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Checks and Balances: Congress and the Federal Courts

Paul D. Carrington*

The problem of superannuated justices is fully stated by Stephen Calabresi and James Lindgren¹ and others in this symposium. Robert Nagel has stated additional reasons for Congress to address that problem as part of a larger one.² My reasons like his go beyond concern for the disabilities of aging or the politics of the appointment process. The Court needs to be less exalted as an icon. It ought to be seen as a part of a larger institution, the federal judiciary, a vast enterprise afflicted with normal human failings, which should be as accountable to the other branches of government as those branches are to it. Congress has long neglected its duty implicit in the constitutional doctrine of separation of powers to constrain the tendency of the Court, the academy and the legal profession to inflate the Court's status and power. The term "life tenure" is a significant source of a sense of royal status having not only the adverse cultural effects noted by Nagel, but also doleful effects on the administration and enforcement of law in the other federal courts for which the Court and Congress share responsibility. Fixing the superannuation problem will not fix everything, but it would be a benign step in the right direction. I will conclude by suggesting numerous related reforms that might help more, all of which have been proposed to Congress in times past. Perhaps legislation addressing the superannuation problem would make it more likely that other needed reforms might be achieved in the future, by Congress or by a judiciary more aware of its own frailties.

* Professor of Law, Duke University. Special thanks to Roger Cramton, Richard Epstein, Peter Fish., George Liebmann, Judith Resnik, and Steve Yeazell for thoughtful responses to an early draft of this paper. Kristin Seeger helped with the documentation.

¹ See *supra* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, pp. ???-???

² See *supra* Robert F. Nagel, *A Comment on Limiting Life Tenure*, pp. ???-???. In the same vein is Robert F. Bauer, *A Court Too Supreme for Our Good*, Washington Post (Aug. 7, 2005).

THE CONSTITUTION IN CONGRESS

The arguments made by numerous authors³ that statutory term limits of any kind would violate Article III of the Constitution are framed as if addressed to the Court and its celebrants. But the forum to consider those arguments is Congress.⁴ I commend to Congress the contrary views on constitutionality expressed in this symposium by Roger Cramton,⁵ Scot Powe,⁶ and Sanford Levinson.⁷ As they contend, the purpose of Article III is to assure the independence of the federal judiciary by securing judges from reward or intimidation. The constitutional objections to term limits legislation rest on restrictive readings of the terms “good behavior” and “one Supreme Court” that cannot be justified by reference to any substantial public harms that might result from a more generous reading that allows Congress to do its job. Justices have long interpreted the text of the Constitution loosely, a practice that may indeed have been indispensable in keeping the Republic more or less on track for two and a quarter centuries. It would be ironic if an uncharitable reading of that text led Congress in an action of self-restraint to forego enactment of reasonable constraints on justices.

If Congressional legislation imposing term limits on justices were enacted and were then held unconstitutional by the Court, it would be time to think about a constitutional amendment. At such a time an amendment might be a realistic possibility. Until then, academic objections to the constitutionality of such legislation should be recognized as arguments for the status quo.

³ See *supra* Calabresi & Lindgen, pp. ???-???; see *infra* Ward Farnsworth, *Some Overlooked Consequences of Life Tenure for Supreme Court Justices*, pp. ???-???; see *infra* John Harrison, *The Power of Congress over The Terms of Judges of the Supreme Court* pp. ???-???; see *infra* William Van Alstyne, *The Proposals for Term Limits on the Supreme Court: A Brief Critical Review*, pp. ???-???

⁴ David P. Currie is providing a history of Congressional attention to the Constitution. See his *The Constitution in Congress: Democrats and Whigs 1829-1861* (2005); *The Constitution in Congress: the Jeffersonians, 1801-1829* (2001); *The Constitution in Congress: The Federalist Period 1789-1801* (1999). It is fair to say that Congress has been willing and able to read the Constitution for itself.

⁵ See *infra* Roger C. Cramton, *Reforming the Supreme Court*, pp. ???-???

⁶ See *supra* L. A. Powe, Jr., “Marble Palace . . . We’ve Got A Problem with You”, pp. ???-???

⁷ See *infra* Sanford Levinson, *Life Tenure and the Supreme Court: What is to Be Done?*, pp. ???-???

THE SUPREME COURT AS THE ONE AMONG MANY

Perhaps in part because my professional preoccupation for the last half a century has been not with the Supreme Court but with other federal courts, I view the “one Supreme Court” as the center of a network of subordinate institutions that should be and are constitutionally accountable to representatives of the people they serve. The “lower” courts shape themselves to the highest Court and also influence the Court in ways making them inseparable. When the whole enterprise has overreached itself, as it has, that is a problem that Congress has a constitutional duty to address.⁸ The Court, afflicted with its quasi-royal sense of itself, has led the federal courts at all levels to forsake the modest role of deciding the cases and controversies that the Constitution commissions them to decide in order to concentrate on the more exalted and gratifying work of making law on subjects of their own choosing.

Although political scientists and others occupied with opinion sampling may question my premise,⁹ I share with others (at least some of whom are federal judges) a sense that there is in the land a growing hostility to the federal judiciary and to the government of which it is a part. Why should this be? One possible reason is that foretold by Montesquieu, that a republic’s status as The Great Power results in an infection of arrogance causing its citizens to be more resentful of the leaders who govern them.¹⁰ Perhaps he was right; there is surely evidence of an infection of arrogance in many American institutions. Resentment also seems to be associated with despair over the nation’s moral state,¹¹ and with a retreat from the optimism of The

⁸ See *infra* Ward Farnsworth, *Some Overlooked Consequences of Life Tenure for Supreme Court Justices*, pp. ???-??; see *infra* John Harrison, *The Power of Congress over the Terms of Judges of the Supreme Court* pp. ???-??; see *infra* Philip D. Oliver, *A Clearly Constitutional Statutory Proposal*, pp. ???-??; see *infra* William Van Alstyne, *The Proposals for Term Limits on the Supreme Court: A Brief Critical Review*, pp. ???-??.

⁹ See *infra* Stephen B. Burbank, *An Interdisciplinary Perspective on the Tenure of Supreme Court Justices*, pp. ???-??; but see Martha Neil, *Half of U.S. Sees Judicial Activism Crisis*, A.B.A.J., ereport, (September 30, 2005).

¹⁰ Charles Secondat de Montesquieu, *The Spirit of Laws*, Book VIII, Chap. 4 (Thomas Nugent trans., London: Nourse, 1750).

¹¹ I take this to be the subtext of Thomas Frank, *What’s the Matter with Kansas? How Conservatives Won the Heart of America* (2004).

Enlightenment on which our national ideology rests.¹² Whatever the causes, those who retain progressive hopes, and see law as a possible instrument of their achievement, as I do, would do well, I perceive, to concede that fellow citizens protesting the moral and political leadership of an unaccountable judiciary placed on a pedestal of immortality may have a point. Prudence calls for an offer of compromise and that is in my mind what our term limits proposals are about.

THE FOUNDERS' SURPRISE

Those who wrote Article III did not see the federal judiciary, even the Supreme Court, as the superlegislators they have become. The judges who were known to the Founders were employed merely to decide contested cases. In the common law tradition familiar to eighteenth century lawyers, the judges entertaining appeals heard legal arguments and then expressed their decisions separately and orally, leaving it to a reporter and his readers to derive if possible any legal principles that might have been expressed in their diverse and unrehearsed utterances, a system depicted by Tennyson as “a lawless science,” a “codeless myriad of precedent,” and a mere “wilderness of single instances.”¹³ Judges made law, but unselfconsciously as they tried to apply it. So long as they made law only in that modest way, they were indeed, as Alexander Hamilton assured us, “the least dangerous branch.”¹⁴ One might fear or resent their power over litigants, but they were not viewed as effective makers of public policy.

That changed in 1801 with the appointment of John Marshall as Chief Justice. Marshall's first decision came in the form of a written opinion of the Court signed by all seven Justices.¹⁵ Writing such an opinion is a deliberate legislative act quite different from any envisioned by those who created the Court. The importance of the device in

¹² Louis Dupre, *The Enlightenment and the Intellectual Foundations of Modern Culture* 153-54 (2004); Jonathan Hill, *Faith in the Age of Reason: The Enlightenment from Galileo to Kant* 7 (2004).

¹³ Alfred Lord Tennyson, “Aylmer's Field,” lines 435-439, in *The Poetic and Dramatic Works of Alfred Lord Tennyson* 241, 246 (1898).

¹⁴ The Federalist Papers 78: “the judiciary is beyond comparison the weakest of the three departments of power.” And see Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1962). Montesquieu put it most strongly: “Of the three powers above mentioned, the judiciary is next to nothing.” *Supra* n. 10, Book XI, Chap. 6.

¹⁵ The first appearance of the opinion of the court came in *Talbot v. Seeman*, 1 Cranch 1 (1801).

elevating the judicial power was confirmed by its immediate adoption by state courts, and, before long, by courts of other nations, not least including England.¹⁶ Combined with the unquestioned constitutional power to invalidate legislation, the opinions of the Court soon became *the* source of constitutional law, making the justices authors and sometime revisors of a constitution that is an extended elaboration of the text written in 1787 seldom amended by the almost impossible process set forth in its Article V. This transformation of the Court was recognized and decried by Jeffersonians as an illegitimate seizure of legislative powers.¹⁷

And in 1805, the Jeffersonian leaders of the Senate wisely forswore use of its impeachment power as a means of correcting Justice Samuel Chase's misguided Federalist politics.¹⁸ But the resulting practice of legislative restraint liberated those writing the subtextual constitutional law from any direct personal accountability for the political decisions they had become empowered to make. It became metaphorically appropriate, even if not literally correct, to speak of justices as officers enjoying "life tenure," a phrase previously reserved for royalty.

In a constitutional scheme of "checks and balances", what were the checks to prevent justices from gradually rewriting the Constitution to accord to their preferences? This is an obvious question having no obvious answer. And the Founders' miscalculation in leaving that question open was soon recognized. In the first half of the nineteenth century, all American state constitutions were revised to assure some form of rotation in high judicial offices and/or to provide other means of correcting bad law made by state judges in the opinions of their courts.¹⁹ Frederick Grimké, a justice of the

¹⁶ See Paul D. Carrington, *Butterfly Effects: The Political Consequences of Law Teaching*, 41 Duke L. J. 741, 753-754 (1992).

¹⁷ E.g., John Taylor, *Construction Construed and Constitutions Vindicated* (1820).

¹⁸ See William H. Rehnquist, *Grand Inquests: The Historic Impeachments of Samuel Chase and President Andrew Johnson 22-27* (1992).

¹⁹ A Federalist legislature in New Hampshire in 1813 expelled all the Democratic judges from the state courts. Edwin D. Sandborn, *History of New Hampshire from Its First Discovery to the Year 1830* 260-61 (1875). The Democratic legislature elected in Kentucky in 1824 fired all members of their highest court (who were Whigs) and replaced them, as punishment for decisions having unwelcome impact on tenants and debtors. Arndt H. Stickles, *The Critical Court Struggle in Kentucky, 1819-1829* (1929). For a review of issues and literature in later times, see Paul D. Carrington, *Judicial Independence and Democratic Accountability*, 61-1 L. & Contemp. Probs. 79 (1998) (Paul D. Carrington & D. Price Marshall, eds).

Ohio Supreme Court explained the view generally prevailing in antebellum times.²⁰ He expressed what would later be designated as Legal Realism—the observation that high court judges are making political decisions—and he 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.” And, he added, “if it is not wise to confer a permanent tenure of office upon the executive and legislative, it should not be conferred upon the judiciary; and the more so, because the legislative functions which the last perform is a fact entirely hidden from the great majority of the community.”²¹

LIVING WITH THE MISTAKE: THE FEDERAL COURTS IN THE NINETEENTH CENTURY

Although few of his contemporaries expressed disagreement with Grimké, nothing was done by Congress in his time to limit the terms of justices sitting on the Supreme Court of the United States. There were reasons that this was so.

One was that the Supreme Court was an organ of a weak national government and was generally held in limited regard. When the Court proclaimed the rights of the Cherokee to remain in Georgia,²² President Jackson simply defied it.²³ When it unconstitutionally declared itself to be the premier authority on the nation’s private law governing contracts and property,²⁴ a decision said to result from the superannuation and arrogance of Justice Story,²⁵ the state supreme courts ignored it. When a minor war arose between political factions in Rhode Island, the Court timidly feared to decide which was legitimate.²⁶ When it declared that Americans of African ancestry had no

²⁰ Frederick Grimké, *Considerations upon the Nature and Tendency of Free Institutions* (H.W. Derby & Co., Cincinnati 1848), republished by Harvard University Press in 1968.

²¹ *Id.* 355.

²² *Worcester v. Georgia*, 31 U.S. 515, (Pet.) 560-63 (1832). See generally Jill Norgren, *The Cherokee Case: The Confrontation of Law and Politics* (1996).

²³ For an account, see Edward A. Miles, *After John Marshall’s Decision: Worcester v. Georgia and the Nullification Crisis*, 39 J. S. Hist. 589 (1973).

²⁴ *Swift v. Tyson*, 41 U.S. 1 (16 Pet.) (1842).

²⁵ John Chipman Gray, *The Nature and Sources of Law* 253 (1909). The unconstitutionality of the decision was declared by the Court in *Erie R. R. v. Tompkins*, 304 U. S. 64 (1938).

²⁶ *Luther v. Borden*, 48 U.S. 1 (7 How.) (1849).

rights,²⁷ the nation led by President Lincoln initiated a war to overrule it. When it seemed that the Court might impede the war effort, Lincoln appointed a tenth justice to assure that it would not be able to marshal the votes to do so.²⁸ When the chief justice issued a writ of habeas corpus to free a citizen who was organizing resistance to the military draft,²⁹ Lincoln ordered the Army to defy the writ. When it seemed that the Court might invalidate Reconstruction legislation, Congress foreclosed its jurisdiction.³⁰ And when the Court later invalidated the federal income tax,³¹ it was in due course reversed by constitutional amendment.³² No contested policy of substantial national concern that was announced by the Court in the nineteenth century was effectively maintained.

It may also have been pertinent that nineteenth century federal judges were more frequently selected for their political prominence.³³ Virtually all justices were then veterans of the political campaign trail because only such persons were visible to the Presidents who nominated them or the Congressmen who confirmed them. Most were therefore able to maintain social and political ties to the legislators working elsewhere in the Capitol, and with those in the regions from which they came. And they were therefore less likely to see themselves or to be seen by others as persons of exceptional power and status. Nor was their high status entirely dependent on that of the office they held.

And to the extent that the Court successfully exercised significant political power in the nineteenth century, its decisions generally involved enforcement of the federal

²⁷ *Scott v. Sandford*, 60 U.S. 393 (19 How.) (1857). The decision in that case was at the time encouraged by the President and leading Senators. On its effects, see Martin Siegel, *The Taney Court, 1837-1864* 66-68 (1987); Don E. Fehrenbacher, *The "Dred Scott" Case: Its Significance in American Law and Politics* 307-313 (1978).

²⁸ On Lincoln's appointment of Stephen Field, see Paul Kens, *Justice Stephen Field: Shaping Liberty from The Gold Rush to The Gilded Age* 95-96 (1997).

²⁹ *Ex parte Milligan*, 71 U.S. 2 (4 Wall.) (1866).

³⁰ *Ex parte McCardle*, 74 U.S. 506 (6 Wall. 318) (1868).

³¹ *Pollock v. Farmers Loan & Trust Co.*, 158 U. S. 429, 601 (1895).

³² See Robert Stanley, *Dimensions of Law in the Service of Order: Origins of the Federal Income Tax 1861-1913* at 225-229 (1993).

³³ See, e.g., Maeva Marcus, *Allen Chair Symposium 2004 Federal Judicial Selection: Symposium Article Federal Judicial Selection: The First Decade*, 39 U. Rich. L. Rev. 797 (2005).

Constitution against allegedly miscreant state legislatures. In that way, the Court played a significant role in the advent of America's Gilded Age by invalidating state laws enacted to protect workers or regulate business.³⁴ But Congress and the President did not much mind these transgressions, for it was only state governments that were directly disadvantaged. And Christopher Tiedemann, a leading constitutional scholar of the era could reassure the nation that it need not worry: "the Congress has 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 judges . . . the popular will may be realized."³⁵

Finally, it was the fact in the nineteenth century that substantial turnover occurred naturally. Many died while in office, some at advanced ages, but some at ages not so advanced. And some retired without pay. One cause of such resignations was the requirement imposed on the justices by Congress that they "ride circuit" in order to remain in contact with the people whom they governed.³⁶ An aim of the requirement was to assure that the justices would write opinions of the court that expressed "the common thoughts of men."³⁷ Circuit-riding required annual trips, often of considerable length, and in horse-drawn vehicles or dangerous steamboats.

THE JUDICIARY ACT OF 1891: CREATION OF COURTS OF APPEALS

The relatively humble status of the Court began to change in 1891 when Congress created the Circuit Courts of Appeals to review most judgments of federal trial

³⁴ Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* (1993); William J. Novak, *The People's Welfare and Regulation in Nineteenth Century America* (1996); Own Fiss, *Troubled Beginnings of the Modern State, 1888-1910* (1993).

³⁵ Christopher G. Tiedeman, *The Unwritten Constitution of the United States* 162 (1890).

³⁶ An elaborate history of the practice is provided by Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *Cardozo L. Rev.* 1753 (2003).

³⁷ The phrase was provided by Thomas Cooley, a Chief Justice of Michigan and the premier constitutionalist of the late nineteenth century. On receiving an honorary degree from Harvard, he cautioned that: "the strength of law lies in its commonplace character, and it becomes feeble and untrustworthy when it expresses something different from the common thoughts of men." *A Record of Commemoration, November 5 to November 9, 1886, On the Two Hundred Fiftieth Anniversary of Harvard College* 95 (1886).

courts.³⁸ The purpose of the new law as proclaimed by its principal champion in the House of Representatives was to achieve “the overthrow and destruction of the kingly power” of the federal trial judges by subjecting them to closer appellate review than the one Supreme Court had provided.³⁹ Prior to the Act, appeals had seldom been allowed in criminal cases (which were then few in number) or in civil cases involving lesser amounts (of which there were many). In those matters, the trial court had the last and only say. The Court after 1891 continued to hear some direct appeals from lower federal courts as well as from highest state courts, and entertained appeals from the intermediate appellate courts. But the Justices were relieved of the odious duty of riding circuit.⁴⁰

The national economy emerging in the last decades of the nineteenth century brought with it the idea of human capitalism and admiration for all forms of expertise. Professional training became more highly valued in all fields of professional work,⁴¹ not least including law, and became a major source of status in the middle class.⁴² The judiciary accordingly began to present themselves more as men of academic learning and less as men of proven political judgment. The Court, and lower federal courts as well, would by the late twentieth century be all but divested of judges with experience as legislators or as candidates for any public office.⁴³ They became more the instruments of a professional elite.

And the notion that the law, even the Constitution, is a mystery requiring professional training to comprehend became increasingly fashionable. Contrary to early nineteenth century practice in many states, bar organizations appeared; they

³⁸ The story of the enactment is told by Felix Frankfurter & James M. Landis, *The Business of the Supreme Court* 86-102 (1928).

³⁹ 21 Cong Rec. 3403 (1890).

⁴⁰ It was essentially a “dead letter” by the time the statute was passed. Frankfurter & Landis, *supra* n. 38 at 87.

⁴¹ Magali Larsen, *The Rise of Professionalism* (1977).

⁴² Burton Bledstein, *The Culture of Professionalism: The Middle Class in the Development of Higher Education* 80-92 (1976).

⁴³ Sandra Day O’Connor was the one member of the Court over the last quarter century who had any experience as a legislator; she served briefly in the Arizona senate. Her experience is recounted in Sandra Day O’Connor, *The Majesty of the Law: Reflections of A Supreme Court Justice* 106-107 (2003).

proclaimed and sometimes even sought to enforce standards of professional conduct for lawyers.⁴⁴ The American Bar Association arose in 1878 as a voluntary association of elite lawyers with a broad agenda of law reforms.⁴⁵ And university law schools materialized.⁴⁶ Along with these developments came a growing sense on the part of the public and of Congress that judges were experts who should be trusted to do their work on their own terms, much as lawyers, doctors, engineers and public schoolteachers were then trusted to do their jobs as well as possible for the benefit of those they served with scant accounting for any mistakes they might make.

To maintain their own professional standards and validate that growing trust, each justice came to need the help of a legal secretary or law clerk. And they came generally to prefer young assistants certified by their law teachers to be individuals of uncommon intellect and energy. This practice became the source of a stable relationship between the justices and the law professors at the schools from which the law clerks were drawn, but weakened ties among the justices.⁴⁷

PROGRESSIVE JUDICIAL LAW REFORM

Then came the Progressive reform politics of 1900-1915, a development rooted in part in growing confidence in professional expertise as a confirmation of the Enlightenment notion that social problems can be solved by well-trained professionals. Roscoe Pound in 1906 famously expounded his “causes for popular dissatisfaction with the law” as including mindless technicalities that wise lawyers could eliminate.⁴⁸ One Progressive campaign was an effort to improve the judiciary by means of “merit selection.”⁴⁹ But it was also Progressive to assure the accountability of the judiciary for

⁴⁴ *Professions and Professional Ideologies in America* (Gerald L. Geison ed., 1983); *The New High Priests: Lawyers in Post-Civil War America* (Gerard W. Gawalt ed., 1984).

⁴⁵ An account is Edson Sunderland, *History of the American Bar Association and Its Work* (1953).

⁴⁶ Robert Bocking Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (1983).

⁴⁷ Bradley J. Best, *Law Clerks, Support Personnel, and the Decline of Consensual Norms on the United States Supreme Court 1935-1995* (2002).

⁴⁸ 29 A. B. A. Rep. 503.

⁴⁹ Proposed by Albert Kales in 1914, it was first adopted in Missouri in 1940. Maura Ann Schoshinski, *Towards an Independent, Fair and Competent Judiciary: An Argument for Improving Judicial Elections*, 7 Geo. J. Legal Ethics 839 (1994).

decisions laden with political consequences by means of constitutional referenda, recall elections and the like.⁵⁰ And the professional training and status of judges were not deemed sufficient to justify conferring on them royal “life tenure” and the power to make almost irreversible political decisions. These ideas did not, however, find their way into the federal government.⁵¹

WILLIAM HOWARD TAFT

President Taft played an enormous role in the history of the Court and in the transformation of the entire federal judiciary. He had been a federal judge and a law school dean in Cincinnati.⁵² While campaigning for the presidency in Pocatello, Taft uttered words foretelling his future role. “I love judges and I love courts,” he told the voters. “They are my ideals. They typify on earth what we shall meet hereafter in heaven under a just God.”⁵³ During his four years as President, Taft had occasion to appoint no fewer than six members of the Supreme Court in whom he presumably detected a measure of divinity. After losing the presidency in 1912, he moved to Yale and wrote about constitutional law, chiefly as it serves to constrain his successors in the White House.⁵⁴

THE JUDICIARY ACT OF 1922: CREATING THE JUDICIAL CONFERENCE

In 1921, President Harding appointed Taft chief justice to preside over the Court on which many of Taft’s own appointees sat.⁵⁵ Among his first acts was to forsake the

⁵⁰ For a contemporaneous expression of the Progressive view, see Gilbert E. Roe, *Our Judicial Oligarchy* (1912).

⁵¹ Pound did express a vision of the role of federal as well as state appellate courts, see Paul D. Carrington, *The Unknown Court*, in *Restructuring Justice* (Arthur Hellman ed., 1990).

⁵² 1 Henry F. Pringle, *The Life and Times of William Howard Taft* (1939). On his appointment to the federal bench, see p. 95-96. On his time as dean, see 125.

⁵³ Jeffrey B. Morris, *What Heaven Must Be Like: William Howard Taft as Chief Justice, 1921-30*, 1983 *Sup. Ct. Hist. Soc. Y. B.* 80, 82 (1983). While President, Taft published an article on judicial administration, *The Delays of the Law*, 18 *Yale L. J.* 28 (1908).

⁵⁴ E.g., William Howard Taft, *Our Chief Magistrate and His Powers* (1916).

⁵⁵ See William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 *A. B. A. J.* 601 (1922). Justice Frankfurter, no admirer of Taft’s politics, later noted, “there was no aspect of judicial reform which did not receive from him a ready response.” *Chief Justices I Have Known*, 39 *Va. L. Rev.* 883, 898 (1953). On Taft’s leadership in the Court, see generally Robert Post, *Judicial Management and Judicial*

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 1922⁵⁶ establishing the institution now known as the Judicial Conference of the United States. The Conference is a low-visibility council composed of chief judges of the federal circuits who acquire their status as chiefs on the basis of their seniority in service on their courts, and of other federal judges selected by their colleagues in the circuits or regions that they represent. The Conference is chaired by the chief justice. It was initially organized to study the needs of the courts and to report them to Congress. By steps, the Conference acquired additional roles and was accorded increasing deference by Congress, with the result that the federal judiciary became substantially self-governing.

In 1934, at the behest of the American Bar Association, Congress enacted the Rules Enabling Act⁵⁷ commissioning the Supreme Court to propose rules of civil procedure for use in all federal trial courts, rules designated to become law if Congress did not timely override the proposals. This was not a radical idea, but a Progressive one having antecedents in the longstanding practice of the federal courts in "suits in Equity."⁵⁸ Yet it was an exceptional delegation by Congress of explicitly legislative power to judges, power they had not previously exercised. The Court turned to a special committee of fourteen eminent lawyers and scholars. The Federal Rules of Civil Procedure were published by the Court on the committee's recommendation notwithstanding a dissent by Justice Brandeis,⁵⁹ and were allowed by Congress to become law in 1938. The new rules were not seen as beneficial to any identifiable

Disinterest: The Achievements and Perils of Chief Justice William Howard Taft, 1998 J. Sup. Ct. Hist 50; Robert Post, *The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship and Decisionmaking in the Taft Court*, 85 Minn. L. Rev. 1267 (2001); and Kenneth W. Starr, *William Howard Taft: The Chief Justice as Judicial Architect*, 60 U. Cin. L. Rev. 963 (1992). See generally Peter Graham Fish, *The Politics of Federal Judicial Administration* (Princeton 1973).

⁵⁶ Act of September 14, 1922, 42 Stat. 837.

⁵⁷ Act of June 19, 1934, 48 Stat. 1064. On its origins, see Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. Pa. L. Rev. 1015 (1982).

⁵⁸ On the relation to practice in Equity, see Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. Pa. L. Rev. 909 (1967).

⁵⁹ Edward Purcell, *Brandeis and the Progressive Constitution: Erie, the Judicial Power, and the Politics of the Federal Courts in the Twentieth Century* 135 (2000).

group of litigants but as an effective method of resolving disputed facts in accordance with the applicable law, and perhaps as a reflection of the Progressive goals proclaimed by Roscoe Pound and others. They were deemed a great success by lawyers and trial judges, and were copied or emulated for use in the courts of most states.⁶⁰ Less noticed was the degree to which the new rules enhanced the discretion and power of the individual trial judge.⁶¹

In time, the committee that had advised the Court by drafting civil rules was replaced by one reporting to the Judicial Conference that in turn reports to the Court.⁶² The new committee consisted mainly of federal judges counseled by a few lawyers and professors. Whether this change was provident may be questioned. But the Conference and its committees were then later empowered to recommend criminal rules, rules of evidence, bankruptcy rules and rules of appellate procedure.⁶³ The Supreme Court has approved almost all the recommendations of the Conference and its advisory committees, and Congress has allowed almost all of them to become law.⁶⁴

⁶⁰ Arthur T. Vanderbilt, *Improving the Administration of Justice: Two Decades of Development*, 26 Cin. L. Rev. 155 (1957); Geoffrey Hazard, *Undemocratic Legislation*, 87 Yale L. J. 1284, 1287 (1978).

⁶¹ Stephen Yeazell, *The Misunderstood Consequences of Civil Process*, 1994 Wis. L. Rev. 631.

⁶² Act of July 11, 1958, 72 Stat. 356.

⁶³ Amendments to 28 U.S.C. § 2071 were made by the Judicial Improvements and Access to Justice Act in 1988 (Pub. L. No. 100-702, Title IV, § 403(a)(1)); 28 U.S.C. § 2072 was added by Judicial Improvements and Access to Justice Act in 1988 (Pub. L. No. 100-702, Title IV, § 403(a)(1)), but was then amended by the Judicial Improvements Act of 1990 (Pub. L. No. 101-650, Title III, §§ 315, 321); 28 U.S.C. § 2073 was added by the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702, Title IV, § 401(a)), and was then amended by the Bankruptcy Reform Act on Oct. 22, 1994 (Pub. L. No. 103-394, Title I, § 104(e)); 28 U.S.C. § 2074 was added by the Judicial Improvements and Access to Justice Act of 1988 (Pub. L. No. 100-702, Title IV, § 401(a)); 28 U.S.C. § 2075 was added on Oct. 3, 1964 (Pub. L. No. 88-623, § 1, 78 Stat. 1001), and amended on November 6, 1978 (Pub. L. No. 95-598, Title II, § 247, 92 Stat. 2672). It was further amended by the Bankruptcy Reform Act of 1994 (Pub. L. No. 103-394, Title I, § 104(f)); 28 U.S.C. § 2076 was repealed in 1988 by Title IV of the Judicial Improvements and Access to Justice Act (Pub. L. No. 100-702). The subject is now governed by 28 U.S.C. §§ 2072-2074; 28 U.S.C. § 2071 was added by the Federal Courts Improvement Act of 1982 (Pub. L. No. 97-164, Title II, § 208(a)), and was amended by the Judicial Improvements and Access to Justice Act in 1988 (Pub. L. No. 100-702, Title IV, § 401(b)). It was further amended by the Judicial Improvements Act of 1990 (Pub. L. No. 101-650, Title IV, § 406).

⁶⁴ For example, there was much controversy over the Federal Rules of Evidence when first promulgated; they were amended and, as amended, enacted by Congress but subject to revision by the procedure established pursuant to the 1934 scheme. The story is told by Raymond F. Miller, *Comment: Creating Evidentiary Privileges: An Argument for the Judicial Approach*, 31 Conn. L. Rev. 771, 771-777 (1999).

While issues abide,⁶⁵ most would concede that rulemaking by the Conference has been on balance a benign enterprise. The committees have been careful to limit judicial rulemaking to procedural matters having no consciously substantive purpose, but the distinction between procedure and substance is not free of difficulty.

Notwithstanding President Taft's assessment of judges as angels of a sort, they do in their rulemaking manifest a tendency to confirm the "public choice theory" fashioned by academic economists to explain the tendency of lawmakers to take special care of their own interests as professionals.⁶⁶ This is not to say that the federal judges are not committed to public service. I can attest from decades of contact with scores of them, that they aspire to nothing but to do justice and maintain fidelity to law. But when they come together on committees, those objectives tend to become conflated with the power and status of the judiciary. It should surprise no one to hear that mortal judges are afflicted with very normal human failings, not unlike those manifested by other professionals, whether public or private.

In 1939, the Conference was supplied with its own support staff by the creation of the Administrative Office of the United States Courts.⁶⁷ It served to displace an arm of the Department of Justice that had been performing that role. One of its purposes was to enable the Conference to deal more directly with Congress in the pursuit of its legislative aims.⁶⁸ The reform tended to relieve the Executive Branch of responsibility for issues of judicial administration.

⁶⁵ For a current effort of a Congressman to amend Civil Rule 11, see <<http://lamarsmith.house.gov/news.asp?FormMode=Detail&ID=644>>. On the recent history of the rule, see Paul D. Carrington, & Andrew Wasson, *A Reflection on Rulemaking: The Rule 11 Experience*, 37 *Loyola L. Rev.* 563 (2004).

⁶⁶ For an account of the theory, see Daniel A. Farber & Philip P. Frickey, *Law and Public Choice: A Critical Introduction* (1991); on its application to the judiciary, see Jonathan R. Macey, *Judicial Preferences, Public Choice and the Rules of Procedure*, 23 *J. Leg. Stud.* 627 (1994); Charles G. Geyh, *Paradise Lost, Paradise Found: Redefining the Judiciary's Role in Congress*, 71 *N.Y.U. L. Rev.* 1165 (1996).

⁶⁷ Act of August 7, 1939, 53 Stat. 1223.

⁶⁸ Peter Graham Fish, *Crises, Politics, and Federal Judicial Reform: The Administrative Office Act of 1939*, 32 *J. Pol.* 599 (1970).

On the advice of the Judicial Conference, Congress fashioned a generous retirement system for federal judges.⁶⁹ This was done in part in response to knowledge of a growing number of superannuated trial judges whose lives were prolonged by twentieth century improvements in public health and whose impatience and arbitrary conduct at trials engendered the mistrust of lawyers and litigants. Because the retirement plan allows them to retire at full pay, and because service on the lower federal courts is less gratifying than the exercise of the powers of a Justice, judges sitting on those courts retire after an appropriate period of service.⁷⁰ Congress thus purchased an end to “life tenure” for district judges and circuit judges.

Justices are afforded the same incentives to retire in a timely way as are the other Article III judges, but they do not choose to subside even though they could draw full pay without working. Judith Resnik suggests that the benefits paid could be made to decline as judges overstay terms to be prescribed by Congress.⁷¹ Possibly Justices might be required to take their retirement after, say, eighteen years of service, or else forfeit the right to receive benefits thereafter.

The Judicial Conference also persuaded Congress to add to the Conference’s broad legislative responsibility as procedural rulemaker, responsibilities for managing through its regional councils judicial misconduct resulting from physical or emotional disabilities.⁷² While only Congress with its impeachment power can remove a justice or any judge appointed by the President, a system of discipline was established within the Judicial Conference regime. Its councils cannot remove any judge from office but it can terminate his or her authority to sit on cases. This power is exercised with utmost, and perhaps excessive, caution or timidity, but it provides a humane method of dealing with emotional difficulties sometimes manifested by judges in their exercise of “kingly power.” On occasion, judges disciplined by other judges have contested the

⁶⁹ 28 U.S.C. § 371 is based on title 28, U.S.C., 1940 ed., §§ 375 and 375a (Mar. 3, 1911, ch. 231, § 260, 36 Stat. 1161; Feb. 25, 1919, ch. 29, § 6, 40 Stat. 1157; Mar. 1, 1929, ch. 419, 45 Stat. 1422; Mar. 1, 1937, ch. 21 §§ 1, 2, 50 Stat. 24; Feb 11, 1938, ch. 25, §1, 52 Stat. 28; May 11, 1944, ch. 192, §1, 58 Stat. 218).

⁷⁰ Albert Yoon, *The End of the Rainbow: Understanding Turnover among Federal Judges*, ___ Am L. & Econ. Rev. ___, ___ (forthcoming 2005).

⁷¹ See Judith Resnik, *So Long*, Legal Affairs 20 (July/August 2005).

⁷² *Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 48 Fed. Reg. 30843, 28 U.S.C. § 272.

constitutionality of this arrangement as constituting an exercise of power reserved by the Constitution to Congress as a part of its impeachment power, but without success.⁷³ By conferring this power on the Conference, Congress with the approval of the Court approved the idea that the “life tenure” of federal judges as prescribed in Article III could be forcibly constrained in appropriate circumstances without need to deploy the impeachment process.

And also on the advice of the Conference, Congress in 1968 greatly enlarged the authority of lower federal courts to select and appoint additional judges who serve limited terms.⁷⁴ By stages, the titles, roles, and compensations of magistrate judges and bankruptcy judges have been elevated.⁷⁵ They are paid slightly less than the district judges appointed by the President, but they are authorized by Congress to exercise most of their courts’ powers.⁷⁶

The creation of these subordinate judgeships is in part a reflection of the Judicial Conference’s concerns for the number of Article III judges. As the number of district and circuit judges increased in the twentieth century to handle increasing caseloads, some judges became concerned over the dilution of their status. Federal judges might come to be seen as ordinary mortals and it might be harder to recruit the best and brightest. A policy disfavoring new judgeships came to influence judicial rulemaking and administrative practices.⁷⁷ In framing this policy, no account was taken of the relationship between the number of Article III judges and the number of lawyers over whom they preside or the populations they serve, nor of the comparison to other legal systems that employ proportionately many more judges, nor of the increasing number of individual substantive rights conferred on a growing population thereby increasing a

⁷³ *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74 (1970), *see supra* discussion in Cramton pp. ???-???

⁷⁴ Act of Oct. 17, 1968, Pub. L. 90-578, Title I, § 101, 82 Stat. 1108 [enacting 28 U. S. C. § 631 et seq.]. There were antecedent practices of a similar sort, especially in the administration of the bankruptcy laws.

⁷⁵ The title “Magistrate Judge” was conferred on magistrates in 1990. The Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089 (1990). *See generally* Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. Pa. L. Rev. 2131 (1989).

⁷⁶ The constitutional objections were dismissed. *United States v. Raddatz*, 447 U.S. 667 (1980); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.* 458 U. S. 50 (1982).

⁷⁷ Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 Harv. L. Rev. 924, 984-986 (2000).

demand for services in ever shorter supply. No matter what the need, there can only be so many Article III judges!

In sum, the Judicial Conference has come to bear some likeness to a labor union, one whose members are employed by an inattentive management that is Congress. Or perhaps it is more a corporate culture led by executives enjoying utmost rewards in the form of political power but unnoticed by its shareholders who bear the consequences of those executive compensations. This development was only indirectly the result of Chief Justice Taft's initiative in 1922, but it reflected his zeal for the power and status of judges. And Taft had other ideas as well.

THE JUDICIARY ACT OF 1925: THE CERTIORARI POWER

Taft's 1922 Act was followed by the Judiciary Act of 1925, a law known at the time as "the judges bill."⁷⁸ It was responsive to a heavy caseload and backlog in the Court. It authorized the Supreme Court to refuse to hear many of the cases brought to it, leaving unreviewed the merits of many cases decided by the federal courts of appeals or by highest state courts. By stages, this discretion was extended to all cases. 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,⁷⁹ no matter how critical other issues might be to the disposition of a case at hand.

When Congress approved the 1925 Act, the Court was hearing about 330 cases a year, and deciding others without need of hearing. Congress was assured that the number would not be substantially reduced and that the Court would separately confer on each denial of certiorari.⁸⁰ In fact, the Court has now reduced its workload to about

⁷⁸ Act of February 13, 1925, 43 Stat. 936; on the legislative history, see Frankfurter & Landis, *supra* n. 38 at 225-294 and Edward Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 Colum. L. Rev. 1643, 1649-1704 (2000). Hartnett also records later revisions expanding the power. Opposition was expressed by Senator Thomas J. Walsh (D.-Mont.). See his *The Overburdened Supreme Court*, 1922 Va. Bar Assn Rep. 216.

⁷⁹ See 28 U. S. C. §§ 1251 et seq.

⁸⁰ The 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* n. 78 at 1646.

seventy-five cases a year and declines to consider the other thousands in which its review is sought.⁸¹ The seventy-five are presumably the most important, or at least present the most important issues, but it is not always clear that this is so.⁸² The Court's own rule purporting to set standards for selecting cases is "hopelessly indeterminate and unilluminating."⁸³ Justices seldom explain their reasons for declining to review a case. That those reasons are of a diverse political nature and sometimes centered on the interests of the federal judiciary, is not to be doubted.⁸⁴ This power to select the cases it decides is transformative. With rare exception, the Court only agrees to hear cases that present the justices with opportunities to legislate on questions they deem worthy of their attention. Indeed, Chief Justice Rehnquist has urged the Court to retain jurisdiction over moot cases if they present interesting and important legal issues; the Court should not, in his view, be deprived of an opportunity to legislate merely because the parties have settled their case and are no longer available to argue it.⁸⁵

It is quite plausible that the power of the Court over its agenda gave it the courage to extend the federal Constitution to matters that had previously been regarded as matters of state law. It was a very short time after passage of the 1925 Act that the Court re-interpreted the Fourteenth Amendment so that almost all the protections of the Bill of Rights applied to the states and thus empowered itself to review a vast array of state court decisions.⁸⁶ As Edward Hartnett observes, it is difficult to imagine the Court publishing an opinion making new constitutional law such that all persons convicted of crime by state courts would become entitled to invoke Supreme Court jurisdiction as a matter of federal right. Concentrating on its legislative role, the Court leaves to lower courts narrow concerns about whether specific cases were rightly decided on the facts

⁸¹ 2003 Annual Report of the Administrative Office of the United States Courts. A review of the 2003 year is available at <<http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>> at p. 9.

⁸² See Rules of the Supreme Court of the United States, Rules 10-16.

⁸³ Samuel Estreicher & John Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U. L. Rev. 681, 790 (1994).

⁸⁴ For accounts, see Richard L. Pacelle Jr., *The Transformation of the Supreme Court's Agenda: From the New Deal to the Reagan Administration* (1991); H. W. Perry Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (1991); Doris Marie Provine, *Case Selection in the United States Supreme Court* (1980).

⁸⁵ *Honig v. Doe*, 484 U. S. 205, 329-330 (1988).

⁸⁶ *Gitlow v. New York*, 268 U. S. 652, 666 (1925).

and the law. In the mode thus established, the Court does still decide cases, but only incidentally to its lawmaking. In this respect, it has turned on its head the judicial role envisioned by the Founders.

An indirect consequence of this arrangement is the nullification of the argument made by Chief Justice Marshall in his celebrated opinion in *Marbury v. Madison*⁸⁷ justifying the Court's role in reviewing the constitutionality of legislation. He explained that role as necessitated by its duty to decide the cases brought to it for decision—it could neither refuse to decide nor could it disobey the Constitution. But the Court no longer has any such duty to decide a case. And it seldom finds it necessary to decide whether in a specific case the lower courts have actually and correctly applied the controlling law.

While the workload of the justices was thus steadily declining after 1925, they were being supplied with more and more help. To help decide seventy-five cases a year, and write eight or so opinions of the Court proclaiming the law to be applied in the future by other lesser courts, each justice is supplied with very bright and energetic law clerks. Their number has been by stages increased from one per justice to four.⁸⁸ This help is employed in different ways by different justices. But it has enabled some to go on automatic pilot, delegating much of their work to assistants.⁸⁹ And a similar development has occurred in the lower federal courts, where, along with the addition of magistrate judges and bankruptcy judges has come a substantial increase in the staff of law clerks and staff attorneys. There, too, the delegation of power and responsibility is much greater than it was in the time when Louis Brandeis could boast of the Court: "We do our own work."⁹⁰

Just as the Supreme Court focuses its energy on only a few of the matters on which its attention is requested, a similar concentration of effort has occurred in the lower federal courts. A half century ago, as the authors of the Judiciary Act of 1891

⁸⁷ 5 U.S. (1 Cranch) 137, 177-178 (1803).

⁸⁸ L. A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 Law and Social Inquiry 1227 (2000).

⁸⁹ David J. Garrow, *Mental Decrepitude on the U. S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995 (2000).

⁹⁰ Bernard Schwartz, *Decision* 48 (1996).

envisioned, every litigant in a federal appellate court was assured of the right to an oral hearing at which the three judges responsible for the decision would appear in person and engage in discourse with counsel to appraise critically the judgment of the court under review.⁹¹ And in due course, the judges hearing the case would publish a decision justifying their action and incidentally giving evidence of their personal attention to the parties' contentions. Those amenities have vanished in many cases.

It ought to be conceded that one reason for this abandonment of appellate procedure has been the duty imposed on federal courts to entertain many appeals presenting no serious issues. These include many routine appeals in criminal cases, or from denials of petitions by prisoners seeking belatedly to challenge their convictions whether in state or federal court, or civil claims of prisoners seeking to gain some improvement in the conditions of their incarceration. The abrupt procedure of the courts of appeals in such cases resembles that of the Supreme Court.

But similar change is also seen in the handling of many other cases in which lawyers have appealed from questionable fact findings or procedural rulings and are making arguments that speak to important rights and interests of the parties but that have little resonance in other cases. Such cases present the circuit judges and their law clerks no opportunity to expound the national law. Instead of providing hearings and decisions in such humdrum cases, circuit judges are prone, like justices, to concentrate their efforts on making "the law of the circuit." Time and energy are invested in writing learned opinions justifying a new legal principle. Those resources are also invested in en banc proceedings and in deciding when such proceedings ought to be deemed necessary to assure that all the judges in a circuit are making the same federal law.⁹² Oral arguments are often unavailable. Only opinions of the legislative sort are generally published. Less interesting cases are often left to law clerks or staff attorneys whose memoranda are simply endorsed by the circuit judges. Circuit judges have proposed that they be given discretion, similar to that conferred on the Supreme

⁹¹ The decline of the institution of oral argument was marked by Charles Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 Wash. U. L. Q. 257.

⁹² On the frailties of the "law of the circuit," see Paul D. Carrington, *The Obsolescence of the United States Court of Appeals*, 15 J. Law & Politics 515 (1999).

Court, to decline to hear on the merits those appeals deemed by them to be unworthy of close attention by important judges responsible for articulating the law of the circuit.⁹³ The argument made for that reform is that it would make the law conform to reality.

But it bears notice that the law of the circuit, in contrast to the law made by the Supreme Court, receives virtually no academic attention and only very occasional study by appellate advocates. The reason is that the law of the circuit is necessarily tentative, depending as it does on the absence of any later relevant utterance by the Supreme Court or by Congress or, indeed, the Executive Branch. And it is in some measure illusory: the empirical data suggest that even other judges sitting on the same circuit court of appeals, do not take the law of the circuit very seriously.⁹⁴ But like justices, circuit judges and their young law clerks are attracted to the making of authoritative utterances presuming to command the acceptance of their readers. If their readers are few, well the same can be said for academic publications. In this sense, the Federal Reporter containing the published opinions of the courts of appeals can be regarded as just a special sort of academic law review. Meanwhile, many litigants seeking the attention of United States circuit judges are receiving very little of it.

A similar transformation has occurred in the federal district courts. Trials at which adversaries present evidence have become rare events in federal courts.⁹⁵ Instead the district judges and their staffs engage in “managerial judging,”⁹⁶ a process by which they seek to facilitate settlements and avoid the necessity of making decisions that might burden the court of appeals with the need to review their judgments; or, if a decision must be made, to render it in the form of a summary judgment, ruling one

⁹³ E.g., Robert M. Parker & Ron Chapman, *Accepting Reality: The Time for Accepting Discretionary Review in the Courts of Appeals Has Arrived*, 50 S.M.U. L. Rev. 573 (1997); Public Hearing Before the Comm. on Structural Alternatives for the Federal Courts of Appeal, Apr. 24, 1998 (statement of Diarmuid F. O’Scainnlain, U.S. Circuit Judge for the Ninth Circuit. *But see* Richard S. Arnold, *The Future of the Federal Courts*, 60 Mo. L. Rev. 540 (1995).

⁹⁴ Mitu Gulati & C. M. A. McCauliff, *On Not Making Law*, 61-3 L. & Contemp. Probs. 157 (1998).

⁹⁵ *See generally* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Leg. Studies 459 (2004).

⁹⁶ 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 (2003); Judith Resnik, *Migrating, Morphing, and Vanishing: The Empirical and Normative Puzzles of Declining Trial Rates in Courts*, 1 J. Empirical Leg. Studies 783 (2004); Stephen C. Yeazell, *Getting What We Asked For, Getting What We Paid For, and Not Liking What We Got: The Vanishing Trial*, 1 J. Empirical Leg. Studies 943 (2004).

party's proffered evidence to be legally insufficient and hence unworthy of being heard,⁹⁷ a procedure that spares the trial judge the need to see and hear witnesses and enables him or her to elaborate the controlling law. And it eliminates the exposure of the judge to contact with actual litigants or jurors. That tendency to employ summary judgment was much encouraged by a trilogy of Supreme Court opinions published in 1986 that enlarged the application of the governing rule without modifying its text.⁹⁸ The tendency was further encouraged by a second trilogy of cases empowering judges, again without modifying the Federal Rule of Evidence governing such rulings, to exclude proffered expert testimony that they deemed to be inadequately based in science, a discipline of which few judges are masters. And the Court proclaimed such rulings to be subject to review in the courts of appeals only for "abuse of discretion."⁹⁹ So empowered, district judges are able to make pretrial dispositions of most of the cases on their docket. Why, Judge Patrick Higginbotham has asked, do we still call them trial judges?¹⁰⁰

His question might be extended—why do we call any of them judges or justices when they spend most of their time legislating? That would be unduly harsh. Federal judges and justices do still decide cases. But it does appear that the preoccupation of the justices with the few cases most suited to their attentions as lawmakers has trickled down to lower federal courts that are also increasingly selective in how they choose to invest their efforts. Implicit in the change is a disregard for the tasks of resolving issues of fact and hearing the claims and concerns of mere individual litigants.¹⁰¹

Meanwhile, as the justices' staffs have enlarged and their docket has fallen, the Supreme Court's calendar has steadily shrunk. The justices take leave for a month in

⁹⁷ Fed. R. Civ. P. 56. Stephen B. Burbank, *Vanishing Trials and Summary Judgment in Federal Civil Cases: Drifting Toward Bethlehem or Gomorrah?*, 1 J. Empirical Leg. Studies 597 (2004).

⁹⁸ The cases and reactions to them are recounted in Paul D. Carrington, *Exorcising the Bogy of Non-Transsubstantive Rules and Making Rules to Dispose of Manifestly Unfounded Assertions*, 137 U. Pa. L. Rev. 2067 (1989).

⁹⁹ The cases are briefly reviewed in Paul D. Carrington & Traci Jones, *Reluctant Experts*, 59-4 L. & Contemp. Probs. 101 (1997).

¹⁰⁰ *So Why Do We Call Them Trial Courts*, 55 S.M.U. L. Rev. 1405 (2002).

¹⁰¹ There may also be a growing problem of lower court judges seeking promotions to higher courts; Guido Calabresi suggests that this development is a threat to judicial independence. *The Current Subtle—and Not So Subtle—Rejection of an Independent Judiciary*, 4 U. Pa. J. Const. L. 637 (2002).

the winter and two months in the summer. During those times, they travel, write books,¹⁰² and engage in other diversions. At all times of the year, and wherever they go, they are feted. When one considers the life style of the justices, it is little wonder that they are disinclined to subside from their high office. The extent to which a similar improvement in life style has occurred for other federal judges is less visible.

TAFT'S COURTHOUSE ARCHITECTURE

Yet another source of judicial grandeur was provided by Chief Justice Taft's third legislative initiative, which was to seek and secure Congressional appropriation for the Supreme Court's building. It is easily the most elegant structure in Washington and reflects Taft's sense of the divinity of justices. It is a magnificent Greek temple. Justice Brandeis protested that it made his colleagues into "the nine beetles of the Temple of Karnak" and would cause them to have an inflated vision of themselves.¹⁰³ Does working as a celebrity in such an environment for decades affect the state of mind of justices? Infuse them with notions of grandeur and indispensability? Informed observers of the Court report that numerous justices serving on the Court in the twentieth century have undergone personal transformations while on the Court that have resulted in policy decisions in many of their most important cases quite different from those anticipated by those responsible for their appointments. It is on this point that concern for superannuation is most closely linked to the concern over hubris and excess that is the subject of this essay. Elementary common sense tells us that a person working for decades on end in such an environment is almost doomed to lose any modesty or sense of proportion he or she might still have retained at the time of confirmation.

Judith Resnik has expressed similar concerns about the wave of more recent federal courthouses in which subordinate federal judges sit and work. Many of them are

¹⁰² E.g. Chief Justice Rehnquist's books are *The Supreme Court: How It Was, How It Is* (1987); *How Grand Inquests: The Impeachments of Justice Samuel Case and President Andrew Johnson* (1992); *All the Laws But One: Civil Liberties in Wartime* (1998); *The Supreme Court* (2001); *Centennial Crisis: The Disputed Election of 1876* (2004).

¹⁰³ Pnina Lahav, *History in Journalism and Journalism in History: Anthony Lewis and the Watergate Crisis*, 29 J. S. Ct. Hist. 163 (2004).

designed around some of the institutional reforms crafted by the Judicial Conference involving staff enlargements and the diminished likelihood of trial.¹⁰⁴ Their work environment, too, does tend to shape their sense of what it is they are expected to do.

THE NORRIS-LAGUARDIA ACT OF 1932

A belated piece of Progressive legislation was enacted by Congress in 1932 on the eve of the coming of the New Deal. The law enacted was a signal example of a wise if belated Congressional response to overreaching by the federal judiciary. As noted, the Supreme Court began in the nineteenth century to invalidate state laws enacted to protect industrial workers. Contemporaneous with that Gilded Age development was the emergence of the strike-breaking injunction issued by lower federal courts. Congress did not by legislation authorize this practice. One legal theory justifying the practice that Circuit Judge Taft had been among the first to advance was that the courts had implied authority to prevent interference with interstate commerce. The import of Taft's opinion explaining his injunction against a rail strike was "that no interference with interstate commerce is ever justifiable."¹⁰⁵ Such an injunction was very effective in breaking strikes, in part because it was a quick response to a walkout, forcing workers back into their plants. So the strike was very likely to be broken at once even if it might later be concluded that a permanent injunction would be inappropriate. The Supreme Court was seldom involved in these matters, but it did in 1895 affirm the conviction of union leader Eugene Debs for his failure to get his members back to work, thereby defying a federal court order, notwithstanding the fact that the injunction lacked the sanction of any federal law.¹⁰⁶ By one count, federal judges imposed over 4,300 injunctions on unions between 1880 and 1930.¹⁰⁷

In 1932, after the death of Chief Justice Taft and his replacement by the Progressive Chief Justice Charles Evans Hughes, the American Federation of Labor at last secured legislative relief from this longstanding practice of federal courts. The Act

¹⁰⁴ *Supra* n.77 at 1031-1036.

¹⁰⁵ Felix Frankfurter & Nathan Greene, *The Labor Injunction* 6-7 (1930).

¹⁰⁶ *In re Debs*, 158 U.S. 564 (1895); *United States v. Debs*, 64 Fed. 724 (1894).

¹⁰⁷ William E. Forbath, *Law and the Shaping of the American Labor Movement* 192-98 (1991).

simply withdrew federal jurisdiction in cases in which employers sought injunctive relief.¹⁰⁸

COURT-PACKING

In 1937, not long after the Court moved into its temple, there came the Court-packing incident.¹⁰⁹ There was reason for the Roosevelt administration to fear that the Court might invalidate much of its legislative program. To prevent that, the President proposed to increase the size of the Court by six justices. This was precisely the remedy prescribed by Professor Tiedemann, the constitutionalist of the Gilded Age, and the remedy employed on a modest scale by President Lincoln. The proposal was widely supported by the law professors of the day. Thurman Arnold suggested that the Court should modify its invocation from “God save the Government of the United States and this Honorable Court” to “God save the United States or this Court,” because God could not possibly do both and should be given His choice.¹¹⁰ The organized bar was, however, most vocal in its opposition to the presidential scheme, confirming a connection in the minds of bar leaders between the reverence for the principle of judicial independence and the profession’s self-respect. The profession is in a sense a fraternity of which the judicial fraternity is a subset, and in that instance the American Bar Association marshaled a lot of public support for its brothers. That daunting force is likely one reason Congress has neglected its duty to govern the federal courts, for there is no rival part of its political constituency with as important a stake in issues of judicial administration as that of the organized bar.

The threat of the Court-packing plan appears to have enabled the Progressive Chief Justice, Charles Evans Hughes, to restrain his judicial brethren so that no enduring harm was done by the Court to the New Deal.¹¹¹ But the President did not

¹⁰⁸ 47 Stat. 70, 29 U. S. C. § 70.

¹⁰⁹ William E. Leuchtenburg, *The Supreme Court Reborn: The Constitutional Revolution in The Age of Roosevelt* 132-79 (1995); Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*, 11-26, 30-32 (1998).

¹¹⁰ *Letter to Mrs. C. P. Arnold, October 23, 1936* in *Voltaire and the Cowboy: The Letters of Thurman Arnold* 234 (Gene Gressley ed., 1977).

¹¹¹ *But see* Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* 11-26, 30-32(1998).

withdraw his proposal, and it was in due course defeated in Congress. The event was in time taken as a signal victory of the Court and the legal profession over the Executive Branch.

THE CIVIL RIGHTS MOVEMENT

The Court's sense of its grandeur was further enhanced by its experience with civil rights. The Court had earlier declined to enforce the Fifteenth Amendment guarantee of an equal right to vote¹¹² and it was very slow to enforce the Fourteenth Amendment for the benefit of those whom it was ratified to protect. But its 1954 decision in *Brown v. Board of Education*¹¹³ was a great moment in American law. It inspired a generation of young lawyers to think of constitutional law as a great instrument for social reform. While many billboards called for the impeachment of Chief Justice Earl Warren, those calls were widely rejected.¹¹⁴ But they led to the confrontation in Little Rock in 1956 when President Eisenhower, on the advice of Attorney General Brownell, sent in the 101st Airborne Division to secure the place of nine African American students in Central High School.¹¹⁵ Judges of lower rank were at times in physical danger; an airborne division was not required for their protection, but there was cause to celebrate their heroism.¹¹⁶

A consequence of the invasion of Little Rock was that justices began to think of themselves as commanding a great military force. In the Little Rock case, they were moved to declare that mere state officials were not entitled to read the Constitution for themselves to justify their protests, but were bound to accept whatever meaning of the constitutional text that they, the justices, might determine and that a failure of state officials to do so would be a violation of their oaths of office.¹¹⁷ The Court thus implied that state officials should be removed from office merely for their disagreement with the

¹¹² Cf. *Giles v. Harris*, 189 U. S. 475 (1903) (per Holmes. J.).

¹¹³ *Brown v. Bd. of Educ.*, 347 U. S. 495 (1954).

¹¹⁴ The story is best told by Richard Kluger, *Simple Justice* (1976).

¹¹⁵ Herbert Brownell & John Burke, *Advising Ike: The Memoirs of Herbert Brownell* 365-384 (1993). On the President's reluctance, see Stephen Ambrose, *Eisenhower* 409 (1984).

¹¹⁶ See Jack Bass, *Unlikely Heroes* (1983).

¹¹⁷ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). And see Justice Frankfurter concurring, at 24.

Court. The language of the opinion had equal application to the President, members of Congress and other federal government officials, who were thus cautioned against reading the Constitution for themselves. Indeed, as Philip Kurland asked,¹¹⁸ if an opinion of the Court is so immutable, how could the Court defy its own dictum in *Plessy v. Ferguson*?¹¹⁹

That the Court played an important role in the civil rights struggles that continued for two decades is not to be doubted. But neither should it be forgotten that many others played important roles in the cause.¹²⁰ While its decisions evoked rage, they also commanded vast popular support created by the efforts of many others over a much longer period of time. And the decisive role was played not by the Court but by Congress in enacting the Civil Rights Act of 1964 that enabled the Department of Justice to play a leading role in bringing force to bear where it was needed. The courts' legal opinions changed few minds.¹²¹

JUDICIAL DECREES TO CHANGE SOCIETY

By 1961, the Court, with self-confidence enlarged by the consequences of the several judiciary acts, its semi-divine surroundings, 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, it took on the job of making America more humane by proclaiming new constitutional rights. Such rights were not to be found in the explicit text of the Constitution, but in principles of natural law said to be implied in the text, discerned by judges, and then elaborated in their opinions of the court. Levinson has observed that many lawyers and legal scholars came increasingly during this time to think of the constitutional text in the way that the Catholic Church has traditionally thought of scripture, as a text truly understood only by

¹¹⁸ Philip Kurland, *Toward A Political Supreme Court*, 37 U. Chi. L. Rev. 19, 31 (1969).

¹¹⁹ 163 U. S. 537 (1896).

¹²⁰ E.g., David J. Garrow, *Bearing the Cross: Martin Luther King Jr. and the Southern Christian Leadership Conference* (1986).

¹²¹ Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (U. Chicago Press 1991); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); and see *Black, White and Brown: The Landmark School Desegregation Case in Retrospect* (Clare Cushman & Melvin I. Urofsky eds., 2004).

those professionally invested in its interpretation.¹²² Mere literates were told to keep their thoughts to themselves. This form of religiosity was also perhaps traceable to the English common law tradition that Lord Coke explained to King James, defining the law as a subject accessible only to initiates and quite beyond the understanding of a mere royal.¹²³ Chief Justice Taft expressed the thought thusly: “The people at the polls, no more than kings upon the throne are fit to pass upon questions involving the judicial interpretation of the law.”¹²⁴ And so a statue of Lord Coke stands in his Greek temple.

As noted, *The Federalist 78* defined the political role of the Court as one of slowing the process of legislation by providing a cautionary restraint on representative government. Ward Farnsworth invokes this notion as a justification for maintaining the extended terms of senior justices better to link the future to the past.¹²⁵ Justice Robert Jackson regretted that linkage, noting that it is usually “the check of a preceding generation on the present one,” and “nearly always the check of a rejected regime on the one in being.”¹²⁶

But in the decades since 1960, it has been the Court more often than Congress that has been out in front with its political agenda. With the encouragement of many lawyers and academics, it has become a primary source of major legislative change. It seemed at times that the Court was more effective than the Kennedy or Johnson administrations in the pursuit of similar political aims, despite the fact that the Court led by Justice Brennan was in form merely reacting to disputes brought to its attention by litigants.

On the other hand, it seems that few if any of the reforms effected through the application of constitutional law by the federal courts have worked as well as was hoped, or as they seemed to promise to those who approved them. The Court did, with the help of Congress and the Department of Justice, put an end to *de jure* segregation

¹²² Sanford Levinson, *Constitutional Faith* 9-53 (1988).

¹²³ A lively account of their encounter is Catherine Bowen, *The Lion and the Throne* 304-316 (1957).

¹²⁴ Quoted by Gerald Gunther, *Learned Hand: The Man and the Judge* 213 (1994).

¹²⁵ Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, ___ U. Ill. L. Rev. ___ (forthcoming 2005).

¹²⁶ Robert H. Jackson, *The Struggle for Judicial Supremacy* 315 (1941).

(no small achievement), but, alas, racial and ethnic isolation in public schools resulting from residential isolation and the departure of advantaged children from the public schools has resulted in much re-segregation that it seems fruitless to prohibit.¹²⁷

In the 1960s, the Court became increasingly receptive to petitions by persons convicted of crime and by prisoners. Over the years Court decisions established a large and complex regime of constitutional criminal procedure. Numerous new procedural requirements on criminal prosecutions were intended to protect defendants from investigative and prosecutorial abuse and to prevent the conviction of the innocent. The Court also embarked the lower federal courts on the mission of correcting the worst abuses of prisoners in state prisons.

It seems certain that there is less police brutality, and fewer convictions of the innocent, and less gruesome treatment of prisoners than there would have been had the Court remained as politically docile as it had been in its first century. Perhaps in this respect the justices have at least partially redeemed the promise uttered on the face of their temple: “Equal Justice Under Law.” There are, however, now two million persons serving sentences in American prisons (more perhaps than in all the rest of the world) and their sentences—negotiated by prosecutors and defense counsel among alternatives presented by ever more severe criminal codes—seem to result in ever longer prison terms. The rise of plea bargaining has now led to efforts of the Department of Justice and some legislators to try to intimidate with possible impeachment federal judges whose sentences are deemed short and thus a restraint on the bargaining power of prosecutors. Those efforts are a genuine threat to the judicial independence Article III is intended to protect, giving rise to concern properly expressed by the American Bar Association¹²⁸ and other professional organizations.

The Court chose to review capital cases and seemed for a time to have abolished capital punishment by imposing procedural requirements that had not been

¹²⁷ E.g. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (1991); Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (2004); Richard Kluger, *Simple Justice* (2d ed., 2004). And see *Black, White and Brown: The Landmark School Desegregation Case in Retrospect* (Clare Cushman & Melvin I. Urofsky eds., 2004).

¹²⁸ The American Bar Association formed a committee on the issue called “The ABA Standing Committee on Judicial Independence.” The website for this organization, with links to various publications, is <http://www.abanet.org/judind/home.html>.

met by state courts in reaching capital sentences. But this evoked bitter responses in many states.¹²⁹ New procedures were devised to meet the new requirements, and capital punishment may even have become more frequent as a result of the reforms that separated consideration of guilt from consideration of punishment.¹³⁰ It is, however, still a topic in litigation in the Supreme Court. The institution of capital punishment remains deeply rooted in the culture of many states.¹³¹

The Court also chose to review an array of cases presenting arguments for the application of the First Amendment by petitioners seeking to override state or local laws or practices as unlawful inhibitions of freedom of speech or religion.¹³² Many arguments for individual rights prevailed in the Court, but engendered resentment by those identifying themselves as a “moral majority.” In the school prayer cases, the Court may simply have mandated a revival of nineteenth century practices in most states, practices that strictly protected religious dissidents from forced conformity. But it was on softer ground less sustained by tradition when it suppressed laws against pornography.

And it was on very soft ground indeed when it invoked the First Amendment along with the Equal Protection Clause to restructure the American political system. “One man, one vote,” sounded nice, but created worse problems than it solved by disconnecting representatives from the geographical units with which their constituents identified and commissioning diverse partisan officials to adjust district boundaries not only to equalize their populations, but to fit their own partisan aims.¹³³ The Court then

¹²⁹ The story is well told in Lee Epstein & Joseph F. Kobylka, *The Supreme Court and Legal Change: Abortion and the Death Penalty* 34-136 (1992).

¹³⁰ Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 Harv. L. Rev. 355 (1995).

¹³¹ See generally, *The Killing State: Capital Punishment in Law, Politics, and Culture* (Austin Sarat ed., New York 1999), and especially Franklin E. Zimring, *The Executioner’s Dissonant Song: On Capital Punishment and American Legal Values*, *id.* at 137.

¹³² See Richard H. Hasen, *The Supreme Court and Election Law: Judging Equality from Baker v. Carr to Bush v. Gore* (2004).

¹³³ *Reynolds v. Sims*, 377 U.S. 533 (1964) was the case holding that a state constitution providing an upper house in the legislature seating representatives from each county was trumped by the Equal Protection Clause of the Fourteenth Amendment. On the current state of the issue, see Daniel Ortiz, *Got Theory?*, 153 U. Pa. L. Rev. 459 (2004); Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*,

went on to constitutionalize the right of those with wealth to use their money to dominate political discourse in ways facilitated by the advent of television and the spot commercial.¹³⁴ “Money is speech?” And then to strip “public figures” such as candidates of effective protection against defamatory advertising,¹³⁵ even in some circumstances anonymous defamation.¹³⁶ These law reforms were wrought by justices, seeking to act—I do not doubt—entirely in the public interest, but as (now Judge) Michael McConnell concluded:

The landscape of American politics today is not an encouraging sight. All too many Americans have come to the conclusion that elections do not matter. Incumbency retention levels rival the most undemocratic regimes of the world. Partisanship and attack politics are the name of the game. Racial appeals abound. 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.¹³⁷

It was a fitting confirmation of that reality when a majority of the Court in 2000 decided the presidential election by 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 colleagues.¹³⁸ It could not be viewed as incidental that the five prevailing justices picked the presidential candidate more likely to select future justices who would share their views and help make more law meeting with the approval of the five.

Then the Court, having restructured the schools, the prisons, and most other public institutions brought to its attention, commenced to try to tell the people not only how to govern themselves but what to believe about grave moral issues of religious import to many citizens. To decide the constitutionality of the Texas law prohibiting

153 U. Pa. L. Rev. 503 (2004); Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line: Judicial Review of Political Gerrymanders*, 153 U. Pa. L. Rev. 541 (2004).

¹³⁴ *Buckley v. Valeo*, 424 U.S. 1 (1976) was the premier decision revisited in *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003); *see generally* Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004).

¹³⁵ *New York Times Co. v. Sullivan*; 376 U.S. 254 (1964).

¹³⁶ *Cf. McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

¹³⁷ Michael McConnell, *Law and the Political Process*, 24 Harv. J. L. & Pub. Policy 103, 117 (2000).

¹³⁸ For contemporaneous comment by the present author, see *The Right to Self Government after Bush v. Gore*, <<http://www.law.duke.edu/pub/selfgov>> (with H. Jefferson Powell, December 29, 2001).

abortions, the Court consulted medical experts for help in codifying principles of medical law it discerned beneath the text of the Constitution.¹³⁹ With its opinion legislating in detail the woman's right to choose, the Court not only presumed to leave few choices to be made by elected representatives, but it treated the religious faith of many citizens as undeserving of notice. At the time of the decision, there was a clearly discernible movement among state legislatures to enlarge the freedom of a woman to make the choice for herself. Some states were even appropriating money to fund free abortions in the hope that this would diminish the need for welfare funds.

But then came the Right to Life Movement.¹⁴⁰ It seems clear that the movement gained much energy from the reaction of adherents of religious faiths. These were people who received the Court's opinion on abortion rights as an evil manifestation of Godlessness and an insult to their religious faith. The intensity of their reaction seems not to have been diminished by the Court's later reconsideration of the issue in an opinion that observed its prior decision was supported by "the thoughtful part of the nation."¹⁴¹ At least partly as a consequence of the Court's political misjudgment in making elaborate law repudiating their faith, and the great difficulty to be encountered in any effort to overrule it by constitutional amendment, religious fundamentalists have become a major force in our national, state, and local politics. And it may now be harder for a woman to get an abortion in some communities than it was before the Court declared her right to do so.

And the reaction is directed at the selection and confirmation of justices and other federal judges, thereby diminishing public interest and awareness of the politics of foreign relations and the national economy that are vital issues exclusively of concern to the federal government and its elected officers. It is reasonable to believe that the Court's decision on the right to abortion controlled the outcome of presidential elections

¹³⁹ Roe v. Wade, 410 U. S. 113 (1973).

¹⁴⁰ To be sure, there was at the time of the decision religiously-based opposition to the liberalization of state laws on abortion. For an account, see Mark Kozlowski, *The Myth of the Imperial Judiciary: Why the Right is Wrong about the Courts* 151-164 (2003).

¹⁴¹ Planned Parenthood v. Casey, 505 U. S. 833, 864 (1992).

in 1980, 1988, and 2000, and has had a political impact even larger than those data might suggest.¹⁴²

The Court was more cautious in telling people what to believe about homosexuality.¹⁴³ Attitudes and values bearing on that subject have changed across the land over the last three decades or so, although more in some areas than others. But the Court's more recent decision to take on the issue to the extent of invalidating criminal laws prohibiting homosexual acts¹⁴⁴ did serve further to excite the hostility of religious fundamentalists. It helped provide the occasion for placing on the ballot in twenty-five states referenda asking voters to express a view on the meaning of the word "marriage."¹⁴⁵ Because that device brought to the polls many citizens who would otherwise not have voted, it very likely determined the outcome of the presidential election of 2004. Whatever the word "marriage" may ultimately be allowed to mean, there remains an apparent tendency of the American public to become increasingly tolerant of sexual activities that previous generations proscribed. But it is unlikely that the pace of change on such issues will be significantly accelerated by any words uttered in the form of an opinion of the Court. People may observe laws with which they disagree, but few will change their views about sexual behavior on the advice of judges and lawyers. They may listen to those whom they choose, but seldom to those who seek to impose their opinions on moral questions even when they invoke constitutional law embodied in judicial precedents.

In delving into such matters, the Court has quite possibly caused poor Chief Justice Taft to roll in his grave in distress at the substance of what he wrought. For myself, I have no problems with the individual rights the Court has sought to create; if we were senators together in the same state legislature, I would vote with William Brennan on those issues almost every time. But the Court has thus contributed to a

¹⁴² See generally William G. Ross, *The Role of Judicial Issues in Presidential Campaigns*, 42 Santa Clara L. Rev. 391 (2002).

¹⁴³ For a salute to their caution see Paul D. Carrington, *A Senate of Five*, 23 Geo. L. Rev. 859 (1989).

¹⁴⁴ *Lawrence v. Texas*, 539 U. S. 558 (2003).

¹⁴⁵ Kavan Peterson, *50-State Rundown on Gay Marriage Laws*, Stateline.org <<http://www.nationalcoalition.org/legal/50staterundown.html>> (July 8, 2004, last visited July 28 2005). Twenty-five states proposed constitutional amendments.

dangerous sense of alienation of many citizens sharing traditional moral and religious views on pornography, abortion, capital punishment, and gay rights that they are powerless to express by ordinary democratic political discourse, perhaps especially not given the ugly political system that the Court has crafted to the despair of Judge McConnell and this author.¹⁴⁶

JUDICIAL LEGISLATION TO ACCOMMODATE JUDGES

The Court's ascendance over Congress and state legislatures is not restricted to its interpretations of the Constitution. As Frederick Grimké long ago explained, bicameral legislatures, including Congress often have difficulty in agreeing on legislative texts that resolve even the most obvious conflicts certain to arise in their enforcement. And they are inevitably slow to correct oversights or misunderstandings manifested years after their enactments. These realities often leave much room for elaboration in opinions of courts that may be transformative.

But acts of Congress did not become frequent subjects of judicial interpretation until the advent of a troubled national economy inspired federal legislation. And it was not until the New Deal that Congress presented the Court with a vast array of laws requiring judicial elaboration and illumination. Often thereafter the Court would resort to committee reports and even speeches of legislators to establish the intent and meaning of federal laws.¹⁴⁷ But it became apparent that such material was frequently available on all sides of a question; it has been said that judges reading legislative history are standing on a balcony and looking into a crowd in search of a friendly face.

As the Court and the lower federal courts became more heavily engaged in the elevated and gratifying task of writing opinions interpreting statutes, they also sometimes again manifested the tendency observed by public choice theorists.¹⁴⁸ Their decisions, although written with utmost integrity, tended to express policies favoring the interests of judges in their collective status and power. Sometimes judge-made policies

¹⁴⁶ *Supra* n. 137.

¹⁴⁷ The development of the techniques of using legislative history is recounted in William N. Eskridge, Philip P. Frickey & Elizabeth Garrett, *Legislation: Statutes and the Creation of Public Policy* at 733-832 (2d ed., 1995).

¹⁴⁸ On "public choice", see *supra* n. 66.

even defeated the policies expressed in Congressional legislation. And sometimes Congress took no notice.

I offer three examples. The first pertains to the size of juries in civil cases in the federal courts. By the year 1300, it was settled that a common law jury seated twelve citizens. That was a good number—sufficient to distribute responsibility for verdicts across a segment of the public but small enough to provide jurors with a sense of personal responsibility. Many changes were effected in the conduct of jury trials over six or seven centuries, but the number twelve did not change. When the Seventh Amendment provided that the right to trial by jury “in suits at common law” “shall be preserved,” that was taken to mean that a citizen contesting a case in a federal court had a right to demand that issues of fact be decided by twelve citizens drawn from the community. Indeed, if anyone questioned the number twelve as implicit in the text of the Amendment, there seems to be no record of the debate.

And in 1968 Congress enacted legislation governing the selection of the jurors to assure that the twelve would fairly reflect the racial and ethnic composition of the district from which it was selected.¹⁴⁹ The Congressional assumption of the number twelve was embodied in the rules limiting the number of objections a party could make to the seating of individual jurors. That number is three. That number allows a party to exclude from a jury individuals whom that party mistrusts for whatever reason. But it is not large enough to allow a party often to be able to influence materially the race, class, or ethnicity of those who will decide his case. The same assumption of the number twelve was explicit in Rule 48 of the Federal Rules of Civil Procedure authorizing a verdict by a number less than twelve but with consent of the parties.¹⁵⁰

Soon after the statute was enacted, some federal judges decided that trials would be easier to conduct if juries were reduced by half. A district judge in Montana simply announced a local rule that in his court juries would be six. Never mind seven centuries of tradition, or the assumptions implicit in the text of the Seventh Amendment and the law enacted by Congress, or explicit in the text of the Federal Rules of Civil

¹⁴⁹ 28 U. S. C. A. §§1861-1871.

¹⁵⁰ Fed. R. Civ. P. 48.

Procedure. And the Supreme Court upheld the local rule, allowing it to spread to most other district courts.¹⁵¹ Justice Thurgood Marshall in dissent accurately assessed the decision as “not some minor tinkering with the role of the civil jury, but with its wholesale abolition and replacement with a different institution which functions differently, produces different results, and was wholly unknown to the Framers of the Seventh Amendment.”¹⁵²

Justice Marshall’s assessment was soon confirmed by experience. Smaller juries are much more likely to be exotic in their demographic composition, in part because of random effect and in part because lawyers have much greater influence over the selection. Smaller juries are much more likely to be dominated by a single strong-minded juror. For these reasons, the verdicts of smaller juries are materially harder to predict. This is likely to be one reason that civil trials are vanishing from federal courts—prudent parties are risk averse. Very few kind words have been uttered in defense of the six-person jury by lawyers or scholars, but Congress has left the matter to the Judicial Conference. In 1995, the Judicial Conference Committee on the Civil Rules proposed a rule amendment returning the jury to twelve.¹⁵³ Although supported by a careful review of the data demonstrating the improvidence of the change, the proposal was summarily rejected by the Judicial Conference. Congress has never considered the proper size of a jury.

A second example of free-wheeling self-dealing by the Supreme Court is its 1991 holding that a federal district judge has “inherent power” to impose the costs borne by an adversary on a litigant whose lawyer was said to act “in bad faith.”¹⁵⁴ What made this decision remarkable was the existence of a federal law imposing consequences on “vexatious litigants”¹⁵⁵ and of an elaborate provision in the Federal Rules of Civil

¹⁵¹ *Colegrove v. Battin*, 413 U.S. 149, 174 (1973); for a review of comments on the opinion, see Paul D. Carrington, *The Civil Jury at 199: Reflections on a Forthcoming Bicentennial*, 1990 U. Chi. L. F. 1, 33.

¹⁵² *Colegrove* at 166-167. See also Carrington *supra* n. 150.

¹⁵³ In 1991 Federal Rule 48 was amended to state a court “shall seat a jury of not fewer than six and not more than twelve.” See Amendments to Federal Rules of Civil Procedure, 134 F.R.D. 525, 545 (1991).

¹⁵⁴ *Chambers v. Nasco*, 501 U. S. 32 (1991). Abuse of process is, of course, a common law tort but the claim does not arise until a judgment favorable to the victim has been entered and a separate suit filed.

¹⁵⁵ 28 U. S. C. §1927.

Procedure authorizing judges to impose cost sanctions on lawyers who are guilty of presenting groundless claims or defenses resulting in costs to an adversary.¹⁵⁶ Neither the statute nor the rule of court authorized the judge to do what he did in the case before the Court. Well, never mind the legal texts; if it seems right, the judge should do it even without explicit authority in the law. Again, Congress has taken no notice but has left the matter entirely to the judges.

My third and most consequential example is the violence done by the Supreme Court to the Federal Arbitration Act of 1925.¹⁵⁷ The Act was written to apply to contracts between businessmen engaged in interstate transactions and validates clauses providing for private arbitration of future disputes between the parties.¹⁵⁸ If businessmen so agree, their contract rights can be fairly determined by an arbitrator because, indeed, their contract rights are whatever the arbitrator decides that they are.

In the American tradition, arbitrators are not bound by the law but can do whatever seems to them right and fair.¹⁵⁹ They may choose to hear a witness or not, or to insist on seeing documentary evidence or not. They have no duty to explain their awards, and the awards can be set aside only if the arbitrator engages in fraud or corruption, or possibly if he should engage in “manifest disregard of the law.” But if parties to contracts choose to define the rights they create by their agreement as those to be fashioned by an arbitrator, who can complain?

For half a century, the Supreme Court and lower federal courts interpreted the 1925 Act in keeping with its purpose.¹⁶⁰ They did not permit the use of arbitration clauses to prevent citizens from enforcing their statutory rights in law courts. Until the Supreme Court began to change its mind in the 1970s. This was a time when the federal courts were concerned about rising caseloads and the prospect of a sizeable

¹⁵⁶ Fed. R. Civ. P. 11.

¹⁵⁷ 43 Stat. 883, now codified as 9 U. S.C. § 1 et seq.

¹⁵⁸ Ian R. MacNeil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 15-133 (1992).

¹⁵⁹ Ian R. MacNeil, Richard E. Speidel & Thomas J. Syipanowich, *Federal Arbitration Law: Agreements, Awards and Remedies under the Federal Arbitration Act §16.3.2.2* (1999).

¹⁶⁰ For comment on Supreme Court interpretations of the Act, see Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 Sup. Ct. Rev. 331 (1997); Paul D. Carrington, *Self-Deregulation: The “National Policy” of the Supreme Court*, 3 Nevada L. Rev. 259 (2002).

increase in the number of federal district judges. And alternative methods of dispute resolution were coming into fashion as a means perhaps of making civil litigation more civil. It was obvious that a more robust arbitration law would get a lot of troublesome cases presenting mere issues of fact off federal dockets and reduce the need for more judges. Suddenly the Supreme Court reversed itself and declared that arbitration is just another and less costly way to enforce a legal right. And if a party agreed to arbitrate a future dispute, even in a contract of adhesion, it should not matter if his claim was not based on the contract containing the arbitration agreement but on federal statute enacted to protect the party against whom the arbitration clause is invoked. Nor even state legislation.¹⁶¹ In other words, no state can assure its citizens of access to its courts to enforce rights it has established for their protection from overbearing conduct by persons or corporations who are in a position to draw them into an arbitration agreement.

In explaining how this happened, the Court has sometimes expressed the unfounded assumption that arbitrators will enforce legal rights and will forego their historic empowerment to do justice as they see fit. In what Alan Rau has described as a quixotic footnote,¹⁶² the Court suggested that arbitral awards in statutory cases might be subject to judicial review for errors of law. The Court's reassurance that arbitrators enforce legal rights even if they are not seen to do so has been revealed for the illusion that it was, and is, by recent holdings of lower federal courts that parties may not agree that an arbitral award rendered pursuant to their contract shall be subject to judicial review for a mere error of law.¹⁶³ To allow parties to create jurisdiction to review awards would be an unwelcome increase in the demand for judicial services. The Court has not been willing seriously to address the issue.

Law made in this free spirit by the Supreme Court now seriously impairs the enforcement of many public laws enacted by legislatures with the expectation that they

¹⁶¹ *Southland Corp. v. Keating*, 465 U.S. 1, 21 (1984).

¹⁶² *The Culture of American Arbitration and the Lessons of ADR*, 40 *Tex. Intl. L.J.* 449, 526 (2005).

¹⁶³ E.g., *Kyocera Corp. v. Prudential-Bache Trade Services Inc.* 341 F 3d 987 (9th cir en banc 2003); see Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 *U. Kan. L. Rev.* 429 (2004).

would be invoked by private parties. Many state courts have been resistant to this radical judicial legislation,¹⁶⁴ and many cases and disputes over the matter continue to rage. Much of the legislation enacted by Congress and by state legislatures to protect consumers and other vulnerable persons may now be entrusted to enforcement in private forums that may or may not be bound by the law. That has been the fate of federal antitrust law, the laws protecting investors, and even the minimum wage law. Yes, even a worker seeking his right to receive the Congressionally-prescribed minimum wage may be required to ask an arbitrator not bound by the law to give it to him.¹⁶⁵ Yet Congress has barely noticed.

With one exception. In 2002, I was retained by the National Association of Automobile Dealers to explain to Congress why dealers should be exempt from the enforcement of arbitration clauses in contracts they make with manufacturers. Congress had long ago enacted the Automobile Dealers' Day in Court Act to protect dealers from overbearing conduct by manufacturers; it assured them of the right to a trial by jury on the question of whether a manufacturer had dealt with them "in good faith."¹⁶⁶ Similar legislation was enacted in nearly all states. When cases were brought under those laws, the manufacturers usually won, but the laws had a benign effect on the way the manufacturers treated their dealers. The dealers recognized that their claims of right under state or federal laws would be substantially weakened if they were forced to present them to an arbitrator who would not be bound by the law, who would not be obliged fully to investigate factual disputes, whose jurisdiction depended on the franchise agreement, and who might be more considerate of the interests of the manufacturer who would be far more likely to have another occasion for employing them. Congress was persuaded by their concerns and a law was enacted to provide

¹⁶⁴ E.g., *Harold Allen's Mobile Home Factory Outlet, Inc. v. Butler*, 825 S.2d 779 (Ala. 2002). *Cash in a Flash Advance of Ark., L. L. C. v. Spencer*, 348 Ark. 459, 74 S.W.3d 600 (Ark. 2002); *Abramson v. Juniper Networks Inc.*, 9 Cal. Rptr. 3d 422 (Cal App. 2004); *Flyer Printing Co. v. Hill* 805 S.2d 829 (Fla. App. 2001); *Cheek v. United Healthcare of the Mid-Atlantic Inc.* 378 Md. 139 (Md. Ct. App. 2003); *State v. Stancil*, 559 S.E.2d 789 (N.C. 2002); *State ex rel. Dunlap v. Berger*. 211 W. Va. 549, 567 S.E.2d 265 (2002). *Cf. Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 6 P.3d 669 (2000).

¹⁶⁵ E.g. *Carter v. Countrywide Credit Industries*, 362 F.3d 294 (5th Cir. 2004).

¹⁶⁶ 70 Stat. 1125, 15 U.S.C. §§ 1221 et seq.

that automobile dealers are no longer forced to arbitrate future disputes with automobile manufacturers.¹⁶⁷

How did this happen? While small in comparison with manufacturers, automobile dealers are sizeable firms and important to the communities in which they are located. They have political clout, and Congress heard their cries for help. But we said nothing to Congress to imply that those who buy automobiles should not be bound by their arbitration agreements with their dealers. Other franchisees selling other goods and claiming rights under state or federal laws enacted for their protection may be able to enforce those laws only in an arbitral forum that is free to do whatever it thinks just. And consumers, workers, patients, investors, borrowers, and diverse others who may think they are in some way protected by state or federal statutes may also find that they are forced to seek enforcement of their rights in tribunals having no accountability for their fidelity to the law. Farmers who grow chickens for processing firms are now seeking in Congress legislative relief similar to that accorded the automobile dealers. What are their chances?

The conclusion I draw from these examples is that the Supreme Court sometimes unwarily takes leave of statutory texts in order to shape the law to the tastes and convenience of the judiciary of which it is a part. As the renovation of arbitration law attests, Justices are so far removed from the concerns of citizens having limited means and capacities that they can be blind to the consequences of the law they make. And Congress and the Department of Justice may take no notice, whether the result is a serious impairment of the enforcement of federal laws or a gratuitous trespass on the sovereignty of a state, or merely a misguided deprivation of ancient civil rights.

On those occasions, rare in the last century, when Congress has been moved to enact laws bearing on judicial administration, it has been moved to do so by a political interest group with a specific substantive agenda, such as “tort reform” or the suppression of securities fraud claims.¹⁶⁸ It is fair to say that its ventures into procedural reform have seldom been effective in advancing the interests they were

¹⁶⁷ Act of November 2, 2002, Pub. L. No. 107-273, 116 Stat. 1758, 11,028 (to be codified at 15 U.S.C. 1226).

¹⁶⁸ The Private Securities Litigation Act of 1995.

intended to advance, and have often served to elevate the costs imposed on all sorts of litigants. Indeed, it seems at times that Congress has also lost its bearing in distinguishing its role from that of the courts and may be less interested in enacting wise legislation than in deciding contested cases in accordance with its own lights. Its recent effort to overrule the Florida courts' decision that Ms. Schiavo should be allowed to die is a spectacular recent example.¹⁶⁹ One hesitates to ask such a Congress to think about matters of constitutional importance. And is it not possible that such antics by Congressmen are in some measure a result of the dreadful reforms imposed by the Court on our election laws?

SUGGESTIONS FOR LEGISLATION

Whatever Congress's own troubles, its attention to issues of judicial administration is overdue. Amending the Constitution is no answer to the need to re-establish the duty of Congress to govern the judiciary. The suggestion has recently been heard in Congress that the federal judiciary needs an inspector general to alert Congress of their occasional failings.¹⁷⁰ Perhaps that is a useful idea. But such an officer would lack the influence or resources to address any of the issues presented in this essay. What then can be done? Structural changes are not only very difficult to achieve because of the resistance of the organized legal profession and the incomprehension of the public but also carry risks of unforeseen adverse secondary consequences. There are, however, proposals worthy of serious consideration by the judiciary committees of Congress. Their mere discussion might have a benign transformative effect by causing justices and judges such as those sitting on committees of the Judicial Conference to be more conscious of their human tendencies to be too much preoccupied with their own status and power. I suggest eight examples of questions to which Congress might usefully attend.

¹⁶⁹ The unusual matter of Theresa Schiavo is recorded in Abby Goodnough, *The Schiavo Case: The Overview: Schiavo Dies, Ending Bitter Case over Feeding Tube*, N.Y. Times A1 (Apr 1, 2005).

¹⁷⁰ Maurice Possley, *Lawmaker Prods Court, Raises Brows*, The Chicago Tribune (July 10, 2005) <<http://www.november.org/Blakely/RaisedBrows7-10-05.html>>.

The first, of course, is the problem of superannuation and the possible enactment of a law imposing term limits on the Justices. Or as Roger Cramton and I have proposed, one providing biennial appointments, with reduced duties for those most senior in service.¹⁷¹ That would be a modest change posing no serious threat of unwelcome secondary effects. It is one that most people who are not lawyers can readily understand and appreciate. Reasonable minds can differ about the details of the scheme, but any flaws in the scheme would be subject to change if need be. And by addressing the problem directly, Congress will have signaled that it is alive to its responsibility to check and balance the Court.

This proposal should be elevated above all others because it is politically viable. One need not be a political sophisticate, or know, or even care very much about law and courts to recognize the blatant improvidence of allowing persons afflicted with normal human failings to conduct public business in a temple for decade after decade. Reasonable term limits for justices is a reform likely to be opposed in Congress by lawyer-romantics, but not by many others who seriously consider the problem.

The other issues Congress should consider are more complex. A second item on its agenda might be to give consideration to the question of how the cases going to the highest national court should be selected. It would do much to correct the false grandeur of the Court if the judges selecting the cases to be decided were not precisely the ones making the decisions on the merits. For example, I would favor a law combining the term limits proposal presented in the Appendix with a change in the certiorari jurisdiction. The senior justices, in addition to sitting on rulemaking committees and lower courts, might participate in certiorari decisions or might even be given exclusive authority to rule on certiorari petitions. If need be, they might be aided by circuit judges selected by seniority and serving short terms as acting justices on the certiorari panel. Or the Court could be gradually enlarged to a number of justices sufficient to achieve that result. Those selecting the cases would then not be the justices who would decide them. And Congress could consider specifying a number of cases that the senior panel would be expected to certify to the junior panel for decision.

¹⁷¹ Our proposal is in the Appendix to this symposium at p. ???.

This would re-establish the role of the deciding justices as judges who decide cases that is their job to decide, and not lawmakers who choose what laws to proclaim.

Third, repeatedly over the last forty years, proposals have been advanced for the establishment of an additional national court that would provide oversight of the courts of appeals, resolving conflicts in their decisions, and enabling them to concentrate on their intended role of providing visibility to litigants and close oversight for the district courts. Alternative schemes have proposed a unification of the courts of appeals to provide rotating panels with specific substantive agendas and nationwide jurisdiction. For example, the Federal Circuit devoted to intellectual property law might be replicated, but with modifications to prevent narrow specialization by the judges.¹⁷² Although such ideas have been advanced by distinguished committees,¹⁷³ including one led by Senator Roman Hruska and one led by Justice Byron White, none of these schemes have received serious attention in Congress. If a second national court were established to oversee the courts of appeals, and also as proposed the justices selecting cases for decision were separated from those deciding the cases, those justices selecting the cases could be empowered with the alternative of sending appropriate cases raising issues of federal statutory law to the new court. This would be a role for which experienced senior justices would be especially well suited.

Fourth, consideration might also be given to re-establishing the rights of litigants to have their appeals from district court decisions heard in person. Given the availability of inexpensive videoconferencing, there is no good reason why a panel of judges deciding an appeal from the judgment of a federal court should not be required as a

¹⁷² On the origins of that institution, see *The United States Court of Appeals for the Federal Circuit—A History 1982–1990* (Marion T. Bennett ed., 1991).

¹⁷³ I directed a study by the American Bar Foundation that was advised by ABA Presidents Bernard Segal and Leon Jaworski, by Circuit Judges Carl McGowan and Thurgood Marshall, and by other eminent persons. *Accommodating the Workload of the United States Courts of Appeals* (1968). A committee appointed by Chief Justice Burger, led by Paul Freund and Alex Bickel, two icons of the time came to similar conclusions; *The Report of the Study Group on the Caseload of the Supreme Court*, 57 F. R. D. 573 (1972). Next came the *Commission on Revision of the Federal Court Appeals System, Structure and Internal Procedures: Recommendations for Change*, 67 F. R. D. 195 (1975); that commission was chaired by Senator Roman Hruska (R. Neb.). Then came the 1995 *Report of the Long Range Planning Committee of the Judicial Conference of the United States*, chaired by Hon. Edward Becker, Chief Judge of the Third Circuit, and reported at <http://www.uscourts.gov.lrp.CVRPGTOC.com>. and finally the 1998 *Report of the Commission on Structural Alternatives for the Federal Courts of Appeals* chaired by Justice. Byron R. White. Every one of these reports has advised Congress to make major structural changes.

form of appellate due process at least to appear on their computer screens to engage in dialogue with counsel. Why should they not be expected to provide at least an oral response to arguments as in the traditional common law proceeding?¹⁷⁴ The rediscovery of the oral opinion on the law rendered by individual judges might result in major economies in the work of the intermediate courts, and serve to give litigants direct, observable evidence that the judges themselves decided their cases.

Fifth, Congress might reconsider the needs of the Supreme Court and courts of appeals for staff support. Scot Powe has suggested that a reduction of law clerks in the chambers of justices from four to two or even one might providentially encourage earlier retirements. A similar reduction in staff for the courts of appeals might serve to reduce the preoccupation of the circuit judges with their writing of the law of the circuit. For all appellate judges, a reduction of staff might be expected to increase the likelihood that the judges would learn less from, and react less to, their staffs and would be more attentive to the legal briefs and arguments of colleagues and counsel. And consideration might be given to elevating all magistrate judges and bankruptcy judges to full rank; they could then enter judgments in all cases and be made directly accountable to the courts of appeals.

Sixth, related consideration might be given to repealing the authority of the courts of appeals to sit en banc. This would also serve to refocus the work of circuit judges on deciding cases in the common law tradition on their factual and legal merits and diminish the attraction of making law in the form of opinions of the court. Given the illusory and tentative nature of the law of the circuit, the loss could not be expected to have grave consequences. This reform would fit neatly with the creation of a second national court. Also, if en banc decisions were eliminated, the number of circuit judges could be increased more readily to supply the judicial manpower needed to staff the appellate due process of oral hearings and explained decisions.

Seventh, similar consideration might be given to the reestablishment of the trial as a means of resolving disputes. Congress should think seriously about whether civil juries should number twelve. Relevant matters not raised in the previous discussion

¹⁷⁴ For my speculation on other uses of technology to transform civil procedure, see Paul D. Carrington, *Virtual Civil Litigation: A Visit to John Bunyan's Celestial City*, 98 Colum. L. Rev. 501 (1998).

might include expanding the availability and use of videoconferences in trial and in pretrial discovery of evidence or the possible use of more court-appointed expert witnesses to serve as consultants to the trial courts on technical factual issues, of the sort familiar in the courts of virtually all other nations, in lieu of the adversary expert witnesses who are seen in American courts, who occupy much time and attention and magnify costs.

Eighth, Congress should surely consider whether parties invoking statutory rights, even those conferred by state legislatures, can or should be required to test their claims and defenses in private arbitral forums that are not bound by the law. If need really must be, consideration might be given to adopting the system employed in California state courts that enables private parties to “rent a judge” whom they choose,¹⁷⁵ but whose judgment is subject to possible review in the state appellate court for its adherence to the rules of procedure and its fidelity to the law.

CONCLUSION

All eight of these reforms could be enacted without threat to the rightly cherished independence of the judiciary. If all were done at once, an approach I do not recommend, there would still be no offense to Article III. And there are surely many other ideas afloat that are worthy of consideration as means of redirecting the attention of the institutions of the federal judiciary to the work we hire our judges to do. That is to resolve our disputes in a manner that commands our respect and acceptance because it is apparent to all that eminent independent judges have paid close attention to our evidence and our arguments and have decided our cases on the law, as best that can be discerned from the sometimes fuzzy utterances of Congress or the generalities of the Constitution. Serious consideration short of enactment of these reforms might alone serve to correct some of the flaws they aim to redress. Our federal courts, including the Supreme Court, might regain a sense of their own mortality and fallibility and appreciate the wisdom of deference to the law, to other branches of government, and to the people they serve, a deference that sadly declined through much of the twentieth century.

¹⁷⁵ California Rules of Court, Rule 244.

