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“Uncle Sam Modernizes His Justice”: Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation

Judith Resnik
Yale Law School

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"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation

JUDITH RESNIK*

The celebration of the 200th birthday of the courts of the District of Columbia offers an opportunity to focus on the diversification and proliferation of the federal institutions of judging. During the twentieth century, the federal courts and Congress worked together to create a host of statutory federal judges, including magistrate and bankruptcy judges who serve through appointments from Article III judges, as well as administrative law judges and hearing officers working within agencies. In addition to inventing this array of judicial officers, the federal judiciary also redefined the work of judging to include efforts to settle cases and to influence congressional deployment and allocation of jurisdiction.

The innovations have many sources. One is doctrinal. The authority of statutory judges stems from a rereading of Article III to license a great deal of federal adjudication without Article III's structural protections. As litigants challenged the devolution of judicial power, their claims became an occasion to explore the import of judicial independence. In general, the life-tenured judiciary permitted (and sometimes welcomed) congressional generation of many adjudicative forms, seen not to pose a threat to "Article III values."

The doctrine in turn was crafted in the face of pressures from an expanding federal docket that required some form of change. The particular programs chosen were based in part on perceptions of the lessening utility of adjudicatory methods, in part on a sense of varying levels of import of cases within the federal docket, and in part on incentives created by legal rules and practices. For example, magistrate judgeships were particularly useful for the Article III judiciary, which gained the power to create slots without the need to obtain specific lines from Congress. As of 2000, the number of non-life-tenured judgeships within Article III was roughly equal to the number of life-tenured trial judgeships. Moreover, in some twenty federal districts, the number of magistrate judges equaled or exceeded that of district judges.

What are the effects of such innovations on the constitutional commitment to, and the prudential belief in, judicial independence? In addition to focusing on the import of contemporary doctrine, Professor Resnik examines the relatively new practices of the appointment and reappointment of judges by judges. After showing the degree to which the life-tenured judiciary is dependent on, and its fortunes are linked with, its non-life-tenured siblings, Professor Resnik argues that Article III judges ought to learn to relax their own status privileges and attempt, self-consciously, to blur distinctions among kinds of judges so as to broaden the embrace of Article III. "Article III values" are, in her view, at stake, and their preservation requires life-tenured judges to attempt to infuse these values into all aspects of federal judging.

* Arthur Liman Professor of Law, Yale Law School. © All rights reserved. My thanks to Vicki Jackson, Denny Curtis, Sam Bufford, Edward Godfrey, John Langbein, Brenda Murray, Richard Revesz, Fred Schauer, Nancy Stanley, Steve Subrin, Elizabeth Warren, Ronnie Yoder, Ann Young, Rya Zobel, and to Cecily Baskir, Deborah Martinez, Anna Rich, Sarah Russell, Kate Andrias, Elizabeth Brundige, Olivia Choe, Daniel Levin, Tracey Parr, and Julie Suk for their insights and assistance. Many individuals facilitated access to archives and libraries for this research. I appreciate the help of Gene Coakley and Dan Wade of Yale's Law Library; Jill Sayenga, the D.C. Circuit Executive and the Secretary of the D.C. Circuit's Historical Society; Roger Karr and Matt Sarango at the Federal Judicial Center; Bill Burchill, Jean Coates, and their staff at the Administrative Office of the United States Courts; as well as staff at the National Archives and at the Third Circuit's library. A portion of the title—"Uncle Sam Modernizes His Justice"—comes from a 1948 article that appeared in Reader's Digest. See discussion infra note 189.
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I. THE LUXURIES OF REFLECTION

In the year 2001, we paused to mark a court system's 200th birthday.1 For my contribution to this Symposium honoring the courts of the District of Columbia, I provide a narrative that interweaves transformations occurring within the federal judiciary nationwide with those occurring in the District. As becomes vivid with the luxury of hindsight, during the twentieth century, the who, what, and where of federal judging have changed dramatically.

The federal judiciary, and specifically judges of the D.C. courts, played a central role in the production of thousands of new trial-level judges, some with life tenure and some without, but all holding part of the federal power of judgment. Life-tenured judges now have the task of appointing hundreds of other "federal judges"—magistrate and bankruptcy judges who serve for fixed and renewable statutory terms. Moreover, today federal judging occurs not only in Article III courthouses but in office buildings belonging to agencies.


In the United States, Article III of the United States Constitution is understood as committing this policy to independent judges. Soon thereafter, in 1801, another artifact of that Constitution—the federal Congress—created the courts of the District of Columbia. See Act of Feb. 27, 1801, ch. 15, § 3, 2 Stat. 103, 105 (authorizing a circuit court staffed by a chief judge and two assistant judges charged with exercising both federal and local jurisdiction); id. §§ 11–12, 2 Stat. at 107 (providing for the Orphans' Court and for justices of the peace). See generally William Henry Dennis, Orphans' Court and Register of Wills, District of Columbia, in 3 Records of the Columbia Historical Society 219 (1900). A century later, their jurisdiction became the predicate for the District's Municipal Court, which, as of 1921, became a court of record. See Act of Feb. 17, 1909, ch. 134, 35 Stat. 623; Act of Mar. 3, 1921, 41 Stat. 1310 (providing for jurisdiction up to $1000 and for jury trials).

In 1802, the District Court for the District of Columbia, comparable in many respects to other United States District Courts, was created. See Act of Apr. 29, 1802, ch. 31, § 24, 2 Stat. 156, 166; see also F. Regis Noel, Some Notable Suits in the Early District Courts, in 24 Records of the Columbia Historical Society 67 (1922) (discussing aspects of the docket in the first century).
During the twentieth century, Congress increased the work for this array of judges through the creation of new causes of action. In addition, the docket diversified through changing understandings of the rights of individuals against government and of the desirability of grouping claims together in aggregates such as class actions and multidistrict litigation. Judges themselves enlarged the scope of their work to include promotion of settlement to litigants, instruction to other judges about how to judge, and advice to Congress about which disputes ought to be brought before the life-tenured judiciary.

An issue for the twenty-first century is what to do with this variety of federal judges, in courts or in agencies and with or without life tenure, now engaged in what some call “multi-tasking.” Decisions need to and will be made about whether to array these judges on a hierarchy so as to underscore the distinctiveness of their functions or, in contrast, to link them into a more homogenized set of juridical actors so as to reflect their commonalities. As in the past, many such decisions will be made in a hodgepodge fashion, responsive to a given problem and reflective of a particular political moment. But realpolitik should not deter us from reflection on what is at stake.

Underlying these choices is a tension between some of the contemporary roles of judges and societal aspirations of independence for federal judges. The retrospective that I offer demonstrates that Article III—the landmark of judicial independence in the United States—is decreasingly relevant to many first-tier federal judges. Questions thus emerge about the relationship between independence, role specificity, and judging. I am less sanguine than some that, a hundred years from now, values of independence of judgment and of procedural regularity will still apply to actors named “judges.”

Under this account, threats to the coherence of judging and therefore to the independence of the judiciary do not come only from high-profile politicized battles targeting particular judges or specific struggles with Congress over jurisdictional boundaries. Rather, challenges to judicial independence also stem from low-level administrative decisions and from doctrinal reinterpretations of the transferability of aspects of federal adjudication to actors outside of Article III who lack structural independence. The life-tenured judiciary is itself a central actor in this tale, as it has promoted the blurring of judicial roles between Article III judges and non-Article III judges, between adjudication and dispute resolution, between public and private dispute resolution, and between the work of the judiciary as a distinctive branch and the activities of other federal agencies.

Therefore, a review of the twentieth century of federal judging needs to be celebratory but not sanguine. Appreciation is due to the many reformers for the invention of new forms of judging and of new layers of high-quality adjudicators. The history of the evolution of trial courts in both the District of Columbia and the nation demonstrates a creativity that has greatly increased judicial numbers and capacity. Yet such diversification also brings new problems. By taking on the tasks of settling rather than adjudicating disputes, of superintend-
ing the appointment, reappointment, and promotion of other judges, and of advocating specific programs and agendas, the Article III judiciary has weakened its claim to a unique and peculiar mandate. Understanding the inventions of the twentieth century therefore prompts questions about what efforts in the twenty-first century are needed to shape a concept of a judicial role that will, a hundred years hence, cohere.\(^2\)

In Part II, below, I detail the twentieth-century devolution of judging from life-tenured to non-life-tenured judges. Entailed in this transition was the reallocation of judicial tasks as case law reconceived the meaning of Article III. Thereafter, in Part III, I place these developments in the context of other aspects of constitutional transformation, enabling national expansion of both the legislative and executive branches. Part IV turns to explore the pressures to make such shifts within the judicial branch. I outline the alterations in the docket, both in terms of the volume of cases and the kind. New causes of action became available against the government, thereby prompting thousands of small claims, while procedural reforms enabled the aggregation of thousands of cases into large-scale litigations. Part V examines how, partly in response, at both the micro and at the macro levels, the federal judiciary reorganized its own work. The job of trial judge was reconfigured to embrace management and mediation. In parallel fashion, the role of the Article III judiciary broadened with the development of a corporate structure, permitting self-administration and the capacity to forward agendas in Congress.

The conclusion, in Part VI, evaluates some of the consequences of the changes by offering competing assessments of the effect of non-life-tenured judges on the idea of judicial independence. One possibility is to embrace the doctrinal toleration of the irrelevance of Article III to a great deal of federal judging. I prefer the alternative, calling for constitutional and prudential interpretations requiring the concept of structural independence to travel with the power to judge. What is needed is the elaboration of a gestalt of judging for the sub-Article III judges that takes seriously how important their decisionmaking has become. Thus, I explore how to buffer against the twentieth-century reforms that have, cumulatively, reduced the degree to which Article III protects individuals holding the power of federal adjudication and reduced the degree to which the term “judge” specifies a set of obligations and tasks. Specifically, I focus on how placing judges in the position of employing other judges and on a career ladder affects the independence of those at both lower and higher rungs. I propose means by which to distinguish judges from other government actors and yet to homogenize the kinds of judges so as to make true the constitutional “boast” of an independent judiciary.\(^3\)

\(^2\) These issues have special relevance to this Symposium dedicated to the courts of the District of Columbia, as the judges and lawyers from the District were leaders in generating the array of judicial actors and activities that have now become commonplace.

\(^3\) This is a variation on a phrase from a dissent by William O. Douglas in Palmore v. United States, 411 U.S. 389, 412 (1973), discussed infra Part VI.
II. A RANGE OF FEDERAL JUDGES IN A VARIETY OF SETTINGS

A. MODIFYING THE WORD "JUDGE" AND SWELLING THE RANKS

In most discussions of the federal judiciary, the assumption is that pursuant to Article III, all federal judges have life tenure and protected salaries. A widely shared correlate is that the model provided by Article III is the best expression of what judicial independence does and should mean.

In 1901, the equation of federal judge with Article III would have been accurate. But in 2001, it is a mistake to assume that the federal judicial system is populated either exclusively or even predominantly by life-tenured judges. Indeed, at the trial level and within the Article III branch of government, more judgeships lack life tenure than have it. As Charts I and II below detail, 845 judgeships are designated for bankruptcy and magistrate judges in contrast to the 646 authorized for district court judges. Because a central question for this discussion is who counts as a federal judge, and because more than one mode of accounting is possible, details of the transformations between the early and late twentieth century are in order.

4. In 1901, life-tenured appellate and trial judges nationally numbered 113; seventy served on the district courts. See History of Federal Judgeships tbl.K (Authorized Judgeships) [hereinafter Authorized Judgeships], available at http://www.uscourts.gov/history/tablek.pdf (last visited Feb. 19, 2002). This table lists a single Article I judgeship as of that date. Id. Not included in this accounting are United States Commissioners, whose office began with the First Judiciary Act. Paid on a fee-for-service basis, commissioners undertook tasks such as administering oaths and issuing warrants that could be understood as judicial but were often described as "ministerial." Their use built on English practice, in which lay justices of the peace did such tasks within the common law courts.

In the early twentieth century in the District of Columbia, ten justices of the peace had civil jurisdiction over matters at or below $300 (today worth about $6000) and had some authority over writs of attachment and replevin; lower level criminal jurisdiction belonged to the Police Court. See Charles S. Bundy, A History of the Office of Justice of the Peace of the District of Columbia, in 5 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 259, 268–70 (1902).


6. Here, I focus on the growth in numbers and kinds of judgeships. Additional measures of legal change include the increase in the number of lawyers, the funds spent on law, and the amount of authoritative legal material. Surveying those measures, Marc Galanter concludes that the legal world is "growing vigorously." See Marc Galanter, The Trial Implosion, Speech Presented at the Section on Litigation and Civil Procedure Joint Program, Civil Litigation Without Trials, Annual Meeting of the American Association of Law Schools (Jan. 3, 2001) (on file with author); see also Marc Galanter, Law Abounding: Legislation Around the North Atlantic, 55 MICH. L. REV. 1 (1992). Changes about law also need to be put into context. For example, census data report that, in the year 1900, the population of the United States was about seventy-five million people; in the year 2000, the population exceeded 280 million, an almost fourfold increase. See Steven A. Holmes, After Standing Up to Be Counted, Americans Number 281,421,906, N.Y. TIMES, Dec. 29, 2000, at A1. The number of life-tenured trial judges grew during that period from seventy in 1901 to 647 in 1999, which represents a ninefold increase during that period.
Chart I

Authorized Federal District Court Judgeships, Nationwide: 1901 and 1999

<table>
<thead>
<tr>
<th>Year</th>
<th>Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>1901</td>
<td>70</td>
</tr>
<tr>
<td>1999</td>
<td>646</td>
</tr>
</tbody>
</table>

Article III District Court Judgeships

Chart II

Authorized Trial Level Federal Judgeships in Article III Courts, Nationwide: 1999

<table>
<thead>
<tr>
<th>Type</th>
<th>Judges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Art. III: District Court, Life-Tenured Judgeships</td>
<td>646</td>
</tr>
<tr>
<td>Magistrate &amp; Bankruptcy Judgeships</td>
<td>845</td>
</tr>
</tbody>
</table>

- Bankruptcy (326)
- Magistrate: Full-Time (454)
- Magistrate: Part-Time (62)
- Magistrate: Combination (3)
1. Capturing a Variegated Landscape

Congress creates "authorized judgeships," not all of which are always filled. In addition, under federal statutes, life-tenured judges can take "senior status," thereby continuing to serve but freeing a judgeship for another appointee. Hence, I provide two accounts of the federal judicial workforce, one through authorized judgeships and another by calculating the numbers of persons actually working as judges under the status of either an "active" or a "senior" judge.

As to authorized judgeships, Congress has provided for 646 district court judgeships. The individuals who gain such appointments have, pursuant to Article III, constitutional protection for their jobs through life tenure and salaries insulated against reductions. I call these judges "constitutional judges." As of 1999, in the District of Columbia, Congress had authorized fifteen such life-tenured trial-level judgeships.

Congress has also created other kinds of judgeships within the Article III branch—bankruptcy and magistrate judges—whom I term "statutory judges" because legislation commissions them to serve for fixed (and renewable) terms through appointment by life-tenured judges. Bankruptcy judgeship lines, set by Congress, number 326. Magistrate judgeship lines have been delegated by Congress to the governing body of federal judges, the Judicial Conference of the United States, which has authorized 519 such judgeships. Given that in the District of Columbia only one bankruptcy and three magistrate judges serve, one could be unaware of the national picture, in which the 845 authorized statutory judgeships outnumber the life-tenured judgeships.

Data also need to be disaggregated to appreciate the effects of the overall numbers. As of 2001, in six federal district courts, the number of magistrate judges was greater than the number of life-tenured judges. In another sixteen...
districts, their numbers were equal. In some districts, magistrate judges join district judges "on the wheel," which means that judges of both kinds are randomly assigned to civil cases when filed. Given the numbers, in some districts, litigants have an equal chance of being assigned a magistrate or a district judge.

An alternative accounting, set forth in Chart III below, puts life-tenured judges about thirty persons ahead of the non-life-tenured judges sitting in federal trial courts around the country. That tally (of 881 life-tenured trial judges) includes the 273 senior life-tenured district court judges who joined their "active" judicial siblings in 1999 and excludes the thirty-eight then unfilled authorized judgeships. A parallel calculation for the statutory judges considers that the bankruptcy bench also relies on senior judges, termed in this context "recalled judges" (adding twenty-nine to their ranks), but also takes into account twenty vacancies, bringing the bankruptcy bench to 335 in number. Some of the senior district court judges and the recalled bankruptcy judges do not sit full time, so that counting the sixty-two part-time, the 454 full-time, and the three "combined" positions for magistrate judges provides comparable

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15. Id. Those districts were in New Mexico, Arizona, the Northern District of New York, the Virgin Islands, the Western District of North Carolina, the Middle District of Louisiana, the Northern District of Mississippi, the Western District of Michigan, the Eastern District of Arkansas, the Northern and Southern Districts of Iowa, North Dakota, Idaho, Montana, Oregon, and the Southern District of Georgia.

16. As the "practice tip" for the United States District Court of Oregon explains: "The District of Oregon includes magistrate judges in the random assignment of new civil case filings." See D. ORE. LOC. R. 72.1 (Practice Tip), available at http://orda.uscourts.gov/rules/civil%20rules/LR%20727.html (last visited Jan. 16, 2002). The District of Oregon is one of those with equal numbers of magistrate and life-tenured trial judges. See supra note 15. Consent for trial before a magistrate judge, however, may not be inferred by a litigant's decision not to object to the assignment of a magistrate judge when a case is filed. See Hajek v. Burlington N. R.R. Co., 186 F.3d 1105 (9th Cir. 1999).

17. Within the federal courts, judges may take senior status, thereby freeing a judgeship for another appointee but continuing to carry a substantial work load. See JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN], reprinted in 166 F.R.D. 49, 160 (1995) (Recommendation 64) (discussing the contributions of senior judges and calling for their recognition through practices, policies, and salaries).


19. See 28 U.S.C. § 375(a)(1) (providing that bankruptcy and magistrate judges may, after retirement, be recalled and through certification serve for renewable five-year periods).


21. Id. at 44 tbl.14. The 1999 published tables do not list vacancies for magistrate judges. Further, those tables do not include recalled magistrate judges. Because I cannot deduct for vacant spots, I have also not added recalled magistrates. Data on the actual numbers are kept by the Magistrate Judges Division. For example, as of January 16, 2001, 466 full-time magistrate judgeships were authorized; nine vacancies existed, and nineteen recalled judges sat, totalling 476; sixty part-time positions were authorized, five vacancies existed, and seven had been recalled, resulting in sixty-two part-time magistrate judgeships. Telephone Interview with Staff, Magistrate Judges Division, Administrative Office of the U.S. Courts (Jan. 16, 2001). A total of 538 magistrates were thus serving in January of 2001—shifting the picture once again to make it likely that nontenured judges outnumbered the tenured.
treatment, yielding a total of 854.22

The District of Columbia provides an especially helpful focal point, for within it are examples of the range of institutions comprising “the federal courts.” Within the territorial boundaries of this District are several specialty courts, some of which are staffed by life-tenured Article III judges and

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22. Yet other methods are available to assess the number of judges. For example, the federal government database providing historical data on judgeships in the federal system includes “Article I” courts, but does not mention either magistrate or bankruptcy courts. See Authorized Judgeships, supra note 4 (describing Article I judgeships for the United States Court of Federal Claims, the United States Tax Court, the United States Court of Appeals for Veterans Claims, and for Territorial Courts and Article III judgeships for the Supreme Court, the courts of appeals, and the district courts). Alternatively, were one to enlarge the lens to include trial and appellate judges, both active and senior and excluding vacant positions, the life-tenured staff would be 1122 in number. See 1999 Annual Report, supra note 5, at 42 tbl.12. Thus far, the bankruptcy and magistrate judgeships have not developed a comparable discrete tier of appellate judges, although bankruptcy judges may serve on appellate panels to review decisions of other bankruptcy judges. See infra notes 129, 130.

In terms of numbers of cases, the docket of bankruptcy judges has the highest number of filings, 1,354,376, in 1999. 1999 Annual Report, supra note 5, at 268 tbl.F (1999).
others of which are populated by statutory judges, sitting for fixed and renewable terms and often termed “Article I courts.” The list includes the United States Court of Federal Claims,23 the United States Court of Appeals for the Federal Circuit,24 the United States Tax Court,25 and the United

23. The first such court was created in 1855. See Act of Feb. 24, 1855, ch. 122, 10 Stat. 612; Fed. Judicial Ctr., Courts of the Federal Judiciary [hereinafter Courts of the Federal Judiciary], available at http://air.fjc.gov/history/oc_bdy.html (last visited Feb. 19, 2002). Congress provided that claimants, relying on a federal statute or regulation or contract to seek money from the federal government, were to seek redress in the Court of Claims. See Stanton J. Peelle, History and Jurisdiction of the United States Court of Claims, in 19 RECORDS OF THE COLUMBIA HISTORICAL SOCIETY 1 (1916). From a contemporary vantage point, that court was both more and less Article III-like.

Despite its specialty jurisdiction, its judges were appointed by the President, confirmed by the Senate, and had life tenure. But, unlike regular federal judges, effectuation of their decisions relied upon congressional enactment of legislation to pay successful claimants. At the court’s inception, the concept of rights held against the government had not been developed, and the doctrine therefore imposed no obligation for Article III processing when such disputes arose. See Murray’s Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1856), discussed infra note 102. In 1866, Congress provided for direct enforcement of judgments of the Court of Claims and for Supreme Court review. A major jurisdictional expansion came in 1887, with the Tucker Act, ch. 359, 24 Stat. 505 (1887), locating all monetary claims against the federal government in that court. See Peelle, supra, at 5–8.


25. In 1924, Congress created the Board of Tax Appeals, which in 1954 was renamed the Tax Court and called an Article I court. See 26 U.S.C. § 7441 (1994). See generally HAROLD DuBROFF, THE UNITED STATES TAX COURT: AN HISTORICAL ANALYSIS (1979). The Tax Court has nineteen judges, sitting for fifteen-year terms through appointment by the President with the advice and consent of the Senate. See 26 U.S.C. § 7443(a)–(c). The Tax Court in turn may appoint assistants, formerly called “commissioners” and, in 1984, renamed “special trial judges.” See Tax Reform Act of 1984, Pub. L. No. 98-369, § 464(a), 98 Stat. 494, 824; see also TAX CT. R. 183(a) (providing for review of those judges’ reports by the Tax Court and a presumption of correctness for factual findings); infra notes 87, 336.
States Court of Appeals for Veterans Claims.\textsuperscript{26} The District of Columbia is also home to what may be termed its "own" courts, focused on the judicial work spawned within the District. Consideration of the District thereby prompts another tally, provided visually in Chart IV below.

![Chart IV](image)

Federal Judges Serving in the District of Columbia, 1999

- Life-Tenured DC Circuit Court (Appellate & District): 27
- Magistrate & Bankruptcy: 4
- Non-Life-Tenured D.C. Courts (Appellate & Superior Court): 68

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One specialty court, the United States Court of International Trade, is based in New York. See Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified at 28 U.S.C. §§ 251–258, 1581). Congress designated the court an Article III court, transferred the nine judges who had served on the Customs Court to the new court, and specified that no more than five could come from the same political party. The Court of International Trade replaced the Customs Court, whose history began in 1890 when Congress created the Board of General Appraisers to take customs disputes out of the district courts. The Board, operating within the Department of

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In the early part of the twentieth century, about twenty judges served in D.C. courts ranging from the Police Court to the Court of Appeals. The ratio of life-tenured to non-life-tenured was close to fifty-fifty. Today, nine appellate judges on the D.C. Court of Appeals and fifty-nine D.C. Superior Court judges are responsible for civil and criminal cases. All are presidential appointees serving for fixed fifteen-year terms. Thus, in 2001, the District relied on twenty-seven life-tenured judges and seventy-two judges without life tenure, or roughly one life-tenured Article III judge for every three judges without those constitutional protections.

The D.C. courts have proven to be a harbinger of the future. The D.C. courts of the early 1900s previewed what a century later proved to describe all the
nation: that roughly half of our "federal" judges would not be life-tenured. Similarly, I predict that, a hundred years from now, life-tenured judges will at best comprise about a quarter of the federal judicial workforce. Indeed, the statement that the life-tenured judiciary is far outnumbered by the non-life-tenured judiciary could also describe the present, if other "federal judges" who work outside federal courthouses are included in the count. Some 1300 judges work in agencies—the Social Security Administration, the SEC, the EEOC, and the like.31 These administrative law judges (ALJs) decide a volume of cases comparable to that of the life-tenured judiciary.32 In addition to ALJs who work under the strictures of the Administrative Procedure Act (APA), another group of individuals—sometimes called "the hidden judiciary"33—discharge yet other aspects of federal judging. Estimates are that some 2600 such individuals, bearing titles such as "presiding officers," "administrative judges," "hearing officers," or "examiners" work within federal agencies but without the classification of "ALJ" as specified by the APA.34

Hold these non-APA judges aside for the moment. Were one to count only

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31. As of September 30, 1999, federal agencies were assigned 1309 administrative law judges. See U.S. Office of Personnel Mgmt., Federal Civilian Workforce Statistics, Occupations of Federal White-Collar and Blue-Collar Workers as of Sept. 30, 1999, at 100–01 tbl.W-E (2000); see also Paul R. Verkuil, Reflections on the Administrative Judiciary, 39 UCLA L. REV. 1341, 1343 (1992) (explaining that, as of the early 1990s, about 1200 ALJs were "assigned to more than 30 agencies," and ALJs' numbers were then "approximately equivalent to the number of judges on the federal trial bench"); Jeffrey S. Lubbers, Federal Agency Adjudication: Trying to See the Forest and the Trees, 31 Fed. B. News & J. 383 (1984) (noting that about five times as many administrative law judges served in 1984 than had in 1947).

32. Verkuil concluded that "ALJs probably decide more 'cases' each year than do their federal judicial counterparts." Verkuil, supra note 31, at 1343. Measuring the workload volume is difficult given that the kinds of disputes, the numbers of parties, and the complexity of cases vary from agency to agency and from agency to court. For example, in the 1997–1998 fiscal year, ALJs in the Social Security Administration handled 500,000 cases; the Appeals Council considered 101,000 appeals. See Soc. Sec. Admin., About SSA's Office of Hearings and Appeals, available at http://www.ssa.gov/oha/overview.htm (last visited Nov. 5, 2001). In fiscal year 1998, the Equal Employment Opportunity Commission (EEOC) received 12,218 requests for administrative hearings and resolved 7494 appeals. In addition, the EEOC receives about 75,000 charges annually; 48,000 discrimination charges are resolved through state and local programs. See EEOC, EEOC Enforcement Activities, http://www.eeoc.gov/enforce.html (last modified July 25, 2001).

33. Verkuil, supra note 31, at 1344.

34. Id. at 1345–46 (discussing these judges who exist outside the protections of the APA and who, according to a 1989 survey conducted by the Administrative Conference of the United States, decided about 350,000 cases). The largest set of cases (about 150,000) were decided by immigration "administrative judges" employed by the Department of Justice; the Department of Health and Human Services relied on "presiding officers employed by insurance carriers . . . [to] decide[] 68,000 cases per year" and the Department of Veterans Affairs handled 58,000 cases. Id. at 1346. Those agencies' judges employed "procedures that range from the equivalent of formal APA hearings to informal processes from which there is no appeal." Id. at 1347; see also John H. Frye III, Survey of Non-ALJ Hearing Programs in the Federal Government, 44 Admin. L. REV. 261, 349 (1992) (discussing the roles of some 2700 presiding officers serving in a range of federal agencies). Many states have a parallel system in which some administrative law judges are covered by state administrative procedure acts and others are not. See Michael Asimow, The Influence of the Federal Administrative Procedure Act on California's New Administrative Procedure Act, 32 Tulsa L.J. 297, 301–02 (1996).
Article I judges in courts such as the Court of Appeals for Veterans Claims or Tax Court, the judges of the District of Columbia, bankruptcy and magistrate judges, and ALJs designated through the APA, the total is about 2350. That number overshadows the 834 life-tenured judgeships (at both trial and appellate level), bringing the current D.C. pattern of one life-tenured judge for every three non-life-tenured judges in line with the country as a whole, as is illustrated by Chart V, below. Moreover, if one thought of the judicial workforce as including all the hearing officers in agencies and all the senior and recalled judges, we could describe the country as currently relying on one life-tenured federal judge for every four or five who lack such protection.

35. Authorized Judgeships, supra note 4 (listing forty-six such authorized judgeships).
36. See 1999 ANNUAL REPORT, supra note 5, at 42 tbl.12 (listing Article III judgeships). The D.C. judges add another sixty-eight, while the bankruptcy and magistrate judges number 845, and the APA ALJs number 1400.
2. Constituting and Constitutionalizing the Capacity to Judge

A brief summary is in order. The federal judiciary now includes hundreds of individuals who work within the Article III judiciary, who function in many respects like Article III judges, but who lack Article III protections. A century ago, most of these positions did not exist. What federal judicial officers there were bore titles such as commissioner, referee, justice of the peace, or appraiser. Over the decades, as their jurisdictional grants and adjudicatory work increased, the practice developed of renaming those individuals “judges.” The title was often modified, cabined by terms such as “bankruptcy judges” or “magistrate judges.” In addition to such judges within Article III courts, another group now sits in semi-free standing courts (such as the Tax Court) or atop an agency structure (such as the Court of Appeals for Veterans Claims). Again, while these institutions are called courts, modification (for example, “Article I” courts or “legislative” courts) invokes the idea that they are somehow not quite “regular” federal courts. A third, much larger, number of non-life-tenured judges are termed administrative law judges, hearing officers, and the like, and they work in agencies.

The numbers that I have provided give a demographic picture of the array of individuals exercising adjudicatory power within the federal system. But some will surely respond that I have miscounted—that some of the individuals to whom I affix the label “federal judge” do not qualify for that appellation; that some of the entities that I describe as “courts” are not; that federal judging is simply not subject to modification; and that all the adjectives—magistrate judge, bankruptcy judge, administrative law judge—are clues to the fact that these folks are not federal judges. Thus, I turn now to reflect on how this proliferation of persons came to be and on why I argue that they should all be understood as variations on the same theme.

The creation of tiers of federal judges could not have occurred without a change in legal meaning—in the doctrine about who can be a “federal judge” and what powers Article III contemplates as belonging exclusively to judges appointed pursuant to its mandates. The issue has emerged many times in the nation’s history. As Congress began in earnest in the twentieth century to create more judicial officers, some litigants complained. They argued their “right” to an Article III judge, by which they meant a judge appointed for life and with salary guaranteed. Their challenge entailed interpretation by Article III judges about the import of Article III.

Plainly, the experience in the United States of judging does not depend on life tenure. State court judges, elected or appointed for terms, abound. Yet in the federal system, Article III serves not only to authorize judging but also to create

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37. The use of the term “court,” like that of judge, has been a subject of debate and discord. See DuBroff, supra note 25, at 165–215 (describing the issues about whether to call the Tax Court a court, as contrasted with a board). For a description of efforts by some judges to block other adjudicators from being termed “judges,” see infra notes 331–34 and accompanying text.
a branch of government and an understanding of the special role of the judge, freed from the ordinary burdens of employment through life tenure and guaranteed salary. On the constitutional paper, the judiciary is peculiarly situated. While creating one of the three branches of the federal government, the constitutional text does not do much to endow institutional authority. The Constitution provides no express guarantees of budgets, courthouses, or even of lower court judges. Further, the parameters of the jurisdictional mandates are sufficiently cloudy so as to have occasioned thousands of pages of case law and commentary on when federal courts can properly exercise jurisdiction and what control Congress has over the courts. Because of this thinness in Article III provisions, some commentators have described the federal judiciary as a “dependent judiciary,” deeply reliant on executive and congressional powers with little ability to act on its own.

But Article III has within it one (potential) safety net: a combination of life tenure and protected salaries for those who achieve the status of “federal judge.” Those are the judges with unique power. One might therefore expect life-tenured judges to guard their distinctive authority by reading Article III’s text to prohibit or to curtail assignment of federal adjudicatory activities to non-Article III judges. Such an interpretation would have put pressure on Congress to increase the numbers of life-tenured judges to meet adjudicatory demands. The ranks of life-tenured judges might therefore have grown and, with them, the power and clout of the Third Branch, populated with a larger corps of persons committed to its special role and possessing its unique attributes. But the demographic picture that I sketched above depends on a different reading of Article III. Instead of prohibiting or finding only a limited role for federal judges outside Article III’s parameters, life-tenured judges have read the United States Constitution to permit the transfer of many tasks of federal judging to non-life-tenured judges.

A review of decades of case law reveals the trajectory. Turn back to the early part of the twentieth century and recall that, in 1932, the Supreme Court required de novo review of “jurisdictional facts” determined by administrative hearing officers in a dispute about damages owed when a longshoreman fell. In contrast, a 1985 Supreme Court decision concluded that Congress could constitutionally give an arbitrator virtually final authority to decide a monetary

dispute arising under a statutory scheme between private litigants.\(^4\) During those intervening fifty years, life-tenured judges shifted their understanding of what "nonjudicial" tasks could be delegated to "nonjudicial actors." During the very same decades, tasks once seen as "nonjudicial" became understood to be part of the job of "judging" but nevertheless able to be shared with non-life-tenured judges. Further, Article III judges relied on the Due Process Clause to require adjudicators located outside of courts to behave in a manner akin to that of court-based judges.

These shifts were gradual, as both practices and doctrine interacted to shape a new normalcy. At first, tasks that were seen as not "judicial" or not "federal" were remitted to lower echelon judicial officers.\(^4\) But over time, tasks that were more obviously "federal judge-like" were passed down or out of Article III. Concurrent with this evolution of doctrine about both delegation and due process were shifting expectations of what federal trial judges were supposed to do. Judges took on new jobs—drafting procedural rules, running the pre-trial process, superintending lawyers, settling cases, and promoting certain legislative agendas in Congress. As Article III trial judges ceased to be coterminous with the federal power of judgment at the trial level, adjudication ceased to be the central focus of trial judging.

The D.C. courts have played a special role in all of these developments. The District has been a repeat player doctrinally, as a regular source of case law prompting the life-tenured judiciary to think about the meaning of Article III.\(^4\) Further, the District of Columbia has been the place in which functional experimentation with additional personnel in courts has occurred.\(^4\) By creating


\(^4\) E.g., Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (holding that in the territories, Congress could authorize judges who lacked life tenure because, in such instances, Congress was acting akin to a state legislature). As I have argued elsewhere, that Chief Justice Marshall opinion now stands as a pillar of Article III jurisprudence but, at the time, it laid to rest the question of the legitimacy of congressional acquisition of additional lands. See Resnik, supra note 40, at 589–92.

\(^4\) See, e.g., Keller v. Potomac Elec. Power Co., 261 U.S. 428 (1923) (approving congressional vestiture of nonjudicial functions in the courts of the District); FTC v. Klesner, 274 U.S. 145 (1927) (concluding that the District’s courts were part of the federal judicial system and may have jurisdiction to enforce FTC orders); O’Donoghue v. United States, 289 U.S. 516 (1933) (ruling that the District’s courts were Article III courts, whose judges’ compensation may not be reduced); Nat’l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949) (concluding that the District’s citizens can use diversity jurisdiction); Palmore v. United States, 411 U.S. 389 (1973) (upholding the District of Columbia Court Reform and Criminal Procedure Act of 1970, which created local courts under Article I).

\(^4\) The District’s early courts and some of its specialty courts created layers of relationships among judges in a fashion familiar today through the example of the relationship between magistrate and district court judge. See, e.g., Act of June 17, 1870, ch. 133, § 20, 16 Stat. 153, 157 (taking criminal jurisdiction from the justices of the peace and placing it in the D.C. Police Court, with authority over offenses not punishable by imprisonment in a penitentiary); Courts of the Federal Judiciary, supra note 23 (describing the reliance by the Court of Claims on "commissioners to take depositions and issue subpoenas" and that, in 1925, Congress authorized that court’s five judges to appoint seven commission-
the position of “pre-trial examiner,” judges of this District pioneered the employment of non-life-tenured actors to undertake new tasks, and many of those same judges were also central to the project of reshaping expectations that shifted those tasks to life-tenured trial judges.

Before I turn to document the evolution, let me underscore that the shifts in doctrine and in practices have been driven by deeply pragmatic instincts about the need to staff cases, to cope with growing dockets, to avoid confrontations with Congress, and to respond to litigants’ needs and rights.46 But the authorization of judgeships outside of Article III was not only responsive to such pressures, it was also inventive, aimed at reshaping and professionalizing judicial roles as the country itself was moving towards a nationalized economic structure. Further, the developments in this area of constitutional law were of a piece with other twentieth-century readings of the Constitution, also expanding the flexibility of national governance.

Such creative responses to the challenges of nationalization and modernity merit our appreciation and respect. But, as will also be detailed below, a majority of the current federal judicial corps no longer enjoys the insulation once understood as definitional of federal judging. Further, those with life tenure risk the dilution of the concept of the independent judge. As a consequence, we who benefit from this multiplication of judicial roles have a burden to find ingenious responses to the new challenges that the solutions provided by our predecessors have generated.


Turn then to constitutional interpretation and statutory creation of judge-like roles for non-Article III actors. The courts of and within the District have many times been the subject of Supreme Court decisions concluding that Congress could constitutionally create court-like structures with judges lacking Article III attributes. A review of rulings attempting to sort D.C. courts reveals statements that sometimes feel comedic, in which doublespeak is used as parody. For example, a nineteenth-century decision concluded that because a justice of the peace in the District was not a “judge,” the jury of twelve persons that he impaneled was not a “jury” and therefore a second jury—also composed of twelve persons—could hear and decide the case again.47 A dissent in a more

46. The pragmatism is often made explicit. See, e.g., Glidden Co. v. Zdanok, 370 U.S. 530, 540 (1962) (plurality opinion) (discussing the utility of understanding the Customs and Patent Appeals Court as an Article III court because, with such denomination, other Article III judges could be designated to comprise a quorum).

47. Capital Traction Co. v. Hof, 174 U.S. 1, 17, 38, 44 (1899) (upholding a statute from 1895 that extended the jurisdiction of the justices of the peace to matters involving property up to $300 and concluding that a (second) jury trial before a circuit court preserved the constitutional right to a jury
recent decision offered the view that “there is nothing ‘inherently judicial’ about ‘adjudication’.” In support was proffered the tautology that Article III judges alone exercised federal judicial power because federal judicial power was vested in Article III judges alone. As Paul Bator put it: “The Supreme Court opinions devoted to the subject of the validity of legislative and administrative tribunals are as troubled, arcane, confused and confusing as could be imagined.” The doctrinal confusion is driven by efforts to make an ever-larger path for Congress to create judgeships without incurring the costs of Article III.

1. The Costs of Article III

Since this country’s inception, a group of individuals with term appointments performed some kinds of adjudicatory roles at the lower end of federal jurisdiction. A few are famous, such as William Marbury, whose failure to receive a commission prompted Marbury v. Madison. The passing decades have witnessed a growth in their numbers and powers. The history of the D.C. trial courts provides the paradigm. The jurisdictional grants to the justices of the peace and to the Police Court were enlarged to provide an early form of what we now call alternative dispute resolution. At the time, these courts were described as a predicate to, but not as a substitute for, the Article III court system. And just as alternative dispute resolution has moved from its status as an “extrajudicial” activity to become part of the judicial activities provided in Article III courts themselves, so have the


49. Id. at 912 (arguing that it is not the “mode of decisionmaking” nor “the type of decision” but rather the identity of the decisionmaker that makes the decision an exercise of federal judicial power).


51. See Bundy, supra note 4, at 268–70 (describing the jurisdiction of the justices of the peace); id. at 272–93 (listing those who served).

52. Id. at 259–68 (describing those events); see also Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

53. Debates then, as now, questioned whether such alternatives impermissibly burdened rights of access to courts. See Capital Traction Co. v. Hof, 174 U.S. 1 (1899) (holding that the justice of the peace trials were not too onerous to undermine the Seventh Amendment right to a jury trial).

54. In the 1983 amendment to the federal procedural rules governing pre-trial processes, this term was used. See Fed. R. Civ. P. 16(c)(7) (as amended in 1983).

55. The 1993 amendments to Rule 16 dropped that term in favor of the words “settlement and the use of special procedures to assist in resolving the dispute.” See Fed. R. Civ. P. 16(c)(9). For further discussion, see infra notes 185–213 and accompanying text.
lower tier justices (once seen as “out of court” actors) moved inside the judiciary, gained new names, and proliferated in other institutions that are now also understood to be courts.

Much of this manufacturing of judgeships has taken place outside of Article III because of its perceived costs. I use the word “costs” here in terms of dollars and politics. The dollar costs of an Article III trial judgeship have been placed at $849,572 for a new judgeship, with yearly recurring costs calculated at $758,653. Magistrate judgeships are less expensive, calculated at $684,834 to begin and thereafter at $596,751 yearly.

The political costs are multifaceted, and they vary with the kind of judge. Political capital is needed to convince Congress to create additional life-tenured judgeships, which give appointments to a President. Requests often pend for years, with the political alignment of Congress and the Presidency being a significant factor. Bankruptcy judgeships are also line-items, requiring political attention but with a different complexion. Once such positions are created, the President does not have life-tenured patronage positions to fill directly because appellate judges appoint bankruptcy judges. Still lower on the political screen are magistrate judgeships, which require only money from Congress because the power to create and to fill those lines lies exclusively within the Article III judiciary itself.

The political economy of administrative judgeships involves yet other factors. Particular constituencies may be enlisted in support of or against specific

56. These are fiscal year 2000 figures. See Unit Cost Tables for New and Existing Judgeship Positions, FY 2000, First Year and Annual Recurring Cost for Judgeships, Fiscal Year 2000 (chart provided by the Administrative Office of the U.S. Courts) [hereinafter Unit Cost Tables]. The initial cost per district court judgeship includes salaries, staff, security, and facilities. Recent legislation provided for cost of living increases. As of 2001, district court judges’ salaries are $145,100; bankruptcy and full-time magistrate judges’ salaries are $133,492. See 106th Congress Ends: A COLA for Judges, New Judgeships and Judiciary Funding in Final Bills, THIRD BRANCH, Dec. 2000, at 1, 1–2 [hereinafter COLA for Judges].

57. Unit Cost Tables, supra note 56.

58. See John M. de Figueiredo, Gerald S. Gryski, Emerson H. Tiller & Gary Zuk, Congress and the Political Expansion of the U.S. District Courts, 2 AM. L. & ECON. REV. 107 (2000) (examining the effects of caseload pressures and politics on the creation of judgeships). Dissatisfaction with this system is often expressed. See Burke Shartel, Federal Judges—Appointment, Supervision, and Removal—Some Possibilities Under the Constitution (pts. 1–3), 28 Mich. L. Rev. 485, 486–88, 723, 870 (1930) (pointing to the plainly political processes of appointment of lower court judges and partisan objections to patronage positions as support for his proposals for a hierarchical structure, in which the Chief Justice would appoint inferior judges and would develop mechanisms for supervision and for removal short of impeachment). For a view that the appointment process is one of the few venues in which Congress has been willing to take an appropriate role in affecting the life-tenured judiciary, see Charles Geyh, Customary Independence, in JUDICIAL INDEPENDENCE AT THE CROSSROADS (forthcoming 2002) (manuscript on file with author); and Charles Geyh, Judicial Independence, Accountability, and Power of Constitutional Custom, 78 Ind. L.J. (forthcoming Winter 2003) (manuscript on file with author).

legislative rights and remedies (such as federal benefits or environmental protection). Their voices can be added to promote the need for adjudicative mechanisms, albeit of varying kinds. Agencies themselves have interests in the kind of judge fashioned. For example, agency staff may want to be able to deploy employees as judges when needed but then to use them for other roles as docket demands fluctuate. Moreover, agency control is greater when the judges created are denominated “administrative judges” or “hearing officers” rather than ALJs given the protections of the APA.  

Returning to the life-tenured, gaining Congress’s attention has proved to be a mixed blessing for the federal judiciary. Requests for judgeships sometimes prompt inquiries from Congress on the deployment of current resources. In the 1950s, for example, congressional inquiry focused on the vacations taken by federal judges; the Judicial Conference responded with a Committee on Air Conditioning to obtain funds to cool courthouses in the summertime. More recently, debate has centered on whether vacancies should be filled and whether certain judgeships should be abolished. In 1998, the Chief Justice appointed

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60. See, e.g., Act of Nov. 29, 1999, Pub. L. No. 106-113, app. C, § 124, 113 Stat. 1501A-160 (providing authority “for the purpose of reducing the Indian probate backlog in the Department of Interior” for the Secretary of Interior to appoint administrative law judges “for such periods of time as the Secretary considers to be necessary” and to do so through a process different from that provided by the APA, but only if the Secretary is “unable to secure the services of at least 10 qualified Administrative Law Judges on a temporary basis from other agencies and/or through appointing retired Administrative Law Judges”); see also Ronnie A. Yoder, Retrospectives and Prospectives on ALI Priorities—A Report in Progress, Remarks at the Federal Administrative Law Judges Seminar at Virginia Beach, Virginia (Sept. 15, 1998) (on file with author) (discussing the problem of the growth of an administrative judiciary lacking APA status and protections).

61. At a 1937 meeting of the Judicial Conference, Chief Justice Charles Evans Hughes read a letter from Senator Henry Ashurst discussing a congressional subcommittee’s review of the judiciary. Noting that close scrutiny of the courts was anticipated, he raised concerns that the “helter-skelter” requests for judgeships was a part of what was prompting such a comprehensive review. See Transcript of 1937 Meeting at 147, in Records Related to Judicial Conference Meetings, 1922-1958 [hereinafter Judicial Conference Meetings Records], Entry 4, Box 13, located in Record Group 116, National Archives, Washington, D.C.


In 1996, the Judicial Conference approved a recommendation that its biennial district judgeship surveys should consider proposing that Congress eliminate judgeships or leave vacancies unfilled. REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 24 (Mar. 1996) (discussing report from the Committee on Judicial Resources); see also REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 18 (Mar. 1999). A proposal to reduce the number of judges in the District of Massachusetts was met with disagreement by its judges. See Letter from Joseph L. Tauro, Chief Judge of the U.S. District Court of Massachusetts, to Patrick Conmy, Chair of the Subcommittee on Judicial Statistics, Judicial Conference (Apr. 8, 1998) (signed by all Article III judges in the U.S. District Court of Massachusetts) (on file with author).
the Judicial Officers Resources Working Group in “partial response” to the concerns of specific Senators that the judiciary be as “vigorous in its standards in filling judicial vacancies as it is to justify creating new judgeships.” Yet, after the election of 2000, certain members of Congress who had previously expressed distress about filling judgeships looked more favorably upon the possibility. In short, the demands on judges for production of work and the complexity of court-Congress interaction to achieve the requisite capacity create incentives for licensing a great deal of non-Article III judging.

2. Overlapping Charters

While life-tenured judges have not yet decided that magistrate and district court judges are fungible, the terrain that is the subject of debate today is light-years from that contested only a few decades ago. For example, during Prohibition, an issue arose about whether commissioners (magistrate judges’ predecessors) could be assigned some of the resultant criminal work. Because of what were understood to be constitutional problems with such delegation, the Judicial Conference did not pursue the proposal. Thereafter, in 1944, the federal judiciary supported giving commissioners the power to accept pleas and to sentence petty offenders. The justification was that, because “the power to impose sentence” was not part of the constitutional judicial authority, Congress could confer it on “administrative officers.” As late as the 1970s, the State of California objected to magistrates conducting evidentiary hearings on habeas petitions. Before the United States Supreme Court, California argued the constitutional invalidity by explaining that magistrates, appointed for terms, lacked the “independence and authority requisite” to decide the serious questions presented in habeas corpus cases. Moreover, Article III contained “the implicit requirement that judges who are charged with the exercise of the judicial function will themselves conduct all proceedings necessary for a proper determination of each case.”

Today, magistrate judges routinely make proposed rulings on state prisoners’ habeas petitions, and the work of magistrate judges is understood to be “judicial.” Similarly, arguments in favor of Article I courts and of agency adjudica-

68. Id. at 2. Similarly, when the legislation for magistrate judges was pending, the Department of Justice argued that giving jurisdiction to magistrate judges in more criminal cases raised constitutional objections not cured by a defendant’s consent. See ADMIN. OFFICE OF THE U.S. COURTS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 8 (1995) [hereinafter LEGISLATIVE HISTORY OF MAGISTRATE JUDGES].
69. Indeed, the legislative history of the 1976 amendments to the Federal Magistrates Act expressly justified the expansion of authority on the grounds that “the Congress has . . . recognized that it is not
tion do not rest on a conception that the decisionmaking is not judicial. Illustrative is the statement quoted at the outset of this section—that "there is nothing 'inherently judicial' about 'adjudication.'" Rather, the constitutional parameters have been reconceived to permit delegation of the constitutional judicial authority to actors who lack the constitutional protections of Article III judges.71

I have already referred to a central contemporary example—the creation in 1968 of the magistrate,72 renamed in 1990 "magistrate judge."73 Initially understood as providing assistance to district judges, magistrate judges' charter has grown several times since.74 Under that statutory regime as interpreted by the courts, magistrate judges may, with parties' consent, preside at civil trials and issue final judgments.75 Magistrate judges also do a wide range of other

feasible for every judicial act, at every stage of the proceeding, to be performed by a 'judge of the court.'" See LEGISLATIVE HISTORY OF MAGISTRATE JUDGES, supra note 68, at 24.

70. Freytag v. Comm'r, 501 U.S. 868, 909 (Scalia, J., concurring in part and concurring in the judgment).

71. As Linda Silberman commented in 1975, in "each instance" when Congress "entrusted" judicial authority to non-Article III tribunals, "the mode of restructuring and refining dispute-resolution mechanisms has been upheld and various adjudicatory functions have been exercised by non-Article III personnel." Linda J. Silberman, Masters and Magistrates, Part II: The American Analogue, 50 N.Y.U. L. REV. 1297, 1307 (1975).


Such appointees initially were understood as providing assistance for judges but not as being judges themselves. For example, within months of the initial act, District Judge Aubrey Robinson explained that magistrates were not "clerical personnel" but "as indicated by the Act when it set up the qualifications and gave them status, reasonable tenure, and what we judge to be at the moment a substantial salary, that they will be, in effect, . . . an integral part of the bench," assisting in the criminal calendar and in pre-trial motions. See Proceedings of the Thirtieth Annual Conference of the District of Columbia Circuit, 48 F.R.D. 141, 164–65 (1969) [hereinafter Thirtieth Annual D.C. Conference].

73. As introduced, the proposal was to change the name to "Assistant United States District Judge." H.R. 5381, § 206 (1990). The Executive Committee of the Judicial Conference of the United States opposed any formal name change, but in the 1990 Civil Justice Reform Act, Congress conferred the title "magistrate judge." See Federal Courts Study Committee Implementation Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5104, 5117 (amending 28 U.S.C. § 631). According to its legislative history, the title "judge" was commonly used beyond Article III and the change "reflect[ed] more accurately the responsibilities and duties of the office," but the Act did not alter either jurisdiction or authority. See LEGISLATIVE HISTORY OF MAGISTRATE JUDGES, supra note 68, at 50–56.

74. In 1974, the Supreme Court ruled that the 1968 Act did not permit delegation to magistrate judges to conduct hearings and propose rulings in habeas petitions filed by state prisoners. See Wingo v. Wedding, 418 U.S. 461 (1974), discussed supra notes 67–68. Thereafter, Congress amended the statute to authorize magistrate judges to make preliminary review of cases, to receive evidence, and to propose findings. See Act of Oct. 21, 1976, Pub. L. No. 94-577, § 1, 90 Stat. 2729, 2729. Since then, Congress has amended the statute several times, including in 1979 to provide for civil trial jurisdiction with consent of the parties and to enlarge criminal misdemeanor jurisdiction, as well as to detail requirements of selection; in 1986 to permit recall of retired magistrates; and in 2000 to provide contempt powers and additional authority over misdemeanor trials. See LEGISLATIVE HISTORY OF MAGISTRATE JUDGES, supra note 68, at 35–56; see also Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2412.

75. See 28 U.S.C. § 636(c); Fields v. Wash. Metro. Area Transit Auth., 743 F.2d 890 (D.C. Cir. 1984); D.D.C. Loc. R. 73.1. While all the circuits have upheld this provision, a few judges, invoking
adjudicatory tasks without parties' consent, including sealing documents, proposing findings and conclusions of law in habeas and Social Security litigation, and ruling on nondispositive motions.

More generally, the constitutional case law establishes the following propositions: Congress has power to create "judicial officers" in "courts" that are not constituted under Article III of the Constitution, as well as to create judicial officers in courts within Article III. Congress derives such powers from Article I of the Constitution and arguably from Article IV. One cannot always

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Article III, have disagreed. See Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037, 1045 (7th Cir. 1984) (Posner, J., dissenting); Lehman Bros. Kuhn Loeb, Inc. v. Clark Oil & Ref. Corp., 739 F.2d 1313, 1319 (8th Cir. 1984) (Arnold, J., dissenting); Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc., 725 F.2d 537, 747 (9th Cir. 1984) (en banc) (Snedden, J., dissenting).

Some fifteen to twenty percent of all civil trials, both bench and jury, in the federal system are conducted by magistrate judges. Telephone Interview with Staff, Magistrate Judges Division, Administrative Office of the U.S. Courts (Apr. 2002). Those trials are not part of the tally of trials provided by the Administrative Office's tables on "trials commenced" in the annual reports. Id.


77. Wash. Post Co. v. Hughes, 923 F.2d 324 (4th Cir.), cert. denied, 500 U.S. 944 (1991). As is indicated by the phrase "cert. denied," the Supreme Court was given the opportunity but declined to explore this aspect of magistrate judges' powers. While one cannot import legal meaning from the Supreme Court's refusal to hear a case, the many requests by litigants to bring issues related to non-Article III judges to the Court's attention is of interest in understanding the shape of the law and at what level the normative decisions have been made. Therefore, throughout the remainder of this Article, I will continue to note when a request for certiorari has been denied.


79. The line between dispositive and nondispositive rulings has provoked a good deal of litigation. Held to be dispositive, and therefore subject to de novo review under the statute, have been requests for preliminary injunctions and summary judgment, while nondispositive rulings, for which the standard of review is "clear error" have included motions to amend complaints, litigation about discovery and sanctions, and motions to disqualify counsel. See 28 U.S.C. § 636(a)-(b); ADMIN. OFFICE OF THE U.S. COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES 45–80 (3d ed. 1999) [hereinafter MAGISTRATE JUDGE DUTIES] (listing case law).

Courts have recently debated whether a remand order from federal to state court is dispositive or nondispositive for purposes of magistrate judges' authority. Compare Vogel v. United States Office Prods., 258 F.3d 509, 514–17 (6th Cir. 2001) (detailing the case law and concluding, like the Third and Tenth Circuits, that remand orders are dispositive because they preclude determinations by a federal court and are therefore subject to de novo review by the district court), with A.C. Acceptance Corp. v. Nelson, 103 F. Supp. 2d 1129, 1130 n.1 (D. Minn. 2000) (noting that in the Eighth Circuit, motions to remand a state court proceeding are not considered dispositive).

80. See Capital Traction Co. v. Hof, 174 U.S. 1, 17–18 (1899) (relying in part on the English tradition of justices of the peace as a model for disposition of disputes outside the system of common law courts); see also McAllister v. United States, 141 U.S. 175 (1891) (upholding such judges for territorial courts).


tell what kind of court Congress has created. The Customs Court has had the dubious distinction of being the subject of a series of Supreme Court rulings, first finding it to be an Article I court and subsequently concluding that it was an Article III court after all.

Moreover, identifying a court as an Article III court does not always forecast the kind of jurisdiction and powers that it possesses. In 1933, the Supreme Court concluded that the D.C. courts were Article III courts that could, nevertheless, also take on special administrative tasks, understood as not judicial. In 1991, the Court concluded that non-Article III courts could themselves spawn assistant judges by recognizing that the Tax Court has the power to create yet other judges ("special trial judges") to staff its cases. And, in 1949, efforts to equalize treatment of the District's citizens with those of the states prompted a few Justices of the Supreme Court to adopt the proposition that, by relying on Article I powers, Congress could constitutionally give jurisdiction to Article III courts beyond the list specified in Article III.

83. See Wilbur Katz, Federal Legislative Courts, 43 Harv. L. Rev. 894, 906 n.50, 910-11 (1930) (discussing treatises in the early part of the twentieth century that did not agree about how to categorize the Court of Claims and commenting that during the litigation of Ex parte Bakelite Corp., 279 U.S. 438 (1929), the lower courts and the litigants assumed that the Court of Customs Appeals was a constitutional court and only the Solicitor General adverted to pending legislation altering its jurisdiction).

84. See Bakelite Corp., 279 U.S. at 460-61. For criticism, see George Stewart Brown, The Rent in Our Judicial Armor, 10 Geo. Wash. L. Rev. 127 (1941). Judge Brown, sitting on the Customs Court, argued that the ruling should be reversed, particularly because it licensed Congress to remove from life-tenured judges significant litigation to which the government was a party.


86. See O'Donoghue v. United States, 289 U.S. 516 (1933) (protecting those judges from salary diminution); Williams v. United States, 289 U.S. 553 (1933). Subsequently, the Court addressed the "hybrid" nature of the D.C. courts—that they were both Article III and Article I courts, serving both national and local functions—and concluded that they were permitted to receive such "administrative" tasks. See Palmore v. United States, 411 U.S. 389, 407 (1973).

87. Freytag, 501 U.S. at 870; 26 U.S.C. § 7443(a) (1994). Ten such judges, appointed by the chief judge of the court, currently serve for fixed terms. With specific jurisdictional grants and review processes by other Tax Court judges, the special trial judges in some ways parallel to magistrate judges in the district courts. See 26 U.S.C. §§ 7433, 7456. The role of such judges has produced some controversy. See Gerald A. Kauf & Jonathan Z. Ackerman, Fact-Finding in the Tax Court: Access to Special Trial Judge Reports, 91 Tax Notes Today 639 (2001) (criticizing a Tax Court decision, Investment Research Associates v. Commissioner, 78 T.C.M. (CCH) 951 (1999), for refusing to release factual findings of a special trial judge and calling for decisions of special trial judges to be treated the same as are those of magistrate judges' decisions).

88. Nat'l Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949). Justice Jackson's opinion, joined by Justices Burton and Black, offered that view to avoid overruling the Marshall Court's conclusion in Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445 (1805), that the word "state" for diversity purposes could not be read to include the District. Tidewater, 337 U.S. at 598. Justices Rutledge and Murphy concurred, but "strongly" dissented from the reasoning which, they argued, was unduly concerned with preserving the Marshall precedent. Id. at 604, 617-18 (Rutledge, J., concurring). Justices Frankfurter and Reed filed one dissent. Id. at 646 (Frankfurter, J., dissenting). Chief Justice Vinson and Justice Douglas another. Id. at 626 (Vinson, C.J., dissenting). In other cases, the Court has also considered the balance between business characterized as "judicial" and other work; for example, the Court concluded that the Claims Court's jurisdiction over ten cases that had been referred to it did not defeat its status as a court dealing mostly with cases and controversies as Article III required. See Glidden, 370 U.S. at 582.
Indeed, the Supreme Court has not squarely explained why it has jurisdiction over cases litigated in territorial courts, the District included. One possibility is that territorial courts are constituted as a part of the “federal judicial power” described in Article III, and hence Supreme Court authority is unproblematic. If territorial courts are within Article III, however, then the question of why Article III judges are not required to staff them remains. Alternatively, if territorial courts exercise authority over cases that Article III courts could not, then why are their rulings subject to the appellate jurisdiction of the United States Supreme Court? The Court’s exercise of that jurisdiction may itself be an illustration of the proposition that Congress may, constitutionally, give Article III courts jurisdiction beyond that specified under Article III itself.89

To add to the confusion, the kinds of federal judges cannot be sorted solely by reference to the types of jurisdiction that they possess. Criminal jurisdiction is not definitional of Article III status. As the D.C. courts themselves demonstrate, federal judges of territorial courts may preside over criminal proceedings. Moreover, magistrate judges handle the bulk of the misdemeanor docket of Article III courts.90 A general federal jurisdictional mandate tied to physical boundaries is also not definitional. The Federal Circuit now has nationwide jurisdiction limited to certain kinds of cases, with a concentration in patents and copyright.91 Oversight of state-federal relations also does not define a line, as magistrate judges do a great deal of first-level habeas work, much of it relating to decisions made in state courts.92 International relations may also be affected

89. See Katz, supra note 83, at 903 (discussing a parallel argument).
92. See 1999 ANNUAL REPORT, supra note 5, at 357 tbl.M-4A (U.S. District Courts—Proceedings and Cases Disposed of by U.S. Magistrate Judges Pursuant to Title 28 U.S.C. § 636(B) and § 636(C) During the Twelve Month Period Ending September 30, 1999) (listing dispositions of a total of 43,225
by rulings of magistrate judges who have power to conduct extradition hearings and to impose conditions of release. Contempt powers, not quite equivalent to those of the district courts, are available in some fashion to bankruptcy judges and now to magistrate judges. The ability to convene juries also cannot be equated with Article III tribunals, in that Article III courts can lack juries and non-Article III courts can have them. Another distinction

"prisoner petitions, including state, federal and civil rights cases," of which some 9700 were state cases). State-federal relations are also in issue in administrative processes, as is illustrated by the pending question of whether states can claim sovereign immunity before the Federal Maritime Commission. See S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165 (4th Cir.), cert. granted, 122 S. Ct. 392 (2001).

93. See Ward v. Rutherford, 921 F.2d 286 (D.C. Cir. 1990), cert. dismissed sub nom. Ward v. Attridge, 501 U.S. 1225 (1991); see also Lo Duca v. United States, 93 F.3d 1100 (2d Cir.) (ruling that such power came directly from the extradition statute, 18 U.S.C. § 3184, and not from the Federal Magistrates Act and, further, that such power was not judicial), cert. denied, 519 U.S. 1007 (1996). In general, the Judicial Conference has opposed congressional proposals to confer jurisdiction directly on magistrate judges for any particular kinds of cases. See MAGISTRATE JUDGE DUTIES, supra note 79, at 1. See In re Requested Extradition of Kirby, 106 F.3d 853 (9th Cir. 1996).

94. Bankruptcy judges have the power to impose sanctions and, some believe, have statutory and inherent authority to impose civil contempt sanctions, including imprisonment, in core bankruptcy matters. See Belinda K. Orem, The Impenitent Contemnor: The Power of the Bankruptcy Courts to Imprison, 25 CAL. BANKR. J. 222, 223 (2000); see also Placid Ref. Co. v. Terrebonne Fuel & Lube, Inc., 108 F.2d 609 (5th Cir. 1940) (holding that 11 U.S.C. § 105 authorized bankruptcy judges to issue contempt orders); Hardy v. United States, 97 F.3d 1384 (11th Cir. 1996) (same); BANKR. R. 9020 (providing procedural mechanisms by which bankruptcy judges could conduct contempt proceedings but noting that punishment may need to be imposed by the district judge). The Judicial Conference proposed legislative recognition of some contempt powers for bankruptcy judges in 1995. See LONG RANGE PLAN, supra note 17, 166 F.R.D. at 112 (Recommendation 27b).

95. See Federal Courts Improvement Act of 2000, Pub. L. No. 106-518, § 202, 114 Stat. 2410, 2412 (amending 28 U.S.C. § 636(e) to provide for the power of summary criminal contempt for behavior, occurring in the presence of a magistrate judge, that obstructs "the administration of justice"). Further, when magistrate judges preside at civil trials with the consent of the parties or in misdemeanor proceedings, the magistrate judge has the power to impose criminal contempt punishable by fine or prison for behavior "constituting disobedience or resistance to the magistrate judges' lawful writ, process, order, rule, decree or command." Magistrate judges may also exercise "the civil contempt authority of the district court." 28 U.S.C. § 636(e) (1994). Magistrate judges' criminal contempt powers are limited to penalties for a Class C misdemeanor, see 18 U.S.C. §§ 3581(b)(8), 3571(b)(6), and therefore magistrate judges may certify contempt to the district court for imposition of greater penalties, 28 U.S.C. § 636(e)(6); cf. Athridge v. Aetna Cas. & Sur. Co., 184 F.R.D. 181, 197 (D.D.C. 1998) (discussing the prior statute).

96. See Glidden Co. v. Zdanok, 370 U.S. 530, 571 (1962) (plurality opinion) (concluding that the status of the Court of Claims as an Article III court did not rely on jury trials because "the legitimacy of that nonjury mode of trial" derived from whether its jurisdiction included suits at common law within the meaning of the Seventh Amendment).

97. See In re Ben Cooper, Inc., 855 (9th Cir. 1996) (same); BANR. R. 9020 (providing procedural mechanisms by which bankruptcy judges could conduct contempt proceedings but noting that punishment may need to be imposed by the district judge). The Judicial Conference proposed legislative recognition of some contempt powers for bankruptcy judges in 1995. See LONG RANGE PLAN, supra note 17, 166 F.R.D. at 112 (Recommendation 27b).

sometimes proffered is that of finality, that a judgment needs to make its way to an Article III judge as a predicate to obtaining the status of an enforceable final decision.\textsuperscript{99} Territorial, military, and the District's own local courts all supply examples of final federal judgments that violate that rule. Further, litigants may waive access to Article III judges.\textsuperscript{100} And, when magistrate judges preside at civil trials, their judgments are entered as final decisions, appealable to the circuit level, as are the judgments of district judges.\textsuperscript{101}

Yet another line, relevant to the relationship between finality and Article III status, relies not on the powers of the judge but on the claims made by the litigants. Under earlier conceptions, claimants against the United States had no "right" of redress, but instead could, at the option of the Executive or Congress, be given the "privilege" of claiming against the government. Further, in such instances, awards were not final but subject to legislative review or executive order, providing for payment.\textsuperscript{102}

In the 1930s, the New Deal brought significant adjudicatory processes into agencies, which had initially been conceived as providing an alternative to courts through a set of processes affiliated with executive branch functioning—specialized, focused, without the full trappings of a rights-based regime.\textsuperscript{103} Indeed, some progressives saw agency decisionmaking as a welcome escape from the federal courts, perceived as unfriendly to small claimants and specially tied to corporate interests.\textsuperscript{104}

But changing conceptions of the rights of claimants against the government undermine the distinctions between agency-based and court-based decisionmak-
ing. As Charles Reich explained in his 1964 essay *The New Property*, government-defined benefits and other forms of contractual arrangements should be understood not as privileges but as "entitlements," forms of property to which constitutional protections against deprivation without due process of law should attach. In 1970, in *Goldberg v. Kelly*, Justice Brennan, writing for the majority, agreed. While that opinion has been many times narrowed, a central premise has (thus far) remained: that some statutorily defined benefits generate rights to procedural protection. As a consequence, during the latter part of the twentieth century, Article III judges imposed obligations on judges in administrative tribunals and legislative courts to behave in a court-like fashion, offering notice, an opportunity to be heard (in some instances orally), impartial judgment, and decisions limited to the record presented.

As a result, while Article III jurisprudence left the legislative branch relatively free under the "public rights doctrine" to design remedies outside of Article III parameters, the life-tenured judiciary invoked the Due Process Clause to insist that adjudicatory decisionmaking take a certain form. That approach has narrowed the distance between administrative judges and their judicial siblings in courts. Delineations remain, occasioning debate on a range of issues including whether agency adjudication is properly described as less adversarial than court-based adjudication, how to distinguish informal and formal adjudication, and whether administrative judges ought to forward agency policy through adjudication. But the functional differences have diminished over the decades.

The line between court and agency has blurred in other respects as well. Agencies are identified through their focus on a specific subject matter, as contrasted with courts, which are assumed to have a more general charter. Yet, as detailed above, federal courts identified by subject matter, such as the

bankruptcy courts and the Federal Circuit, have become a feature of the life-tenured system. Indeed, because of the jurisdictional constriction after the 1973 reorganization, the D.C. Circuit increasingly is seen as a court specializing in review of administrative actions. In sum, not only have the numbers and tiers of federal judges increased and their statuses become more varied, the places of adjudication have also diversified. No longer can one look only to the buildings called “courthouses” to find courts.

3. Policing Boundaries

I do not argue a complete collapse of distinctions. A few limitations on the powers of non-Article III judges, often stemming from statutory interpretation, can be found in the case law. For example, parties are generally required to consent to trial by a magistrate judge through affirmative measures rather than opt-out procedures. Magistrate judges also have a limited role in felony cases, but, with defendants’ consent, may preside at jury selection and, in some circuits, at felony voir dire. Moreover, a “growing number of courts have authorized magistrate judges to conduct allocution proceedings to accept felony guilty pleas.”

Moving to the constitutional level, constraints exist on the authority of Congress to vest jurisdiction in non-Article III judges, but detailing the boundaries with specificity is difficult. As is well-known, two decades ago, the United States Supreme Court ruled in Northern Pipeline Construction Co. v. Marathon Pipe Line Co. that Congress had violated Article III in its grant of powers to


114. See D.D.C. Loc. R. 73.1(a)–(b) (2000); see also Rembert v. Apfel, 213 F.3d 1331 (11th Cir. 2000) (requiring affirmation, rather than inaction, for consent to avoid Article III issues); Nasca v. Peoplesoft, 160 F.3d 578 (9th Cir. 1998) (same). However, absent class members were not deemed parties required to consent in a case in which a magistrate judge enjoined further prosecution of other class actions. See Williams v. Gen. Elec. Capital Auto Lease, Inc., 159 F.3d 266 (7th Cir.), cert. denied sub nom. Harper v. Gen. Elec. Capital Auto Lease, Inc., 527 U.S. 1035 (1998). Moreover, consent need not always be specific; one circuit concluded that a litigant’s signing a “joint status report” provided sufficient evidence of a willingness to proceed before a magistrate judge. See Kadonsky v. United States, 216 F.3d 499 (5th Cir. 2000).


116. United States v. Taylor, 92 F.3d 1313 (2d Cir. 1996), cert. denied, 519 U.S. 1093 (1997) (requiring that, as long as the district court reviews the objections, the district judge’s delegation was to be given substantial deference).

117. MAGISTRATE JUDGE DUTIES, supra note 79, at 124–26; see also United States v. Torres, 258 F.3d 791 (8th Cir. 2001) (joining the Second and Fifth Circuits in holding that, upon a defendant’s consent, a magistrate judge has the power to accept felony pleas as long as district judges provide de novo review). Superintendence of jury deliberations has also been permitted. MAGISTRATE JUDGE DUTIES, supra note 79, at 131–32. Some of the case law has attempted to delineate that which was “integral to the trial” (and thereby exclusively the domain of district judges) and those pre-trial and post-trial proceedings that are delegable. See, e.g., Ward v. Rutherford, 921 F.2d 286, 288 n.3 (D.C. Cir. 1990).

118. 458 U.S. 50 (1982).
bankruptcy judges, but the Court lacked a unified view of the precise transgression. In his plurality opinion, Justice Brennan attempted to create a presumption against non-Article III judgemaking.\footnote{Id. at 83–84 (plurality opinion). Justice Brennan wrote for four; Justices Rehnquist and O'Connor concurred on the view that, by permitting bankruptcy judges to rule on state law claims related to the bankruptcy, Congress had unconstitutionally vested disputes that had been "the stuff" of Westminster in non-life-tenured judges. Id. at 89–90 (Rehnquist, J., concurring in the judgment); see also Eric A. Posner, The Political Economy of the Bankruptcy Reform Act of 1978, 96 MICH. L. REV. 47, 91–93 n.154 (1996) (reporting that some members of Congress perceived that Chief Justice Burger, who had lobbied about the status of bankruptcy judges under the 1978 Act, had promised that the provisions of that Act would be upheld, and citing his comment in dissent that the plurality had not held the "broad grant of jurisdiction to the bankruptcy courts" to be inconsistent with Article III as an effort to be true to that effort).} But only a few years thereafter, his efforts were superseded when Justice O'Connor, writing for the majority in Commodities Futures Trading Commission v. Schor,\footnote{478 U.S. 833 (1986); see also Erwin Chemerinsky, Decision-Makers: In Defense of Courts, 71 AM. BANKR. L.J. 109, 121 (1997) (arguing that the post-Northern Pipeline decisions make the plurality opinion no longer good law, and that, were the issues decided today, the 1978 amendments would have been upheld).} adopted a more forgiving balancing test, focusing on the need for judgeships and whether congressional purposes were consistent with "Article III values."\footnote{Schor, 478 U.S. at 851–57. Professor Bator objected to the balancing test and offered, in its stead, what he termed an "instrumental approach" akin to a substantive due process test—that the Constitution be read to authorize Congress to constitute non-Article III courts and that congressional decisionmaking be respected "unless irrational and unreasonable." Bator, supra note 50, at 257.} The view, now widely held, is that Congress has power when creating "public rights" (an ill-defined category that includes but is not limited to disputants' claims against the United States government) to control remedial regimes.\footnote{The scope of disputes over which Congress has control is the subject of debate. While the Court has approved allocation of controversies over statutory rights between private parties to non-Article III judges, Justice Scalia has argued that the public rights doctrine ought to be limited to controversies to which the federal government is a party. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 65, 70–71 (1989) (Scalia, J., concurring in part and concurring in the judgment). In addition to the Supreme Court case law, lower federal courts have upheld allocation of decisionmaking to non-Article III judges in a range of settings. See, e.g., Noriega-Perez v. United States, 179 F.3d 1166 (9th Cir. 1999) (imposition of a fine of $96,000 by the Executive Office of Immigration Review); Cavallari v. Office of the Comptroller of the Currency, 57 F.3d 137 (2d Cir. 1995) (restitution orders under the Financial Institutions Reform, Recovery and Enforcement Act of 1989); Simpson v. Office of Thrift Supervision, 29 F.3d 1419 (9th Cir. 1994) (adjudication of breach of fiduciary claims against officers of a state-chartered savings and loan association).} Because, the doctrine explains, Congress is not required to provide judicial redress at all, it has power to locate judge-like remedies in judges who lack Article III protections. The life-tenured judiciary retains the power of oversight, but has not since 1982 ruled that Congress has crossed the constitutional line.

One constraint remains for discussion: the concept that supervision and review by Article III judges cleanse any constitutional defects that delegation of decisionmaking to non-Article III judges entails. If appellate review is available, goes the theory, then access to Article III remains open and hence the "values of Article III" (here translated as the structural independence of adjudica-
tors) are served. Proponents of this view note that the Constitution does not contemplate that federal judicial power has to be exercised initially by inferior courts. Therefore, as long as an Article III court has “ultimate power to control the legality and constitutionality” of the powers of administrative or lower echelon adjudicators, constitutional mandates have been fulfilled. Illustrative of this approach are decisions addressing magistrate judges’ powers and relying on statutory provisions for review as a solvent to the constitutional objections raised. 

But that line has thinned in theory and is blurring in practice. In a few instances, the Supreme Court has decoupled finality and Article III. Moreover, most of the decisions of the administrative judiciary are no longer subjected to de novo review. Even when that form of review is mandated by statute (as in the case with dispositive rulings proposed by magistrate judges), new “determinations,” rather than new hearings, suffice. A range of other decisions are reviewed under deeply deferential standards, such as that of clear error.

In addition, the authority of non-Article III judges to serve as appellate judges is itself expanding. Some circuits permit magistrate judges to provide the initial review of bankruptcy decisions. Further, bankruptcy judges themselves have appellate powers. In the late 1970s, circuits gained the authority to create appellate powers. 

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125. See, e.g., Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 482–83 (1985) (approving statute that gave non-Article III decisionmakers virtually final decision authority over disputes about moneys owed when costs of data production are to be shared under the Fungicide Act); Glidden Co. v. Zdanok, 370 U.S. 530, 573–74 (1962) (plurality opinion) (concluding that Article III decisionmakers need not always have final powers and noting that most of the Court of Claims’ jurisdiction involved rendering final decisions that were of a “sufficiently conclusive character” to suffice for Article III purposes).

126. United States v. Raddatz, 447 U.S. 667 (1980). A few courts have limited the power of district judges to reject findings when credibility is important unless the contested testimony is heard again. See, e.g., Hill v. Beyer, 62 F.3d 474 (3d Cir. 1995). Others have noted district court discretion to hold such hearings. See, e.g., Conetta v. Nat’l Hair Care Ctrs., Inc., 236 F.3d 67, 73–75 (1st Cir. 2001) (deciding that a district judge may hold an evidentiary hearing on a default judgment if additional investigation is needed). Appeal courts generally presume the adequacy of the de novo determination.


128. MAGISTRATE JUDGE DUTIES, supra note 79, at 121–22. ("Most circuits have held that bankruptcy appeals may be referred to magistrate judges under 28 U.S.C. § 636(b)(3).")
Bankruptcy Appellate Panels (BAPs), groups of bankruptcy judges who sit in lieu of district court judges to review the decisions of other bankruptcy judges. Amendments in 1994 make BAPs the preferred mode, and a current issue is the stare decisis effects of their decisions. In sum, given that only a very small percent of all bankruptcy rulings are appealed, the idea that "Article III values" are served by providing litigants access through appellate review to life-tenured judges has more theoretical power than practical application.

Writing in the late 1980s, Paul Bator could not imagine the transfer of judicial review of administrative agencies to non-life-tenured judges. In contrast, from a contemporary vantage point, in which layers of non-Article III judges review each others' work and Congress has restricted judicial review in certain areas, the specter of increasing reliance on non-Article III actors for appellate work becomes a plausible prediction. And at least one circuit is experimenting with an "appellate commissioner," an attorney sitting in the court of appeals and ruling on selected motions, such as those seeking attorneys' fees.


130. Questions include whether BAPs have the power to create precedent and, if so, whether that precedent binds bankruptcy judges throughout a circuit and a district. See, e.g., Bank of Maui v. Estate Analysis, Inc., 904 F.2d 470, 472 (9th Cir. 1990) (noting that BAPs cannot bind district judges); In re Enriquez, 244 B.R. 156, 159 (Bankr. S.D. Cal. 2000) (disagreeing with the claim that it was bound by Ninth Circuit BAP decisions); In re Endicott, 254 B.R. 471, 476 (Bankr. D. Idaho 2000) (commenting that BAP precedent "should be followed by Bankruptcy Courts in the absence of any contrary authority from the District Court"); Life Ins. Co. v. Barakat, 173 B.R. 672 (Bankr. C.D. Cal. 1994) (holding that BAPs bind bankruptcy but not district judges); see also In re Weinstein, 164 F.3d 677, 686 (1st Cir. 1999) (noting that while not binding, the bankruptcy panel's appellate decision was "convincing"). When reviewing the Barakat decision, the Ninth Circuit affirmed on the merits, declining to decide the issue of BAPs' "precedent-setting power," which it characterized as a "subject of great debate." See Barakat v. Life Ins. Co., 99 F.3d 1520, 1526 n.9 (9th Cir. 1996). See generally Bryan T. Camp, Bound by the "BAP": The Stare Decisis Effects of BAP Decisions, 34 SAN DIEGO L. REV. 1643 (1997).

131. For example, some 1,354,376 bankruptcy filings occurred in 1999. See 1999 ANNUAL REPORT, supra note 5, at 34 tbl.6 (U.S. Bankruptcy Courts—Bankruptcy Code Cases Filed, Terminated, and Pending, Fiscal Years 1995 Through 1999). In terms of the federal circuit courts, bankruptcy appeals in 1999 accounted for 1109 of the 54,693 cases filed. See id. at 96-101 tbl.B-3 (U.S. Courts of Appeals—Sources of Appeals and Original Proceedings Commenced, by Circuit, For the 12-Month Periods Ending September 30, 1995 Through 1999). In addition, BAPs received 1356 filings in 1999. Id. at 67 tbl.S-13 (U.S. Bankruptcy Appellate Panels—Appeals Commenced, Terminated, and Pending by Circuit, During the 12-Month Periods Ending September 30, 1998 and 1999). Given the gap between the time of filing and of appeal, a rough estimate is that some 2600 cases were reviewed by either a BAP or a circuit court (and perhaps a few more were reviewed by a district judge) out of more than 1.3 million filings considered at the first instance.

132. See Bator, supra note 50, at 270 (commenting that "the question is somewhat unreal and contrived"). Further, he thought such provisions might fail as a matter of substantive due process. Id.


134. See Press Release, U.S. Court of Appeals for the Ninth Circuit, Federal Court of Appeals Appoints First Appellate Commissioner (May 2, 1994) (on file with author) (describing the Ninth
The increasing equivalence between life-tenured trial judges and their statutory cousins on the trial bench is not a claim that the two sets of judges currently hold identical powers. The Article III judiciary continues to express both a doctrinal commitment to some distinctions and a political stance that the tiers of federal judges are different. In terms of the case law, life-tenured judges still have a more general jurisdiction, more jurisdictional powers, more control over felony prosecutions, and more finality of judgment than do their non-life-tenured colleagues. In terms of the structure of governance within the judiciary, life-tenured judges dominate decisionmaking. Policy arguments reflect these differences, as exemplified by the ongoing discussion about whether bankruptcy judges ought to gain Article III status.

But reflection on the trend over the decades requires acknowledgement that markers of difference have diminished while enthusiasm for delegation has grown. Both case law and other judicial commentary by life-tenured judges have approved and encouraged congressional expansion of the non-Article III Circuit General Order Pertaining to the Appellate Commissioner and detailing his duties, including review of payments to lawyers under the Criminal Justice Act and ruling on “certain non-dispositive motions”).

135. That approach is maintained through the governance structures of the federal judiciary itself, which has limited the participation of bankruptcy and magistrate judges, as well as through positions taken by the Article III judiciary in Congress about the status of such judges. See Posner, supra note 119, at 80–84.

136. Many decisions address the question of the authority of magistrate judges. See, e.g., United States v. Desir, 257 F.3d 1233 (11th Cir. 2001) (reversing a conviction after, without a defendant’s consent and without district judge superintendence, a magistrate judge responded to a question by a jury and instructed the jury on deliberations); United States v. Johnston, 258 F.3d 361 (5th Cir. 2001) (holding that a consensual delegation of the final judgment in a federal prisoner’s motion to vacate conviction or sentence to a magistrate judge violated the Constitution); First Union Mortgage Corp. v. Smith, 229 F.3d 992 (5th Cir. 2000) (holding that a magistrate judge lacked the power to order a remand order to state court without a district court de novo review); Hill v. City of Seven Points, 230 F.3d 167 (5th Cir. 2000) (holding that a postconsent order of reference—either by local rule or by an individual judge—was required to vest authority in a magistrate judge for disposition of a summary judgment order based on immunity); United States v. Weissenberger, 951 F.2d 391, 398 (D.C. Cir. 1992) (ruling that a magistrate judge lacked authority to order a competency examination without a district court request but that de novo review by that judge removed any defect); In re Wilson, 153 F. Supp. 2d 1013 (E.D. Ark. 2001) (holding that magistrate judges lacked the power to strike a local rule).


138. See LONG RANGE PLAN, supra note 17, at 34, 166 F.R.D. at 94 (Recommendation 10) (“Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or to Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact finding.”).
judiciary. These judges are literally now built into our understanding of the federal courts. Courtrooms and chambers are reserved for them in new federal courthouse construction. Indeed, part of the impetus for new courthouse construction in the District is the lack of appropriate courtrooms for bankruptcy and magistrate judges.\textsuperscript{139} And, in the new buildings, the dimensions of magistrate judges’ courtrooms—like the powers of magistrate judges—have grown. The 1997 design manual for construction of federal courthouses requires that magistrate judge courtrooms be larger than before, increasing from 1500 to 1800 square feet.\textsuperscript{140}

4. Distancing Federal Judging from Article III

In short, the last century has produced a proliferation of federal judges. Through new interpretation of the meaning of Article III, the idea of who can have some of the federal power to judge has been transformed. When contemporary debates about the powers of bankruptcy and magistrate judges are viewed from a hundred-year vantage point, the shift in where we are on the spectrum becomes plain. A new tier of federal judges has emerged to wield the federal power of judgment in an array of contested disputes, often with the government as one of the disputants. When their numbers are compared with the life-tenured judges, the tally reveals that a majority of first-tier federal judges do not have the constitutionally specified attributes aimed specifically at protecting their independence of judgment. Initial fact-finding and law application at the trial level are increasingly the purview of a judiciary lacking life tenure.

The result of these decades of case law and statutory revisions is a rereading of the Constitution that distances Article III from the center of federal judging. Such a revision requires one to assume that (1) Article III is ill-suited to all the kinds of judging needed in the federal system; (2) were Article III to be a predicate for such judge creation, sufficient numbers of judges would never be provided; and/or (3) Article III’s purposes are sufficiently or better served with fewer judges having its distinctive protections. Some commentators welcome all or any of these premises, reflecting a flexible approach both in terms of separation of powers and of the strictures of Article III.\textsuperscript{141} But I am concerned that, although we have functionally

\textsuperscript{139} The 1952 courthouse provided twenty courtrooms. A space on the first floor served as a hearing room for United States Commissioners. See \textit{The United States Courthouse for the District of Columbia: A Description of the Building and Copies of the Floor Plan} 3, 4 (1952). One small courtroom, now used by magistrates, is considered unsuitable for criminal proceedings.

\textsuperscript{140} For the new requirements, see \textit{U.S. Courts Design Guide} 4-41 (1997). The guide was prepared under the direction of the Security and Facilities Committee of the Judicial Conference of the United States and is available from the U.S. Department of Commerce, Accession No. PB97-152466. That guide was first published in 1991. \textit{Id.} at Preface-2. The prior space requirements are detailed at Revisions-3.

\textsuperscript{141} See, e.g., Bator, \textit{supra} note 50, at 261 (describing a “reciprocal relationship” between the delegation of “low-level and specialized and transitory tasks of administrative adjudication” and the
altered the definition of a federal trial judge, we have yet to face the effects of those changes on our commitment to an independent federal judiciary.

III. SORTING JUDICIAL ROLES BY RECONCEIVING THE "FEDERAL"

The creation of tiers of federal judges is one invention of the twentieth century, albeit one not yet plain within either popular or legal culture. In contrast, the assumption that the term "the federal courts" delineates a recognizable and coherent group of judges and courts is so familiar in the twenty-first century that it may be difficult to retrieve earlier impressions. In the nineteenth century, the state courts dominated the landscape, literally in material terms and figuratively in legal terms. Only in the twentieth century did federal construction programs help to create a federal presence in many communities through buildings that were in part a courthouse, in part a post office, and in part a customs office.142 Only in the 1930s did law school curricula begin to include courses focused on the federal courts.143 In the same decade, *Erie Railroad Co. v. Tompkins*144 brushed aside a conception of a shared common law145 and replaced it with the requirement that federal trial courts, in diversity cases, had to look to state courts for interpretations of law. After the 1954 ruling in *Brown v. Board of Education*,146 popular attention turned to the lower federal courts as they undertook a program of desegregation. School prayer litigation continued to make the federal courts a flash point, as did debates about the rights of criminal defendants. By the end of the twentieth century, the phrase "Don't make a federal case out of it" had become a part of the national vocabulary.147

Thus, another invention of the twentieth century was making meaningful the concept of "the federal," in part through efforts to delineate sets of problems as properly addressed by federal courts as contrasted with state (or, in the terms of the District of Columbia, "local") courts. The larger issues of federalism are for

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3. 304 U.S. 64 (1938).
another time, but one aspect must be considered here. The changing concept of what is a "federal case" provides further insight into the impetus to delineate categories of federal judges and of courts. The issue is of particular relevance to the history of the District of Columbia, which during the later part of the twentieth century formally separated two aspects of its court system and hence embodied the notion of the distinction. But despite the two different sets of courts, what the District exemplifies is that the local and the national are deeply interactive entities. Assignments of particular kinds of issues to one venue or the other are not based in unchanging history or constitutional text but stem from specific decisions in a given time about which level of government should perform what task.

A. "THIS DISTRICT IS WHOLLY FEDERAL"

The question of the status of the District of Columbia's courts has spawned a body of case law. In 1833, Chief Judge William Cranch of the Circuit Court for the District of Columbia ruled on the court's power to hold over an indictment that had charged an individual with the crime of running a house of "ill fame" and to reach witnesses outside the District's boundaries. Apparently, the disputants agreed that federal courts had the power to hold special sessions for federal offenses and to subpoena witnesses beyond the District but that municipal courts did not. All also agreed that when Congress legislated for the District, it did so "in its national character." At issue was how to categorize the District's circuit court.

Chief Judge Cranch concluded that Congress had given the District jurisdiction without distinguishing cases of "a purely federal character, and those of what might be called a municipal character." He opined:

Here it is all federal power and federal jurisdiction. . . . Here is no government but that of the United States; no executive but that of the United States; no legislature but that of the United States; and no judiciary but that of the United States. . . . This District is wholly federal.


149. United States v. Williams, 28 F. Cas. 647 (C.C.D.C. 1833) (No. 16,712). The judge also served as the official reporter for both the Circuit Court in the District and the United States Supreme Court. See Noel, supra note 1, at 88; see also William F. Carne, The Life and Times of William Cranch, Judge of the District Circuit Court, 1801-1855, in 5 Records of the Columbia Historical Society, supra note 4, at 294.

150. Williams, 28 F. Cas. at 648.

151. Id. (citing Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (mem.)).

152. Id. at 649.

153. Id. at 655. The court rejected the view that Congress acted like a legislature of a state. Id. at 658. The decision did not refer to American Insurance Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828), which had been decided a few years earlier and which had reasoned that, when Congress legislated in the territories, it was providing a government akin to that provided by the states. The Williams decision did,
Cranch argued not only the inevitability of his characterization but its propriety: that the District was a place in which all citizens of the United States stood on equal footing, and that federal criminal jurisdiction was particularly appropriate to exercise as a means of recognizing that status rather than permitting offenders routes of escape by leaving the jurisdiction.\textsuperscript{154}

Jump a century and a half forward to the 1970s and to another marker in the District's history, the District of Columbia Reform and Criminal Procedure Act of 1970.\textsuperscript{155} As Chief Judge David Bazelon explained, in the 1970 legislation, "Congress created a two court system in the District of Columbia which is analogous in many respects to the federal-state court systems elsewhere in the United States."\textsuperscript{156} The very passage of the Act marks the intelligibility of a distinction between that which is federal and that which belongs to state (or, in this context, to local) courts.\textsuperscript{157}

Yet that delineation was not intuitive in 1833. Between Chief Judge Cranch's assertion in 1833 that the District was "wholly federal" and the Court Reorganization Act of 1970 came a Civil War; a host of national legislative enactments creating federal statutory laws governing antitrust, consumer fraud, securities, environmental regulation, and civil rights; and many Supreme Court holdings delineating the "state" from the "federal." Landmarks such as \textit{Murdock v. City of Memphis}\textsuperscript{158} established the concept of state control over state law at the level of the Supreme Court, while \textit{Erie Railroad Co. v. Tompkins}\textsuperscript{159} provided the district court analogue. The subdivision of the District's courts relies on the idea, acquired in the nineteenth century and deepened over the course of the twentieth century, that "a federal case" can be distinguished from a "a state case."

But probe a bit deeper and the delineations fade, again because of political and social activities of the last two centuries. Those close to the subject matter of federal jurisdiction know well how ethereal the distinction is between that which is federal and that which is state. Reams of published opinions struggle to mark such a boundary as well as to acknowledge the overlap between state and federal authority. Concepts such as pendent and ancillary jurisdiction authorize federal courts to hear claims arising under state law. Bodies of law going under however, rely heavily on the special and distinctive nature of the District, hence implicitly distinguishing it from other territories.

\textsuperscript{154} Williams, 28 F. Cas. at 655–58.

\textsuperscript{155} Pub. L. No. 91-358, 84 Stat. 473.


\textsuperscript{157} As Judge McGowan noted at the Thirty-Third Annual D.C. Conference, the Reorganization Act was "the farthest advance thus far made towards home rule" in the District, putting the "judicial branch out in front of the executive and legislative departments in terms of analogizing the District to a state." \textit{Id.} at 281.

\textsuperscript{158} 87 U.S. (20 Wall.) 590 (1875) (mem.).

the headers of "abstention" and "comity" require federal courts to decline to hear some claims arising under federal law if it would require interpretation of state law or interrupt pending state court proceedings. Moreover, determining when a claim "arises" under federal law has proved daunting even for the Supreme Court, which has yet to settle on a single test and which in the recent past has split on whether a particular claim is "federal" or not. Further, the scope of federal common law and of federal procedural rulemaking powers continues to provide debate.

Such problems have prompted efforts to revise jurisdictional lines. Indeed, when Professor Paul Mishkin offered a tour through the subject at the D.C. Circuit conference devoted to the Court Reorganization Act of 1970, he joked that "seven years," rather than thirty-seven minutes, would be a more appropriate segment in which to address the topic. He then explained efforts by the American Law Institute to develop principles of distinction. And in the 1990s, the Institute launched yet another project aimed at statutory reform.

But however murky or unavailing such line drawing is, one aspect of the line has become plain: to be "federal" has come to be understood as to be more "important." Given egalitarian norms, discussions of the hierarchy are often downplayed, with celebrations of "our federalism" that emphasize the centrality of states in the governance of the United States. But within the framework of courts, it is the United States Supreme Court that has the final word, and the Supremacy Clause of the Constitution imposes the rule that when state and

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federal law conflict, state law gives way. Furthermore, in terms of the status of judges, Article III's attributes of life tenure and protected salaries are those claimed to provide the best shield for judges, and hence the status of Article III is much coveted by judges without it. Dockets are also distinguished by social and political import, and here again, over the twentieth century, federal jurisdiction has come to be equated with the "important cases." The phrase "Don't make a federal case of it" is readily translated as an injunction against making an issue more important than it is.

B. THE PLASTICITY OF CONSTITUTIONAL INTERPRETATION AND OF CONSTITUTIONAL INSTITUTIONS

The approach of federal lawmakers, both congressional and judicial, toward constitutional strictures within Article III and the development of a robust concept of the richness of federal law are part of a larger story of constitutional interpretation. During the second half of the twentieth century, the Constitution was not read by either the courts, the Congress, or the Executive as imposing substantial inhibitions on national transformation. The plasticity of constitutional design appeared both in doctrine about what each of the three branches could do and also in practice, as each of the three branches developed institutions not mentioned in constitutional text. Article III does not specify an organizational structure for the judiciary outside the hierarchy of court processes. Similarly, Article I does not dictate the committee and staff structure now central to legislation, and Article II gives few hints as to the shape of what is now the executive branch.\(^{165}\)

As the judiciary offered a flexible reading of Article III that sanctioned and enabled the production of thousands more judicial personnel, the judiciary also developed an open attitude toward the Commerce Clause, understanding its capacity to permit national legislation on issues ranging from strip-mining to migratory birds, from labor policies to children's welfare.\(^{166}\) In a comparable fashion, executive authority was also understood broadly, such that, for example, provisions of the Constitution about war powers did not prevent executive authorization of war-like activities.\(^{167}\) Similarly, legislative powers were not understood to preclude entities other than Congress from promulgating regulations that are statute-like in their reach.\(^{168}\)

Retrenchment, in some form, marked the last decade of the twentieth century, but its contours are not yet solid. Plainly, a bare majority of the

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current Supreme Court no longer understands congressional authority to be as capacious as it once was. Executive powers at the regulatory level have been contested, but, in the wake of the September 11th terrorist attacks, are likely to be understood as robust. Turning specifically to Article III’s scope, the current Court has curtailed congressional powers to confer jurisdiction, but has tolerated a good deal of congressional incursion on Article III courts’ power. For example, relying on separation of powers, the meaning of the “case and controversy” requirements of Article III, and, more recently, the Commerce Clause, the Eleventh Amendment, and the Fourteenth Amendment, the Court has struck legislation granting access to the federal courts.

The Court has also tolerated congressionally imposed limits created in the 1990s when Congress turned what had been law school hypotheticals about “jurisdiction stripping” into statutes. These provisions have been upheld, but interpreted as leaving open very limited avenues for redress. Further, while some lower court judges had objected to congressional restrictions on courts’ equitable powers, the Supreme Court has concluded that Congress has a great deal of license to constrain life-tenured judges’ remedial authority. The phrase Article III constriction captures the Court’s holdings insisting on the limits of Congress’s constitutional powers to grant jurisdiction to life-tenured judges yet upholding congressional constraints on the judiciary’s remedial authority.

Article III devolution captures the Court’s enthusiasm for shifting judicial powers from life-tenured to others. For example, in discussion of the problems of asbestos class actions, the Supreme Court has repeatedly appealed to Con-


171. See, e.g., Plaut v. Spendthrift Farm, 514 U.S. 21 (1995) (separation of powers); Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) (Article III); Morrison, 529 U.S. at 627 (Commerce Clause and Fourteenth Amendment); Seminole Tribe, 517 U.S. at 44 (Eleventh Amendment); Kimel, 528 U.S. at 91 (Fourteenth Amendment).


gress to provide resolution mechanisms outside the Article III courts. Moreover, through approval of alternative dispute resolution, including mandatory arbitration for federal statutory claims, the Court has welcomed the transfer of jurisdiction out of the judiciary itself. Thus, by means of both case law and commentary, the leaders of the life-tenured judiciary have voiced opposition to "federalization," by which is meant the creation of civil causes of action providing access to the federal courts and of criminal prosecutorial authority in the federal courts. More judging moves outside Article III and, through encouragement of alternative dispute resolution and enforcement of contracts for private dispute resolution, outside of courts altogether.

IV. ALTERING THE UNDERSTANDINGS OF A CASE: A SMORGASBORD OF CASES AND THE GROWTH OF LARGE-SCALE LITIGATION

Federal judges were not the only ones multiplying in number and diversifying in kind during the twentieth century. So were cases. In raw numbers, the dockets of both trial and appellate courts have grown enormously. According to the Administrative Office of the United States Courts, during thirty-year intervals before the 1960s, both the number of cases and the number of judges doubled; between the 1960s and 1990s, the numbers tripled. Beginning in 1974, the Administrative Office has also tracked jurisdictional grants. Congress created 474 new causes of action during the twenty-four years between 1974 and 1998. New legislative enactments, both civil and criminal, ranged from consumer and environmental rights to workers' protection and civil rights.

175. See Ortiz v. Fibreboard Corp., 527 U.S. 815, 848 (1999); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 622 (1997); see also Judicial Conference of the United States, Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (Mar. 1991) ("Reavley Committee") (proposing such alternatives in the early 1990s); Fairness in Asbestos Compensation Act of 1999, 106th Cong., H.R. 1283, 1st Sess. (1999) (proposing the establishment of an Asbestos Resolution Corporation to provide initial process for such claims, subject to judicial review in the district courts).


177. See Long Range Plan, supra note 17, 166 F.R.D. at 84–94 (Recommendations 2–10) (urging Congress to have a presumption against the creation of new federal civil causes of action and new federal criminal jurisdiction); discussion infra notes 224–29 and accompanying text.

178. See Admin. Office of the U.S. Courts, Data on U.S. Courts of Appeals, Number of Judgshps and Appellate Filings, Selected Years, and U.S. District Courts, Number of Judgshps and Cases Filed, Selected Years (Sept. 1998) (on file with author).


180. Data on filings provide a limited picture, as the judiciary recognized when it refined its measurement techniques to analyze "weighted" filings, attempting to reflect the different burdens imposed by various kinds of cases, some of which conclude without any court action at all. One such evaluation determined that, between 1962 and 1988, work for district court judges doubled. See Larry Kramer, "The One-Eyed Are Kings": Improving Congress's Ability to Regulate the Use of Judicial Resources, 54 Law & Contemp. Probs. 73, 74 (1991); see also Gordon Bermant, Patricia A. Lombard & Carroll Seron, The Cases of the United States Court of Appeals for the District of Columbia
Caseloads continue to be the central source of judicial work. Yet the word “case,” like the phrase “federal judge,” has had a changing definition. While many commentators focus on Congress as the source of new work for judges, less attention has been paid to the role of judges and lawyers, who, through doctrine and as rulemakers, have also contributed significantly to the judicial workload by altering understandings of what configurations of events form a single “case.” In 1966, for example, the Court recognized that state claims emerging from the same “nucleus of operative fact” as federal claims could constitutionally be brought into federal court under the theory of pendent jurisdiction. The Federal Rules of Civil Procedure, crafted in 1938, authorized liberal rules of joinder of parties and of claims and the consolidation of cases. These rules helped to shift the understanding of the plausible parameters of cases. As amended in 1966, these rules also permitted a new mechanism for group-based litigation: the class action. Further, the Judicial Conference sought and received congressional authority to alter venue rules through the multidistrict litigation statute to bring cases together for pretrial processing.

Through such efforts, the idea of what claims were sufficiently linked and interrelated to be part of the same unit changed. Our vocabulary reflected the shift by describing the “asbestos litigation” or the “tobacco litigation,” as a series of cases properly before a single judge, charged with ruling on law, facts, and remedial regimes. The resulting array of cases creates a smorgasbord, with choices to be made about which judges are to preside over what disputes. Further, the growth in the docket and the emergence of large-scale litigation was one of several factors that prompted judges to reconceive the tasks of “judging” by focusing on management, settlement, and alternative dispute resolution.

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184. See generally Judith Resnik, From “Cases” to “Litigation,” 54 LAW & CONTEMP. PROBS. 5 (1991). Grouping cases also enables an organization to reduce the numbers of tasks to do by consolidating the number of decisions to be made.
V. MULTIPLYING JUDICIAL ROLES

The changes in who can judge and in the numbers and kinds of cases were concurrent with changes in what trial judges actually do. Judges within the District of Columbia were among the first to insist that the Article III judiciary needed additional personnel to accomplish its tasks and among the first to alter the understanding of what those tasks were. Through such efforts, “the judicial” took on new meaning.

A. INVENTING AND STAFFING THE PRETRIAL PROCESS BY REORIENTING THE ROLE OF THE JUDGE

In 1958, judges of the U.S. District Court for the District of Columbia obtained approval from the Judicial Conference of the United States to employ someone called a “pre-trial examiner,” deputized to meet with litigants in personal injury disputes to discuss discovery and settlement. Within a decade, proposals to create the position of magistrate were before Congress, and when the Federal Magistrates Act passed in 1968, the District of Columbia was one of five districts chosen to have magistrates. These new judicial officers had tasks identified as ministerial, administrative, and supportive. Further, in the case of the pre-trial examiner, the job itself was novel, consisting of advising and assisting parties in negotiations and in trial preparation. In 1958, that work was not understood as part of what federal judges did. As explained by a committee of the Judicial Conference evaluating the use of pre-trial examiners in personal injury cases, the experiment was a success because judges could be “relieved of many non-judicial functions in connection with pretrial proceedings and . . . enabled thereby to devote themselves strictly to their judicial tasks.”

Over the subsequent decades, however, judges began to perceive that their own


In 1960, the Judicial Conference authorized a similar position for the Southern District of New York. See Budget Committee Report 5 (1960), in Judicial Conference/AO Collection, supra, at Binder Sept. 1960; see also Memorandum re Use of Special Master to Supervise Pre-Trial Discovery in Protracted Cases (Jan. 21, 1957), in Judicial Conference Records/AO Collection, supra, at Binder Mar. 1957, Supplemental Agenda Item 9 (“special masters in protracted cases”). After the Magistrate Act in 1968, the District continued to have pre-trial examiners. See Excerpts from Proceedings of the Thirty-Second Annual Judicial Conference of the District of Columbia Circuit, 54 F.R.D. 107, 122, 124–25 (1972) [hereinafter Thirty-Second Annual D.C. Conference] (remarks of Judge Gerhard A. Gesell) (discussing the court’s use of pre-trial examiners, noting that the District was the “only court in the country” currently using them and commenting that the trend was for those individuals to become magistrates).


187. Report of the Committee on Court Administration 3, app. at 26 (1964), in Judicial Conference Records/AO Collection, supra note 185, at Binder 1, Sept. 1964 (emphasis added). In contrast, a 1970 report to Congress on the District stated that the pre-trial was “a judicial function” and advocated that pre-trials be used and that they be held by judges “who will try the case . . . two weeks to a month before the actual trial.” Senate Comm. on the District of Columbia, 91st Cong., 1st Sess., Report of
role was multifaceted and that "judging" included the work of managing cases, superintending lawyers, controlling the shape of litigation, and promoting settlement in lieu of adjudication. Judges of the D.C. courts played a central part in this reorientation of the judicial role.

The magazine story from which I drew the title of this Article provides a window into these efforts. Uncle Sam Modernizes His Justice was published in Reader's Digest in August of 1948. Its subject was the D.C. District Court's new experiment.

Uncle Sam Modernizes His Justice

Tucked away at the end of a comparatively quiet corridor in the busy, noisy courthouse of the District of Columbia is one of the country's new and unusual tribunals—the Pre-Trial and Assignments Court, which dispenses more justice in less time than any other in the building. What was "new and unusual" was that judges and lawyers were conferring in advance of trial to discuss the contours of a lawsuit and, some hoped, to settle such disputes as well.

The Honorable Bolitha Laws of the D.C. District Court was central to these efforts (and to the press coverage of them). He had worked as a member of the Judicial Conference's Pre-Trial Committee, created in 1940 to encourage the use of pre-trials, a then-novel addition in the federal system that the 1938 Federal Rules of Civil Procedure had licensed. Bolitha Laws and his colleagues were distressed that their fellow judges did not fully embrace the "modern" method of the pre-trial conference, which, in their view, could streamline trials and respond to the problems posed by growing dockets. These judges tried to promote judicial use of pre-trials through surveys, through distribution of "how-to" handbooks, and through targeted marketing of pre-trial techniques to newly appointed judges. Were one appointed to the federal trial bench in the early 1950s, one would have received a letter beginning:

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189. Frederic Sondern, Jr., Uncle Sam Modernizes His Justice, Reader's Digest, Aug. 1948, at 45.
190. Id. at 45.
191. Judge Laws was a member of the D.C. District Court from 1945 to 1958 and served as its chief from 1948 until 1958. See also Bolitha J. Laws, Pre-Trial Procedure, Address Before the Section of Judicial Administration of the American Bar Association (Sept. 10, 1940), in 1 F.R.D. 397, 401–02 (explaining his efforts at settlement and noting that he reassured counsel not to be deterred from seeking their days in court).
192. See Pre-Trial Committee Folder (1949), in Records of the Pre-Trial Committee, 1940–1955 [hereinafter Pre-Trial Committee Records], Entry 7, Box 2, located in Record Group 116, National Archives, Washington, D.C.
The National Judicial Conference Committee on Pre-Trial Procedure bids you a warm welcome to the federal judiciary. Many of our fine trial judges are convinced by experience that the sensible use of pre-trial is of material aid in the proficient and expeditious disposition of litigation. When such efforts provided insufficient, these judges undertook yet another new task: teaching.

Only fifty years ago, the idea of teaching judges about judging was thought odd. In 1954, a senior staff member of the Administrative Office wrote to a distinguished judicial leader that "the idea of a 'school for judges' would lend itself to ridicule." Judges were assumed to be steeped in the life of the law; formal education would undercut that image. But interest in teaching came from several sources, including from judges formulating and promoting a new pre-trial role for judges in ordinary cases and from judges involved in what is now called "large-scale" or "complex" litigation. In 1951, E. Barrett Prettyman, Sr. chaired a committee charged by the Judicial Conference of the United States to consider how to handle such "protracted cases." He recommended that judges who were assigned such protracted cases should "at the earliest moment take actual control of the case and rigourously exercise such control throughout the proceedings." Further, such judges (whom he described as "iron-hearted in demeanor") should hold conferences with lawyers to organize the path of the litigation. These views took hold among a group of judges who became eager to explain to their colleagues how to handle the "big case." And judges promoting pre-trials in ordinary cases were frustrated that too few of their colleagues shared their enthusiasm.

Together these judicial leaders pressed for institutional innovation. The first seminars convened were for protracted cases, and then, in 1960, the Judicial Conference of the United States began holding regular seminars for newly appointed judges. Five years later, the New York Times reported that "the

193. See, e.g., Letter from Alfred P. Murrah to Lester L. Cecil (May 25, 1953) (on file with author). Judge Cecil was then a new appointee to the federal bench in Ohio.


199. Id. at 385.
Federal judicial hierarchy is pushing a campaign to make its trial judges abandon their traditional role as passive umpires between opposing lawyers and to become more masterful in controlling trials.200 Reader’s Digest’s description and appreciate how accurately it captured the work of Judge Bolitha Laws and his colleagues, whom the author described as “crusader[s].”201 Judge Laws “and a group of the nation’s foremost judges and attorneys... preach[ed] their gospel to bar associations all over the country.”202 Thereafter, they succeeded by formalizing education for the profession of judging. Forty years later, their vision of the judicial role has come to permeate judicial education programs, federal statutes, practices, and rules.203

Materials from the D.C. Circuit’s conferences and its local rules reflect the shift in expectations of judges.204 In 1969, the D.C. Circuit began regularly publishing its conference proceedings.205 At several conferences, discussions addressed the changing role of individual judges toward their cases,206 the pre-trial process,207 judicial promotion of settlement,208 and reliance on magistrate judges, attorneys designated as “early neutral evaluat-

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201. Sondem, supra note 190, at 45.
202. Id.
205. See Thirtieth Annual D.C. Conference, supra note 72, at 141. The format has shifted over time; conferences from 1958 until 1960 included formal resolutions, debated and then voted upon. My thanks to staff of the D.C. Circuit for providing photocopies of those proceedings to me.
206. See id. at 159–60 (comments of Judge Wright) (describing that there was “no better way to expedite the disposition of a lawsuit than by placing the responsibility for the termination of that lawsuit upon the shoulders of a particular judge...[who] by pretrying the case himself...can expedite the determination of cases without trial”).
208. Id. at 384–87 (debating whether judges or magistrates should be involved in settlement); Proceedings of the Thirty-Ninth Annual Judicial Conference of the District of Columbia Circuit, 81 F.R.D. 263, 321 (1978) (including description of a magistrate judge who began by stating, “This is a settlement conference. The main rule is we don’t leave here until settlement is achieved”); Proceedings of the Thirty-Eighth Annual Judicial Conference of the District of Columbia Circuit, 77 F.R.D. 256, 302–06 (1977) [hereinafter Thirty-Eighth Annual D.C. Confer-
tors,” “mediators,” and “arbitrators.” In 1971, the conference described such efforts under the title “Non-Judicial Means of Resolving Legal Disputes.” Just thirty years later, these techniques are no longer viewed as “non-judicial” because arbitration, special masters, magistrate judges, and settlement efforts have become a part of judicial proceedings.

A ruling in the 1990s of the D.C. Circuit’s appellate court provides the appropriate coda. At issue was whether a court-appointed mediator, working in an alternative dispute resolution program in the “local” D.C. courts, was entitled to judicial immunity to protect him from a civil suit for damages. The appellate court held that the mediator was entitled to judicial immunity because what the court-appointed mediator did was no different from what a judge might have done. In other words, the tasks of judges have come to encompass mediation. Both judge and mediator strive to resolve cases without adjudication.

B. INVENTING THE ORGANIZED JUDICIARY

Just as individual judges came to understand their job to be different, so did the judiciary as an institution alter its approach to its own role. During the same
decades in which agencies were being required to function more like courts, the federal courts were developing institutional structures that enabled the judiciary to act more like an agency. Today, the federal judiciary functions as an entity that can minister to itself and can present to other branches of government a set of goals and programs. During the twentieth century, the Article III judiciary developed means by which to define a set of interests as its own and to promote them.

Although federal judges in the District have long had ready access to each other and to other public officials, the rest of the federal judiciary was dispersed and relatively uncoordinated. Recall, for example, that in 1915, some 120 federal judges were spread across the nation, with, for example, a single district judge in Indiana or Maryland or Massachusetts. They used different rules when deciding cases in their courts, and they had little institutional means by which to talk with each other. The Attorney General gave Congress reports on the federal courts and asked Congress for the judiciary’s funds. The American Bar Association also served to advance concerns about judicial administration, salaries, and staffing. Further, while individual judges might have pressed specific reforms, no means existed to do so collectively.

But in the 1920s, Congress authorized annual meetings for a group of senior judges, which became what is now called the Judicial Conference of the United States. The Chief Justice of the Supreme Court presides over the twenty-seven judges, who make official policy for the federal judiciary. In 1937, the D.C. Circuit joined that body. In 1939, at the behest of life-tenured federal judges, Congress created the Administrative Office of the United States Courts to collect data, submit budgets, and run the facilities for the federal court system. In 1967, the Federal Judicial Center came into being to expand the ability of the judiciary to focus on education and research. Under Warren

214. See, e.g., 220 F. v-vii (1915) (listing the district judges and their assignments).
215. As then-Chief Justice William Howard Taft put it, each federal judge had “to paddle his own canoe.” William Howard Taft, Possible and Needed Reforms in Administration of Justice in Federal Courts, 8 A.B.A. J. 601, 602 (1922).
216. See Act of Sept. 14, 1922, ch. 306, § 2, 42 Stat. 837, 838. The Act created the Conference of Senior Circuit Judges, which has since been renamed, revamped, and, as the Judicial Conference, is now authorized under 28 U.S.C. § 331 (1994). As Robert Post has argued, legislation that reconfigured the Supreme Court’s docket was also instrumental in bringing into being the judicial branch as we understand it today. See Robert Post, The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court, 85 MINN. L. REV. 1267 (2001) (discussing the Judiciary Act of 1925, which reduced the mandatory jurisdiction of the Supreme Court and thereby ceded authority to the Court to shape its own docket, which in turn occasioned a different understanding by the justices of their role).
Burger’s tenure, Chief Justices began to make “state of the judiciary” speeches. In 1991, the judiciary set up an Office of Judicial Impact Assessments to file “estimates” or predictions on the effects of new causes of action on court dockets. A few years thereafter, via a “futures planning process,” the Judicial Conference approved ninety-three recommendations to Congress as part of an official document, a first-ever Long Range Plan for the Federal Courts, issued in 1995. Thus, this body of judges has formally taken on the role of speaking on behalf of the Article III judiciary itself.

In short, over the last few decades, the federal judiciary has become an organization with more than 1500 judges (including magistrate, bankruptcy, and Article III judges), some 30,000 staff, and a budget of much less than one percent of the federal budget. As a corporate entity, the federal judiciary educates, plans, lobbies, and opines about the shape, nature, and future of judging. In terms of the positions taken in the last few years in its corporate voice, the federal judiciary has argued for limited growth in the number of life-tenured judges and, in some instances, for retrenchment for better salaries and courthouses, for expansion of the statutory federal judiciary, for less federal jurisdiction, and for a presumption against creation of federal


222. See LONG RANGE PLAN, supra note 17, 166 F.R.D. at 49.


224. See Omnibus Appropriations Bill a Mixed Bag for Judiciary, THIRD BRANCH, Nov. 1998, at 1, 5 (describing “total [fiscal year] obligations of $4.06 billion for the Judiciary,” and summarizing the allocations to salaries and expenses, to defender services, to juror fees, and to court security).

225. See LONG RANGE PLAN, supra note 17, 166 F.R.D. at 98 (Recommendation 15) (“The growth of the Article III judiciary should be carefully controlled so that the creation of new judgeships, while not subject to a numerical ceiling, is limited to that number necessary to exercise federal court jurisdiction.”).

226. In addition, and relying on a long tradition of private interest-based associations, federal judges have also organized another group, the National Federal Judges Association, focused on judicial salaries and benefits.

227. LONG RANGE PLAN, supra note 17, 166 F.R.D. at 94 (Recommendation 10) (“Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefits or regulatory cases that typically involve intense fact-finding.”); id. at 161 (Recommendation 65) (“Magistrate judges should perform judicial duties to the extent constitutionally permissible and consistent with sound judicial policy.”). In the commentary that follows, the Long Range Plan called for consideration of expanding the role of magistrate judges. Id.

228. Id. at 83 (Recommendation 1) (“Congress should be encouraged to conserve the federal courts as a distinctive judicial forum of limited jurisdiction in our system of federalism. Civil and criminal jurisdiction should be assigned to the federal courts only to further clearly defined and justified national interests, leaving to the state courts the responsibility for adjudicating all other matters.”); id. at 84–87 (Recommendations 2–5, criminal jurisdiction); id. at 88–94 (Recommendations 6–10, civil jurisdiction).
rights if enforced in federal court.229

VI. THE CONSTITUTIONAL "BOAST"

A. A HUNDRED-YEAR RETROSPECTIVE

A review of the last century makes plain that life-tenured judges have been instrumental in a self-conscious effort to reorganize the deployment of judges, to refocus the content of judging, and to shape the judiciary as an institutional force. They saw needs to generate more judges (of a variety of kinds and sited in an array of institutions) and more processes to respond to (if not to keep pace with) the demands for adjudication that a large population, a complex economy, and a multifaceted government imposed.

Moreover, they have succeeded. The persons who hold some aspects of the federal power of judging have multiplied. The venues of judging have diversified. The volume and kind of cases have changed. Some tasks of judging have devolved, while new ones have been invented and now overlap with roles once thought to belong to nonjudicial staff. The nineteenth-century positions of commissioner, referee, and justice of the peace have been renovated in the twentieth century into a subsidiary judiciary of serious capacity, with stature and status.230 The federal judiciary has also gained a corporate structure, enabling it to forward agendas by functioning through means associated with agencies and special interest groups.231

In some of the literature on judging, this dazzling set of innovations is explained only by reference to growing demands for judges’ time. Of course, the impulse to make changes was in part driven by conditions of excess. Altering process and posture was one way to increase capacity. Yet volume alone does not suffice to explain the entire set of transformations.232 Rather,

229. Id. at 88 (Recommendation 6) ("Congress should be encouraged to exercise restraint in the enactment of new statutes that assign civil jurisdiction to the federal courts and should do so only to further clearly defined and justified federal interests.").

230. The position of the magistrate judge is a particularly interesting innovation. The authorizing legislation gives Article III judges the ability to beget judges without asking Congress for a judgeship. All that is needed is funding. The quantities and allocations of magistrate judges remain internal managerial decisions of life-tenured judges who also hold the power of selection.

231. The interactions to further these efforts rely on a range of modes of communication, from published decisions to legislative testimony and informal contacts. See generally ROBERT KATZMANN, COURTS AND CONGRESS (1997); Posner, supra note 119, at 75 & n.86 (describing federal judicial lobbying work during the enactment of bankruptcy legislation); Henry Robert Glick, Policy-Making and State Supreme Courts: The Judiciary as an Interest Group, 5 LAW & SOC’Y REV. 271 (1970) (analyzing efforts by state court justices to affect state legislative policy and affiliation with other groups in support of specific policy agendas). In contrast to these practices, in which the judiciary competes with other groups for resources, literature on judicial independence posits that an independent judiciary serves to arbitrate disputes among special interests. See, e.g., William M. Landes & Richard A. Posner, The Independent Judiciary in an Interest Group Perspective, 18 J.L. & ECON. 875 (1975).

institutional actors came to believe not only in the need for greater productivity but also in the desirability of different modes and sites of production. Settlement efforts and alternative dispute resolution became celebrated as preferable forms of dispute resolution, as more amicable and more creative than adjudication.\footnote{233} The role of judge as deliberate decisionmaker receded in favor of the role of judge as dispute resolver.\footnote{234} Understandings developed that a life-tenured judge need not staff all of federal adjudication. The efforts to identify issues as not requiring a federal (as contrasted with state) court, as not requiring a constitutional (as contrasted to a statutory) judge, and as not requiring public (as contrasted to private) dispute resolution were founded upon a range of political and social premises in which efficient distribution of resources played a part but was not the sole determinant.

This set of responses is not anomalous. The historical trajectory I have detailed could belong to many organizations faced with higher demands for services that required expanded capacity through increasing the numbers and kinds of providers, delegating duties, routinizing processes, and reconfiguring the work. Organizational theory might well thus assimilate the developments

United States Courts surveyed federal trial judges repeatedly in the 1940s and 1950s and received reports that case loads were manageable in many areas and/or that pre-trial management and settlement efforts were not desirable responses. See, e.g., Folder Survey and Statistics, Federal Courts, 1944, in Pre-Trial Committee Records, supra note 192, at Box 2 (survey of Apr. 7, 1944, discussed in a letter from the Pre-Trial Committee to all district and circuit judges concerning pre-trial procedure in the federal courts). But promotion of efforts to respond to docket excess did not abate.

Similarly, trial rates in the federal system are now under four percent (down from twenty percent in the 1940s), and although filings in general are up, some labor-intensive forms of litigation have also declined, yet efforts to find alternatives to adjudication continue to be pursued. See Stephen Yeazell, \textit{The Misunderstood Consequences of Modern Civil Process}, 1994 \textit{Wis. L. Rev.} 631, 633–34 (discussing the declining trial rate); see also Terence Dunworth & Joel Rogers, \textit{Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991}, \textit{21 LAW & SOC. INQUIRY} 497 (1996) (finding that while the volume of litigation grew in the early period, it declined thereafter). The same is true in the District of Columbia. See \textit{FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA} 19 (1999).

This measure needs caveats. As noted, this form of trial data includes a range of evidentiary hearings and does not include magistrate and bankruptcy judge trials, which may affect the numbers somewhat, nor do recent charts address changes in the length of cases that do proceed to trial. These issues are before the Judicial Conference, which has commissioned a review of the decline in trials. See Admin. Office of the U.S. Courts, \textit{DRAFT/DECREASING TRIAL RATES IN THE UNITED STATES DISTRICT COURTS} (2001) (on file with author).


\footnote{234} How judicial productivity is measured reflects this preference. Data track the number of pending cases per district court judge but not the number of adjudicatory decisions per trial judge. Telephone Interview with Staff, Administrative Office of the U.S. Courts (Jan. 2001). Appellate courts do track the numbers of appellate decisions rendered. See \textit{U.S. Courts of Appeals—Judicial Caseload Profile}, at http://www.uscourts.gov/cgi-bin/cmsa2000.pl (last visited Jan. 29, 2002). Further, specialized studies, either by the judiciary or by legal commentators, address publication rates. See, e.g., Mitu Gulati & C.M.A. McCauliff, \textit{On Not Making Law}, \textit{61 LAW & CONTEMP. PROBS.} 157 (1998). In one analysis, publication of decisions is a measure of the “burden” of an appellate docket. See, e.g., Bermant, Lombard & Seron, \textit{supra} note 180, at xi–xii.
within the federal judiciary to those of other institutions, also busy, which “strive to become less reactive,” to have agendas “less controlled” by those to whom they provide service, and to be “more self-directed and bureaucratically organized.”

The issue is whether the federal judiciary ought to welcome the comparison with other organizations or whether its peculiar mandate and constitutional position should prompt concern about its assimilationist evolution. The question for the next generation of reformers is whether to try to link the enterprise of federal judging to values identified as central to Article III or to permit Article III to become increasingly attenuated from that work. My answer is that an independent judiciary is, as Justice Douglas commented in a case about the D.C. Circuit, “one of our proudest boasts, by reasons of Article III.”

But what I have shown is that Article III does not speak directly to the judiciary’s current structure, to most of the people who serve as judges within the federal system, nor to a significant amount of the tasks they undertake. Article III as currently interpreted is not sufficient to the task of ensuring that judicial independence can and will be sustained.

Who and what is at risk? In my view, life-tenured judges are not themselves immediately vulnerable. However unpleasant the contemporary rhetoric, United States history is replete with verbal attacks and legislative efforts (mostly aborted) aimed at undermining the Article III judge. This era is sometimes identified as another peak, particularly given congressional incursions on federal court jurisdiction and remedies. These statutes could be read as assaults on judicial independence or as specially targeted constraints on the judicial authority to recognize the rights of particular sets of litigants, such as prisoners and immigrants, now subjected to different and more onerous requirements that limit their access to courts. But the statutory revisions could also be understood as reflecting an agreement between the judiciary and the Congress about appropriate limitations on access for certain sets of litigants. Indeed, a five-person majority of the Court has often led the way in restricting access. Rather than delineate boundaries to protect judicial remedial authority, the leadership of the federal judiciary has shifted constitutional meanings to tolerate both diminished access for litigants to courts and reductions in certain forms of judicial power.


237. See supra note 172.


239. The circumscription of common law powers of federal courts is a central example. See Peter Strauss, Courts or Tribunals? Federal Courts and the Common Law, 53 Ala. L. Rev. (forthcoming
Moreover, the office of the life-tenured judge remains, at present, secure—if judicial independence is translated to mean both freedom of an individual judge to decide a case without risk of loss of tenure and the ability to obtain the requisite economic support to provide services.\textsuperscript{240} Debates can properly be had about whether salaries are too low, courthouse construction insufficient, or congressional inquiries too persistent.\textsuperscript{241} Yet the Article III judiciary has had a record of considerable success with Congress, which has provided the life-tenured with better pay, staff, and facilities than other judiciaries in the United States.\textsuperscript{242}

Turn from the life-tenured Article III judiciary to the large numbers of non-life-tenured federal judges within and without, and the picture is less encouraging. As a raft of bankruptcy and magistrate judges come up for


\textsuperscript{241} For example, the federal judiciary has proposed a significant program of courthouse renovation and building, which in turn has prompted disagreements. See \textit{generally} Gen. Accounting Office, GAO/GGD-97-39, \textit{Courthouse Construction: Better Courtroom Use Data Could Enhance Facility Planning and Decisionmaking} (1997); Gen. Accounting Office, GAO/T-GGD-96-19, \textit{Federal Courthouse Construction: More Disciplined Approach Would Reduce Costs and Provide for Better Decisionmaking} (1995). Some of the proposals were delayed. See, e.g., \textit{Courthouse Funding Delay Jeopardized Judicial System}, \textit{Third Branch}, July 1998, at 1 (describing testimony by judges urging Congress to approve construction projects). But thereafter, several were funded. See \textit{Omnibus Bill Funds Courthouses in 1999}, \textit{Third Branch}, Nov. 1998, at 1 (describing the authorization and appropriation of $460 million for thirteen new projects and another $25 million for repairs, as well as the lack of assistance from the White House in obtaining these funds).

Another focus has been on congressional efforts to elicit information from judges on their allocation of time and their travel. In the mid-1990s, Senator Charles E. Grassley, as chair of a Senate oversight committee, sent sitting judges questions about their use of time. See \textit{Now the Judges Face the Questions}, \textit{Legal Times}, Feb. 5, 1996, at 8 (describing responses by judges to questionnaires sent by Senator Grassley); see \textit{also} GAO Releases Report on Noncase-Related Travel by Judges, \textit{Third Branch}, Apr. 1998, at 6 (discussing a report, also requested by Senator Grassley, that reviewed “non-case related trips” of sixty-four appellate and 254 district court judges “encompassing 3,200 appellate workdays and 9832 district court workdays, most of which were spent on court seminars and meetings”); Judith Resnik, \textit{The Federal Courts and Congress: Additional Sources, Alternative Texts, and Altered Aspirations}, 86 Geo. L.J. 2589, 2601-04 (1998) (outlining the debate on salaries and budgets).

In December of 2000, Congress responded to some of the goals of the judiciary by providing appropriations for cost of living adjustments for federal judges, for courthouse construction, and for new judgeships. See \textit{COLA for Judges, supra} note 56, at 1. However, in his annual discussion about the judiciary in 2001, the Chief Justice again reported his distress about salaries and emphasized the degree to which they were unattractive to private practitioners. William H. Rehnquist, \textit{2001 Year-End Report on the Federal Judiciary} (Jan. 1, 2002), http://www.supremecourts.gov/publicinfo/year-end/2001year-endreport.html.

\textsuperscript{242} Further, Article III remains a source of protection. See United States \textit{v. Hatter}, 532 U.S. 557 (2001) (holding that the Compensation Clause prohibited the collection of Social Security taxes, but not Medicare taxes, from Article III judges holding office before Congress imposed such taxes on federal employees).
reappointment, their vulnerabilities are becoming plain. Some of those judges have begun to raise questions about the effects of the reappointment process on independence.\textsuperscript{243} One concern is that entities targeting state court judicial reelections might turn their attention to reappointment processes within the federal system.\textsuperscript{244}

The federal administrative judiciary has yet fewer luxuries, and Congress has recently proven itself especially unkind. Judges within agencies are not equipped with the markers of prestige. They often work in cramped facilities, with little by way of support staff. In the 1990s, over the objection of a wide range of commentators, Congress abolished the Administrative Conference of the United States, the institution that had provided some systematic consideration of the administrative judiciary.\textsuperscript{245} Further, despite many proposals to revamp administrative judicial processing,\textsuperscript{246} Congress has refused to consider efforts to enhance the authority, prestige, respect, and élan of that group of judges. In addition, in recent years, pressure has mounted to turn away from the independence accorded judges appointed under the APA and


\textsuperscript{244} Judicial elections in states have become more expensive because of the entry of national participants. As one commentator has explained, "The continuing nationalization of state judicial elections is further shown by the U.S. Chamber of Commerce’s recent efforts through the Institute for Legal Reform to support the election of pro-business judges in Alabama, Illinois, Michigan, Mississippi, and Ohio. The goal is to make both direct campaign contributions and to pay for issue advertising." See Anthony Champagne, Interest Groups and Judicial Elections 8 (2000) (paper prepared for the Summit on Improving Judicial Selection, on file with author); see also William G. Kelly, Selection of Judges, A.B.A. JUD. DIVISION REC., Winter 2000, at 3 (describing efforts by the Chamber of Commerce and trial lawyers and "other interest groups" spending money "raking the candidates over the coals").

The results from the perspective of the Ohio Chamber of Commerce are discussed in Keith Lake, Outcome of Elections Leaves Political Landscape Unchanged, OHIO MATTERS (Ohio Chamber of Commerce, Columbus, Ohio), Nov./Dec. 2000, http://www.ohiochamber.com/events/ohiomatters/ohiomatters_novdec00news4.html (noting that its "greatest political challenge... was to elect two Supreme Court justices who don’t answer to personal injury lawyers and are not swayed by politics and personal agendas").

\textsuperscript{245} See William Funk, R.I.P. A.C.U.S., ADMIN. & REG. L. NEWS, Winter 1996, at 1 (describing the termination of funding for the Administrative Conference of the United States (ACUS) despite bipartisan efforts to preserve it).

to permit agencies to appoint less-well-protected individuals to serve as hearing or administrative judges.\textsuperscript{247} As one commentator puts it, "Non-ALJ adjudicators' are sprouting faster than tulips in Holland."\textsuperscript{248} And, while many nongovernmental organizations are now concerned about judicial independence,\textsuperscript{249} their attention has only begun to turn to the problems of federal judges who lack life tenure.\textsuperscript{250}

These very differences in status, prestige, and resources between life-tenured and other federal judges demonstrate another aspect of the import of Article III itself. That constitutional text both protects a particular cohort of federal judges and provides an icon, a marker that the judge in the United States is a specially situated government employee. Article III locates the federal judge as radically independent, in the sense that the judge has the power to sit in judgment of both public and private parties yet those litigants have only indirect methods of control or retaliation. The power of the symbolism came into sharp relief through the President's efforts in the fall of 2001 to escape Article III by seeking to locate the trials of non-United States citizens charged with terrorism in a commission controlled by the executive branch.\textsuperscript{251} The proposal to avoid trying designated defendants in Article III courts serves as an example of the promise of judicial indepen-

\textsuperscript{247} See supra note 60 (discussing authorization for the Department of Interior to use non-APA judges under certain circumstances). Regulations issued pursuant to that statute altered the definition of "administrative law judge" by adding the term "OHA deciding official" and by providing that either ALJs or "Indian probate judges, who are senior attorney-advisers appointed pursuant to specific congressional authority" could handle certain Indian probate cases. See Trust Management Reform: Probate of Indian Trust Estates, 66 Fed. Reg. 67,652, 67,652 (Dec. 31, 2001) (to be codified at 43 C.F.R. pt. 4).

\textsuperscript{248} Jeffrey S. Lubbers, APA-Adjudication: Is the Quest for Uniformity Faltering?, 10 ADMIN. L.J. Am. U. 65, 70–71 (1996) (discussing the use of non-APA judges in the Departments of Justice, Agriculture, and Defense); Yoder, supra note 60 (citing examples of efforts to avoid providing judges protected by the APA). The incentives to avoid APA adjudication include a range of costs, such as that ALJs may qualify for pay higher than other employees, the hiring system can be slow, and judges outside the APA may be subjected to management standards. Lubbers, supra, at 73–74.

\textsuperscript{249} Many communities of lawyers—in the American Bar Association, the Judicature Society, within state and federal judiciaries, and more recently formed organizations—have raised concerns about the rise of vitriolic attacks on judges, particularly in state but also in federal courts. Such efforts are part of a well-funded campaigns arguing that judges in the United States have "too much" independence. See Bruce Fein & Burt Neuborne, Why Should We Care About Independent and Accountable Judges?, 84 JUDICATURE 58 (2000); ABA, AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997).

\textsuperscript{250} See, e.g., Ann Marshall Young, Judicial Independence Resolution Passes 279 to 2, A.B.A. JUD. DIVISION REC., Fall 2001, at 15 (reporting that the ABA House of Delegates had adopted resolutions addressing judicial independence of administrative adjudication by urging that governments hold such judges accountable under ethical standards adapted from the ABA Model Code of Judicial Conduct; also proposing that removal of administrative judges, excluding agency heads, occur only upon notice and hearing before an independent tribunal from which appeal exists).

\textsuperscript{251} See Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (subjecting noncitizens whom "from time to time" the President "determines" should "in the interest of the United States, be subject to that order" to be detained and "tried by military commission").
Such is Article III's power. Therefore, it is time to face the impact of its dilution. Rather than return to the debates of the second half of the twentieth century about whether non-Article III federal adjudication is constitutionally permissible, I invite discussion about the consequences of the doctrine relaxing its contours. The effects of the growing dominance of first-tier federal judges who lack life tenure need to be explored with a focus not only on those judges but also on their Article III superiors and on a culture that imagines federal judges to be uniquely independent actors.

As Article III's relationship to federal judges becomes attenuated, does an understanding of the federal judge as an independent actor blur? Or does the aura of independence travel with the title judge? If so, should that title be conferred more sparingly or can a large number of individuals lay claim to and enact its commitments? Ought the title "administrative judge" convey an understanding that a substantively different job is involved than that belonging to a magistrate, bankruptcy, or district court judge? Should the judges within Article III similarly be kept distinct? Or should we aspire, through pressing for similar practices, norms, and ethical rules, to homogenize the many judges and perhaps bring them within the same institution?

One set of responses to such questions returns to the discussion of appointment practices, with a focus on whether more of these judges ought to have Article III status. Instead, I pursue a different tack, opening up discussion on whether the means by which a judge is appointed could become less relevant to that judge's status. By way of conclusion, I respond to the question of the relationship between the diversification of federal judges and judicial independence through sketching competing responses, incorporating aspects of contemporary law and forecasting future developments.

B. FEDERAL JUDGING WITHOUT ARTICLE III: ADMINISTRATORS OR JUDGES?

One option is to conclude that Article III has nothing to say to non-Article III judges. That view may well summarize the current law on administrative law judges. Under this approach, the form that non-Article III federal judging takes is shaped by other parts of the Constitution, by statutes free of the strictures of Article III, and by common law and social practices. State judges and judges in many other countries live without life tenure and salary protection. A growing group of federal judges can do the same.

What then delineates the role of the judge? One source is the due process

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252. The effort at avoidance is especially interesting given that life-tenured judges have not had a glorious history of blocking reductions in civil liberties in wars gone by, as decisions sanctioning the detention and internment of individuals of Japanese heritage exemplify. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).
tradition (both constitutional and common law), which locates a judge as an impartial officer but not one structurally independent from the institution that supplies salary and position. But what are the parameters of a constitutional due process model of judging? Old precedents refused to acknowledge that it included the concept of institutional independence. For example, an argument was made in the nineteenth century that federal judges in territories had constitutional independence based on English legal traditions. A majority of the Court, however, rejected the dissent’s view that England’s commitment to an independent judiciary had been incorporated into the Constitution to shelter all judges serving under federal commission. Similarly, a century later, to underscore his objections to the increasing reliance on administrative courts, Justice Douglas commented that the Bill of Rights had no necessary relationship to administrative courts. Moreover, to the extent that constraining norms flow from the common law side of due process, scholarly commentary and Supreme Court decisions are increasingly pronouncing that the federal courts lack common law powers.

Further, not only are due process moorings loose but their contours are flexible. Under United States law, a due process approach does not bring with it Article III requirements of finality of decisional power or exclusivity of function. As currently understood, agency-based judges need not work only as judges. Moreover, such judges may be subject to superintendence by administrators in a fashion quite foreign to current aspirations of a judge’s freedom. At some points, judges might—like other public employees—find protection through the First Amendment, invoked, for example, to buffer administrative judges from discharge based on their decisions. But, were administrators to undertake peer review for quality control, then judgments could be subject to revision by colleagues or superiors who had not directly heard the disputants. While

256. Glidden Co. v. Zdanok, 370 U.S. 530, 605-06 (1962) (Douglas, J., dissenting). He argued further that “we subtly undermine the constitutional system when we treat federal judges as fungible.” Id. at 603. His commentary invoked Ex parte McCord, 74 U.S. (7 Wall.) 506 (1868) (mem.), and United States v. Klein, 80 U.S. (13 Wall.) 128 (1871), Glidden, 370 U.S. at 605 n.11, which provokes the question of the symmetry between the growth of deference to congressional control over jurisdiction and the growth of non-Article III judiciaries.
257. See generally Strauss, supra note 239.
258. See, e.g., Perry v. McGinnis, 209 F.3d 587 (6th Cir. 2000) (holding First Amendment protections accorded to hearing officer’s decisions); Harrison v. Coffman, 35 F. Supp. 2d 722 (E.D. Ark. 1999) (denying motion to dismiss and holding that a state hearing officer gained such protection under the First Amendment against discharge based on a claim that rulings were too favorable to prisoners); Harrison v. Coffman, 111 F. Supp. 2d 1130 (E.D. Ark. 2000) (reiterating that approach in a decision denying summary judgment).
259. Peer review—here used to mean that a decision would be read by other judges prior to its issuance—is currently a topic of debate within the administrative judiciary. Some argue it will improve
statutes and civil service rules might protect their jobs, the fact that they are judges would not intrinsically insulate them from discharge based on failures to produce sufficient quantities of decisions or to meet other guidelines. In short, the current Court’s retreat from imposing procedural due process requirements on many judgments rendered in agencies and its broad conception of congressional powers to structure statutory remedies within agencies do not give judicial officers in such entities much by way of constitutional protection.

Imagine then the many federal judges standing outside Article III and shaded slightly by a thin line of due process and First Amendment doctrine mixed with common law practices. Judging could, nevertheless, continue to look familiar—at least for awhile. If we think of judging not only as a legal institution but also as a social practice, it is possible (either as a universalist matter or in terms of this specific culture) that its parameters, which have developed historically and that we associate with judging, will persist, providing direction to those individuals and institutions charged with the task of adjudication. If the social predicates remain in place and if the norms of judging are artifacts of social interactions, disconnecting them from Article III does not, necessarily, undo them. Moreover, to the extent law is needed, the Constitution is not its necessary source. Many statutes shore up traditions of adjudication. A good deal of judging within federal administrative agencies is governed or influenced by the APA, which specifies that trial-like procedures be provided at hearings.

That more optimistic analysis is undercut primarily by the efforts—detailed above—to alter the practices of judging undertaken by the Article III judiciary itself. Here is where the “modernizing” quest that focused on relaxed processes for “Uncle Sam’s Justice” becomes so important. Judicial enthusiasm for off-the-record negotiations and support for alternative dispute resolution alter the social meaning of judging. Not surprisingly, the informality and free-ranging quality; others say it undermines the independence of judges and, depending on its form, the due process rights of litigants. See generally Ann Marshall Young, Evaluation of Administrative Law Judges: Premises, Means, and Ends, 17 J. Nat’l Ass’n Admin. L. Judges 1 (1997); John Hardwicke & Ronnie A. Yoder, Does Mandatory Quality Assurance Oversight of ALJ Decisions Violate ALJ Decisional Independence, Due Process or Ex Parte Prohibitions?, 17 J. Nat’l Ass’n Admin. L. Judges 75 (1997). A system used in some federal circuits could be analogized to peer review. Some circuits have staff attorneys read opinions before they are released to check for intracircuit conflicts. If found, the decision is returned to the panel to decide if its judgment should be revised.


of contemporary innovations inside Article III are mirrored by similar efforts in
the non-Article III judiciary, such that the statutory predicates for their forms of
judging are also changing. California, for example, has revised its APA to
permit “informal hearings” and to welcome alternative dispute resolution.\textsuperscript{263} As
long as the Article III judiciary continues to insist that courts constituted outside
the parameters of Article III are “purely creatures of statutes,”\textsuperscript{264} and as long as
the Article III judiciary continues its leadership role in redefining the tasks and
means of judging, erosion of the adjudicatory model becomes the more likely
development. Thus, signature aspects of judging today—such as the current
conception of a judge tethered to a record—may soon cease to be understood as
intrinsic to the “judicial.”

Having sketched a mélange of contemporary doctrine and its possible evolu-
tions about the processes afforded by and the protections provided to federal
judges outside of Article III, I have shown that the role of “judge” may offer a
thinner veneer than might have been expected. As more people work as judges
outside of Article III and as those within Article III adopt a wider range of
techniques, the content of what is entailed in federal judging shifts. Process,
place, and person combine to make judging intelligible as a discrete decisionmak-
ing method. But the trajectory that I project homogenizes the tasks of various
officials of the government and among public and private dispute resolvers. The
distinctive identity of judges in courts diminishes.

Looking back and then forward, the few decades within the twentieth century
when actors within agencies had to rely on judicial processes to decide entitle-
ments against the government could become a blip on the screen, overshadowed
by the current (and projected future) retreat from a concept of individuals
having such enforceable rights. The expansion of sovereign immunity law,
sheltering states from claims made against them, points in this direction.\textsuperscript{265} as
does the narrowing scope of procedural due process and new constraints on
implying private causes of action.\textsuperscript{266} The license provided by the doctrine of
public rights becomes central, giving the federal government control over when,
how, and if to organize claims and remedies.

For some, this flexibility is both attractive and constitutionally proper. I,
however, find both the current contours and the future possibilities a source of
concern, prompting an interest in alternative understandings of “our proudest
boast” of judicial independence. Therefore, I turn to examine how growing

\textsuperscript{263} Asimow, supra note 34, at 319–21.
\textsuperscript{264} Smith’s Estate v. Comm’r, 638 F.2d 665, 669 (3d Cir. 1981) (holding that a decision by a
“special trial judge” was not a decision of the Tax Court, appealable at that time).
\textsuperscript{265} See Vicki C. Jackson, \textit{Principle and Compromise in Constitutional Adjudication: The Eleventh
Amendment and State Sovereign Immunity}, 75 \textit{Notre Dame L. Rev.} 593 (2000); Vicki C. Jackson,
\textit{Federalism After Alden: Deductions of Coherence, State Sovereign Immunity, and the Denationali-
275 (2001). For further discussion, see supra note 238.
reliance on non-life-tenured federal judges within Article III affects the independence of both employing and employed judge. I then argue for a broader reading of Article III than is suggested by this first analysis of current doctrine.

C. FEDERAL JUDGING WITHIN BUT WITHOUT ARTICLE III: THE INDEPENDENCE OF EMPLOYER AND EMPLOYEE

Consider the future prospects of both the judges without and with life tenure within the Article III judiciary. Under the umbrella of "judicial adjunct," Congress could devolve a great deal of first-tier authority to individuals whose positions depend upon Congress and could possibly mandate processes quite distinct from those linked with the life-tenured judiciary. Moreover, it is possible that all first-tier fact-finding will become the purview of such judges. As years pass, the redundancy of two sets of trial judges could seem inefficient and antiquated. Reformers could become eager to rationalize the system by formally turning the life-tenured bench into an appellate body.

Could Congress constitutionally spin magistrate and bankruptcy jurisdiction off into non-Article III courts that serve as the gateway to appellate review by life-tenured judges? Many academic commentators have argued that the only Article III requirement is access, at some point, to a constitutionally independent judge. Were the grant of jurisdiction direct to magistrate and bankruptcy judges and the nexus to the Article III branch more attenuated, however, rebellion from the life-tenured could prompt the conclusion that the balance has tipped too far from Article III values. Much of the expansion of the powers and duties of magistrate and bankruptcy judges has, after all, been justified on the grounds that serving under the supervision of Article III judges provides both legitimacy to and security for such judges.

Those constitutional assumptions make Article III the likely port for a growing group of non-life-tenured judges. The question then becomes one about the limits from within. How does the growing presence of statutory judges affect the concept of the federal judiciary as independent? One issue is size:

267. The Judicial Conference, however, has consistently objected to the direct grant of jurisdiction to magistrate judges. See MAGISTRATE JUDGE DUTIES, supra note 79, at 1 (describing Judicial Conference view that magistrate judges’ jurisdiction should flow by designation from Article III judges rather than directly from Congress). Congress has not always followed that advice. See 18 U.S.C. § 3184 (2000) (authorizing “any justice or judge of the United States, or any magistrate” to conduct extradition proceedings). Although courts have concluded that “extradition officers” specified in the statute do not themselves hold “judicial power under Article III,” that jurisdictional grant indicates the pressures and utilities of direct provisions. See, e.g., Lo Duca v. United States, 93 F.2d 1100, 1108 (2d Cir.), cert. denied, 519 U.S. 1007 (1996).

268. As Paul Bator explained, the reliance on the theory of magistrate and bankruptcy judges as adjuncts to the district courts undermines the purpose of such judges—to take on work, not to require that such work be done twice. See Bator, supra note 50, at 252–53.

269. See Paul D. Carrington, The Obsolescence of the United States Courts of Appeals: Roscoe Pound’s Structural Solutions, 15 J.L. & Pol. 515 (1999) (reminding readers of Pound’s idea for a posttrial motion to a panel of three judges to serve as a quick and effective appeal).

270. See supra note 123.
Should we worry about a tipping point? (Recall that sixteen trial benches have equal numbers of magistrate and district court judges; six have more magistrate judges than district court judges.) Another question is about dependence on Congress, which holds the power to cut statutory jobs. A third issue is the process: Can Article III judges enact the values of judicial independence as they carry out the duties of employing other judges? My focus here is on this third question—the effects of appointment and reappointment of judges by judges on the conception of a judge as independent.

1. Judicial Selection of Judges by Judges

Life-tenured judges have always had some power of appointment—of clerks, clerical staff, commissioners, special masters, law clerks, and other assistants. But for the first time in the history of the United States, life-tenured judges play a pivotal role in choosing a large number of people to serve as the initial adjudicators within Article III and then in deciding whether such individuals may, through reappointment, continue to do so. The two facets of this task—initial selection and reappointment—require separate analysis, as does their cumulative effect.

The initial question is one of constitutionality. One might argue that separation of powers theory prohibits judges from selecting judges, either because it is beyond the province of the judge or because doing so impermissibly intrudes on the powers of other branches. That judges have staffed their own chambers or districts and have selected juries and special masters can be distinguished. Article III judges could have the power to create ad hoc judges for a particular instance but not the power to anoint long-term office holders. Yet, given doctrinal toleration of mixed functions and the practices of the last several decades, a challenge to the congressional statutes delegating selection of magistrate and bankruptcy judges to the Article III judiciary is unlikely to succeed.

Having, however, argued the flexibility of constitutional doctrine, I need to consider whether the Constitution should be read differently. Debate in the United States has centered on two options for empowering judges: election and appointment through political processes. Dissatisfaction with both routes is commonplace, as money and politics play large roles in who can become a judge. In contrast, the federal judiciary has, quietly, crafted a third and new alternative: appointment through judicial processes. Selection of judges by

272. In addition, judicial appointment of other judges within Article III could be argued under Article II, Section 2 of the United States Constitution, which authorizes the President to make appointments but also provides that “the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” U.S. CONST. art. II, § 2, cl. 2; see also Freytag v. Comm’r, 501 U.S. 868, 891–92 (1991) (holding that the reference to “Courts of Law” includes non-Article III courts closely resembling Article III courts, that the Tax Court was within Article II, and, therefore, that it could properly make appointments of special judges).
judges could thus either be celebrated as proffering a new model or bemoaned as harmful both to Article III judges and the polity.

Turn first to the advantages of judicial appointment of judges. As a few details of current practices illustrate, the judiciary has selected a high-quality and relatively nonpolitical corps of judges in a relatively inexpensive fashion. The authorizing legislation for magistrate judges specifies very general requirements and calls on the Judicial Conference to promulgate procedures that include public notice and provide for merit selection panels to assist in identifying qualified persons. The statutory provisions for bankruptcy judges are less directive, reflecting in part the controversy in the early 1980s about whether then-sitting bankruptcy judges ought to gain Article III status and about how to provide for those holding jobs at the time of the 1984 act. Congress has required public notification of bankruptcy positions and listed general qualifications. The Judicial Conference, in turn, has promulgated regulations that provide more direction to district courts on the selection and reappointment of magistrate judges than to circuit courts, charged with the task of employing bankruptcy judges. Districts and circuits also have additional rules.

273. See 28 U.S.C. § 631(b) (1994) (specifying a few criteria, such that candidates have a certain number of years of experience as lawyers and not be related to a judge on the appointing court). Provisions for merit selection were included in 1979 amendments. See Federal Magistrate Act of 1979, Pub. L. No. 96-82, § 3(c), (e), 93 Stat. 643, 644-45 (1979) (calling for merit selection panels to give “due consideration to all qualified individuals, especially such groups as women, blacks, Hispanics, and other minorities”).

274. See 28 U.S.C. § 152(a)–(c) (providing that courts of appeal shall appoint bankruptcy judges in numbers specified in that statute and upon consultation with the Judicial Conference).


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As compared with either state judicial elections or Article III nominations, the selection process for federal statutory judges is a low-profile event. Some variation occurs as each district and circuit runs its own processes, but in general, after public notice, lawyers apply for positions as they become available. Questionnaires and inquiry follow, and the qualities of particular individuals are debated outside the heat of public hearings. Because the selection process crafted through statute and Judicial Conference guidelines does not mimic the inquiries associated with the congressional approval of Article III judgeships and party affiliations are less central, the pool of prospective federal judges is different. Some individuals now serve as judges who would not as a political matter have been likely to have been nominated by a President nor approved by the Senate.

Further, given the dependence of life-tenured judges on magistrate and bankruptcy judges and the blur from the public perspective of exactly which judge holds what position, Article III judges have incentives to pick stellar candidates. That judgments about lawyers’ professional capacity are made by judges, as contrasted with executive officials, politicians, or voters, enables those with knowledge to identify others capable of doing such work. The process appears to have resulted in bankruptcy and magistrate benches of high quality. Indeed, the ranks of Article III judges are increasingly populated by individuals who once served as statutory judges.

The very sheltering of these judicial appointments from politics can be seen as either its virtue or its vice—at both constitutional and prudential levels. One critique rests on the view that the choice of who should be our judges is essentially a political one, committed by the Constitution to other branches of government. The policy in support of the constitutional claim is that the process ought to be porous, open to public input and public scrutiny. The argument is that federal judging is a form of power that may not legally and ought not prudentially be conferred through processes outside the public purview. Further,
had judgeships been available only through Article III and the number of such judgeships expanded in response to demand (rather than have demand lowered through delegating judging to non-Article III judges), the current “confirmation mess” (as some describe contemporary nomination and confirmation processes)282 might not have occurred because neither the Executive nor Congress would have had the stamina to politicize so many jobs.

A second set of criticisms, again available at both constitutional and prudential levels, focuses on the risks to life-tenured judges of being in the position of making judicial appointments. Article III created judicial independence to avoid judges needing to curry favor in order to retain their jobs and their salaries. But through the power of judicial appointment, judges now have something to give.283 Salaries, staff support, courtrooms, chambers, committee assignments, and pensions come with magistrate and bankruptcy judge positions. As life-tenured judges become a source of patronage, applicants and their supporters have more to gain by courting those judges.284

Tiers of judging inside Article III can undermine judicial independence, as traditionally understood, in another respect. A much celebrated aspect of life tenure is that it can put judges outside career ladders by providing a great job, forever. The reality is not quite so rosy. Ambitions do not end with a judgeship. One problem is the “bench climber,” by which is meant a district judge hoping to be an appellate judge, and an appellate judge auditioning for

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283. That relationships can be a form of threat to independence has been explored in the context of the English judiciary. See Lemmings, supra note 1, at 134–35 (concluding through an examination of which individuals were actually selected in Hanoverian England that, after the Act of Settlement, more senior judges had closer ties to the governing party than had judges in earlier periods, and that through “the process of ‘policisation’” a good deal of control was imposed). In terms of the contemporary incentives of judges, economists and public choice theorists have begun to spawn a literature exploring these issues. See, e.g., Frederick Schauer, Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior, 68 U. CINN. L. REV. 615 (2000) (bemoaning the lack of empiricism on judicial self-interest); Jonathan R. Macey, Judicial Preferences, Public Choice, and the Rules of Procedure, 23 J. LEGAL STUD. 627 (1994); Janet Alexander, Judges’ Self-Interest and Procedural Rules: Comment on Macey, 23 J. LEGAL STUD. 647 (1994); Richard A. Posner, What Do Judges Maximize? (The Same Thing Everyone Else Does), 3 SUP. CT. ECON. REV. 1 (1994); Posner, supra note 119 (detailing such issues in the context of bankruptcy legislation).

284. Some insulation of the Article III district court comes from the merit selection panels, required to do the initial screening and make recommendations for magistrate judges. See 28 U.S.C. § 631(b)(5) (1994); 1997 MAGISTRATE JUDGES SELECTION PROCEDURES, supra note 277, at 9–12 (detailing the procedures for the merit selection panel); 2001 Magistrate Judges Selection and Reappointment Procedures, supra note 277, § 3.02 (specifying that the merit selection panel shall be comprised of no fewer than seven members, at least two of whom are nonlawyers and none of whom are sitting federal judges).

The regulations addressing bankruptcy permit but do not require the appellate courts to use merit selection panels. See 2001 Bankruptcy Selection Regulations, supra note 278, § 301 (providing that a circuit council “may appoint a merit selection panel” or “may authorize the chief judge” of a circuit to do so); id. § 3.02 (providing that the panel have at least three members who are residents of the circuit but not detailing other requirements).
the Supreme Court. Further, and in part through judicial promotion of alternative dispute resolution, more lucrative options exist. With the title of federal judge on one’s resume, one can be a player in the growing market for private judges. Between giving and getting jobs, life-tenured judges have more reasons to please litigants, other judges, and lawyers, some of whom may be future employees, employers, or sponsors.

The statutory judgeships create another step on the career ladder and exacerbate the problem. In the early years of the Federal Magistrates Act, a pervasive assumption was that a magistrate job was for people who were unlikely to become life-tenured judges. But over time, as the job has grown in content and stature, that expectation has diminished. An increasingly well-trodden path is for a person to shift from magistrate or bankruptcy judge to district court judge. The federal system thus has started to resemble a pattern associated with the European judiciary, in which judges are specially trained and move from one court level to the next. Analysts of such career judiciaries note that judges who sit at lower levels and seek promotion or reappointment have incentives to conform and defer, that they tend to be cautious in an atmosphere in which collegiality is a virtue and retaliation is feared. Further, such judiciaries do not always provide high status. In contrast, in systems in which lawyers are directly appointed to prestigious judgeships, the assumption is that the very traits which brought those lawyers to prominence make them open as judges to exercising discretion and engaging in legally adventurous interpretation. Thus, the development of a career ladder for judges, while attractive in terms of training and information, may deter

285. One review found a three percent probability of a circuit judge being appointed to the Supreme Court and a six percent probability of a district judge being appointed to a circuit. See Frank B. Cross & Blake J. Nelson, Strategic Institutional Effects on Supreme Court Decisionmaking, 95 Nw. U. L. Rev. 1437, 1469 (2001). See generally Laura Little, Loyalty, Gratitude, and the Federal Judiciary, 44 Am. U. L. Rev. 699 (1995). In addition, judges may compete for committee assignments, travel opportunities, and other markers of leadership.

286. See William H. Rehnquist, 2000 Year-End Report on the Federal Judiciary, THIRD BRANCH, Jan. 2001, at 1 (reporting that fifty-four district and appellate judges had left the bench during the 1990s and noting that “while we cannot say that these judges left because of salary concerns alone, this number compares with 41 judges during the 1980s and just three during the 1960s”); see also Emily Van Tassel, Resignations and Removals: A History of Federal Judicial Service—and Disservice, 1789–1992, 142 U. Pa. L. Rev. 333 (1993) (focusing on the entire history of departures until the early 1990s and on the 190 judges total who had resigned from the bench for reasons other than age or health). In some state courts, the degree to which sitting judges seek to attract favorable attention from future ADR employers has been a topic of concern. See Reynolds Holding, Judges’ Action Cast Shadow on Court’s Integrity: Lure of High-Paying Jobs as Arbitrators May Compromise Impartiality, S.F. Chron., Oct. 9, 2001, at A13 (discussing judicial support for mandatory arbitration and that, in addition to easing workloads, such programs may offer judges “potentially lucrative jobs as arbitrators after they leave the bench”).


288. NIGEL G. FOSTER, GERMAN LEGAL SYSTEM & LAWS 90–91 (2d ed. 1996) (contrasting the German judiciary, with its lower status and its conservatism, to that of the judiciary in the United Kingdom); see also Rehnquist, supra note 241 (noting the lack of status of some European judiciaries and attributing it in part to the absence of an infusion of private practitioners into those judiciaries).
individuals from behaving in a manner associated in the United States with judicial independence.

2. Reappointment of Judges by Judges

How life-tenured judges go about deciding how to reappoint other judges raises yet harder questions about judicial independence. That task requires appraisal not of an individual’s performance as a lawyer but as a judge. “Article III values,” we are told, mean that we value independent judges, unafraid of encountering popular disapproval and free from needing collegial approval. How do life-tenured judges enact those values as they contemplate the question of reappointment of other judges? What effect does reappointment have on the statutory judges seeking it?

Again, a look at current practices is in order. The 1984 Bankruptcy Act, so controversial in enactment, did not much detail the process of reappointment of bankruptcy judges commissioned for fourteen-year terms. But twelve years later, the statute was amended to provide for regulations about reappointment, and the problem of how to do it is now visible to the legal community as large numbers of bankruptcy and magistrate judges (who have eight-year terms) become eligible for reappointment. For example, “over 2/3 of the terms of currently sitting bankruptcy judges . . . expire[d] during the three-year period from 1999 to 2001.”

Regulations of the Judicial Conference address the reappointment process. A first set had provided a presumption of reappointment but in light of controversies that developed (and are detailed below), revisions in 2001 eliminated those provisions but continue to require that incumbents be considered for reappointment before courts turn to other candidates. The revised regulations

291. Magistrate judgeships began in 1968, but only seventy positions were full-time, whereas about 400 were part-time. The ratio has now flipped, in that more than 400 are full-time and fewer than seventy are part-time. See supra note 112.
293. See, e.g., 1997 MAGISTRATE JUDGES SELECTION PROCEDURES, supra note 277, at 26 (stating that “normally, an incumbent magistrate judge who has performed well in the position should be appointed to another term of office”); 2000 Bankruptcy Selection Regulations, supra note 278, § 5.01(b) (providing that reappointment “should not be denied unless the incumbent has failed to perform the duties of a bankruptcy judge according to the high standards of performance regularly met by United states bankruptcy judges”).
294. See 2001 Bankruptcy Selection Regulations, supra note 278, § 5.01(b) (“The court of appeals shall decide whether or not to reappoint the incumbent judge before considering other potentially
on reappointment of magistrate judges charge district courts with taking an initial vote on whether to consider reappointment of an incumbent before the public process proceeds. For bankruptcy, the practice is somewhat more varied. The regulations could be read as requiring public notice once an incumbent has indicated a willingness to serve, but at least one circuit’s regulations provide for a screening first. Further, unlike the procedures for reappointment of magistrate judges, which at the reappointment stage continue to rely on merit selection panels, the bankruptcy court regulations do not require advisory panels.

In terms of the rate of reappointment, a widely shared impression is of high reappointment rates, although developing data suggest a somewhat more complex picture. Recent cases and public commentary involving bankruptcy judges in the Third, Sixth, and Ninth Circuits have prompted complaints (and some litigation) about the reappointment process. At issue in one case, qualified candidates. In making this decision, the court of appeals shall take into consideration the professional and career status of the incumbent, and whether the incumbent has performed the duties of a bankruptcy judge according to the high standards of performance regularly met by United States bankruptcy judges and demonstrated [other qualifications outlined in the regulations].); see also 2001 Magistrate Judges Selection and Reappointment Procedures, supra note 277, § 6.02 (providing that before an incumbent magistrate judge’s term expires, the district court by majority vote, must, giving “due consideration to the professional and career status,” determine whether it wishes to consider that judge’s reappointment).

296. See 2001 Bankruptcy Selection Regulations, supra note 278, § 5.02(a) (requiring public notice by publication in a “general local newspaper,” “bar journals,” and the like); Ninth Circuit Bankruptcy Judge Reappointment Regulations, supra note 279, § 2(c).
297. Sixth Circuit Bankruptcy Procedures, supra note 279, § 9(b)-(d) (detailing requirements for the provision of financial disclosure statements, an initial screening with a presumption of reappointment, which, if passed, then prompts the public notice, an investigation of a committee, and a report to the Court including copies of “all comments received”).
298. 2001 Magistrate Judges Selection and Reappointment Procedures, supra note 277, § 6.03(b).
299. See 2001 Bankruptcy Selection Regulations, supra note 278, §§ 5.02-.03. Those regulations also do not require provision of information gathered through public comment to an incumbent. Circuit regulations may provide more. See, e.g., Ninth Circuit Bankruptcy Regulations, supra note 279, § 2(e)(2) (providing that, if a preliminary assessment is against reappointment, the incumbent judge be provided with “a copy of the materials considered by the committee ... with due regard for confidentiality,” and including “redacted public comments, both positive and negative,” and also providing the incumbent judge with an opportunity to respond and provide “a list of possible contacts for the committee to consider in its investigation and fact finding”).
300. One news service reported that “[o]f 126 bankruptcy judges whose terms expired during the past two years, 39 (or more than 30 percent) were not reappointed for various reasons, including retirement and promotion.” Cleaning Up the Bankruptcy Reappointment Mess, Part I, BANKR. CT. DECISIONS WKLY. NEWS & COMMENT, Oct. 25, 2000, at A1. Preliminary data from another survey found that of 166 judges between October 1, 1998 and September 30, 2001, the reappointment rate could be calculated at about seventy-four percent or at about ninety-two percent, depending on how one evaluated decisions by incumbents about seeking reappointment. See Bernstein, supra note 243, at 3, 7. In nine cases, reappointment was denied in a “clear-cut” fashion, while a few others were denied informally, and in yet others, incumbents chose to retire. Id. at 5–8.
301. See The Seven Most Serious Problems with the Process of Reappointing Bankruptcy Judges, CONSUMER BANKR. NEWS, Oct. 17, 2000, at 10. Two lawsuits have been filed. See Shannon P. Duffy & Jeff Blumenthal, Court Votes Not to Reappoint Bankruptcy Judge David Scholl, LEGAL INTELLIGENCER,
involving a judge not reappointed in the Third Circuit, is both process and outcome. Apparently, the Third Circuit had first sought input through a notice and comment period and then supplemented the information by sending surveys to a set of lawyers.\textsuperscript{302} After the bankruptcy judge was not reappointed, some of his supporters claimed that a campaign by unhappy litigants (creditors in this instance) prompted intense scrutiny that led to nonrenewal.\textsuperscript{303} Through a challenge in the Court of Claims, that judge, in turn, has argued that the Third Circuit's process violated his due process rights.\textsuperscript{304} In another instance in the Ninth Circuit, a bankruptcy judge who was reappointed offered a detailed criticism of the process. For example, he argued, the information collection process was unreliable and the opportunities for the incumbent to respond too narrow.\textsuperscript{305} More generally, one commentator reports that "a significant number of applicants for reappointment were put through the ringer."\textsuperscript{306}

The problems that have emerged thus center about the kind of information sought, the methods for gaining it, and the process accorded incumbents. Soliciting views through public notice relies completely on self-selection. Some unhappy lawyers might be reluctant to comment for fear that, were their objections to fail, their complaints would become known to a judge before whom they have to appear. Sophisticated repeat-player litigants might, on the other hand, participate to mount a campaign, either in support or opposition.\textsuperscript{307} Because bankruptcy judges have power over attorneys' fees and may impose

\textsuperscript{302} Shannon P. Duffy, \textit{Bankruptcy Judge Sues for His Job}, NAT'L L.J., Sept. 4, 2000, at B1 (describing the bankruptcy judge's claim that, after an initial comment period, a questionnaire was sent to some 1165 lawyers, which excluded "large numbers of practitioners" who had appeared before him).

\textsuperscript{303} \textit{See Judge David Scholl: Reappointment's Lightning Rod!}, BANKR. CT. DECISIONS WKLY. NEWS & COMMENT, Oct. 18, 2000, at A9 (describing Scholl's publication of more decisions than other judges in his district but also allegations of higher reversal rates; also noting his unpopularity because he awarded excessively low fees or was allegedly proconsumer); Bernstein, supra note 243, at 11, 16, 19 (discussing concerns about how the reappointment process undermines independence while noting that, given the specialized jurisdiction of the bankruptcy docket, interest groups are less likely to attempt to influence appointments).

\textsuperscript{304} \textit{See Scholl v. United States}, No. 00-737C (Fed. Cl. filed Aug. 23, 2000); \textit{Judge Scholl Sues to Regain His Job}, CONSUMER BANKR. NEWS, Sept. 21, 2000, at 3.

\textsuperscript{305} Letter from Samuel L. Bufford to Frank Szczebak, supra note 301; \textit{The Seven Most Serious Problems with the Process of Reappointing Bankruptcy Judges}, supra note 301.

\textsuperscript{306} Bernstein, supra note 243, at 2.

\textsuperscript{307} \textit{See Duffy & Blumenthal, supra note 301; The Seven Most Serious Problems with the Process of Reappointing Bankruptcy Judges}, supra note 301 (describing such allegations in a particular case).
sanctions, special attention may be paid to their candidacies. Social science sampling methodologies, constructed to elicit a range of views, would be an improvement, but only if a sample of litigants were properly fashioned and the response rate sufficient.

Assume that, given sensitivity to problems of “junk science,” circuits were to invest resources in developing surveys and were to receive a sufficient distribution of responses. Turn then to the problem of content. Imagine that a group of litigants complains that a judge is insufficiently prompt, courteous, or evenhanded. What percentage of reply raises doubt? What form of response by the judge so accused suffices to mitigate? A preliminary analysis of cases of nonreappointment found that, in some, serious acts of misconduct were evident, while in others, the applicant had alienated colleagues or litigants. As another bankruptcy judge commented, the reappointment process “creates the opportunity for influence, political gamesmanship and the like.” And, current regulations build in no “right” of a bankruptcy judge to investigate, to receive, or to respond to allegations.

In short, the process and the criteria used for reappointment pose challenges to the ideology of independent judges that Article III promotes. As constitutional judges evaluate the track records of statutory judges by soliciting information from litigants and by reviewing decisions and reversal rates, they may prompt lower level judges to search for supporters, publish little, and keep low profiles. While presumptive reappointment avoids those problems, it results in giving life-tenured judges power to create, de facto, another set of tenured judges.

Further, the more public the process, the more the status differentials between the kinds of judges in Article III appear. In contrast to the review of statutory judges, no mechanism exists for periodic assessments of sitting life-tenured judges. A process is available for bringing complaints against sitting judges (both Article III and non-Article III), alleged to have acted in...

308. See Lynn M. LoPucki & William C. Whitford, Venue Choices and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies, 1991 Wis. L. Rev. 11 (discussing filing choices made to maximize fee awards); see also Letter from Samuel L. Bufford to Frank Szczebak, supra note 301, at 1–2 (commenting that “at least three letters opposing my reappointment were written by lawyers [in a case in which] I had recently imposed sanctions on them and their client for egregious discovery abuses. None of those lawyers has ever appeared in any other case in my court.”).

309. Cf. Judge Scholl Sues to Regain His Job, supra note 304 (describing his allegation that the questionnaire was sent to only 1165 lawyers, “disproportionately” in reorganization cases rather than the full range of the docket, heavily concentrated in consumer bankruptcy, and that of that number, only some 300 responded, making the reply rate insufficient).

310. See Bernstein, supra note 243, at 13–14.


312. Local rules or informal practices may make such provisions, and revisions in 2001 enabled the process of reappointment to be extended for brief periods by the chief judge of a circuit. 2001 Bankruptcy Selection Regulations, supra note 278, § 5.04, at 18.
a manner "prejudicial to the effective and expeditious administration of the business of the courts" or to be unable to discharge the duties of office. Further, analyses of that process suggest that complaints are rare and that, while informal sanctions may be used, official discipline of judges is infrequent. But through the procedures used for reappointment of statutory judges, life-tenured judges send signals to the legal community about the lower status of statutory judges within Article III.

Those signals may prove problematic for both kinds of judges. If litigants and lawyers come to see the statutory judges within Article III as weak, their sense of the federal judiciary itself as uniquely independent will lessen and be replaced by an understanding that, like other institutions, it has administrators (here, life-tenured judges) who must be pleased. Thus, social and political expectations for (or romanticization of) the role of the federal judicial structure are diluted. Evaluating the selection and reappointment processes thus helps to illuminate the deeper problems posed by a hierarchy of judges within Article III. The life-tenured judiciary is both deeply dependent on and its fortunes are now linked with its non-life-tenured siblings. The very structures that delineate the status among the two sets of judges work to undermine the independence of both.

Having detailed the problems that a model of hierarchy creates for judicial independence, I turn then to explore the alternative, which I have captured through the term "homogenization." The better route for preservation of Article III values is for life-tenured judges to attempt to infuse them into all aspects of federal judging. Because Article III judges have retained the power to read the Constitution's meaning, they have the power to revise the jurisprudence to focus it on equipping their siblings with more authority, élan, sense of self, and import—all of which are presumed to enable wise and deliberate judicial decisions. Hence, below, I sketch a different jurisprudence and set of practices through which life-tenured judges could relax their own status privileges and attempt, self-consciously, to blur the distinctions among federal judges so as to broaden the embrace of Article III.

314. 28 U.S.C. § 372(c)(3)(A). Further, the statute empowers the chief judge of the circuit to screen complaints and dismiss not only those related to the merits but others deemed frivolous or otherwise not permitted. Id. § 372(c)(3)(A)–(B); cf. Bernstein, supra note 243, at 16 (describing the fears of bankruptcy judges that a "handful of non-appealed decisions... will be subjected to very critical inquiry").
316. See Claire L’Heureux-Dubé, Administrative Globalization, Address to the Council of Canadian Administrative Tribunals’ International Conference Held in Quebec, Canada (June 17, 2001) (on file
D. ARTICLE III INFUSION: ALTERING DOCTRINE, STATUTES, AND PRACTICES

My claim is not that Article III demands that all judges have life tenure but rather that Article III requires that all judges be independent actors. The goal is for Article III judges to share their cultural capital by reshaping law, policies, and practices to convey an understanding that all federal judges share a posture of independence. The techniques are three-fold: shifting doctrine, statutes, and practices.

First, turn to doctrine. Constitutional scholars know well the many choices within the exegesis of Article III and its commitment of federal judicial power. When interpreting the requirements of Article III, life-tenured judges should condition the transfer of adjudicatory authority on a concomitant transfer of structural independence. For example, the Constitution ought to be read to require that those holding federal adjudicatory power be charted for sufficiently long terms, be insulated from certain forms of dismissal, and be protected against certain kinds of pressures such as directives to resolve cases in a particular fashion. Such an interpretation could also refer to international norms of judicial independence, in which factors such as lack of procedural protections from recall and “time limited appointments of judges have given cause for concern.” Moreover, doctrine should limit judges to certain forms

318. See McAllister v. United States, 141 U.S. 174, 196-99 (Field, J., dissenting) (making this argument).
319. What form of supervision is permissible is a subject in need of exploration. For example, descriptions of the concept of judicial independence in Germany indicate that in the “core area of judicial activity” (determining the contents of judgments and preparing for oral hearings), “supervisory measures are simply inadmissible.” The German Judiciary Act: Documents on Politics and Society in the Federal Republic of Germany 6-7 (Oguz Akalin ed., 1993). In contrast, forms of “peer review” may be provided for administrative law judges in the United States, in which supervising judges review proposed judgments. See Sippel, supra note 260. Moreover, in some circuits, decisions are circulated pre-publication as a means of checking for conflicts, and if prior case law is discovered on point, notice is provided to judges who are given an opportunity to change their ruling.
320. See, e.g., Starrs v. Ruxton, 2000 J.C. 208, 226 (H.C.J. 1999) (interpreting the European Convention on Human Rights provision in Article 6, para. 1, on the right to a public hearing before an “independent and impartial tribunal” and relying on other precedents to hold illegal the use of temporary sheriffs for sheriff courts in Scotland, in which they served for one-year terms without formal safeguards against recall by the executive, without limits on the assignment of cases during their terms, with no procedural protections if removed, and with reappointment resting on the Lord Advocate, who was a member of the Scottish Executive and chief prosecutor). In a subsequent decision, the use of temporary judges was upheld, on the grounds that, while appointed by the Scottish Executive, the judges were under the control of judges. See Clancy v. Caird, 2000 Sess. Cas. 441 (Sess. 2000).

Many countries have a jurisprudence on what forms of institutional protections must accompany the role of the judge; special note is often made of a series of Canadian cases. See, e.g., Reference re: Public Sector Pay Reduction Act (P.E.I.), 150 D.L.R. 4th 577, 692-93 (Can. 1997) (holding that the Canadian Charter of Rights and Freedoms required that provincial court judges’ salaries be protected from manipulation by the political branches and therefore that provinces were required to constitute
of discourse, marking and making boundaries. Further, Article III judges should reconsider the license their doctrine has given to Congress. The “public rights” approach has increasingly become a means by which Article III powers shrink, and it is time to revisit the breadth of congressional power to fashion rights and remedies outside judicial processes. Article III judges could also turn to an amalgam of constitutional and common law rights to guarantee public access to some adjudicatory proceedings. All kinds of federal judges ought to have mandates to decide impartially and openly, with the public having a presumptive place in the process, be it located in courts or agencies.

Second, consider statutes. I have raised the problem of selection and reappointment of statutory judges. As to selection, were the federal system to include more members of the public in the selection process and revisit the question of openness of its procedures, it might develop a model that focuses on quality but does not exclude the public from participating in determining who should be its judges. At a minimum, Congress ought to require the Judicial Conference to rely on merit selection panels, in which nonjudges play a significant role, and to include public avenues for comment on nominees.

Turning to the problem of judicial retention, while it is new to the federal judiciary, it is not unique to the federal system. A range of models are available. One option, common to some constitutional courts in Europe, is to have fixed, nonrenewable terms. New Jersey’s constitution provides another—a

Independent, effective commissions to review the adequacy of and proposed changes in judicial salaries and to provide non-binding recommendations to the executive and legislative bodies, whose decisions could be reviewed for rationality by the courts. See generally Martin L. Friedland, Judicial Independence and Accountability: A Canadian Perspective, 7 CRIM. L.F. 605 (1996).


324. For example, the District of Columbia has a Commission on Judicial Disabilities and Tenure and another for Judicial Nominations (and reappointments), comprised of individuals appointed from an array of institutions, including the federal and local executive, the judiciary, and the bar. See D.C. CODE ANN. §§ 11-1521 to -1522 (2001). Press descriptions of the reappointment process state that efforts to block reappointments are rare and in the instance described, unsuccessful. See Nancy Lewis, 35 Prosecutors Try to Block D.C. Judge’s Reappointment, WASH. POST, Feb. 11, 1996, at B1; Bill Miller, Judge Criticized by Prosecutors Wins New Term, WASH. POST, Feb. 14, 1996, at C4.

325. See, e.g., Article 4 of the Law of the Federal Constitutional Court of Germany (as amended 1998) (providing for judges of that constitutional court to have twelve-year terms, for which neither “immediate” nor “subsequent re-election” is permitted); see also EDWARD McWHINNEY, SUPREME COURTS AND JUDICIAL LAW-MAKING: CONSTITUTIONAL TRIBUNALS AND CONSTITUTIONAL REVIEW 57 (1986) (summarizing a variety of provisions for judicial term and concluding that most—the United States excepted—provide for nonrenewable terms of seven to twelve years, which may constitute “desirable time limits for exercise” given the discretion and range accorded to judges).
seven-year term followed by reappointment for “good behavior.”\footnote{326} As to the length of service, a long, nonrenewable term could shift a pool of applicants toward those seeing a statutory judgeship as the cap to a career as a lawyer, not the bridge to a sequence of judgeships,\footnote{327} and thereby reduce those interested or able to climb a career ladder within the judiciary.

Third, turn to practices. Were life-tenured judges to embrace the idea that they share the lot of all federal judges—statutory judges inside of Article III as well as the administrative judiciary outside—Article III judges might use their lobbying resources to press Congress for support of the federal judiciary in its entirety. Interjurisdictional associations of judges could develop to identify shared needs, rather than each group of judges primarily focused on its own professional organization, salaries, and facilities. Some efforts at homogenization are underway, as, for example, consideration is given to whether one set of ethics can properly embrace all kinds of judges.\footnote{328}

Further, within agencies, attention is being paid to the ever-present problem of charging officials with undertaking a mixture of functions.\footnote{329} Thus, for administrative judges to gain more stature requires not only different treatment by Congress and their life-tenured siblings but also that such judges behave differently themselves. Courts within agencies provide little opportunity for public oversight, which is part of the rationale for judicial independence.

\footnote{326} N.J. Const. art. VI, § 3 (providing this term for justices of the supreme court and judges of the superior court; also providing for retirement upon the age of seventy).

\footnote{327} Shorter terms, on the other hand, could signal that a judgeship be seen as a temporary position. Historically, territorial judges and judges of the D.C. lowest courts held short terms, from four to six years. See Katz, supra note 83, at 897 n.13, 899 n.24.


\footnote{329} How constrained ALJs should be has been a matter of dispute. Administrative law judges currently may be so enmeshed in an array of activities that they may need to reallocate work so as to distinguish themselves from other employees. Alternatively, the range of decisions they make may need to be sorted to clarify when they act as judges. See generally Michael Asimow, When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies, 81 Colum. L. Rev. 759 (1981); see also Young, supra note 250, at 15, 18 (detailing that the resolution defined the “administrative judiciary” to exclude agency heads who had policy making duties).
E. HIERARCHY OR HOMOGENIZATION

These proposals may not be greeted warmly in all quarters. The Article III judiciary is deeply ambivalent about the expansion of the non-Article III federal judiciary. This ambivalence is one reason why the case law on Article III is a notorious mess. We have a desperate need for more judges. We greatly admire the constitutional position of federal judges as independent, and we have yet to devise means to achieve that end at the rate needed for judges.

The current status quo has supporters who see the evolution that I have detailed as responsive to all of these concerns. They fear that, were Article III judges too plentiful, their status would decline and moreover, if too many held that office, they could not perform in a fashion that enhances their value. Moreover, they believe that not all decisions of the administrative state are of grave import to the administrative state, however much they affect the individual claimants. Given that the shape of statutory remedies the government ought to provide is deeply contested, a presumption against constitutionalizing too many judicial roles flows. And, given that increasing diversification and specialization has occurred in many professions, a varied typography of courts is similarly appropriate.\footnote{330}

Thus, anxiety attends each extension of the term “court” and the title “judge.” The permissive approach toward delegation of judging I have detailed has not been undertaken without qualms. Judges, both state and federal, have fought to prevent others whom I have called judges from bearing their name. In the 1970s, the Judicial Conference of the United States disagreed with provision of the title “judge” for administrative hearing officers,\footnote{331} and opposed using the term “judge” in lieu of “referee” in bankruptcy proceedings.\footnote{332} In the 1990s, when the word “judge” was proposed to be added to magistrates’ titles, Article III judges objected again.\footnote{333} Such a posture is not unique to the federal judiciary. State judges have also argued against state hearing examiners being...
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renamed "judges." 334

The desire to keep a distinctive trademark is, I think, evidence of the fear that the position of the judge is not immune from erosion and that, in fact, confusion in the minds of the consumer is likely to follow. (Data on popular perceptions support that view; attitudes toward state and federal lower courts are very similar.) 335 Yet these concerns have not succeeded in stopping judges and courts, in name and in fact, from multiplying. 336

I too worry about the idea of the judicial and about the protection of the independence, power, and social and political import of the judge. But given that the appellation "judge" is applied to a growing number of individuals in a range of statuses around the country, my suggestion is to try to link those individuals by practices that bring respect to that title. Thus, while I lack no appreciation for the impulse toward hierarchy (to delegate some of what seem like lesser tasks to individuals understood as lesser in terms of power, position, and capacity in an effort to conserve the concept of the judge), I think that the better preservationist approach is to try to elevate the statuses of the lower tiers. Moreover, as I read the twentieth century's developments of judges, such has been the trend. The narrative I have provided above is a story of increasing status and professionalization of lower-level judges, and the anniversary of the 200th year of the D.C. courts will, I hope, serve as an opportunity to reinforce that effort.

Thus, instead of hierarchy, I counsel self-conscious efforts at homogenization to recognize that the fate of all judges is already woven together and that, when incursions on the independence of one set occur, others become more vulner-

334. See Ann Marshall Young, supra note 261, at 16. As she put it, "Every administrative law judge (and they are legion) who has ever heard the words 'real judge' uttered to differentiate his or her chaff from others' wheat recognizes this reticence to accord unequivocal respect to our profession." Id. at 17.

335. See generally American Bar Association Report on Perceptions of U.S. Justice System, 62 ALB. L. REV. 1307 (1999) (detailing similar levels of knowledge of lower court justice systems and comparable levels of confidence in the lower courts of either); David B. Rottman, Voters in Judicial Elections: Motivation, Capability, and Trust 4 (2000) (paper prepared for the Summit on Improving Judicial Selection, on file with author) ("Most Americans are unable to answer questions that speak to fundamental aspects of the judiciary, such as the difference between federal and state courts, the existence of an independent judicial branch of government, and even the manner in which judges are selected in their state.").

336. As the Fourth Circuit recently noted, "[a]dministrative judges are what their name says they are—judges." S.C. State Ports Auth. v. Fed. Mar. Comm'n, 243 F.3d 165, 174 (4th Cir.), cert. granted, 122 S. Ct. 392 (2001). Another illustration comes from changes dating from the 1920s to the 1960s in the naming of what is now known as the Tax Court. See Revenue Act of 1924, Pub. L. No. 68-176, ch. 234, § 504, 43 Stat. 253, 336-38 (creating the "Tax Board"); Revenue Act of 1942, ch. 619, § 504, 56 Stat. 798, 957 (renaming the body the "Board of Tax Appeals"); Tax Reform Act of 1969, Pub. L. No. 91-172, §§ 951-962, 83 Stat. 487, 730-36 (renaming the body the "Tax Court" and confirming its status as an Article I court). Recall also that the Tax Court appoints assistants who used to be called "commissioners" but who, in 1984, were renamed "special trial judges." See Tax Reform Act of 1984, § 464(a), 98 Stat. 494, 824; discussion supra notes 25, 87. A similar history can be provided by tracing the Board of General Appraisers, created in 1890, through its reincarnation at the Customs Court in 1926 and its reorganization, in 1980, as the U.S. Court of International Trade.
able. I do not believe that such a proposal is unduly ambitious. As one gazes back one hundred years, it is stunning to see how ideas unimaginable in 1901 draw no attention in 2001 because they have become so much a part of ordinary life. The thousands of federal judges upon whom the nation depends did not exist in 1901; that they might in 2101 be seen as important and peculiar government actors, specially licensed and specially protected, should not be considered unduly daring.