Presidential Commission
on the Supreme Court of the United States

Statement for the Record for the Public Hearing

June 30, 2021

Prepared for the panel discussion on

Equity, Access to Justice, and Transparency in the Operation of the Supreme Court

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Thank you for the invitation to provide a written statement and to meet with you to discuss the U.S. Supreme Court and questions of reform. I am the Arthur Liman Professor of Law at Yale Law School, where I teach courses on federalism, procedure, courts, prisons, equality, and citizenship. My scholarship focuses on the relationship of democratic norms to government services such as courts, prisons, and post offices; the role of collective redress and class actions; contemporary conflicts over privatization; the relationships of states to citizens and non-citizens; the interaction among federal, state, and tribal courts; the forms and norms of federalism; practices of punishment; and equality and gender.

My commentary is informed by my research on the U.S. Supreme Court, by my work as a lawyer arguing before the Court and filing amici briefs in the Court, and my analyses of adjudication and courts. In addition to writing books and articles about the function of courts and the processes of judgment, I am a co-editor of an edited volume entitled *Federal Court Stories*, which provides in-depth accounts of several leading Supreme Court decisions addressing the allocation of power among the branches of the federal government and between federal and state systems.[2] During the last year, I have served on a small task force on judicial selection that was convened by The Project on Government Oversight (POGO), a nonpartisan organization that draws on U.S. constitutional principles to enhance "effective, ethical, and accountable federal government."[3]

As I discuss below, all of our federal courts, the Supreme Court included, have changed substantially in the last centuries. These changes are *not* newsworthy inside the federal judiciary, which has been clear about the challenges it faces. As the twentieth century was drawing to a close, the judiciary undertook an ambitious, long-range planning project to identify needed reforms. Yet that effort did not address the practices of the Supreme Court. This Commission provides an important opportunity to remedy that exclusion and to explore needed changes at the Court. Meeting the contemporary challenges that face the Supreme Court requires focusing on the central role that Congress plays in shaping the federal courts and on the Supreme Court's dependence on and relationship with lower federal courts. The Court is part of a judicial ecosystem that looks radically different than it did in 1935 when the Court took up residence in its building.

The U.S. Constitution grants Congress a good deal of power to regulate the courts and their jurisdiction. Congress uses a lot of that authority to help equip the courts and to welcome litigants to use them. Indeed, during the last several decades, Congress has authorized a myriad of new causes of action and has created whole new sets of lower court judges. The Court's jurisprudence has also been a source of powerful social change by insisting that all people are equal before the law.

Formal equality is not enough, and the lack of substantive equality haunts the decisions of all tiers of the federal judicial system. Many claimants come to court with limited resources; more than half of the appeals filed in the federal circuits come from individuals who are not represented by lawyers. Furthermore, in response to a perceived overload in demand, those circuit courts have deemed about 85 percent of their dispositions as "not for publication." That phrase denotes that the appellate courts believed that these rulings were not of sufficient importance to have an impact on future decisions. Yet, as I detail below, in the last three terms, more than 14 percent of the cases in which the Court granted certiorari come from decisions that were "not published."

This divergence in the assessment of the impact of rulings and the percentage of lawyer-less litigants are two of many indications of dysfunction in the current federal judicial system. Records made in the lower courts when litigants are without lawyers undermine the quality of adjudication in the cases the Court reviews, and the lack of transparency at the intermediate appellate level is mirrored by the Court's development of its own "shadow docket" in which fast track decision-making has, for a significant number of cases, replaced reasoned deliberation.[4]

Other divergences between the lower courts and the apex court likewise raise concern. Congress has structured the rule-making of the lower federal courts, crafted criteria for disqualification and disability, and imposed term limits on individuals who sit as the chief judge of a district or appellate court. To date, Congress has not imposed those rules on the Court, and the Court has not voluntarily conformed its own practices to these norms. At the same time, the powers of the Chief Justice have grown dramatically; the person in that position sits at the helm of a large administrative and educational apparatus with some 25,000 to 30,000 judicial employees and the authority to make appointments to committees and to courts, such as the Foreign Intelligence Surveillance Court.

Therefore, it is time to rethink the decisions of the last century that have given the Court so much control over its own docket and the Chief Justice so much power for so long. It is also time to rethink the decision of the nineteenth century to rely on only nine people to oversee a federal judicial system that bears little resemblance to what existed in the Civil War era. Given the growth in the numbers and kinds of lower federal courts, the breadth of the caseload, the long terms of service, and the twenty-first century commitments to equity, access, and transparency, retooling is needed.

Below, I discuss changing the process by which cases make their way to the Court, shifting to term limits for tenure on the Court, enlarging the number of positions and using panels, and standardizing transparency in rule-making, ethics, and in the decision-making of the Court. Furthermore, given the legions of people with limited resources in need of the federal courts and the volume of decisions deemed as having no future legal value, this Commission should call on the Court for leadership to generate a national initiative to enable everyone coming into the federal courts to receive the assistance that they need and to support revisions in its own and lower court adjudication.

People need courts, and so does the government, which relies on courts to generate and enforce our country's norms. As Justice Harlan explained in 1971 in a decision holding that states had to waive filing and service fees for a litigant unable to pay and seeking to obtain a divorce:

> Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner.[5]

Equal access to courts, transparent decision-making by the judiciary, and constrained exercises of power need to be hallmarks of the Supreme Court and lower federal courts. Supporting the Court's institutional legitimacy requires rethinking the concentration of power on the Court and revising the practices of the Court.

I. Much Has Changed

I begin with a photograph (Figure 1) that is familiar. It shows the front steps of the U.S. Supreme Court, which in 1935 finally got a building of its own.[6] Carved in stone atop the entry are the words "Equal Justice Under Law." Three years later, the Court promulgated the first set of the Federal Rules of Civil Procedure. One of the rule drafters echoed the Court's inscription by toasting the achievement: "drink to our Rules—they know of no flaw: 'Equal Justice Under the Law!'"[7]

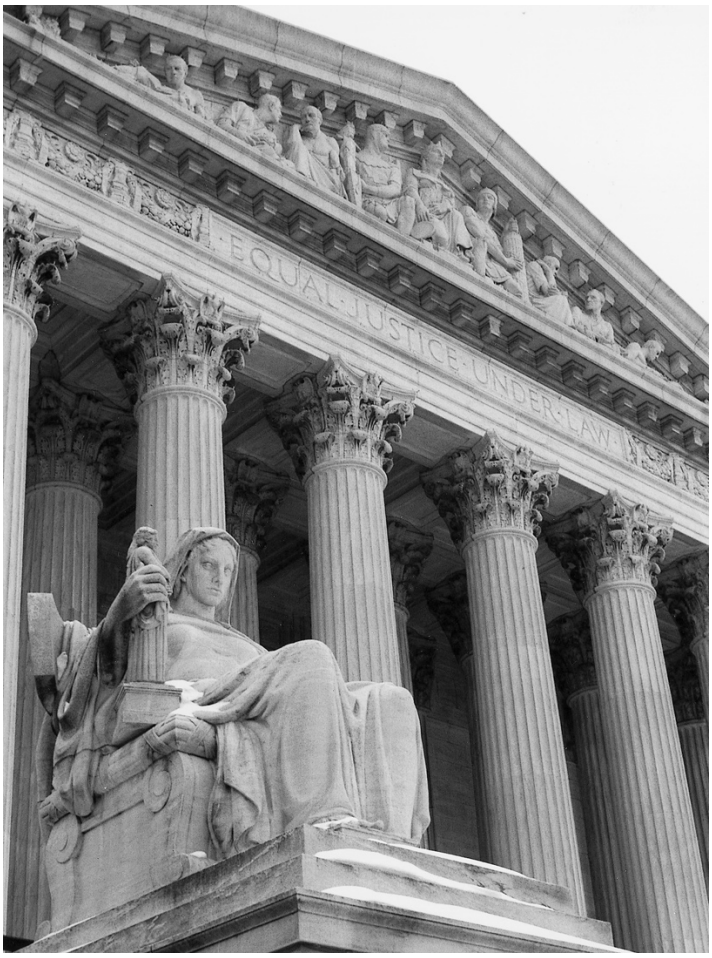

Figure 1. United States Supreme Court, The Contemplation of Justice and the Inscription "Equal Justice Under Law," Washington, D.C., 1935.

Yet those 1930s references to "equal justice" did not *then* mean what those words denote today. Racial segregation was commonplace, as were barriers that prevented many in this country from participating in all aspects of economic, professional, and political life. The Justices on the Court and the lawyers appearing before them were almost all white men. These exclusionary practices were not outside the law; indeed, many of the Court's practices and rulings helped to sustain forms of subordination and discrimination.

The differences between the 1930s and today can be seen by learning about what happened when a large mural, reproduced in Figure 2, was installed in a federal courtroom in 1938, three years after the Court took up its residence in Washington and in the same year that the Federal

Rules of Civil Procedure became effective nationwide. In the wake of the Depression, the federal government funded construction and art; one commission went to a Northeast artist whose depiction of *Justice as Protector and Avenger* was placed behind a judge's bench in a new federal courthouse and post office in Aiken, South Carolina.[8]

Figure 2. Justice as Protector and Avenger, Stefan Hirsch, 1938, Charles E. Simons, Jr. Federal Courthouse, Aiken, South Carolina.[9]

The artist chose to depict the Renaissance Virtue Justice, recognizable because that personification can be found in courthouses around the world. The artist explained that rather than adorn his "figure of Justice" with the conventional attributes of scales and sword, the only "allegory" he had permitted himself was "to use the red, white and blue [of the United States flag] for her garments."

What did others see? A local newspaper objected to this "barefooted mulatto woman wearing bright-hued clothing." The federal judge assigned to the courtroom called it a "monstrosity"—a "profanation of the otherwise perfection" of the courthouse. The artist argued that impartial observers would not think "that the figure's face . . . appears to have negroid traits," but that he was eager "to obliterate this 'blemish'" and proposed to "lighten Justice's skin color." Others, including the National Association for the Advancement of Colored People, objected. The denouement was that, for decades, tan curtains (seen at the edges of the photograph) covered the mural.

I bring this image to the fore because it marks an important aspect of the history of the federal courts. They were one of many venues making and enforcing racial, gender, and class hierarchies.[10] Just as a perceived "mulatto" woman could not serve uncontested in 1938 as a representation of the Virtue Justice, people of color lacked many forms of equal treatment under the law.

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Invoking the history of this image is also a way to *celebrate* the transformation of courts in the decades thereafter and to appreciate the central role played by the U.S. Supreme Court in understanding the constitutional commitments to equality, as the Court explained in decisions such as *Brown v. Board of Education* in the 1950s and *Reed v. Reed* in the 1970s. Indeed, the focus of this panel's discussion—equity, access to justice, and transparency in the United States Supreme Court—reflects that, as a result of political and social movements, courts have become committed to welcoming everyone as litigants, witnesses, jurors, staff, and lawyers, and that the federal judiciary aspires to accord dignified and equal treatment to all participants.[11] The Supreme Court's inscription—"Equal Justice Under Law"—has become its motto, as if it always referenced an understanding of equality that has become central to the identity and to the legitimacy of courts themselves.

The photographs capture one facet of the many transformations in the law of the U.S. Supreme Court since 1935. To keep one's eye only on the Supreme Court is to miss that it is part of an interdependent system. Aside from a small "original jurisdiction docket," the Court sits to review decisions made by other judges working on courts that have changed substantially since 1935. I therefore turn to a few charts and tables to highlight more of the many profound alterations in the kinds and numbers of cases on the docket, in the judges deciding them, in the procedures and statutory mandates for rulemaking, and in the challenges the Court faces.

The next two graphs summarize the civil and criminal filings in the federal district courts during the last 120 years. As you can see from Figure 3, at the beginning of the twentieth century, fewer than 30,000 cases were filed, nationwide, and more of them (15,734) were criminal than civil (11,971). By the end of the twentieth century, more than 300,000 cases were filed, and civil cases (250,907) far outstripped the criminal filings (62,884). As can also be seen when looking at this chart, between 2000 and 2020, the number of criminal and civil filings remains relatively constant. The graph in Figure 4 is focused on federal district court filings between 1950 and 2020 and maps the increase in filings between the 1950s and the 1980s and the flattening thereafter.

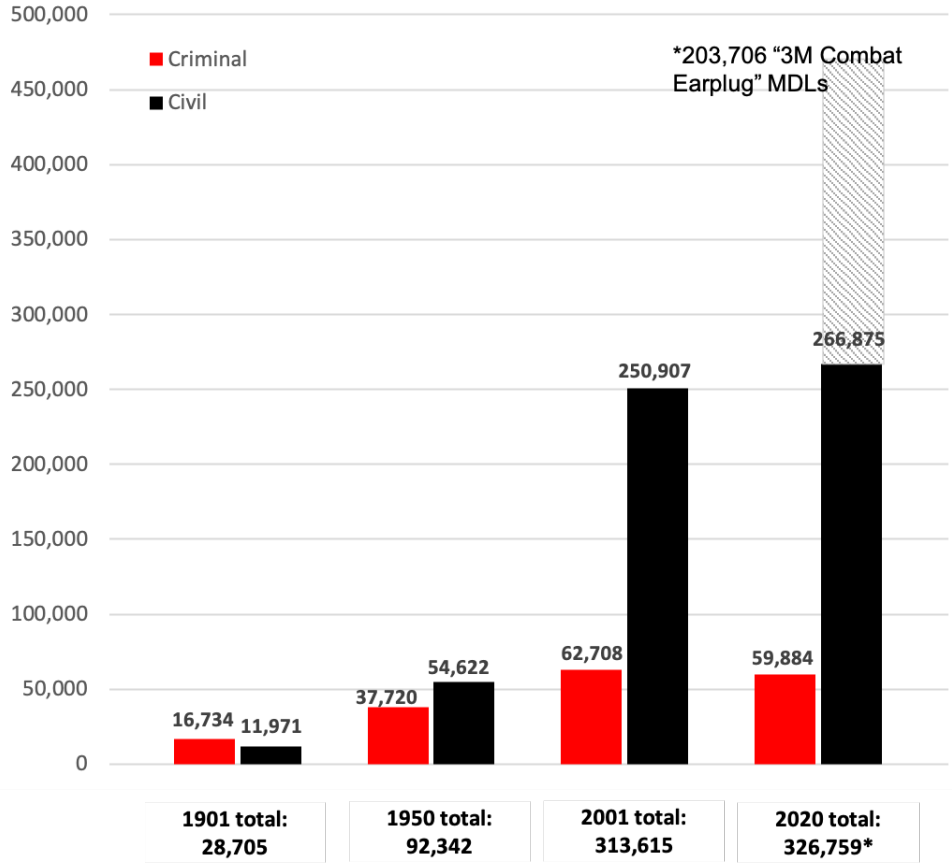

Figure 3. Federal District Court Filings in 1901, 1950, 2001, and 2020.[12]

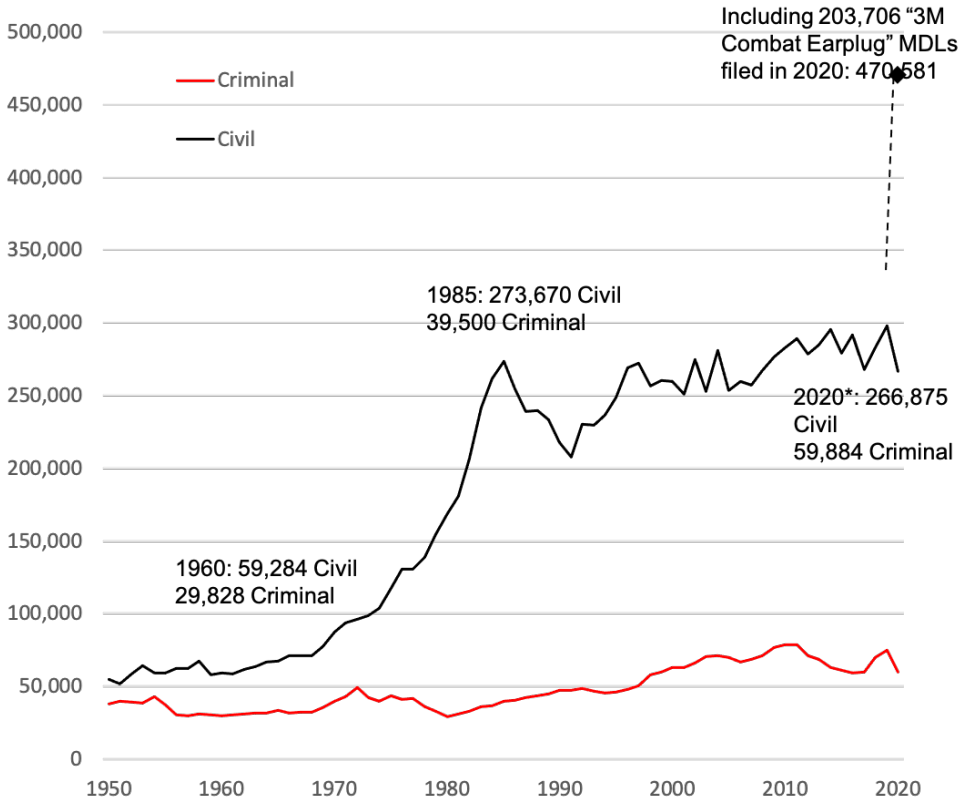

Figure 4. Federal District Court Filings, 1950–2020.[13]

Excluded from 2020 are approximately 203,000 individual filings in the 3M combat earplug MDL.

The accounting provided below in Figure 5 shows the rise in the number of Article III judgeships. At the beginning of the twentieth century, Congress had authorized fewer than 120 life-tenured judgeships at all three tiers; by century's end, Congress had chartered 839 judgeships, none of which added Supreme Court Justices. During the last twenty years, that number has increased at a much slower rate; as of 2020, Congress had created 870 life-tenured judgeships, again exempting the Supreme Court.

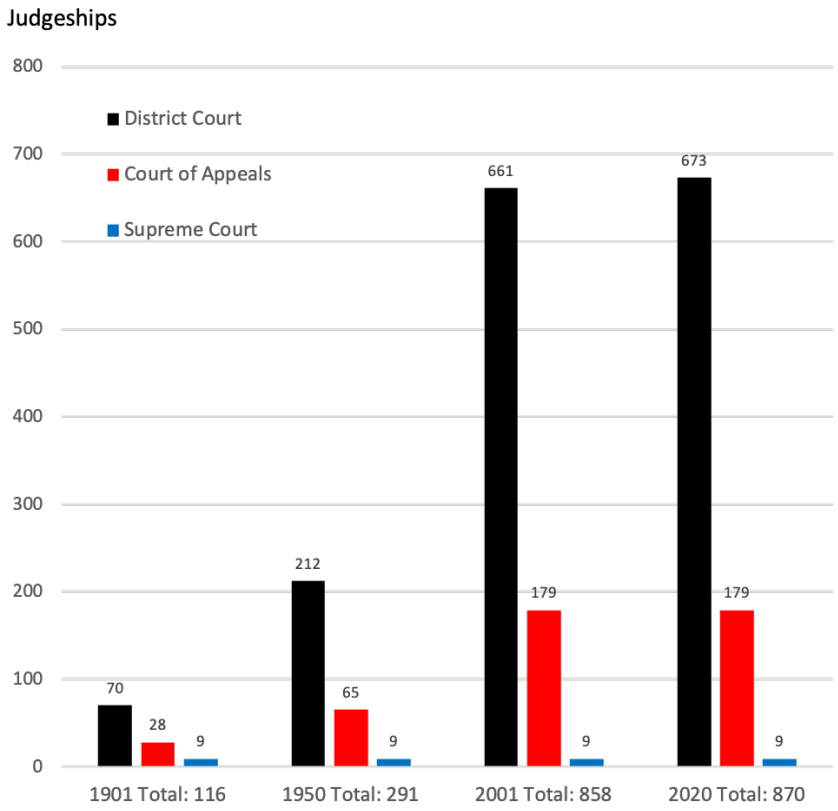

Figure 5. Article III Judgeships[14]
The bars depict the district, appellate, and Supreme Court judgeships; the total numbers include all Article III judgeships, such as the U.S. Court of International Trade.

Yet, as Figure 6 below makes plain, that number of lower court Article III judges does not come close to meeting the need for federal adjudication. In 1968, at the behest of the federal judiciary, Congress created the position of magistrates and, a few decades later, changed the name to "magistrate judges." District court judges select individuals to serve eight-year, renewable terms. Through another enactment in 1978 (revised in 1984 after the Supreme Court held that Congress had erred in giving too much authority to the new bankruptcy judges[15]), Congress chartered bankruptcy judges and tasked the appellate courts with selecting individuals to fill those slots for fourteen-year, renewable terms. As of 2019, the number (948) of these non-Article III judges was larger than the number (870) of life-tenured judgeships. Hundreds more judges sit in federal agencies and on specialized courts, such as the Patent Court.

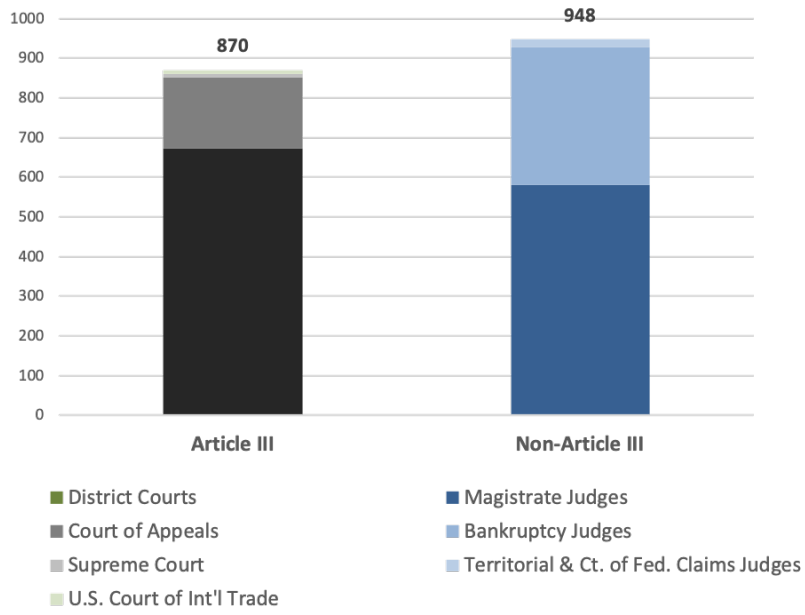

Figure 6. The Numbers of Article III and Non-Article III Judgeships Compared[16]

Magistrate and bankruptcy judges join life-tenured judges, many of whom work for decades on the federal courts. Indeed, the length of time that life-tenured judges spend in that office has, like almost all other aspects of the federal courts, grown. Some years ago, for a symposium on judicial independence in democratic constitutional orders, I worked with students to understand more about the terms of office.[17] We took snapshots by identifying individual federal judges who started when the country did in 1789 as well as those who joined the federal courts by 1809. We counted 63 individuals whose average term of service was 14 to 16 years. Looking at another cohort starting between 1833 and 1853, we identified 45 individuals who, on average, spent between 14 and 20 years as judges or Justices. We leaped forward to judges who began serving on the federal bench between 1983 and 2003. That much larger group (536 jurists) spent, on average, about 24 years on the bench.[18] Many other scholars have used various metrics to probe the impact of "life-tenure" as currently interpreted; the approach that I took is summarized in Figure 7.

Federal Judges Whose Service *Began* Between 1789–1809

Court	# of Judges or Justices	Avg. Length of Service	Avg. Age at Start	Avg. Age at Death
Supreme	16	14 years	47 years	67 years
Lower	47	16 years	43 years	64 years

Federal Judges Whose Service *Began* Between 1833–1853

Court	# of Judges or Justices	Avg. Length of Service	Avg. Age at Start	Avg. Age at Death
Supreme	9	20 years	49 years	70 years
Lower	36	14 years	47 years	65 years

Federal Judges Whose Service *Began* Between 1983–2003

Court	# of Judges or Justices	Avg. Length of Service	Avg. Age at Start	Avg. Age at Death
Supreme	6	24 years	57 years	88 years
Lower	530	24 years	52 years	75 years

Comparison of Lengths of Service: Lower Court Judges, 1800s/2000s

Year Range	# of Judges	Avg. Length of Service	Avg. Age at Start	Avg. Age at Death
1789–1809	47	16 years	43 years	64 years
1833–1853	36	14 years	47 years	65 years
1983–2003	530	24 years	52 years	75 years

Figure 7. Lengths of Service of Article III Judges: 1800s/2000s.[19]

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Three straightforward conclusions flow from this sketch of a few facets of federal adjudication. First, the institution of the federal judiciary has changed enormously in its girth, kinds of judges, tenure of office, and interpretation of U.S. law.

Second, Congress is central to that change. For those of us who teach about the federal courts, we typically explore the constitutional parameters of Article III to probe whether and how the Constitution insulates federal judges from congressional control. Often, the shorthand used is "jurisdiction stripping."

Yet more often than not, Congress is *the enabler*. During the last centuries, Congress created a myriad of new causes of action to welcome litigants into the federal courts and sometimes offered incentives such as treble damages or attorney's fees to encourage people to bring lawsuits;[20] established hundreds of life-tenured and statutory judgeships; funded courthouse construction; and authorized and supported the Administrative Office of the U.S. Courts (begun in 1939) and the Federal Judicial Center (in 1968).[21]

To be sure, Congress has also imposed some obligations on the federal judiciary and, on rare occasion, crossed Article III boundaries. One example was Congress's 1978 grant of jurisdiction to bankruptcy judges.[22] More generally, however, a large swath of accepted congressional regulations govern the Article III judiciary. I have already referenced the Federal Rules of Civil Procedure, an artifact of the 1934 Rules Enabling Act that directs the U.S. Supreme Court to promulgate rules of practice and procedure. Congress amended that statute in 1988 to require an open and transparent process for rule drafting. Hundreds of other statutes organize the judiciary and, on occasion, specify procedures for or create presumptions about the timing and contours of decision-making and remedies in certain kinds of cases. Obvious examples include the Norris-LaGuardia Act of 1932, the Speedy Trial Act of 1974, the Securities Litigation Reform Act of 1996, and the Prison Litigation Reform Act of 1996.

Third, rather than handwringing about whether any changes ought to be made in the Supreme Court, exploration of what changes are needed at the Supreme Court ought to be welcomed and, indeed, are overdue. This proposition ought not to be as politically fraught as it has become. Public and private institutions around the world have shifted modes of work to respond to changing circumstances and to demands for equity, access, and transparency.

Moreover, as I noted at the outset, the need for change has not been lost on the federal judiciary. Toward the end of the last century, Congress chartered a Federal Courts Study Committee and thereafter, the Judicial Conference of the United States created a Committee on Long Range Planning, which held hearings and put forth 93 recommendations directed at Congress and the lower federal courts.[23] Yet, unfortunately, none of those proposals addressed the practices of the U.S. Supreme Court.

Indeed, until this Commission, there has been scant federal government institutional support to explore how to revamp the Court and plan for its future. The large hulking stone statue in the photograph with which I opened is called "Contemplation of Justice," and that is what is needed now. Building on the work of this Commission and through a mix of legislation and the Court's own initiative, all branches of the federal government should work together to explore and then implement changes at the Court. Below I identify a few of the many areas in which alterations are needed.

II. Unwise Exemptions from Constitutional and Statutory Norms for Judges

The U.S. Supreme Court is an impressive institution. Yet some of its twentieth-century evolution has been not only anomalous—as compared with other courts in the United States—but also unwise.

During the twentieth century, Congress built on constitutional and common law understandings of judicial impartiality and due process to articulate norms for most of the federal judiciary. Statutes provide access as-of-right to federal adjudication for certain kinds of cases (and on rare occasions for federal jurisdiction exclusive of the states) and funding for some litigants with limited means. Congress elaborated methods for rulemaking, imposed standards for recusal, mandated term limits on individuals serving as the chief judge of a district and or a circuit court, and instituted a process for complaints to be filed against judges. Congress has also supported research on and long-term planning for the federal courts.

The Court has chosen to put itself outside the framework of much of what Congress has organized for other federal judicial institutions. It has neither formally bound itself to the rulemaking processes it oversees, nor to the ethics code applied to other federal judges.[24] To be sure, Congress could include the Court in many of its mandates, and the Court can voluntarily conform its practices to that of the lower courts.

Currently, the nine individuals who sit on the U.S. Supreme Court, of whom one serves as the Chief Justice, hold enormous and unfettered authority and do so for decades. Moreover, after Congress licensed an annual meeting of Senior Circuit judges in 1922, formalized that structure in 1948 with creation of the Judicial Conference of the United States, and equipped the federal judiciary with the institutional infrastructure of the Administrative Office and the Federal Judicial Center, the position of Chief Justice has only grown in import and capacity.

Thus far, the Court and its Chief Justices have not been the role model they should be in leading efforts to enhance access to justice, ethical obligations, equity, and transparency. The country needs that leadership. Below, I outline several problems and remedies, some of which the U.S. Supreme Court could implement voluntarily.

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The Supreme Court is dependent on and presides over a troubled judicial system. Most of the cases that the Court heard during the last three terms came from the lower federal courts. Two challenges of particular import to equity and transparency at those lower tiers pose problems for the Supreme Court.

First, the lower courts are awash with lawyer-less litigants, and second, the appellate courts deem the vast majority of their decisions as having no precedential value. Yet neither the Chief Justice nor the Court has begun initiatives to respond to this “justice gap,” nor have they insisted on transparent and accountable decision-making throughout the Article III judiciary.

Participation in adjudication requires resources. The difficulties of limited assets that people (disproportionately of color) face when encountering the legal system became vivid during the second half of the twentieth century, when many new statutes and judicial decisions made courts plausible sources of remedies for employees, tenants, household members, prisoners, and other groups not previously welcomed to seek legal redress. Through a mix of constitutional reinterpretation, legislation, and rulemaking, the U.S. Supreme Court once played a pivotal role in interpreting the Constitution to require assistance for a few kinds of litigants. Under the Court’s case law, indigent criminal defendants must be provided with lawyers, and courts have to waive

fees for people unable to pay and seeking divorces, and hence mitigated a few of the fiscal barriers for small subsets of litigants.[25] Congress also responded by creating the Legal Services Corporation and providing for fee-shifting in some kinds of cases. As is familiar, neither the congressional funding nor the constitutional mandates have been sufficient to meet the needs of litigants.

Much of the contemporary concern has been focused on criminal defendants, people seeking to reorganize family relations, tenants disputing landlords, and debtors facing mounds of credit. State courts, where some eighty million cases are filed annually, bear the brunt of responding to such litigants.[26]

Thus, it may come as a surprise that a large number of unrepresented individuals seek relief in the federal courts, and hence that the U.S. Supreme Court presides over a system replete with people who lack the means to use it. Over the last decades, as graphed in Figure 8, one quarter of all civil cases were brought by people who are lawyer-less, and about a half of the federal appellate filings came from unrepresented appellants. Currently, no uniform practice organizes how federal district courts appraise requests by individuals for fee waivers and to proceed "in forma pauperis."[27]

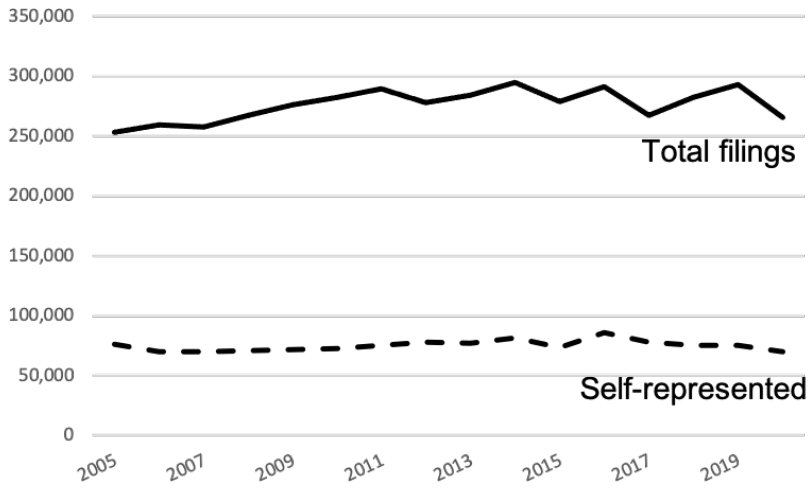

Figure 8a. Self-Represented Civil Filings in the U.S. District Courts: 2005–2020.[28]

Figure 8b. Self-Represented Appeals in the U.S. Courts of Appeals: 1997–2020.[29]

In contrast, the United States Supreme Court is a luxurious place to litigate. The Court selects so few cases for review and its staff is so gracious and supportive that litigants who appear before the Court have a remarkable amount of support. Moreover, private sector lawyers and law school clinics are eager to appear in the Court; parties with limited resources often receive offers of volunteer assistance.

Of course, problems of what the English call "inequality of arms" remain. Chief Justice Warren Burger saw an aspect of this issue when he encountered some attorneys representing states whom he thought were ill-equipped to argue before the Court. He helped to promote the National Center for State Courts, which provides support sessions for states attorneys general to learn how to argue before the Court. Some members of Congress have argued that state public defenders need such help as well and have called for the creation of a new institution (a "Supreme Court Defender") to respond.[30]

Yet, in recent years, the Court has developed a reputation for being unwelcoming towards some sets of litigants, such as employees and consumers. Some of the Court's case law—such as its interpretations of the 1925 Federal Arbitration Act and its construction of the class action rule—have either shut the door or made it more difficult to bring lawsuits in federal courts.[31] Whatever differences exist on the meaning of the relevant federal statutes and rules, the Court has ample opportunity to use its role at the center stage of American adjudication to respond to the data I provided about the unrepresented and minimally-resourced people seeking its help.

One way to improve access to the lower federal courts from which the U.S. Supreme Court draws most of its cases is to enlist the resources of the Court's administrative apparatus, which Chief Justice William Howard Taft launched a hundred years ago. In addition to promoting the construction of the Supreme Court's building and the creation of national federal rules, Taft proposed a national organization of federal judges—with the Chief Justice as the chair—so that each federal judge would not, as he put it, be "paddling his own canoe."[32] Another pivotal figure was Chief Justice Warren Burger, who began a tradition of issuing a "state of the judiciary" year-

end address, which provides chief justices with a regular occasion to address the nation and set forth the priorities and concerns of the judiciary.

Since the 1920s, what is now called the Judicial Conference has formed many task forces and chartered a host of committees to propose policies, rule changes, judgeships, and much else to Congress and federal judges. In the past, some of the Chief Justices have worked to create and support the federal public defender services and have sought better reimbursement for lawyers and experts representing criminal defendants. Further, as I mentioned, toward the close of the twentieth century, the Conference launched a major initiative on long-range planning. Since then, the Judicial Conference has periodically issued reports to follow up on the 1996 recommendations.

Unfortunately, its *2020 Strategic Plan for the Federal Judiciary* provides an example of the lack of attention the federal judiciary has afforded to the needy in its own courts. Although the plan called for a focus on "providing justice," the thirty-page monograph focused on case management, resources for the federal judiciary itself, security of employees, preserving public trust in and understanding of the federal courts, as well as issues of management, workplace, technology, and inter-branch relations.[33] One segment was labeled "enhancing access to justice" and made a brief mention of the need to "[d]evelop best practices for handling claims of pro se litigants in civil and bankruptcy cases."[34]

Yet nowhere in the 2020 strategic plan do readers learn about the data that the Administrative Office of the U.S. Courts collects and from which I graphed the years in which one quarter of the people filing civil cases in the trial courts and one half on appeal did so without lawyers.[35] Nor was any mention made of an undertaking to interrogate the fee schedules. The income stream from bankruptcy petitioners is significant. Those filings once numbered more than a million and have now declined substantially. Yet bankruptcy petitioners continue to far exceed the number of other civil litigants. Individual bankruptcy filers—who by definition assertg resource challenges—are nonetheless required to pay filing fees of more than $300.[36] Even as the Supreme Court has concluded that the Constitution does not require a fee waiver for bankruptcy petitioners,[37] the courts have discretion to lower charges and alter fee schedules. Filing a civil complaint costs $350, on top of which the Administrative Office imposes a $52 additional assessment,[38] and the Supreme Court imposes a docket fee of $300 unless one is proceeding in forma pauperis.[39] Given the advances of technology, one would hope that entrance fees would go down.

In addition to the Judicial Conference's own history of work on behalf of "youthful offenders," federal public defenders, and courthouse construction, the judiciary under the leadership of the Chief Justice could draw on efforts by the lower federal courts, state courts, and from abroad. One example comes from the Northern District of Illinois: to be admitted to practice, lawyers have to agree to do some pro bono representation.[40] The U.S. Supreme Court could likewise couple its bar membership with public service.

Another resource on which to draw is the work in state courts. Illustrative are the successful calls by the chief justices of California and New York to have their state's budgets provide funds for certain kinds of civil litigants. Moreover, several other state court chief justices have convened task forces to examine and propose altering court fees and other financial obligations imposed by

the judiciary. An example from abroad comes from the Supreme Court of Argentina, which responded to concerns about violence against women by creating an office in its courthouse dedicated to domestic violence.

Congress can also play a role through providing resources and by calling on the federal judiciary to study and report on its efforts to meet the country's equity and access to justice needs. Indeed, the statute authorizing the Judicial Conference itself calls for "continuous study" of the rules and procedures and for regular reporting to Congress on the Court's business.[41] Moreover, in 1994, Congress called on the courts to undertake studies of gender bias in the courts.[42]

In short, many opportunities and mechanisms exist for the Chief Justice and the Judicial Conference that the Chief chairs to take a high-profile role in organizing a national system to ensure that unrepresented and resource-limited individuals are welcome in all the federal courts. This opportunity to play a critical role in advancing access to justice stems from the enormous power invested in the Court and the Chief. Below, I discuss some options for reallocations that will lessen the concentration of power in the person who holds the position of Chief Justice.

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Another challenge in the lower courts that ought to be of central concern to the Court is the rate at which federal appellate courts deem their decisions "not for publication" and thereby discourage their use as precedent. About 85 percent of circuit decisions issued in 2020 were designated not for publication. In the last three terms, however, more than 14 percent of the cases that the Supreme Court has selected to review were rulings that lower court judges marked as not of legal significance.

Explanations of the development of the non-publication practice, the confusion it has produced, and its import for the Supreme Court are in order. As the federal courts' caseload grew in the second half of the twentieth century, federal appellate courts began to instruct that some of their decisions were not to be invoked as a rule of law thereafter.[43] In the 1960s, the Judicial Conference of the United States promoted that shortcut, and by 1985, about 60 percent of the decisions were denoted to be one-shot rulings.[44]

Yet concerns emerged about the relationship of this practice to the constitutional commitment of "judicial power" to Article III judges. In 2000, the Honorable Richard Arnold, sitting on the Eighth Circuit, concluded that calling rulings not binding in the future breached judges' obligations under Article III. As he explained in *Anastasoff v. United States* (which was later vacated as moot by an en banc panel),[45] the word "publication" was confusing. The question was not whether judges sent their decisions to legal publishers to be bound in books or for online posting.[46] Rather, the problem was that a "non-citation" rule (for which non-publication was a shorthand) was unlawful.

In the opinion for the panel, Judge Arnold explained and rejected the rationale for such a rule:

> It is often said among judges that the volume of appeals is so high that it is simply unrealistic to ascribe precedential value to every decision. . . . If this is true, the judicial system is indeed in serious trouble, but the remedy is not to create an

> underground body of law good for one place and time only. The remedy, instead, is to create enough judgeships to handle the volume, or, if that is not practical, for each judge to take enough time to do a competent job with each case.

Judge Arnold objected to non-citation; when judges labeled a decision not for citation, judges choose

> for themselves, from among all the cases they decide, those that they will follow in the future, and those that they need not. . . . Those courts are saying to the bar: "We may have decided this question the opposite way yesterday, but this does not bind us today, and, what's more, you cannot even tell us what we did yesterday." . . . [S]uch a statement exceeds the judicial power, which is based on reason, not fiat. . . .
>
> . . . The judicial power of the United States is limited by the doctrine of precedent. [The Circuit's non-citation rule] expands the judicial power beyond the limits set by Article III by allowing us complete discretion to determine which judicial decisions will bind us and which will not. Insofar as it limits the precedential effect of our prior decisions, the Rule is therefore unconstitutional.[47]

That decision was part of a heated debate about appellate court decision-making.[48] In addition to the Article III problems, some commentators raised First Amendment concerns about judges telling litigants not to cite court decisions. Yet the *Anastasoff* analysis has not been endorsed by the federal judiciary.

Instead, a Judicial Conference Committee proposed, and in 2006 the Supreme Court promulgated, a new federal appellate rule (Rule 32.1) that aimed to mitigate some of the concerns while it licensed appellate courts to weigh the import of their own decisions. That rule provides that courts "may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been . . . designated as 'unpublished,' 'not for publication,' 'non-precedential,' or the like."[49] As that phrasing makes clear, Rule 32.1 recognizes the use of non-publication and non-precedential rulings. Circuit courts have invoked Rule 32.1 as well as other federal appellate rules (Rule 36, on the "entry of judgment, notice," and Rule 47 on "local rules" for appellate courts) to set forth their own views related to publication and subsequent use of decisions as binding.

These local rules are not uniform, nor are the rates of non-publication across circuits. The text of rules from some circuits seems to create presumptions in favor of publication,[50] while others appear to create presumptions against publication.[51] The rates of non-publication in the circuits between 1997 and 2017 have varied from about 40 percent of decided cases to more than 90 percent.[52] The local rules about publication sometimes detail criteria, such as cases of first impression, clarification, or modification of existing doctrine; those metrics result in circuit judges picking cases they perceive to be important for publication.[53]

How, in practice, the federal circuits decide which dispositions to make summarily and which to designate as "not for publication" is a question debated in the literature. An article written some decades ago that analyzed "summary dispositions" in the Third Circuit identified the use of such rulings to "not make law" in cases that raised significant issues.[54] A more recent essay

identified "cut and copy" precedent: despite the appellation of non-precedential rulings, judges routinely recycled descriptions of law verbatim and used such decisions informally as precedent.[55] Non-publication may also be a part of circuit judges' decision-making about whether to join opinions; some may agree with an outcome contingent on obscuring the legal principles that were the basis, or hope that by noting a decision as not for publication, the case will not proceed to the U.S. Supreme Court. Moreover, as an analysis of non-publication in a state court system revealed by comparing the rate of affirmances and reversals that were published, that practice may skew opinion production and undermine the evenhanded application of law.[56]

Whatever the criteria, the volume is impressive. By 2020, as charted below in Figure 9, more than 85 percent of the federal appellate opinions (then numbering fewer than 50,000) were marked not for publication.

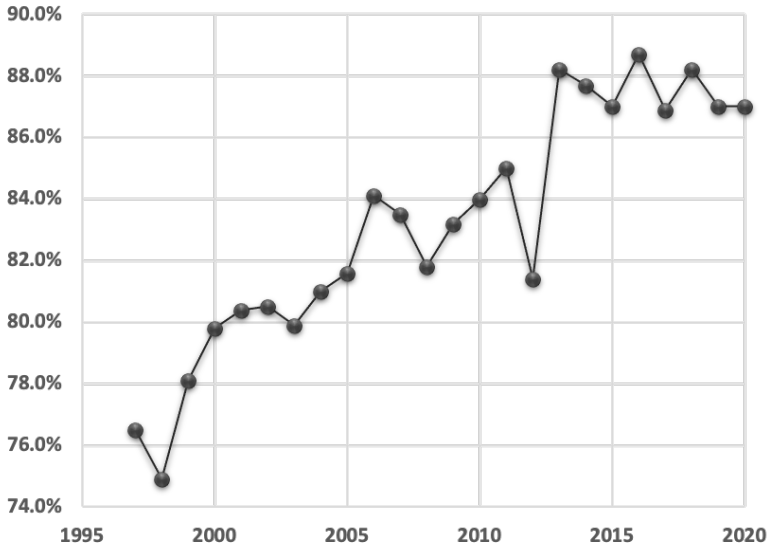

Figure 9. Rate of Non-Published Opinions in Federal Courts of Appeals: All Circuits, 1997–2020.[57]

What does the avalanche of non-publication decisions mean for the Supreme Court? One might expect that almost none of the cases that appellate judges deem routine or unworthy of subsequent use would be part of the Supreme Court's docket.

Yet, as charted below in Figure 10, of the 217 cases in which certiorari was granted between 2018-2021, about one-seventh of those grants came in cases where appellate courts marked their decisions as not for publication. The types of cases were eclectic. Of the 31 grants, 18 were civil and 13 criminal. Included were *United States v. Davis,* interpreting the Hobbs Act;[58] *Stokeling v. United States*, addressing sentencing under the Armed Career Criminal Act;[59] and *Gundy v. United States*, interpreting the Sex Offender Registration and Notification Act (SORNA).[60] More analysis is needed, of course, by looking not only at the cases in which certiorari was granted, but also at all the petitions filed to learn about the distribution in petitioning between decisions for publication and those marked as non-publication decisions, the presence or absence of counsel, and the issues raised in cases in which circuits do not publish opinions.

Total cert. grants	217
Three-judge panels	4
% cert. grants/state supreme courts	15.7%
% cert. grants/federal Courts of Appeals	84.3%
% cert. grants/published decisions below	86%
% cert. grants/unpublished decisions below	14%

Figure 10. Certiorari Grants from Federal Appellate Unpublished Decisions, 2018–2021.

The disjuncture between what lower courts understand to be cases of legal significance and what four members of the Supreme Court believe worthy of review raises yet more puzzles about how federal appellate judges decide (or bargain) over non-publication and about the wisdom of the current certiorari process through which the Court has exclusive control over the composition of its docket. As Figure 10 also describes, of the 217 grants of certiorari, the federal appellate courts are the dominant source of cases; about sixteen percent came from the state courts, and an additional four cases came from the Court's mandatory appellate jurisdiction over three-judge courts.[61]

The system we have is not inevitable but a choice. As is familiar, in 1925, Congress gave the Court a remarkable degree of discretion to compose its own docket.[62] Such control expanded when, in the 1970s, Congress limited the jurisdiction of three-judge courts and, with that contraction, the Court's mandatory docket shrunk.

Another source of the Court's control over its docket (as well as that of the lower federal courts) is the current Court's refusal to defer to congressional decisions on which litigants have the kinds of injuries that Article III judges may adjudicate. Despite a variety of federal statutes that authorize individuals to bring cases to enforce their rights (such as for accurate credit postings and oversight of pension funds), members of the Supreme Court have questioned or rejected litigants who seek to invoke rights under those provisions.[63] Some Justices have elaborated the idea that congressional definitions of injury may constitute what they call "an injury at law" (such as posting erroneous information about an individual on the web) and have taken it upon themselves to assert that such a statutory violation is insufficient to constitute a "case" or "controversy" under Article III.[64]

This mix of unfettered authority to make choices pursuant to its certiorari docket and its Article III jurisprudence means that the nine individuals on the U.S. Supreme Court are gatekeepers for all the federal courts. Further, unilateral control over case selection permits Justices to shop for facts and issues to pursue legal agendas rather than to be responsive to the needs of litigants. The selection of unpublished lower court decisions for certiorari reflects that the Justices and appellate judges do not share views on the import of a small but significant number of cases.

Many alternatives exist that could encourage more dialogue among judges and Justices and lessen the agenda-setting powers of the individuals who sit on the Supreme Court. More than a decade ago, Professors Paul Carrington and Roger Cramton encouraged the creation of a body of appellate judges to serve for a period of time to take on the primary role of case selection (with some authority remaining with the Court).[65] Given the role of state courts in our federation, state court justices could be selected by the Conference of Chief Justices to join such a group. Another option is for Congress to take a more robust role in mandating (or encouraging) Supreme Court review of categories of cases.

Further, because the Court promulgates federal rules and because the Chief Justice has occasions to address the nation, the Judicial Conference could call for its committees dedicated to the appellate courts, rulemaking, and court management to explore the impact of that practice. The Court needs also to revisit its own decision-making practices that parallel the lower courts' non-publication mode—rendering rules (such as stays involving capital proceedings) that come with no explanation. Other commentators have addressed the concerns about what is termed a "shadow docket,"[66] and thus I will not discuss those problems.

To help move the discussion forward, I suggest an alternative approach that the Court could take for itself and could ask the drafting committees on federal rules for the lower courts to consider. Congress may want to address these issues as well by holding hearings or expanding on the bills that have been put forth on "sunshine" in the courts. Given that transparency, accountability, equitable decision-making, and public access regardless of people's economic resources are the touchstones, a provision along the lines set out below would be helpful to start discussion:

> In all cases in which a decision is made by Article III judges or Justices, that decision shall be written and shall explain its basis with citations when appropriate to relevant aspects of the record and governing law. That decision must be made available publicly through free-of-charge websites and be able to be used by litigants in other cases when making arguments. Any such decision may be relied upon as relevant authority thereafter.

***

Before leaving rulemaking, I want to underscore another curious feature of current Supreme Court practices: the Court has not formally conformed its methods of procedure to mirror what Congress has required of the lower federal courts. Instead of voluntarily adopting the format of the Rules Enabling Act, chartering an advisory committee to draft rules, and providing time for notice and comment to obtain systematic input from the bar, other judges, and the public, the Court unilaterally decides how to conduct its business. (At times, the Court has referenced lower federal court rules to use as guides.[67])

Even as constitutional questions may exist about the authority of Congress to direct the Court's procedures when the Court makes decisions in original jurisdiction cases,[68] Congress has a great deal of authority over the Court's appellate jurisdiction, as the Constitution describes the Court's appellate jurisdiction as subject to "such exceptions and under such regulations as the Congress shall make." Many rulings have parsed these words, and a legion of constitutional

commentators have argued about the scope of congressional license under the text and under the Court's interpretation of statutes related to its exercise of appellate jurisdiction.[69] One way to avoid confronting these issues is for the Supreme Court voluntarily to pattern its processes for rulemaking after the practices of the lower courts.

***

A final set of concerns relates to the length of time that Justices serve on the Supreme Court. The current Chief Justice, for example, is only the seventeenth person since the country's founding to hold that position. Before examining term lengths for Associate Justices, I explain how remarkable authority has accrued to the position of the Chief Justice, whose authority needs to be cabined.

The content of the role of Chief Justice stems not from the Constitution (which mentions the term only once, when discussing who presides in the event of an impeachment trial of the President). Instead, the breadth of authority derives from dozens of statutes enacted in an ad hoc fashion over many decades, from customs, and from the vision, decisions, and ambitions of those who have held the office of the Chief Justice. Appendix A—*The Statutory Duties of the Chief Justiceship*—is a lengthy account of the dozens of statutes that augment the power accorded to the Chief Justice.[70] Moreover, several Chief Justices—such as William Howard Taft, Earl Warren, Warren Burger, and William Rehnquist—carved out new authority, proposed and obtained funds for new institutional structures and courthouse construction, and successfully persuaded the other branches to support their visions.

Thus, as in so much else about the federal courts, many facets of the chief justiceship are relatively new and under-appreciated. As I noted, the Chief Justice chairs the Judicial Conference and through that role sets agendas and appoints committees as well as designates judges to sit on certain courts.[71] The Chief Justice has a range of obligatory and potentially time-consuming duties, and the Director of the Administrative Office of the U.S. Courts and other staff work under his aegis. Yet the Chief Justice and other judicial officials are largely sheltered from public view, thereby creating an administrative authority free of many of the constraints imposed on other agencies and offices.

Insulation from the public can be valuable when the Chief Justice is acting in the role of a jurist. But the administrative portfolio currently held for life by the Chief Justice cannot find its justification in the rationales that protect adjudicators from inappropriate oversight. Rather, the packet of powers now encapsulated in that position has and can be used to promote instrumental agendas that make their way into legislation and then return to the Court as legal questions to be adjudicated.[72]

Alternatives exist that are constitutionally permissible and pragmatically appealing. Because the powers of the Chief Justice are artifacts of custom and statute rather than the Constitution, revisiting these practices is possible. The Chief Justice could reconfigure some of the parameters by sharing a variety of powers with other members of the Court. In addition, Congress could and should reorganize those powers to reduce the eclectic array of duties assigned to the Chief Justice.

One option is to provide a more limited term of office for the Chief Justice so as to share the authority. Models come from the lower federal courts, where chief judges serve for seven-year terms keyed to age and seniority, and from state courts where, as detailed in Appendix B, *Tenure and Methods of Selection of State Chief Justices as of 2005*,[73] some state court justices sit for fixed terms, and some are selected by their peers.

The issue of length of service is a concern for Associate Justices as well. Many commentators have proposed term limits and rotation. Undergirding those suggestions is the insight that appointment to the Article III judiciary provides protection but not necessarily an entitlement to a specific judgeship within the federal courts. Part of the impetus to explore these changes comes from the riven conflicts about Supreme Court nominees, as the stakes of each appointment—under the current system—are so high. One way to lower those stakes is to have individuals selected to sit for six, eight, or ten years on the Court and then shift to a judgeship on the lower courts. Again, models exist elsewhere in the federal system. Retired Supreme Court justices occasionally sit on appellate courts, and lower court judges regularly sit "by designation" on appellate courts or move from one district to another to augment the resources of that court. This practice dates back to proposals from Chief Justice William Howard Taft, who called for a "flying squadron of judges" to dispatch in response to caseload needs in different parts of the country.[74]

In addition to changing the terms of office on the Court, increasing the number of sitting Justices and shifting to a system of panels would mitigate the undue impact of any one appointment. Examples of larger groups of Justices working constructively together exist in the lower federal courts, state courts, and in other constitutional democracies that, like the United States, are committed to judicial independence and excellence. For example, the Supreme Court of the United Kingdom has twelve Justices, who sit on panels of five or more. Were the United States to have more Justices and panel decisions, the interactions of the Justices would be less predictable. As to implementation, some of the changes I have outlined could be made without legislation and others require Congress, which could expand the mandatory jurisdiction of the Court, the number of Justices sitting on the Court, and structure a panel system for decisions.

These proposals are but a few of the many ideas that aim to constrain a small group of people from entrenching their views of law's obligations and from limiting opportunities to debate the meaning and impact of our norms.[75] As I have elsewhere detailed, the fact of a democracy does not drive specific selection methods for judges,[76] but it should inform rules about the concentration of power of judges through terms of service and modes of action. Democracy teaches that no one person (judges included) ought to hold too much power for too long, and that all who do exercise power should do so in a visible and accountable way.

III. Inventing Again

I have mapped many ways in which the U.S. Supreme Court has developed its own systems that entrench enormous power in nine people and concentrate authority in one of them, the Chief Justice. I have described a variety of interrelated improvements to alter the process for choosing and deciding cases, for assigning Justices, for making rules, and for publication that, if dealt with together as a packet, would dilute the concentration of power in any one individual.

I have provided glimpses of various changes in the federal courts, in the Supreme Court, and in the Office of Chief Justice as reminders that the system is always dynamic and that congressional initiatives are driven by a mixture of what is politically plausible and useful. In *The Reader's Digest* of 1948, a story discussing innovations called that change: "Uncle Sam Modernizes His Courts."[77] In every decade thereafter and often in the name of modernization, the federal judiciary has retooled itself. Yet, to date, the Supreme Court has neither reshaped its own practices nor required the lower courts to respond sufficiently to the country's aspirations for equity, access to justice, and transparency.

One last picture underscores this point. Below is a photograph of the U.S. Supreme Court that was taken in 1935 after the opening of the courthouse. When it was constructed, the building's architecture was a departure from styles—such as Art Deco and the International Style—that were then in vogue. The goal was to create the impression that the building had always been there.[78] Yet inside, a few features—including a press room and quarters for an administrative office—were forward looking.

Even as there is much to celebrate, admire, and preserve, there is much to reconsider to meet the needs of twenty-first century America. Just as the inscription "Equal Justice Under Law" has been imbued with new meaning in the decades after it was carved in stone, the practices of the Court need to be reworked. One way to underscore that need is to look at the cars parked in 1935 along the front of the courthouse. While antique aficionados may still want to drive them, new engineering and concerns about safety and the environment have made these vehicles obsolete. It is time to move forward in redesigning the practices and conventions of the Supreme Court that, like these cars, ought not be frozen in the past.

Figure 11. U.S. Supreme Court, Washington, D.C. Architect: Cass Gilbert, 1935. [79]

Appendix A[80]

Statutory Duties of the Chief Justice of the United States

2 U.S.C. § 135	The Librarian of Congress purchases law books under the direction of the Chief Justice.
2 U.S.C. § 352	The Chief Justice appoints two of the eleven members of the Citizens' Commission on Public Service and Compensation.
5 U.S.C. § 5520a	The Chief Justice or the Chief Justice's designee is responsible for promulgating regulations to implement garnishment of pay provisions for the judicial branch.
5 U.S.C. § 5582	The Chief Justice or the Chief Justice's designee is responsible for promulgating regulations allowing judicial branch employees to designate beneficiaries.
8 U.S.C. § 1532	The Chief Justice appoints the five district judges who constitute the Alien Terrorist Removal Court.
8 U.S.C. § 1532	The Chief Justice designates the chief judge of the Alien Terrorist Removal Court from among the members of that court.
10 U.S.C. § 942	If a vacancy occurs on the U.S. Court of Appeals for the Armed Forces, the Chief Justice may, upon the chief judge of that court's request, appoint an Article III judge to fill the vacancy.
18 U.S.C. app. 3, § 9	The Chief Justice prescribes rules to protect against disclosure of classified information held by the federal courts.
19 U.S.C. § 3432	The Chief Justice approves judges who have been identified by circuit chief judges as eligible to participate on NAFTA dispute settlement panels and submits a list of approved judges to the Trade Representative.
20 U.S.C. § 41	The Chief Justice, the President, the Vice President, and the heads of executive departments constitute the Smithsonian Institution.
20 U.S.C. § 42	The Board of Regents of the Smithsonian Institution is composed of the Chief Justice, the Vice President, three Members of the Senate, three Members of the House of Representatives, and nine other persons who are not Members of Congress.
20 U.S.C. § 72	The Board of Trustees of the National Gallery of Art includes the Chief Justice, the Secretary of State, the Secretary of the Treasury, the Secretary of the Smithsonian Institution, ex officio, and five general trustees.
20 U.S.C. § 76cc	The Board of Trustees of the Hirshhorn Museum and Sculpture Garden includes the Chief Justice and the Secretary of the Smithsonian Institution, who serve as ex officio members, and eight general members.
20 U.S.C. § 4502	The Chief Justice recommends two members of the judiciary to serve on the James Madison Memorial Fellowship Foundation Board of Trustees.

28 U.S.C. § 1	The Supreme Court of the United States consists of a Chief Justice of the United States and eight Associate Justices, any six of whom constitute a quorum.
28 U.S.C. § 42	The Chief Justice may allot the Justices among the circuits if such allotment is necessary while the Court is in vacation.
28 U.S.C. § 45	The Chief Justice receives the certification of a circuit court chief judge who decides to step down and to resume service as a circuit judge.
28 U.S.C. § 49*	The Chief Justice appoints three Justices or circuit judges to compose a body, called the Special Division of the U.S. Court of Appeals for the District of Columbia, to appoint independent counsels.
28 U.S.C. § 136	The Chief Justice receives the certification of a district court chief judge who decides to step down and to resume service as a district judge.
28 U.S.C. § 258	The Chief Justice receives the certification of a Court of International Trade chief judge who decides to step down and to resume service as a judge on that court.
28 U.S.C. § 291	Upon request of the chief judge or circuit justice of that circuit, the Chief Justice may temporarily assign a circuit judge to another circuit.
28 U.S.C. § 292	Upon presentation of a certificate of necessity by the chief judge or circuit justice of that circuit, the Chief Justice may temporarily assign a district judge to another circuit.
28 U.S.C. § 292	Upon presentation of a certificate of necessity by the chief judge of that court, the Chief Justice may temporarily assign a district judge to the Court of International Trade.
28 U.S.C. § 293	Upon presentation of a certificate of necessity by the chief judge of that circuit, the Chief Justice may temporarily assign a judge from the Court of International Trade to serve in any circuit.
28 U.S.C. § 294	The Chief Justice may designate a retired Justice to serve as a judge or circuit justice on a court of appeals.
28 U.S.C. § 294	The Chief Justice maintains a roster of retired district and circuit judges willing to undertake judicial duties.
28 U.S.C. § 295	The Chief Justice may revoke designations of district and circuit judges to other courts.
28 U.S.C. § 297	The Chief Justice may assign judges to serve on the courts of the freely associated compact states when officials of those courts certify necessity and the assigned judges agree.
28 U.S.C. § 331	The Chief Justice calls annual and special meetings of the Judicial Conference and designates the time and place for such meetings.
28 U.S.C. § 331	The Chief Justice presides over meetings of the Judicial Conference.

28 U.S.C. § 331	Every judge summoned to the Judicial Conference shall attend unless excused by the Chief Justice. If a judge designated as a member of the Conference is unable to attend, the Chief Justice may summon a replacement judge.
28 U.S.C. § 331	If the Judicial Conference elects to establish a standing committee for judicial discipline matters, the Chief Justice appoints the members of that committee.
28 U.S.C. § 331	The Chief Justice may order subpoenas to be issued in connection with Judicial Conference judicial discipline proceedings.
28 U.S.C. § 331	The Chief Justice may summon the Attorney General to report to the Judicial Conference on matters related to the courts and, particularly, related to the United States as a party before the courts.
28 U.S.C. § 331	The Chief Justice submits to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation.
28 U.S.C. § 360	Judicial Conference investigations for judicial discipline purposes cannot be disclosed unless authorized by the judge being investigated and by the Chief Justice, the chief judge of the circuit, or the chairman of the standing committee.
28 U.S.C. § 371	The Chief Justice must certify annually that a Justice sitting as a Senior Justice continues to qualify for that status.
28 U.S.C. § 371	The Chief Justice certifies the temporary or permanent disability of a Senior Justice.
28 U.S.C. § 372	The Chief Justice signs certificates of permanent disability authorizing the voluntary early retirement of Justices and chief judges.
28 U.S.C. § 372	The Chief Justice may present a certificate of permanent disability to the President to recommend involuntary retirement of the Chief Judge of the Court of International Trade.
28 U.S.C. § 601	The Chief Justice appoints and can remove, on consultation with the Judicial Conference, the Director and Deputy Director of the Administrative Office of the United States Courts.
28 U.S.C. § 611	The Director of the Administrative Office of the United States Courts may elect special retirement coverage by filing a written form with the Chief Justice.
28 U.S.C. § 621	The Chief Justice serves as the permanent chair of the Board of the Federal Judicial Center.
28 U.S.C. § 629	The Chief Justice appoints three of the seven members, including the chair, of the Federal Judicial Center Foundation Board, which receives gifts and property for use by the Federal Judicial Center.
28 U.S.C. § 671	The Chief Justice authorizes the Supreme Court Clerk to remove deputy clerks.
28 U.S.C. § 671	With the approval of the Chief Justice, the Supreme Court Clerk appoints and sets compensation for deputy clerks.
28 U.S.C. § 672	With the approval of the Chief Justice, the Supreme Court Marshal appoints and fixes compensation for assistants.

28 U.S.C. § 673	With the approval of the Chief Justice, the Supreme Court Reporter appoints and fixes compensation for assistants.
28 U.S.C. § 673	The Supreme Court Reporter, under the direction of the Chief Justice or the Supreme Court, prepares the Supreme Court's decisions for publication.
28 U.S.C. § 674	With the approval of the Chief Justice, the Supreme Court librarian appoints and fixes compensation for assistants and sets the rules governing the use of the library.
28 U.S.C. § 675	The Chief Justice and the Associate Justices of the Supreme Court may appoint law clerks and secretaries whose salaries shall be fixed by the Court.
28 U.S.C. § 676	Either the Chief Justice or the Supreme Court selects the Supreme Court's printer.
28 U.S.C. § 676	Either the Chief Justice or the Supreme Court determines the manner in which Court decisions are printed.
28 U.S.C. § 677	The Chief Justice appoints the Administrative Assistant to the Chief Justice and determines the level of compensation and duties for that position.
28 U.S.C. § 677	The Chief Justice approves compensation for additional employees needed by the Administrative Assistant to the Chief Justice.
28 U.S.C. § 677	The Chief Justice approves acceptance of volunteer services by the Administrative Assistant to the Chief Justice.
28 U.S.C. § 1407	The Chief Justice may transfer a judge from the judge's district or circuit to a court to which multidistrict litigation has been transferred.
28 U.S.C. § 1407	The Chief Justice appoints the seven members of the Multidistrict Litigation Panel.
28 U.S.C. § 2109	If the Supreme Court does not have a quorum to hear a case, the Chief Justice may order the case remitted to the court of appeals for hearing by either, at the Chief Justice's discretion, three judges or the court en banc.
40 U.S.C. § 6102	The Chief Justice approves the Supreme Court Marshal's regulations for protection and maintenance of the Supreme Court building.
40 U.S.C. § 6112	The Chief Justice approves the hiring of employees for the maintenance of the Supreme Court's building and grounds.
40 U.S.C. § 6121	The Chief Justice approves the Supreme Court Marshal's regulations for the Supreme Court police.
40 U.S.C. § 6122	Under the general supervision and direction of the Chief Justice, the Supreme Court Marshal designates Supreme Court employees as members of the Supreme Court police.
40 U.S.C. § 6502	The Chief Justice or the Chief Justice's designee was charged with approving the final architectural plans for the Thurgood Marshall Federal Judiciary Building.
40 U.S.C. § 6503	The Chief Justice appoints two of the thirteen members of the Commission for the Judiciary Office Building.
40 U.S.C. § 6506	The Chief Justice was to determine what space was needed by the judiciary in the Thurgood Marshall Federal Judiciary Building and to inform the Architect of the Capitol.

40 U.S.C. § 6506	The Chief Justice notifies the Architect when the judiciary requires additional space in the Thurgood Marshall Federal Judiciary Building.
42 U.S.C. § 659	The Chief Justice may promulgate regulations for the judicial branch to implement consent to income withholding, garnishment, and similar proceedings for enforcement of child support and alimony obligations.
44 U.S.C. § 2501	The Chief Justice appoints a member of the judiciary as one of the fifteen members of the National Historical Publications and Records Commission.
44 U.S.C. § 3318	The Chief Justice appoints a member of the judiciary as one of the seventeen members of the National Study Commission on Records and Documents of Federal Officials.
48 U.S.C. § 1424b	The Chief Justice may assign a circuit or district judge from another circuit to serve temporarily as a judge in the District of Guam whenever such assignment is necessary and the assigned judge and the chief judge of the assigned judge's circuit consent.
48 U.S.C. § 1614	The Chief Justice, after obtaining the consent of the assigned judge and the assigned judge's circuit, may assign a circuit or district judge to serve temporarily on the District Court of the Virgin Islands.
48 U.S.C. § 1821	The Chief Justice, after obtaining the consent of the assigned judge and the assigned judge's circuit, may assign a circuit or district judge to serve temporarily on the District Court for the Northern Mariana Islands.
50 U.S.C. § 1802	The Chief Justice, with the concurrence of the Attorney General and in consultation with the Director of National Intelligence, establishes security measures for maintaining the Attorney General's certification for electronic surveillance to acquire foreign intelligence.
50 U.S.C. § 1803	The Chief Justice appoints the eleven district judges who make up the Foreign Intelligence Surveillance Court.
50 U.S.C. § 1803	The Chief Justice appoints three district or circuit court judges to serve as an appellate board to review any denial by the Foreign Intelligence Surveillance Court of an application by the government for surveillance authorization.
50 U.S.C. § 1803	Proceedings under the Foreign Intelligence Surveillance Act are conducted under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.
50 U.S.C. § 1822	The Chief Justice, with the concurrence of the Attorney General and in consultation with the Director of National Intelligence, establishes the security measures under which the Attorney General's certifications of the need for physical searches, conducted for foreign intelligence surveillance purposes and undertaken without court orders, are to be kept.

50 U.S.C. § 1822	Records of proceedings under the Foreign Intelligence Surveillance Act, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence.
50 U.S.C. § 1842	The Chief Justice appoints a U.S. magistrate judge to hear applications for and grant orders approving the installation and use of pen register or trap and trace devices under the Foreign Intelligence Surveillance Act.
50 U.S.C. § 1861	The Chief Justice appoints a U.S. magistrate judge to hear applications for the production of tangible things under the Foreign Intelligence Surveillance Act.

Appendix B[81]

Tenure and Methods of Selection of State Chief Justices (as of 2005)

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
Alabama	6 years ALA. CODE § 12-2-1	Popular election ALA. CODE § 12-2-1	6 years ALA. CONST. art. VI, § 154(a); ALA. CODE § 12-2-1	Popular election ALA. CONST. art. VI, § 152; ALA. CODE § 12-2-1
Alaska	3 years ALASKA CONST. art. IV, § 2(b)	Court selection ALASKA CONST. art. IV, § 2(b)	10 years Initial term = at least 3 years ALASKA CONST. art. IV, § 6	JNC nominates; governor appoints; retention election ALASKA CONST. art. IV, §§ 5-6
Arizona	5 years ARIZ. CONST. art. VI, § 3	Court selection ARIZ. CONST. art. VI, § 3	6 years Initial term = at least 2 years ARIZ. CONST. art. VI, §§ 4, 37(C)	JNC nominates; governor appoints; retention election ARIZ. CONST. art. VI, §§ 37-38
Arkansas	8 years ARK. CONST. amend. 80, §§ 2(B), 16(A)	Popular election ARK. CONST. amend. 9, § 1; ARK. CONST. amend. 80, §§ 2(A),(B), 18	8 years ARK. CONST. amend. 80, § 16(A)	Popular election ARK. CONST. amend. 80, §§ 2(A), 18
California	12 years [a,b]CAL. CONST. art. VI, § 16(a); CAL. ELEC. CODE §§ 9083, 13109	Governor nominates after review by Commission on Judicial Nominees Evaluation; Commission on Judicial Appointments approves; retention election [a,b]CAL. CONST. art. VI, § 16(a), (d); CAL. ELEC. CODE §§ 9083, 13109	12 years Initial term = until next gubernatorial election CAL. CONST. art. VI, § 16(a), (d); CAL. ELEC. CODE § 9083	Governor nominates after review by Commission on Judicial Nominees Evaluation; Commission on Judicial Appointments approves; retention election CAL. CONST. art. VI, § 16(a), (d); CAL. ELEC. CODE §§ 9083, 13109
Colorado	Serves "at the pleasure of a majority of the court" COLO. CONST. art. VI, § 5(2)	Court selection COLO. CONST. art. VI, § 5(2)	10 years Initial term = at least 2 years COLO. CONST. art. VI, §§ 7, 20	JNC nominates; governor appoints; retention election COLO. CONST. art. VI, §§ 20, 25
Connecticut	8 years CONN. GEN. STAT. ANN. § 51-44a(h)	JNC proposes; governor nominates; legislature appoints CONN. CONST. art. V, § 2; CONN. GEN. STAT. ANN. § 51-44a(h)	8 years CONN. CONST. art. V, § 2	JNC proposes; governor nominates; legislature appoints CONN. CONST. art. V, § 2 CONN. GEN. STAT. ANN. § 51-44a(h)

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
Delaware	12 years DEL. CONST. art. IV, § 3	JNC nominates; governor appoints; senate consents DEL. CONST. art. IV §§ 2, 3; Exec. Order No. 4	12 years DEL. CONST. art. IV, § 3	JNC nominates; governor appoints; senate consents DEL. CONST. art. IV, § 3; Exec. Order No. 4
District of Columbia	4 years D.C. CODE § 11-1503(a)	Designated by JNC D.C. CODE § 1-204.31(b)	15 years; mandatory retirement at age 74 D.C. CODE § 11-1502	JNC nominates; President appoints; senate consents D.C. CODE. §§ 1-204.33, 11-1501(a)
Florida	2 years ʿFLA. R. JUD. ADMIN. 2.030(a)(2)(A)	Court selection FLA. CONST. art. V, § 2(b); FLA. R. JUD. ADMIN. 2.030(a)(2)(A)	6 years Initial term = at least 1 year FLA. CONST. art. V, §§ 10(a), 11(a)	JNC nominates; governor appoints; retention election FLA. CONST. art. V, §§ 10(a), 11(a)
Georgia	2 years (no more than 4 years) ʿ1999 Ga. Supreme Court Administrative Minutes	Court selection GA. CONST. art. VI, § 6, para. 1	6 years GA. CONST. art. 6, § 7, para. 1	Popular election GA. CONST. art. 6, § 7, para. 1
Hawaii	10 years; mandatory retirement at age 70 HAW. CONST. art. VI, § 3	JNC nominates; governor appoints; senate consents HAW. CONST. art. VI, § 3	10 years; mandatory retirement at age 70 HAW. CONST. art. VI, § 3	JNC nominates; governor appoints; senate consents HAW. CONST. art. VI, § 3
Idaho	4 years IDAHO CONST. art. V, § 6	Court selection IDAHO CONST. art. V, § 6	6 years IDAHO CONST. art. V, § 6	Popular election IDAHO CONST. art. V, § 6
Illinois	3 years ILL. CONST. art. VI, § 3	Court selection ILL. CONST. art. VI, § 3	10 years ILL. CONST. art. VI, § 10	Popular election; retention election ILL. CONST. art. VI, § 12
Indiana	5 years IND. CONST. art. VII, § 3	JNC appoints IND. CONST. art. VII, § 3	10 years Initial term = at least 2 years IND. CONST. art. VII, § 11	JNC nominates; governor appoints; retention election IND. CONST. art. VII, §§ 10-11
Iowa	8 years IOWA CODE ANN. § 602.4103	Court selection IOWA CODE. ANN. § 602.4103	8 years Initial term = at least 1 year IOWA CONST. art. V, § 17	JNC nominates; governor appoints; retention election IOWA CONST. art. V, §§ 15, 17

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
Kansas	Duration of service KAN. CONST. art. III, § 2	Seniority KAN. CONST. art. III, § 2	6 years Initial term = at least 1 year KAN. CONST. art. III, §§ 2, 5	JNC nominates; governor appoints; retention election KAN. CONST. art. III, § 5
Kentucky	4 years KY. CONST. § 110(5)(a)	Court selection KY. CONST. § 110(5)(a)	8 years KY. CONST. § 119	Popular election KY. CONST. § 117
Louisiana	Duration of service LA. CONST. art. V, § 6	Seniority LA. CONST. art. V, § 6	10 years LA. CONST. art. V, § 3	Popular election LA. CONST. art. V, § 22(A)
Maine	7 years [a]ME. CONST. art. VI, § 4	Governor appoints; senate confirms [a]ME. CONST. art. V, pt. 1, § 8	7 years ME. CONST. art. VI, § 4	Governor appoints; senate confirms ME. CONST. art. V, pt. 1, § 8
Maryland	10 years; mandatory retirement at age 70 [a]MD. CONST. art. IV, §§ 5A, 14	Governor designates MD. CONST. art. IV, § 14	10 years; mandatory retirement at age 70 Initial term = at least 1 year MD. CONST. art. IV, § 5A	JNC nominates; governor appoints; senate confirms; retention election MD. CONST. art. IV, § 5A; Md. Exec. Order 01.01.2003.09
Massachusetts	"[G]ood behavior;" mandatory retirement at age 70 [a]MASS. CONST. pt. 1, art. 29; MASS. CONST. pt. 2, ch. 3, art. 1	Governor appoints; governor's council consents [a]MASS. CONST. pt. 2, ch. 2, § 1, art. 9	"[G]ood behavior"; mandatory retirement at age 70 MASS. CONST. pt. 1, art. 29; MASS. CONST. pt. 2, ch. 3, art. 1	Governor appoints; governor's council consents MASS. CONST. pt. 2, ch. 2, § 1, art. 9; Ma. Exec. Order No. 470
Michigan	2 years [c]MICH. CT. R. 7.323	Court selection MICH. CONST. art. VI, § 3; MICH. CT. R. 7.323	8 years MICH. CONST. art. VI, § 2	Popular election MICH. CONST. art. VI, § 2
Minnesota	6 years [a]MINN. CONST. art. VI, § 7	Popular election [a,b]MINN. CONST. art. VI, § 7; MINN. STAT. ANN. § 204B.06(6)	6 years MINN. CONST. art. VI, § 7	Popular election MINN. CONST. art. VI, § 7
Mississippi	Duration of service MISS. CODE ANN. § 9-3-11	Seniority MISS. CODE ANN. § 9-3-11	8 years MISS. CONST. art. VI, § 149	Popular election MISS. CONST. art. VI, § 145

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
Missouri	2 years [c]MO. CONST. art. V, § 8; MO. SUP. CT. R. 82.01	Court selection MO. CONST. art. V, § 8; MO. SUP. CT. R. 82.01	12 years Initial term= at least 1 year MO. CONST. art. V, § 19; MO. CONST. art. V, § 25(c)	JNC nominates; governor appoints; retention election MO. CONST. art. V, § 25(a), (c)
Montana	8 years MONT. CODE ANN. § 3-2-101	Popular election MONT. CONST. art. VII, § 8; MONT. CODE ANN. § 3-2-101	8 years MONT. CONST. art. VII, § 7; MONT. CODE ANN. § 3-2-101	Popular election MONT. CONST. art. VII, § 8; MONT. CODE ANN. § 3-2-101
Nebraska	6 years Initial term = at least 3 years NEB. CONST. art. V, § 21(3)	JNC nominates; governor appoints; retention election NEB. CONST. art. V, § 21	6 years Initial term = at least 3 years NEB. CONST. art. V, § 21(3)	JNC nominates; governor appoints; retention election NEB. CONST. art. V, § 21
Nevada	Generally two years NEV. CONST. art. 6, § 3; NEV. REV. STAT. ANN. § 2.030	Seniority NEV. CONST. art. 6, § 3; NEV. REV. STAT. ANN. § 2.030	6 years NEV. CONST. art. 6, § 3; NEV. REV. STAT. ANN. § 2.030	Popular election NEV. CONST. art. 6, § 3; NEV. REV. STAT. ANN. § 2.030
New Hampshire	"Good behavior;" mandatory retirement at age 70 [a]N.H. CONST. pt. 2, arts. 73, 78	Governor appoints; governor's council approves [a]N.H. CONST. pt. 2, arts. 46-47	"Good behavior;" mandatory retirement at age 70 N.H. CONST. pt. 2, arts. 73, 78	Governor appoints; governor's council approves N.H. CONST. pt. 2, arts. 46, 47
New Jersey	"Good behavior;" mandatory retirement at age 70 Initial term = 7 years. [a]N.J. CONST. art. VI, § 6, ¶ 3	Governor appoints; senate consents N.J. CONST. art. VI, § 6, ¶ 1	"Good behavior;" mandatory retirement at age 70 Initial term = 7 years. N.J. CONST. art. VI, § 6, ¶ 3	Governor appoints; senate consents N.J. CONST. art. VI, § 6, ¶ 1
New Mexico	2 years N. M. STAT. ANN. § 34-2-1	Court selection N. M. STAT. ANN. § 34-2-1	8 years N.M. CONST. art. 6, § 33	Popular election; retention election N.M. CONST. art. 6, § 33
New York	14 years N.Y. CONST. art VI, § 2(a)	JNC nominates; governor appoints; senate confirms N.Y. CONST. art VI, § 2	14 years N.Y. CONST. art VI, § 2(a)	JNC nominates; governor appoints; senate confirms N.Y. CONST. art VI, § 2

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
North Carolina	8 years	Popular election	8 years	Popular election
	N.C. GEN. STAT. ANN. § 7A-10(a)	N.C. GEN. STAT. ANN. § 7A-10(a)	N.C. GEN. STAT. ANN. § 7A-10(a)	N.C. GEN. STAT. ANN. § 7A-10(a)
North Dakota	5 years or until term on court expires, whichever occurs first	Selection by judges of supreme and district courts	10 years	Popular election
	N.D. CENT. CODE § 27-02-01	N.D. CENT. CODE § 27-02-01	N.D. CONST. art. 6, § 7	N.D. CONST. art. 6, § 7
Ohio	6 years	Popular election	6 years	Popular election
	OHIO CONST. art. IV, § 6(A)(1)	OHIO CONST. art. IV, § 6(A)(1)	OHIO CONST. art. IV, § 6(A)(1)	OHIO CONST. art. IV, § 6(A)(1)
Oklahoma	2 years	Court selection	6 years Initial term = at least 1 year	JNC nominates; governor appoints; retention election
	[c,d]OKLA. STAT. ANN. tit. 5, ch. 1, app. 7, App. Div. R. 1	OKLA. CONST. art. VII, § 2; OKLA. STAT. ANN. tit. 5, ch. 1, app. 7, App. Div. R. 1	OKLA. CONST. art. VII, § 2; OKLA. CONST. art VII-B, § 5	OKLA. CONST. art. VII-B
Oregon	6 years	Court selection	6 years	Popular election
	OR. REV. STAT. ANN. § 2.045	OR. REV. STAT. ANN. § 2.045	OR. CONST. art. VII, § 1	OR. CONST. art. VII, § 1
Pennsylvania	Duration of service	Seniority	10 years	Governor appoints; senate consents; retention election
	PA. CONST. art. V § 10(d)	PA. CONST. art. V § 10(d)	PA. CONST. art. V §§ 13(a), 15(a)	PA. CONST. art. V §§ 13(a), 15(b)
Rhode Island	"Good behavior"	JNC nominates; governor appoints; consent of Senate and House of Representatives	"Good behavior"	JNC nominates; governor appoints; consent of Senate and House of Representatives
	[a]R.I. CONST. art. X, § 5	[a]R.I. CONST. art. X, § 4	R.I. CONST. art. X, § 5	R.I. CONST. art. X, § 4
South Carolina	10 years	Legislature selects	10 years	Legislature selects
	S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10	S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10	S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10	S.C. CONST. art. V, § 3; S.C. CODE ANN. § 14-3-10
South Dakota	4 years	Court selection	8 years Initial term = at least 3 years	JNC nominates; governor appoints; retention election
	S.D. CODIFIED LAWS § 16-1-2.1	S.D. CONST. art. V, § 8; S.D. CODIFIED LAWS § 16-1-2.1	S.D. CONST. art. V, § 7	S.D. CONST. art. V, § 7

States	Chief Justice Tenure	Chief Justice Selection Method	Other Justices Tenure	Other Justices Selection Method
Tennessee	4 years	Court selection	8 years	JNC nominates; governor appoints; retention election
	[c] TENN. SUP. CT. R. 32	TENN. CONST. art. VI, § 2; TENN. CODE ANN. § 16-3-102	TENN. CONST. art. VI, § 3	TENN. CONST. art. VI, § 3; TENN. CODE ANN. §§ 17-4-112, 17-4-115
Texas	6 years	Popular election	6 years	Popular election
	TEX. CONST. art. V, § 2	TEX. CONST. art. V, § 2	TEX. CONST. art. V, § 2	TEX. CONST. art. V, § 2
Utah	4 years	Court selection	10 years Initial term = at least 3 years	JNC nominates; governor appoints; senate confirms
	UTAH CODE ANN. § 78-2-1	UTAH CODE ANN. § 78-2-1	UTAH CODE ANN. § 78-2-1	UTAH CONST. art. VIII, § 8
Vermont	6 years	JNC nominates; governor appoints; senate consents	6 years	JNC nominates; governor appoints; senate consents
	[a] VT. CONST. Ch. II, § 34	VT. CONST. Ch. II, § 32	VT. CONST. Ch. II, § 34	VT. CONST. Ch. II, § 32
Virginia	4 years	Court selection	12 years	Legislature selects
	VA. CODE ANN. § 17.1-300	VA. CODE ANN. § 17.1-300	VA. CONST. art. VI, § 7	VA. CONST. art. VI, § 7
Washington	4 years	Court selection	6 years	Popular election
	WASH. CONST. art. IV, § 3	WASH. CONST. art. IV, § 3	WASH. CONST. art. IV, § 3	WASH. CONST. art. IV, § 3
West Virginia	1 year	Rotation by seniority	12 years	Popular election
	[c] W. VA. CODE ANN. § 51-1-2; Order Re: Designation of Chief Justice	[d] W. VA. CODE ANN. § 51-1-2	W. VA. CONST. art. VIII, § 2	W. VA. CONST. art. VIII, § 2
Wisconsin	Duration of service	Seniority	10 years	Popular election
	WIS. CONST. art. VII, § 4	WIS. CONST. art. VII, § 4	WIS. CONST. art. VII, § 4	WIS. CONST. art. VII, § 4
Wyoming	4 years	Court selection	8 years Initial term = at least 1 year	JNC nominates; governor appoints; retention election
	[d] WYO. STAT. ANN. § 5-2-102	WYO. CONST. art. V, § 4; WYO. STAT. ANN. § 5-2-102	WYO. CONST. art. V, § 4	WYO. CONST. art. V, § 4

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[1] All rights reserved, Judith Resnik, June 2021. My institutional affiliation is provided for identification purposes only, and the views expressed are my own. This statement and its charts were prepared with the help of able colleagues and former and current law students. Special thanks are due to Jonathan Petkun, an Associate Fellow of the Liman Center at Yale Law School, with whom I have worked to understand federal court practices from a quantitative perspective, and to law students Russell Bogue, Megan Hauptman, Adela Lilollari, Emma Perez, Malina Simard-Halm, and Shunhe Wang for research on non-publication and other facets of this Statement. Bonnie Posick provided helpful editorial suggestions. Professor Merritt McAlister has generously permitted me to adapt one of her charts; her work on non-publication of opinions in the appellate courts informs my discussion, and Professors Stephen Vladeck and Vicki Jackson offered helpful commentary as I formulated this submission.

[2] FEDERAL COURTS STORIES (Vicki C. Jackson & Judith Resnik eds., 2009).

[3] The Project on Government Oversight, https://www.pogo.org.

[4] *See* The Supreme Court's Shadow Docket, Testimony submitted before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary, 117th Cong. (Feb. 18, 2021), (statement of Stephen I. Vladeck, Professor, University of Texas School of Law).

[5] Boddie v. Connecticut, 401 U.S. 371, 374 (1971).

[6] I discuss some of the history of the building and its imagery in Judith Resnik & Dennis Curtis, *Inventing Democratic Courts: A New and Iconic Supreme Court,* Lecture presented at a meeting of the Supreme Court Historical Society (June 4, 2012), and published at 38 J. SUP. CT. HIST. 207 (2013).

[7] George Wharton Pepper, *A Toast to the Federal Rules (Circa 1938),* 137 U. PA. L. REV. 1877 (1989), Appended to Stephen N. Subrin, *Preface—The 50th Anniversary of the Federal Rules of Civil Procedure, 1938-1988,* 137 U. PA. L. REV. 1877 (1989).

[8] STEFAN HIRSCH, JUSTICE AS PROTECTOR AND AVENGER (1938) at U.S. Courthouse and Post Office, Aiken, S.C. The Aiken building was subsequently named the Charles E. Simons Jr. Federal Courthouse in honor of that court's Chief Judge who served from 1980 to 1986. *See also* MARLENE PARK & GERALD E. MARKOWITZ, DEMOCRATIC VISTAS: POST OFFICES AND PUBLIC ART IN THE NEW DEAL 61, 90 n.30 (1984); KAREL ANN MARLING, WALL-TO-WALL AMERICA: A CULTURAL HISTORY OF POST OFFICE MURALS IN THE GREAT DEPRESSION 64-65 (1982). For more discussion and sources for the quoted references, *see* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 110-13 (2011), and *Mural: "Justice as Protector & Avenger," by Stefan Hirsch*, LIBR. OF CONG. (Nov. 16, 2016), https://www.loc.gov/item/2017656599.

[9] This image was first provided to me by the Fine Arts Collection, United States General Services Administration.

[10] One of the most powerful accounts of the nineteenth-century role played by the federal courts comes from ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS (1975).

[11] JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2020) [hereinafter 2020 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY].

[12] Federal district court filings for 1901, 1950, and 2001 from the Federal Judicial Center (FJC), *Caseloads: History of Federal Caseload Reporting*, https://www.fjc.gov/history/courts/caseloads-history-federal-caseload-reporting. Filings for 2020 from the ADMINISTRATIVE OFFICE OF THE U.S. COURTS (AO), JUDICIAL BUSINESS OF THE U.S. COURTS tbls. D-Cases, C-1 (2020) [hereinafter JUDICIAL BUSINESS].

[13] Federal district court filings for 1950–2017 from the FJC, *supra* note 12. Filings for 2018–2020 from JUDICIAL BUSINESS tbls. D-Cases, C-1. Excluded from 2020 are approximately 203,000 individual filings in the 3M combat earplug MDL.

[14] AO, *Authorized Judgeships*, https://www.uscourts.gov/sites/default/files/allauth.pdf. Totals include all Article III judgeships including Customs and Patent Appeals, Court of Claims, Court of International Trade, and Court of Federal Claims. District court counts for 2001 and 2020 include 10 authorized temporary judgeships.

[15] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

[16] Data on bankruptcy judges from JUDICIAL BUSINESS tbl.12. Data on magistrate judges from JUDICIAL BUSINESS tbl.13. Data on Article III and other Article I judges from AO, *Authorized Judges*, *supra* note 1314.

[17] Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579 (2005) [hereinafter Resnik, *Judicial Selection*].

[18] *Id.* at 618.

[19] *Id.* at 618 tbl.4.

[20] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. (2010).

[21] I provide some of the history of these innovations in Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000).

[22] *See* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). The metes and bounds of bankruptcy judges' jurisdiction continue to prompt litigation with some differences on the Court about the propriety of congressional delegation to the bankruptcy courts. *See, e.g.*, Stern v. Marshall, 564 U.S. 462 (2011); Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015).

[23] The plan included 93 recommendations (which were approved by the Judicial Conference) and 76 implementation strategies that were discussed in its report but not necessarily endorsed by the Conference. *See* Judicial Conference of the United States, Long Range Plan for the Federal Courts (1995), https://www.uscourts.gov/sites/default/files/federalcourtslongrangeplan_0.pdf.

[24] *See* Johanna Kalb & Alicia Bannon, Supreme Court Ethics Reform: The Need for an Ethics Code and Additional Transparency (Brennan Center for Justice, 2019).

[25] Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78 (2011); JUDITH RESNIK, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, in THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 259-86 (Katharine G. Young, ed., Cambridge University Press, 2019).

[26] S. Gibson, B. Harris, N. Waters, K. Genthon, A. Fisher Boyd & D. Robinson, CSP STAT Overview, NAT'L CENTER FOR STATE COURTS, https://www.courtstatistics.org/csp-stat-nav-cards-first-row/csp-stat-overview (2021). Those researchers identified more than seventy million cases in thirty-eight state courts whose data was accessible.

[27] Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478 (2019).

[28] JUDICIAL BUSINESS, tbl. C-13.

[29] JUDICIAL BUSINESS, tbl. B-19.

[30] *See* Clarence Gideon Full Access to Justice Act (*Gideon Act*), available at https://www.congress.gov/115/bills/s330/BILLS-115s330is.pdf.

[31] *See, e.g.*, ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

[32] William Howard Taft, *Possible and Needed Reforms in Administration of Justice in Federal Courts*, 8 A.B.A. J. 601, 602 (1922).

[33] 2020 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY.

[34] 2020 STRATEGIC PLAN FOR THE FEDERAL JUDICIARY, at 22.

[35] Within the last few months, a proposal was sent to the Judicial Conference for rulemaking focused on responding to litigants seeking to proceed in forma pauperis. *See* Letter of Zachary D. Clopton and Andrew Hammond (Jan. 19, 2021), in Advisory Committee on Civil Rules 357-59 (Apr. 23, 2021), https://www.uscourts.gov/rules-policies/archives/agenda-books/advisory-committee-civil-rules-april-2021.

[36] *See* https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule *See Bankruptcy Court Miscellaneous Fee Schedule*, U.S. COURTS, https://www.uscourts.gov/services-forms/fees/bankruptcy-court-miscellaneous-fee-schedule; *December 1 Changes to Bankruptcy Rules, Forms, and Fees,* NCLC (Nov. 29, 2020), https://library.nclc.org/december-1-changes-bankruptcy-rules-forms-and-fees. Some years ago, I sought to estimate the income to the federal courts coming from bankruptcy fees. *See* Judith Resnik, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1832 (2014). As of 2012, I estimated that Chapter 7 bankruptcy petitioners provided some $250 million in revenue, while civil filing fees accounted for about $100 million. Again, the data were drawn from the Administrative Office.

[37] United States v. Kras, 409 U.S. 434 (1973).

[38] *U.S. Court of Federal Claims Fee Schedule*, U.S. COURTS, https://www.uscourts.gov/services-forms/fees/us-court-federal-claims-fee-schedule.

[39] Scott S. Harris, *Memorandum to Those Intending to Prepare A Petition For a Writ of Certiorari in Booklet Format and Pay the $300 Docket Fee*, SCOTUS OFFICE OF THE CLERK (July 2019), https://www.supremecourt.gov/casehand/guidetofilingpaidcases2019.pdf.

[40] *See* N.D. Ill. LR 83.35.

[41] 28 U.S.C. § 331 (2018).

[42] *See* 34 U.S.C. § 1281, titled Equal Justice for Women in Courts, which provides that:

> "In order to gain a better understanding of the nature and the extent of gender bias in the Federal courts, the circuit judicial councils are encouraged to conduct studies of the instances, if any, of gender bias in their respective circuits and to implement recommended reforms." Per 34 U.S.C. § 1281(b), the statute provides that the study may include: the interpretation of criminal law, the treatment of victims and defendants, sentencing, appointments to committees of the Judicial Conference, the treatment of employees, and the admissibility of victims' past sexual history."

[43] *See* Merritt E. McAlister, "*Downright Indifference": Examining Unpublished Decisions in the Federal Courts of Appeals*, 118 MICH. L. REV. 533 (2020); Penny Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435 (2004); Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471 (1994).

[44] McAlister, *supra* note 43, at 549.

[45] Anastasoff v. United States, 223 F.3d 898 (8th Cir. 2000), *opinion vacated on reh'g en banc*, 235 F.3d 1054 (8th Cir. 2000).

[46] "The question presented here is not whether opinions ought to be published, but whether they ought to have precedential effect, whether published or not. We point out, in addition, that 'unpublished' in this context has never

meant 'secret.' So far as we are aware, every opinion and every order of any court in this country, at least of any appellate court, is available to the public. You may have to walk into a clerk's office and pay a per-page fee, but you can get the opinion if you want it. Indeed, most appellate courts now make their opinions, whether labeled 'published' or not, available to anyone on line." *Anastasoff*, 223 F.3d at 904.

[47] *Anastasoff*, 223 F.3d at 904-05.

[48] *See* Tony Mauro, *Court Endorses Use of Unpublished Opinions*, NAT. L.J., April 12, 2006.

[49] FED. R. APP. P. 32.1.

[50] The First Circuit, for example, states, "In general, the court thinks it desirable that opinions be published." *See* 1st Cir. R. 36.0(b)(1).

[51] For example, the Eleventh Circuit's rule reads: "The unlimited proliferation of published opinions is undesirable because it tends to impair the development of the cohesive body of law," and further characterizes this proliferation as a "serious problem." 11th Cir. IOP 36.5. Thus, opinions are "unpublished unless a majority of the panel decides to publish" them. 11th Cir. R. 36-2. As Professor McAlister has also noted, some circuits specifically provide mechanisms in local rules for turning unpublished decisions into published ones. *See, e.g.*, 1st Cir. L. R. 36-0(b)(2)(D) (any interested person can apply to court for publication of an unpublished opinion, which is a term of art in this circuit that would not include memorandum/order dispositions); 9th Cir. L. R. 36-4 (request for publication by anyone to a clerk within 60 days of issuance); 11th Cir. L. R. 36-3 (party may file a motion to request publication and court may do so sua sponte).

[52] McAlister, *supra* note 43, at 595 App'x A.

[53] *See, e.g.*, 1st Cir. R. 36.0(b)(1) (Publication of Opinions); 4th Cir. R. 36(a) (Publication of Decisions); 5th Cir. R. 47.5; D.C. R. 47.5 (Publication of Opinions); 6th Cir. R. 32.1(b) (Publication of Decisions); 9th Cir. R. 36-2 (Criteria for Publication).

[54] Mitu Gulati & C.M.A. McCauliff, *On Not Making Law*, 61 LAW AND CONTEMPORARY PROBLEMS, 157-228 (Summer 1998).

[55] Brian Soucek, *Copy-Paste Precedent*, 13 J. APP. PRAC. & PROCESS 153 (2012).

[56] *See* Bert I. Huang & Thjas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719 (2015). Another issue is the quality and nature of appellate review. *See* Bert I. Huang, *Lightened Scrutiny*, 124 HARV. L. REV. 1109 (2011).

[57] McAlister, *supra* note 43, at 550.

[58] 139 S. Ct. 2319 (2019).

[59] 139 S. Ct. 544 (2019).

[60] 139 S. Ct. 2116 (2019). The Court held that a provision of the Sex Offender Registration and Notification Act (SORNA) did not violate the non-delegation doctrine. Below, after an appeal, a Second Circuit opinion remanding the case, and a subsequent appeal, that court issued an unpublished opinion, which the Supreme Court heard. *See* United States v. Gundy, 804 F.3d 140 (2d Cir. 2015); United States v. Gundy, 695 F. App'x 639 (2d Cir. 2017). And in some of the cases in which a decision was not published and certiorari was granted, the petition was dismissed. For example, in Walker v. United States, 140 S. Ct. 519 (2019), the petitioner died, and the Court dismissed the petition. *See* 140 S. Ct. 953 (2020).

[61] Those cases were Virginia House of Delegates v. Bethune-Hill, 139 S. Ct. 1945 (2019); Rucho v. Common Cause, 139 S. Ct. 2484 (2019); Benisek v. Lamone, 138 S. Ct. 1942 (2018); Trump v. New York, 141 S. Ct. 530 (2020).

[62] *See* Edward Harnett, *Questioning Certiorari: Some Questions Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (November 2000).

[63] *See, e.g.*, Spokeo, Inc. v. Robins, 136 S. Ct. 1540 (2016); Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).

[64] This concept is discussed in *Spokeo*, 136 S. Ct. at 1549-50.

[65] *See* Paul D. Carrington & Robert C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009).

[66] *See* Vladeck, *supra* note 4; Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 HARV. L. R. 123 (2019).

[67] One example comes from South Carolina v. North Carolina, 558 U.S. 256 (2010), which addresses intervention in the case filed under the Court's original jurisdiction.

[68] *See, e.g.*, Kansas v. Colorado, 556 U.S. 98, 109 (2009) (Roberts, C.J., concurring).

[69] The literature is vast and familiar to those on this commission. *See, e.g.*, Daniel J. Meltzer, *The Story of Ex parte McCardle: The Power of Congress to Limit the Supreme Court's Appellate Jurisdiction*, in FEDERAL COURTS STORIES 57-86 (Vicki C. Jackson & Judith Resnik eds., 2010); Amanda L. Tyler, *The Story of Klein: The Scope of Congress's Authority to Shape the Jurisdiction of the Federal Courts*, in FEDERAL COURTS STORIES, at 87-114.

[70] I have borrowed materials assembled in Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, Appd'x B (2006).

[71] *See, e.g.*, Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341 (2004).

[72] *See* Judith Resnik, *The Programmatic Judiciary: Lobbying, Judging, and Invalidating the Violence Against Women Act*, 74 S. CAL. L. REV. 269 (2001).

[73] Again, I have borrowed materials assembled in Resnik & Dilg, *supra* note 70.

[74] I discuss his innovations and impact in Resnik, *Transforming the Meaning of Article III*, *supra* note 21.

[75] Professors Balkin and Levinson have analyzed how Article III as currently interpreted facilitates partisan entrenchment. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

[76] Resnik, *Judicial Selection*, *supra* note 17.

[77] Frederic Sondern, Jr., *Uncle Sam Modernizes His Justice*, READER'S DIGEST, Aug. 1948.

[78] Resnik & Curtis, *A New and Iconic Supreme Court*, *supra* note 6.

[79] The archival image was provided to me by the National Archives and Records Administration, and with the assistance of a research historian at the Federal Judicial Center.

[80] Resnik & Dilg, *supra* note 70, Appendix B.

[81] *Id.* at Appendix C.