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ARTICLES

THE UNITARY EXECUTIVE AND THE PLURAL JUDICIARY: ON THE POTENTIAL VIRTUES OF DECENTRALIZED JUDICIAL POWER

*Ronald J. Krotoszynski, Jr.**

ABSTRACT

The federal judiciary features a highly decentralized system of courts. The Supreme Court of the United States reviews only a few dozen cases each year. Meanwhile, regional U.S. courts of appeals operate independently of each other; district courts further divide and separate the exercise of federal judicial power. The role of the state courts in enforcing federal law further subdivides responsibility for the adjudication of federal law claims. Indeed, the Office of Chief Justice itself incorporates and reflects this vesting of the judicial power of the United States exclusively in collegial institutions—literally in a multiplicity of hands—effectively precluding its unilateral or precipitate exercise by a single person. The standard narrative posits that the radically decentral-

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* John S. Stone Chair, Director of Faculty Research, and Professor of Law, University of Alabama School of Law. This Article reflects the benefit of the thoughtful and constructive suggestions of the law faculties at the Cornell Law School, Indiana University-Bloomington Maurer School of Law, Loyola University-Los Angeles School of Law, Pepperdine University School of Law, University of Missouri-Columbia School of Law, and Tulane University School of Law, which all hosted faculty workshops associated with this project. Judge David F. Hamilton, of the U.S. Court of Appeals for the Seventh Circuit, and Dean Deanell Reece Tacha, formerly of the U.S. Court of Appeals for the Tenth Circuit, provided very helpful observations and insights into the workings and deliberative process of their respective courts. Professors Josh Chafetz, Trey Childress, Dan Cole, Michael Dorf, Martha Dragich, Heather Elliott, Joel Goldstein, Lily Kahng, David Law, Wayne Logan, Barry McDonald, Rob Mikos, Andy Morriss, James Puckett, Jeff Rachlinski, and Keith Werhan all generously read and commented on earlier drafts of this Article; I am grateful for their assistance. Jon Tebbs, Alabama '14, provided excellent research assistance. Finally, the participants at the Constitutional Law Discussion Group, hosted at the University of Louisville Brandeis School of Law, individually and collectively provided excellent comments and suggestions. As always, the usual disclaimer applies: any and all errors or omissions are my responsibility alone.

ized nature of federal judicial power is a vice, rather than a virtue, because it renders federal law, including constitutional law, non-uniform based solely on the accident of geography.

This Article challenges the received wisdom, contending that the radical division of judicial authority makes perfect sense. Consensus among the disparate federal courts serves as a highly valuable means of legitimating the exercise of judicial review (notwithstanding the lack of a democratic mandate). The creation and maintenance of a highly decentralized system of federal and state courts exists by design, not accident. Greater centralization of judicial power easily could be achieved, yet we should think twice before abandoning our present system precisely because decentralized judicial deliberation improves and enhances the process of resolving difficult questions of fundamental importance. We should not reflexively accede to the suzerainty of uniformity as the paramount value in judicial decision making; instead, we must carefully consider the potential benefits associated with decentralizing judicial power by denying any one person—or juridical body—the exclusive power to exercise “[t]he judicial Power of the United States.”

INTRODUCTION

In many contexts and all too often, the familiar escapes careful or thoughtful consideration. Precisely because it is familiar, we unconsciously assume it to be fixed and unchangeable; indeed, we come simply to accept it as a background condition. This general principle holds true with respect to both law and legal institutions. For example, few reasonable people would agree to create a legislative body in which California, with over 30 million citizens, enjoys the same representation and voting power as Wyoming or North Dakota, which each have less than a million residents.¹ As Professor Sanford Levinson observes, “[t]he equal-vote rule in the Senate makes an absolute shambles of the idea that in the United States the majority of the people rule[s].”² Yet, path dependence seems to insulate this institution from sustained public criticism as radically undemocratic; most people in the contemporary United States simply accept the equal representation of the states in the Senate. Thus, an historical anomaly associated with the Connecticut Compromise goes largely unchallenged.³

1 Cf. SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49–62 (2006).

2 *Id.* at 58.

3 U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.”); see LEVINSON, *supra* note 1, at 62. Professor Levinson strongly questions this state of affairs, arguing that “[t]he Senate represents a travesty of the democratic ideal, with consequences that are harmful to most members of the American political community.” *Id.* at 60. In fact, the Constitution purports to make the equal voting rights of each state in the Senate an unamendable structural feature of the federal government. See U.S. CONST. art. V (permitting amendments to the Constitution with supermajority votes in Congress and the states, but purporting to render invalid an amendment to dilute equal voting rights in the Senate by providing that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”). Levinson observes that this restriction “presumably requires unanimous consent for any constitutional amendment that would change the allocation of voting power [in the Senate].” LEVINSON, *supra*

In a similar vein, relatively little sustained attention has been devoted to the institutional structure of the federal courts.⁴ The institution includes the Supreme Court of the United States, U.S. courts of appeals, and U.S. district courts. Moreover, the state judiciaries also should be included on any flow chart of the exercise of judicial power over federal questions given that these courts also routinely hear and decide important questions of federal law. Despite the central importance of institutional structure to the exercise of “[t]he judicial Power of the United States,” we tend not to think very much—or very carefully—about either the structure of the federal courts or the Office of Chief Justice.

We ought to pay closer attention to this very familiar office and also to the broader question of the institutional structure of the federal judiciary itself. The two questions, although severable, are entwined. The design of the Office of Chief Justice arguably has a metonymous relationship to the structure of federal judiciary more generally.

Consider the Office of Chief Justice of the United States, and the utter lack of specific, constitutionally conveyed, institutional powers associated with it. Indeed, the Constitution does not even bother to formally create the office; no specific reference to the Office of Chief Justice exists in Article III.⁵ To be sure, the Constitution does contain a single reference to the Chief

note 1, at 62. He rightly posits that “it is almost impossible to imagine that Wyoming or Alaska would assent to the elimination of its advantage under the current rules.” *Id.*

4 See, e.g., Wilfred Feinberg, *Unique Customs and Practices of the Second Circuit*, 14 *HOFSTRA L. REV.* 297, 297–98 (1986) (lamenting the relative lack of attention paid to the structural and procedural aspects of the federal courts and characterizing judicial administration as “the stepchild of the law”). To be sure, thoughtful legal scholars have addressed the decentralized nature of the federal courts system, generally in order to lament the geographically non-uniform legal rules that it routinely produces and the failure of the Supreme Court reliably to address the problem of non-uniform federal law. See, e.g., Wayne A. Logan, *Constitutional Cacophony: Federal Circuit Splits and the Fourth Amendment*, 65 *VAND. L. REV.* 1137 (2012). Logan objects that “the rights of individuals, and the authority of law enforcement to conduct searches and seizures, vary in nature and scope throughout the land, often for extended periods of time.” *Id.* at 1140. He posits that non-uniform federal law “undermine[s] the nation’s sense of shared constitutional culture, highlighting the inability of the courts of a single sovereign—the U.S. Government, perceived by most Americans as the prime expositor of national constitutional law—to render consistent constitutional outcomes.” *Id.* at 1141–42 (footnote omitted); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 *STAN. L. REV.* 817, 852 (1994) (observing that uniformity in federal law ensures equal treatment of all litigants and constitutes “a hallmark of fairness in a regime committed to the rule of law”).

5 See U.S. CONST. art. III, §§ 1–3. Article III refers to a collective group: “The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” *Id.* art. III, § 1. The second sentence of Article III, Section 1 also speaks of a collegial institution, providing that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.” *Id.* Article III is entirely *silent* on the Office of Chief Justice; it neither mentions the office nor assigns any specific juridical or administrative powers to this office.

Justice—in Article I, Section 3, Clause 6.⁶ Otherwise, however, the office and its institutional powers are left entirely to the discretion of Congress and the Supreme Court itself to determine. Thus, upon closer examination of the institutional role of the Chief Justice, one is immediately struck by the relative *insignificance* of the office—both with respect to the Constitution’s text, but also with respect to the office’s powers within the Supreme Court and the federal judiciary more generally.

It is tempting to line up the Chief Justice with the President, the Speaker of the House, and the Majority Leader of the Senate. After all, the Chief Justice of the United States is the titular head of the judicial branch of government created by Article III of the Constitution.⁷ Yet, this assumption of material equivalence, upon sustained reflection, proves to be false. Unlike the heads of the executive and legislative branches of the federal government, the Chief Justice possesses absolutely no unilateral authority to oversee and direct the operations of either the Supreme Court or the inferior federal courts (much less the *state* judiciaries, which also play an important and ongoing role in the enforcement of the Constitution, treaties, and laws of the United States).⁸ In fact, whatever powers the Chief Justice enjoys rest almost entirely on internal rules and practices of the Supreme Court itself (which five members of the nine member body could presumably abolish or amend at will) and on specific statutes that vest authority with the Chief Justice, such as the Rules Enabling Act,⁹ which permits the Chief Justice, in conjunction

6 *Id.* art. I, § 3, cl. 6 (“When the President of the United States is tried [under articles of impeachment], the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.”).

7 *Id.* art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

8 *See id.* art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” (emphasis added)).

9 The Rules Enabling Act, ch. 651, Pub. L. 73-415, 48 Stat. 1064 (June 19, 1934) (codified at 28 U.S.C. §§ 2071–2077 (2006)). Other administrative duties and powers exist, but all of them are conveyed by statute on the Chief Justice. For example, the Chief Justice serves as head of the Judicial Conference of the United States, *see* 28 U.S.C. § 331 (2006), which also includes the Chief Judge of each of the U.S. courts of appeals, a district judge from each court of appeals, and the Chief Judge of the Court of International Trade. For reasons that are not entirely clear, the Chief Justice also serves as Chancellor of the Smithsonian Institution and holds an ex officio seat on the Board of Governors of the Smithsonian Institution. *See The Board of Regents*, SMITHSONIAN, <http://www.si.edu/Regents/members.htm> (last visited on Nov. 24, 2013). Evidently, the Smithsonian Institution’s Charter specifies that the Chief Justice of the United States will serve as Chancellor and hold a seat on the Board of Regents. *See id.*; *see also* 20 U.S.C. § 42(a) (2006) (listing the Chief Justice as “Chancellor” of the Smithsonian Institution and head of the Board of Regents). The Chief Justice also serves on the boards of various national cultural institutions, such as the National Gallery of Art and the Hirshhorn Museum. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice*

with his duties as head of the Judicial Conference of the United States, to appoint members to the various advisory committees charged with reviewing and updating the federal rules of evidence, criminal procedure, civil procedure, and bankruptcy.¹⁰

This lack of centralized power is replicated in the broader organizational structure of the federal court system. Indeed, if one were to step back and consider the federal judiciary in more general terms, the most obvious structural characteristic is the almost complete decentralization of power. In fact, any federal judge, even the Chief Justice, has to obtain the agreement and consent of other federal judges to do virtually *anything* of consequence. The structure of the lower federal courts also enhances, rather than reduces, the requirement of collective, rather than individual, action.

After reflecting upon the Office of Chief Justice and the structure of the federal courts more generally, it is striking that the Framers—and Congress—have created in the federal courts something of a photographic negative image of the executive branch.¹¹ The Constitution expressly vests the President with broad authority to personally direct and oversee the operations of the executive branch of the federal government,¹² whereas the Con-

of the United States, 154 U. PA. L. REV. 1575, 1620–21 (2006) (listing various cultural posts held by the Chief Justice of the United States).

10 See 28 U.S.C. § 2073 (2006); see also Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 533–34, 618–19 (2001). Resnik and Dilg argue cogently that the Chief Justice’s control over the various rules revision committees, powers to make appointments within the federal judiciary to special and statutory courts, and ability to communicate the views of the judiciary directly and personally to Congress actually vest the office with too much concentrated and unaccountable institutional power. See Resnik & Dilg, *supra* note 9, at 1578–80, 1588–1621. Even so, Resnik and Dilg agree that most of these powers derive from statutes and institutional customs, and not from the Constitution itself, and therefore could be placed in different hands. See *id.* at 1636–49.

11 Of course, the decentralized structure of the federal courts has not gone unnoticed. See, e.g., THOMAS E. BAKER, *RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS* (1994); Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004). Professor Martha Dragich’s concerns about the downsides of non-uniform federal decisional law are illustrative. See Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535 (2010). As she puts it, “[t]he geographic organization of the federal courts . . . favors regional over national concerns, rendering these courts ill-suited to promote uniform interpretation of federal law.” *Id.* at 537. Moreover, the dispersed nature of judicial authority in the circuits results in “a systemic lack of capacity for uniform development of federal law.” *Id.* at 539.

12 The Constitution provides that all of the executive powers “shall be vested in a President of the United States of America” and that the President “shall take Care that the Laws be faithfully executed.” U.S. CONST. art. II, §§ 1, 3; see *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3155–56 (2010) (“The Constitution requires that a President chosen by the entire Nation oversee the execution of the laws.”); *id.* at 3164 (“The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so.”). The proposition that presidential control and oversight of executive branch func-

stitution is entirely mute with respect to the institutional power and authority of the Office of Chief Justice, vesting all judicial powers in a group of decentralized, collegial institutions. To state the matter simply: we have a unitary executive and a plural judiciary.¹³

What's more, the radical decentralization of the federal court system is further enhanced by the non-uniform rules of operating procedure in force within federal circuit and district courts.¹⁴ For example, in some U.S. courts of appeals, draft panel decisions circulate to the entire court's membership, whereas in others, panels issue opinions autonomously and without prior circulation to other chambers (save in special circumstances, such as when a panel proposes limiting or overruling a prior precedent of the circuit).¹⁵ In other words, the operating rules and procedures governing the exercise of the judicial power of the United States vary from circuit to circuit.¹⁶ Thus, not only is decisional authority separated and widely dispersed, but the procedures associated with the exercise of this authority are non-uniform, making the *decisional process* itself different among the federal courts.

tions enjoys support from both formalists (who often embrace the unitary executive theory) and functionalists (who are generally more open to novel reallocations of power between and among the three branches of the federal government). Compare Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 544–50 (1994) (arguing, from a formalist perspective, that the President must enjoy complete personal control over the execution of federal laws and, by implication, substantial discretion to select and remove executive officers), and Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165–67, 1207–08 (1992) (same), with Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 596–97, 599, 648–50, 662–64, 668–69 (1984) [hereinafter Strauss, *The Place of Agencies*] (arguing, from a functional perspective, that meaningful and direct forms of presidential oversight are essential to preserving the ability of the executive branch to resist undue encroachments by Congress). As Professor Peter Strauss has stated the proposition, “All will agree that the Constitution creates a unitary chief executive officer, the President, at the head of the government Congress defines to do the work its statutes detail.” Peter L. Strauss, *Overseer, or “The Decider”?: The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 696 (2007).

13 See Calabresi & Rhodes, *supra* note 12, at 1165–67, 1207–08.

14 Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 DUKE L.J. 315, 325–65 (2011) (discussing the divergent case management practices of five of the U.S. courts of appeals). Professor Levy observes that that “the federal courts of appeals have widely varied practices, from intake and screening to disposition.” *Id.* at 365.

15 See *infra* notes 97–100 and accompanying text; see also Steven Bennett & Christine Pembroke, “Mini” *In Banc Proceedings: A Survey of Circuit Practices*, 34 CLEV. ST. L. REV. 531, 544–57 (1986) (surveying internal operating policies and procedures regarding pre-publication circulation of draft panel opinions to the full court within all thirteen U.S. courts of appeals); Levy, *supra* note 14, at 325–65 (providing a comprehensive survey of how five circuits manage cases from the filing of a notice of appeal to publication of a final panel or en banc opinion).

16 See Levy, *supra* note 14, at 365 (“When one more closely examines how each circuit functions, however, it becomes clear that each court has adopted its own approach to managing appeals.”).

In sum, independent courts exercise judicial authority using different rules of the road; the multiplicity of decision makers is further augmented by a multiplicity of operating procedures. The balance of this Article will develop these themes, first by considering the text of the Constitution itself, as it bears upon the structure and operation of the federal courts, and then by considering how other, non-constitutional rules and practices have the effect of dividing and limiting an individual judge's power within the Article III courts.

My thesis is that the decentralization of the judicial power of the United States, coupled with the different local operating rules in force within the U.S. courts of appeals, district courts, and state court systems, constitute a virtue rather than a vice. By making the decisional process on important, but difficult, questions of constitutional law a collective endeavor, placed in entirely separate hands, operating largely independently of each other, the risk of insufficiently considered—reasoned—decision making is substantially reduced (as are some of the risks of collective, collegial decision making, such as so-called “group think”).¹⁷ When disparate and independent courts ask and answer the same question and render the same answer, the legitimacy of that answer is greatly enhanced. Moreover, the popular legitimacy of a judicial act displacing the act of a democratically elected and accountable legislative body or executive officer is surely improved and enhanced when different decision makers, operating independently of each other, reach a common conclusion (whether or not on the same premises or reasoning).¹⁸ Research also shows that diverse groups, generally speaking, are less likely to

17 See generally IRVING L. JANIS, *GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES* (2d ed. 1982) [hereinafter JANIS, *GROUPTHINK*] (evaluating the detrimental effect on work product that results from working in groups, as opposed to working without the influence of others); IRVING L. JANIS, *VICTIMS OF GROUPTHINK: A PSYCHOLOGICAL STUDY OF FOREIGN-POLICY DECISIONS AND FIASCOES* (1978) (same); MARVIN E. SHAW, *GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR* (3d ed. 1981) (describing the psychological effects of working in groups); Stephen M. Bainbridge, *Why a Board? Group Decisionmaking in Corporate Governance*, 55 *VAND. L. REV.* 1 (2002) (looking at corporate boards of directors as a “team production problem” and evaluating the attendant problems). Careful attention to the structure of judicial decision making could improve the substance of judicial decisions. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 *CORNELL L. REV.* 1, 3–6, 27–42 (2007) [hereinafter Guthrie et al., *Blinking*]; Chris Guthrie et al., *Inside the Judicial Mind*, 86 *CORNELL L. REV.* 777, 777 (2001); Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 *NW. U. L. REV.* 1165, 1213–14 (2003). In order to overcome the problem of biased or intuitive judicial decision making, dividing and separating judicial power makes great sense. See Guthrie et al., *Blinking, supra*, at 42–43 (advocating “divided decision-making” as a means of combating bias in judicial decisions). Although much of the scholarly work on judicial bias focuses on the work of trial courts, the same problems of bias, prejudice, and intuition exist at both the trial and appellate levels of adjudication and, accordingly, similar solutions should potentially work. Certainly, the same psychological factors are at work whether a case is being tried in the first instance or appealed.

18 As Professor Jeffrey Rachlinski has noted, “It might well be the case that group decisionmaking forces individuals to discuss their reasoning in a way that facilitates debiasing.”

polarize toward more extreme positions than individuals.¹⁹ Of course, the reverse should also hold true: just as judicial consensus enhances the legitimacy of a particular result, judicial dissensus logically implies that the politically accountable branches of government should enjoy a broader residual authority to act free and clear of judicial superintendence.

The argument proceeds in four principal parts. Part I begins by considering the implications of the Constitution's text for both the Office of Chief Justice and the federal courts, with particular attention to the differences in the respective Vesting Clauses of Articles I, II, and III, which provide important evidence supporting the thesis that the Framers intended for federal judicial power to be widely dispersed and incapable of unilateral exercise by any single federal or state court judge (up to and including the Chief Justice of the United States).²⁰ Part I then analyzes how the decentralized vesting of judicial power of the United States profoundly affects its exercise and contrasts the diffuse nature of federal judicial power with the far more concentrated executive and legislative powers.²¹ Part I concludes by considering the relevance of Federalist political theory, which appears to have animated Congress's initial decision, in the Judiciary Act of 1789, to create local federal courts exercising independent authority.²²

Part II examines the potential benefits and risks associated with a multiplicity of deciders and collegial decision making, in lieu of a single decider.²³ Part III takes up various mechanisms that the Supreme Court, Congress, or both could theoretically adopt to centralize the exercise of the judicial power of the United States. Part III concludes that myriad constitutionally permissible means exist to streamline and consolidate the exercise of judicial authority within the federal courts and, accordingly, posits that the failure of the Supreme Court or Congress to embrace these means provides further important evidence that the contemporary structure of the federal and state courts reflects an intentional embrace of multiplicity and diversity, rather than a mere historical accident.²⁴

Part IV considers the potential relevance of the law and psychology literature on the dynamics of group decision making.²⁵ Although the evidence is somewhat mixed, this literature generally provides support for the proposition that decentralized, separate, and independent decision makers, operating independently of each other, will usually do a better job of considering diverse, alternative viewpoints than would a single deliberative body operat-

Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 587 n.76 (1998).

19 See generally *id.* at 587–88 n.76 (noting that “[g]roups seem to show slightly less bias than individuals”).

20 See *infra* notes 27–45 and accompanying text.

21 See *infra* notes 46–63 and accompanying text.

22 See *infra* notes 64–87 and accompanying text.

23 See *infra* notes 88–136 and accompanying text.

24 See *infra* notes 137–73 and accompanying text.

25 See *infra* notes 174–277 and accompanying text.

ing in real time, with its members sitting around the same table. Finally, the Article concludes by arguing that contrary to the received wisdom and standard narrative, the decentralized nature of the federal judiciary arguably constitutes a strength, rather than a weakness, of the Article III courts.

In a political system in which contesting and winning elections is the key to legitimating decision making, federal judges and the federal judiciary as a whole require an alternative means of establishing the bona fides of their work. Creating a system that enhances and replicates the process of deliberation and reason-giving arguably constitutes an effective substitute for seeking and winning elections. Moreover, and perhaps of equal importance, the deliberative process consumes time, which also permits the once “unthinkable” (desegregation of public institutions, equal rights for women without regard to sex, same-sex marriage) to become the quotidian, thereby reducing the potential risk of the political branches rejecting the federal court’s answer to a particular constitutional question.²⁶ In sum, decentralized deci-

26 For example, had the Supreme Court considered the constitutional status of the indefinite detention of persons that the President designated as “enemy combatants” in the immediate aftermath of the attacks of September 11, 2001, one wonders whether the Justices would have so strongly rejected the President’s unilateral assertion of such a power. Cf. *Boumediene v. Bush*, 553 U.S. 723, 732–33 (2008) (holding that neither Congress nor the President may unilaterally suspend the writ of habeas corpus, at least with respect to persons held under the jurisdiction of the United States and outside the active field of combat). Earlier decisions, closer temporally to the events of September 11, 2001, were more tentative in both tone and result. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (holding that the President’s use of military commissions to adjudicate the status of detainees designated as enemy combatants, absent certain additional procedural protections, failed to comport with the minimum requirements of procedural due process). Federal judges are no less subject to the passions of the day, and to acting out of fear or panic, than anyone else. See Christina E. Wells, *Fear and Loathing in Constitutional Decision-Making*, 2005 WIS. L. REV. 115, 117. But cf. STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* 10–31 (1999) (arguing that government officials have a special duty to protect speech of a dissenting cast, particularly by minorities within the community, and arguing that “[i]f we must have a ‘central meaning’ of the First Amendment, we should recognize that the dissenters—those who attack existing customs, habits, traditions, and authorities—stand at the center of the First Amendment and not at its periphery”); STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 5–8, 96–100 (1990) (arguing that the state has a duty to support and protect unpopular forms of dissent and positing that “[t]he first amendment’s purpose and function in the American polity is not merely to protect negative liberty, but also affirmatively to sponsor the individualism, the rebelliousness, the antiauthoritarianism, the spirit of nonconformity within us all” (footnotes omitted)); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 449–50 (1985) (“[T]he overriding objective at all times should be to equip the first amendment to do maximum service in those historical periods when intolerance of unorthodox ideas is most prevalent and when governments are most able and most likely to stifle dissent systematically. The first amendment . . . should be targeted for the worst of times.”). The difficulty, of course, is that any theory that relies on the bravery of federal judges is likely to be difficult, if not impossible, to implement in the real world, where judicial courage often proves to be somewhat fleeting. But see JACK BASS, *TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR. AND THE SOUTH’S FIGHT OVER CIVIL RIGHTS* (1993) (providing an authoritative biography of Judge Frank M.

sional authority, within the Supreme Court and more generally, enhances the ability of the federal courts to make their decisions stick. We should therefore think very carefully before embracing speed, efficiency, and uniformity as the paramount virtues to be sought in a judicial system charged with safeguarding the nation's most fundamental human rights commitments.

I. THE FEDERAL JUDICIARY: DECENTRALIZED BY DESIGN

This Part considers in some detail the source of federal judicial power and the roots of its highly decentralized structure. The Constitution itself diffuses judicial power and subsequent congressional enactments have extended a model of independent, regional courts operating independently of each other. These materials demonstrate that the uniformity of federal law has never been a controlling consideration in the design or operation of the federal courts. Moreover, Federalist political theory embraced the use of the federal courts as the local face of the federal government within the states, quite literally linking the people of the states to the union through these local judicial institutions.

This Part begins by considering how the Constitution itself wildly disperses judicial power—by design rather than by accident—with particular attention to the striking contrast between the Article III judiciary and the Article II executive branch. It then proceeds by examining the practical consequences that flow from the Constitution's creation of a decentralized judicial branch. The Part concludes by analyzing the relevance of Federalist political theory to understanding and theorizing our decentralized federal judiciary.

A. *The Constitution, the Judiciary, and the Executive Branch*

Although one may quibble with the utility of textual analysis as a starting point in constitutional analysis,²⁷ when attempting to understand the Fram-

Johnson, Jr., who exhibited extraordinary courage in enforcing constitutional rights in Alabama during the Civil Rights era); JACK BASS, UNLIKELY HEROES (1981) [hereinafter BASS, UNLIKELY HEROES] (discussing the important contributions that Southern federal appellate and district judges made to the project of securing constitutional rights for all in the states of the former Confederacy).

27 See generally BRUCE A. ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (2000) (arguing that the text of the Constitution matters far less in establishing constitutional rules or norms than does the contemporary social consensus regarding constitutional principles and positing a series of "constitutional moments" at which the scope and meaning of important constitutional principles significantly changed without any formal amendment of the text); cf. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999) (identifying a method of Constitutional interpretation in which the reader relies on and references repeated words and phrases within the document to discern a specific passage's meaning); Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131 (1991) (arguing that the Bill of Rights and the Constitution are not diametrically opposed in their regulatory strategies and, accordingly, should be read and interpreted together to best achieve the

ers' structural intentions—-independent of how particular offices have changed and evolved over time through practice and tradition²⁸—the text is a logical place to start. And, in considering the Office of Chief Justice and the structure of the federal judiciary more generally, the text provides some important evidence about both the nature of the office and also of the federal judiciary itself.

Consider first the Vesting Clauses of Article II and Article III. With respect to the executive power, the Constitution provides that “[t]he executive Power shall be vested in a President of the United States of America.”²⁹ As Justice Scalia so famously thundered in *Morrison v. Olson*, “this does not mean *some of* the executive power, but *all of* the executive power.”³⁰ Although the Supreme Court has accepted limitations on the power of the President to remove executive branch personnel, the Justices have insisted that the President enjoy some ability to oversee and control the operations of the executive branch, even in the context of so-called independent agencies.³¹ For example, in *Free Enterprise Fund*,³² the Supreme Court found that a two-tiered system of “good cause” removal violated the separation of powers by unduly insulating the members of the Public Corporation Accounting Oversight Board from presidential control.³³ Given the clear and express language of Article II, Section 1, “most” simply is not good enough for government work.³⁴

Framers' intentions for securing just governance and ordered liberty). Professor Ackerman generally rejects the concept that the Constitution's text establishes firm or unchanging rules (independent of contemporary constitutional practices), whereas Professor Amar plainly views the text as establishing important limits on how to properly understand and enforce constitutional principles.

28 See, e.g., Bruce Ackerman & David Fontana, *Thomas Jefferson Counts Himself into the Presidency*, 90 VA. L. REV. 551 (2004) (noting that the Electoral College system for selecting the President did not survive much beyond the Washington Administration and that the party system affected the structure and functioning of the executive branch of the federal government); Joel K. Goldstein, *The Contemporary Presidency: Cheney, Vice-Presidential Power, and the War on Terror*, 40 PRES. STUD. Q. 102 (2010) (describing evolution over time in the power and importance of the Office of the Vice President).

29 U.S. CONST. art. II, § 1.

30 *Morrison v. Olson*, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

31 See *Humphrey's Ex'r v. United States*, 295 U.S. 602, 631–32 (1935).

32 *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3153–57, 3159, 3164 (2010); see also *Myers v. United States*, 272 U.S. 52, 163–64 (1926) (discussing the imperative of presidential control over persons exercising federal executive power); Ronald J. Krotoszynski, Jr., *Cooperative Federalism, the New Formalism, and the Separation of Powers Revisited: Free Enterprise Fund and the Problem of Presidential Oversight of State-Government Officers Enforcing Federal Law*, 61 DUKE L.J. 1599, 1640–59 (2012) (discussing the unitary executive and the separation of powers imperative of meaningful and direct presidential oversight of the enforcement of federal law).

33 See *Free Enterprise Fund*, 130 S. Ct. at 3151–55.

34 Consideration of limitations on the scope of direct presidential control over the executive branch, as explicated in cases such as *Humphrey's Executor*, 295 U.S. at 627–29, and *Myers*, 272 U.S. at 164–68, lies beyond the scope of this Article. Suffice it to say that, whatever limitations exist on the President's ability to oversee personally and directly the

As Alexander Hamilton explains in *Federalist No. 70*, the Framers' purpose in vesting the whole executive power in a single national executive officer was to create a "vigorous executive" imbued with sufficient "energy,"³⁵ which Hamilton defines as "unity; duration; an adequate provision for its support; and competent powers."³⁶ He explains:

Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.³⁷

Moreover, "[d]ecision, activity, secrecy, and dispatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished."³⁸ Professor Peter Strauss quite rightly argues that "[o]f the decisions clearly taken, perhaps none was as important as the judgment to vest the executive power in a single, elected official, the President."³⁹

Now, contrast this vesting of responsibility over the executive branch of the federal government in the office of the President with the corresponding provision of Article III: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress

operations of the various components of the administrative state, the baseline proposition remains that the President must enjoy some measure of meaningful control over the operation of Article II institutions, and this control must not be unduly attenuated. *See Free Enterprise Fund*, 130 S. Ct. at 3138; *see also* Ronald J. Krotoszynski, Jr., *Resignations, the (Quasi) Plural Executive, and a Critical Assessment of the Unitary Executive Theory*, in *SPEECH AND SILENCE IN AMERICAN LAW* 83, 89 (Austin Sarat ed., 2010) ("The framers of the Constitution of 1787 created a unique national office in the presidency. Unlike the legislative and judicial branches, which would be headed by collegial institutions, Article II squarely vests the executive power of the United States in the president . . ."); Strauss, *The Place of Agencies*, *supra* note 12, at 599, 607, 642, 648–52, 662–63 (discussing the functional importance and utility of presidential oversight of the execution of federal law, including the necessity of this power if the President is to serve as an effective institutional counterweight to Congress).

35 THE FEDERALIST NO. 70, at 391 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

36 *Id.* at 392.

37 *Id.* at 391.

38 *Id.* at 392. *But cf.* THE FEDERALIST NO. 77, at 427 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that the Senate's ability to check presidential appointments through the advice and consent power is a desirable feature, a "salutary" restraint of executive power, because it "connects the official existence of public men with the approbation or disapprobation of that body which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the government").

39 Strauss, *The Place of Agencies*, *supra* note 12, at 599.

may from time to time ordain and establish.”⁴⁰ The differences with Article II’s Vesting Clause could not be more striking; the Framers vested judicial power not in an individual (the Chief Justice), but rather in an institution (the federal judiciary, including but not limited to the Supreme Court). In fact, as noted earlier, the Office of Chief Justice does not even merit a direct textual reference in Article III—literally, there is no express constitutional requirement that the Office of Chief Justice even exist.

To be sure, the Constitution does contain an *indirect* reference to the Office of Chief Justice: “When the President of the United States is tried, the Chief Justice shall preside; And no Person shall be convicted without the Concurrence of two thirds of the Members present.”⁴¹ Thus, the Framers plainly presupposed that there would be an Office of Chief Justice, although Article III itself only adverts to a collective institution, namely, “one supreme Court.”⁴² In this respect, the Office of Chief Justice stands on the same constitutional ground as the cabinet departments, although the Constitution manages *two* references to these institutions, as opposed to the single reference to the Office of Chief Justice.⁴³

In contrast with the President, the unitary repository of “the executive Power” of the United States, the Chief Justice plainly enjoys only some part of the entire judicial power of the United States, which he or she must share

40 U.S. CONST. art. III, § 1; see also Calabresi & Rhodes, *supra* note 12, at 1165–67, 1207–08 (discussing the unitary executive theory and the vesting of executive power in the President and contrasting the more diffuse vesting of judicial power with the federal and state courts); Saikrishna Bangalore Prakash, *Hail to the Chief Administrator: The Framers and the President’s Administrative Powers*, 102 YALE L.J. 991, 991–92 (1993) (arguing that “the Framers attempted to establish an executive who alone is accountable for executing federal law and who has the authority to control its administration” and positing that “[w]henever an official is granted statutory discretion, the Constitution endows the President with the ability to control that discretion”). But cf. A. Michael Froomkin, *The Imperial Presidency’s New Vestments*, 88 NW. U. L. REV. 1346, 1372–74 (1994) (arguing that Congress may constitutionally insulate executive officers from direct forms of presidential control provided that the President retains some meaningful ability to hold such officials accountable, for example, through a power of removal from office for cause); Krotoszynski, *supra* note 34, at 83–93 (arguing that the Constitution does not clearly vest the President with the power to directly control all executive branch activity, but instead conveys the ability to superintend such activity in circumstances where Congress has vested particular duties or powers with subordinate executive officers).

41 See U.S. CONST. art. I, § 3, cl. 6.

42 See *id.* art. III, § 1.

43 See *id.* art. II, § 2, cl. 2 (“He shall have Power, by and with the Advice and Consent of the Senate . . . [to] nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the *Heads of Departments*.” (emphasis added)); see also *id.* art. II, § 2, cl. 1 (providing that the President “may require the Opinion, in writing, of the *principal Officer in each of the executive Departments*, upon any Subject relating to the Duties of their respective Offices” (emphasis added)).

with the other members of the Supreme Court, with the inferior federal courts (should Congress exercise its discretion to create them), *and* with the state courts (which, had Congress elected not to create lower federal courts, would adjudicate federal claims in the first instance and also likely decide initial appeals).

In other words, rather than creating a concentration of judicial authority in a single office, held by a single person, Article III disperses and divides judicial authority, both within the highest federal judicial tribunal, the Supreme Court, and also within the lower federal courts.⁴⁴ And, depending on how broadly one interprets the Exceptions and Regulations Clause, this power could be held in multiple courts with no single authority enjoying jurisdiction to resolve conflicts among them, including conflicts about the meaning of the Constitution itself.⁴⁵

44 See Calabresi & Rhodes, *supra* note 12, at 1186–1208.

45 U.S. CONST. art. III, § 2, cl. 2 (“In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”); see also THE FEDERALIST NO. 81, at 451–53, 456–57 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (discussing and explaining the structure of the federal courts and their relationship with the state court systems). A long-standing disagreement exists among federal courts scholars regarding whether Congress could eliminate the Supreme Court’s jurisdiction over substantive questions of federal law. Under the “essential attributes” theory, jurisdiction stripping that denies the Supreme Court the final say on the meaning of a substantive question of federal law would violate the separation of powers by denying the Supreme Court its proper role within the federal system. See Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210–16 (1985) (arguing that the federal judicial power over questions of federal law must be vested in a federal court, although not necessarily in the Supreme Court); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 749–50 (1984) (same); Lawrence Gene Sager, *The Supreme Court, 1980 Term—Foreword: Constitutional Limitations on Congress’ Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981) (evaluating the contours of the jurisdiction the Constitution bestows on the Supreme Court and lower federal courts); cf. MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 41–51 (1980) (arguing that the Vesting Clause of Article III, Section 1 is qualified by later textual provisions of Article III, such that Congress need not grant jurisdiction over all federal questions in the Supreme Court or a lower federal court); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1372–73 (1953) (arguing that Congress has broad discretion to grant or withhold jurisdiction over federal question claims); Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–06 (1965) (arguing that Congress has discretion over the conveyance of federal question jurisdiction). This would, of necessity, rest on an inferred structural claim rather than on the text of the Exceptions and Regulations Clause itself, which would plainly seem to permit Congress to give an inferior federal court, such as a regional U.S. court of appeals, the final appellate authority over a particular class of cases. *Federalist No. 82* directly speaks to this question, endorsing the idea of appeals from the state court system to inferior federal courts. See THE FEDERALIST NO. 82, at 463 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (noting that the Constitution vests Congress with broad discretion to create lower

B. Federal Judicial Power Is Widely Dispersed and Can Be Exercised Only Through Collective Action

The contemporary dispersion of power within the federal judiciary extends even beyond the Constitution's textual requirements. Congress has structured the lower federal courts in such a way that further separates and divides judicial power, for example, by dividing the federal appellate courts into separate judicial circuits, with dozens of distinct federal trial courts operating within these independent appellate courts.⁴⁶ Professor Wayne Logan notes that "from the outset, creation of an intermediate tier of federal appellate courts prompted worry, including from the bill's sponsor, New York Senator William Evarts, that 'diverse tribunals in geographical distribution' would sow confusion in 'all that we had secured heretofore by a uniformity of conclusions.'"⁴⁷

Of course, this latent concern did not lead Congress to adopt any measures designed to ensure the uniformity of federal law across the circuits. Moreover, the prior system vested substantial responsibility for the enforcement and development of federal law in the district courts and also was, until 1869 when Congress first created dedicated federal appellate judgeships,⁴⁸ entirely dependent on the ability of a handful of judges (incumbent Justices of the Supreme Court) to perform the task of appellate review for error cor-

federal courts and to define their jurisdiction and inferring from this that "I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined"). Certainly, the Federalist view of the role and importance of the Article III courts would tend to support the mandatory vesting thesis. See JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 826, at 588 (1833); see also Alison L. LaCroix, *Federalists, Federalism, and Federal Jurisdiction*, 30 LAW & HIST. REV. 205, 206–12 (2012) (noting that the structure and authority of the federal courts were meant as a structural bulwark to help support and sustain the union under the national government).

46 See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS, § 3, at 11 (7th ed. 2011) (discussing the structure and function of the lower federal courts, including the thirteen courts of appeals); see also Circuit Court of Appeals Act, ch. 517, 26 Stat. 826 (1891) (codified in scattered sections of 28 U.S.C.) (replacing the practice of having members of the Supreme Court, in combination with federal district judges, constitute the membership of courts of appeals and creating a new cadre of federal judges to permanently staff newly reorganized U.S. courts of appeals). Congress initially created only three courts of appeals, the Eastern, Southern, and Middle, which heard appeals from the thirteen U.S. district courts. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73. These federal appellate courts were staffed with two incumbent Justices of the Supreme Court and one local federal district judge. Congress doubled the number of circuits from three to six in 1802. See Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157–58. For a discussion of the creation and operation of the lower federal courts, see ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS (2d ed. 2002).

47 Logan, *supra* note 4, at 1143–44.

48 See Act of Apr. 10, 1869, ch. 22, § 2, 16 Stat. 44, 44–45. Professor Logan explains that "in 1869, a circuit judge was assigned to each circuit, with the two other judges on the three-member panels drawn from among the district court judges and Supreme Court Justices." Logan, *supra* note 4, at 1143.

rection at both the intermediate and final appellate levels. Limits on the ability of the federal courts to review state law decisions that upheld, rather than rejected, federal law claims—a rule that existed until 1914—also ensured that federal law would be non-uniform.⁴⁹ Finally, the proscription against federal courts offering advisory opinions,⁵⁰ given the ability of many state courts to do so, opining even on issues of federal constitutional law, also generates non-uniform interpretations of federal law that cannot be easily corrected by the Supreme Court.

The traditions and practices of the federal courts also tend to promote the diffusion, rather than the concentration, of judicial power and decisional authority within the federal bench.⁵¹ For example, the rule that a U.S. court of appeals is not bound by precedents of its sister circuits creates the certainty of non-uniform interpretations of federal law.⁵² One could imagine a contrary rule: i.e., the first U.S. court of appeals to rule on a legal question establishes a baseline rule that binds either all other circuits or at least all other district courts (pending a conflicting decision within the district court's own circuit).⁵³ So too, within a district court, the decision of a single federal district judge has no precedential effect within that court—or even within that judge's own courtroom. Accordingly, conflicting decisions can and will issue from the very same subunit of the federal trial courts.⁵⁴ The cumulative

49 *Illinois v. Gates*, 462 U.S. 213, 221 (1983) (“Since the Act of Dec. 23, 1914, ch. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state-court decisions even when a claimed federal right has been upheld.”); *see also* *Delaware v. Van Arsdall*, 475 U.S. 673, 695–98 (1986) (Marshall, J., dissenting) (noting the historical inability of the Supreme Court to review state court judgments vindicating claims arising under federal law and arguing that “although this Court now has the power to review decisions defending federal constitutional rights, the claim of these cases on our docket is secondary to the need to scrutinize judgments disparaging those rights”). *Compare* Act of Sept. 24, 1789, § 25, 1 Stat. 85–86, *with* Act of Dec. 23, 1914, 38 Stat. 790, *and* S. REP. NO. 63-161, at 2 (1914).

50 *See* *Flast v. Cohen*, 392 U.S. 83, 94–97 (1968); *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792); *see also* *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945) (holding that the Court is “not permitted to render an advisory opinion”).

51 *See* Mary Garvey Algero, *A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions*, 70 TENN. L. REV. 605, 608 (2003); Logan, *supra* note 4, at 1143–47, 1160–71. *But cf.* Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567, 1571–72, 1579–1606, 1639 (2008) (strongly questioning whether the problem of relatively small variances in federal law within the circuits merits any formal reform effort and suggesting that “the federal courts have overvalued uniformity in the interpretation of nonconstitutional federal law”).

52 *See* Dragich, *supra* note 11, at 536–40.

53 *See* Algero, *supra* note 51, at 609–10, 635–640 (proposing that the first court of appeals to decide a question would create a precedent with binding effect in all of the U.S. courts of appeals).

54 *See* Gregory C. Sisk et al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1430 (1998) (noting that multiple district and appellate federal courts reached conflicting decisions regarding the constitutionality of the Federal Sentencing Commission and, by implication, the legal validity of the Federal Sentencing Guidelines).

effects of these rules, and the structure of the federal courts themselves, is to render it virtually impossible for a single judge to exercise personally the judicial power of the United States. Rather, the judicial power of the United States will almost always be exercised collectively and collegially.

Returning to the Office of Chief Justice, the Chief Justice has remarkably few supervisory powers over either his colleagues at the Supreme Court or the judges of the lower federal courts. Again, the constitutional baseline defines neither the office nor its powers. Nevertheless, constitutional common law or statute could have enhanced the powers of the office, much as the Senate, by rule and custom, has created the position of Majority Leader and vested this position with substantial control over the flow of legislative business in the Senate.

Although the Constitution itself creates the office of Speaker of the House,⁵⁵ it does not address the scope of the Speaker's powers within the chamber. Over time and by both rule and custom, however, the Speaker of the House has consolidated a great degree of control over the business of the House of Representatives, including near absolute control over the floor of the House through discretionary appointments to the House Rules Committee.⁵⁶

Thus, even though both houses of Congress are plainly collective entities that require majority support to act as institutions, within both bodies offices exist that consolidate power and afford the holder of that power an effective

55 See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.”). In the Senate, the Constitution provides that “[t]he Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided,” and also that “[t]he Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.” *Id.* art. I, § 3. Thus, the Office of Majority leader, which came into existence in the early twentieth century, enjoys only an indirect constitutional imprimatur (the position is an “other officer,” in the language of Article I). See *Majority and Minority Leader and Party Whips*, U.S. SENATE, www.senate.gov/artandhistory/history/common/briefing/Majority_Minority_Leaders.htm (last visited on Nov. 26, 2013) (noting that “[t]he first floor leaders were formally designated in 1920 (Democrats) and 1925 (Republicans)”).

56 See THOMAS E. MANN & NORMAN J. ORNSTEIN, *THE NEW CONGRESS* 102–08 (1981); MAURICE B. TOBIN, *HIDDEN POWER* 4–7 (Joan Shaffer ed., 1986); Roger H. Davidson, *The Speaker and Institutional Change*, in *THE SPEAKER: LEADERSHIP IN THE U.S. HOUSE OF REPRESENTATIVES* 157 (Ronald M. Peters, Jr. ed., 1994). See generally Margaret Sanregret Shockley, “Canonizing” Under Newt Gingrich: *The Speaker’s Consolidation of Power in the House of Representatives*, 9 STAN. L. & POL’Y REV. 165 (1998) (discussing the evolution and development of the institutional powers and prerogatives of the Speaker of the House). The power of the Office of Speaker reached its apogee under Speaker Joe Cannon; his high-handed behavior led to a revolt within the GOP majority caucus that reduced the powers of the Speaker vis-à-vis those of senior members in general and standing committee chairs in particular. See BLAIR BOLLES, *TYRANT FROM ILLINOIS: UNCLE JOE CANNON’S EXPERIMENT WITH PERSONAL POWER* (1951); GEORGE B. GALLOWAY, *HISTORY OF THE HOUSE OF REPRESENTATIVES* 54–56 (1961); BOOTH MOONEY, *MR. SPEAKER: FOUR MEN WHO SHAPED THE HOUSE OF REPRESENTATIVES* (1964).

veto over collective consideration of legislation. By way of contrast, even within the Supreme Court itself, the Chief Justice has but a single vote on the question of whether to grant a writ of certiorari in a particular case, and also but a single vote with respect to the disposition of cases. Unlike the Speaker or the Majority Leader, the Chief Justice exercises very little substantive control over the work of the Supreme Court itself, to say nothing of the work of the lower federal courts or state courts.

For example, if the Chief Justice believes a decision by a panel of a court of appeals to be mistaken, he has no means of securing either Supreme Court or en banc court of appeals review of that decision. And, even if he were to act as Circuit Justice in a given case, perhaps issuing a stay, any decision he made when acting in that capacity could be overridden by a simple majority vote of the Supreme Court's whole membership.

Even on questions of administration within the Supreme Court, the Chief Justice acts only by custom and with the ongoing consent of a majority of his colleagues.⁵⁷ Thus, for example, the Chief Justice could not definitively and unilaterally set a policy on cameras in the Supreme Court for oral arguments, or a revised policy on the release of audio recordings of oral arguments.⁵⁸ The Supreme Court, to a much higher degree than either the House of Representatives or the Senate, is a collegial body and requires consensus to act.⁵⁹

57 See WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964) (analyzing the strategic options for garnering the consent of a majority of Justices); H.W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 41–91 (1991) (describing the internal processes and customs of the Court).

58 See Theodore W. Ruger, *The Chief Justice's Special Authority and the Norms of Judicial Power*, 154 U. PA. L. REV. 1551, 1568 (2006) (noting that the Chief Justice could not unilaterally make changes to the Supreme Court's policies and practices and observing, in particular, that "[t]he same dynamic would apply to key changes in oral argument procedure, such as the introduction of television cameras into the Supreme Court chamber"); see also R. Patrick Thornberry, Note, *Televising the Supreme Court: Why Legislation Fails*, 87 IND. L.J. 479, 482–85 (2012) (discussing various efforts to require that Supreme Court oral arguments be televised to the public and the Justices' general opposition to such a policy). Professor Ruger aptly notes that "[i]ndeed, the fact that even the Chief Justice's leadership authority within the Court is formally constrained within a collective structure only underscores the incongruity of the several individualistic powers the Chief exercises over the broader judiciary." Ruger, *supra*, at 1568. In other words, these "individualistic powers" are the exceptions that tend to demonstrate the more general rule that the Chief Justice is merely a first among equals.

59 It is true that the Chief Justice, by statute, has substantial responsibilities to oversee the operation of the Federal Judicial Conference, an administrative arm of the federal judiciary. See 28 U.S.C. § 331 (2006). By statute, he also enjoys the power to name judges to special courts, such as the FISA court, see 50 U.S.C. § 1803 (2006), and members to the various rules revision advisory committees, see 28 U.S.C. §§ 2071–2077 (2006). I would observe, first, that these powers are all creatures of statute, and that Congress could remove or restrict these duties at any time; they are simply not inherent powers, vested by the Constitution itself or by constitutional common law in the Office of the Chief Justice. Second, these powers do not directly involve the exercise of the judicial power (i.e., the judicial resolution of actual cases or controversies on the merits), but rather only the pro-

In circumstances involving credible allegations of judicial misconduct, the Chief Justice lacks any unilateral power to act to remove a corrupt or incompetent judge from judicial service. Instead, such power, by statute, rests in the hands of the various U.S. courts of appeals' judicial councils.⁶⁰ A judicial council has the power to limit or remove a lower federal court judge's judicial caseload—but not the power formally to suspend a judge from office or to cease the judge's federal pay (both of which would require either voluntary resignation or impeachment by Congress). The Chief Justice has no direct power to suspend or remove a federal judge (whether on the Supreme Court or a lower federal court), nor does the Constitution itself require that any such power be vested in the person holding this office.

In the end, then, the text of the Constitution and the structure and operation of both the Supreme Court and the lower federal courts reduce the Chief Justice to little more than a first among equals.⁶¹ As Professor Theodore Ruger explains, “[t]he Chief Justice’s adjudicative power is structured and channeled in ways very much like the other eight Justices on the Court, and, in a more general sense, is much like the authority of any judge on a multimember appellate tribunal.”⁶²

To be sure, the Chief Justice does enjoy responsibility for making some appointments to various committees and special courts, and also has administrative oversight responsibilities for the Judicial Conference of the United States. Nevertheless, if one contrasts the powers and perquisites of the office against those of the President, Speaker, or Majority Leader, the real structural weakness of the position comes into very clear focus. Simply put, the

cedures used incident to the exercise of that power; accordingly, this supervisory power does not really enhance the Chief Justice’s own ability to wield the power of the federal courts directly and personally, in the same way the President serves as commander-in-chief. Finally, neither the Constitution nor any federal statute vests the Chief Justice with any overriding or comprehensive duty to ensure the effective operation of the federal courts; no equivalent of the Take Care Clause, U.S. CONST. art. II, § 3, which vests the President with a generic oversight responsibility over the entire executive branch of the federal government, exists with respect to the judiciary. In the federal courts, the duty to ensure the proper exercise of the judicial power is both widely held and exercised by more-or-less independent agents.

60 See generally NAT’L COMM’N ON JUDICIAL DISCIPLINE AND REMOVAL, REPORT OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL (1993) (discussing the proper mechanisms for disciplining or removing judges); see also Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 673 (1999) (evaluating the competing concerns of judicial discipline and judicial responsibility); Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. REV. 209, 211 (1993) (arguing that “strict originalism” makes sense in light of removal methods fully performed by the elected branches of government, with impeachment as the only mechanism intended to punish federal judges).

61 See Ruger, *supra* note 58, at 1551 (“Within the Court’s core adjudicative function, the Chief’s status as ‘*prima inter pares*’—first among equals—is a well-known and generally apt description of a type of special status that is highly visible, but also limited in important respects.”).

62 *Id.*

Chief Justice lacks the power to command his colleagues; instead, he must persuade them. The power of his office depends, in a very real way, on his ability to convince his colleagues, both in the Supreme Court and on the lower federal courts, of the wisdom of his views.⁶³

C. *Federalist Political Theory and the Federal Courts as Local Institutions*

The decentralization of the federal courts is rooted in structural decisions initially made in the early years of the Republic. Under the Judiciary

63 The Chief Justice does possess some useful tools in this regard. By customary practice, the Chief Justice speaks first when the Justices meet in conference to cast preliminary votes in argued cases and also when discussing whether to grant a writ of certiorari. See PERRY, *supra* note 57, at 43–44 (discussing the speaking order of the Justices when at conference); Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 647 (2001) (“As the first speaker, the Chief Justice is able to frame the discussion that follows.”); see also *Justice Kagan Gives Students Perspective on the Supreme Court—and on Eckstein Hall*, MARQ. LAW., Summer 2012, at 5 (noting that at conference “every other justice gives a view before she [Associate Justice Elena Kagan] gets her chance” because she currently is the most junior Associate Justice). As Professor Hathaway notes, “[t]he Chief Justice thus has the power to add alternatives for the other Justices to consider (for example, by raising the possibility of dismissing a case as improvidently granted or putting forward a jurisdictional concern) and may thereby alter the holding of the case.” Hathaway, *supra*, at 647.

In addition, the Chief Justice also prepares and circulates the “discuss” list of cases for conference, which conveys an important agenda setting function. See PERRY, *supra* note 57, at 85–89; see also Hathaway, *supra*, at 647 (“Although any Justice may add a case to the discuss list with a simple request, the Chief Justice’s power to set the initial agenda still influences the outcome. It allows the Chief Justice to suggest a set of certworthy cases and thus create a presumption that cases not on the list are not worthy of the Court’s consideration.”). To be clear, however, other members of the Court are quite free to add cases to the “discuss list,” so this power is somewhat limited in its scope and effect. Finally, when the Chief Justice votes in the majority with respect to the disposition of a case, the power of assignment falls to him. PERRY, *supra* note 57, at 85–89. In close cases, the Chief Justice no doubt uses this power of assignment strategically to help maintain a majority in favor of his preferred disposition of the case.

These prerogatives within the Supreme Court Conference, however, merely permit the Chief Justice to nudge his colleagues, not command them. Any member of the Supreme Court may place a pending case on the conference discuss list. *But cf.* Hathaway, *supra*, at 647 (noting that “it is likely that a Justice who adds a case to the discuss list feels compelled to argue in favor of granting certiorari for the case” and positing that “[b]ecause no Justice is likely to take on this responsibility lightly, the Chief Justice’s power to issue the initial discuss list places a great deal of the agenda-setting power in his hands”). At the end of the day, however, the Chief Justice’s vote in favor of granting review counts as only one of the four required votes and, from the opposite side of the ledger, if four members of the Supreme Court vote to grant a writ of certiorari, the Chief Justice’s objections to a grant are completely meaningless. Similarly, if the Justices vote 8-1 to overturn a criminal conviction, the Chief Justice’s dissenting voice carries no more weight or authority than a dissenting vote cast by an Associate Justice. My point is that, even within the confines of the Supreme Court itself, the powers of the Office of Chief Justice more often than not involve enhanced opportunities to persuade his colleagues rather than direct powers of control or supervision.

Act of 1789, Congress established federal district courts that corresponded to the existing states.⁶⁴ “With the Judiciary Act of 1789, signed on Sept[ember 24, 1789], it created 13 district courts, three circuit courts and a six-member Supreme Court (with two justices drawn from each circuit).”⁶⁵ In other words, Congress designed the lower federal courts to be local institutions within the states—indeed, quite possibly the only federal institution located within a particular state (save, perhaps, for military installations, such as forts or naval bases).

Consider too that members of the preeminent national federal court, the Supreme Court of the United States, for many years⁶⁶ labored under a statutory duty to hear and decide cases while “riding circuit,” meaning that members of the Supreme Court had an obligation to visit regularly parts of the United States outside the national capital city (first, in New York City,

64 See Judiciary Act of 1789, ch. XX, 1 Stat. 73. Congress expressly required that the district courts retain their local character. See *id.* § 3 (“That there be a court called a District Court, in each of the afore mentioned districts, to consist of one judge, *who shall reside in the district for which he is appointed*, and shall be called a District Judge, and shall hold annually four sessions” (emphasis added)).

65 George Hodak, *February 2, 1790: Supreme Court Holds Inaugural Session*, ABA J. (Feb. 1, 2011, 12:00 AM), http://www.abajournal.com/magazine/article/february_2_1790_supreme_court_holds_inaugural_session/; see also Judiciary Act of 1789, ch. XX, § 2, 1 Stat. 73 (“That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the State of Massachusetts which lies easterly of the State of New Hampshire, and to be called Maine District; one to consist of the State of New Hampshire, and to be called New Hampshire District; one to consist of the remaining part of the State of Massachusetts, and to be called Massachusetts district; one to consist of the State of Connecticut, and to be called Connecticut District; one to consist of the State of New York, and to be called New York District; one to consist of the State of New Jersey, and to be called New Jersey District; one to consist of the State of Pennsylvania, and to be called Pennsylvania District; one to consist of the State of Delaware, and to be called Delaware District; one to consist of the State of Maryland, and to be called Maryland District; one to consist of the State of Virginia, except that part called the District of Kentucky, and to be called Virginia District; one to consist of the remaining part of the State of Virginia, and to be called Kentucky District; one to consist of the State of South Carolina, and to be called South Carolina District; and one to consist of the State of Georgia, and to be called Georgia District.”). The three circuit courts were the “eastern,” “middle,” and “southern” circuits. See *id.* § 4. The circuit courts consisted of the local district judge and the two Supreme Court Justices assigned to that circuit. See *id.*

66 Congress significantly limited the Justice’s circuit riding duties in 1869, and completely abolished them in 1911. Judicial Code of 1911, ch. 231, § 297, 36 Stat. 1087 (codified in various parts of U.S.C.); F. Andrew Hessick & Samuel P. Jordan, *Setting the Size of the Supreme Court*, 41 ARIZ. ST. L.J. 645, 668 n.100 (2009); see Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1815–31 (2003) (discussing the reduction in circuit riding duties beginning in 1869, again in 1891, and their formal abolition in 1911). Retired Justices, however, remain free to “ride circuit” by serving as temporary judges on the courts of appeals. 28 U.S.C. § 294(a) (2006) (“Any retired Chief Justice of the United States or Associate Justice of the Supreme Court may be designated and assigned by the Chief Justice of the United States to perform such judicial duties in any circuit, including those of a circuit justice, as he is willing to undertake.”); see Glick, *supra*, at 1830–31 (discussing the service of retired Justices on the courts of appeals).

then, in Philadelphia, and finally, in Washington, D.C.).⁶⁷ In section 5 of the Judiciary Act of 1789, Congress specified the cities and times at which the circuit courts would sit, thereby requiring, by statute, that the circuit courts, like the district courts, maintain a consistent local presence within the states.⁶⁸ Thus, unlike Congress or the President, the official duties of the Chief Justice and Associate Justices required them to regularly conduct their official functions in the states, rather than in the national capital.⁶⁹ Although members of the House and Senate were elected from the states, their official service took place almost exclusively in the national capital city.

As Professor Alison LaCroix has observed, Chief Justice John Marshall and Associate Justice Joseph Story were “deeply committed to the belief that the inferior federal courts were and ought to be the principal physical embodiment of the national government, reaching into the otherwise highly localized space of the cities, towns, and countryside of the United States.”⁷⁰ Indeed, she argues that “Marshall and his colleagues believed that the inferior federal courts—not Congress—were the most important symbolic and institutional nodes by which the people of the nation would encounter the authority of the general government.”⁷¹

The federal courts, from 1789 to the present, were designed to be local institutions that connect the people of the states to the federal government. Not only are the district and circuit courts physically present in each and every state, but these institutions are also staffed by judges drawn from local bar associations. The design of the federal courts, coupled with longstanding traditions regarding the allocation of seats on the U.S. courts of appeals to

67 See Hodak, *supra* note 65 (noting that “the court’s initial session was set for Feb. 1, 1790, at the Royal Exchange in New York City, the republic’s first temporary capital” but observing that “the [first] session was postponed [to February 2, 1790] as only three justices [of six] were present,” therefore depriving the Supreme Court of a quorum); see also Glick, *supra* note 66, at 1763–64 (describing the brief first session of the Supreme Court). The Supreme Court’s first session was very brief, adjourning on February 10, only eight days later, with the Justices having “no cases on the docket” but having resolved “a few procedural matters” and admitting “26 attorneys and counselors” to the Supreme Court’s bar. Hodak, *supra* note 65.

68 Judiciary Act of 1789, ch. XX, § 5. Indeed, Congress not only specified the locations at which the circuit courts would sit, but the days of the month on which the sittings would take place, at least initially. See *id.*

69 JOHN E. SEMONCHE, KEEPING THE FAITH: A CULTURAL HISTORY OF THE U.S. SUPREME COURT 41 (1998); see Leonard Baker, *The Circuit Riding Justices*, 1977 SUP. CT. HIST. SOC’Y Y.B., 48, 50–51, available at http://www.supremecourthistory.org/wp-content/themes/supremecourthistory/inc/schs_publications-1977.pdf (noting that the practice of circuit riding created meaningful bonds between the federal courts and the local communities in which they sat).

70 LaCroix, *supra* note 45, at 206.

71 *Id.* at 206–07; see Glick, *supra* note 66, at 1760 (“Favorable public opinion was necessary to ensure the survival of the young Republic and the active and visible presence of the justices would help foster loyalty toward the new form of government and somewhat weaken the people’s previous allegiance to their state’s government.” (footnotes omitted)).

particular states, has the effect of creating a highly diverse group of decision makers quite literally drawn from the whole nation. The federal courts are both local, in a literal sense, but are also “local” in a more metaphorical sense insofar as they are staffed with persons drawn from the local community.

In some instances, the regional nature of the lower federal courts can make the enforcement of locally unpopular federal rights more difficult, as was the case in some communities during the civil rights movement.⁷² On the other hand, however, the fact that local judges enforce federal constitutional rules has the effect of rendering the decision one from a representative of the community, rather than an outsider. When John Minor Wisdom⁷³ or Frank M. Johnson, Jr.⁷⁴ issued important rulings in landmark civil rights cases, they were acting on behalf of the federal courts, but were still both very much members of the New Orleans and Montgomery communities.⁷⁵ The service of members of the local state bar on federal courts almost certainly helps to enhance the prospects for local compliance with federal court rulings.

It is not surprising, then, that “[e]xpanding federal judicial power to the inferior federal courts. . . had long been a crucial element of the Federalists’ project of ensuring national supremacy through the institution of the judiciary.”⁷⁶ Professor LaCroix explains that “Marshall’s and Story’s commitment to building the power of the inferior federal courts therefore stemmed from their deeply held belief that the ‘judicial [P]ower of the United States’ described in Article III of the Constitution represented the chief bulwark against the wayward, localist tendencies of the states.”⁷⁷ Marshall and Story possessed “an almost metaphysical belief in the federal judicial power as at once proceeding outward from the center and connecting the peripheries back to the center, thereby countering the omnipresent threat that the federal republic would revert to a confederation.”⁷⁸ Thus, “Marshall and his colleagues insisted that the inferior federal courts were a crucial locus of federal power precisely because they were present in the town square and therefore created a practical, physical connection between the central government and the local polity.”⁷⁹ In sum, they “viewed union as the mandate of the Constitution, and federal courts as the guardians of union.”⁸⁰

For the lower federal courts to play this crucial role, however, they would have to be decentralized and physically located in the several states. Moreover, given the severe limitations that existed in the late eighteenth century with respect to communication and travel, these courts would be operating

72 See BASS, UNLIKELY HEROES, *supra* note 26, at 9–55.

73 See *id.* at 15–27, 41–55, 100–09, 272–76.

74 See *id.* at 56–83, 97–111, 259–85.

75 *Id.* at 46–47, 80–81.

76 LaCroix, *supra* note 45, at 207.

77 *Id.* at 210.

78 *Id.*

79 *Id.*

80 *Id.* at 242.

largely independently of each other, at least with respect to day-to-day judicial business. The practice of having members of the federal Supreme Court “ride circuit” and serve as intermediate appellate judges (along with local district court judges) certainly brought a centralizing presence that was undermined in 1891 when Congress abolished the practice.⁸¹ Nevertheless, for the federal courts to play the role envisioned by Marshall and Story, these juridical entities would have to operate largely independently of one another. Rather than seeking to promote uniformity, the Framers instead sought to secure a local presence for the federal government via the district and circuit courts.

The Federalist Papers also lend material support to Professor LaCroix’s thesis. “I am not sure but that it will be found highly expedient and useful to divide the United States into four or five or half a dozen districts, and to institute a federal court in each district in lieu of one in every State.”⁸² Hamilton adds that “[j]ustice through them may be administered with ease and dispatch and appeals may be safely circumscribed within a narrow compass.”⁸³ In other words, federal courts were to be local federal institutions and would operate in a *decentralized* fashion. A more streamlined model for the federal courts could have been adopted—for example locating the federal judiciary in the national capital, with Congress and the President—but this approach was not taken.⁸⁴

A practical need also existed for these local institutions to enforce federal rights because “[t]he reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself.”⁸⁵ Moreover, “the most discerning cannot foresee how far the prevalence of a local spirit may be found to disqualify the local tribunals

81 See Logan, *supra* note 4, at 1143–44.

82 THE FEDERALIST NO. 81, *supra* note 45, at 454.

83 *Id.*

84 It bears noting that Congress has created national courts, located in Washington, D.C., with narrowly defined subject matter jurisdiction over particular legal matters—for example the Court of International Trade and the Court of Federal Claims. See PATRICK C. REED, THE ROLE OF FEDERAL COURTS IN U.S. CUSTOMS & INTERNATIONAL TRADE LAW 18–20 (1997) (discussing the reasons that led Congress to create subject matter specific tribunals, such as the Court of International Trade); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111, 1111–15 (1990) (discussing specialized federal courts enjoying subject matter specific jurisdiction). The Federal Circuit, which enjoys exclusive jurisdiction over certain subject matter, such as appeals in patents cases, provides yet another example. See Hon. S. Jay Plager, *The United States Courts of Appeals, The Federal Circuit, and the Non-regional Subject Matter Concept: Reflections on the Search for a Model*, 39 AM. U. L. REV. 853, 854–55 (1990). Thus, Congress has chosen to secure uniformity and centralized judicial decision making over regional diversity and localized decision making within the states in some important areas of federal law. Even so, however, Congress has not acted to secure greater levels of uniformity across the lower federal courts, including the courts of appeals and the local district courts, which enjoy significantly broader jurisdiction over federal law questions.

85 THE FEDERALIST NO. 80, at 446 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

for the jurisdiction of national causes.”⁸⁶ Hamilton also observed that “State judges, holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws.”⁸⁷

In other words, in order to safeguard rights arising under federal law, local federal courts would be essential. Yet, if these courts were to be truly local, then they would have to be constituted and operate in ways that would give rise to regional differences in both the substance of federal law and also with respect to the procedures used to adjudicate federal law claims. Plainly, however, the benefits associated with securing a meaningful local presence for the federal government within the states must have been deemed a sufficiently offsetting benefit to justify the risk of independent, local federal courts rendering federal law non-uniform.

II. COMPARATIVE INSTITUTIONAL ADVANTAGE, PUBLIC CHOICE, AGENCY CAPTURE, AND THE BENEFITS OF DECENTRALIZED AND COLLECTIVE DECISION MAKING WITHIN THE FEDERAL JUDICIARY

In *The Politics*, Aristotle argues that a well-ordered society should adopt institutional structures of government that vest the execution of particular tasks with the individuals or institutions that are best capable of executing the particular function at issue.⁸⁸ The more modern law and political science theory associated with this seminal idea is that of comparative institutional analysis. Professor Neil Komesar’s work, for example, systematically considers which institution of government would be best suited to the adoption and implementation of specific government objectives.⁸⁹ In an ideal world, we

86 THE FEDERALIST NO. 81, *supra* note 45, at 454.

87 *Id.*

88 ARISTOTLE, *THE POLITICS*, bk. III, ch.11, at 122–27 (T.A. Sinclair trans., 1962). Aristotle explains:

[I]t is possible that the many, no one of whom taken singly is a good man, may yet taken all together be better than the few, not individually but collectively, in the same way that a feast to which all contribute is better than one given at one man’s expense. For where there are many people, each has some share of goodness and intelligence, and when these are brought together, they become as it were one multiple man with many pairs of feet and hands and many minds. So too in regard to character and powers of perception.

Id. at 123. To be clear, by invoking Aristotle’s *Politics* in the context of the potential superiority of a collective body, representative of the whole polity, exercising what Aristotle denominates the “wisdom of the multitude,” *see id.*, to oversee government generally and also to engage in fact finding and deliberation in the context of a trial, I should not be taken as endorsing Aristotle’s views about a well-ordered polity more generally. To cite a specific example, I do not believe that a well-ordered government must vest the principal executive and legislative offices and functions in a small group of wealthy, highly intelligent individuals who constitute the “aristocracy.” *Cf. id.* bk. IV, ch. 2, at 151–53.

89 NEIL K. KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* (1994). For a thoughtful discussion of how insights from cognitive psychology might improve institutional choice, see Jeffrey J. Rachlinski & Cynthia R.

would seek to optimize the performance of specific governmental tasks by assigning them to the institution best able to execute them, and we would also structure that institution in a fashion that is conducive to the performance of the task.⁹⁰

Thus, if we seek accurate factual determinations and the entrenchment of specific governing principles, one would seek to create an institution in which direct political controls would be attenuated, so as to avoid having political considerations distort either factual analysis or the application of particular controlling general principles (such as, say, a rule against establishing a state church or religion). This is not to say that democratic accountability is not a good thing as a general matter; instead the concern relates to the question of incentives. A person holding office subject to a requirement of frequent reelection by the general citizenry will, in general, be more responsive to the perceived wishes of the electorate than a person who faces the voters at less frequent intervals.⁹¹ Accordingly, from a broader historical perspective, members of the U.S. Senate, who hold six-year terms of office,⁹² and who were elected by state legislatures rather than by the general citizenry until ratification of Seventeenth Amendment in 1913,⁹³ generally have been

Farina, *Cognitive Psychology and Optimal Government Design*, 87 CORNELL L. REV. 549, 555–58 (2002).

90 See KOMESAR, *supra* note 89, at 3–8, 45–50, 80, 149–50, 177–95, 197, 254–55, 271–76.

91 See THE FEDERALIST NO. 81, *supra* note 45, at 451–52 (“The members of the legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges; and as, on this account, there will be great reason to apprehend all the ill consequences of defective information, so, on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breath of faction may poison the fountains of justice.”); see also THE FEDERALIST NO. 78, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (arguing that “[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution” because limits on government “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void”). Alexander Hamilton argues that without an independent judiciary vested with the power of judicial review “all the reservations of particular rights or privileges would amount to nothing.” *Id.*

92 See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof for six Years; and each Senator shall have one vote.”); see also LEVINSON, *supra* note 1, at 50 (discussing the six-year term of office and noting that “the country has probably been reasonably well served by the six-year term” because “[i]t encourages taking a more long-term view than do members of the House, who are constantly aware that they will face a new election literally within twenty-two months of taking their oaths of office”).

93 See U.S. CONST. amend. XVII, § 1 (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”); see also LEVINSON, *supra* note 1, at 61 (noting that “the framers envisioned senators as quasi emissaries from their state legislatures, even if they also enjoyed the valuable independence that comes from receiving their salary from the national government and enjoying a guaranteed six-year term of office”).

less directly responsive to the general public's wishes than members of the U.S. House of Representatives, who must stand for election every two years.⁹⁴

In the judicial context, empirical evidence suggests that the practice of holding contested, partisan judicial elections undermines the quality of the justice system—if by “quality” one means neutrality with respect to the parties and outcomes.⁹⁵ Indeed, the very notion of a contested partisan judicial election raises serious conflicts between core First Amendment values and core due process values.⁹⁶

94 See U.S. CONST. art. I, § 2, cl. 1. Of course, from the perspective of the Revolutionary generation, a two-year term of office seemed radically anti-democratic; many state legislatures required annual election and also provided for constituents to recall their delegate during the annual term of office. See 5 THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 127, 224–26, 241–45 (Jonathan Elliot ed., 1836) (discussing the term of office for members of the House and the question of a recall power); see also Neil Gorsuch & Michael Guzman, *Will the Gentlemen Please Yield? A Defense of the Constitutionality of State-Imposed Term Limitations*, 20 HOFSTRA L. REV. 341, 346–52 (1991) (discussing debates at the Federal Convention over the frequency of elections, terms of office for federal offices, and the question of a recall power). At the time, “[t]he terms of state legislators were mostly fixed at one year.” *Id.* at 348 n.37. Moreover, “Connecticut and Rhode Island had semi-annual elections and South Carolina held them biennially.” *Id.*; see also THE FEDERALIST NO. 53, at 300–04 (James Madison) (Clinton Rossiter ed., 1961) (discussing contemporary terms of office in various state legislatures and advocating the virtues of holding federal elections only every two years). Indeed, the Articles of Confederation followed this model, using a single year term of office for members of the Congress, and also permitting a state legislature to recall its delegates at will. See ARTICLES OF CONFEDERATION OF 1781, art. V, § 1 (“For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.”). The Articles of Confederation also imposed strict term limits on members of Congress. See *id.* art. V, § 2 (providing that “no person shall be capable of being a delegate for more than three years, in any term of six years”). The power for constituents to bind their members provides yet another feature of these more robustly democratic legislative bodies; the House of Representatives debated whether to include the power to instruct a member of Congress as part of the First Amendment, but squarely rejected this idea. See RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, “OFFENSIVE” PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 109–10 (2012); see also 1 ANNALS OF CONG. 733–49 (1789) (Joseph Gales ed., 1834). Instead, the House agreed with James Madison, who had argued that the right to petition the House provided a sufficient means of ensuring democratic input and a means of securing both access and accountability. See 1 ANNALS OF CONG. 913 (1789) (Joseph Gales ed., 1834).

95 See Jared Lyles, *The Buying of Justice: Perversion of the Legal System Through Interest Groups’ Involvement with the Partisan Election of Judges*, 27 LAW & PSYCHOL. REV. 121, 122 (2003); Stephen J. Ware, *Money, Politics and Judicial Decisions: A Case Study of Arbitration Law in Alabama*, 15 J.L. & POL. 645, 646 (1999).

96 Compare *Republican Party of Minn. v. White*, 536 U.S. 765, 788 (2002) (holding that prohibiting judicial candidates “from announcing their views on disputed legal and political issues violates the First Amendment”), with *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 884 (2009) (concluding that “[t]here is a serious risk of actual bias when a person with a personal stake in a particular case had a significant and disproportionate influence

Widely dispersing the power to act also might be conducive to better, more accurate decision making: if the same question must be decided by different decision makers, who are not bound to follow each other's examples, the probability of a conclusion being correct should be enhanced if these independent and autonomous decision makers nevertheless reach the same conclusion. By way of contrast, if the decision makers reach different conclusions, the certainty of a given potential answer seems compromised—the question, in fact, is debatable.⁹⁷

This system of diffuse decision making extends beyond the federal system to the state courts, which must adjudicate federal claims on a regular basis. Thus, we have the district courts, the thirteen U.S. courts of appeals, the fifty state supreme courts, and the state intermediate appellate and trial courts, the D.C. court of appeals, as well as the local territorial trial and appellate courts in the U.S. territories, such as Guam, Puerto Rico, and the U.S. Virgin Islands,⁹⁸ as well as a handful of specialty federal courts, and so-called Article I tribunals,⁹⁹ all vested with making interpretative decisions about the meaning of the Constitution, treaties, statutes, and regulations. There is, in fact, a surfeit of decision makers operating both concurrently and largely independently of each other.

This diffusion of decisional authority, and the perceived ill effects of non-uniform federal law, explain and justify the “essential attributes” argu-

in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent”); see also William P. Marshall, *Judicial Takings, Judicial Speech, and Doctrinal Acceptance of the Model of the Judge as Political Actor*, 6 DUKE J. CONST. L. & PUB. POL'Y 1 (2011) (discussing the constitutional concerns associated with judges also being political actors); Jonathan Remy Nash, *Judicial Election Versus Judicial Appointment: Evaluating the Potential for a Race to the Bottom*, 64 N.Y.U. ANN. SURV. AM. L. 617, 617–18 (2009) (noting that “many commentators have taken the position that the holding in *White* poses grave problems for judicial elections, with some insisting that it portends the inevitable end of judicial elections”).

97 See, e.g., *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011) (upholding the mandate provision of the Patient Protection and Affordable Care Act of 2010 against a Commerce Clause challenge); *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011) (invalidating the individual mandate provision of the Patient Protection and Affordable Care Act of 2010 as beyond the scope of Congress's Commerce Clause powers). Ultimately, the Supreme Court fractured badly and was unable to generate a single opinion that enjoyed the unqualified support of five members. See *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012). Given the badly divided reasoning—and outcomes—in the lower federal courts, and the same result within the Supreme Court itself, one would predict that *National Federation of Independent Business* will likely have only a limited precedential effect going forward. Cf. *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954). When a deliberative juridical body composed of very different persons, reasoning independently and holding radically different ideological, political, and even moral commitments, reaches a common conclusion about the meaning of the Constitution, the ruling will have a broader, deeper jurisprudential effect than a plurality decision issued by a badly fractured court.

98 See, e.g., *Posadas de P.R. Assocs. v. Tourism Co. of P.R.*, 478 U.S. 328 (1986).

99 See Pfander, *supra* note 11, at 656–60 (discussing the creation and jurisdiction of Article I specialty courts, or “tribunals,” and their relationship to Article III courts).

ment that seeks to require that the Supreme Court of the United States enjoy appellate jurisdiction over questions of federal law. In the absence of such appellate authority, federal law will differ from state to state, without any ability to create a single, national standard (at least with respect to constitutional questions).¹⁰⁰

There are, of course, likely other factors at play here. One might reasonably ask whether either Congress or the President would wish to see the full judicial power of the United States vested in a single individual, holding life tenure, and capable of wielding a veto that effectively requires two-thirds of both houses of Congress and three-fourths of the state legislatures to override.¹⁰¹ It should not be surprising that Congress has not acted to concentrate judicial power in a single individual or court, but instead has adopted policies that disperse and limit the ability of any single judge, or court, to disallow congressional policy choices. Were the judicial power to be more concentrated in fewer hands, and capable of more resolute exercise, the effects, at least from Congress's perspective, would plainly be quite negative. Particularly in a system that grants federal judges life tenure, Congress would never centralize judicial power because doing so would empower a politically entrenched group of rivals capable of thwarting the incumbent majority's will through the exercise of judicial review. By using structural constraints, rather than substantive restraints, Congress also avoids the appearance of

100 See Dragich, *supra* note 11, at 536–40, 579–89. As Professor Dragich observes, “[t]he importance of uniformity in federal law has long been assumed but is not free from debate.” *Id.* at 540. Congress or an administrative agency could amend a statute or regulation to create a single national standard in the face of nonuniform state and federal lower court opinions. See *id.* at 586–87. A treaty, as well, could be amended (subject to the agreement of the signatory states) or Congress could enact implementing legislation that preempts nonuniform lower court interpretations of the treaty's text. However, Congress would have to resort to the Article V amendment process, which requires an affirmative two-thirds vote of both chambers of Congress and the subsequent assent of three-fourths of the states (via the legislature or a ratification convention), to definitively resolve a conflict regarding a constitutional question (in the absence of an authoritative ruling by the Supreme Court). See U.S. CONST. art. V.

101 See U.S. CONST. art. V. If a single person, for the sake argument, say the Chief Justice, could personally and individually wield the power of judicial review, virtually any policy adopted by Congress or the President could be rejected by this hypothetical super judge. To vest this sort of unilateral power in a single person would seem to contradict virtually all the structural safeguards that the Framers built into the design of the federal government. By way of contrast, vesting the power to veto congressional or presidential policies, via the power of judicial review, in a collective entity that cannot even control its own exercise of the power—the ban on advisory opinions limits the ability of the federal courts to reach out and decide questions not integral to a pending case or controversy brought to the bar by litigants—makes great sense if one is at all troubled by the potential for this power to be either misused or abused. See THE FEDERALIST NO. 78, *supra* note 91, at 433 (“The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”). As Hamilton notes, the federal judiciary “may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.” *Id.*

attempting to usurp judicial authority (something that the Supreme Court has successfully resisted in the past and would likely attempt to resist in the future).¹⁰²

But the merits of dispersing federal judicial power are not solely limited to maintaining congressional or presidential prerogatives. It is plainly much harder to capture hundreds of decision makers (thousands if one includes state court judges who may decide federal questions) than to capture a single juridical body.¹⁰³ By decentralizing the federal courts and creating separate juridical entities that operate more or less entirely independently of each other, Congress has greatly reduced the risk of agency capture with respect to the federal courts.¹⁰⁴ Capture avoidance provides another sound reason for creating a highly decentralized system of courts.

Accordingly, one should not be surprised that Congress has consistently adopted measures that have the effect of diffusing judicial power and preventing its vesting in any single individual (or even court). This approach both reduces the potential risk of federal judges thwarting Congress's will and also renders the federal courts less capable of capture (whether by the President or private interests). By separating and dividing judicial power, Congress both enhances its own relative institutional power and also, even if by accident or happenstance, has created a structural bulwark that helps to maintain the institutional integrity and autonomy of the federal courts. But the loss of uniformity constitutes a necessary and unavoidable cost of this decentralized vesting of federal judicial power in myriad hands.

The contrast with the executive branch is simply astonishing. To a remarkable degree, essential powers of the executive branch are vested directly in a single person, the President. Consider, for example, the Commander-in-Chief powers: "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States."¹⁰⁵ Even if the Presi-

102 See *Unites States v. Klein*, 80 (13 Wall.) U.S. 128, 146–47 (1871). But see *Ex parte McCardle*, 74 (7 Wall.) U.S. 506, 514 (1868) (holding that Congress may repeal the Court's jurisdiction in certain instances); Wechsler, *supra* note 45, at 1004–06 (arguing that Congress possesses broad authority to regulate the jurisdiction of the lower federal courts and the appellate jurisdiction of the Supreme Court).

103 See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that courts are generally less susceptible to capture than legislative or executive entities).

104 See *Sierra Club v. Morton*, 405 U.S. 727, 745–47 & 747 n.6 (1972) (Douglas, J., dissenting) (arguing that federal agencies are subject to capture by regulated industries and that public interest group standing should be recognized to counter this phenomenon); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 135–36, 142–44, 161–62, 191–92 (1990); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1045 (1997).

105 U.S. CONST. art. II, § 2, cl. 1.

dent cannot unilaterally declare war, he has the ability to initiate military confrontations that could, essentially, force Congress to take such action.¹⁰⁶

The Treaty Power provides another example: the Framers vested the President with a unilateral and absolute veto power over the United States acceding to a particular treaty. Although the Constitution requires that two-thirds of the Senate ratify a treaty, only the President may introduce a treaty to the Senate for its advice and consent.¹⁰⁷ No matter how popular a treaty, Congress lacks any authority to force the United States government to join a particular pact. Other examples exist—it is doubtful, for example, that Congress could force the President to recognize a particular nation-state, or establish formal diplomatic relations with a specific polity.

To a significant degree, President George W. Bush was not far off the mark when he famously declared “I’m the decider.”¹⁰⁸ The President enjoys wide latitude to exercise relatively vast discretionary powers. The Chief Justice enjoys no comparable power, and the federal judiciary lacks any single officer, or group of officers, capable of effective direct superintendence of the various subunits of the federal judiciary;¹⁰⁹ a material difference exists between directing a lower court’s decision and reversing it on appeal.

106 See Bruce Ackerman, *Legal Acrobatics, Illegal War*, N.Y. TIMES, June 21, 2011, at A27, available at <http://www.nytimes.com/2011/06/21/opinion/21Ackerman.html> (describing President Obama’s justifications for initiating American military involvement in Libya without requesting congressional approval for the military action); Eugene Robinson, *What War in Libya?*, WASH. POST, June 21, 2011, at A17 (same); Jonathan Schell, *Say What You Will, It’s a War in Libya*, L.A. TIMES, June 21, 2011, at A13, available at <http://articles.latimes.com/2011/jun/21/opinion/la-oe-schell-war-powers-20110621> (same); Paul Staborin, *A Moral Flip-Flop? Defining “War,”* N.Y. TIMES, Aug. 7, 2011, at SR5, available at <http://www.nytimes.com/2011/08/07/opinion/sunday/harold-kohs-flip-flop-on-the-libya-question.html> (same).

107 U.S. CONST. art. II, § 2, cl. 2.

108 See Jonathan Yardley, *When Bush Writes It, It Stays Rote*, WASH. POST, Nov. 8, 2010, at C1 (“During his White House years, Bush liked to characterize himself as ‘the decider,’ a self-portrait that he continues to paint (hence its title) in ‘Decision Points.’”); see also Tom Shales, *‘Decider’: Eight Years of Dubious Reasoning*, WASH. POST, Dec. 29, 2008, at C1 (“At a news conference, Bush tells reporters, ‘I’m the decider, and I decide what’s best.’ It sounds almost Nixonian.”).

109 Of course, the federal courts possess *no* supervisory authority over the state courts, which means in practice that state courts can hear and decide cases in circumstances under which the federal courts simply could not. For example, many state supreme courts offer advisory opinions at the request of the state legislature, the governor, or the attorney general, and do so in an entirely abstract context, i.e., no plaintiff exists who has suffered a concrete and particularized injury in fact that is traceable to the conduct at issue in the litigation and could be successfully redressed by a court of law. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575–76 (1992); *Sierra Club*, 405 U.S. at 737; see also Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459 (2009) (describing the standing requirements for a case to be heard in the federal courts). Indeed, even if a state supreme court addresses issues of federal constitutional law in an advisory opinion, the Supreme Court of the United States would lack constitutional authority to review the decision because of the absence of an Article III “case or controversy.” See *Muskraut v. United States*, 219 U.S. 346, 356 (1910); *The Correspondence of the Justices (1793)*, reprinted in RICHARD H. FALLON, JR. ET

In fact, the President's control over the litigation strategies of the Department of Justice and, in particular, the Solicitor General's office, has the effect of vesting the President with substantial oversight powers related to the appellate dockets of the federal courts.¹¹⁰ In a very real sense, when a case involves a challenge to a federal law or regulation, and the President elects not to pursue an appeal after an adverse lower court ruling, the President can indirectly control the case load of the federal courts.¹¹¹

If we conceive of the judicial task as being rooted in fact finding and offering principled reasons for particular decisions, then the highly decentralized structure of the federal courts makes perfect sense. Decentralizing decisional responsibilities—and authority—places a premium on agreement. For a rule to be truly binding, on a national level, either all of the lower federal and state courts must agree to a particular disposition of a case (which almost never happens in cases that implicate gray areas of constitutional law) or the Supreme Court must review a case and issue an opinion of sufficient clarity to remove any residual discretion from the lower courts.¹¹²

AL., HART AND WECHSLER'S *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 50–54 (6th ed. 2009); see also STEWART JAY, *MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES* 117–48, 153–70 (1997) (discussing advisory roles undertaken by federal judges in the early years of the Republic); Ronald J. Krotoszynski, Jr., *Constitutional Flares: On Judges, Legislatures, and Dialogue*, 83 MINN. L. REV. 1, 16 (1998) (discussing the ways in which federal courts engage in advice-giving to the political branches in cases otherwise meeting the requirements of an Article III “case or controversy”).

110 See generally Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124 HARV. L. REV. 869 (2011) (arguing that the President and Attorney General exercise significant control over the federal courts through the power to seek, or to decline to seek, judicial review of adverse rulings within the federal courts).

111 It is possible, of course, that another private party with standing could elect to appeal an adverse district court decision to the court of appeals, or an adverse court of appeals decision to the Supreme Court. But, in an important subset of cases involving, for example, executive privilege, it seems likely that a decision by the executive branch not to appeal an adverse decision would likely preclude any appeal of the decision.

112 This is something that the Supreme Court often fails to do in practice, instead establishing broad guidelines or considerations that leave open ample discretion for the lower courts. Consider, in this context, *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009). The Supreme Court held, by a bare majority, that an objective appearance of bias requires, as a matter of due process, a judge to recuse himself. See *id.* at 884 (“We conclude that there is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”). However, Justice Kennedy’s opinion for the majority does very little to establish precisely when such an objective appearance of bias exists—clearly, a \$5 million donation, representing 90% of a judicial candidate’s campaign war chest, meets the standard, whereas a \$25 contribution would not. However, at what point, in terms of net dollar amount, and percentage of the overall campaign fund, does an “objective appearance of bias” arise? Justice Kennedy, writing for the *Caperton* majority, helpfully explains that “[t]he inquiry centers on the contribution’s relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the

The system places a premium on disparate decision makers all reaching the same conclusion—when this occurs, the decision enjoys both great formal scope of application and legitimacy.¹¹³

A very good case can be made that, if life-tenured, unelected judges are to be empowered to review the actions of the democratically elected and accountable executive and legislative branches, those decisions should enjoy limited scope of application absent agreement among a widely dispersed set of decision makers. The President obtains a direct mandate from “We the People,”¹¹⁴ and in turn the President enjoys the ability to make unilateral, binding decisions that are not subject to direct review either by Congress or the Courts. In a very real sense, the President *is* the decider on myriad issues of substantial importance.

The Chief Justice, on the other hand, is at most a “first among equals” who lacks any formal prescriptive powers over his colleagues—both on the Supreme Court and within the lower federal courts—and has absolutely no authority whatsoever over the state court systems. To the extent that a particular Chief Justice enjoys influence, it must be a function of his ability to persuade his colleagues of the wisdom of his vision of the Constitution; lacking any real power to compel, the Chief Justice relies instead on the power of persuasion.¹¹⁵ Yet, the common perception of the Chief Justice suggests that, more often than not, the persons holding this office have been able to use the institutional tools at hand to move their colleagues to embrace their vision.

One must, of course, account for the possibility that when a President enjoys the power to make multiple Supreme Court appointments, including a Chief Justice, the new Chief seems to enjoy Svengali-like powers of persuasion. On the contrary, I rather doubt that Chief Justice Harlan Fiske Stone,

outcome of the election.” *Id.* Suppose ten donors each give a state appellate court candidate \$100,000, and that the next highest donations are all below \$5,000, with a net campaign fund of \$2 million dollars. Would the judge be required to recuse herself from cases involving the \$100,000 donors? *Caperton* provides virtually no useful guidance on how to apply its governing principle on facts such as these. *See id.* at 890–902 (Roberts, C.J., dissenting).

113 *See, e.g.*, *United States v. Nixon*, 418 U.S. 683 (1974) (unanimous opinion); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (same); *cf. Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (split court produced six different written opinions); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (case resulting in three separate opinions); *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971) (per curiam opinion of the Court with seven separate concurring and dissenting opinions).

114 *See* Strauss, *The Place of Agencies*, *supra* note 12, at 599–601, 641–42.

115 *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”).

Chief Justice of the United States from 1941 to 1946, was a particularly gifted vote gatherer. Instead, from 1937 to 1942, President Roosevelt had the ability to staff the Supreme Court with six Justices who shared his vision of the scope of federal power.¹¹⁶ Indeed, Chief Justice Stone is neither particularly well regarded, nor particularly well remembered, as a jurisprudential thinker and leader. The same is true of Truman's appointee to the Chief Justice's seat, Fred M. Vinson, who served in a highly undistinguished fashion from 1946 to 1953.¹¹⁷

The relevant point here is that a Chief Justice's power of persuasion will almost certainly prefigure his ability to shape and control the direction of the law. A Chief Justice who enjoys a reliable working majority on the Supreme Court enjoys the luxury of "preaching to the choir," and his success in

116 See generally NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) (detailing Roosevelt's Court appointees and their respective visions of federal power).

117 Justice Felix Frankfurter famously—and somewhat cruelly—quipped that Chief Justice Vinson's unexpected death from a heart attack was the first indication that Frankfurter had ever had of the existence of God. See RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 656 (1976) ("In view of Vinson's passing just before the *Brown* reargument, Frankfurter remarked to a former clerk, 'This is the first indication I have ever had that there is a God.'"); Philip Elman, *The Solicitor General's Office, Justice Frankfurter, and Civil Rights Litigation, 1946–1960: An Oral History*, 100 HARV. L. REV. 817, 840 (1987) (reporting Frankfurter's exact quote as "Phil, this is the first solid piece of evidence I've ever had that there really is a God."); see also Carlton F.W. Larson, *What if Chief Justice Fred Vinson Had Not Died of a Heart Attack in 1953?: Implications for Brown and Beyond*, 45 IND. L. REV. 131, 131–32 (2011) (noting that historians have frequently argued that Chief Justice Vinson would not have led the Court to a unanimous decision in *Brown* and that he possibly would have voted to retain segregated schools). Justice Frankfurter also issued an ironic statement at the time of Vinson's death: "Chief Justice Vinson's death comes as a great shock to me." *Id.* at 132 n.13 (quoting JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 3 (2006)) (internal quotation marks omitted). As Professor Larson aptly notes, "Frankfurter's contempt for Vinson was rarely far from the surface." *Id.*; see also Elman, *supra*, at 840 ("Frankfurter said to me, 'I'm in mourning,' sarcastically.").

Perhaps the "greatest" legacy of the Vinson Court was its willingness to sustain security-based incursions on civil rights and liberties in the name of fighting communism. See, e.g., *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (affirming the conviction of petitioners over their First Amendment challenge because the majority concluded that the mere advocacy of communist doctrines constituted a "clear and present danger" to the federal government's survival, notwithstanding the absence of any record evidence to support this conclusion); see also Wells, *supra* note 26, at 118–33 (analyzing *Dennis* in detail). Chief Justice Vinson personally authored the plurality opinion for the Court sustaining the Smith Act's prohibitions on advocacy of communism against a robust First Amendment challenge. *Dennis*, 341 U.S. at 510–11. Another major accomplishment in Vinson's service as Chief Justice was his personal, herculean effort to ensure that the Rosenbergs would be executed on time, and on schedule, after Justice Douglas issued a temporary stay in the case; Vinson recalled the members of the Supreme Court from the summer recess to Washington, D.C., on an emergency basis, in June 1953, to consider whether Justice Douglas's stay should be lifted. See Joseph L. Rauh, Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 225 (1990).

advancing a particular vision of the Constitution reflects, at least in part, his presence as a member in good standing of the incumbent majority voting bloc—nothing more and nothing less. And, yet, some Chief Justices have been able to persuade successive appointees of the opposition political party to subscribe to their vision of the Constitution. Chief Justice John Marshall undoubtedly provides the best example of this phenomenon. The intrinsic weakness of the tools of the office will be most apparent when the Chief Justice finds himself regularly in the minority.

By way of contrast, a Chief Justice who enjoys a reliable working majority on the Court might seem to be more persuasive than he really is—again, the “preaching to the choir” effect in action. For example, Chief Justice Earl Warren inherited a Supreme Court comprised of members who shared his views about the proper scope of the Fourteenth Amendment and the Bill of Rights. So, it should not be particularly surprising that he was able to reliably muster majorities in cases like *Mapp v. Ohio*¹¹⁸ and *Reynolds v. Sims*.¹¹⁹

It also bears noting that a great deal of jurisprudential distance separated the most liberal of the Roosevelt, Truman, and Eisenhower appointees, such as Justices Black, Douglas, Warren, and Brennan, from more conservative members of the Court during this period, such as Justice Frankfurter, Chief Justice Vinson, and later, Justices Minton, Stewart, and Harlan. Nevertheless, with these important caveats, Chief Justice Warren generally enjoyed a fairly reliable working majority on the Court, which meant, in practice, that his leadership skills in many decisions were probably less important than they would have been had his views fallen outside the mainstream of the Supreme Court as a whole.

One should take care, however, not to overstate this point. Chief Justice Warren’s ability to rally a unanimous 9-0 Court in *Brown*¹²⁰ required considerable persuasive effort—and skill—given the presence of several members of the Court who were not at all sympathetic to vigorous enforcement of the Equal Protection Clause¹²¹ in the context of public schools or, for that matter, more generally. Thus, while garnering a simple majority in *Brown* was not a heavy lift, gathering and leading a unanimous Court in support of a strong opinion—an opinion that famously declared that “[s]eparate educational facilities are inherently unequal,”¹²² and, accordingly, that “in the field of public education the doctrine of ‘separate but equal’ has no place”¹²³—represents a remarkable display of judicial leadership.

This general dynamic also describes the Rehnquist Court. Although it is certainly true that Justices O’Connor and Kennedy controlled the outcomes of most closely divided cases, Chief Justice Rehnquist could usually rely on

118 367 U.S. 643 (1961).

119 377 U.S. 533 (1964).

120 *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

121 U.S. CONST. amend. XIV, § 1 (“No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

122 *Brown*, 347 U.S. at 495.

123 *Id.*

the support of at least three other members of the Court. Accordingly, his ability to command a majority rested less on persuasion than it would have if the Supreme Court's membership had been of a less strongly conservative cast.

However, counterexamples do exist. For example, although Chief Justice John Marshall joined a Supreme Court bench heavily staffed with Federalists who supported a vigorous and effective national government, he was the last Federalist Party nominee to the Supreme Court for literally two decades.¹²⁴ A succession of Democratic-Republican Party¹²⁵ Presidents followed John Adams, including Jefferson, Madison, and Monroe. Accordingly, new appointees to the Supreme Court and the lower federal courts were presumably not as strongly committed to protecting the authority of the federal government as was Chief Justice Marshall.

Yet, somehow, the appointment of Jeffersonian nominees did not seem to alter or shake the Supreme Court's role as the principal defender of federal authority. *McCulloch v. Maryland*,¹²⁶ for example, provided a highly expansive gloss on the scope of the Article I, Section 8 enumerated powers in general, and on the Necessary and Proper Clause in particular.¹²⁷ *Gibbons v. Ogden*,¹²⁸ an even later case, provides a second example; the decision established a broad scope of application for the federal preemption doctrine with

124 Technically, he was the *last* Federalist Party appointee to the Supreme Court of the United States. John Adams's son, John Quincy Adams, was at the time of his selection as President by the U.S. House of Representatives in 1825, not a member of the Federalist Party, but rather a member of the Democratic-Republican Party (which shattered after the election of 1824 and the bitter Adams/Jackson rivalry for the presidency). In fact, the Federalist Party last fielded a presidential candidate in the 1816 national election and dissolved completely in 1820. See REEVE HUSTON, *LAND AND FREEDOM: RURAL SOCIETY, POPULAR PROTEST, AND PARTY POLITICS IN ANTEBELLUM NEW YORK* 57 (2000); DAVID TORBETT, *THEOLOGY AND SLAVERY: CHARLES HODGE AND HORACE BUSHNELL* 67 (2006). With the demise of the Federalist Party in 1820, the presidential election of 1824 featured a four-way race among rival members of the Democratic-Republican Party, with none of the candidates receiving the constitutionally required majority in the Electoral College. In the end, the House of Representatives selected Adams over Andrew Jackson, even though Jackson had won both the most popular votes and a plurality of Electoral College votes. LARRY J. SABATO, *A MORE PERFECT CONSTITUTION* 294 n.21 (2007); see also SHAW LIVERMORE, JR., *THE TWILIGHT OF FEDERALISM: THE DISINTEGRATION OF THE FEDERALIST PARTY, 1815–1830*, at 263–65 (1962) (detailing the fall of the Federalist Party).

125 JOHN H. ALRDICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 68–95 (1995) (discussing the formation and principles of the Democratic-Republican Party, co-founded by Thomas Jefferson and James Madison, and today considered the forerunner of the contemporary Democratic Party).

126 17 U.S. (4 Wheat.) 316 (1819).

127 *Id.* at 421 (“Let the end be legitimate, let it be within the scope of the [C]onstitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the [C]onstitution, are constitutional.”).

128 22 U.S. (9 Wheat.) 1 (1824).

respect to regulations affecting the instrumentalities of interstate and international commerce.¹²⁹

At the time John Marshall became the third Chief Justice of the United States in 1801, the Supreme Court had six seats (the Chief Justice and five Associate Justices) and all were held by Federalist Party appointees.¹³⁰ A Congress controlled by Jeffersonians added a seventh seat in 1807.¹³¹ By 1812, Presidents Jefferson and Madison had named *five* of the six Associate Justices—Johnson (1804), Livingston (1807), Todd (1807), Duvall (1811), and Story (1812).¹³² Thus, with the appointment of Justice Story in 1812, Chief Justice John Marshall was one of only two remaining Federalist Party appointees serving on the Supreme Court.¹³³ In light of the ocean separating the views of Jefferson and Madison, on the one hand, and Marshall, on the other, regarding the proper scope of federal authority, one would have expected to see Chief Justice Marshall increasingly marginalized, perhaps to the point of irrelevance in 1812.

This, of course, did not happen. One could posit an extraordinarily unlucky string of Supreme Court picks by Presidents Jefferson, Madison, and Monroe, but this explanation seems too facile. Given the controversy of the “midnight judges” appointed at the bitter end of the Adams Administration after Vice President Thomas Jefferson and his Democratic-Republicans had defeated President John Adams in the national presidential election of 1800, one would have thought that the Democratic-Republican Party’s members would have used a screening process for judicial nominees that would have made the Department of Justice under either Alberto Gonzalez or Ed Meese blush. It is simply not plausible to posit an extraordinary run of bad luck—six bad picks (counting Associate Justice Thompson, appointed by Monroe in 1823).¹³⁴

Instead, it seems clear that Chief Justice Marshall was able to co-opt the Democratic-Republican appointees; he brought them around from the Democratic-Republican vision of a highly limited, subordinate, federal government to one that embraced a strong, powerful, and effective set of national governing institutions. It also probably helped that between 1812, with the

129 *Id.* at 195, 209. Ironically, Justice William Johnson, a Democratic-Republican appointee of President Jefferson, authored an even more expansive vision of federal preemption, suggesting that even if the Coasting Act did not exist, the New York state law granting a monopoly for interstate passenger traffic would be unconstitutional.

130 See *Members of the Supreme Court of the United States*, SUPREME COURT OF THE U.S., www.supremecourt.gov/about/members_textl.aspx (last visited Jan. 8, 2014); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1721 (2d ed. 1988) (documenting these appointments).

131 See TRIBE, *supra* note 130, at 1721; see also Act of February 24, 1807, ch. 16, § 5, 2 Stat. 420, 421 (“That the supreme court of the United States shall hereafter consist of a chief justice, and six associate justices, any law to (the) contrary notwithstanding.”).

132 TRIBE, *supra* note 130, at 1721.

133 The other was Associate Justice Bushrod Washington, appointed to the Supreme Court by President John Adams in 1798. See *id.*

134 See *id.*

appointment of Justice Story on February 3, 1812, and 1823, with the appointment of Justice Thompson on September 1, 1823—a period of over eleven years—the membership of the Supreme Court remained unchanged.¹³⁵ Five members of the Supreme Court, a comfortable working majority, served together from 1807, with the addition of Justice Todd in the newly created seventh seat, to 1823—a span of sixteen years.¹³⁶

Given the institutional weakness of the Supreme Court in the early years of the Republic, and the fact that Marshall himself was a somewhat controversial holdover appointee from the first presidential administration to be electorally repudiated, it is nothing short of amazing that Marshall was so successful in bringing his colleagues to share his vision of a powerful and effective central government. His success, however, came not because of the perquisites of being Chief Justice, but rather despite the near-total absence of such perquisites.

III. RECONSIDERING THE COSTS AND BENEFITS OF DECENTRALIZING JUDICIAL POWER AND POTENTIAL CONSTITUTIONAL MEANS OF CREATING GREATER CONCENTRATIONS OF FEDERAL JUDICIAL POWER IN FEWER HANDS

One should note that although the federal judicial system has been designed and operated on a decentralized basis since its inception in 1789, no constitutional imperative for this structure exists that requires this arrangement to continue going forward. Either Congress or the Supreme Court itself could attempt to create structures, practices, and institutions that would consolidate judicial authority within the federal government in fewer hands and permit its exercise to be more carefully superintended by some sort of central authority.

National courts defined by subject matter, for example, could remove certain kinds of cases from the regular, generalist federal courts and also from the state court systems. To some extent, the Tax Court and the Court of Claims reflect and incorporate this approach,¹³⁷ as do the U.S. Court of Appeals for the Federal Circuit and the U.S. Court of Appeals for the District of Columbia Circuit.¹³⁸ The Federal Circuit enjoys responsibility for appeals from a variety of national federal courts with jurisdiction over particular subject matter, such as tax, international trade, and patents,¹³⁹ and the D.C. Circuit almost always enjoys jurisdiction to hear petitions for review of federal agency action (although as often as not, this jurisdiction is concurrent with other courts of appeals, rather than exclusive).¹⁴⁰

135 See *Supreme Court Justices' Roots*, USA TODAY, http://usatoday30.usatoday.com/news/graphics/supreme_courtline/flash.htm (last visited on Nov. 27, 2013).

136 *Id.*

137 See Pfander, *supra* note 11, at 650–58.

138 See Plager, *supra* note 84, at 854 n.2, 860–62.

139 *Id.* at 854–55, 858–60.

140 See Judith Resnik, “*Uncle Sam Modernizes His Justice*”: *Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 GEO. L.J. 607, 637 (2002)

In addition to these mechanisms, Congress could create a new national appellate court with a mission of centralization and error correction. This idea is hardly original to me; at various times and at regular intervals, public law scholars have suggested that Congress create a national Supreme Court of Appeals to ensure uniformity of federal law in cases that do not raise sufficiently serious questions of constitutional, statutory, or treaty law to merit review and consideration by the Supreme Court of the United States.¹⁴¹ Most recently, a group of public law scholars concerned with the potential ill effects of the life tenure enjoyed by members of the Supreme Court, led in large part by Professor Paul Carrington, have renewed calls for creation of a judicial entity of this sort.¹⁴² A central national appellate court with the power to review and decide appeals from the various courts of appeals, and perhaps also from the state supreme courts, would have a powerful centralizing effect and could, at least in theory, considerably reduce the problem of non-uniform federal law.

The possibility of using fairly simple bureaucratic reforms to centralize judicial authority, perhaps at the Supreme Court level, could also reduce the decentralization of the federal courts. Professor David S. Law has written cogently on how such devices operate in the context of the Japanese judicial system.¹⁴³ Law notes that simple administrative controls, such as a central bureaucratic structure that oversees the hiring and placement of law clerks, can produce powerful centralizing effects on the operation of a national judicial system.¹⁴⁴

Although Article III, Section 1 guarantees that federal judges will enjoy life tenure and salary protection,¹⁴⁵ the Constitution does not require Congress to provide any particular staffing or administrative support. If Congress wished to create a centralized Office of Personnel Management entity within the federal courts, controlled by the Chief Justice, and to vest this entity with the selection of law clerks and perhaps even administrative assistants, one would be hard pressed to argue that such a “reform” violates any express

(“Indeed, because of the jurisdictional constriction after the 1973 reorganization, the D.C. Circuit increasingly is seen as a court specializing in review of administrative actions.”); Revesz, *supra* note 84, at 1133 (noting the specialized subject matter jurisdiction of the D.C. Circuit).

141 See, e.g., FED. JUDICIAL CTR., REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972) (recommending a National Court of Appeals to screen petitions and decide cases of conflicts between the various circuits); cf. Charles L. Black, Jr., *The National Court of Appeals: An Unwise Proposal*, 83 YALE L.J. 883 (1974) (arguing that the Federal Judicial Center’s recommendation of a National Court of Appeals should be considered a last resort).

142 See REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006).

143 David S. Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545, 1549 (2009).

144 *Id.* at 1556–86.

145 See U.S. CONST. art. III, § 1.

constitutional prohibition on the structure of the federal judiciary.¹⁴⁶ So too, the Chief Justice, or the national Judicial Conference, could exercise broad control over the assignment of cases to particular courts or perhaps even to particular judges, if authorized to do so by statute.¹⁴⁷

Through a combination of direct and indirect controls, substantial oversight and control mechanisms over the federal judicial system could be created and deployed that would render the operation of the federal judicial system much more centralized. And, although the actual power to decide a given case might remain widely dispersed, with sufficient incentives and controls, the Chief Justice, the Judicial Conference, or both could enjoy broader authority to influence, if not control, the operation of the federal courts. To take an easy example, if Congress authorized the Chief Justice or the Judicial Conference to review judicial performance on an annual basis and make positive salary adjustments, writing opinions that seem persuasive to the Chief Justice (or the Judicial Conference) might easily become a higher institutional priority for at least some members of the federal judiciary.

The Constitution only protects against diminution of a judge's salary; it does not require that all judges receive identical raises in salary and benefits going forward.¹⁴⁸ So too, the Constitution protects against removing a judge from office, save via the cumbersome impeachment process,¹⁴⁹ but it does not protect any judge's workload from reassignment, either directly and individually, as happens when a judicial council finds that a judge has engaged in misconduct, or on a court-wide basis, as happens when Congress tinkers with the jurisdiction of the lower federal courts or the appellate jurisdiction of the Supreme Court.¹⁵⁰

Professor Law observes that “[p]olitical control over judicial behavior need not be overt” and that “[p]olitical actors can influence a court's behavior directly or indirectly by manipulating the composition of the court, the resources available to members of the court, and the range of strategic options available to the court as an institution.”¹⁵¹ Moreover, he astutely

146 See David S. Law, *How to Rig the Federal Courts*, 99 GEO. L.J. 779, 826–33 (2011) (arguing that the resources needed by the federal courts, like law clerks, “can be manipulated more effectively and easily than the judges themselves” due to a lack of any explicit constitutional prohibitions on the structure of the federal courts).

147 See *id.* at 781–84, 798–803, 832–34; see also Law, *supra* note 143, at 1556–64, 1579–86 (discussing various administrative structures and practices, including assignment of judges and law clerks within the Japanese judiciary, that have the effect of centralizing control over the Japanese courts in a small group of judicial bureaucrats).

148 See U.S. CONST. art. III, § 1.

149 See *Nixon v. United States*, 506 U.S. 224 (1993) (describing the requirements of the impeachment process).

150 See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (holding that the Court cannot issue a judgment in a case once Congress has removed the Court's jurisdiction to hear such cases); see also William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229, 267–69 (1973) (describing the power of Congress to alter the jurisdiction of federal courts).

151 Law, *supra* note 143, at 1587.

posits that “[p]olitical actors need not engage in sustained and repeated efforts to influence the direction of a court if power on the court itself is concentrated in the hands of a single individual who is subject to replacement at relatively frequent intervals.”¹⁵²

In Japan, consolidating oversight of the entire Japanese judiciary in the Chief Justice and General Secretariat has the effects of severely cabining judicial independence and rendering the exercise of judicial control subject to centralized forms of oversight and control.¹⁵³ Unlike the Chief Justice of the United States, the Chief Justice of the Supreme Court of Japan possesses “truly awesome” administrative powers over the entire judicial system, including effective control of assignment of lower court judges to particular benches and substantial control over new appointments to the Supreme Court itself.¹⁵⁴ As Law puts the matter, “[t]he Japanese judiciary may be a bureaucracy, but it is also a highly disciplined one in which power is concentrated to an unusual degree in the hands of one person [namely, the Chief Justice].”¹⁵⁵

Simply put, if Congress so desired, there are no obvious constitutional impediments to the adoption of many of the devices presently at work in Japan. For example, if the Chief Justice possessed the power to assign particular Article III judges to specific district and circuit courts, he could essentially reshape those courts to suit his ideological and jurisprudential preferences. Centralized control over the hiring and assignment of law clerks could also profoundly affect the day-to-day operation of both the federal circuit and district courts. Congress could also tinker with the appellate jurisdiction of the lower federal courts and the Supreme Court to better centralize decisional power. Congress might also adopt procedural rules designed to streamline the exercise of judicial power into fewer hands than under the present system.

To be sure, constitutional objections to the adoption and enforcement of such schemes exist, but they sound in general separation-of-powers terms, rather than in the express language of Article III itself. And the Supreme Court has been remarkably open to Congress tinkering with the power and authority of the federal courts, permitting Congress to assign judges non-Article-III tasks¹⁵⁶ and also allowing Congress to reallocate to non-Article-III tribunals core functions of the Article III courts.¹⁵⁷ Accordingly, as fantastic

152 *Id.* at 1589–90.

153 *See id.* at 1590–91.

154 *Id.* at 1591–92.

155 *Id.* at 1593.

156 *See* *Mistretta v. United States*, 488 U.S. 361, 412 (1989); *Morrison v. Olson*, 487 U.S. 654, 660–63, 661 nn.3 & 5, 666–67 (1988); *see also* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 417–18 (1997).

157 *See* *CFTC v. Schor*, 478 U.S. 833, 835–39, 858–59 (1986); *Dames & Moore v. Regan*, 453 U.S. 654, 659–68, 688 (1981); *see also* Krotoszynski, *supra* note 156, at 472–84 (arguing against the contraction or expansion of the federal judiciary’s duties). *But see* *Stern v. Marshall*, 131 S. Ct. 2594, 2600, 2608–11 (2011) (invalidating on separation of powers

as Professor Law's proposals for "rigging" the federal courts might seem on first consideration,¹⁵⁸ his suggestions strike me as being, for the most part, facially constitutional.

One need not worry unduly, however, about the death of judicial independence or the creation of a true "Super Chief" who wields more direct forms of control over his judicial colleagues. It is virtually unthinkable that Congress would ever use these mechanisms to centralize oversight of judicial authority or that the Chief Justice (or Judicial Conference) would attempt to create and enforce such mechanisms on their own. Again, it bears noting that the federal judicial system has been highly decentralized, by virtue of its design, since the Judiciary Act of 1789 instituted the lower federal courts and created and assigned the statutory judicial duties of members of the Supreme Court of the United States. Although Americans like to claim that we have a written constitution, the truth is considerably more complicated; the text, in many respects, is merely a starting point for our constitutional law, rather than an end point.¹⁵⁹ Longstanding traditions and practices take on the character of constitutional constraint, even though they might not enjoy a firm textual foundation.¹⁶⁰

Consider, for example, the size of the Supreme Court itself. At this point, it seems very unlikely that Congress would modify the size of the Supreme Court's bench. For several generations, and since Reconstruction, the Supreme Court has consisted of nine members—a Chief Justice and eight Associate Justices.¹⁶¹ A nine-member Supreme Court does not enjoy

grounds portions of the Bankruptcy Act and local implementing rules that permitted the adjudication of certain common law claims in bankruptcy courts in which non-Article-III judges preside).

158 See Law, *supra* note 146, at 807–33.

159 See AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION*, at ix–xiii, 13, 19–20 (2012) (arguing that "sound constitutional interpretation involves" analysis of "America's written Constitution and America's unwritten Constitution"). As Professor Amar states the proposition, "[t]he eight thousand words of America's written Constitution only begin to map out the basic ground rules that actually govern our land." *Id.* at ix.

160 See, e.g., LAURENCE TRIBE, *THE INVISIBLE CONSTITUTION* 11–12, 26–29 (2008); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 417–24, 427–30, 432–38, 478–89 (2012) (describing the role of historical institutional practice in constitutional interpretation); James E. Fleming, *We the Unconventional American People*, 65 U. CHI. L. REV. 1513, 1536–39 (1998) (noting that changes in constitutional understanding reflect both continuities and discontinuities, often cloaked in "the myth of rediscovery" and advocating "a theory of interpretation that conceives fidelity to the Constitution as integrity with the moral reading of the Constitution" because "[s]uch a theory can acknowledge change in interpretation without needing to dress it up in the garb of translations of original meaning or transformations of popular sovereignty"); Gillian E. Metzger, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479 (2010) (describing the value of constitutional common law to ordinary administrative law).

161 Congress established the current nine-member bench in 1869 and has not modified it since. Act to Amend the Judicial System of the United States, Pub. L. No. 41-18, ch. 22, § 1, 16 Stat. 44, 44 (1869); see Hessick & Jordan, *supra* note 66, at 665–73 (discussing the

any constitutional mandate; this is simply a result of history, tradition, and practice.¹⁶² And, prior to Reconstruction, the size of the Supreme Court varied, from six members to ten members, with political considerations sometimes motivating Congress to create a new seat (to give a President an appointment to the Supreme Court) or abolishing a seat upon the resignation or death of its current occupant (to deny a President the power of nominating a new Justice).¹⁶³

President Roosevelt's attempt to "pack" the Supreme Court in 1937, however, led to a national dialogue about the use of this expedient as an indirect means of controlling the Supreme Court's exercise of the power of judicial review;¹⁶⁴ even FDR's fellow Democrats were quite unwilling to throw judicial independence under the bus in favor of overt forms of political control over the federal courts.¹⁶⁵ Now, over seventy years later, we have a constitutional custom, or constitutional common law,¹⁶⁶ under which court

variation in the Supreme Court's membership in the nineteenth and twentieth centuries, the reasons for this variation in the size of the Supreme Court, as well as unsuccessful efforts to modify the number of Supreme Court seats during this period). The Supreme Court has varied in size from six members (at the low end) to ten members (at the high end). Richard H. Fallon, Jr., *Marbury and the Constitutional Mind: A Bicentennial Essay on the Wages of Doctrinal Tension*, 91 CAL. L. REV. 1, 17 n.67 (2003) ("After the first judiciary act provided that the Court would have six members, the number of Justices reached a high of ten in 1863, before being reduced briefly to seven and then settling at the current nine in 1869." (citations omitted)).

162 See Hessick & Jordan, *supra* note 66, at 664–71; see also *id.* at 707 ("How large should the Supreme Court be? There is no single answer. Setting the size of the Supreme Court is a difficult task that depends on how we perceive and define the role of that institution."); John V. Orth, *How Many Judges Does It Take to Make a Supreme Court?*, 19 CONST. COMMENT. 681, 684–85 (2002) (discussing the question of the optimal size of the Supreme Court); Louis Michael Seidman, *Acontextual Judicial Review*, 32 CARDOZO L. REV. 1143, 1154 n.51 (2011) ("The Court initially consisted of six Justices. A seventh Justice was added in 1807, and two more Justices were added in 1837. In 1863, a tenth Justice was added, but in 1866, the size was reduced to six. In 1869, the size was again increased to nine, where it has remained.").

163 Hessick & Jordan, *supra* note 66, at 665–67.

164 See WILLIAM E. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL* 231–38 (1963) [hereinafter LEUCHTENBURG, *THE NEW DEAL*] (noting congressional opposition to Roosevelt's plan, even among those "who agreed with his objections to recent decisions [but] still wished to preserve the dignity of the bench"); WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 84–85, 96–97, 112–21, 142–43, 160–62, 216–20 (1995) [hereinafter LEUCHTENBURG, *THE SUPREME COURT REBORN*] (describing the flood of citizen proposals for Roosevelt to intervene in the Court's decision making); William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347.

165 See LEUCHTENBURG, *THE NEW DEAL*, *supra* note 164, at 236–39 (describing the opposition to the Court plan as destroying "the unity of the Democratic Party"); LEUCHTENBURG, *THE SUPREME COURT REBORN*, *supra* note 164, at 132–62 (chronicling the history of the Court packing plan).

166 See Metzger, *supra* note 160, at 479; Henry P. Monaghan, *The Supreme Court 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 1–3 (1975); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 877–80 (1996).

packing is essentially considered a wholly illegitimate means of seeking to alter existing Supreme Court doctrine. No serious person, in either major political party, suggests court packing as a means of overturning disliked Supreme Court decisions, whether the decision in question is *Roe v. Wade*¹⁶⁷ or *Citizens United*.¹⁶⁸

We have decided to fight over who gets to sit in one of the nine seats, and to conduct a no-holds-barred contest over nominations to the Supreme Court, but not to tinker with the Supreme Court's structure itself. So too, the Office of Chief Justice has not accumulated a bevy of direct and indirect controls over the other members of the Supreme Court or the lower federal courts for precisely the same reason: neither Congress nor successive Chief Justices have sought to remake the office on the model of the President, the Speaker, or the Majority Leader.

Nor should this come as a surprise. To a tremendous degree, courts in general operate based on precedent—and this respect for precedent seems to apply as much to procedure and structure as it does to substantive law. Given the model of the great Chief Justice John Marshall, who faced the seemingly impossible task of leading a bench staffed almost entirely with Justices selected by the opposition political party, it would constitute an admission of defeat for a modern Chief Justice to seek to augment the formal powers of the office with direct forms of oversight over his colleagues (whether on the Supreme Court or on the lower federal courts). To even attempt such a task would be to concede that one could not succeed using tools available to John Marshall.

The other structural impediments, of course, would be the other Justices and federal judges themselves, who would be expected to oppose with vigor any attempted power grab by an incumbent Chief Justice—with or without the blessing of Congress. In fact, when modern Chief Justices have attempted to assert themselves, they often have encountered substantial push back from their colleagues. *The Brethren* is rife with examples of the Associate Justices declining to follow the lead of Chief Justice Warren Burger, on matters as picayune as the seats used on the Supreme Court bench.¹⁶⁹ It is doubtful that Associate Justices would simply acquiesce in unilateral assertions of authority by a future Chief Justice. Moreover, because the exercise of Article III power remains a collegial endeavor—one must garner and keep votes for a particular outcome and a particular set of reasons for that out-

167 410 U.S. 113 (1973).

168 *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

169 See BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN* 28–29, 64–66, 176–80, 218–20 (1979). For example, Chief Justice Burger unilaterally decreed that new chairs would be installed on the Supreme Court's bench, because the existing chairs, a mélange of styles and heights, “looked unseemly, disorderly.” *Id.* at 30. This unilateral effort was successfully resisted by his colleagues, and provides a small but telling example of the limits on the Chief Justice's unilateral power to act for the institution, even in a matter as picayune as redecoration and decor.

come¹⁷⁰—a Chief Justice who alienated his colleagues might well find his influence in conference substantially diminished.¹⁷¹

Thus, although I agree with Professor Law that there are structural changes that could centralize authority within the federal courts,¹⁷² I am quite doubtful that either Congress or an ambitious Chief Justice would be seriously tempted to use them. We have a decentralized federal judicial system and, given this fact, we must believe, whether expressly or merely by implication, that such a system will produce good results more reliably than a system in which judicial power is highly concentrated. The current system is not an accident of history, but rather the natural and predictable outcome of an institutional design that maximizes the impact and independence of each and every Article III judge.

The current system both requires and rewards consensus, while at the same time rendering the achievement of consensus more difficult by denying any one person, or even one court (at least below the Supreme Court level), the power to issue an authoritative ruling that binds other actors within the system. Moreover, the approach is highly inefficient and provides few sanctions against idiosyncratic decision making.¹⁷³ Yet, when these disparate elements all reason their way to a common conclusion on the same legal, or constitutional, question, the political and practical effect of this unity is potentially tremendous. On those few occasions when the federal judiciary speaks with one voice, the political branches of government would have to think twice before disregarding the judgment of the federal courts.

170 See Michael C. Dorf, *Courts, Reasons, and Rules*, 19 QUINNIPIAC L. REV. 483, 493 (2000); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633 (1995).

171 See LAWRENCE S. WRIGHTSMAN, JUDICIAL DECISIONMAKING: IS PSYCHOLOGY RELEVANT? 110 (1999) (arguing that “[a]s in all endeavors, the personality of the judge affects his or her ability to influence” and positing that one “who gets along with colleagues, who is likeable and skilled in interpersonal relations . . . gains influence” (citation omitted)); FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE 160–63, 231 (1991) (discussing the importance of rules and practices in allocating power within institutions and in sustaining support and legitimacy for the work of juridical bodies tasked with giving formal reasons for their decisions).

172 Law, *supra* note 143, at 781–84, 833–34.

173 For example, even if six courts of appeals have answered a particular question in a certain way, there is no real cost to a seventh court of appeals deciding the question differently. One court of appeals does not have to answer to another sister circuit court; moreover, if a majority of a panel in the seventh court of appeals to decide a particular question believes that the other courts have erred, opening up a circuit split is one of the best ways to draw attention from the Supreme Court of the United States. Dissent within the lower federal courts has a powerful signaling effect; moreover, judges on the lower federal courts are well aware of this phenomenon and use it both systematically and strategically.

IV. GROUP DECISION MAKING DYNAMICS AND THE POTENTIAL BENEFITS OF DECENTRALIZED JUDICIAL POWER

Having canvassed the constitutional, political, and practical reasons that support the creation and maintenance of a decentralized judiciary, an important question remains to be asked and (hopefully) answered: As an empirical matter, do decentralized collegial institutions tend to make better decisions than single deciders or groups that deliberate collectively and in real time? In other words, should we expect collegial bodies, operating independently of each other, to do a better job of considering relevant factors, ignoring irrelevant factors, and avoiding the obvious trap of bias or prejudgment of important questions of law and fact? Although the available evidence is mixed, in general creating a plethora of diverse and independent decision makers should improve the quality of the decisional process and, by implication, the quality of the decisions themselves.

A. *Group Decision Making Dynamics*

Perhaps the most well-known group decision making bias, “groupthink,” describes the tendency of members of “cohesive in-group[s]” to so strongly “striv[e] for unanimity” that they fail to “realistically appraise alternative courses of action.”¹⁷⁴ Professor Irving Janis’s iconic study examined United States government policy “fiascoes” of the twentieth century,¹⁷⁵ exploring the role of groupthink within the groups responsible, and comparing these “fiascoes” to more successful policy decisions.¹⁷⁶ Using these case studies, Janis deduced a theoretical model of the dynamics of groupthink.

Janis identifies four “antecedent conditions” that are likely to be present where groupthink occurs.¹⁷⁷ First, and most importantly, there must be some level of cohesiveness¹⁷⁸ within the group.¹⁷⁹ Second, the more that groups are “insulated,” lacking “opportunit[ies] for the members to obtain expert information and critical evaluation from others within the [larger] organization,” the more likely they are to fall into groupthink.¹⁸⁰ The third condition facilitating groupthink is a “lack of a tradition of impartial leadership” in the group.¹⁸¹ Finally, groups lacking “norms requiring methodical procedures for dealing with the decision-making tasks” are more prone to

174 JANIS, *GROUPTHINK*, *supra* note 17, at 9.

175 *See id.* at 14–130, 198–241 (discussing the role of groupthink in various policy decisions by group decision makers, namely those responsible for the “Bay of Pigs” invasion, the Korean War, the failure to adequately defend or prevent the Pearl Harbor attack, the Vietnam War, and the Watergate Scandal).

176 *See id.* at 132–72 (discussing the Cuban Missile Crisis and the formation of the Marshall Plan).

177 *See id.* at 176–77.

178 *See id.* at 245 (defining group cohesiveness as the “degree to which the [group] members value their membership in the group and want to continue to be affiliated”).

179 *Id.* at 176.

180 *Id.*

181 *Id.*

groupthink.¹⁸² Each of the last three conditions “represents the *absence* of a potential source of organizational *constraint* that could help to prevent the members of a cohesive policy-making group from developing a norm of indulging in uncritical conformity.”¹⁸³ Another possible contributing factor is the existence of a shared background and ideology common to group members.¹⁸⁴

Groupthink is characterized by eight “symptoms,” which are divided into three types: overestimations of the group’s power and morality, closed-mindedness, and pressures toward uniformity.¹⁸⁵ Members of groups engaging in groupthink tend to overestimate their own groups, entertaining an “illusion of invulnerability,” resulting in “excessive optimism” and encouraging extreme risk taking; they also tend to possess an “unquestioned belief in the group’s inherent morality, inclining the members to ignore the ethical or moral consequences of their decisions.”¹⁸⁶ The closed-mindedness characteristic of groupthink manifests as “[c]ollective efforts to rationalize in order to discount warnings” or similar information that might cause the group to second-guess the decision it intends to make; it also manifests as a low view of the intellect or value of “enemy leaders” (obviously, this characteristic is derived from studies of groups engaged in foreign policy making).¹⁸⁷ Pressures toward uniformity manifest as “[s]elf-censorship” by group members inclined to voice opinions contrary to the “apparent group consensus,” a “shared illusion of unanimity concerning judgments conforming to the majority view,” “[d]irect pressure” on group members who voice “strong arguments against any of the group’s stereotypes, illusions, or commitments” to stifle their disloyal dissent, and “[t]he emergence of self-appointed mindguards,” who will protect the group from information that might disrupt consensus.¹⁸⁸

The results of groupthink are ineffective performance by group members and a high likelihood that the group as a whole will “fail to obtain [its] collective objectives as a result of concurrence-seeking.”¹⁸⁹ These consequences are likely where a group displays most or all of the symptoms of

182 *Id.* at 177.

183 *Id.* at 249.

184 *Id.* at 239.

185 *Id.* at 174–75.

186 *Id.* at 174.

187 *Id.*

188 *Id.* at 175; *see also id.* at 256–59 (exploring psychological explanations for each of the eight symptoms). Groupthink “might be best understood as a mutual effort among the members of a group to maintain emotional equanimity in the face of external and internal sources of stress arising when they share responsibility for making vital decisions that pose threats of failure, social disapproval, and self-disapproval.” *Id.*

189 *See id.* at 175 (identifying seven discrete consequences of groupthink as “[i]ncomplete survey of alternatives[,] . . . [i]ncomplete survey of objectives[,] . . . [f]ailure to examine risks of preferred choice[,] . . . [f]ailure to reappraise initially rejected alternatives[,] . . . [p]oor information search[,] . . . [s]elective bias in processing information at hand[,] . . . [and f]ailure to work out contingency plans”).

groupthink.¹⁹⁰ Although groupthink, in itself, may produce such consequences, it can also worsen the impact of other points of error in group deliberation.¹⁹¹

Groupthink can be prevented or its effects mitigated when one or more of several conditions are present. Elite groups whose cohesiveness is rooted in the shared status of high competence among individual members are less likely to engage in groupthink (although they still can do so), because dissent and disagreement among members are more likely to be tolerated.¹⁹² Moderate heterogeneity among members of a group (in terms of social background and ideology) may reduce the likelihood of groupthink by enabling exploration of more alternative viewpoints.¹⁹³ Janis also recommends dispersing and decentralizing decision making as a means of reducing the likelihood and effects of groupthink.¹⁹⁴ Further, a system forcing groups to reconsider their decisions after reaching a preliminary consensus may mitigate the effects of groupthink.¹⁹⁵

The structure of the federal courts rather obviously fits Janis's model of independent, highly dispersed, decentralized decision making. The lack of intercircuit precedent and any precedential value for district court opinions also has the effect of maximizing the opportunities for reconsideration of the same legal question by different decision makers.

Moreover, the fact that judges have always been drawn from the local legal communities in which they sit also helps to improve the quality of the deliberative process.¹⁹⁶ Socio-legal communities differ within the United States; a person selected for appointment to the federal bench from the Oklahoma state bar is likely to hold very different moral, political, and jurisprudential views than a judicial nominee drawn from the Oregon state bar. The heterogeneity of the federal judiciary, because of its local presence within each of the states and the practice of appointing local lawyers to the local federal courts, presents another potential strength of the current federal court structure. If all federal court judges were instead drawn from a national pool and sat together in the same city, the federal bench would lose the very wide variety of perspectives that obtains under the current system.

Another set of related group decision-making phenomena are known as choice shift, risky shift, and group polarization. Group polarization is the tendency of individuals in deliberating groups to "predictably move toward a more extreme point in the direction indicated by the members' predelibera-

190 *Id.*

191 *Id.* at 197.

192 *See id.* at 247–48.

193 *Id.* at 250.

194 *Id.* at 264–65 (recommending a system of multiple "independent policy-planning and evaluation groups" working on the same problem, as well as splitting up the main policy making group into smaller groups that work independently and convene periodically).

195 *See id.* at 270–71.

196 *See supra* notes 72–75 and accompanying text.

tion tendencies,”¹⁹⁷ while choice shift refers to this same tendency as it manifests in the opinions and decisions of groups as collective entities.¹⁹⁸ The extremeness of a group or individual opinion is defined internally, relative to the initial opinions of group members, rather than by any external or normative measure.¹⁹⁹

There are four primary psychological explanations for choice shifts in deliberative groups.²⁰⁰ The first, “social comparison theory,” holds that in deliberating groups, members with relatively moderate initial opinions are either *enabled* to adopt the more extreme position they would not have adopted outside of the influence of other group members holding such an extreme position, or else they are *pressured* to do so in order to maintain their reputation within that group.²⁰¹

A second explanation, persuasive arguments theory, looks to the content of arguments presented during deliberation rather than the social mechanisms at work within groups.²⁰² This theory holds that when a group is predisposed in a certain direction, the pool of arguments among the group members will be disproportionately weighted in that direction. Thus, the group members will be exposed to more and better arguments on one side, biasing their opinions in that direction.²⁰³

The third explanation for choice shifts, self-categorization theory, “explains group polarization on the basis of the actors’ conformity to an extreme norm or prototypical position of the group.”²⁰⁴ The prototypical position is one defined by what the group has in common, “*in contrast to other relevant out-groups.*”²⁰⁵ Essentially, group members who define themselves as such work to close the distance between their own view and the “prototypical” group view.²⁰⁶ Because the prototypical view is defined by how it *differs* from views of other groups, it is more likely to be extreme; thus the in-group members tend to move toward a more extreme position.²⁰⁷ A fine distinction between self-categorization theory and social comparison theory is that self-categorization theory’s mechanism for in-group conformity (and therefore, in many cases, polarization) is “social identification (awareness of one’s

197 Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 74 (2000).

198 *Id.* at 74 n.10.

199 *Id.*

200 See Noah E. Friedkin, *Choice Shift and Group Polarization*, 64 AM. SOC. REV. 856, 858–60 (1999) (discussing the four explanations).

201 *Id.* at 858; see also Sunstein, *supra* note 197, at 79–81 (discussing classic experiments exemplifying how deliberation can lead to group polarization, resulting in irrational decision making).

202 Friedkin, *supra* note 200, at 858.

203 *Id.*

204 *Id.* at 859.

205 Craig McGarty et al., *Group Polarization as Conformity to the Prototypical Group Member*, 31 BRIT. J. SOC. PSYCHOL. 1, 3 (1992).

206 Friedkin, *supra* note 200, at 859.

207 *Id.*

social identity as an in-group member) rather than group pressure or social comparison.”²⁰⁸

The fourth choice shift explanation, “social decision schemes,” looks to the initial distribution of opinions among members of a deliberating group, along with the decision rule (e.g., majority rule, most extreme position, median position) utilized by the group, to explain the extent to which the group does or does not polarize.²⁰⁹ This theory utilizes the initial distribution of opinions to “specify the relative influence of the alternative initial positions of group members on an issue.”²¹⁰ A fifth explanation, “social influence network theory,” is essentially the same as social decision schemes theory except, in addition to accounting for the initial distribution of opinions and the decision rule utilized, it also accounts for the relative influence of the particular group members who hold the alternative initial opinions.²¹¹

So called “risky shift” is a particularized instance of choice shift and group polarization, wherein a group, given a conservative and a risky option, chooses the risky option, due to polarization, whereas the individual group members would not have done so before the collective deliberations.²¹² However, this tendency is not unique to risk, and may just as easily pull a group toward a more conservative decision, depending on the initial distribution of opinions within the group and other relevant group dynamics.²¹³

Similar to group polarization, and possibly a mechanism enabling it, “group confirmation bias,” wherein groups “tend to search unduly for information and pay too much attention to arguments that confirm initial hypotheses,” is another problem exacerbated by deliberating groups.²¹⁴ Where a group has a preferred opinion or decision in mind prior to seeking out relevant information and deliberating, group confirmation bias operates in two ways to skew the group’s opinion. First, groups fail to adequately seek infor-

208 Dominic Abrams et al., *Knowing What to Think by Knowing Who You Are: Self-Categorization and the Nature of Norm Formation, Conformity and Group Polarization*, 29 BRIT. J. SOC. PSYCHOL. 97, 99, 116–17 (1990). Abrams presents three conclusions drawn from this study: Group members exert more or less “informational influence”—the extent to which individuals are able to get their group to pay attention to their contributions—in defining in-group social norms based on the extent to which they are perceived as members of that group, as opposed to belonging to different groups; the same holds true for an individual group member’s normative influence within a group—that is, “when group membership is salient only an in-group seems to be effective in applying [normative] pressure” to its members; finally, group members will give less credence to the views of members of other “equal status” groups whose views differ from their own than they will the differing views of individuals who are not identified with any group at all. *See id.*

209 Friedkin, *supra* note 200, at 859.

210 *Id.*

211 *See id.* at 860–72 (discussing social influence network theory in detail).

212 James H. Davis, *Some Compelling Intuitions About Group Consensus Decisions, Theoretical and Empirical Research, and Interpersonal Aggregation Phenomena: Selected Examples, 1950–1990*, 52 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 3, 10 (1992).

213 *See id.* at 10–13 (discussing risky-shift and polarization).

214 Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 538 (2002).

mation that cuts against the preferred opinion or decision.²¹⁵ This tendency is lessened in groups that are heterogeneous, in terms of members' initial preferences.²¹⁶ Second, during deliberation, if some group members already possess information cutting against the preferred position, groups tend to fail to fully consider this information in comparison to how they would consider information tending to confirm the preferred hypothesis.²¹⁷

Another problematic group dynamic, social loafing, holds that "individuals' motivations . . . are diminished when their efforts go towards a group product."²¹⁸ The literature discusses the role of identifiability of an individual's contribution to the group effort²¹⁹ in increasing or decreasing the prevalence of social loafing. Generally, a lack of identifiability increases social loafing in two ways. First, individuals feel that they are able to avoid the negative stigma for loafing that would otherwise attach if their individual effort were isolable and known by others.²²⁰ Second, group members may lack a positive incentive to perform well when they know their individual efforts cannot or will not be recognized.²²¹ However, in cognitive tasks, as opposed to physical group tasks, identifiability has been found to have no impact on loafing where a group is asked to make a decision (group members work equally hard with or without identifiability), whereas when the group is asked merely to give an opinion, decreased identifiability increases social loafing.²²²

Individuals with "sole task responsibility" tend to loaf more where identifiability decreases, as opposed to individuals with "shared task responsibility," whose efforts are less impacted by the presence or absence of identifiability.²²³ Group members who believe that their input will affect a final decision—and therefore are integral to the decision-making process—are less likely to loaf.²²⁴

Another danger of groups is known as "in-group bias," which is the "tendency to evaluate one's own groups more positively in relation to other groups."²²⁵ The bias can be so extreme as to lead in-group members to perceive each and every member of their group as more competent than the

215 Stefan Schulz-Hardt et al., *Biased Information Search in Group Decision Making*, 78 J. PERSONALITY & SOC. PSYCHOL. 655, 658 (2000).

216 *See id.*

217 Seidenfeld, *supra* note 214, at 538.

218 *Id.* at 510–11.

219 *See, e.g.*, Kenneth H. Price, *Decision Responsibility, Task Responsibility, Identifiability, and Social Loafing*, 40 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 330, 330 (1987).

220 Bibb Latané et al., *Many Hands Make Light the Work: The Causes and Consequences of Social Loafing*, 37 J. PERSONALITY & SOC. PSYCHOL. 822, 830 (1979).

221 *Id.*

222 Price, *supra* note 219, at 337.

223 *Id.* at 342–43.

224 *Id.* at 331.

225 Christopher L. Aberson et al., *Ingroup Bias and Self-Esteem: A Meta-Analysis*, 4 PERSONALITY & SOC. PSYCHOL. REV. 157, 157 (2000).

group average, which is impossible.²²⁶ This bias occurs whether the group is a traditional type of group (e.g., an organization, race, ethnicity, or gender) or one that is wholly arbitrarily or randomly assigned or created, such as groups formed by coin toss.²²⁷ Further, the bias occurs at a conscious level (explicitly) as well as a subconscious level (implicitly).²²⁸

“Herding” is a decision-making bias wherein, over time, decision makers tend to rely increasingly on the information utilized and produced by previous decision makers (especially the final decisions reached by these previous decision makers) rather than their own private information;²²⁹ thus, each consecutive decision becomes less informative to successive decision makers looking to previous decisions for guidance.²³⁰ The cumulative effect of this process is a tendency for more and more decision makers to reach the same decision, “herding” in one direction, as each successive decision maker, by considering the decision made before her, is progressively less well informed in reaching her conclusion than the last.²³¹ Even when an individual decision maker may benefit (for example, by reaching a preferred or correct decision) from her own herding behavior, this behavior may still be harmful to the decision-making quality of the entire “herd.”²³² Herding can occur within a group decision-making context or among dispersed, individual decision makers, because it relies on decision makers observing the decisions of others rather than any kind of deliberation or collaboration.²³³

“Cascades” are an aspect of the herding phenomenon.²³⁴ In a herding situation, the “cascade” is the decision maker whose decision adds no useful information for future decision makers, because she decided based solely on her observations of prior decisions, in the process disregarding or undervaluing her own private information.²³⁵ “[O]nce a cascade starts, public infor-

226 See, e.g., Yechiel Klar & Eilath E. Giladi, *No One in My Group Can Be Below the Group's Average: A Robust Positivity Bias in Favor of Anonymous Peers*, 73 J. PERSONALITY & SOC. PSYCHOL. 885, 885 (1997).

227 See Antony Page, *Unconscious Bias and the Limits of Director Independence*, 2009 U. ILL. L. REV. 237, 249.

228 *Id.* at 249–50.

229 See Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q.J. ECON. 797, 798 (1992) (defining “herding” simply as “everyone doing what everyone else is doing, even when their private information suggests doing something quite different”).

230 See *id.* at 798–99.

231 *Id.*

232 *Id.* at 801 (“[I]nefficient herd behavior can arise even when the individuals themselves capture the rewards from their decisions.”).

233 See *id.* at 798; see also Andrew F. Daughety & Jennifer F. Reinganum, *Stampede to Judgment: Persuasive Influence and Herding Behavior by Courts*, 1 AM. L. & ECON. REV. 158, 158 (1999) (describing herding behavior among federal appellate courts, which are dispersed, independent decision makers).

234 See Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151, 152–54 (1998) (highlighting social learning in the herding process).

235 See *id.* at 153–55 (providing a detailed explanation and example of the herding process).

mation stops accumulating. An early preponderance towards [one decision or another] causes subsequent individuals to ignore their private signals, which thus never join the public pool of knowledge.”²³⁶

Cascades may form even when decision makers only observe the choices of a few other previous decision makers, such as those made by individuals in the decision makers’ local proximity, rather than the entire chain of previous decisions.²³⁷ Cascades form more easily where the decision alternatives are discrete (i.e., “yes” or “no”);²³⁸ further, the fewer the alternatives available to decision makers, the more easily and quickly cascades form.²³⁹ However, cascades are less likely to form where individuals receive or possess “conclusive signals”²⁴⁰—information so valuable and insightful that decision makers will ignore the previous decisions of others and follow this private information.²⁴¹ Idiosyncrasies in individuals—for example, their tendency not to follow the rational-choice-based cascade and herding models—have little effect on the overall likelihood of cascade formation, because they can equally enhance or neutralize herding effects—the outcome depends on the individual and her particular idiosyncrasy.²⁴²

As with groupthink, the decentralized structure of the federal judicial system, in tandem with the repeated, independent analysis of the same question, seems quite well suited to addressing these potential pathologies and pitfalls. Random assignment of judges to panels means that subgroups of the entire court are constituted to hear and decide particular cases.²⁴³ Different judges will bring different predilections (biases) to the table, but the size of most of the U.S. courts of appeals would seem helpful in avoiding problems associated with choice shift, group polarization, and herding. However, the small size of the U.S. Court of Appeals for the First Circuit, with only six active service judges, appears potentially problematic. With such a small pool of judges, the potential for variation in panel composition is significantly reduced.

236 *Id.* at 155.

237 *Id.* at 159.

238 *See id.* (noting that “when individuals have bounded powers to perceive or recall fine gradations, they tend to divide up actions into discrete choices, even when those actions have a continuous character”). This fact then generally increases the likelihood of cascade formation. *See id.* at 155–60 (analyzing the existence of cascades).

239 *See id.* at 159.

240 *Id.* at 160.

241 *Id.*

242 *See id.* at 160–62 (discussing individual payoffs).

243 Obviously, at the Supreme Court level, it simply is not possible to have diverse panels using the current practice of having all sitting members of the Court sit in decision on all cases. However, the Constitution itself does not mandate this system and, in theory, either the Supreme Court or Congress could modify it in order to create more diverse panels of judges at the Supreme Court level. *See* Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 90–104 (2011) (discussing various potential mechanisms that could create panel effects at the Supreme Court level).

The U.S. Courts of Appeals for the D.C. Circuit and Federal Circuit also present some potential issues because of where they sit. Both courts sit in the District of Columbia (albeit in different courthouses). The physical proximity of the judges to each other—they are quite literally “just down the hall” from each other—raises the risks of decisional dynamics becoming skewed and arguably exacerbates the risks associated with choice shift, risky shift, group polarization, and herding (as well as groupthink). By way of contrast, however, the current structure of the U.S. Court of Appeals for the Ninth Circuit arguably conveys a benefit, insofar as it greatly enhances the prospects for diverse panel composition and also draws judges from multiple, very different, political and legal subcultures. Not to put too fine a point on the matter, Montana isn’t California, and Alaska isn’t Hawaii.

Although the structure of the federal courts is important in creating multiple deciders who consider common legal questions independently of each other, the *procedures* used in the various circuits with respect to writing and issuing opinions also varies.²⁴⁴ In some U.S. courts of appeals, such as the Tenth Circuit and the D.C. Circuit, panel members will routinely circulate their draft opinions to the chambers of all active service judges currently serving on the circuit’s bench.²⁴⁵ In other circuits, however, such as the Fifth Circuit and the Eleventh Circuit, the practice is for panels to publish opinions independently of the other members of the court;²⁴⁶ to be sure, non-panel members may request that a poll be taken regarding possible en banc review of a panel decision, but the political dynamics of such a poll—and en banc review itself—are obviously very different from the informal lobbying that undoubtedly takes place in circuits that require pre-publication circulation of draft panel opinions.

In the Third Circuit, only non-unanimous panel opinions circulate to the full court before being released by the clerk’s office.²⁴⁷ Finally, in some

244 See Levy, *supra* note 14, at 321–26, 360–65 (discussing case management and publication).

245 See U.S. COURT OF APPEALS FOR THE D.C. CIR., HANDBOOK OF PRACTICE AND INTERNAL PROCEDURE 53(2005), available at <http://tinyurl.com/dxb28em> (“Final drafts of all opinions to be published also are circulated to all active judges on the Court.”); U.S. COURT OF APPEALS FOR THE 10TH CIR., PRACTITIONER’S GUIDE 59 (9th rev. 2013), available at http://www.ca10.uscourts.gov/downloads/pracguide_web.pdf (“A copy of a proposed opinion is circulated by the authoring judge, not only to the other members of the panel but to the whole court.”); Bennett & Pembroke, *supra* note 15, at 550–52 (discussing procedures in the Tenth Circuit and D.C. Circuit).

246 5TH CIR. R. 47.5, available at <http://www.ca5.uscourts.gov/clerk/docs/5thcir-iop.pdf>; see Bennett & Pembroke, *supra* note 15, at 554–55 (“The Fifth Circuit does not ordinarily circulate panel opinions to the full court.”); see also 11TH CIR. R. 4, available at <http://www.ca11.uscourts.gov/documents/pdfs/BlueDEC11.pdf> (“Copies of proposed opinions are not normally circulated to non-panel members.”); Bennett & Pembroke, *supra* note 15, at 556–57 (“The Eleventh Circuit policy is for each panel to send its opinions directly to the Clerk of Court for issuance.”).

247 3D CIR. I.O.P. 5.5.4, available at http://www.ca3.uscourts.gov/Rules/IOP_2010_final2.pdf (“Drafts of unanimous not precedential opinions do not circulate to non-panel judges.”). However, if the panel is not unanimous in a precedential (published) opinion,

circuits, such as the First Circuit and Seventh Circuit, panel opinions will circulate to the full court only if they overrule or call into question an existing circuit precedent or create a split between or among circuits on an important question of federal law.²⁴⁸

Diversity in operating procedures within the circuits is a good thing, insofar as it renders the process of deciding cases somewhat different from circuit to circuit. To date, no sustained study of the effects of these differences in internal operating rules has been published,²⁴⁹ but one would predict that an obligation to circulate an opinion to the entire court pre-publication must have some effect on the autonomy of panels within the circuit. From the perspective of someone concerned with the potential ill effects of groupthink, herding, and the like on the decisional process, however, the use of different procedures should improve the quality of the overall deliberative process and, hopefully, the net quality of judicial reasoning within the federal courts.

B. Applications of the Decisional Process Social Psychology Literature to the Lower Federal Courts

Professor Stephen Bainbridge, applying the social psychology literature to determine the ideal corporate decision-making structure, ultimately concludes that a group decision maker is preferable over a unitary autocrat.²⁵⁰ In reaching this conclusion, Bainbridge touts the “synergistic effects” of group deliberation²⁵¹ while rejecting reliance on a best-member strategy, cit-

drafts “are circulated to all active judges of the court after the draft opinion has been approved by all three panel members, concurring or dissenting opinions have been transmitted, or all members of the panel have had the time set forth in I.O.P. 5.6.3 to write separate opinions.” *Id.*

248 See 7TH CIR. R. 40(e), available at <http://www.ca7.uscourts.gov/Rules/rules.htm#opproc> (noting that a panel opinion that “would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted”); Bennett & Pembroke, *supra* note 15, at 544–47 (discussing the Seventh Circuit); see also *In re Grand Jury Subpoenas*, 123 F.3d 695, 697 n.2 (1st Cir. 1997) (discussing the informal First Circuit practice of circulating “to all the active judges of the court for pre-publication comment” a draft panel opinion if the panel’s draft opinion “reverses a prior panel”); Bennett & Pembroke, *supra* note 15, at 555 (discussing the Fifth Circuit). Bennett and Pembroke report that the First Circuit “does not have any formal procedure for circulating drafts of opinions to non-panel members and has not adopted any mini in banc procedure.” *Id.* at 556.

249 But see Levy, *supra* note 14, at 316–20 (noting the absence of sustained studies of the internal operating rules of the lower federal courts and positing that differences in case management practices could easily lead to differences in substantive outcomes, at least in some instances).

250 Bainbridge, *supra* note 17, at 54.

251 *Id.* at 24.

ing the difficulties inherent in identifying this best member.²⁵² Further, Bainbridge prefers a board of directors because groups are better at “critical evaluative judgment,” which is what boards most engage in.²⁵³ The potential advantages of individuals engaging in creative tasks and idea generation are less persuasive to Bainbridge because he does not view these tasks as primary functions of corporate directors.²⁵⁴

Another group of researchers studied herding behavior among “horizontal” courts, namely United States courts of appeals.²⁵⁵ The study considered the behavior of the courts in deciding an issue leading up to the Supreme Court’s decision in *Eastern Enterprises v. Apfel*.²⁵⁶ Consistent with the dynamics of herding, a circumstance where successive decision makers take less and less of their private information into account and rely more heavily on the decisions of those before them, “[e]ach succeeding appeals court opinion referenced all the previous decisions . . . [.] became progressively shorter . . . [.] and applied progressively similar criteria to reach the same conclusion.”²⁵⁷

The authors drew several conclusions from the study. When courts take into consideration previous decisions by other federal appellate courts, they are more likely to decide consecutively in the same way than they are to deliver a “mixed” sequence.²⁵⁸ For example, if a court’s decision options on an issue could be reduced to “yes or no,” a sequence of “yes, yes” or “no, no” is more likely than “yes, no” or “no, yes.”²⁵⁹ On the other hand, when courts do not take these decisions into account, “mixed sequences” are more likely.²⁶⁰ However, this herding behavior can either trend toward the ultimate “correct” decision (the authors define this as the decision the Supreme Court ultimately makes on the issue) or away from it.²⁶¹ In other words, the fact that many or all of the federal appellate courts agree on an issue cannot be taken as a signal that the Supreme Court will necessarily agree with them.²⁶²

252 *Id.* at 26 (“[A]n advantage of group decisionmaking is that the group is sure to get the benefit of its best decisionmaker. A group that delegates decisions to the individual identified by the group as its best decisionmaker may not do so.”).

253 *Id.* at 41.

254 *See id.* at 29–30, 54.

255 *See* Daughety & Reinganum, *supra* note 233, at 158–60 (discussing herding in the courts of appeals).

256 *Id.* at 162; *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

257 Daughety & Reinganum, *supra* note 233, at 162.

258 *Id.* at 180.

259 *Id.*

260 *Id.*

261 *Id.*

262 *See id.* at 181 (explaining the problematic situation that such unanimity among the appellate courts may present). Specifically, this unanimity discourages appeal to the Supreme Court until an individual appellant “receives an extremely strong (and contrary to the history of decisions) private signal” that his or her appeal might succeed, so that in situations where the Supreme Court ultimately decides the issue against the unanimous trend in appellate courts, this “corrective” decision is delayed. *Id.* at 180–81.

Another study applying decision-making dynamics to the judiciary considered the inner workings of three-judge federal appellate court panels.²⁶³ The study considered appellate courts' application of *Chevron* deference to administrative agency decisions,²⁶⁴ specifically how the ideological leanings of the judges composing the panels affected their decisions whether to follow the Supreme Court's mandate regarding the proper level of deference to administrative agency decisions.²⁶⁵ The study found that when judicial panels voted as a 3-0 majority, they were far more likely to implement the partisan policy inclinations of individual judges than were 2-1 majorities.²⁶⁶ That is, heterogeneous panels tend to make better quality decisions (where quality is defined as rational application of doctrine to the facts at hand) than homogeneous panels.²⁶⁷ The authors explain this by identifying the dissenting judge as a "whistleblower," who either makes the majority conscious of the possibility of reversal, or else "may simply force the majority to acknowledge its subconscious disobedience to doctrine and therefore to mend its ways."²⁶⁸

Other studies support these results and explore alternative explanations.²⁶⁹ One study, by Professor Pauline T. Kim,²⁷⁰ confirmed the existence of this phenomenon and tested the "strategic account" for its existence, specifically asking "whether judges act strategically in the sense that they are influenced by the broader institutional context and not solely by conditions internal to the panel deciding a particular case."²⁷¹ This "broader institutional context" includes the ideological bent of reviewing courts and Congress.²⁷² Kim found no evidence that the ideological leanings of the Supreme Court accounted for the prevalence of this intra-panel phenome-

263 Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2159–60 (1998).

264 See *id.* at 2162–68 (explaining that *Chevron* deference is an especially useful example because the doctrine "creates a loophole through which disobedient courts may advance their policy preferences at the expense of sincere application of doctrine").

265 *Id.* at 2158.

266 *Id.* at 2173.

267 *Id.*

268 *Id.* at 2174.

269 See, e.g., Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717, 1732, 1756 (1997) (finding some evidence that ideological voting is less prevalent on ideologically heterogeneous panels than on homogenous panels).

270 See Pauline T. Kim, *Deliberation and Strategy on the United States Courts of Appeals: An Empirical Exploration of Panel Effects*, 157 U. PA. L. REV. 1319, 1330–31 (2009) (noting that "judges in the majority vote differently (in a less stereotypically ideological fashion) than judges on a homogenous panel").

271 *Id.* at 1342–43.

272 *Id.* at 1341–43.

non,²⁷³ but did find evidence that its prevalence was impacted by the ideological preferences of the circuit (as a whole) in which the panel sat.²⁷⁴

Another study of panel effects similarly found that panel composition affects ideological voting.²⁷⁵ The authors offered several possible explanations for the phenomenon, including the previously discussed “whistleblower effect” and group polarization,²⁷⁶ as well as “the collegial concurrence,” which is a product of the influence of the other judges on a panel, as well as the burden and relatively small payoff of writing a dissent at the appellate level.²⁷⁷

C. *Some Preliminary Conclusions*

The social psychology literature on group decisional dynamics certainly highlights the limitations and drawbacks associated with a traditional, deliberating group decision maker. Given Janis’s recommendations for decentralizing decision making as a means of reducing groupthink, along with the fact that many of the negative “symptoms” of groupthink overlap with other well-documented group decision-making biases (e.g., risky decisions and problems with homogeneous groups), it seems that decentralization of the federal courts should help to mitigate these biases.

For example, Janis’s recommendation that, whenever feasible, groups should be divided into independent, smaller working groups that only convene periodically aligns with the federal appellate court model of three-judge panels that convene for oral arguments and then work independently. The decentralized judicial system also seems to deal with other group biases; for example, social loafing seems less likely where judges decide on their own or in small panels, rather than as large deliberating bodies, especially because judges must render *decisions* rather than merely *votes* or *opinions* for consideration by a deliberating body. Furthermore, federal judges—and particularly appellate federal judges—seem to rely on unique and creative idea genera-

273 *Id.* at 1367 (explaining that this study found “no support for the theory that minority judges are more likely to vote in an ideological direction in situations in which they could expect that their dissent would serve as a signal encouraging the Supreme Court to review a case”). That is, these results contradict the “whistleblower” theory discussed in the article by Cross and Tiller. See *supra* notes 263–68 and accompanying text.

274 *Id.* at 1368 (“[T]his study provides strong evidence that the preferences of the full circuit influence panel effects. . . . Strategic judges are hypothesized to anticipate the actions of the circuit en banc. When the minority is aligned with the circuit, the minority judge perceives that she would be better off, and the majority judges perceive that they would be worse off, if the circuit were to hear the case en banc, and therefore the panel judges adjust their voting behavior accordingly.”).

275 See Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 306 (2004) (“Apparently a large disciplining effect comes from the presence of a single panelist from another party. Hence all-Republican panels show far more conservative patterns than majority Republican panels, and all-Democratic panels show far more liberal patterns than majority Democratic panels.”).

276 See *id.* at 340–46 (discussing these two hypotheses).

277 See *id.* at 337–40 (explaining “the collegial concurrence”).

tion to move the law forward in cases of first impression. Accordingly, Professor Bainbridge's preference for a board over a unitary decision maker is rendered less relevant, because he largely rested his conclusion on the fact that corporate boards typically engage in critical evaluation rather than idea generation.

However, a decentralized decision maker does not necessarily solve all potential problems. As the Daughety study found, even the highly dispersed U.S. courts of appeals can fall into herding behavior. Additionally, some of the literature directly examining the efficacy of dispersed decision making points to the superiority of face-to-face deliberation. However, these drawbacks do not seem to outweigh the advantages afforded by dispersed and relatively independent decision making.

First, it is not certain that herding among decentralized decision makers is worse than the many other documented problems with traditional deliberative decision making. It is also unclear whether herding is any worse among dispersed decision makers than it would be within a centralized, deliberating group. Moreover, the studies pointing out the drawbacks of dispersed collaboration are of limited relevance, because those dispersed groups were essentially aiming to replicate the conditions and advantages of traditional deliberation, whereas in the highly decentralized judicial system the goal is not to replicate deliberation with group members who are dispersed. Instead, this decentralized system functions to enable the collected individual decisions of judges (rather than the judges themselves) to work in a cumulative and interactive fashion. In sum, decentralized juridical bodies, working independently of each other, should in theory be better able to reason their way to sensible conclusions.

CONCLUSION: DECENTRALIZED FEDERAL COURTS ENHANCE AND IMPROVE THE DELIBERATIVE PROCESS

The Framers created a federal judiciary in which decisional authority would be widely dispersed among independent federal and state courts. The judicial system they designed and implemented requires that courts reach consensus for an entrenched precedential rule to be created and successfully enforced. Simply put, judicial decisions that enjoy broad support within the federal judiciary will be capable of faster and more effective implementation than hotly contested decisions. The diffuse vesting of judicial authority places a premium on the attainment of consensus, which in turn provides a powerful incentive to compromise in order to reach a mutually acceptable resolution of a difficult constitutional or statutory question. Unanimity, although difficult to achieve, has a strong validating effect on the underlying reasons offered in support of a particular judgment.

To be sure, and as noted earlier,²⁷⁸ evolution is certainly possible; the federal courts need not remain structured as they presently are. Moreover,

278 See *supra* notes 137–73 and accompanying text.

evolutionary change has taken place with respect to other federal offices, notably including the vice presidency.

Texan John Nance Garner, President Franklin D. Roosevelt's first Vice President, once wryly remarked that the Office of Vice President "isn't worth a pitcher of warm spit."²⁷⁹ The limited powers of the vice presidency seem to be both well known and well appreciated, not only by the holder of the office, but within the general legal and political community as well.²⁸⁰ Yet, this office has evolved in the modern era and recent Vice Presidents have wielded substantial policy-making authority.²⁸¹

Thus, it is certainly possible that the Supreme Court or Congress might undertake a project to consolidate more judicial power in fewer hands. However, this outcome seems highly unlikely. Congress has little institutional incentive to augment the power of the federal courts by rendering the power of judicial review capable of speedier, more unilateral exercise; most federal judges would gain little were the institutional powers of either the Chief Justice or the Supreme Court increased vis-à-vis the lower federal courts.

Moreover, the decentralized federal judiciary plainly conveys important benefits with respect to the quality of the deliberative process. These benefits would be lost were the diffuse nature of the federal judicial power rendered more capable of direct and unilateral exercise—whether by the Chief Justice alone, the Supreme Court, or some new national appellate court. To be sure, and as legal scholars like Professor Wayne Logan cogently have argued,²⁸² non-uniform federal law, and particularly non-uniform constitutional law, can and does create real hardship and inequity.²⁸³ However, any reform programs designed to reduce the substantive effects of circuit splits should be carefully structured so as to avoid unduly attenuating the deliberative process within and across the lower federal and state court systems. Greater uniformity in federal law need not, and should not, come at the expense of the decentralized deliberative process (which provides important

279 See Daniel L. May, *The Third Vice President of the United States of Earth*, 73 A.B.A. J. 76, 76 (1987); Dennis Rogers, *No. 2 Job Isn't Worth It*, NEWS & OBSERVER (Raleigh, N.C.), July 7, 2004, at B1 (quoting Vice President Garner as saying that the vice presidency "wasn't worth 'a bucket of warm spit'"). An alternative version of the quote, substituting an even more objectionable body fluid, also has been regularly reported and quoted. See JAMES L. HALEY, *PASSIONATE NATION* 537 (2006) (reporting that Vice President Garner actually said that the vice presidency "wasn't worth a bucket of warm piss"). When asked by a reporter about the ostensible quote and the exact liquid involved, Vice President Garner himself clearly endorsed the saltier iteration. Eric Malone, *The Bob Doyle Tapes*, 30 LEGAL STUD. F. 57, 83–84 (2006).

280 But see JOEL K. GOLDSTEIN, *THE MODERN AMERICAN VICE-PRESIDENCY: THE TRANSFORMATION OF A POLITICAL INSTITUTION* (1982) (discussing the role of the Vice-President); Goldstein, *supra* note 28, at 102–05 (elaborating on Vice President Cheney's expansion of executive powers).

281 See Goldstein, *supra* note 28, at 103 (discussing Vice President Cheney's power).

282 See Logan, *supra* note 4, at 1138–42, 1162–66 (discussing circuit splits).

283 See *id.* at 1139–40, 1162–63, 1171–75, 1193–94 (elaborating on the problems of circuit splits).

benefits by requiring independent decision makers both to decide and explain their decisions independently and over time).

The structure of the Supreme Court, and of the Office of Chief Justice, both provide constructive examples of the benefits of diffusing decisional authority both across and within the federal courts. The Chief Justice lacks the institutional powers of either the President or the leaders of the House and Senate, and these limitations exist to ensure that a veto power cannot be wielded unilaterally by a person holding a lifetime appointment and who lacks a democratic mandate. The office, upon sustained consideration, provides its holder with remarkably few vested powers to direct and control the operation of the federal judiciary. It does provide an important and visible opportunity to persuade other federal judges, on both the Supreme Court and lower federal courts, to subscribe to the Chief Justice's jurisprudential vision, but few, if any, direct tools for imposing this vision on his colleagues.

Chief Justice John Marshall, often styled "the Great Chief Justice John Marshall,"²⁸⁴ justly enjoys this appellation precisely because, notwithstanding a bench almost entirely staffed with appointees of the opposition party, he managed to build and hold the center of the Court until his retirement in 1836. This constitutes a remarkable achievement, and one that probably deserves more careful study and consideration by scholars of the dynamics of judicial decision making than it has received to date.²⁸⁵

More recently, Chief Justice Earl Warren enjoys the reputation of having been a "Super Chief,"²⁸⁶ largely because of his success in making the Bill of Rights and Fourteenth Amendment relevant to the task of day-to-day governance. Unlike Marshall, however, Warren enjoyed the clear benefit of both Republican and Democratic Supreme Court appointees who shared his vision and supported his jurisprudential project. His successor, Chief Justice Warren E. Burger, seems to belong in the category of minor Chief Justices, precisely because he never enjoyed a reliable majority.

Institutionally, the federal judiciary is quite robust, with constitutionally entrenched life tenure, salary protections, and a constitutional history in which a political understanding developed early on that it was not appropriate to impeach federal judges solely based on disagreement with a particular

284 See, e.g., Michael J. Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111, 1113 n.13 (2001) (citing CHARLES F. HOBSON, *THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW* 47 (1996)).

285 *But cf. id.* (analyzing the practical political difficulties that faced Chief Justice Marshall after the ascendancy of the Jeffersonian Democratic-Republicans in the election of 1800 and thereafter). Professor Klarman posits that President Jefferson (and by implication, Presidents Madison and Monroe after him) did not place any particular importance on ensuring that his judicial appointees shared his views regarding the proper scope of the enumerated powers delegated to the federal government. *Id.* at 1169–72.

286 See BERNARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT* (1983) (discussing Chief Justice Earl Warren and the Warren Court's jurisprudential legacy); G. EDWARD WHITE, *EARL WARREN: A PUBLIC LIFE* (1982) (providing an authoritative biography of Chief Justice Warren's professional life).

decision.²⁸⁷ Nevertheless, within this robust whole, a near-absolute requirement of consensus-based decision making exists, starting with, but hardly ending with, the Office of Chief Justice. The diffusion of judicial power renders its exercise more difficult, more transparent, and makes consensus a valuable, but relatively rare, commodity in the day-to-day work of judging. If greater uniformity in federal law comes at the cost of undermining this carefully calibrated system of dispersed decision making by multiple independent courts, one ought to question whether reform would constitute an unmitigated good.

In the end, it should not be surprising that the Framers chose to vest the federal judiciary with a powerful check against the political branches (the power of judicial review), but at the same time also designed a system that makes the exercise of this power difficult. The independence of federal judges, secured through life tenure and salary protections, renders them politically unaccountable and creates a concomitant need to prevent the exercise of the federal judicial power either unilaterally or without sufficient sober deliberation.

Thus, the loss of uniformity is, at least to some extent, a necessary casualty of a system that intentionally elevates process values associated with dispersed, independent deliberation, through a series of local juridical bodies, that undertake the judicial task without any formal obligation to take into account the work of other federal or state courts. In short, a choice had to be made between speed, efficiency, and consistency (attributes more generally associated with the executive branch than with courts), on the one hand, and deliberative process values, on the other. Our present system discounts speed, efficiency, administrative convenience, and uniformity, but, in so doing, greatly enhances process values and diffuses judicial power in a way that advances deliberation, reason-giving, and consistency among and between courts.

To be clear, I would not suggest that the current accommodation of competing goals and values should never be questioned, that all efforts at reform are misguided, or that more reliably uniform federal law would clearly be a bad thing; as Professor Marin Levy cogently has argued, “[a] federal system demands a certain level of uniformity.”²⁸⁸ My point is more limited: before we embrace efforts to promote higher levels of uniformity, to

287 See Michael J. Gerhardt, *The Lessons of Impeachment History*, 67 GEO. WASH. L. REV. 603, 614–15, 624–25 (1999) (discussing impeachment); Klarman, *supra* note 284, at 1169–70 (elaborating on Marshall’s Court and the attempted impeachment of Justice Chase); see also WILLIAM H. REHNQUIST, *GRAND INQUESTS: THE HISTORIC IMPEACHMENTS OF JUSTICE SAMUEL CHASE AND PRESIDENT ANDREW JOHNSON* 114 (1992) (elucidating the impeachment of Justice Samuel Chase); David P. Currie, *The Constitution in Congress: The Most Endangered Branch, 1801–1805*, 33 WAKE FOREST L. REV. 219, 259 (1998) (discussing Chase’s acquittal); Adam A. Perlin, *The Impeachment of Samuel Chase: Redefining Judicial Independence*, 62 RUTGERS L. REV. 725, 726 (2010) (elaborating on the meaning of Chase’s acquittal).

288 Levy, *supra* note 14, at 378.

be achieved more quickly and more reliably, we should not fail to appreciate some of the deliberative benefits of the current system.²⁸⁹

In sum, although the contemporary structure of the federal courts has its vices, it also has its virtues. Perhaps most importantly, decentralized judicial review creates greater breathing room for democratic politics, and hence democratic self-government, to function—something that plainly constitutes a virtue rather than a vice.

289 See Daniel J. Meador, *A Challenge to Judicial Architecture: Modifying the Regional Design of the U.S. Courts of Appeals*, 56 U. CHI. L. REV. 603, 633–34 (1989) (arguing that the “percolation” of important legal questions over time enhances the quality of the Supreme Court’s ultimate resolution of difficult questions of constitutional law); see also Ruth Bader Ginsburg & Peter W. Huber, *The Intercircuit Committee*, 100 HARV. L. REV. 1417, 1424–26 (1987) (discussing “percolation” theory and the potential benefits to reasoned judicial decision making of “accretion, erosion, and correction” between and among lower federal and state courts in their published decisions). *But cf.* Logan, *supra* note 4, at 1169 (arguing that “strong reason exists to reject the percolation rationale” and positing that “[c]onstitutional rights . . . are not the proper subject of experimentation”).

