of Federal Judicial Power, 1954–1968*, 82 ST. JOHN'S L. REV. 1 (2008).

116 For diverse ruminations, see STEPHEN B. PRESSER, RECAPTURING THE CONSTITUTION: RACE, RELIGION, AND ABORTION RECONSIDERED 200–01 (1994) (positing that the Supreme Court has lost its way and infringed on the role of the legislature); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193, 1224–29 (1992); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 18–19 (1959) (arguing that courts should respect value judgments made by legislatures).

117 *Compare* ROBERT H. BORK, SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE 117–18 (1996) (arguing that the way to achieve constitutional legitimacy is through a constitutional amendment "making any federal or state court decisions subject to being overruled by a majority vote of each House of Congress"), *with* LARRY D.

his colleagues' ambitions, and he cautioned: "The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements."[118]

Reforms imposed on the public from above have special problems; they are less likely to command acceptance and more likely to evoke resistance. Few citizens confident of their rights are likely to get their moral or political values from the utterances of a superlegislature. One certainty is that the Court's extension of the Fourteenth Amendment has substantially diminished American citizens' sense that a representative process, for which they share some measure of responsibility, accounts for important and contestable government policies.[119] Superlegislation is also less likely to be the result of compromise, which is the saving grace of democratic government. When political mistakes are embedded in proclamations of federal constitutional law, they are all but impossible to correct. Indeed, when an effort was made to secure ratification of a wise and badly needed amendment declaring the equal rights of women, a prevailing argument against ratification was that the Court could not be trusted to accept the obvious meaning of its text and would likely invoke it to achieve novel cultural changes contrary to the wishes of most citizens.[120]

Jefferson Powell cautions the Justices on the morality of imposing their political preferences on other citizens. "[A]t the heart of a faithful justice's conscience, shaping his or her view of what the Court should decide, are constitutional virtues of humility and acquiescence that counsel against judicial arrogance and overconfidence."[121] Alas, as Professor Powell's work implies, the Court often lacks those "constitutional virtues." Robert Nagel has made a strong case for attributing the frequent absence of such virtues to the failings of the American legal profession.[122] As he observes, many contemporary American lawyers have difficulty visualizing the possibility that an important or

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KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 227–48 (2004) (advocating for a system of popular constitutionalism rather than the Supreme Court as the ultimate arbiter of the Constitution), *and* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 154–76 (1999) (arguing for the abolishment of judicial review in favor of popular constitutionalism).

118 Reynolds v. Sims, 377 U.S. 533, 624–25 (1964) (Harlan, J., dissenting).

119 The degeneration of state sovereignty over matters of popular concern also seems to have vitiated the political vitality of local governments. *See generally* ROBERT F. NAGEL, THE IMPLOSION OF AMERICAN FEDERALISM (2001).

120 *See* William Van Alstyne, *Notes on a Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 957 n.61.

121 H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 118 (2008).

122 *See* NAGEL, *supra* note 104, at 121–33.

interesting political issue does not have a legal, constitutional dimension.[123] Perhaps on that account, there is no exit from *Roe v. Wade* or other divisive issues that elected politicians would as soon leave to those with life tenure. As Professor Nagel observes, Chief Justice Marshall's excuse that he was forced to decide the constitutional issue presented in *Marbury v. Madison*, and that he was only deciding that narrow issue, is a contagious idea upon which American lawyers were raised and that serves to empower and elevate their profession.[124]

The one recourse visibly open to citizens offended by policies made by Justices is to elect a President who might someday appoint Justices who share their political preferences. That hope has made the judicial confirmation process a test of political ideology,[125] even for district and circuit judges.[126] There is no need in this brief reminder to reconsider the merits of the many public policies that the Court, once elevated by the mid-century events, was moved to find in the subtexts of the Constitution or unnoticed congressional enact-

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123 *See id.* at 130.

124 *See id.* at 129.

125 The inability of Harriet Miers to win confirmation in 2005 was apparently the result of her inability to persuade Republican Senators that she was sufficiently committed to their political convictions. *See* Michael A. Fletcher & Charles Babington, *Miers, Under Fire from Right, Withdrawn as Court Nominee*, WASH. POST, Oct. 28, 2005, at A1 (quoting former Senator Dan Coats, who accompanied Miers on meetings where "senators rightly wanted to see some objective evidence of what her judicial philosophy was"). The Senate Minority Leader, Harry Reid, at the time of her nomination by President Bush released a statement:

> I like Harriet Miers. As White House Counsel, she has worked with me in a courteous and professional manner. I am also impressed with the fact that she was a trailblazer for women as managing partner of a major Dallas law firm and as the first woman president of the Texas Bar Association.
>
> In my view, the Supreme Court would benefit from the addition of a justice who has real experience as a practicing lawyer. The current justices have all been chosen from the lower federal courts. A nominee with relevant non-judicial experience would bring a different and useful perspective to the Court.

Press Release, Senator Harry Reid, U.S. Senate, Statement of Senator Harry Reid on the Nomination of Harriet Miers to the U.S. Supreme Court (Oct. 3, 2005), http://democrats.senate.gov/newsroom/record.cfm?id=246777.

After the confirmation of Justice Samuel Alito, nominated by President Bush after Miers' withdrawal, Senator Reid released another statement:

> I continue to believe that Harriet Miers received a raw deal. She is an accomplished lawyer, a trailblazer for women and a strong advocate of legal services for the poor. Not only was she denied the up-down vote that my Republican colleagues say every nominee deserves, but she was never even afforded the chance to make her case to the Judiciary Committee.

Press Release, Senator Harry Reid, U.S. Senate, Reid Statement on the Confirmation of Samuel Alito (Jan. 31, 2006), http://democrats.senate.gov./newsroom/record.cfm?id=250959.

126 For an account, see GEYH, *supra* note 5, at 171–222 (discussing prospective accountability of judicial nominees to the U.S. Senate); NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 151–80 (2005) (observing that since the 1968 Presidential election, candidates have made the selection of Justices and judges a campaign issue).

ments. Few informed readers will question Judge Posner's observation that "[j]udicial modesty is not the order of the day in the Supreme Court."[127]

II
The Absence of Judicial Independence Caused by Superlaw Governing Judicial Elections

We note one set of law "reforms" imposed by the Court through its generous reading of the Fourteenth Amendment as examples of its excessive independence. The constitutional law made by the Court in recent decades has gravely imperiled the independence of many state judiciaries.[128] Indeed, the Court has by its edicts made it virtually impossible for many states to ensure the appropriate independence of their judiciaries.[129]

First, the Court's holding that the Due Process Clause of the Fourteenth Amendment incorporates the First Amendment protection of free speech has been extended to detrimentally affect the inde-

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127 Posner, *supra* note 18, at 56; *see also* Sosa v. Alvarez-Machain, 542 U.S. 692, 750 (2004) (Scalia, J., concurring) (protesting that "[t]his Court seems incapable of admitting that some matters—*any* matters—are none of its business") (citations omitted). But note that Justice Scalia was among those who could not admit that the outcome of a presidential election is none of the Court's business. Bush v. Gore, 531 U.S. 1046, 1046–47 (2000) (Scalia, J., concurring) (responding to Justice Stevens' dissent to the Court's intervention by granting certiorari).

128 Judicial elections are a special problem, but the negative consequence of the Court's derivation of the "one man, one vote" rule from the Equal Protection Clause should not be ignored. That decision has increased the manipulation of district boundaries by legislators diminishing the vulnerability of elected bodies to popular influence. In *Reynolds v. Sims*, 377 U.S. 533, 568–71 (1964), the Court held that a state constitution providing that an upper house in the legislature seating representatives from each county did not meet the requirements of the Equal Protection Clause of the Fourteenth Amendment. On the current state of the issue, see Guy-Uriel E. Charles, *Democracy and Distortion*, 92 Cornell L. Rev. 601 (2007) (arguing that the Supreme Court's regulation of political gerrymandering can be justified); Heather K. Gerken, *The Texas and Pennsylvania Partisan Gerrymandering Cases: Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. Pa. L. Rev. 503 (2004) (discussing the Court's current and prior jurisprudence and speculating on what the Court's next steps will be); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004) (arguing that it is impossible to render claims of political gerrymandering nonjusticiable and that the Justices' intervention, prompted by claims of excessive partisanship, may actually encourage further reduction in political competition); Daniel R. Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459, 475–501 (2004) (discussing application of the "got theory" argument, which is that the Court must defer to the political branches in these political cases, including partisan gerrymandering cases). So far, "one man, one vote" has not arisen in cases involving judicial elections.

129 *See generally* Richard L. Hasen, The Supreme Court and Election Law: Judging Equality from *Baker v. Carr* to *Bush v. Gore* (2003) (examining the Court's role in regulating political equality); Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 Mich. L. Rev. 213 (2003) (discussing the one person, one vote standard in a general context rather than specifically applied to judicial elections); *cf.* Guy-Uriel Charles, *Judging the Law of Politics*, 103 Mich. L. Rev. 1099 (2005) (reviewing Hasen, *supra*).

pendence of many state judiciaries. Justice Brandeis, a judge often celebrated for his self-restraint, led the first step in this development. His step was consequential only in constraining brutalities in the administration of criminal law.[130] He took this step only weeks after Congress had empowered the Court to refuse to hear appeals from the highest state courts,[131] and perhaps he would not have taken it if the Justices were obliged to review all the claims to procedural rights advanced by defendants convicted in state courts.

The Court then went on to impose many other constraints on state laws that no one had previously detected in the Fourteenth Amendment.[132] It found, for example, that not only Congress but also state legislatures must follow the First Amendment and shall make no "law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[133] All state constitutions already contained similar language. The effects of the Court's rendition were to transfer the primary responsibility for enforcing related civil liberties from state courts to federal courts and to transfer the primary responsibility for declaring the scope of our civil liberties from state supreme courts to itself.

Readers will surely join the authors in affirming that many of the Court's civil liberties' proclamations were welcome or at least benign. The specific problem to which we point is that the Court has enlarged civil liberties in ways that have had unfortunate and seemingly irremediable consequences for both federal and state laws governing the conduct of democratic elections. The impact upon the elections of judges, which state constitutions require in order to provide a measure of democratic accountability for their politicized judiciaries, has been especially consequential.

Perhaps the Court's most extravagant proclamation of public policy is its declaration that citizens have a constitutional right to spend money to influence election outcomes, even judicial elections, through campaign contributions to candidates or through indepen-

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130 *See* Gitlow v. New York, 268 U.S. 652, 666 (1925).

131 *See* Judiciary Act of 1925, ch. 229, 43 Stat. 936, 937–38.

132 Justice Stone's famous footnote in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), declared that the purpose of the Court was to advance the interests of citizens less influential with legislatures. *See* WILLIAM M. WIECEK, THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, *in* 12 THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES, *supra* note 39, at 116–42 (Stanley N. Katz ed., 2006) (stating that footnote four from *Carolene Products* announced "the paradigm of post-1937 constitutional development").

133 U.S. CONST. amend. I. In *Gitlow*, the Court commenced the process of incorporation of the Bill of Rights into the Fourteenth Amendment. 268 U.S. at 664–67. For an account, see ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT (2007).

dent use of the media. In the United States today, "money is speech."[134] The Court has been seemingly oblivious to the resemblance of campaign contributions to bribery, a matter of grave sensitivity to elected officers at every level of government. In regard to the federal government, a visible consequence of money as speech is the necessity felt by Congresspersons and the President to reward contributors with "earmark" appropriations or the like—expenditures that would not have been made except in response to indispensable campaign support. The financial dependency requires legislators and presidents to pay close heed to the advice of lobbyists who represent the sources of funds required for retention of office. But Article III judges who hold office for "good behavior" are not obliged to raise money to keep their jobs, so they can view the idea that money is speech without personal anxiety. If it is true that Washington is "broken," so are most or all state capitals, and much of the responsibility for the breakage must be assigned to those sheltered in the temple.

For state judicial elections, the resemblance of a judicial campaign contribution to a bribe is a special horror.[135] Contributions to state judicial campaigns go to judges whom the donors expect or hope will make agreeable decisions, but these contributions do not obligate the judge to depart from preexisting law. Defeated litigants in state courts, however, are likely to be skeptical. One recent example involved a justice elected in 2005 to the Supreme Court of Illinois in a monstrously expensive campaign. Shortly thereafter, he cast the deciding vote to reverse a very large award of damages rendered by a lower court against an insurance company whose officers had made

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134 Buckley v. Valeo, 424 U.S. 1, 262 (1976) (White, J., concurring in part and dissenting in part). *Buckley*, which struck down provisions of the Federal Election Campaign Act of 1971 that limited campaign expenditures, is the premier decision in this area. *See generally* Richard H. Pildes, *The Supreme Court 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 55–153 (2004) (discussing the design of democratic institutions, the nature of equal political representation, the role of political parties, and the structure of election financing); Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 383–97 (2009) (discussing *Buckley* and subsequent cases dealing with the danger of corruption resulting from political campaign contributions). The Supreme Court revisited the issue in *McConnell v. FEC*, in which the Court reviewed provisions of the Bipartisan Campaign Reform Act of 2002. 540 U.S. 93 (2003); *cf. also* Randall v. Sorell, 548 U.S. 230, 236–37 (2006) (holding that limitations on expenditures by candidates and contributions by political parties in a Vermont campaign finance statute were "inconsistent with the First Amendment"). *But cf.* Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 382 (2000) (applying *Buckley* but sustaining a Missouri law limiting the size of contributions to candidates in state senate races to $1,075). The Court's latest utterance pushes the limit a little further by invalidating a federal law allowing candidates to accept larger individual contributions if they are competing with a "millionaire candidate" spending vast sums of his own money. Davis v. FEC, 128 S. Ct. 2759, 2770–75 (2008) (invalidating parts of the Bipartisan Campaign Reform Act of 2002).

135 *See generally* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J.L. & POL. 57, 96–133 (1985) (discussing judicial campaign financing and possible reforms).

major contributions to his campaign.[136] When asked to review that final judgment by the Illinois court as a denial of due process, the Justices of the Supreme Court of the United States chose not to become involved.[137] The Supreme Court agreed to consider a similar case from West Virginia,[138] only to have the challenged judge belatedly recuse himself.[139]

The freedom to use money to influence the selection of judges is further called into question by the Court's affirmation of the right of judicial candidates to make campaign promises. For decades, bar organizations have maintained standards of judicial ethics constraining the conduct of candidates for judicial office.[140] In 2002, the Supreme Court cast a large cloud of doubt over all such rules of judicial ethics.[141] The Court invalidated a Minnesota rule, in force since 1975, that provided that a "candidate for a judicial office, including an incumbent judge," shall not "announce his or her views on disputed legal or political issues."[142] The Eighth Circuit further elaborated on remand, when it additionally struck down rules foreclosing partisan-

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136 After accepting over $350,000 from diverse employees of State Farm Insurance Company for his 2004 campaign, Justice Lloyd Karmeier denied a motion to disqualify himself from casting the deciding vote in favor of State Farm on its appeal from an adverse judgment requiring it to pay punitive damages. Avery v. State Farm Mut. Auto. Ins. Co., 835 N.E.2d 801, 863–64 (2005) (reversing part of the lower court's judgment, including punitive damages), *cert. denied*, 547 U.S. 1003, 1003 (2006); *see* Leonard Post, *Contributions to Justice Lead to Protest: Ethics Case Highlights Judicial Election Issue*, NAT'L L.J., Feb. 13, 2006, at 4.

137 *Avery*, 547 U.S. at 1003.

138 *Justice Recusing Self from Massey Appeals*, CHARLESTON DAILY MAIL (Charleston, W. Va.), Feb. 3, 2009, at 2A, LexisNexis Academic.

139 Marcia Coyle, *Review Sought on Judicial Recusals: W.Va. Case Triggers Key Ethical Query*, NAT' L.J., Aug. 4, 2008, at 1.

140 The American Bar Association first promulgated its Canons of Judicial Ethics in 1924. *See* CANONS OF JUDICIAL ETHICS (1924), *in* AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES WITH THE CANONS ON PROFESSION ETHICS AND CANON JUDICIAL ETHICS 29, 29–39 (1936). In 1972 the ABA published its Model Code of Judicial Conduct that was intended to be enforced by a disciplinary system. An important aim of the Code was to protect the independence of the elected judiciary by forbidding those campaign practices most likely to call the integrity and disinterest of the candidates into public question. Judges have been subjected to discipline for gross violations of such rules. *See, e.g.*, William Glaberson, *States Rein in Truth-Bending in Court Races: Judges Face Penalties for Deceiving Voters*, N.Y. TIMES, Aug. 23, 2000, at A1 ("Across the country, judges are being fined, censured, and even threatened with removal for practicing that venerable political art: exaggerating or outright lying during a campaign."). In 2007, the Code was revised. Although states have enacted diverse variations on the code, all have enforcement procedures that are active. *See generally* JAMES J. ALFINI ET AL., JUDICIAL CONDUCT AND ETHICS § 11.03 (4th ed. 2007) (discussing judicial discipline agency jurisdiction over campaign ethics violations).

141 *See* Republican Party of Minn. v. White, 536 U.S. 765, 788 (2002) (striking down a rule prohibiting candidates for judicial election from announcing their views on disputed legal and political issues on First Amendment grounds).

142 MINN. CODE OF JUDICIAL CONDUCT Canon 5(A)(3)(d)(i) (2000).

ship of judicial candidates[143] and forbidding direct requests for campaign funds by judicial candidates.[144] The Supreme Court held that Minnesota's law of judicial campaign ethics violated the First Amendment as incorporated in the Fourteenth.[145] Justice O'Connor explained in her concurring opinion that if the people of Minnesota choose to elect their judges, they must choose as well to respect the newly proclaimed First Amendment rights of candidates. It seems that voters must reconsider the reform and do it Justice O'Connor's way or not at all. It also seems that concerned voters are unlikely to be persuaded by mere dicta to surrender their authority over their courts.

Yet another major problem regarding the content of utterances presented in the course of campaigning is defamation. The Supreme Court has affirmed the freedom of citizens to defame public figures.[146] Judges, as public figures, are exposed to vicious and misleading attacks during judicial campaigning that almost surely impair public regard for the courts.[147] In some circumstances, they may be more exposed to defamation because so few genuine, current political issues of interest to voters are present in judicial campaign contests.[148] The Court has even affirmed the right to make defamatory utterances anonymously.[149]

An extreme example of political defamation arose in the judicial election held in Wisconsin in 2008.[150] Justice Louis Butler, an Afri-

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143 Republican Party of Minn. v. White, 416 F.3d 738, 754–63 (8th Cir. 2005) (en banc), *cert. denied*, 546 U.S. 1157 (2006).

144 *Id.* at 763–66.

145 *See id.* at 766 (holding that the state rule violated the First Amendment).

146 N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–83 (1964) (holding that in order for public officials to recover damages for a defamatory falsehood relating to their official conduct, they must prove "actual malice").

147 *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 313–15 (1997) (discussing the removal of Tennessee Supreme Court Justice Penny White); Traciel V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 JUDICATURE 68 (1999) (discussing the defeat in retention elections of Nebraska Supreme Court Justice David Lanphier and Tennessee Supreme Court Justice Penny White); Emily Heller, *A Pa. Rarity: Incumbent Justice Out: Anger over Quiet Pay Raise Hits Judicial Vote*, NAT'L L.J., Nov. 14, 2005, at 6; Carol Morello, *W.Va. Supreme Court Justice Defeated in Rancorous Contest*, WASH. POST, Nov. 4, 2004, at A15.

148 For an empirical study of voter awareness of the identities of judicial candidates, see J. Christopher Heagarty, *Public Opinion and an Elected Judiciary: New Avenues for Reform*, 39 WILLAMETTE L. REV. 1287, 1295–99 (2003).

149 *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995) (striking down an Ohio provision prohibiting anonymous campaign materials on First Amendment grounds).

150 *See* Viveca Novak, *Judgment Day in Wisconsin*, FACTCHECK.ORG, Mar. 10, 2008, http://www.factcheck.org/judicial-campaigns/judgment_day_in_wisconsin.html [hereinafter Novak, *Judgment Day*]; *see also* Viveca Novak, *Wisconsin Judgment Day: the Sequel*, FACTCHECK.ORG, Mar. 21, 2008, http://www.factcheck.org/elections-2008/wisconsin_judgment_day_the_sequel.html [hereinafter Novak, *Sequel*].

can-American judge, was a candidate for reelection.[151] His opponent, Michael Gableman, a trial judge with brief experience and questionable qualifications for the office, spent many dollars on defamatory television advertising.[152] A major feature of his campaign was an ad showing Justice Butler's image sharing the screen with that of a former client who was also African American and who was a convicted rapist.[153] The voice-over reported that Justice Butler had protected this rapist.[154] It was true that Butler, many years earlier while serving as a public defender, had represented this client.[155] The client had been convicted of rape, served nine years in state prison, and then, on his release, committed the offense again.[156] Not only was this campaign commercial perhaps the most blatant display of "the race card" in modern memory, but it was also a fraud.[157] But it won.[158] Perhaps this disgraceful campaign is not constitutionally protected. But if the Wisconsin legal profession is permitted to impose an appropriate sanction on Justice Gableman,[159] the imposition of a sanction will require reducing the reach of constitutional law that the Supreme Court has proclaimed.

To avoid the obvious problems associated with judicial campaigns, whether partisan or non-partisan, many states adopted variations of the "Missouri Plan" that was fashioned by Progressives in the early years of the twentieth century.[160] The Plan reinforces judicial independence by replacing competitive elections with retention elections.[161] The voters have an opportunity to remove a notably unpopular judge from office but do not choose the replacement, who is selected by the usual appointment process. The absence of an opposing candidate provided a measure of job security and independence for the others. For decades, and in many states, this system worked well. Judges were restrained by the knowledge that they were account-

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151 *See* Novak, *Judgment Day*, *supra* note 150.

152 *See id.*

153 *See* Novak, *Sequel*, *supra* note 150.

154 *See id.*

155 *See id.*

156 *See id.*

157 The strategy may have been suggested by John Grisham's novel *The Appeal* (2007), a painful account of a bought judicial election.

158 *See* Adam Liptak, *Rendering Justice, with One Eye on Re-election*, N.Y. TIMES, May 25, 2008, § 1, at 1.

159 The Wisconsin Judicial Commission commenced a proceeding on October 7, 2008 in the Supreme Court of Wisconsin. *See* Patrick Marley & Steven Walters, *Judicial Commission Says Gableman Ad Was Deceiving*, MILWAUKEE J. SENTINEL, Oct. 8, 2008, at A1, LexisNexis Academic.

160 *See* Maura Anne Schoshinski, *Towards an Independent, Fair, and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 GEO. J. LEGAL ETHICS 839, 847 (1994).

161 *See id.* at 847–48.

able to the citizens they served.[162] Meanwhile, every judge that sought retention was retained and citizens who voted for retention acquired a measured sense of responsibility for the integrity of their courts.[163] But beginning in California in the 1980s, interest groups discovered the possibility that the law being made in the highest state courts might be made more agreeable to themselves if specific judges were denied retention.[164] Millions of dollars are now sometimes spent for such purposes.[165] And defamatory television commercials are, for obvious reasons, the instrument of choice. Constraints on such campaigns of intimidation encounter obvious difficulty because of the propositions that money is constitutionally protected speech and that one is entitled to freely speak ill of public figures.

California Chief Justice Ronald George wrote the recent opinion of his court allowing gay marriage.[166] His opinion was apparently overridden by voters who amended the state constitution in 2008.[167] He must stand for retention in 2009 if he is to remain on the court.[168] In 2008, he summoned a conference to discuss judicial independence.[169] What, indeed, can one say to California voters to assure their fidelity to the principle of judicial independence in the light of such decisions? Ohio Chief Justice Thomas Moyer acknowledged that judicial election campaigns in his state have become "very negative" but offered the hopeful thought that requiring publication of cam-

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162 *See id.* at 849.

163 *See* MICHAL R. BELKNAP, TO IMPROVE THE ADMINISTRATION OF JUSTICE: A HISTORY OF THE AMERICAN JUDICATURE SOCIETY 102–06 (1992); Schoshinski, *supra* note 160, at 850. For an account of the variations in judicial selection schemes, *see* Polly J. Price, *Selection of State Court Judges*, *in* STATE JUDICIARIES AND IMPARTIALITY: JUDGING THE JUDGES 9, 16–19 (Roger Clegg & James D. Miller eds., 1996).

164 For accounts of the California debacle, *see* BETTY MEDSGER, FRAMED: THE NEW RIGHT ATTACK ON CHIEF JUSTICE ROSE BIRD AND THE COURTS 80–81 (1983); PREBLE STOLZ, JUDGING JUDGES: THE INVESTIGATION OF ROSE BIRD AND THE CALIFORNIA SUPREME COURT (1981); John H. Culver & John T. Wold, *Judicial Reform in California*, *in* JUDICIAL REFORM IN THE STATES 139, 156 (Anthony Champagne & Judith Haydel eds., 1993); Joseph R. Grodin, *Developing A Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988); Robert S. Thompson, *Judicial Independence, Judicial Accountability, Judicial Elections, and the California Supreme Court: Defining the Terms of the Debate*, 59 S. CAL. L. REV. 809 (1986).

165 Data on lawyer contributions was provided by the American Bar Association. *See* TASK FORCE ON LAWYERS' POLITICAL CONTRIBUTIONS, REPORT AND RECOMMENDATIONS: PART TWO 89–107 (1998). The U.S. Chamber of Commerce reportedly spent $120 million in 2002–06, most of it through the Institute for Legal Reform, a tax-free affiliate. *See* Zach Patton, *Robe Warriors*, GOVERNING, Mar. 2006, at 34, 36.

166 *See In re* Marriage Cases, 183 P.3d 384, 397 (Cal. 2008).

167 Jessica Garrison et al., *Voters Approve Proposition 8 Banning Same-Sex Marriages*, L.A. TIMES, Nov. 5, 2008, http://www.latimes.com/news/local/la-me-gaymarriage5-2008nov05,0,1545381.story.

168 *See* MacLean, *supra* note 11.

169 *See id.*

paign contributions tended to diminish the odium of the television commercials.[170]

Given the unrest of voters that Justices Breyer and O'Connor have addressed, there is very little prospect of voters in many states approving constitutional amendments to remove their judges from their ballots.[171] As J.J. Gass has forcefully affirmed, "due process rights of individual litigants are not the state's to forfeit."[172] Due process ought therefore be taken to preclude the submission of a citizen's case to a judge elected at the expense of his adversary, as happened in Illinois in 2005.[173]

Judicial elections are the most serious and seemingly insoluble problem created by the Court's jurisprudence on democratic elections. But American political campaigns are generally deplorable, as (now Judge) Michael McConnell concluded: "The landscape of American politics today is not an encouraging sight. . . . It is fair to say that the responsibility for a great deal of the political problem is to be laid at the feet of the Supreme Court's well-meaning reforms from the early 1960s."[174]

A fitting confirmation of the reality observed by Judge McConnell unfolded in 2000 when a majority of the Court decided the presidential election, usurping the roles of the electoral college and the House of Representatives—notwithstanding the text of the Constitution, plainly written to exclude the Justices from any role in the selection of the President who selects their future colleagues.[175] Surprisingly, the

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170 *See id.*

171 The most recent effort to amend a state constitution to make judges less accountable to the people was made in Ohio in 1987. Despite the support of both parties and an array of other organizations, it was soundly rejected by the voters. *See* John D. Felice et al., *Judicial Reform in Ohio*, *in* JUDICIAL REFORM IN THE STATES, *supra* note 164, at 51, 51–69. A similar result can now be expected in other states. The American Bar Association in 2002 reluctantly recognized this reality by acknowledging public finance of judicial campaigns as an alternative acceptable to it. *See* AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON JUDICIAL INDEPENDENCE, REPORT OF THE COMMISSION ON PUBLIC FINANCING OF JUDICIAL CAMPAIGNS *passim* (2002).

172 J.J. GASS, AFTER *WHITE*: DEFENDING AND AMENDING CANONS OF JUDICIAL ETHICS 10 (2004). On the relation between canons of judicial ethics and due process, see Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 GEO. J. LEGAL ETHICS 1059 (1996).

173 *See supra* notes 136–37 and accompanying text.

174 Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 116–17 (2000).

175 *See generally* Bush v. Gore, 531 U.S. 98 (2000). For contemporaneous comment, see Paul D. Carrington & H. Jefferson Powell, *The Right to Self-Government After* Bush v. Gore, (Duke Univ. Sch. of Law Pub. Law and Legal Theory Working Paper Series, Working Paper No. 26, 2001); *see also* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); Frank I. Michelman, *Suspicion, or the New Prince*, 68 U. CHI. L. REV. 679 (2001). *But see* John C. Yoo, *In Defense of the Court's Legitimacy*, 68 U. CHI. L. REV. 775 (2001). Justice Breyer assures us that the people accepted that result as demonstrated by the fact that there was no need to summon paratroops to enforce the

Court gave John Marshall's explanation of its action: "When contending parties invoke the process of the courts . . . it becomes our unsought responsibility to resolve the federal and constitutional issues the judicial system has been forced to confront."[176] Never mind the text of the Constitution conferring jurisdiction elsewhere—or the thousands of parties who every year invoke the Court's jurisdiction only to be turned away.

It cannot be viewed as incidental that the five prevailing Justices in *Bush v. Gore* supported the contentions of the presidential candidate more likely to select future Justices who would share their politics and support them in their work as superlegislators. Almost certainly, concern for the prospective Court's lack of independence in choosing the President was the reason the Founders directed the House of Representatives to make that choice. Was this action of the Justices, departing from the text of the Constitution, a demonstration of the judicial independence that Justices Breyer and O'Connor seek to improve? Those who voted against the election of President Bush were not unreasonable if they felt violated by the Court. Would a different President have been elected in 2000 if the fifth Justice had, by chance, been appointed by a Democratic President? Presumably, Justices Breyer and O'Connor think not.

III
Secondary Effects on Lower Courts of the Supreme Court's Role As Superlegislature

We do not rest our case for the proposed reform of the Court on our assessment of the political wisdom advanced by Justices as superlegislators or even on the reaction of citizens to the enlarged role the Justices have claimed for themselves. Even one who approves all the laws that the Court proclaims may share our concern for the unforeseen and remote consequences of the Court's elevated empowerment in producing similar effects in lower federal courts. We here provide a brief account of those secondary consequences.

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judgment. *See* Stephen Breyer, *Judicial Independence: Remarks by Justice Breyer*, 95 Geo. L.J. 903, 907 (2007). His view is supported by polling data assembled before the decision was announced. *See* Howard Gillman, *Judicial Independence Through the Lens of* Bush v. Gore*: Four Lessons from Political Science*, 64 Ohio St. L.J. 249, 260 (2003). For a comprehensive review of commentary on the decision, see Clarke Rountree, Judging the Supreme Court: Constructions of Motives in *Bush v. Gore* (2007).

176 *Bush v. Gore*, 531 U.S. at 111. Unnoticed was another utterance of Chief Justice Marshall: the Court has "no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821).

The Judiciary Act of 1922 established the institution now known as the Judicial Conference of the United States.[177] The Chief Justice chairs the Conference for as long as he holds that office, and he alone appoints all the members of its many committees.[178] Congress initially organized the Conference merely to study the needs of the courts, a role that had previously been performed by the Department of Justice in the Executive Branch.[179] Over time, the Conference acquired additional roles, and Congress accorded it increasing deference. The result is that the federal judiciary as a whole became not merely independent, in the constitutional sense of being free to decide cases without fear or hope of reward, but substantially autonomous and self-governing with respect to its internal structures and procedures.

Broadly consequential policies of judicial administration first began to take form as rules of court promulgated by the Supreme Court under congressional authority conferred in 1934 via the Rules Enabling Act.[180] The Civil Rules were promulgated by the Court in 1938 on the advice of an elite committee and were promptly accepted by Congress.[181] In 1939, Congress supplied the Judicial Conference with its own support staff by the creation of the Administrative Office of the United States Courts.[182] That office displaced the arm of the Department of Justice that had previously performed that role for the Attorney General.[183] It enabled the Conference (through the Chief Justice) to deal more directly with Congress in the pursuit of the Conference's own legislative aims.[184] The law governing proceedings in the federal courts was thereafter promulgated by the Supreme Court on the advice of the Judicial Conference that acted in turn on the advice of the committees appointed by the Chief Justice, all with scant involvement of the Congress or the Executive Branch.

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177 Judiciary Act of 1922, ch. 306, sec. 2, 42 Stat. 837, 838 (current version at 28 U.S.C. § 331 (2006)). The Conference is a seldom-noticed council composed of the chief judges of the federal circuits, who acquire their status as chiefs by seniority in service on their courts, and other federal judges selected by their colleagues in the circuits or regions that they represent.

178 Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 5, at 181, 189.

179 *See* Peter Graham Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 J. POL. 599, 601–02 (1970).

180 Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064 (codified as amended at 28 U.S.C. §§ 2072–74). For a discussion on its origins, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1043–98 (1982).

181 The committee drafting the Federal Rules of Civil Procedure included no judges, but only eminent academics and leaders of the organized bar. Burbank, *supra* note 180, at 1132–37.

182 Act of Aug. 7, 1939, ch. 501, 53 Stat. 1223.

183 *See* Fish, *supra* note 179, at 601–02.

184 *See id.* at 604.

A consequence of this form of judicial self-government has been an enormous increase in the support personnel of the federal courts,[185] freeing all the "Article III" judges and Justices from much work they deem less worthy of their attention. This development may be seen as a demonstration of the public choice theory that informs us that public officials must be expected when permitted, with rare exception, to make decisions tending to advance their own status and convenience.[186] Even the most publicly motivated officers tend to conflate the public interest with the powers of their own offices.[187] Judges, alas, share our human failings.

The Supreme Court led the way, over time obtaining a staff of four elite law clerks for each Justice, some of whom would come to constitute the "cert pool" that we now propose to replace. Their roles vary from one Justice to the next, but each Justice's chamber came to resemble a small law firm with one senior partner whose less-gratifying tasks are delegated to very able young lawyers.[188] The support of such a highly qualified staff has enabled several Justices to retain their office for years after they have become too disabled to do the work of a Justice for themselves but have retained sufficient wit to delegate their work to their staffs.[189] And it seems to have provided the Court with a

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185 *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 605–13 (2005).

186 For an account of the theory, see generally DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991) (exploring the applications of public choice to legal issues). On its application to the judiciary, see Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996) (evaluating the strengths and weaknesses of the public choice theory with respect to federal judges); Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure,* 23 J. LEGAL STUD. 627 (1994) (arguing that federal judges can create procedural rules that reflect their own self-interest because they have control over the development of the Federal Rules of Civil Procedure).

187 Over a period of forty years, the authors have worked closely with scores of federal judges and attest that every one of them was highly professional and dedicated to the public interest. But judges, like professors or lawyers or doctors, do tend, when sharing a public responsibility, to agree that the future status of their group is an important and often dominant consideration.

188 There have been times when clerks' roles were elevated by disabilities of aging Justices requiring greater delegation.

> The post-1970 era . . . has featured two especially stark examples of judicial failure: the publicly visible mental disability of Justice William O. Douglas in 1975 following a serious stroke, and the far less dramatic scandal of Justice Harry A. Blackmun increasingly allowing his law clerks to hold greater and greater sway over his opinions during the 1980s and early 1990s. In addition, at least three other justices since 1970—Hugo Black, Lewis Powell, Thurgood Marshall—have suffered mental decrepitude that seriously impaired their ability to do their jobs . . . .

David J. Garrow, *Protecting and Enhancing the U.S. Supreme Court*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURTS JUSTICES, *supra* note 5, at 271, 273 (citations omitted).

189 *See, e.g.*, SIDNEY FINE, FRANK MURPHY: THE WASHINGTON YEARS 161–63 (1984); LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 148–49, 176–79 (2005); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U.

substantial political constituency, for its former clerks are likely to approve the empowerment of the Justices they served.

As the elite and celebrated institution, or "crown jewel," of our judiciary, the Supreme Court serves as a model for lower courts. The staffs of circuit judges and district judges, like those of the Justices, have also been substantially enlarged. Central staff lawyers and administrators in every circuit serve to assist in identifying those matters or issues worthy of the attention of Article III judges.[190] Each circuit judge is assisted by three or four highly qualified law clerks. This evolution has enabled federal judges to be more selective about their work, to delegate more to subordinates, and to conduct a legal process that is, like that of the Supreme Court, far less transparent than that conducted by their predecessors a few decades ago.

The authors of the Judiciary Act of 1891, which created the intermediate appellate courts, envisioned these courts as institutions assuring litigants who were dissatisfied with decisions of the formerly "kingly" federal trial judges that their appeals would receive the careful attention of three Article III judges.[191] Every litigant was afforded a right to appeal that created an expectation of an oral hearing at which the judges responsible for the decision would appear in person and engage in discourse with counsel to appraise critically the judgment under review.[192] In due course, the judges hearing the case would publish a decision with an opinion justifying their action and incidentally giving public notice of their personal attention to the parties' contentions. Citizens whose rights were upheld or denied were thus assured that their concerns had been considered by thoughtful, independent judges appointed by the President and confirmed by the Senate to hear and decide their cases. And others could see that this had happened. This expectation was indeed universally shared for many decades.

But those procedural amenities have vanished in many cases decided by the courts of appeals.[193] One undoubted reason has been the obligation acquired by those courts to entertain many appeals presenting no seriously contested issues: these include many routine appeals in federal criminal cases, made plentiful by the mandated

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CHI. L. REV. 995 (2000) (providing multiple examples of ailing Justices relying heavily on their clerks); David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF. May–June 2005, at 26.

190 For a summary listing of all the positions for which a young lawyer might apply, see Online System for Clerkship Application & Review (OSCAR), http://lawclerks.ao.uscourts.gov.

191 Judiciary Act of 1891, ch. 517, 26 Stat. 826.

192 Decline of the institution of oral argument was first marked by Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257, 265–69.

193 *See* WRIGHT & KANE, *supra* note 75, at 771.

right to counsel; and petitions by state and federal prisoners seeking belatedly to challenge their convictions or to gain some improvement in the conditions of their incarceration.[194] The abrupt and non-transparent procedure of courts of appeals in most criminal or prisoner cases now resembles in its brevity that of the Supreme Court in its summary denials of certiorari. Equally lacking in transparency are appellate decisions in many other cases deemed undeserving of the full attention of Article III judges. It seems that many cases present no questions of law sufficiently interesting to the circuit judges to motivate them to give the personal attention required to provide the traditional transparency that results from deliberation and decision.

A contributing cause of the decline of transparency in federal appellate proceedings has been a steady growth in the preoccupation of circuit judges and their law clerks with the publication of suitably long and learned opinions proclaiming the "law of the circuit" that lower courts and prospective litigants within their jurisdictions are expected to obey. The vision of a regionalized national law made by circuit judges evolved gradually. It first became a concern when circuit courts of appeals were expanded to more than three circuit judges, creating a risk of dissonance between diverse panels.[195] En banc procedure to promote harmony among panels was a device that the judges themselves fashioned;[196] Congress approved en banc proceedings only after the Supreme Court confirmed the implied authority of all five judges of the Third Circuit to sit together.[197] Neither Congress nor the Court gave much consideration to the secondary implications of the "law of the circuit" or to its likely effectiveness in a circuit of many judges. These questions were raised repeatedly in the last third of the twentieth century by august and well-qualified groups of lawyers and judges summoned to consider the problems of the federal appellate courts.[198] This reinforces a sense on the part of at least some

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194 *Id.* at 352–69; *see also* JOHN W. PALMER, CONSTITUTIONAL RIGHTS OF PRISONERS 351–79 (8th ed. 2006) (discussing the various types of additional litigation that prisoners may pursue after incarceration). *See generally* RICHARD L. LIPPKE, RETHINKING IMPRISONMENT (2007). The precipitate growth in prisoner petitions is, in large measure, a result of the vast increase in the number of persons incarcerated in the United States, which is a secondary consequence of the "war" on drugs.

195 See Lamar Alexander, *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563, 578 (1965).

196 Textile Mills Sec. Corp. v. Comm'r, 314 U.S. 326, 334 n.14 (1941). In *Lang's Estate v. Commissioner*, 97 F.2d 867, 869 & n.2 (9th Cir. 1938), the court had held that it could not sit in panels larger than three.

197 Congress approved the practice in 1948. *See* Act of June 25, 1948, ch. 646, § 46, 62 Stat. 869, 871 (codified as amended at 28 U.S.C. § 46(c) (2006)). *See* W. Pac. R.R. Corp. v. W. Pac. R.R. Co., 345 U.S. 247, 250–51 (1953).

198 AMERICAN BAR FOUNDATION, *supra* note 32; FEDERAL JUDICIAL CENTER, *supra* note 32; Commission on the Revision of the Federal Court Appellate System, *supra* note 32, at 206–07; Commission on Structural Alternatives for the Federal Courts of Appeals, *supra*

circuit judges that lawmaking as mini–supreme court justices, or semi-superlegislators, may be the primary duty and concern of federal circuit judges.

Even if each circuit court of appeals were able to maintain coherent federal law for its territory, the conflicts between the circuits impart an additional and useless complexity to the national law.[199] Insofar as the national law is enacted to facilitate legal planning, knowledge of the law of one circuit is seldom an adequate basis for planning. Erwin Griswold noted over a half century ago that it is unjust to decentralize tax appeals;[200] everyone should pay the same federal taxes, and equality can be achieved only if the interpretation of the Internal Revenue Code is placed in the hands of a single federal appellate court. Especially inasmuch as any judge-made "law of the circuit" is subject to revision not only by the court that proclaimed it, but by other panels of that circuit as well as the Supreme Court and by the other branches of the national government, the law of the circuit is seldom a reliable basis for planning legal transactions or relationships. Disregarding such unsettling consequences, the Supreme Court has in recent decades left many, many questions unresolved, despite conflicts in circuit court opinions.[201] Justice Byron White, among others, was outspoken in his disapproval of this practice,[202] but it remains in place.[203] Given that the current members of the Court

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note 32, at 34–36; Study Group on the Caseload of the Supreme Court, *supra* note 32, at 574–75. Among the eminent advocates of restructuring the federal judiciary have been American Bar Association presidents (e.g., Bernard Siegel and Leon Jaworski), eminent federal judges (e.g., Carl McGowan, Thurgood Marshall, and Edward Becker), eminent scholars (e.g., Paul Freund, Alexander Bickel, and Maurice Rosenberg) and congressional leaders (e.g., Senator Roman Hruska).

199 Judge Posner has suggested that conflict resolution might be a task to be undertaken by the American Law Institute:

> The simplification of law was one of the Institute's original goals, and it is one that would be well served by the Institute's undertaking to monitor the thousands of appellate decisions, state and federal, handed down every year for conflicts on technical points of law and to propose solutions that I predict would be welcomed by courts and legislatures.

RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 308–09 (1999).

200 *See* Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153, 1173 (1944) (arguing that the only "sensible system of court review of tax cases is to have a unified appellate procedure").

201 *United States Law Week* compiles a list annually. *See, e.g.*, *Circuit Splits Recently Noted in Law Week—4th Quarter 2007*, 76 U.S. L. WK. 1381, 1381–84 (2008).

202 *See, e.g.*, Beaulieu v. United States, 497 U.S. 1038, 1038–40 (1990) (White, J., dissenting); Metheny v. Hamby, 488 U.S. 913, 915 (1988) (White, J., dissenting).

203 In 2005, the Judicial Conference presumed to declare which circuit had the right answer to questions of law on which there was disagreement. *See* Jacob Scott, Comment, *Article III En Banc: The Judicial Conference as an Advisory Intercircuit Court of Appeals*, 116 YALE L.J. 1625, 1628–31 (2007). This was not an acceptable role for the Conference to play, not least because it had no jurisdiction to decide cases and no "case or controversy" had been presented to it. That the Conference nevertheless attempted to provide a solution does signify the reality of the problem of circuit conflict.

are all veterans of service on the intermediate courts, they may perhaps be expected to prefer not to deprive their former colleagues of the greater satisfactions of sitting as semi-superlegislators.[204] A tertiary consequence of the instability of the national law is the temptation posed to the Justices to write ever longer opinions invoking ever broader propositions of law that others may or may not read to resolve diverse future cases. And circuit judges face the same temptation.

The ambition of the circuit judges to make law in the manner of the Justices is reflected in their practice of writing opinions for non-publication. To semi-superlegislators, the humble roles of the judicial opinion, as an explanation to the parties of the result in their case and as a demonstration that independent judges have thought about their contentions, are entitled to less professional attention than their work as lawmakers. And so non-publication of decisions by panels of circuit judges became the order of the day. It was stated that such expressions by judges were not statements of law binding on their colleagues but were intended to be applicable only to the case at hand and to be read only by the parties and their counsel.

It has been evident for some time that the circuit judges themselves, when sitting in panels of three, may not be as faithful to the precedents set by their colleagues sitting on other three-judge panels of the same circuit as they are expected to be in adhering to the precedents established by the Supreme Court.[205] Fine distinctions

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204 The contention is sometimes advanced that it is a good thing to let issues of national law "percolate" in the various circuits before the Supreme Court burdens itself with resolving the conflict. *See, e.g.*, California v. Carney, 471 U.S. 386, 400 n.11 (1985) (Stevens, J., dissenting). *See generally* Cordray & Cordray, *supra* note 112, at 437–39 (discussing different Justices' views both for and against "percolation"). This notion, however, was ridiculed by Justice Rehnquist. William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 11–12 (1986). Justice White was even more dismissive. *See* Byron R. White, *The Work of the Supreme Court: A Nuts and Bolts Description*, 54 N.Y. ST. B.J. 346, 349 (1982); *see also* Ruth Bader Ginsburg, *Remembering Justice White*, 74 U. COLO. L. REV. 1283, 1285 (2003) ("Byron White was an 'activist' Justice only in his unswerving view that the Court ought not let circuit splits linger, that it should say what the federal law is sooner rather than later."); Dennis J. Hutchinson, *Two Cheers for Judicial Restraint: Justice White and the Role of the Supreme Court*, 74 U. COLO. L. REV. 1409, 1415 (2003). Justice O'Connor has also been critical of this type of "percolation" in certain cases. *See* Johnson v. Texas, 509 U.S. 350, 378–79 (1993) (O'Connor, J., dissenting). No state has opted for the idea of percolation, and it seems unlikely that anyone would propose such a scheme to Congress or any other legislature. Although much empirical work has been done on the Court's selection of cases, no example has yet been found of a legal issue that the Court resolved more wisely because it was left to percolate at the expense of citizens burdened by the continuing uncertainty and the cost of litigation.

205 Sixty-eight percent of the district judges participating in a survey disagreed with the statement, "There is consistency between panels considering the same issue." Paul D. Carrington, *The Obsolescence of the United States Court of Appeals: Roscoe Pound's Structural Solution*, 15 J.L. & POL. 515, 519 n.13 (1999) (citing NINTH CIRCUIT JUDICIAL COUNCIL, SURVEY OF DISTRICT COURT JUDGES REGARDING U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT 4 (1987) (conducted by the Office of the Circuit Executive)).

may be drawn, or a case may be decided with an unpublished decision making no reference to a discernable conflict with a prior opinion published in the name of the same court.[206] Non-publication may thus serve to mask non-law. Several circuits prohibit counsel from citing such material, and most discourage such citations. In 2000, Judge Richard Arnold issued a vigorous opinion declaring such a prohibition to be a violation of the First Amendment; the Eighth Circuit rendered his decision in that case moot, but his opinion was not without effect.[207] The complaint of lawyers was that the practice, by denying transparency to the appellate process, relieved the appellate judges of accountability for their fidelity to preexisting law. After a decade of protest by the bar, the Judicial Conference and the Supreme Court addressed the issue in a rule proclaiming the right to cite all circuit court decisions.[208]

That rule took effect in 2007;[209] one observer predicted that this would result in a "sea change" in the practices of federal appellate courts.[210] But who can be seen reading unpublished opinions or briefs citing unpublished opinions? One lawyer sitting on the Appellate Rules Committee pronounced them to be "junk law."[211] Few if any cases can be found in which a court of appeals decision is explained by adherence to the precedent established by an unpublished opinion.

Also in the fashion of the Supreme Court, limited evidence indicates that many federal appellate judges delegate much of their responsibility for matters of lesser interest to the staffs of their courts or to their personal staffs. Knowing observers assume that it must be so.

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206 *See, e.g.*, Mitu Gulati & C.M.A. McCauliff, *On* Not *Making Law*, LAW & CONTEMP. PROBS., Summer 1998, at 157, 181–84 (discussing In re *Tseng Labs, Inc.*, 954 F. Supp. 1024 (E.D. Pa. 1996), *aff'd mem.*, 107 F.3d 8 (3d Cir. 1997), in which the Third Circuit affirmed the lower court's grant of summary judgment without discussing a potential conflict with previous Third Circuit decisions).

207 Anastasoff v. United States, 223 F.3d 898, 905 (8th Cir. 2000) (en banc), *vacated as moot*, 235 F.3d 1054, 1056 (8th Cir. 2000) (en banc) ("[W]hether unpublished opinions have precedential effect no longer has any relevance for the decision of this tax-refund case.").

208 FED. R. APP. P. 32.1(a).

209 *See id.* The Court so ordered on April 12, 2006.

210 This observer was Chief Judge John Walker of the Second Circuit. Tony Mauro, *Green Light to Cite Unpublished Opinions*, LEGAL TIMES, April 19, 2004, at 8. Alex Konzinski, Chief Judge of the Ninth Circuit, testified to the House Judiciary Committee that unpublished opinions are "simply a letter to the parties telling them who won and who lost, and why." Issuing such opinions instead of full-blown rulings requiring many drafts, Kozinski said, "frees us up to spend the time that needs to be spent on published opinions, the ones that actually shape the law." Tony Mauro, *Courts Move Forward on Citation Change*, LEGAL TIMES, May 26, 2003, at 8 [hereinafter Mauro, *Courts Move Forward*]. But his "simple letter" *is* the judicial task—to which shaping the law is a coincidental consequence and not the primary mission of this semi-superlegislature.

211 Mauro, *Courts Move Forward*, supra note 210.

Indeed, Judge Posner, who surely knows, has affirmed that "[m]any appellate judges have never actually written a judicial opinion."[212] We know that each circuit judge, like each Justice, is served by the ablest recent graduates of the most prestigious law schools, many of whom feel well qualified to make any political decisions needing to be made.[213] Assistance is also provided by substantial central staffs that did not exist as recently as 1960. The visible differences between a court and an administrative agency have declined.

All of this is not to say that U.S. circuit judges have lost all sense of obligation to obey and enforce preexisting law. They do a lot of that.[214] But the effect of the Supreme Court as a role model trickles down. A similar transformation of the judges' mission has also occurred in the federal trial courts, contributing to a comparable loss of transparency in proceedings at that level. Trials at which adversaries present evidence in public have become rare events in federal courthouses.[215] There are several obvious reason for this, but others may be a result of the transformation of the judicial role at the higher levels.

One obvious cause for the decline of criminal trials has been congressional legislation on sentencing that the Court has recently held excessive in its restraints on the discretion of the sentencing judge.[216] Severe mandatory sentences make it so risky for an accused person to seek a trial at which evidence would be heard that most federal criminal cases have been—and will continue to be—resolved by plea bargaining.

But the number of civil trials has been declining almost as rapidly. One obvious cause has been the establishment by the Supreme Court of a "national policy favoring arbitration."[217] Congress has

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212 Posner, *supra* note 18, at 61.

213 *See* L.A. Powe, Jr., "*Marble Palace, We've Got A Problem—With You*", *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 5, at 99, 102.

214 *See generally* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS (2007); HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL STANDARDS OF REVIEW: REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS (2007) (an extended description of the courts' concerns with the law of appellate jurisdiction).

215 *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (describing a steady decline in both the number of trials and percentage of cases terminated by trial in the American judicial system between 1962 and 2002).

216 United States v. Booker, 543 U.S. 220, 244 (2005) (holding that Federal Sentencing Guidelines are inconsistent with the Sixth Amendment because they require judges to impose sentences based on facts not presented to the jury).

217 Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006). The "policy" was first declared in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983). In 1985, the Court proclaimed, contrary to its legislative history, that the Act reflected a "congressional desire to enforce agreements into which parties had entered." Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985).

never approved any such "national policy," and it weakens private enforcement of laws enacted by Congress or state legislatures.[218] Certainly, the Federal Arbitration Act of 1925 expressed no such policy[219] as understood at the time of its enactment or during the half century that followed. That statute was enacted for the purpose of enabling contract disputes between businessmen engaged in interstate commerce to be resolved more amiably and economically.[220] But the "national policy" that the Court established favors the enforcement even of arbitration clauses in standard-form contracts signed by pay-day borrowers that are on their face criminally usurious, are invalid under applicable state law, and that effectively deny the borrower access to a forum that might hear his claim.[221]

Congress has in recent times authorized the federal courts to use arbitration as an alternative method of resolving disputes in cases filed in federal courts, but only if litigants have "freely and knowingly" consented to arbitration of an existing dispute.[222] This standard was not applied by federal courts enforcing the "national policy" proclaimed by the Justices and established in contracts of adhesion. The only other relevant statements of Congress have been an enactment in 2002 assuring automobile dealers judicial enforcement of their rights against automobile manufacturers notwithstanding the arbitration clauses in their franchise agreements[223] and another in 2008 providing a similar assurance to farmers growing livestock under contract with processing firms.[224] The law protecting automobile dealers, however, does not protect consumers who buy automobiles from the same dealers with printed bills of sale containing arbitration clauses, because the Court has decreed that these must be observed even against consumers who are suing in a state court to enforce a state law en-

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218 California law conferring rights on franchisees was made subject to preemption by the Federal Arbitration Act in *Southland Corp. v. Keating*, 465 U.S. 1, 8 (1984).

219 Federal Arbitration Act of 1925, ch. 213, 43 Stat. 883, (codified as amended at 9 U.S.C. § 1 (2006)).

220 *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 102–21 (1992).

221 *Buckeye Check Cashing*, 546 U.S. at 440.

222 Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 6, 112 Stat. 2293, 2995–96, (codified at 28 U.S.C. § 654 (2006)) (amending the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988)).

223 21ST CENTURY DEPARTMENT OF JUSTICE APPROPRIATIONS AUTHORIZATION ACT, Pub. L. No. 107-273, § 11,028, 116 Stat. 1758, 1835–36 (2002) (codified at 15 U.S.C. § 1226 (2006)). This statute overruled *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Senators Grassley and Feingold introduced a bill in the Senate that would have provided the same terms for growers of livestock and poultry. See *infra* note 224. It was reported from committee but never brought to a vote by the full Senate. Library of Congress, THOMAS, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s221: (last visited Jan. 22, 2009).

224 Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. (2007).

acted for their protection.[225] No one has tried to write a Court opinion explaining to citizens this "national policy" favoring dealers and disfavoring their customers. No one who publicly takes responsibility for such law could be elected to public office. Congress has not so far moved to correct the situation because there is no organization able or willing to spend the political capital required to secure the enactment of such a law. Such a law would protect unorganized consumers against dealers who contribute to political campaigns.[226]

In addition to the rise of arbitration, procedural reforms initiated by the Judicial Conference have steadily enlarged the discretion of the judge in the conduct of proceedings.[227] Among the new staff added to the federal district courts were those designated as magistrate judges or as bankruptcy judges; these are almost equal in number to Article III judges and exercise almost all the powers of a judge, but they are selected by their Article III colleagues, serve only limited terms, and make only the decisions delegated to them.[228] The ready acceptance of term limits for those officers is not easily reconciled with objections to term limits for the Article III Justices and judges themselves, but it assures their subordination to the Article III judges.

Also, the role of special masters and other "neutrals" appointed by district judges has been enlarged. This enlargement better enables them to assist the judges appointing them to serve in specific cases to receive evidence and recommend resolution of issues.[229] The Article III judge was thus moved off the trial bench for most of his or her service, and into an executive office to give directions to subordinates. In lieu of trials, the district judges and their staffs tend to practice "managerial judging,"[230] a process by which they seek, by diverse

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225 *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984) (stating that "Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration").

226 *See* Press Release, U.S. Senator Russ Feingold, Sen. Feingold, Rep. Johnson Introduce Measure to Preserve Consumer Justice (July 12, 2007), http://feingold.senate.gov/record.cfm?id=307045.

227 *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 631.

228 First approved by Congress in the Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107 (1968), (current version at 28 U.S.C. §§ 631–39), then upheld in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). However, Justices White and Powell and Chief Justice Burger found the majority decision upholding the law to have read Article III out of the Constitution. *Id.* at 113 (White, J., dissenting).

229 FED. R. CIV. P. 53. See James S. DeGraw, Note, *Rule 53, Inherent Powers, and Institutional Reform: The Lack of Limits on Special Masters*, 66 N.Y.U. L. REV. 800, 801, 808 (1991).

230 Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments*, 78 N.Y.U. L. REV. 982, 1003–07, 1016 (2003); Judith Resnik, *Migrating, Morphing,* and *Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. EMPIRICAL LEGAL STUD. 783, 827, 830 (2004); Stephen C. Yeazell, *Getting What We Asked for, Getting What We Paid for, and Not Liking What We Got: The Vanishing Civil Trial*, 1 J. EMPIRICAL LEGAL STUD. 943,

methods,[231] to facilitate settlements and avoid the necessity of making decisions that might burden a court of appeals with the need to review their judgments.[232] Or, if a decision on the merits must be made, to render it in the form of a summary judgment, ruling one party's proposed evidence to be legally insufficient and hence unworthy of being heard, a procedure that spares the trial judge the need to see and hear witnesses, but still enables him or her to expound the controlling law.[233] Why, Judge Patrick Higginbotham has asked, do we still call them "trial courts"?[234] In their remoteness to, and seeming lack of interest in, litigants seeking their personal attention, twenty-first century district judges may be thought to resemble their nineteenth-century antecedents, who were said to exercise "kingly power" over litigants whose cases were decided in their courts.[235]

The Supreme Court has also contributed to the disappearance from federal courtrooms of federal district judges sitting in civil cases by its decisions reinterpreting the Federal Rules of Civil Procedure that were earlier promulgated by the Court itself. In 1986, it decided a trilogy of cases forsaking the text of Rule 56, and its own prior statements on the subject, to encourage more frequent use of summary judgments, foreclosing trials.[236] Judge Patricia Wald, reviewing a decade of experience with the Court's pronouncements, observed that the practice of rendering summary judgment was no longer restricted to frivolous or sham cases, for the rule had, without modification of its text, been transformed into "a potential juggernaut" to dispose of civil cases without trial.[237]

963–67 (2004) (discussing the increase of settlements driven by expensive pretrial fact investigation, and the resulting low level of public investment in judicial officers).

231 For an account of the diverse methods of encouraging settlement without trial, see Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U. CHI. LEGAL F. 303.

232 The extraordinary rise of plea bargaining between the prosecutor and the accused is a major part of this development. *See* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA 2 (2003) ("[A]lthough we can find many worthy accounts of why the jury fell, we must ask instead why plea bargaining triumphed.").

233 FED. R. CIV. P. 56; *see* Miller, *supra* note 230, at 1055–56 ("Clearly, Rule 56 has evolved . . . into a powerful tool for judges to control dockets and respond to the supposed 'litigation explosion.'" (footnotes omitted)).

234 Patrick E. Higginbotham, *So Why Do We Call Them Trial Courts?*, 55 S.M.U. L. REV. 1405 (2002).

235 *See supra* note 27 and accompanying text.

236 *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–88 (1986); Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 245–50 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986); *see also* Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. EMPIRICAL LEGAL STUD. 591, 623 (2004).

237 Patricia M. Wald, *Summary Judgment at Sixty*, 76 TEX. L. REV. 1897, 1917 (1998). Empirical data tends to confirm Wald's account. *See* Joe S. Cecil et al., *A Quarter-Century of*

In 2007, in *Bell Atlantic Corp. v. Twombly*,[238] the Court reinterpreted Rule 8 to substantially enlarge the power of the district judge to enter judgment on the pleadings, thereby foreclosing not only trial but also discovery when the judge senses that discovery will be expensive and not likely to bear fruit. Although the Court emphasized that the case before it was a potentially complex antitrust case, Justice Stevens' dissent rightly observed that this is precisely the sort of case for which discovery has long been deemed of special importance—because "'the proof is largely in the hands of the alleged conspirators.'"[239] No recent decision of the Court better illustrates the disconnection of the Justices from the realities of the courtroom or the legislative chamber. The Sherman Act of 1890 provided a reward of treble damages to encourage private plaintiffs to step forward as private enforcers of a public law; that provision reflected Congress's appreciation of the evidentiary problems faced by those seeking to enforce its prohibitions.[240] The Court's 2007 decision substantially diminished the prospects that the law will in the future be successfully enforced by private plaintiffs. Lower courts have extended the principle to apply to all civil cases; thus, in many federal courts, cases do not go to trial if the judge finds the complaint to be implausible.[241] Indeed, in combination with its 1986 trilogy, this decision substantially repudiates a major theme of the 1938 Federal Rules of Civil Procedure and the amendments promulgated by the Court and accepted by Congress over the years. That theme had been to constrain trial judges from premature dispositions and thus protect the rights of citizens to have their cases adequately heard in federal courtrooms by Article III judges.

Thus, at all levels, the Justices and judges "holding office" under the Constitution are increasingly preoccupied with making political decisions and are diminishingly concerned with the humdrum task of enforcing the preexisting applicable law to disputed facts or with assuring litigants that their interests have been seriously considered by members of an independent judiciary. This is an inversion of the constitutional scheme federal courts were established to maintain—an inversion that those voting for the Judiciary Act of 1925 did not foresee—and even an inversion of procedural rules resulting from the

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Summary Judgment Practice in Six Federal District Courts, 4 J. EMPIRICAL LEGAL STUD. 861 (2007).

238 127 S. Ct. 1955, 1965–69 (2007).

239 *Id.* at 1983 (Stevens, J., dissenting) (quoting Hosp. Bldg. Co. v. Tr. of Rex Hosp., 425 U.S. 738, 746 (1976)).

240 *Id.*

241 *See, e.g.*, Goldstein v. Pataki, 516 F.3d 50 (2d Cir. 2008), *cert. denied*, 128 S. Ct. 2964 (2008); Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315 (3d Cir. 2008). *But see* Aktieselskabet AF 21. November 2001 v. Fame Jeans Inc., 525 F.3d 8, 17 (D.C. Cir. 2008).

creation of the Judicial Conference in 1922 and the Rules Enabling Act of 1934.

This inversion is not, to be sure, solely the result of the transformation of the Supreme Court into a superlegislature. But the transformation of the Supreme Court is almost certainly a factor in the transformation of the courts of appeals and the district courts. Indeed, the Court as superlegislature, in making the law governing the proceedings of lower courts, has demeaned the value of transparency. It has helped make the lower federal courts more like itself.

IV
A Reform to Provide a "Cert Pool" Serving for "Good Behavior"

We turn now to some details of our specific proposal to reinstate some of the Court's mandatory jurisdiction by withdrawing much of its discretion to select the cases it decides. When Congress approved the 1925 Act, the Court was hearing about 300 cases a year and affirming others on their merits without need of hearing.[242] Congress was assured that the number would not be substantially reduced and that the Court would separately confer on each decision to deny plenary review.[243] But the Court, with the help of the panel of young law clerks established by the Justices to assist them in deciding which questions are most worthy of their attention,[244] has now reduced its workload to about 80 selected cases a year.[245]

Chief Justice Taft, the champion of status and discretion for Justices, did not invent law clerks. Their presence is, in some measure, a secondary consequence of the advent of the elite, academically pretentious, professional law school in the last decades of the nineteenth century.[246] By Taft's time, some Justices had concluded that a talented and self-assured young law graduate could be more useful than an ordinary file clerk.

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242 For a graph of the caseload, see Sternberg, *supra* note 17, at 5.

243 Then–Solicitor General, James M. Beck, testifying on behalf of the legislation at Taft's request, "estimated that the number of cases of public gravity that the Court could decide on the merits was between four hundred and five hundred" per year. Hartnett, *supra* note 17, at 1646.

244 For recent accounts of the present role of law clerks, see Todd C. Peppers, Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk 191–205 (2006); Artemus Ward & David L. Weiden, Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court 109–49 (2006); Cordray & Cordray, *supra* note 17, at 791.

245 John G. Roberts, Jr., 2008 Year-End Report on the Federal Judiciary 10 (2008), http://www.supremecourtus.gov/publicinfo/year-end/2008year-endreport.pdf. The Chief Justices' year-end reports from 2000 on are available at http://www.supremecourtus.gov/publicinfo/year-end/year-endreports.html (last visited Jan. 25, 2009).

246 Robert Stevens, Law School: Legal Education in America from the 1850s to the 1980s, at 60–64 (1983).

The "cert pool" is an institution that has evolved in recent decades and appears to have had a significant effect in diminishing the likelihood that a petition for certiorari will gain the four votes required to secure a place on the Court's agenda.[247] Most law clerks come to the Court after a year of service to a circuit judge, and most remain with a Justice for a single year before going on to a career elsewhere.[248] Each law clerk in the pool is selected by a Justice to be a member of his or her personal staff, but some are then assigned to the "pool" to read the petitions and responses and strive objectively to discern the reasons why petitions should be denied.

Justice Stevens was the one Justice who did not assign one of his clerks to the pool. He has expressed the view that an excessive delegation is involved, and that the pool is an important cause of the reduction in the number of petitions that are granted.[249] In 2008, Justice Alito joined Justice Stevens in his withdrawal from the pool.[250] Memoranda written by cert pool clerks are read in the chambers of each of the Justices who are members of the pool, but these memoranda are only occasionally discussed in the Justices' private conferences. As noted, the reasons animating the Justices' votes on certiorari petitions are of a diverse political nature and are sometimes instrumental in nature.[251] Surely as Judge Posner confirms,[252] they strive to use their power to serve the public good, but that good is identified through their own moral and political lenses.[253] And they strive to avoid work they deem unworthy of their attention. The task assigned to the talented juniors is therefore complex. Each clerk is free to add his or her own recommendation, but a clerk writing such a memorandum is

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247 PEPPERS, *supra* note 244, at 194 ("As soon as I am confident that my new law clerks are reliable, *I take their word and that of the pool memo writer* as to the underlying facts and contentions of the parties in the various petitions." (quoting Chief Justice Rehnquist) (footnote omitted)); WARD & WEIDEN, *supra* note 244, at 143–44 (arguing that an increase in cert petitions, a growing reliance by the Justices on the clerks' recommendations, and the cautiousness of clerks when recommending a grant of certiorari have contributed to a decline in grants).

248 PEPPERS, *supra* note 244, at 31.

249 WARD & WEIDEN, note 244, at 143.

250 Adam Liptak, *A Second Justice Opts Out of a Longtime Custom: The "Cert Pool"*, N.Y. TIMES, Sept. 26, 2008, at A21.

251 For accounts, see RICHARD L. PACELLE, JR., THE TRANSFORMATION OF THE SUPREME COURT'S AGENDA: FROM THE NEW DEAL TO THE REAGAN ADMINISTRATION (1991); PERRY. *supra* note 114; DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980).

252 *See* RICHARD A. POSNER, HOW JUDGES THINK 269–323 (2008); *see also* FRANK M. COFFIN, ON APPEAL: COURTS, LAWYERING, AND JUDGING 281–85 (1994).

253 An empirical demonstration is JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). And increasingly in recent years, the Justices have invoked their own notions of the public good in disregard of the stated aims of legislators expressed by committees or draftsmen who proposed and advocated enactments. *See genrally* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION (2009).

at risk of misleading the Justices into granting certiorari in a case that they later regret deciding. That would call the young clerk's judgment into question. The pool clerks are therefore motivated to overlook no reason why a particular petition should be denied.[254]

So light has the workload of the Justices become that a veteran observer of the Court was recently moved to observe that if the Justices were employed in the private sector they would all have received pink slips.[255] Ample time is left to the Justices to write books, lecture, teach, and travel abroad. Plainly, the Court could decide many more cases than it does; Justice White thought that 150 cases a year[256] was the right number; Justice Brennan agreed.[257] Our proposal would cause a substantial increase in the number of cases decided each year but would not impose that high a number of cases on the Court.

We would replace the "cert pool" of law clerks with a panel of experienced federal judges. These judges would be empowered to hear all petitions for certiorari and evaluate the petitions on the basis of standards supplied by Congress. They would place a specified and substantial number of cases on the docket of the Court, and the Court would be obligated to decide these cases on their merits. We tentatively designate the group as the Certiorari Division of the Supreme Court. Specifically, we suggest that a group of thirteen Article III judges be assigned the task of selecting perhaps as many as 120 cases a term that the Court would be obliged to decide in the manner of *Marbury v. Madison*. One member of the group might be drawn from each of the regional circuits to preclude suspicion of geographical bias. They might be selected automatically by a principle enacted by Congress. This service could, for example, be performed for limited part-time terms by circuit judges with at least ten years of federal judicial experience. All members of this Certiorari Division would still have ample time to bear a substantial share of the regular duties of circuit judges. Senior Justices who have retired from regular duty on the Court might also be asked to sit in the Division.[258]

We envision that five members of the Division would be summoned in regularly scheduled sessions by the Clerk of the Supreme Court to meet and rule on pending certiorari petitions. It would be

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254 WARD & WEIDEN, *supra note* 244, at 132.

255 Philip Allen Lacovara, *The Incredible Shrinking Court*, AM. LAW., Dec. 2003, at 53.

256 Byron R. White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST L.J. 275, 277 (1982).

257 William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231 (1983).

258 This would be especially appropriate if the Justices were limited to eighteen-year terms, as we have previously urged. *See supra* note 24; *see also* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, *in* REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES, *supra* note 5, at 15, 50–51.

the duty of the Clerk to transmit petitions as they are received to the members of the next incoming panel. Their duty roster would be designed, perhaps by the Judicial Conference of the United States, to rotate the duty so that membership of the panels would not be constant. A circuit judge summoned to certiorari duty in three annual terms might thereafter be returned to full duty in the circuit and replaced by a colleague.

It would be the duty of the members of the Certiorari Division at each session to grant an appropriate number of pending certiorari petitions in accord with standards expressed by Congress. Given that the Court's present practice purporting to set standards for the exercise of this power is "hopelessly indeterminate and unilluminating,"[259] Congress or the Judicial Conference should be able to improve the law governing those decisions. It might prudently, as Justice White so long urged,[260] give priority to the resolution of conflicts in the interpretation of federal law by the courts of appeals and to substantial issues of federal constitutional law presented by the decisions of the highest state courts.

We do not propose to prevent the Supreme Court from overruling a denial of certiorari by the Certiorari Division. Given the Court's workload and the dynamics of the situation, this would seem likely to be an infrequent event, but history indicates that the Justices could pick another hundred cases if they were highly motivated to do so.[261] They would also retain the power to grant a petition for certiorari in order to vacate a judgment and remand the case to the lower court to revise its judgment in light of recent developments. Perhaps the Certioriari Division might on some occasions recommend that course to the Court.[262]

The Certiorari Division would not write or publish an opinion to explain why a petition was granted, but an individual member of the ruling panel would be allowed to opine or dissent. A dissenting opinion might attract the interest of the Justices, who might then grant a petition that was not granted by the Division. The personal law clerks of the Justices might independently identify a case that their Justice might seek to bring before the Court.

Our proposal bears a resemblance to five others that were addressed to Congress by serious and honorable groups over the last

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259 Estreicher & Sexton, supra note 113. The stated rule is Supreme Court Rule 10. For a discussion of the rule and a critique of its indeterminate articulation of grounds for granting certiorari, see *id.* at 711–12.

260 *See* cases cited *supra* note 202.

261 *See supra* notes 242–43 and accompanying text.

262 The practice is not without difficulty. For a critique, see Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 MICH. L. REV. (forthcoming Mar. 2009).

four decades.[263] Those proposals shared the premise that the present structure of the federal judiciary is inappropriate and ought to be revised to assure more effective oversight of lower federal courts and administrative agencies. All five envisioned the creation of another national court to share the responsibilities presently borne by the Justices alone.[264] The institution we here propose would not be another court because it would neither make final decisions on the merits of cases nor publish opinions of the court.

Richard Arnold observed that "the courts, like the rest of the government, depend on the consent of the governed," and they need often to be reminded of that dependence.[265] Our present proposal is a response to his wise advice. It promises at least five important benefits. First, and most important in our view, the restructuring of the certiorari process would restore the Supreme Court to the more judicial and less legislative role that it generally performed prior to 1925. The Justices, like real judges, would have to decide many cases placed on their docket. This would partially restore the validity of Chief Justice Marshall's justification of the Court's power to review legislation, that it is obliged under Article III to decide cases and can only decide them in compliance with the text of the overriding Constitution.[266] We would hope that thus restored to the role of a law court, the Supreme Court might rediscover the virtues of humility and acquiescence that Jefferson Powell has identified as the moral dimensions of the Justices' work.[267] Perhaps it might also serve to scale down the excessively elevated expectations of the legal profession observed by Robert Nagel.[268]

Second, relieving the Justices of the certiorari task they currently perform would provide them with increased time to decide a larger number of cases that raise important issues of national law. The Court so structured could be expected to leave fewer conflicts in the

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263 *See supra* note 32.

264 *See* Commission on Revision of the Federal Court Appellate System, *supra* note 32, at 236–38 (proposing the creation of the National Court of Appeals); Commission on Structural Alternatives for the Federal Courts of Appeals, *supra* note 32, at 40–44, 64–66 (proposing organizing the Ninth Circuit Court of Appeals into regional adjudication divisions and authorizing any circuit to establish district court appellate panels); Study Group on the Caseload of the Supreme Court, *supra* note 32, at 590–95 (proposing the creation of a National Court of Appeals).

265 Judge Richard Arnold, U.S. Court of Appeals for the Eighth Circuit, Address at the Arkansas Bar Foundation Symposium on the Judiciary, *in* SYMPOSIUM ON THE JUDICIARY 12, 12 (Patricia A. Eables & John P. Gill eds., 1989) (available at the University of Arkansas at Little Rock William H. Bowen School of Law Library).

266 *See supra* notes 43–45 and accompanying text.

267 *See supra* note 121 and accompanying text.

268 *See* NAGEL, *supra* note 104, at 121–23 (discussing how legal training and practice contribute to lawyers' perception of judicial decisions as occupying a "superior domain of rational thought").

interpretation of federal law of the sort that have increasingly plagued the system.[269] There would be a reduced need for courts of appeals to sit en banc. This in turn would ease the problems associated with the appointment of additional circuit judges needed to give proper and transparent attention to all the appeals filed in their courts.

Third, the new arrangement would vest the power to select a large part of the Court's cases in judges who are in the best position to know what issues of national law are most in need of authoritative attention: the veteran circuit judges who are the object of the Court's oversight and who have experience sitting on three-judge panels.

Fourth, we hope that our proposal will be perceived as an elevation of the status and authority of circuit judges, many of whom might expect to serve a three-year term on a division of the Supreme Court responsible for identifying the issues of national law needing authoritative resolution.

Finally, this reform would provide a modest measure of transparency to the Court's decisions to select cases for review and would reduce the influence on the selection process of instrumental considerations of the sort to which the public choice theory adverts. One might indeed view the proposed device as a source of judicial independence; those selecting the cases for the Court to decide would seldom if ever have the professional stake in their decisions that the Justices inevitably have. Judges sitting on a Certiorari Division panel would also be tempted to be instrumental in their choices of cases, but these temptations would not be constant or persistent. The increased transparency in case selection might also encourage a restoration of transparency in the proceedings in the lower courts. More oral arguments in the courts of appeals, at least in electronic form, might be provided.[270]

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269 In 1975, a national commission concluded that "unnecessary and undesirable uncertainty" concerning federal law was a major problem. Commission on Revision of the Federal Court Appellate System, *supra* note 32, at 217. Too many unresolved inter-circuit conflicts resulted in differing law being applied in different states. Delay in the resolution of many issues for federal law imposed costs and resulted in "years of uncertainty, confusion and . . . forum shopping by litigants." *Id.* at 218. Since 1975, the number of certiorari petitions filed each year has more than doubled and the total number decisions of all federal courts of appeals has more than tripled. The Supreme Court, which decided about 175 cases a year on the merits in 1975, was then reviewing fewer than one percent of the cases decided by the federal courts of appeals—a percentage that many informed persons thought was inadequate to provide needed supervision and guidance. Today, the Court decides less than one-tenth of one percent of the approximately 10,000 filings per year from all federal and state courts, nearly all of which are certiorari petitions. *See* SUPREME COURT OF THE U.S., THE JUSTICES' CASELOAD, http://www.supremecourtus.gov/about/justicecaseload.pdf (last visited Jan. 30, 2009); *see also* Posner, *supra* note 18, at 36–37.

270 For reflections on the possible uses of electronic technology to establish visible contact between judges and parties, see Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 COLUM. L. REV. 1516, 1529–31 (1998).

Notwithstanding these benefits, we anticipate that the Justices will not join in urging Congress to adopt our proposal. Justice White to the contrary notwithstanding, we have been told that "the Justices are unanimous in their praise for the virtues of the discretionary court."[271] On that issue, we can respond with confidence that none of the Justices bring judicial independence to the question of whether others should have a say in defining their workload. They are disqualified to opine on the subject.

Conclusion

We do not suppose that our magic wand has produced a panacea, and we are fully aware that judicial law reform is very difficult to enact; legend has it that law reform is "no sport for the short-winded."[272] Nevertheless, we advance this scheme for restructuring the certiorari process firm in the belief that legislation along these lines is much needed to restore and rehabilitate the judicial function of our most honored judges. We foresee no risk of serious adverse consequences if Justices were required to decide more cases—even some they might prefer not to decide. This reduction in what we see as an excess of judicial independence might over time help to relieve the concerns voiced by Justices Breyer and O'Connor, among many others.

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271 Sternberg, *supra* note 17, at 14.

272 Arthur T. Vanderbilt, *Introduction* to The National Conference of Judicial Councils, Minimum Standards of Judicial Administration, at xvii, xix (Arthur T. Vanderbilt ed., 1949).