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The Supreme Court, Article III, and Jurisdiction Stuffing

James E. Pfander

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The Supreme Court, Article III, and Jurisdiction Stuffing

James E. Pfander*

ABSTRACT

Reflecting on the state of the federal judiciary in the aftermath of the Biden Commission report and subsequent controversies, this Article identifies problems with the current operation of both the Supreme Court and the lower courts that make up the Article III judicial pyramid. Many federal issues have been assigned to non-Article III tribunals, courts poorly structured to offer the independent legal assessment that such Founders as James Wilson prized as they structured the federal judiciary. Meanwhile, the Supreme Court devotes growing attention to a slice of highly salient public law questions, including those presented on the shadow docket, thereby slighting matters of private law and fueling dysfunctional decision-making.

Instead of jurisdiction-stripping and court packing, two controversial proposals for court reform, this Article proposes modest jurisdiction stuffing. By that, the Article means jurisdictional provisions that will expand the Court's mandatory appellate docket to encompass a broader range of matters, without unduly burdening the Court. Among its proposals, the Article suggests some broadening of the Court's mandatory review of state court decisions, some expansion of three-judge tribunals to clarify the factual and legal issues that now occupy the Court's shadow docket, and some as-of-right review of a slice of Federal Circuit decisions that implicate matters of private law. The Article proposes novel filtration rules to select cert-worthy issues for mandatory review.

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I. INTRODUCTION

Even as the Biden Commission went out with something less than a bang,¹ scholars in the field of federal jurisdiction have been ruminating on whether and how to fix the Supreme Court.² But one might ask if reform efforts should focus on the Court alone or on its relationship to a judicial system that includes a host of inferior courts, state and federal.³ Indeed, as the Scots immigré James Wilson explained in 1792, the judiciary is best understood as a pyramid with a broad base of lower courts down below and one Supreme Court on top to bring uniformity to federal law.⁴ We know Wilson today as one the first six Justices George Washington named to serve on the Supreme Court, as a leading figure in the framing of Article III, and as a judgment debtor who was hounded by his creditors to an early grave.⁵ (Somewhat later, of course, Wilson also lent his name to the work of Professor Robert Pushaw.⁶) Wilson's

1. See PRESIDENTIAL COMM'N ON THE SUPREME COURT OF THE U.S., DRAFT FINAL REPORT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final.pdf>. For criticisms of the Report, see Austin Sarat, *Why Did Biden's Supreme Court Commission Fail So Completely?*, SLATE (Dec. 9, 2021), <https://slate.com/news-and-politics/2021/12/bidens-scotus-commission-was-a-failure-from-the-start.html> (discussing the Report's vague and compliant character, which will not help address "an activist and reactionary court"); Jay Willis, *Supreme Court Term Limits Are Not Going to Cut It*, BALLS & STRIKES (Oct. 19, 2021), <https://ballsandstrikes.org/court-reform/supreme-court-term-limits-commission-lol/> ("The commission's treatment of [arguments made over Supreme Court reform] makes abundantly clear that their primary interest is ending public debate as expeditiously as possible.").

2. See, e.g., Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 152 (2019) [hereinafter Epps & Sitaraman, *How to Save the Supreme Court*] (arguing that any kind of Supreme Court reform must have three components: (1) "it must be constitutionally plausible," (2) "it must be capable of implementation via statute," and (3) "the proposal needs to be stable going forward"); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1706 (2021) (distinguishing two different reform mechanisms: those which "alter personnel," and those which "disempower the institution"); Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 399 (2021) (considering legislative, executive, and internal Supreme Court reform strategies).

3. *Comparing Federal & State Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Sept. 25, 2023).

4. James E. Pfander & Daniel D. Birk, *Article III and the Scottish Judiciary*, 124 HARV. L. REV. 1613, 1631–42 (2011) (discussing the influence of Wilson and the Scots on the architecture of Article III).

5. *Id.* at 1620; Nicholas Mosvick, *Forgotten Founders: James Wilson, Craftsman of the Constitution*, NAT'L CONST. CTR. (July 13, 2020), <https://constitutioncenter.org/blog/forgotten-founders-james-wilson-craftsman-of-the-constitution>.

6. Professor Pushaw, the James Wilson Professor at Pepperdine University Caruso School of

pyramidal model offers a framework for this Article's assessment of the state of the federal judicial system.

A growing body of evidence points to a judicial pyramid in need of a tune-up if not an overhaul. When Wilson wrote, we were a nation of 4 million people scattered across thirteen states on the Eastern seaboard.⁷ Today, we're a nation of 340 million.⁸ Back then we had twenty federal judges, or one for every 200,000 people.⁹ Today we have roughly 1,200 federal judges (if we count those on senior status) or one for every 280,000 people.¹⁰ This reduction in per capita judge-power seems striking;¹¹ the pace of life has obviously changed and we're more thickly planted with laws, regulations, and controlling decisions than we were in 1790.¹² One supposes the Federal Register sets forth more rule-like regulations of modern life than all the common-law precepts so patiently abridged in the digests of Bacon, Viner, and Comyn combined.¹³

Law, has helped spark a Wilson renaissance. See Robert J. Pushaw Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393 (1995–1996) (discussing the idea of justiciability as developed by leading Federalists such as James Wilson).

7. See U.S. CENSUS BUREAU, 1790 CENSUS: RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES, <https://www.census.gov/library/publications/1793/dec/number-of-persons.html> (last visited Nov. 1, 2023).

8. U.S. CENSUS BUREAU, DECENNIAL CENSUS BY DECADE: 2020 (Aug. 4, 2022), <https://www.census.gov/programs-surveys/decennial-census/decade.2020.html#list-tab-693908974>.

9. U.S. COURTS, AUTHORIZED JUDGESHIPS 1, <https://www.uscourts.gov/file/19476/download> (last visited Nov. 1, 2023) (showing that in 1789, there were 19 authorized Article III judgeships).

10. *Id.* at 8 (showing that in 2022, there were 860 authorized Article III judgeships and 20 authorized Article I judgeships).

11. *Id.* at 1–8. One can, of course, point out that much federal judging now occurs before magistrates and bankruptcy judges, subject to oversight in the district courts. See *infra* Appendix B.5. Similar forms of judicial assistance were available in the nineteenth century when Congress authorized commissioners and bankruptcy referees to support the adjudication function. See, e.g., Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (1898) (amended 1938) (implementing bankruptcy as a means of protecting debtors from creditors).

12. See, e.g., Albert Roland Kirafly et al., *Growth of Statute Law and Codes*, BRITANNICA, <https://www.britannica.com/topic/common-law/Growth-of-statute-law-and-codes> (last visited Mar. 17, 2023) (discussing the transition in the United States from common law to statutory law, as well as the increased power of Congress to regulate under its commerce power).

13. See MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW, VOL. I (1736); CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY (THE LAWBOOK EXCHANGE, LTD. 2014) (1742–1757); JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND (LEGARE ST. PRESS 2023) (1800). Since 2002, each annual edition of the Federal Register has contained more than 70,000 pages. FED. REGISTER, FEDERAL REGISTER FACTS 1 (2010), https://www.federalregister.gov/uploads/2011/01/fr_facts.pdf. On the other hand, Bacon's *Abridgment* is 762 pages long, Viner's is 590 pages long, and Comyn's digest is 3,204 across five volumes. See BACON, *supra*; VINER, *supra*; COMYNS, *supra*.

Signs of systemic tensions abound. Counting bankruptcy proceedings, litigants file around 800,000 new cases in federal courts every year.¹⁴ Following their initial disposition, appellate courts hear around 45,000 new appeals every year, a small fraction of the total district court caseload (one that reflects the well-known tendency toward settlement).¹⁵ In disposing of those 45,000 appeals, as of 2020 the appellate courts declined to publish more than 85% of precedential decisions.¹⁶ The Supreme Court, for its part, hears around seventy cases during a busy year.¹⁷ One might well conclude, as many contend in reflecting on their own fields of expertise, that the Court's modest diet of plenary decisions cannot effectively guide the appellate and district courts on the issues that come before these lower courts for decision.

State courts, meanwhile, increasingly proceed without any federal judicial oversight at all. In any given year, state courts entertain over 50,000,000 new filings, roughly 98% of the new cases filed in the American court system.¹⁸ State courts of last resort hand down some 50,000 new decisions each year.¹⁹ To be sure, every such decision does not present an issue of federal law.²⁰ But many surely do. Still, of the 16,078 total petitions for Supreme Court review between 2019 and 2021, the Court has agreed to decide only twenty state court appeals on the merits, less than 0.12% of the total.²¹ Appeals from state court decisions accounted for only five cases on the Court's plenary docket in the 2021 term.²² The size of the docket has dropped precipitously, from something approaching 160 cases in the 1980s to fewer than seventy cases in recent years, due in part to the switch from as-of-right to

14. *See infra* Appendix B, Tables 4–5.

15. *See infra* Appendix B, Tables 2–3.

16. *See* JUDITH RESNIK, *SIZING THE FEDERAL COURTS* (forthcoming 2023); *see also* Judith Resnik, *Changes in the Federal Courts and Changes Needed on the U.S. Supreme Court: Statement for the Record for the Public Hearing*, PRESIDENTIAL COMMISSION ON THE U.S. SUP. CT. 19 (June 30, 2021) (“By 2020 . . . more than 85 percent of the federal appellate opinions (then numbering fewer than 50,000) were marked not for publication.”).

17. *See infra* Appendix B, Table 1.

18. *See infra* Appendix A, Table 5.

19. *See infra* Appendix A, Table 3.

20. *See Comparing Federal & State Courts*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (last visited Nov. 1, 2023) (describing that state courts hear a variety of non-federal question cases, including criminal, probate, contract, tort, and family law disputes).

21. *See infra* Appendix B, Table 1.

22. *See infra* Appendix B, Table 1.

discretionary review of state court decisions.²³

Finally, in the federal system, many adjudications take place before non-Article III adjuncts of one kind or another.²⁴ Some land on the desk of magistrate and bankruptcy judges after an initial filing in federal district court.²⁵ Others start and end in administrative agencies with the prospect for some review on a record in federal appellate courts.²⁶ Reports from the trenches do not inspire confidence; immigration judges (IJs), for example, face pressure from their overseers in the executive branch of government to handle more cases.²⁷ The pressure for expedition has had well-known and predictable consequences for the quality of IJ adjudication and imposes serious burdens on federal appellate capacity (and patience).²⁸

23. See *infra* Appendix B, Table 1; Michael Heise et al., *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court's Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020). Heise and colleagues report that

During the 1940s, the Court decided roughly 177 appeals per Term. During the 1950s, that number dropped to approximately 124 per Term. In the 1960s, the number rose to about 137 per Term, and by the middle of the 1980s, the Court heard slightly more appeals. The 1980s, as a decade, is the most recent high-water mark in terms of the Court's workload, with 167 appeals per Term. Starting in the late 1980s and moving forward to the present, however, that number began to drop precipitously. By the 2000 Term, the Court decided only 87 appeals. During the last Term included in this study, 2017, the Court decided 68 appeals, which represents the fewest number of merits decisions at any point since the mid-twentieth century.

Id. Like other scholars, Heise and colleagues attribute the decline to the 1988 adoption of legislation conferring discretion on the Court to decide whether to allow appeals from state courts. *Id.* at 1571–72 (citing Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.)).

24. See William Baude, *Adjudication Outside Article III*, 133 HARV. L. REV. 1511, 1516 (2020) (describing long-accepted forms of federal adjudication before non-Article III courts, including territorial courts, administrative proceedings, and military tribunals).

25. See 28 U.S.C. §§ 151, 157 (defining bankruptcy court as unit of district court and providing for reference of bankruptcy cases).

26. See JONATHAN M. GAFFNEY, CONG. RESERACH SERV., LSB10558, JUDICIAL REVIEW UNDER THE ADMINISTRATIVE PROCEDURE ACT (APA) 1–2 (2020).

27. See *Courts in Name Only: Repairing America's Immigration Adjudication System*, 136 HARV. L. REV. 908, 914–15 (2023) (“[T]he prioritization and implementation of heightened enforcement has contributed to the immense backlog of cases facing immigration judges and brought even more noncitizens into a resource-strained immigration court system already struggling under pressures to adjudicate more cases faster.”).

28. See *Rodriguez-Molinero v. Lynch*, 808 F.3d 1134, 1140 (7th Cir. 2015) (Posner, J.) (vacating and remanding decision of the Board of Immigration Appeals after finding that the immigration judge mistakenly found and applied law to fact in rejecting the petitioner's argument that his removal to

As this brief synopsis suggests, the judicial pyramid that Wilson described centuries ago stands in need of thoughtful and sympathetic repairs. At the top of the pyramid, the Court devotes much of its time to divisive, political issues and little time to private and adjective law.²⁹ At the bottom of the pyramid, many non-Article III tribunals (including state courts and federal agencies) conduct adjudication in the shadow of federal court oversight that they often do not receive.³⁰ Recent decisions, such as *Lucia* and *Arthrex*, bring these non-Article III adjuncts ever more obviously under the control of political actors and set them further apart from the law- and fact-finding independence and neutrality one might expect were they more closely associated with the judiciary.³¹

After sketching some of the most troubling issues in Part II, this Article turns in Part III to a consideration of potential solutions. At the pyramid's top, the Article suggests that, instead of jurisdiction stripping, a common progressive prescription for perceived maladies, Congress should consider jurisdiction stuffing. A tailored approach to expanding the Court's docket might help to refocus its attention on issues of law and turn it away from issues of politics. At the bottom of the pyramid, Congress should follow Professor Judith Resnik's suggestions to improve the independence and performance of non-Article III tribunals by associating them more closely with Article III judges.³²

Mexico would present a substantial risk of torture); *see also* *Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006) (refusing to credit IJ's assessment of applicant's credibility where they were infected by "factual error, bootless speculation, and errors of logic"); *Gomes v. Gonzales*, 473 F.3d 746, 755 (7th Cir. 2007) (declaring, after review of IJ's decision, that "we have no idea why the IJ ruled as he did."). *See generally* Adam Cox, *Deference, Delegation, and Immigration Law*, 74 U. CHI. L. REV. 1671, 1679–80 (2007) (describing Judge Posner's view that immigration decisions are "arbitrary, unreasoned, irrational, inconsistent, and uninformed").

29. *See, e.g.*, E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571, 1627 (2004) (discussing how the Court as constituted in 2004 had "little prior exposure to private law prior to joining the Court," leading the Justices to turn "away from hearing cases . . . outside of the constitutional area").

30. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 722 (2004) (explaining that federal appellate courts have limited power to oversee Article I tribunals).

31. *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (discussing administrative law judges); *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (discussing administrative patent judges).

32. Judith Resnik, *Interdependent Federal Judiciaries: Puzzling About Why & How to Value the Independence of Which Judges*, 137 DAEDALUS 28, 38–42 (2008).

II. THE ARTICLE III PYRAMID AND THE STRUCTURE OF THE FEDERAL JUDICIARY

Among Enlightenment thinkers, the pyramid enjoyed a certain cache.³³ It appeared most indelibly on the backside of the Great Seal of the United States, as adopted by Congress in 1782.³⁴ Congress chose to depict an unfinished pyramid with thirteen steps leading to a flat top that may have been drawn to suggest the prospects for future growth.³⁵ Instead of completing its pyramid, Congress capped it with an all-seeing eye.³⁶ In a deist world, the all-seeing eye was meant, as Congress explained at the time, to “allude to the many signal interpositions of providence in favour of the American cause.”³⁷ That message of providential intervention was echoed in the motto, *annuit coeptis*, which invokes a deity partial to America.³⁸

As we reflect on Wilson’s judicial pyramid, we might do well to recognize that he did not portray it as capped by an all-seeing eye of providential judicial wisdom.³⁹ As Wilson explained,

According to the rules of judicial architecture, a system of courts

33. Aderson Bellegarde Francois, *Only Connect: The Right to Community and the Individual Liberty Interest in State-Sponsored Racial Integration*, 112 PENN ST. L. REV. 985, 1000 (2008) (describing that Enlightenment thinkers differentiated their political philosophy, which emphasized individual liberty and autonomy, from the “ancient and medieval commitments to order and hierarchy”).

34. See Jessie Kratz, *The Great Seal: Celebrating 233 Years of a National Emblem*, U.S. NAT’L ARCHIVES (June 20, 2015), <https://prologue.blogs.archives.gov/2015/06/20/the-great-seal-celebrating-233-years-of-a-national-emblem/> (“The ‘reverse,’ or back side, of the Great Seal contains a 13-step pyramid representing strength, while the Eye of Providence sits above the pyramid within a triangle.”).

35. See *Great Seal Secrets Revealed!*, NBC NEWS: POL. NEWS (Feb. 12, 2008, 6:52 AM), <https://www.nbcnews.com/id/wbna23125663> (explaining that the Great Seal “uses images of traditional heraldry, such as the unfinished pyramid to symbolize a work in progress”).

36. See Kratz, *supra* note 34.

37. See U.S. DEP’T OF STATE BUREAU OF PUB. AFFAIRS, THE GREAT SEAL OF THE UNITED STATES 5 (2003), <https://bensguide.gpo.gov/images/symbols/statedept-thegreatsealoftheus.pdf> (quoting Charles Thompson, Remarks and Explanation (June 20, 1782)).

38. See *id.* at 15 (“The pyramid signifies strength and duration: The eye over it and the motto, *Annuit Coeptis* (He [God] has favored our undertakings), allude to the many interventions of Providence in favor of the American cause.”).

39. See JAMES WILSON, LECTURES ON LAW (1790), *reprinted in* 2 COLLECTED WORKS OF JAMES WILSON 833 (Kermit L. Hall & Mark D. Hall eds., 2007), https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2074/Wilson_4140.02_LFeBk.pdf (“The pyramid of government—and a republican government may well receive that beautiful and solid form—should be raised to a dignified altitude: but its foundations must, of consequence, be broad, and strong, and deep.”).

should resemble a pyramid. Its base should be broad and spacious: it should lessen as it rises: its summit should be a single point. To express myself without a metaphor—in every judicial department, well arranged and well organized, there should be a regular, progressive gradation of jurisdiction; and one supreme tribunal should superintend and govern all the others.⁴⁰

For Wilson, the Supreme Court served both to bring uniformity on appeal to the law of the United States and to confine all inferior tribunals within the bounds of their assigned jurisdiction.⁴¹ In other words, Wilson viewed the Court’s function in structural terms, as the superintendent of lower court justice rather than as the primary source of its dispensation.⁴²

That meant that the lower courts, the base, should be broad, spacious, and well-constructed.⁴³ Wilson approved of the supreme courts in England but cast aspersions on their base: he described the “durability” of an otherwise well-proportioned edifice as impaired by “narrowed and weakened” inferior establishments.⁴⁴ By this, Wilson was referring to problems with the county courts in England.⁴⁵ In an earlier section of the lectures, he had been harshly critical of the English county courts, observing that the Crown frequently promised to appoint able judges but had failed to do so.⁴⁶ By contrast, the

40. *Id.* at 945.

41. *See* Mosvick, *supra* note 5 (discussing how Wilson’s litigation of the 1782 Wyoming Valley case, which settled a border dispute between Pennsylvania and Connecticut, suggested to him that “the federal government needed a supreme court to give final resolution to issues between states.”).

42. *See* JAMES E. PFANDER, *ONE SUPREME COURT: SUPREMACY, INFERIORITY, AND THE JUDICIAL POWER OF THE UNITED STATES* 150 (2009) (exploring the supervisory role of the Supreme Court).

43. WILSON, *supra* note 39, at 945 (“[A system of courts] should be broad and spacious: it should lessen as it rises: its summit should be a single point . . . [I]n every judicial department, well arranged and well-organized, there should be a regular, progressive gradation of jurisdiction; and one supreme tribunal should superintend and govern all the others.”).

44. *Id.* at 946 (“But by an unwise inattention, to say the least of it, to the inferior establishments, the base of the exquisitely proportioned edifice, erected by Alfred, is narrowed and weakened; and its beauty and durability are consequently impaired.”).

45. *Id.* at 891 (“From circumstances, however, which were the natural consequences of the introduction and progress of the feudal system in England, this court began and continued to make ambitious and unnecessary encroachments on the inferior jurisdictions.”).

46. *Id.* at 893 (noting the king’s “promise to appoint justiciaries, constables, sheriffs, and bailiffs of such as knew the law of the land, and were well disposed to observe it”). In contrast to the promises of the Crown, the “county establishments, from that period to the present moment, have been despised or disregarded in England; and other establishments, less natural and less convenient to the nation, have been substituted in their place.” *Id.*

county courts in Pennsylvania were well-constructed.⁴⁷ As Wilson observed, the county courts of common pleas were staffed by judges with assurances of life tenure and independence.⁴⁸ With effective and independent adjudication at the base, the judicial pyramid could distribute justice country-wide without the necessity of an appeal in every case to a single well-constructed tribunal at the top.⁴⁹

Wilson's conception of judicial architecture invites our attention to the work performed at the pyramid's top, by the Supreme Court, and at the base, by lower federal courts and tribunals. As we have seen, Wilson included in that base all tribunals responsible for the administration of justice in the United States, including both federal courts and state courts.⁵⁰ Thus, when he turned to the consideration of the lower courts' role in his pyramid, Wilson launched into a discussion (slightly repetitive) of the organization of the courts in the Commonwealth of Pennsylvania.⁵¹ He viewed them, like the lower federal courts, as essential to the administration of federal justice and as subject to the oversight and ultimate control of the Supreme Court of the United States.⁵²

A. *The Base of the Pyramid: Non-Article III Tribunals*

A quick look at the dockets of inferior tribunals today tells a striking story: the lower federal courts handle a very small slice of the legal issues that enter the federal judicial system for adjudication and receive comparatively

47. *Id.* at 894–95 (“[B]y the constitution and laws of Pennsylvania, a jurisdiction . . . is reunited in the supreme court of this commonwealth. But along with that reunion, the measures proper for avoiding its inconveniences have been adopted. The supreme court is stationary; and juridical establishments, highly respectable, are formed in every county.”).

48. *Id.* at 906 (noting that the judges of the county courts of common pleas held their offices “during good behaviour”).

49. *Id.* at 914 (“The easy, the regular, and the expeditious administration of justice has, in every good government, been an object of particular attention and care. To the attainment of an object so interesting, the distribution of the juridical powers among convenient districts is highly conducive. . . . Every citizen should be always under the eye and under the protection of the law and of its officers; each part of the juridical system should give and receive reciprocally an impulse in the direction of the whole.”).

50. *See id.* at 946 (discussing the hierarchy of state and federal courts in the United States judicial system).

51. *Id.* (discussing the organization of the state courts of Pennsylvania).

52. *Id.* (“From the highest court of a state, a writ of error lies, in federal causes, to the supreme court of the United States.”).

generous financial support.⁵³ Consider a few numbers taken from the data more fully set forth in the Appendix. New filings for 2021 were as follows:

Federal district courts: 403,391
 Federal bankruptcy courts: 434,540
 Social security claims: 382,870
 Immigration proceedings: 244,140
 State trial courts: 56,012,265⁵⁴

Based on these numbers, filings in federal district court, even with the inclusion of bankruptcy proceedings, as of 2021 comprised only 1.5% of the matters entering the system through state and federal courts.

If we look at budget figures, the relatively well-supported nature of federal court adjudication comes more sharply into focus. The total budget of the Article III judiciary for the fiscal year 2020 was \$7.5 billion.⁵⁵ If we weigh that budget according to dispositions at the trial, appellate, and Supreme Court levels, then roughly 90% of the judiciary's dispositions cases occurred in the district courts and their adjuncts.⁵⁶ So understood, the federal judiciary spent \$6.75 billion to entertain 530,465 cases at the trial level.⁵⁷ By contrast, the budgets for the state courts were markedly smaller.⁵⁸ Consider, for example, that the Illinois state courts handled 1,657,966 new filings.⁵⁹ A rough cost/filing comparison reveals that federal courts devote \$15,526 to each matter while the state courts spend only \$420.⁶⁰

With additional financial support, the federal judiciary can afford to

53. See *infra* Appendix B, Table 4 (displaying that in 2020 there were 530,465 cases filed in United States District Courts and 329,845 terminations); ADMIN. OFFICE OF THE U.S. COURTS, THE JUDICIARY FISCAL YEAR 2021 CONGRESSIONAL BUDGET SUMMARY i (2020) (explaining that the Judiciary's Fiscal Year 2020 enacted appropriation was \$7.5 billion).

54. See *infra* Appendix B, Table 4, Table 5; Appendix C, Table 1, Table 4.2; Appendix A, Table 5.

55. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 53, at i (2020).

56. See Appendix B (displaying that the overwhelming majority of federal cases were filed in federal district courts and adjunct Article III courts).

57. ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 53, at i (explaining that the Judiciary's Fiscal Year 2020 enacted appropriation was \$7.5 billion); Appendix B, Table 4.

58. See, e.g., GOVERNOR J.B. PRITZKER, ILLINOIS STATE BUDGET FISCAL YEAR 2022 79 (2021) (displaying that \$697,173,000 was appropriated for the state of Illinois's judicial agencies in 2020).

59. Sarah Gibson et al., *CSP STAT Overview*, CT. STATS. PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-navcards-first-row/csp-stat-overview> (last updated June 5, 2023).

60. See PRITZKER, *supra* note 58, at 79 (displaying that \$697,173,000 was appropriated for the state of Illinois's judicial agencies in 2020); ADMIN. OFFICE OF THE U.S. COURTS, *supra* note 53, at i (2020) (explaining that the Judiciary's Fiscal Year 2020 enacted appropriation was \$7.5 billion).

provide a relatively sophisticated form of initial adjudication. In general, the federal judiciary has the resources to allow judges to hire able law clerks and staffers, to install relatively sophisticated equipment in federal courtrooms, and to provide up-to-date tech support and security.⁶¹ Such resources help to explain in part the rise of MDL: transferee federal courts have the resources to oversee complex multi-party litigation.⁶²

Other non-Article III tribunals enjoy few of the advantages of the Article III courts. Accounts of the working life of IJs portray a judiciary with crowded dockets, little time to consider the nuances of particular cases, and a tendency to use form language to dispose of cases that do not match the form.⁶³ Federal circuit court decisions have repeatedly identified these problems, sharply criticizing the system of immigration adjudication for slipshod practices.⁶⁴ During especially busy periods in immigration court, federal circuit courts routinely devote much time and attention to the assessment of asylum and other claims.⁶⁵ The demands for simple justice have seemed to necessitate such outsized commitment of time and resources by the Article III

61. See, e.g., Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1122–23 (1977) (discussing the quality of clerks at the federal level as an important factor when evaluating federal courts' overall competence); Stephen L. Grant, *Courtroom Technology Is Changing the Landscape of Federal Courts*, 39 AM. BANKR. INST. J. 22, 39 (2020) ("Since the courtroom technology evolution, federal courts have been at the forefront of this change and will continue to lead in this endeavor.").

62. On the challenges of MDL, see Andrew D. Bradt et al., *Dissonance and Distress in Bankruptcy and Mass Torts*, 91 FORDHAM L. REV. 309 (2022).

63. See DANA LEIGH MARKS, REFLECTIONS ON A 40-YEAR CAREER AS AN IMMIGRATION LAWYER AND JUDGE 3 (2019), <https://cmsny.org/wp-content/uploads/2019/04/Reflections-on-a-40-Year-Career-as-an-Immigration-Lawyer-and-Judge.pdf> ("From the time I became an immigration judge, we have never received the resources we needed in a timely or well-studied manner, but instead for decades we have played catch-up, had to make do with less, and have faced constant pressure to do our work faster with no loss of quality."); see also Daniel Wiessner, *Immigration Court Backlogs No Excuse for Terse Decisions-3rd Cir.*, REUTERS (July 26, 2021, 9:41 AM), <https://www.reuters.com/legal/litigation/immigration-court-backlogs-no-excuse-terse-decisions-3rd-cir-2021-07-26> (discussing a Third Circuit decision where the panel acknowledged the immense 1,500 case average workload on immigration judges, but nonetheless held that the "workload does not allow them to deprive asylum applicants of due process.").

64. Faiza W. Sayed, *The Immigration Shadow Docket*, 117 NW. U. L. REV. 893, 940–41 (2023) (discussing the "scathing indictments" issued by federal circuit court judges of the BIA's decision-making. Judge Jon O. Newman of the Second Circuit, for example, stated "the courts of appeals often lack the reasoned explication that is to be expected of a properly functioning administrative process." (citing JON O. NEWMAN, STATEMENT BEFORE THE SENATE COMMITTEE ON THE JUDICIARY 8 (2006)).

65. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 353 (2007) (discussing the increased caseload at the federal court of appeals level after single member decision-making became the norm at the Board of Immigration Appeals).

appellate judiciary.

Contrast the work of IJs with that of magistrate and bankruptcy judges. Working within Article III, magistrates and bankruptcy judges handle a great many proceedings, but do not face the same docket pressures as do the IJs.⁶⁶ What's more they enjoy access to federal judicial resources to support their work, including law clerks and support personnel.⁶⁷ Of course, bankruptcy and magistrate judges occasionally go wrong, but those errors can often be corrected at the district court level, where the federal judiciary exercises the authority to oversee both the selection of the adjunct judges and the quality of their work product.⁶⁸ Consequently, relatively few bankruptcy and magistrate decisions arrive, undigested, on the dockets of the federal appellate courts for plenary review to avoid injustice.

The contrast between the workways of IJs and Article III adjuncts reveals the enduring truth of Wilson's argument for creating a strong base on which to erect the federal judicial pyramid. The institutional design decisions that govern courts and judges at the base will inevitably affect the work of courts further up in the hierarchy and the quality of justice dispensed by the system as a whole. That Wilsonian conclusion supports a recommendation that Professor Resnik made some years ago: that non-Article III adjuncts be brought more closely into conversation with their Article III counterparts.⁶⁹ By moving the IJs, say, into federal courthouses, and treating them more like bankruptcy and magistrate judges, Congress might vastly improve the quality of immigration adjudication.

The case for a closer affiliation between agency adjudicators and Article III courts has grown more compelling since Professor Resnik wrote. The unitary executive thesis may begin to weigh more heavily on the quality and independence of adjudicative justice delivered by the non-Article III tribunals

66. See Appendix B, Table 5 and Appendix C, Table 4.2 for the relevant figures. In 2022, 350 IJs were on the receiving end of 707,558 new filings. That same year, roughly the same amount of bankruptcy judges entertained 383,810 new filings.

67. PETER G. MCCABE, *A GUIDE TO THE FEDERAL MAGISTRATE JUDGES SYSTEM* 54 (2014) (“[M]agistrate judges rely on the court’s pro se law clerks . . .”)

68. See 28 U.S.C. § 152 (establishing the procedures for the appointment of bankruptcy judges); John D. Ayer et al., *Bankruptcy Appeals*, XXIV AM. BANKR. INST. J. 1 (2005), www.kirkland.com/siteFiles/kirkexp/publications/2330/Document1/Bankruptcy%20Appeals.pdf (discussing appellate review of bankruptcy court decisions).

69. Resnik, *supra* note 32, at 38–42 (tracing the rise of administrative adjudicators, noting their distance from Article III judges, and describing challenges to their decisional and institutional independence).

operating within the federal agencies.⁷⁰ Some commentators, including a growing number of Supreme Court Justices, take the view that Article II requires that the President exercise at-will removal authority over a growing slice of federal officialdom.⁷¹ In perhaps the most adventuresome of such decisions, the Court ruled in *United States v. Arthrex, Inc.* that decisions of administrative patent judges (APJs) working within the patent and trademark office must remain subject to review by the director of their agency to better insure a measure of responsiveness to the President.⁷² *Lucia v. SEC* holds that administrative law judges (ALJs) working within the SEC must be appointed by officials responsive to the President.⁷³ Together, *Lucia* and *Arthrex* put in place structures of executive branch control that can exert greater pressure on the independence of agency adjudication, suggesting that the judges charged with that responsibility may answer less to the law as declared by the federal courts than to the policy preferences articulated by the executive.

Yet the federal judiciary, acting through the Judicial Conference of the United States, has erected a substantial hurdle to legislation that would bring agency adjudicators more closely into the Article III fold.⁷⁴ The Conference

70. See *infra* notes 71–73 and accompanying text.

71. See, e.g., *Seila Law L.L.C. v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (holding in a 5–4 decision that the President could remove the director of the Consumer Financial Protection Bureau because “in our constitutional system, the executive power belongs to the President, and that power generally includes the ability to supervise and remove the agents who wield executive power in his stead.”); *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018) (holding that administrative law judges of the Securities and Exchange Commission are “officers of the United States” subject to the Constitution’s Appointments Clause); *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 513 (2010) (finding that the Sarbanes-Oxley Act violated the separation of powers doctrine by giving broad powers to the Public Company Oversight Board while simultaneously preventing the President of the power to appoint or remove Board members).

72. 141 S. Ct. 1970, 1983–85 (2021) (concluding that power of APJs to issue binding decisions in *inter partes* patent disputes gives them final authority over executive policy in violation of Article II and necessitates invalidation of provisions that interfere with the director’s power to review such decisions).

73. *Lucia*, 138 S. Ct. at 2049 (invalidating panel decision by ALJs within the SEC who had been appointed by other employees rather than by the Commission itself).

74. See JUDICIAL CONFERENCE OF THE U.S., STRATEGIC PLAN FOR THE FEDERAL JUDICIARY (2010) (incorporating recommendation and implementation strategies outlined in JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995) [hereinafter LONG RANGE PLAN]); *Long Range Plan for the Federal Courts*, U.S. Cts., <https://www.uscourts.gov/statistics-reports/publications/long-range-plan-federal-courts> (last visited Feb. 13, 2024) (discussing how the Strategic Plan for the Federal Judiciary, whose “recommendations and implementation strategies include many statements of Judicial Conference policy that, unless superseded by later Judicial Conference action, remain in effect to this day”).

has a policy that, apart from fully staffing requests for new Article III judge-ships, Congress should establish new tribunals and adjudication *outside* the Article III judiciary.⁷⁵ In short, when Congress makes adjudication design decisions, the federal judiciary frequently opposes any expansion of Article III adjudicative responsibility.⁷⁶ One sees an example of that instinctive hostility to any expansion of the Article III footprint in Chief Justice Warren Burger's opposition to the vesting of bankruptcy judges with Article III status.⁷⁷ Similar forms of opposition arise in discussions of the role of the court of claims and other non-Article III tribunals.⁷⁸

Like federal agency tribunals, state courts handle a large share of federal business with judges who lack assured independence. An enormous literature has grown up around the so-called parity debate over the comparative capacity of state courts to serve as effective tribunals for the enforcement of federal rights.⁷⁹ Without rehashing the details of that debate here, we might simply observe that electoral politics places enormous strain on the neutrality and independence of state supreme court judges.⁸⁰ Scholars have shown that state supreme court judges vote differently in death penalty cases during years in which they must stand for retention or reelection.⁸¹ State judges deciding

75. See LONG RANGE PLAN, *supra* note 74, at 34 (“Recommendation 10: Where constitutionally permissible, Congress should be encouraged to assign to administrative agencies or Article I courts the initial responsibility for adjudicating those categories of federal benefit or regulatory cases that typically involve intensive fact-finding.”).

76. See *id.*

77. See Geraldine Mund, *A Look Behind the Ruling: The Supreme Court and the Unconstitutionality of the Bankruptcy Act of 1978*, 78 AM. BANKR. L.J. 401, 402–03 (2004) (tracing Chief Justice Burger's vigorous lobbying against the extension of Article III status to bankruptcy judges and describing dissent from the invalidation of the 1978 statute as reflecting his desire to influence the subsequent design of bankruptcy adjudication).

78. See, e.g., Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 614 n.159 (1985) (explaining that some oppose the expansion of the Article III judiciary because the expansion “would intrinsically diminish the prestige of the federal bench”).

79. See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

80. See generally Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13 (2003) (arguing that judicial elections have caused a reduction in judicial independence).

81. See Brandice Canes-Wrone et al., *Judicial Selection and Death Penalty Decisions*, 108 AM.

death penalty appeals in the shadow of a pending election affirm death penalties at a rate significantly higher than do judges in non-election years.⁸² One supposes political exposure informs other categories of state court adjudication.

B. The Supreme Court and Its Discontents

Diagnosing dysfunction at the Supreme Court may be the favorite indoor sport of law professors.⁸³ This Article will focus on four problems: the Court does not make enough law; it does not effectively oversee state courts; the law it makes tends to be public law that highlights and perhaps exacerbates the country's political divisions; and the Justices themselves appear to be withdrawing into partisan camps that undermine the prospects for consensus and law-based decisions. Signs of this sort of declining consensus abound, as the Justices snipe at one another over decisions on the shadow docket and elsewhere question the legitimacy of the Court's approach to stare decisis.⁸⁴

POL. SCI. REV. 23, 34 (2014) (calculating the probability of judicial upholding of the death penalty based on public support of capital punishment); *see also* Michael S. Kang & Joanna M. Shepherd, *Judging Judicial Elections*, 114 MICH. L. REV. 929, 939 n.37 (2016) (reviewing prior work that demonstrates significant changes in judicial voting behavior in death penalty proceedings as the shadow of reelection looms).

82. *See generally* RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1271–72 (7th ed. 2015) (reporting that federal courts intervene more frequently via habeas in death penalty than in other state post-conviction review proceedings).

83. *See* Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439 (2009) (arguing that Congress should expand the Supreme Court's decision-making capacity by increasing its membership, hearing most of its cases in panels, and retaining the authority to grant en banc review); *see also* Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess, Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009) (suggesting a "Certiorari Division of the Supreme Court" to alleviate the dysfunction in the Supreme Court's decision-making process of certiorari petitions).

84. *See* *Helix Energy Sols. Grp., Inc. v. Hewitt*, 143 S. Ct. 677, 685 n.2, 688 n.5 (2023) (Kagan, J.) (chiding the dissent for opining on an issue that the petitioner had forfeited and characterizing the dissent's argument as a "non-sequitur to end all non-sequiturs"); *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2498 (2021) (Sotomayor, J., dissenting from denial of stay) (describing the majority Justices' refusal to intervene as a "stunning" failure to block a flagrantly unconstitutional law and as a decision to bury their "heads in the sand"); *Biden v. Nebraska*, 143 S. Ct. 2355, 2388 (2023) (Kagan, J., dissenting) (criticizing the majority for "blow[ing] through [the] constitutional guardrail" that is standing by reaching the merits in the case).

1. The Dearth of Law

By any assessment, the Supreme Court resolves fewer important questions of law today than it has for much of the past century.⁸⁵ During its last three Terms, the Court decided fewer than seventy cases on the merits, most of them addressing questions of public law.⁸⁶ By contrast, during the 1970s and 1980s, the Court routinely handled upwards of 150 cases on the merits each year.⁸⁷ Most scholars attribute the Court's shrinking docket to the absence of any substantial mandatory appellate jurisdiction.⁸⁸ Since 1988, when Congress substituted discretionary for mandatory jurisdiction over appeals from state court denials of claims based on federal law, the Court's appellate docket has steadily declined.⁸⁹

The Court's shrinking docket has significantly limited its oversight of state courts.⁹⁰ In contrast to years in which it heard dozens of proceedings that originated in state court, the Court has decided only four and five cases on appeal from the states in 2020 and 2021, respectively.⁹¹ Practically speaking, then, the state courts face no routine form of federal judicial oversight, despite their evident inclusion in the federal pyramid.⁹² The lack of any assured access to federal appellate review casts doubt on a number of doctrines, such as the well-pleaded complaint rule and the abstention doctrines,⁹³ that were formulated during a time when deferring to initial state court

85. Heise et al., *supra* note 23, at 1567.

86. *See infra* Appendix B, Table 1.

87. Heise et al., *supra* note 23, at 1567.

88. *But see id.* at 1572 (arguing that the absence of the Court's mandatory jurisdiction of appeals gives the Justices more freedom to choose their docket but does not mean there are fewer appeals for the Court to hear).

89. *Id.* at 1567, 1572.

90. *See* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 751–52 (2001) (noting the 1988 legislation's repeal of 28 U.S.C. § 1257(1) and (2), which permitted appeals from state courts).

91. *See infra* Appendix B, Table 1.

92. *See* PFANDER, *supra* note 42, at xii (arguing the Constitution requires the U.S. judicial department to resemble a pyramid with the authority to check state courts on issues of federal law).

93. *See* Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 153 (1908) (foreclosing original federal jurisdiction over federal questions that arise as a defense to state law claims presented in a well-pleaded complaint); Younger v. Harris, 401 U.S. 37, 53–54 (1971) (foreclosing federal district courts from hearing affirmative federal law challenges to pending state court enforcement proceedings in which the federal claim would necessarily arise as a defense to liability). Both doctrines pre-date the 1988 switch to a discretionary appellate docket. *Mottley*, 211 U.S. at 149; *Younger*, 401 U.S. at 37.

adjudication only delayed, but did not essentially foreclose, federal judicial engagement.⁹⁴ The Court's current practice of exercising discretion over appellate oversight at the back-end of completed state proceedings puts increasing pressure on litigants to steer federal law matters to the federal district courts on the front end, a hydraulic pressure that helps account for the persistent and aggressive removal tactics that many litigants pursue at the trial level.⁹⁵

Apart from the declining mix of state court cases, the Court's docket largely consists of public law issues.⁹⁶ Of course, one can define the public-private divide in a variety of ways, depending on whether the government appears as a formal party to the litigation and whether the subject deals with the administrative state.⁹⁷ But notwithstanding the Court's emphasis in its standing decisions on the importance of preserving the private dispute resolution model of adjudication, the cases that the Court accepts on its docket do not feature many private law questions. Of the cases decided in the 2020 Term, the Harvard Law Review coded fifty-two of them as presenting questions of public law, leaving private law disputes to account for the remaining ten or so.⁹⁸ Of course, the switch to public law reflects the rise of the administrative state and the announcement of the *Erie* doctrine, both of which tend to put the Court out of the business of formulating rules of private law.⁹⁹ The

94. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 408–10 (1996) (noting the appeal process by which certain kinds of cases could be brought before the Court prior to the repeal of mandatory jurisdiction).

95. See Valerie D. Nannery, *Closing the Snap Removal Loophole*, 86 U. CIN. L. REV. 541, 545 (2018) (describing the rise of snap removal among corporate defendants with the resources to monitor state court dockets and remove actions before service); E. Farish Percy, *Inefficient Litigation over Forum: The Unintended Consequences of the JVCA's Bad Faith Exception to the Bar on Removal of Diversity Cases After One Year*, 71 OKLA. L. REV. 595, 601 (2019) (describing the way defendants exploit elements of removal law by engaging "in bad-faith forum manipulation by removing based upon frivolous allegations").

96. For a series of tables categorizing the Court's docket from the 2020 Term by subject matter, see *The Statistics*, 135 HARV. L. REV. 491, 501–03 (2021).

97. The Court, for example, often characterizes the so-called public rights exception to Article III as turning on the presence of the government as a party. See, e.g., *Stern v. Marshall*, 564 U.S. 462 (2011) (distinguishing public from private rights on this basis). For a critique, see James E. Pfander & Andrew G. Borrasso, *Public Rights and Article III: Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493 (2021).

98. *The Statistics*, *supra* note 96, at 501–04 (coding ten cases as private litigation during the 2020 term).

99. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (rejecting the *Swift* conception of the

last great private lawyer to serve on the Court, Benjamin Cardozo, died in 1938.¹⁰⁰ The greatest private lawyer working in the federal system today, Judge Guido Calabresi, routinely invites state court engagement on matters of private law through the certification process.¹⁰¹

One might suppose that a consistent failure to address issues of private law poses few problems in a largely public law world. Well, maybe. But when the Court does happen to bump into matters of private law, it can make a hash of them. Consider its ham-handed handling of issues of equitable remediation—issues that Professor John H. Langbein highlighted in a sharply critical essay on the Court’s equity jurisprudence.¹⁰² Consider as well the fact that the Court’s *Erie*-induced inability to entertain matters of private law forces the Court to federalize broad swaths of law that might be handled in other ways.¹⁰³ The right of action in *Bivens* was less a judge-made right to sue than a federalized right to sue; the common law suit against federal officers had been around since the Founding.¹⁰⁴ Similarly, without control over

federal judiciary as enjoying the power to fashion rules of general common law). *See generally* Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1246 (1994) (pointing out the adjudicative responsibilities assigned to administrative agencies within the structure of the administrative state).

100. *See generally* Hon. Homer Cummings, Address at the Meeting of the Bar of the Supreme Court of the United States in Memory of Benjamin N. Cardozo 1, 3 (Dec. 19, 1938) (describing the life of Justice Benjamin N. Cardozo and his deep knowledge of the common law).

101. *See* Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. REV. 1293, 1301 (2003); *see also* Carroll v. Trump, 49 F.4th 759, 761, 781 (2d Cir. 2022) (Calabresi, J.) (certifying the question of whether Trump’s defamatory statements occurred within scope of his employment to D.C. Court of Appeals).

102. John H. Langbein, *What ERISA Means by “Equitable”*: *The Supreme Court’s Trail of Error in Russell, Mertens, and Great-West*, 103 COLUM. L. REV. 1317, 1319 (2003). One might add to this list the Court’s refusal to allow ERISA plan beneficiaries to contest fiduciary breach. *See* Thole v. U.S. Bank N.A., 140 S. Ct. 1615 (2020).

103. *See* Cordray & Cordray, *supra* note 90, at 774 (speculating that the Court’s adjudication of private civil cases reduces homogeneity within lower courts); *see also* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as “Law” and the Erie Doctrine*, 120 YALE L.J. 1898, 1972–73 (2011) (noting the Court’s explicit rulings regarding contractual disputes within the context of maritime law).

104. *See* James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117, 123 (2009) (“The structural confirmation flows from the fact that Congress, by transforming claims for law enforcement (and other) torts into claims against the United States under the FTCA, has largely eliminated state common law remedies as a relevant source of relief for individuals who have suffered a constitutional injury.”). *See generally* James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics*, in FEDERAL COURTS’ STORIES 275 (Judith Resnik & Vicki C. Jackson eds., 2009) (discussing the evolution of a federalized right to sue government officials).

the common law, the Court can manage such questions as standing and punitive damages only by deploying the heavy artillery of Article III and Fourteenth Amendment due process.¹⁰⁵

Apart from the lack of private law engagement, the Court's docket means that it rarely stays abreast of important questions in the many fields of law it supposedly oversees. For all the attention accorded its marquee decisions, one can quite readily identify questions that the Court has shied away from addressing. Just in the field of procedure and jurisdiction, the list includes notable omissions:

*Although the Court has been increasingly active in addressing judicial jurisdiction, most recently in *Ford Motor* and *Mallory*, it has never engaged with the problem of how one evaluates judicial jurisdiction on the internet. In its concern for a hypothetical duck carver in Maine, the Court has failed to address real-world internet cases that might clarify the framework for analysis.¹⁰⁶

*What are the limits on state choice of law? The Court has done little to clarify the application of due process and full faith and credit to state choice of law decisions and sometimes appears to equate

105. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425–26 (2003) (holding that due process imposes limits on the allowable extent of punitive damage awards in state law tort litigation). Notably, when exercising admiralty jurisdiction and the federal common law applicable to such litigation, the Court formulated a rule of proportionality for punitive damages that did not require invocation of due process. See *Exxon Shipping v. Baker*, 554 U.S. 471 (2008) (fixing a ratio of 1:1 for punitive and compensatory damages in admiralty). On the transition from standing as a form of equitable discretion to standing as a constitutional limit on judicial power, see JAMES E. PFANDER, *CASES WITHOUT CONTROVERSIES: UNCONTESTED ADJUDICATION IN ARTICLE III COURTS* (2021).

106. See *Ford Motor Co. v. Mont. Eighth Judicial Dist. Court*, 141 S. Ct. 1017, 1028 n.4 (2021) (exploring the implications of internet-based jurisdiction over a hypothetical wood carver in Maine); *Mallory v. Norfolk S. Ry. Co.*, 143 S. Ct. 2028 (2023) (upholding a state law that requires foreign companies who are registered to do business within the state to agree to appear on “any cause of action” and concluding that the law does not violate the Due Process Clause); cf. *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 887, 892 (2011) (Breyer, J., concurring) (acknowledging “changes in commerce and communication, many of which are not anticipated by our precedents” but declining to address those changes and discussing instead the implications of the Court’s doctrine for “a small Egyptian shirt maker, a Brazilian manufacturing cooperative, or a Kenyan coffee farmer”). For an account of the varying approaches of the lower courts to internet-based personal jurisdiction, see A. Benjamin Spencer, *Jurisdiction and the Internet: Returning to Traditional Principles to Analyze Network-Mediated Contacts*, 2006 U. ILL. L. REV. 71 (2006) and Scott T. Jansen, Comment, *Oh, What a Tangled Web . . . The Continuing Evolution of Personal Jurisdiction Derived from Internet-Based Contacts*, 71 MO. L. REV. 177, 185–90 (2006).

judicial and legislative jurisdiction.¹⁰⁷

*When can a government contractor claim to be the government for purposes of invoking the removal authority conferred in 28 U.S.C. § 1442? The Court has tiptoed around the issue but has not taken a case to end that debate.¹⁰⁸

*When can a corporate defendant engage in snap removal? The answer should be never, but neither the lower federal courts nor Congress has been able to generate that sensible answer.¹⁰⁹

Specialists in other fields can doubtless identify similarly important and yet unresolved questions.¹¹⁰

2. The Absence of Effective State Court Oversight

As James Wilson understood, the need for appellate oversight increases as the quality of adjudication at the base of the judicial pyramid declines.¹¹¹ One sees support for that conclusion in the relatively intense federal appellate

107. Maggie Gardner et al., *The False Promise of General Jurisdiction*, 73 ALA. L. REV. 455, 477 (2022). The Court has been relatively active in the past ten years or so, announcing personal jurisdiction decisions in a variety of settings. See, e.g., *Nicastro*, 564 U.S. at 887; *Daimler AG v. Bauman*, 571 U.S. 117, 120–21 (2014); *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 582 U.S. 255, 258 (2017); *Ford Motor*, 141 S. Ct. at 1022. On forum shopping, see *Ford Motor Co.*, 141 S. Ct. at 1031 (characterizing its earlier decision *Bristol-Myers Squibb* as one in which “the plaintiffs were engaged in forum-shopping—suing in California because it was thought to be plaintiff-friendly, even though their cases had no tie to the State.”). Needless to say, the choice of law process means that the selection of California as the forum state furnishes no guarantee that plaintiff-friendly California substantive law will apply to the disposition of tort claims with no ties to the state. *Bristol-Myers Squibb*, 582 U.S. at 263; see also *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 806–07 (1985) (explaining that the Constitution prohibits forum states from applying forum substantive law without contacts creating state interests such that the application of forum law is neither arbitrary nor fundamentally unfair).

108. See *BP P.L.C. v. Mayor of Baltimore*, 141 S. Ct. 1532, 1543 (2021) (failing to define removal rights of government contractors).

109. See *Gibbons v. Bristol-Myers Squibb Co.*, 919 F.3d 699 (2d Cir. 2019); *Encompass Ins. Co. v. Stone Mansion Rest. Inc.*, 902 F.3d 147 (3d Cir. 2018); *McCall v. Scott*, 239 F.3d 808, 813 n.2 (6th Cir. 2001).

110. See, e.g., Brian K. Van Engen, *Nobelmann v. American Savings Bank: The Supreme Court’s Answer Raises More Questions*, 20 J. CORP. L. 363, 387 (1995) (evaluating the Court’s failure to clarify questions related to creditors’ rights, especially relating to mortgages, under federal bankruptcy statutes).

111. See WILSON, *supra* note 39, at 945 (“If no superintended tribunal . . . were established, different courts might adopt different and even contradictory rules of decision.”).

court engagement with issues of immigration law on review of a poorly staffed and supported group of immigration judges.¹¹² Much the same phenomenon may be occurring in connection with federal judicial review of state court decisions. Particularly in connection with the handling of death penalty appeals, one has reason to question the capacity of state judiciaries to enforce federal law. Scholars report that judges on state supreme courts cast more prosecution-friendly votes in death penalty appeals as they contemplate or campaign for re-election.¹¹³

The nature of Supreme Court oversight of state court decisions has changed dramatically in the last generation. With the loss of its mandatory appellate jurisdiction over state decisions in 1988, the Court has tended to display less interest in using its relatively scarce certiorari resources to ensure review of state court decisions.¹¹⁴ As previously noted, the Court agreed to review only four or five cases coming from the state courts in the 2020 and 2021 Terms, respectively.¹¹⁵ With state supreme courts issuing around 55,000–60,000 decisions each year, the prospects for review in any particular case seem vanishingly small.¹¹⁶

The loss of effective Supreme Court review has been accompanied by restrictions on access to review of state court decisions by the lower federal courts. Notably, Congress has curtailed the effectiveness of federal habeas post-conviction review of state court convictions, imposing important restrictions on the scope of review in federal district court proceedings.¹¹⁷ The Court has abetted these limits, narrowing the review of ineffective assistance

112. See Sayed, *supra* note 64, at 940–41 (describing “scathing indictments” by federal circuit court judges of the Board of Immigration Appeal’s decision-making). This Article focuses on immigration adjudication, as the issues are ones in which political salience will most likely tend to inform executive branch oversight of the work of immigration judges. See, e.g., Daniel R. Buteyn, *The Immigration Judiciary’s Need for Independence: Breaking Free from the Shackles of the Attorney General*, 46 MITCHELL HAMLINE L. REV. 958, 968 (2020) (“Immigration judges . . . are at the mercy of the executive branch and can be pressured to rule in a way that aligns with the political views of the President.”).

113. See *supra* notes 80–82 an accompanying text.

114. See Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167, 170–72 (2018) (analyzing findings showing “a consistent underrepresentation of state courts” in the Supreme Court between the 2002 and 2014 terms).

115. See *infra* Appendix B, Table 1.

116. See *infra* Appendix A, Table 3.

117. See FALLON, JR. ET AL., *supra* note 82, at 336 (accounting for the Antiterrorism and Effective Death Penalty Act (AEDPA) restrictions on federal habeas relitigation).

of counsel and casting doubt on such bedrock decisions as *Brown v. Allen*.¹¹⁸ To the extent that *Brown* was conceived as providing a form of appellate oversight to compensate for the Court's inability to furnish it on direct review, federal habeas post-conviction review may no longer deliver on that promise.¹¹⁹

3. Addressing the Shadow Docket

Of the recent developments at the Court, nothing matches its increased use of its shadow or emergency docket as a forum for the elaboration of controlling legal principles.¹²⁰ Critics of the shadow docket decisions of the past five years have argued that the arrival of a conservative majority coincided with a marked increase in controlling shadow docket dispositions.¹²¹ Across a range of subjects, including abortion rights, religious liberty, and election law, the Court's shadow docket decisions have anticipated and set the stage for new legal rules.¹²² To mention only the most obvious, the Court's failure to halt the Texas statute S.B.8 in September 2021 anticipated its refusal three months later to allow an *Ex parte Young* action to proceed against Texas courts and judges and its decision several months after that to overturn *Roe v.*

118. See *Shinn v. Ramirez*, 596 U.S. 366 (2022) (narrowing access to federal habeas review of ineffective assistance claims); *Brown v. Davenport*, 142 S. Ct. 1510, 1522 (2022) (depicting the de novo habeas relitigation approved in *Brown* as a departure from an earlier world in which habeas issued only to confine state courts within their justification). On the other hand, the Court has sometimes expanded its own capacity for direct review of state court decisions to compensate for AEDPA's inroads on federal habeas review. See *Montgomery v. Louisiana*, 577 U.S. 190 (2016).

119. See *Brown v. Allen*, 344 U.S. 443, 462, 463 (1953). Under AEDPA, federal courts no longer review state court decisions for errors of law. See 28 U.S.C. § 2254(d). Instead, they ask if the state court decision was "contrary to" or an "unreasonable application" of the law established in Supreme Court decisions. *Id.* at § 2254(d)(1).

120. See Richard J. Pierce, Jr., *The Supreme Court Should Eliminate Its Lawless Shadow Docket*, 74 ADMIN. L. REV. 1, 3 (2022) (describing the growth in shadow or emergency docket dispositions and tracing them to the rise of suits brought by state attorneys general to seek universal injunctive relief against presidential policy initiatives).

121. See STEVE VLADECK, *THE SHADOW DOCKET* 24 (2023) (tracing the development of the shadow docket and arguing that the Court's conservative majority has used it to shift American jurisprudence to the right).

122. See, e.g., *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021) (holding that the State's abortion restriction legislation, which would be enforced by private individuals, could take effect); *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (holding that an injunction pending appeal was warranted in an action asserting a free exercise challenge to California's restrictions on private gatherings during COVID-19 pandemic); *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (staying an injunction for a vote dilution challenge to Alabama's congressional redistricting plan).

Wade.¹²³ Shadow docket litigation in the aftermath of universal injunctions has become increasingly common and disruptive.¹²⁴

4. The Court at the Bar of Politics¹²⁵

Instead of settling legal questions, the Court has come to pay a good deal more attention to its political docket. In recent years, the Court reevaluated the *Roe/Casey* framework and the individual rights of pregnant people¹²⁶ and reimagined the doctrine of affirmative action.¹²⁷ Less salient but equally important, the Court has expanded the major questions doctrine in ways that significantly undercut the deference owed to agency interpretation of general legislative directives.¹²⁸ A series of decisions expand the potency of a unitary executive and (as we have seen) threaten the independence of agency adjudicators.¹²⁹ At the same time, the Court's ever more energetic use of its shadow docket threatens to upend settled doctrine in such areas as voting rights and religious liberty.¹³⁰ Its refusal to stay enforcement of a Texas law designed to shut down access to then-lawful abortion services drew sharply worded dissents.¹³¹

123. See *Whole Woman's Health*, 595 U.S. at 39, 45 (sovereign immunity blocks *Ex parte Young* suit against state judges and clerks but not against licensing officials). On remand, the Fifth Circuit did not return the case to the district court, as some Justices assumed it would. See *Whole Woman's Health v. Jackson*, 23 F.4th 380, 384 (5th Cir. 2022). Instead, that court certified to the Texas Supreme Court questions as to the authority of state licensing officials to enforce S.B.8. *Id.* The Texas Supreme Court ruled that the relevant statutes conferred no such authority. See *Whole Woman's Health v. Jackson*, 642 S.W.3d 569, 583 (Tex. 2022); cf. *Whole Woman's Health*, 141 S. Ct. at 2495–96 (citing doubts as to the propriety of suit against named defendants among reasons to refrain from staying S.B.8 before it went into effect on September 1, 2021).

124. See *Pierce, Jr.*, *supra* note 120, at 3 (discussing the changed environment that has accompanied the Supreme Court's more frequent use of its shadow docket, which includes an increase in universal injunctions by district courts).

125. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 244 (1962).

126. See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

127. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141 (2023).

128. See *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–08 (2022); *Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661 (2022) (per curiam); *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

129. See *supra* notes 71–73 and accompanying text (describing cases in which the Court has strengthened the executive's control over agency officials).

130. See VLADÉCK, *supra* note 121, at 164, 226.

131. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2496, 2498, 2500 (2021) (four dissents).

The predominance of political and public law cases poses a problem for those who do not happen to share the Court's politics. But it's even a problem for those who do. Put simply, the Court was designed to solve legal problems, rather than political ones.¹³² However one might react to decisions protecting minority rights and displacing majority preferences, it seems obvious that the Court does its best work when it sticks to legal questions. We all recognize this intuitively, but comments of Justice Elena Kagan confirmed our intuition. Speaking with the apparent distinction between political and legal questions in mind as part of public comments to a faculty group, Justice Kagan described the Supreme Court's deliberative process.¹³³ On the most divisive questions of constitutional law, on which the Justices have well-developed views, deliberations do not help.¹³⁴ But as to what one might consider the more lawyerly questions, such as issues of jurisdiction, Justice Kagan described a vigorous and helpful deliberative process as the Justices strove for right lawyerly answers.¹³⁵

Justice Kagan's account of the deliberative process may help us better understand the results of an interesting study of two competing models for predicting Supreme Court outcomes. In a study comparing the predictive power of an algorithm (predictions based on Martin-Quinn scores that ignore doctrine and measure the ideology of the Justices and array them along a spectrum) to that of "experts" (a group of academics and appellate practitioners with knowledge of the Court's doctrine and workways), the algorithm generally won.¹³⁶ But the experts "substantially outperformed the model in

132. See BICKEL, *supra* note 125, at 260–61. Much of the discussion of the Court's role reflects fundamental disagreements about its exercise of judicial review. *Id.* at 16–17, 29. For some, judicial review represents a welcome enforcement of constitutional limits on the excesses of the political branch authority. *Id.* at 29. For others, such review unduly authorizes the Court's unelected Justices to decide questions better left to the political branches, posing what some have labeled the "counter-majoritarian difficulty." *Id.* at 16–17.

133. For an account of Justice Kagan's remarks, see John O. McGinnis, *Our Two Supreme Courts*, L. & LIBERTY (May 6, 2015), <https://lawliberty.org/our-two-supreme-courts> (recounting Justice Kagan's speech at Northwestern University Pritzker School of Law).

134. See *id.* (arguing that further deliberation is unhelpful where there is a lack of "common legal language" or even "shared preferences" on the Court).

135. *Id.*

136. See Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1152, 1163–69 (2004) (finding that a statistical model better forecasted the Supreme Court's decisions than predictions made by legal experts).

predicting both case outcomes and votes in the judicial power cases.”¹³⁷ The cases in this category presented “technical issues of procedure in which the rule of decision was unlikely to directly implicate broad policy debates outside the legal system.”¹³⁸ In such situations, the authors found, legal experts may have a “comparative advantage over the machine.”¹³⁹ Legal doctrine may have greater holding power in procedure cases than in the more ideologically-charged issues of constitutional law that come before the federal courts.¹⁴⁰ One might predict that, if the Court were doing more private law, the private lawyers would outperform the public lawyers in predicting outcomes.

The coherence of private law may help shore up the sociological legitimacy of the Supreme Court. Scholars have debated the legitimacy of the Supreme Court at some length.¹⁴¹ As Professor Tara Grove explained in a review of Professor Richard Fallon’s book on the Court’s legitimacy,¹⁴² the Court depends on acceptance of its decisions by those who disagree with them; on this account, “[l]egitimacy is for losers.”¹⁴³ But losers may care more about outcomes than about the rationale deployed to reach them. The Court might expand its diffuse external or sociological legitimacy if it renders decisions that cohere with the views of experts in the field. Recognizing that the Court has deployed an agreed-upon methodology to reach widely acceptable results, observers may respond to the Court’s lawyerly decisions in ways that support the outcomes as based in law and thereby entitled to diffuse public support.

137. *Id.* at 1182.

138. *Id.*

139. *Id.*

140. *Id.* (describing the more procedural rather than ideological nature of the “judicial power cases,” showing more judicial reliance on doctrinal and legal analysis in these types of cases).

141. See, e.g., Gillian E. Metzger, *Considering Legitimacy*, 18 *GEO. J. L. & PUB. POL’Y* 353, 357 (2020) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)); Epps & Sitaraman, *How to Save the Supreme Court*, *supra* note 2, at 148 (discussing the effects of Justice Brett Kavanaugh’s confirmation and of cementing a conservative majority on the Court’s legitimacy); ROSALEE A. CLAWSON & ERIC N. WALTENBURG, *LEGACY AND LEGITIMACY: BLACK AMERICANS AND THE SUPREME COURT* 18 (2009) (analyzing the issue of Court legitimacy in the African American community).

142. See Tara Leigh Grove, *The Supreme Court’s Legitimacy Dilemma*, 132 *HARV. L. REV.* 2240 (2018) (reviewing FALLON, JR., *supra* note 141). Grove follows Fallon in assessing the Court’s sociological (or external) legitimacy, its moral legitimacy, and its legal legitimacy. *Id.* at 2245, 2250–51. As she explains, the Court’s approval rating has dropped in an era of hyper-partisanship, threatening the diffuse public support that ensures public respect for and obedience to its decisions. *Id.* at 2252–53.

143. *Id.* at 2250.

5. The Holding Power of Ideological Commitments

It has become a commonplace of our current era to observe a rising partisanship in all walks of our political life.¹⁴⁴ At one time, perhaps, the Supreme Court may have been able to transcend the partisan divide. Chief Justice Marshall was remarkably successful in crafting a broad judicial consensus on the Court even after the Federalists lost their numerical control of the institution.¹⁴⁵ Whether as a matter of sheer persuasive power or as a matter of warmth and hospitality at the Court's boarding house in the District,¹⁴⁶ it seems that few of the Court's Justices could resist Marshall's conception of right answers to legal questions. Even during the showdowns with Virginia and Maryland in debates over § 25 of the Judiciary Act of 1789 and the Bank of the United States, Marshall kept his judicial coalition together in the face of strong partisan opposition.¹⁴⁷

Observing the power of collegiality and consensus at the Court, many have sought ways and means of preventing partisan drift on the part of the Justices.¹⁴⁸ Many supporters of President Eisenhower, including the President himself, bristled at the decisions rendered by two of his Justices, Chief Justice Earl Warren and Justice William Brennan.¹⁴⁹ Since then, partisan critics have

144. See, e.g., Michael S. Kang, *Hyperpartisan Campaign Finance*, 70 EMORY L.J. 1171, 1173–75 (2021) (contrasting today's hyperpartisanship with the bipartisanship and moderation of the Cold War era).

145. See Charles F. Hobson, *Defining the Office: John Marshall as Chief Justice*, 154 U. PA. L. REV. 1421, 1431 (2006) (noting that “the Marshall Court during the next dozen years achieved its highest degree of internal unity and stability” even with a minority of Federalist Justices and a majority of Republican Justices).

146. See GERARD N. MAGLIOCCA, *WASHINGTON'S HEIR: THE LIFE OF JUSTICE BUSHROD WASHINGTON* 56 (2022) (describing Marshall's command over the Court's deliberations as the Justices lived and took meals together during term time).

147. See *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816); *Cohens v. Virginia*, 19 U.S. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 316 (1819) (unanimous decision).

148. See, e.g., David Orentlicher, *Politics and the Supreme Court: The Need for Ideological Balance*, 79 U. PITT. L. REV. 411, 412 (2018) (arguing for a Supreme Court that functions on an ideological balanced basis); Alicia Bannon & Michael Milov-Cordoba, *Supreme Court Term Limits*, BRENNAN CTR. (June 20, 2023), <https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits> (discussing idea of “staggered 18-year terms” for Supreme Court Justices); Simon Lazarus, *How to Rein in Partisan Supreme Court Justices*, BROOKINGS (Mar. 23, 2022), <https://www.brookings.edu/articles/how-to-rein-in-partisan-supreme-court-justices/> (suggesting resolution of partisanship on the Supreme Court by “tightening existing requirements” that include “strengthening judicial ethics, conflict of interest, and good practice and procedure standards”).

149. See Michael O'Donnell, *Commander v. Chief*, THE ATLANTIC (Apr. 2018),

attacked the work of Harry Blackmun and John Paul Stevens as unbecoming of their status as appointees of Republican presidents.¹⁵⁰ Justices Souter, Kennedy, and O'Connor received similar criticisms after publishing their joint opinion in *Planned Parenthood v. Casey*, largely reaffirming the *Roe* framework for the protection of a right to abortion.¹⁵¹ Some critics spoke of the impact of the *New York Times*, whose op-ed writers tend to laud the progressive and sharply criticize the conservative decisions.¹⁵² For Justices who travel in polite circles in Washington, D.C., sharp criticism in the leading salons and newspapers may have made it more difficult to hew to a particular party line.¹⁵³

With the fragmentation of the media in the United States and the loss of the mainstream press as a focal point for consensus national opinion, the “Greenhouse effect” (as commenters have sometimes characterized the phenomenon of partisan drift)¹⁵⁴ has lost its purchase on the imagination of the

<https://www.theatlantic.com/magazine/archive/2018/04/commander-v-chief/554045/> (describing Warren’s shock over Eisenhower’s vocal and racist opposition to the ruling in *Brown v. Board of Education*).

150. See Jon D. Hanson & Adam Benforado, *The Drifters*, BOS. REV. (Jan. 2, 2002), <https://www.bostonreview.net/articles/jon-d-hanson-adam-benforado-the-drifter-supreme-court-makes-justices-more-liberal/>.

151. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022). For criticisms of the controlling three-justice plurality, see Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003).

152. See David Rutz, *New York Times, Washington Post Opinion Sections Strongly Negative on Supreme Court Abortion Ruling: Analysis*, FOX NEWS (July 5, 2022), <https://www.foxnews.com/media/new-york-times-washington-post-opinion-sections-strongly-negative-supreme-court-abortion-ruling> (reporting that “28 out of 38 columns, guest essays or editorials . . . were negative about the Supreme Court’s decision” in *Dobbs*); cf. Joseph A. Wulfsohn, *Bill Maher Buries NYT for Burying Kavanaugh Assassination Attempt: ‘They Wear Their Bias on Their Sleeves’*, FOX NEWS (June 11, 2022), <https://www.foxnews.com/media/bill-maher-buries-nyt-burying-kavanaugh-assassination-attempt-wear-bias-sleeves> (reporting Bill Maher’s comments regarding the *New York Times*’s reporting on the Brett Kavanaugh assassination attempt. At one point, Maher stated: “If this had been a liberal Supreme Court Justice that someone came to kill, it would have been on the front page.”).

153. See, e.g., Joan Biskupic, *Analysis: Supreme Court Justices Respond to Public Criticism with Distance and Denial*, CNN (Sept. 13, 2022), <https://www.cnn.com/2022/09/13/politics/supreme-court-public-criticism-distance-denial-roberts/index.html> (discussing appearances of Justices at party-affiliated events after *Dobbs*).

154. Martin Tolchin, *Press Is Condemned by a Federal Judge for Court Coverage*, N.Y. TIMES, (June 15, 1992) at A13 (quoting Judge Silberman characterizing Republican judges as drifting to the center-left to curry favor with *New York Times* reporter Linda Greenhouse).

Justices.¹⁵⁵ Instead of playing to an imagined consensus as reflected by the *Times*, the *Washington Post*, and *CBS Evening News*, Justices can now do their work with the reaction of their political base foremost in mind. Indeed, the Federalist Society has quite effectively identified potential judges and then supported their candidacy through an increasingly bitter and divisive confirmation process.¹⁵⁶ Coming shortly after a bruising confirmation battle, the standing ovation that Justice Kavanaugh received at the Federalist Society's annual dinner may have helped to compensate in part for wounds inflicted at the Senate and to clarify for the new Justice the identity of his closest friends and strongest supporters.¹⁵⁷ The Federalist Society's annual conference (like its counterpart at the American Constitution Society) can do much to moderate the sting of popular criticism by offering reliable applause from true believers.¹⁵⁸

Playing to the base, in fact, increasingly shapes the work of Supreme Court Justices. One can see that reflected in the speaking and educational engagements the Justices accept and in the uproar caused by the proposal (floated but shouted down within the Judicial Conference) that federal judges should no longer affiliate with groups like the Federalist Society.¹⁵⁹ Professor Suzanna Sherry identified the Court's growing tendency to play to the base as a reflection of what she calls our "Kardashian Supreme Court."¹⁶⁰

155. For an account of partisan drift, see generally Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. L. REV. 1483 (2007). For the Federalist Society strategy to ensure we will see "No More Souters," see Mark Joseph Stern, *A Trump Judge's Tantrum at Stanford Law Was Part of a Bigger Plan*, SLATE (Mar. 13, 2023, 4:53 PM), <https://slate.com/news-and-politics/2023/03/trump-judge-kyle-duncan-stanford-law-scotus-audition.html>.

156. See LIDIA JEAN KOTT & NOAH FELDMAN, TAKEOVER: HOW A CONSERVATIVE STUDENT CLUB CAPTURED THE SUPREME COURT (2021) (telling the story of how the Federalist Society grew from a student club to a highly influential legal organization).

157. See Adam Liptak, *Kavanaugh Recalls His Confirmation at Conservative Legal Group's Annual Gala*, N.Y. TIMES (Nov. 14, 2019), <https://www.nytimes.com/2019/11/14/us/kavanaugh-federalist-society.html>.

158. See, e.g., *Supreme Court Justices Cheered at Conservative Group's Anniversary Dinner*, CBS NEWS (Nov. 21, 2022), <https://www.cbsnews.com/news/supreme-court-justices-cheeredconservative-groups-anniversary-dinner/> (noting the "lengthy history of [conservative Justices] addressing the annual Washington meeting of the organization").

159. See Madison Alder, *Judges Not Barred from Federalist Society, ACS Membership*, BLOOMBERG L. (July 30, 2020, 3:26 PM), <https://news.bloomberglaw.com/us-law-week/judges-wont-be-barred-from-federalist-society-acs-membership>.

160. Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020)

Emblematic of that brand-conscious approach to the task of judging, Professor Sherry highlighted the celebrity that Justice Ginsburg attained by embracing the “notorious RBG” description that had been bestowed upon her in popular culture.¹⁶¹ Sherry describes other examples of Justices who play increasingly to their base and aim to distinguish their work from the work of the Court by writing an ever-increasing number of separate dissents and concurrences.¹⁶² Sherry would solve the problem of celebrity-consciousness by eliminating the signed opinion and requiring the Court to do all its business through opinions of the Court.¹⁶³

III. SHORING UP THE ARTICLE III PYRAMID

Having identified at least some of the challenges facing the federal judiciary, this Part offers a program of reforms. At the Supreme Court level, it may make sense to increase the Court’s workload to some degree, thereby enabling it to answer a broader range of legal questions, maintain closer contact with the adequacy of state justice, and moderate the courtship of celebrity. Justices busily working to resolve cases may have less time to fashion intricate concurring and dissenting opinions that signal to the base and preserve ideological purity. With a docket that features more legal and fewer political issues, the Court’s deliberative processes may improve as Justices learn to respect one another as lawyers and to align in shifting coalitions about the right answer to legal questions. At the base of the pyramid, too, some changes may be necessary. One strategy, supported by Professor Resnik, would be to associate the process of agency adjudication more closely with the Article III judiciary.¹⁶⁴

A. *Jurisdiction Stuffing*

Critics of the Supreme Court often speak of legislation that would foreclose the Court’s consideration of one or more divisive questions of public

(“The contributing cause is that individual Justices have become celebrities akin to the Kardashians. Television appearances, books, movies, stump speeches, and separate opinions aimed at the Justices’ polarized fan bases have created cults of personality around individual Justices.”).

161. *Id.* at 185–86.

162. *Id.* at 199.

163. *Id.* at 197.

164. Resnik, *supra* note 32, at 38–42.

law.¹⁶⁵ Court-curbing and jurisdiction-stripping have been a focus of both conservative and progressive law reform efforts for much of the twentieth century.¹⁶⁶ Indeed, then Professor Frankfurter pioneered progressive jurisdiction-stripping with the development of limits on the federal courts' jurisdiction to enter labor injunctions.¹⁶⁷ Conservative measures have been similarly effective, often in the immigration and national security space.¹⁶⁸ In among the most sweeping recent jurisdictional restrictions, Congress, in adopting the Military Commission Act of 2006, foreclosed federal adjudication of both habeas petitions and *Bivens* claims to contest the legality of detention and treatment of prisoners at Guantanamo Bay.¹⁶⁹ The Court invalidated only the Act's habeas restrictions.¹⁷⁰

But restrictions on the jurisdiction of the lower federal courts and the Supreme Court, though arguably within Congress's authority, may not, for well-understood reasons, achieve their desired results. State courts would often retain authority to adjudicate in the wake of federal jurisdiction restrictions and might view themselves as bound by the decisions and doctrines that Congress set out to attack. Limiting federal adjudication of, say, Second Amendment claims, would do little to ensure continued federal judicial engagement

165. See Alex Glashauser, *The Extension Clause and the Supreme Court's Jurisdictional Independence*, 53 B.C. L. REV. 1225, 1226 (2012) (discussing legislative attempts to prevent the Court from hearing cases on politically charged topics "such as marriage, religion, and abortion").

166. See, e.g., Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988, 992–93 (1982) (discussing jurisdiction-stripping bills introduced in the 97th Congress, including bills aimed at restricting lower federal court jurisdiction in abortion cases); Samuel Moyn, *Resisting the Juristocracy*, BOST. REV. (Oct. 5, 2018), <https://www.bostonreview.net/articles/samuel-moyn-resisting-juristocracy/> ("Instead of terrorizing the court into moving through various court-packing schemes, it is a much better and bolder choice for the left to stand up for reforms that will take the last word from it.").

167. See generally FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* (1930) (treatise on the functioning of the injunction in labor disputes).

168. See, e.g., *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, § 306, 110 Stat. 3009-546 (1996) (stripping *all* courts of jurisdiction to issue orders stopping removal unless the person claims to be a U.S. citizen, permanent resident, or someone previously granted refugee status).

169. *Military Commissions Act of 2006*, Pub. L. No. 109-366, § 7, 120 Stat. 2600 (2006); see Joshua Alexander Geltzer, *Of Suspension, Due Process, and Guantanamo: The Reach of the Fifth Amendment After Boumediene and the Relationship Between Habeas Corpus and Due Process*, 14 U. PA. J. CONST. L. 719, 724–27, 730–31 (2012) (discussing how Military Commission Act of 2006 restricted Guantanamo Bay detainees' constitutional rights to habeas petitions and *Bivens* claims).

170. *Boumediene v. Bush*, 553 U.S. 723, 792 (2008) (holding that the provision of the Military Commissions Act denying federal courts of jurisdiction to hear habeas corpus actions pending at the time of its enactment was an unconstitutional suspension of habeas corpus).

with the law and could lock in a set of outcomes that progressives might urge the federal courts to abandon. Without one Supreme Court to resolve conflicts in the law as it develops, state courts might go in a variety of different directions.

Instead of jurisdiction stripping, this Article urges the consideration of some jurisdiction stuffing, some expansion of the Court's docket to encompass more cases and a broader range of legal questions.¹⁷¹ While critics have doubted the wisdom and constitutionality of jurisdiction-stripping, those concerns do not appear to arise from proposals that would expand the Court's mandatory jurisdiction to some extent.¹⁷² (Of course, the *Marbury* decision forecloses jurisdiction stuffing through the expansion of the Court's original jurisdiction.)¹⁷³ After all, the Court once had a very large slice of mandatory appellate jurisdiction, extending to decisions by both lower state and federal courts.¹⁷⁴ Even after the Judiciary Act of 1925 gave the Court a good measure of control over its appellate docket, Congress assigned some constitutional claims to three-judge courts, the decisions of which were subject to as-of-right review in the Supreme Court.¹⁷⁵ Restoring a measure of mandatory jurisdiction would surely fall within the scope of Congress's power to control the extent of any exceptions and regulations to the Court's appellate

171. For a cautionary introduction to the idea of "jurisdiction stuffing," see James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 1010 COLUM. L. REV. 1515, 1590–91 (2001); cf. Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control*, 94 N.C. L. REV. 7, 100 (2015) (citing Pfander).

172. See, e.g., Richard H. Fallon, *Jurisdiction-Stripping Reconsidered*, 96 VA. L. REV. 1043, 1084 (2010) (objecting to jurisdiction-stripping on the grounds that it could "violate Article I, Section III, and the constitutional separation of powers"). For example, Congress could exercise its 1988 grant of discretion and restore broader mandatory review of state court decisions. See, e.g., Heise et al., *supra* note 23, at 1572 (discussing how the Supreme Court Case Selections Act of 1988 reduced the Court's mandatory jurisdiction, which "afforded the Justices almost total freedom in selecting the appeals that they wanted to hear and decide").

173. *Marbury v. Madison*, 5 U.S. 137, 175–76 (1803).

174. See Felix Frankfurter & James M. Landis, *The Supreme Court Under the Judiciary Act of 1925*, 42 HARV. L. REV. 1, 1 (1928) (citing to the Court's expressed desire for limits on mandatory jurisdiction because "more than two-thirds of the cases which come to us under our obligatory jurisdiction—from State courts, circuit courts of appeals, district courts, and the Court of Claims—result in judgments of affirmance by our court, and also a goodly number are ultimately dismissed for want of prosecution.").

175. See *id.* at 25 (explaining reasoning behind Court's continued use of three judge courts for such actions under the Judiciary Act).

jurisdiction.¹⁷⁶

More mandatory jurisdiction could improve the Court's deliberative process. A Court with more work to do may face an obligation to economize on its decisional and writing time. The press of business might lead some Justices to suppress dissents on small matters, yielding a greater range of consensus opinions. The press of business might also generate more jurisdictional and adjectival law; courts with lots of work to do often develop and apply jurisdictional and procedural restrictions to limit access to their docket.¹⁷⁷ While increasing the number of such non-merits decisions might appear to waste the Court's time and resources, adjectival dispositions often help to clarify procedural rules that govern proceedings in the lower courts.¹⁷⁸ Perhaps most importantly, the press of business may lead the Justices to lay aside political differences and return to resolving legal questions, something the Court has the capacity to do exceptionally well, as Justice Kagan's description of the Justices' deliberations appears to confirm.¹⁷⁹

The challenge lies in creating structures that would identify proper matters for mandatory appellate review that deserve the Court's attention and suitably fill out its docket, and yet do not pose a threat to the Court's ability to get its work done. Some scholars urge for the creation of a lottery docket, one that would randomly select cases from the Article III pyramid and bring them to the Court for resolution.¹⁸⁰ Though clever in concept, one might worry that the lottery docket would bring a good many matters to the Court that do not deserve its attention on appeal. The lottery docket does have the virtue of trying to educate the Justices about the nature of the proceedings over which they preside, but the Justices can learn at least a little something from their

176. See U.S. CONST. art. III, § 2, cl. 2 (conferring appellate jurisdiction on the Supreme Court subject to "such Exceptions, and . . . Regulations as the Congress shall make.")

177. See Robert J. Pushaw Jr., *The Inherent Powers of Federal Courts and the Structural Constitution*, 86 IOWA L. REV. 735, 760–62 (2001) (discussing increased reliance on procedural laws to manage docket efficiently).

178. See, e.g., *id.* at 761 (providing several examples of the Court clarifying procedural laws for lower courts, such as that "federal trial judges could invoke *forum non conveniens* to dismiss cases within their statutory jurisdiction and venue if they concluded that another court would be more appropriate").

179. See McGinnis, *supra* note 133 ("Justice Kagan said that during her time on the Court one of the longest conferences revolved around an obscure jurisdictional issue of the kind that would draw no public attention.")

180. See Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705 (2018) (arguing for the creation of a Supreme Court "lottery docket" of cases selected at random from final judgments of the circuit courts to offset imbalances in the Court's case selection process).

chambers' reviews of certiorari petitions.¹⁸¹

Instead of a lottery docket,¹⁸² this Article suggests the consideration of three forms of mandatory review. The first such mandatory docket could identify matters suitable for resolution by three-judge district courts and make them subject to as-of-right review in the Supreme Court. The second such docket could subject some state court decisions to review in the regional federal circuit courts within which the states are located and then make those federal circuit decisions subject to as-of-right review. The third could identify a small slice of appeals from the Federal Circuit for mandatory review. These three design choices would ensure Supreme Court engagement with the issues Congress assigns to three-judge courts, restore a measure of Supreme Court oversight over state court enforcement of federal rights, and would bring some private law matters to the Court's attention.

1. Three-Judge Courts

Consider the value of using the three-judge court model to address state applications for universal injunctions.¹⁸³ Many critics of the universal injunction question both the standing of the states to seek broad injunctive relief against contemplated federal initiatives and the wisdom of allowing a single hand-picked federal judge adjudicate the claim.¹⁸⁴ Issuance of universal

181. *Id.* at 735 (“Because the lottery docket would be more representative of the workload of the circuit courts, deciding these cases would educate the Court about the types and distribution of disputes that occupy the federal courts—at least at the circuit level—yielding more of the kinds of information that is needed for crafting effective rules.”).

182. *Id.* at 732.

183. Others have suggested use of three-judge courts for universal or nationwide injunctions. See Gregg Costa, *An Old Solution to the Nationwide Injunction Problem*, HARV. L. REV. BLOG (Jan. 25, 2018), <https://blog.harvardlawreview.org/an-old-solution-to-the-nationwide-injunction-proble/>; cf. Bradford Mank & Michael E. Solimine, *State Standing and National Injunctions*, 94 NOTRE DAME L. REV. 1955 (2019) (noting and criticizing the use of three-judge courts to combat forum shopping and proposing instead the D.C. courts). For an overview of the phenomenon, see JOANNA R. LAMPE, CONG. RESEARCH SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS 1 (2021) (describing the problem as arising from an injunction that “that prevents the government from implementing a challenged law, regulation, or other policy with respect to *all persons and entities*, even those not before the court in the litigation.”).

184. See Tara Leigh Grove, *Foreword: Some Puzzles of State Standing*, 94 NOTRE DAME L. REV. 1883,1889 (2019) (showing contrasting views of state standing). *But see* Ernest A. Young, *State Standing and Cooperative Federalism*, 94 NOTRE DAME L. REV. 1893, 1895 (2019) (countering the claim that “because states are themselves public and political actors, litigation by them against the

injunctions—a practice that has grown more common in recent years¹⁸⁵—puts a good deal of pressure on appellate courts to grant or deny stays and equivalent pressure on the Supreme Court to intercede at the government’s behest if a policy has been put on hold.¹⁸⁶ The sometimes feverish atmosphere of expedited stay litigation may not provide the best framework for considered adjudication.

Three-judge courts could help address the universal injunctions’ pathologies. For starters, by routing the litigation to a panel that the parties did not entirely control through venue choice, a three-judge court might moderate the forum-shopping incentives and with it the temperature that often rises with the advent of such litigation.¹⁸⁷ What’s more, by including a circuit judge among the three judges on the panel, the reform would ensure the possibly broader perspective that such judges bring to their role.¹⁸⁸ Finally, by guaranteeing access to the Supreme Court for final resolution of the issues presented, the three-judge model would help ensure thorough consideration of the central issues on plenary review.¹⁸⁹ Knowledge that plenary consideration lay ahead

national government is inherently ‘political’ in some way that litigation by ordinary private litigants is not.”). For a sample of the sizable literature on the universal injunction, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); cf. Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 921 (2020) (rebutting critique of “universal” injunctions as recent inventions); James E. Pfander & Jacob P. Wentzel, *The Common Law Origins of Ex parte Young*, 72 STAN. L. REV. 1269, 1271 (2020) (supporting legitimacy of *Ex Parte Young* “empowering the lower federal courts to entertain suits to enjoin allegedly unconstitutional state action”).

185. See LAMPE, *supra* note 183, at 2 (“[A]s of February 2020, the Department of Justice had identified 12 nationwide injunctions issued during the presidency of George W. Bush, 19 issued during Barack Obama’s presidency and 55 such injunctions issued against the Trump Administration.”).

186. For accounts of the pressures to intervene in response to stay applications, see VLADECK, *supra* note 121, at 3–9, 93–96; Pierce, Jr., *supra* note 120, at 13.

187. Many have criticized the Texas attorney general for forum shopping. See, e.g., Stephen I. Vladeck, *Don’t Let Republican Judge Shoppers Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html> (noting that Texas attorney general Ken Paxton has sued the Biden administration twenty-six times in two years, often in the single-judge district in Amarillo, where the conservative jurist Matthew Kacsmaryk presides). The Judicial Conference issued guidance designed to limit judge-shopping to some extent. See Mattathias Schwartz, *New Federal Judiciary Rule Will Limit ‘Forum Shopping’ by Plaintiffs*, N.Y. TIMES (Mar. 12, 2024), <https://www.nytimes.com/2024/03/12/us/judge-selection-forum-shopping.html>.

188. See Susan B. Haire et al., *Appellate Court Supervision in the Federal Judiciary: A Hierarchical Perspective*, 37 L. & SOC’Y REV. 143, 148–49 (2003) (“[C]ircuit judges must monitor and supervise the trial court’s activities” and therefore “enjoy the benefits of . . . a broader perspective on the interpretation and applicability of legal doctrine.”).

189. See Michael E. Solimine, *Three-Judge District Courts, Direct Appeals, and Reforming the*

would dampen the incentives of both sides to rush issues to the Court for resolution through emergency stay applications on the shadow docket.¹⁹⁰

The original impetus for the creation of three-judge courts, the statewide injunction, provides a useful analogue to the problems associated with the universal injunction.¹⁹¹ Statewide injunctions, issued by a single federal judge in the aftermath of *Ex parte Young*, were seen as a threat to federalism values and an invitation to precipitous judicial decision-making.¹⁹² Universal injunctions now pose some of the same risks by allowing a single federal judge to stay a federal government initiative at the behest of politically motivated state attorneys general.¹⁹³ Many have responded to the unbalanced decisions that emerge from partisan red and blue state litigation by inviting congressional intervention.¹⁹⁴ Creation of a three-judge court would address these concerns, less by directly regulating access to a universal remedy than by assuring careful judicial engagement both at trial and at the Supreme Court.¹⁹⁵

Views might differ as to what other questions Congress might profitably assign to three-judge district courts for plenary as-of-right review in the Supreme Court. It may make sense to evaluate the Court's experience with a

Supreme Court's Shadow Docket, 98 IND. L.J. 37, 54 (2023) (“[T]he three-judge district court process may enable the Court to better engage in plenary review at the stay stage if it comes to that.”); Stephen I. Vladeck, *Opinion Guest Essay: F.D.R.’s Court-Packing Plan Had Two Parts. We Need to Bring Back the Second*, N.Y. TIMES (Jan. 7, 2022), <https://www.nytimes.com/2022/01/07/opinion/supreme-court-vaccine-mandate.html> (“[W]ith three-judge panels, we could also expect . . . a more efficient path to full merits review by the Supreme Court.”).

190. See Solimine, *supra* note 189, at 43–44 (suggesting implementing three-judge court in the mid-1930s lessened the norm for rapid appeals).

191. Indeed, from 1937 to 1976, Congress required a three-judge court in actions seeking to enjoin a federal statute on constitutional grounds. See *id.* at 43–45 (providing history and an analysis of 1937–1976 three-judge court legislation).

192. For an account of the rise and fall of three-judge courts, see FALLON, JR. ET AL., *supra* note 82, at 1089–90.

193. See Pierce, *supra* note 120, at 13 (explaining that when seeking universal injunctions “[i]t is predictable and lawful for the attorney general to file a complaint and motion in the district court that is most likely to grant the petition and the motion.”); Solimine, *supra* note 189, at 40 (describing norm of attorneys general forum shopping to achieve desired political outcome).

194. See LAMPE, *supra* note 183, at 38–44 (cataloging reform proposals).

195. Identifying mandatory appellate jurisdiction as one drawback to the Supreme Court's structure, critics have urged elimination of three-judge courts. See, e.g., Solimine, *supra* note 189, at 47 (“For many decades the [Supreme] Court has interpreted the [three-judge district court] statutes in an open and unapologetically narrow manner, to minimize its mandatory docket and keep most of its docket discretionary through writs of certiorari.”). But those criticisms have less force in a world where the Court already devotes an outsized share of its time and attention to universal injunctions on the shadow docket.

pilot project before broadening the scope of its mandatory jurisdiction. But Congress must surely monitor developments and adjust the three-judge court's authority as the underlying law continues to develop. The Court might well take steps that significantly curtail universal injunctions, either by narrowing the scope of state standing or by imposing limits on the availability of such broad injunctive remedies.¹⁹⁶ Were that to happen, the range of matters on the Court's mandatory docket might shrink considerably, making room for three-judge court consideration of other issues.

Of course, state applications for universal injunctions present sharply partisan issues as blue state attorneys general challenge policy initiatives of red presidents and vice versa.¹⁹⁷ Bringing such litigation directly to the Supreme Court may not obviously advance the stated goal of lowering the political temperature and redirecting the Court's attention to less politicized docket. But the press of business might encourage the Court to develop a body of adjective law that would ensure more careful screening of applications for universal injunctions.¹⁹⁸ Such a body of law would presumably apply across the board to all such applications, thereby dampening the ardor of attorneys general in both camps.

2. Appellate Review of State Court Decisions

The absence of any routine review of state court decisions on issues of federal law may represent the most striking change in the judicial architecture since the founding era. Back then, § 25 of the Judiciary Act of 1789 conferred

196. Some Justices have suggested a willingness to review the legality of universal injunctions. *See* *Trump v. Hawaii*, 138 S. Ct. 2392, 2426–29 (2018) (Thomas, J., concurring) (tracing the origins and criticizing the advent of universal injunctions); *U.S. Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 601 (2020) (Gorsuch, J., concurring) (“[I]t would be delusional to think that one stay today suffices to remedy the problem. The real problem here is the increasingly common practice of trial courts ordering relief that transcends the cases before them . . . they direct how the defendant must act toward persons who are not parties to the case.”). But they continue apace. *See supra* note 185 and accompanying text.

197. *See* Solimine, *supra* note 189, at 40 (attributing the Court's shadow docket practices in part to “change in part to party polarization, resulting in less legislation passing in Congress, and in consequence, Presidential administrations of both parties relying on executive orders and similar policy-making” against which attorneys general often seek universal injunctions in forums that favor their desired disposition).

198. *See, e.g.,* Sam Heavenrich, *An Appellate Solution to Nationwide Injunctions*, 96 *IND. L.J.* 1, 2–3 (2021) (proposing a rule that “only appellate courts may grant nationwide injunctions against the federal government” as opposed to current standards which fail to “constrain the judiciary”).

mandatory appellate jurisdiction on the Court in any case in which a state court of last resort rejected a claim of right under federal law.¹⁹⁹ Today, as we have seen, the Court's discretionary jurisdiction extends to such claims (and to claims in which state courts sustain federal claims of right).²⁰⁰ But the Court rarely grants review.²⁰¹ As a result, one major segment of the Article III pyramid, decisions of state courts on issues of federal law, have essentially disappeared from any effective oversight.²⁰² To be sure, state courts remain bound to give effect to the Court's latest explications of federal rights.²⁰³ But litigants have little opportunity to enforce that duty in a federal forum.²⁰⁴

Restoration of mandatory review in the Supreme Court, however, might threaten to swamp the Court's appellate docket. As the tables in the appendix reveal, state courts of last resort decide some 50,000–60,000 cases every year.²⁰⁵ Not all such cases present a dispositive federal question. But many do. In the past few years, the Court has received somewhere between 1,500–1,800 petitions for review of state court decisions.²⁰⁶ One can predict that virtually all those petitions identify controlling issues of federal law. A mandatory docket for such matters would pose a significant burden.

Instead of initial access to mandatory review in the Supreme Court, this Article suggests a filtering device that can moderate the docket impact and restore some review of state court decisions. Congress should authorize litigants to appeal of right from state court decisions that deny claims under federal law. But Congress should route those appeals in the first instance to the

199. The Judiciary Act of 1789, § 25, 1 Stat. 73, 85 (1789) (current version at 28 U.S.C. § 1257).

200. *Id.*; see, e.g., *Trump*, 138 S. Ct. at 2403 (deciding whether the entry policy enacted by the President under the Immigration and Nationality Act violates the Establishment Clause of the First Amendment).

201. See *infra* Appendix B, Table 1 (showing the Court granted review to only four and five appeals from state courts in 2020 and 2021, respectively).

202. See *id.*; see also Adam Feldman, *Empirical SCOTUS: The Importance of State Court Cases Before the Supreme Court*, SCOTUSBLOG (Sept. 4, 2020), <https://www.scotusblog.com/2020/09/empirical-scotus-the-importance-of-state-court-cases-before-scotus/> (observing that “the Supreme Court cannot review state court judgments on questions of purely state law” thus implying that essentially all petitions from state court that the Court denies review involve dispositive questions of federal law).

203. See *Obligation of State Courts Under the Supremacy Clause*, JUSTICIA, <https://law.justitia.com/constitution/us/article-6/05-obligation-of-state-under-supremacy-clause.html> (last visited Oct. 11, 2023).

204. See *infra* Appendix B, Table 1 (showing few number of petitions from state court decisions reviewed by the Court).

205. See *infra* Appendix A, Table 3.

206. See *infra* Appendix B, Table 1.

federal circuit court of appeals for the region that encompasses the state in question. Such a model of review in the intermediate federal appellate courts, though novel, does not appear to present any constitutional concerns. Lower federal courts have long exercised the functional equivalent of appellate oversight (in habeas and removal proceedings to name only two) and well-informed members of the founding generation, including Alexander Hamilton, confirmed that such review was a design choice available to Congress.²⁰⁷

Appeal from the regional circuit courts to the Court should follow, as a matter of right, but not in every case. Congress instead should authorize mandatory review only where the regional circuit reverses the state supreme court and more fully enforces the federal claim of right. Such a model of review has two filters to focus and limit the Court's mandatory jurisdiction. It begins by narrowing the pool of mandatory appeals to those in which the state courts have rejected federal claims. Then, it further narrows the pool by limiting mandatory appeals to matters in which the regional circuit has concluded that the state court erred in its view of the federal right. Disagreement between the state court of last resort and the regional circuit as to the proper enforcement of a federal right provides some assurance that the matter warrants Supreme Court engagement.²⁰⁸

The model enjoys some support in history and tradition, combining two filtering devices on which Congress has long relied in shaping the Supreme Court's mandatory docket. For much of the Court's history, its mandatory appellate jurisdiction was devoted to instances in which the court below may have acted parochially in protecting its own turf.²⁰⁹ That was true in § 25 of the Judiciary Act of 1789, of course, which mandated review when state courts refused to enforce federal rights.²¹⁰ But it was also true in connection with the

207. See James E. Pfander, *An Intermediate Solution to State Sovereign Immunity: Federal Appellate Court Review of State-Court Judgments After Seminole Tribe*, 46 UCLA L. REV. 161, 216–17 (1998) (“Article III suggests that the Framers viewed Congress as enjoying the authority to assign any part of the “judicial power” of the United States to any inferior courts it chose to establish.”).

208. See generally Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 NOTRE DAME L. REV. 235, 236–38 (2014) (examining “state court contributions to federal constitutional diversity” and state courts’ “long shared concurrent obligation with lower federal courts to interpret the U.S. Constitution”).

209. See Mark Tushnet, *The Mandatory Jurisdiction of the Supreme Court—Some Recent Developments*, 46 U. CIN. L. REV. 347, 347, 352, 354–55 (1977) (discussing developments in mandatory appellate review and Congress's singling out of cases in which they feared “state courts would be enigmatically hostile to federal interests” and vice versa).

210. The Judiciary Act of 1789 § 25, 1 Stat. 73, 85 (1789) (current version at 28 U.S.C. § 1257);

Court's mandatory review of decisions by lower federal courts.²¹¹ As Congress narrowed the Court's appellate jurisdiction in the nineteenth century, it limited oversight of federal circuit courts to matters in which the federal court had given effect to a federal claim of right in preference to claims based on state law.²¹² By combining both features in a single appellate review provision, the model identifies cases in which the state courts may have acted parochially in denying federal rights and cases in which the regional circuit may have acted parochially in giving effect to such rights. The model thus isolates matters most in need of refereeing by a higher tribunal.

Again, one cannot predict with certainty how many cases such a model of filtered appellate review would bring to the Court's mandatory docket. For a back-of-the-envelope reckoning, we might start with the current number of petitions, over 1,500 per year.²¹³ We might cut that number in half to reflect the fact that petitioners can now appeal from state court enforcement and rejection of federal claims of right. Of the 750 petitions that remain, we might imagine that relatively few (perhaps fifty cases a year) would lead to outright federal circuit reversals of the state court decision. That may seem counter-intuitive, but as the model takes hold, state supreme courts would come to view federal regional circuit authority as controlling on issues of federal law and would presumably conform their decisions to that standard. Only where the state court deliberately rejects circuit authority and the regional circuit reaffirms its own view would the matter land on the Court's appellate docket.²¹⁴

see also John M. Simpson, *Turning Over the Reins: The Abolition of the Mandatory Appellate Jurisdiction of the Supreme Court*, 6 HASTINGS CONST. L. Q. 297, 301 (1979) (explaining that § 25 of the Judiciary Act of 1789 mandated appellate review where a state law was sustained over a federal or constitutional challenge).

211. *See* Tushnet, *supra* note 209, at 347, 354 (exploring the Court's review when federal courts had been "imprudently intervening in state proceedings without due regard for state interests").

212. For an account of former 28 U.S.C. § 1254(2), allowing an appeal from federal circuit decisions invalidating state statutes as repugnant to federal law, *see* PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1580 (2d ed. 1973).

213. *See infra* Appendix B, Table 1.

214. Of course, the adoption of this model of filtered mandatory review would not necessitate eliminating discretionary review of state court decisions. Such review would doubtless remain available, both to clarify the law and to address the concerns identified in such cases where the Court has broadened its authority to review state court over-protection of federal rights. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1039–41 (1983) ("[W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.").

In that way, state courts might generally conform to circuit authority but can secure reliable Supreme Court review when they disagree with the regional circuit's interpretation of federal law.

The model of filtered mandatory review has the advantage of ensuring uniformity and consistency in the application of federal laws that govern conduct in a specific place, like New York or California. Persistent disagreements between state and federal courts as to the content of federal law may make it difficult for government officials to conform their conduct to the law. The Court justified appellate review in *Camreta v. Green* to clarify the rule of federal law that would govern state officials in Oregon and the Ninth Circuit.²¹⁵

3. Appellate Review of Certain Federal Circuit Decisions

Each year, the U.S. Court of Appeals for the Federal Circuit hears some 1,300–1,400 appeals from a variety of different courts and agency tribunals.²¹⁶ Some represent appeals from agency adjudications, such as those dealing with trademarks and patents, veterans' benefits, and contract claims against the federal government.²¹⁷ Others come up from decisions of the district courts in patent litigation and from the court of international trade.²¹⁸ Still others challenge decisions of the U.S. Court of Federal Claims, which bears primary responsibility for money claims against the United States in suits not sounding in tort (i.e., those based on contract and property claims).²¹⁹ Many of the decisions of the Federal Circuit entail the adjudication of issues of private law: contract, tort, property (including intellectual property), employment relations, and the like.²²⁰ The docket of the Federal Circuit thus provides one

215. See *Camreta v. Greene*, 563 U.S. 692 (2011) (upholding Oregon state official's standing to appeal from a decision sustaining official's claim of qualified immunity where the official had continuing interest in contesting clarifying the legal standard for the future).

216. See *infra* Appendix B, Table 3.

217. See *Court Jurisdiction*, U.S. CTS., <https://cafc.uscourts.gov/home/the-court/about-the-court/court-jurisdiction/> (last visited Sept. 20, 2023); see, e.g., *Table B-8—U.S. Court of Appeals for the Federal Circuit Federal Judicial Caseload Statistics*, U.S. CTS. (Sept. 30, 2022), <https://www.uscourts.gov/statistics/table/b-8/judicial-business/2022/09/30>.

218. See *supra* sources cited in note 217.

219. See *supra* sources cited in note 217; *About the Court*, U.S. CTS., <https://www.usefc.uscourts.gov/about-court> (last visited Sept. 20, 2023) (describing role of the Federal Claims court).

220. See *supra* sources cited in note 217. In 2022, 58% of the Federal Circuit's caseload involved intellectual property. Another 10% involved personnel issues in the context of administrative law.

plausible source of private law disputes on which institutional designers might rely in broadening the Court's mandatory jurisdiction. But as-of-right appellate jurisdiction over Federal Circuit decisions might overstuff the Supreme Court.

Instead of mandatory jurisdiction over all appeals, Congress might confer appellate jurisdiction over claims by individuals against the federal government that the lower court accepted but the Federal Circuit rejected on appeal. Such a statute would have two virtues. First, it would narrow appellate jurisdiction to the small slice of cases in which the Federal Circuit reversed a lower court or tribunal. Data from the Administrative Office of the U.S. Courts reveals that, in fiscal year 2021, the Federal Circuit had a reversal rate of roughly over 10% (although it was considerably higher in 2022, at 29%).²²¹ That filter would thus restrict the potential universe of mandatory appeals to some 130 to 140 cases a year.²²² Second, the proposed statute would narrow the mandatory docket further by authorizing appeal only in those cases in which the individual litigant had won below and lost on the government's appeal to the Federal Circuit. Such an appellate filter would focus the Court's attention on situations in which the government defeated an individual claim on appeal. In

Four percent of total claims dealt with contracts, 2% with military or civilian pay, 1% with takings, and 0.6% with tax. *Appeals Filed by Category*, U.S. CTS., <https://cafc.uscourts.gov/wp-content/uploads/reports-stats/caseload-by-category/CaseloadbyCategory-FY2022.pdf> (last visited Nov. 6, 2023).

221. *Compare Table B-8—U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, U.S. CTS., <https://cafc.uscourts.gov/wp-content/uploads/reports-stats/appeals/AppealsFY2020.pdf> (last visited Oct. 11, 2023) and *Table B-8—U.S. Court of Appeals for the Federal Circuit Statistical Tables for the Federal Judiciary*, U.S. CTS. (Dec. 31, 2021), <https://www.uscourts.gov/statistics/table/b-8/statistical-tables-federal-judiciary/2021/12/31> with *Table B-8—U.S. Court of Appeals for the Federal Circuit Federal Judicial Caseload Statistics*, *supra* note 217. Note that the high reversal rate in 2022 can be traced to matters coming to the Federal Circuit from the U.S. Court of Federal Claims, where the reversal rate was an astonishing 73%. That figure appears to be an outlier; comparable reversal rates for the Court of Federal Claims were 15% in 2021 and 13% in 2020. It may have to do with a disagreement as to the jurisdiction of the Court of Federal Claims over certain taxpayer refund and penalty claims. U.S. COURT FED. CLAIMS, STATISTICAL REPORT FOR THE FISCAL YEAR OCTOBER 1, 2021–SEPTEMBER 2022 5 (2022) [hereinafter U.S. COURT FED. CLAIMS 2022 REPORT]; U.S. COURT FED. CLAIMS, STATISTICAL REPORT FOR THE FISCAL YEAR OCTOBER 1, 2020–SEPTEMBER 2021 5 (2021) [hereinafter U.S. COURT FED. CLAIMS 2021 REPORT]; U.S. COURT FED. CLAIMS, STATISTICAL REPORT FOR THE FISCAL YEAR OCTOBER 1, 2019–SEPTEMBER 2020 5 (2020) [hereinafter U.S. COURT FED. CLAIMS 2020 REPORT].

222. *See* Appendix B, Table 3 (showing total number of appeals Federal Circuit hears yearly, about 10% of which gets reversed); *see, e.g., Table B-8—U.S. Court of Appeals for the Federal Circuit Statistical Tables for the Federal Judiciary*, *supra* note 221 (showing Federal Circuit's 14% reversal rate in 2021).

contrast to a lottery docket, the proposed jurisdictional screen would select out only those cases where the individual had a substantial claim (as measured by the individual's success in the lower court) but lost in the Federal Circuit.

Many of these claims would address issues of private law.²²³ Consider, for example, suits instituted in the U.S. Court of Federal Claims to recover compensation for a government breach of contract or invasion of property right.²²⁴ The claim on the merits often turns on constructs of contract or property that depend to some substantial degree on private law concepts.²²⁵ Consider also claims on appeal from the Merit Systems Protection Board ("MSPB") and the Court of Appeals for Veterans Claims ("Veterans' court"), two non-Article III courts that handle litigation between individuals and the government, subject to review by the Federal Circuit.²²⁶ Both handle claims by individuals seeking recognition of federal employment rights (MSPB) and veteran's benefit claims.²²⁷ While such claims do not implicate private law as such, they would draw the Court's attention to matters of employment and benefit law that do not necessarily attract a great deal of political controversy or Supreme Court attention.²²⁸

223. See *Appeals Filed by Category*, *supra* note 220 (showing almost half of appeals before the Federal Circuit address private law).

224. The Court of Federal Claims accounted for 126 and 310 appeals to the Federal Circuit in the past two years, or roughly 10–20% of the Federal Circuit's docket. U.S. COURT FED. CLAIMS 2022 REPORT, *supra* note 221; U.S. CT. FED. CLAIMS 2021 REPORT, *supra* note 221; *see also infra* Appendix B, Table 3 (showing number of cases in Federal Circuit's docket).

225. See, e.g., *Shell Oil Co. v. United States*, 896 F.3d 1299 (Fed. Cir. 2018), *aff'g* 1130 Fed. Cl. 8 (Fed. Cl. 2017) (determining allocation of damages based off of contract construction). See generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640–41 (2012) (clarifying that "[p]rivate law defines the rights and duties of individuals . . . as they relate to one another," thus including areas of law like contracts, property, torts, and intellectual property).

226. Recent reports indicate that the Veterans' court and the MSPB account for 180–200 appeals to the Federal Circuit each year, somewhat more than 10% of the docket. See Appendix B, Table 3; Table B-8. *U.S. Court of Appeals for the Federal Circuit—Appeals Filed, Terminated, and Pending*, *supra* note 221; Table B-8—*U.S. Court of Appeals for the Federal Circuit Statistical Tables for the Federal Judiciary*, *supra* note 221; Table B-8—*U.S. Court of Appeals for the Federal Circuit Federal Judicial Caseload Statistics*, *supra* note 217.

227. See JONATHAN M. GAFFNEY, CONG. RESEARCH SERV., IF11365, U.S. COURT OF APPEALS FOR VETERANS CLAIMS: A BRIEF INTRODUCTION (2021) (explaining role of the Veteran's court); JON O. SHIMABUKURO & JENNIFER A. STAMAN, CONG. RESERCH SERV., R45630, MERIT SYSTEMS PROTECTION BOARD (MSPB): A LEGAL OVERVIEW (2019) (describing role of the MSPB).

228. See Goldberg, *supra* note 225, at 1640 (contrasting private law from public law "which establishes the powers and responsibilities of governments" and "defines the rights and duties of individuals in relation to governments"); ANGIE GOU ET AL., STAT PACK FOR THE SUPREME COURT'S 2021–22

B. Broadening the Article III Base

Wilson was quite concerned with the base of the Article III pyramid and viewed life tenure and judicial independence as essential features of the preferred structure.²²⁹ As we have seen, however, Congress has come to rely on non-Article III tribunals, whose judges lack the sort of independence that Wilson prized in state and federal courts.²³⁰ Recent decisions extending unitary conceptions of executive authority to encompass the work of agency Administrative Law Judges (ALJs) suggest decisional independence may come under greater pressure.²³¹ More dramatically, Justice Thomas has raised doubts about the constitutionality of any non-Article III adjudication of private rights disputes.²³² But the number of cases handled by agency adjudication might swamp the Article III courts if transferred in gross to lower federal courts.²³³ As the Appendix reveals, the lower federal courts disposed of some 400,000 matters in the most recent year, somewhat fewer than the 450,000 matters handled by the judges of a single federal agency—the Social Security Administration.²³⁴ The docket threat posed by non-Article III adjudication explains both the decision of Congress to rely on agency ALJs and the reluctance of the Judicial Conference to embrace any expansion of the judiciary to encompass such proceedings.²³⁵

Some urge a broad expansion of Article III judgeships so as to create a

TERM 1, 5–6 (2022), <https://www.scotusblog.com/wp-content/uploads/2022/07/SCOTUSblog-Final-STAT-PACK-OT2021.pdf> (showing major areas of law of cases in the Court’s merits docket, with less attention on issues in employment or benefits law).

229. See *supra* Part II; Pfander & Birk, *supra* note 4, at 1685 (describing importance to Wilson of the inferior pyramid levels).

230. See *infra* Appendix C (showing massive reliance on federal agency tribunals).

231. See, e.g., *Lucia v. SEC*, 138 S. Ct. 2044 (2018) (holding ALJs within SEC require appointment by officials responsive to the President); see also *supra* Section II.A.

232. *Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 906 (2023) (Thomas, J. concurring) (“I have grave doubts about the constitutional propriety of Congress vesting administrative agencies with primary authority to adjudicate core private rights with only deferential judicial review on the back end.”). The Thomas position would mandate broader Article III engagement with such litigation. *Id.*

233. See *infra* Appendix C.

234. Compare *infra* Appendix B, Table 4 (providing 2022 District Court cases) with *infra* Appendix C, Table 1 (providing 2022 Social Security Administration dispositions).

235. See LONG RANGE PLAN, *supra* note 74 (encouraging congress to assign fact intensive cases to non-Article III courts); *infra* Appendix C (demonstrating Congress’s reliance on non-Article III courts).

whole array of lower federal court judges to staff these matters.²³⁶ Yet such an avulsive change in the number of federal judges could upend settled assumptions about the role of the federal courts and, perhaps as Chief Justice Burger feared in opposing Article III status for bankruptcy judges, undermine the quality of the federal judiciary by diminishing the prestige associated with the office.²³⁷ On the other hand, Congress might considerably expand the number of magistrate judges, relying on them to do much of the initial fact-intensive work associated with the resolution of Social Security and immigration claims. Responsive to their district courts and operating within the settled assumptions of the judicial branch as to docket size and litigation support, magistrate judges can manage initial adjudication fairly and consistently, thereby relieving pressure for do-overs at the federal circuit level.

Magistrates offer several comparative advantages over immigration judges working within the Department of Justice. For starters, the Administrative Office has measures of docket size and case complexity that would presumably prevent docket pressure from overwhelming the individual judges charged with adjudication.²³⁸ In addition, magistrates answer directly to the district court that employs them, rather than to the executive branch departments in which many agency adjudications now take place.²³⁹ Finally, magistrates often have a mixed docket of civil and criminal matters, reflecting the range of cases that arrive in district court.²⁴⁰ Such heterogeneity would broaden the judicial perspective and better ensure the ability of judges to view each case as a distinctive matter with unique facts.²⁴¹ Appellate courts have

236. See, e.g., Memorandum from Steven G. Calabresi & Shams Hijiri, Northwestern Univ. Pritzker Sch. of Law, to the U.S. Senate and House of Representatives on Proposed Judgeship Bill 1 (Nov. 7, 2017), <https://archive.thinkprogress.org/uploads/2017/11/calabresi-court-packing-memo.pdf> (urging Congress to remedy problems caused by the “crisis in volume” in federal courts by passing a judgeship bill that would “greatly expand” the size of the circuit and district courts).

237. See *supra* note 77 and accompanying text.

238. See generally U.S. COURTS, INVENTORY OF UNITED STATES MAGISTRATE JUDGE DUTIES (2013), https://www.uscourts.gov/sites/default/files/inventory_of_magistrate_judge_duties_0.pdf (setting guidelines for magistrate authority and duties).

239. See *id.* at Introduction (“The authority that a magistrate judge exercises is the jurisdiction of the district court itself, delegated to the magistrate judge by the district judges for the court under governing statutory authority and local rules of court.”).

240. See *Table M-7—U.S. District Courts—U.S. Magistrate Judges Statistical Tables For The Federal Judiciary*, U.S. CTS. (June 30, 2023), <https://www.uscourts.gov/statistics/table/m-7/statistical-tables-federal-judiciary/2023/06/30> (showing array of criminal, civil, and miscellaneous dispositions).

241. See generally *Courts in Name Only*, *supra* note 27 (showing failures of overworked immigration judges facing repetitive legal issues).

criticized overworked immigration judges for using repetitive form-book language to dispose of some of the matters they handle.²⁴²

The Judicial Conference might moderate its reflexive opposition to such a proposal, if assured that the money now spent on immigration adjudication in the Department of Justice would be transferred to the Third Branch to support the expanded magistrate mission.²⁴³ It may be, however, that the cost of adjudication would be significantly higher if the responsibility for immigration adjudication were transferred to the federal judiciary.²⁴⁴ If so, the Conference should bargain for a more sizable appropriation.

IV. CONCLUSION

This Article points to systemic problems in the structure of the federal judiciary. At the base, elected state court judges display a worrisome concern for popular opinion as they reckon with the enforcement of federal law.²⁴⁵ Overworked immigration judges struggle to deliver equal justice to applicants for asylum and claimants seeking other claims for relief from removal.²⁴⁶ One might deal with the immigration problem by bringing the adjudication process more closely in contact with the Article III judiciary, as Professor Resnik suggested.²⁴⁷ But without a decision by Congress to devote substantial resources to improving the performance of the state judiciary, one can address state court adjudication only through more searching appellate review of the kind suggested here.

Problems at the base do not necessarily translate into problems at the top. But this Article has identified concerns that also implicate the Supreme

242. *See id.* at 915 n.66 (providing examples of rushed decisionmaking resulting in appellate court decisions remanding back to the immigration court).

243. *See About the Judicial Conference*, U.S. CTS., <https://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited Oct. 13, 2023) (explaining role of Judicial Conference includes making budget recommendations to Congress); *The Judiciary Fiscal Year 2024 Congressional Budget Summary*, U.S. CTS. (Mar. 2023), <https://www.uscourts.gov/sites/default/files/FY%202024%20Congressional%20Budget%20Summary.pdf>.

244. *See infra* Appendix C, Table 4.1 and Table 4.2 (providing high number of cases before immigration court annually).

245. *See* Kang & Shepherd, *supra* note 81, at 941 (documenting that “judges modify important decisions to appease voters and improve their personal prospects in an upcoming election, particularly as it approaches.”).

246. *See* sources cited *supra* note 28 (showing failures of immigration courts at achieving justice).

247. *See supra* Resnik, note 32, at 38–42.

Court's role in federal adjudication. The Court does not make enough law, particularly private law, and instead devotes a substantial portion of its docket to public law matters.²⁴⁸ Its use of the shadow docket reduces the quality of the briefing and argument that precede many of its important decisions and undermines the clarity of its decisional process.²⁴⁹ Expanding the Court's appellate docket would produce more legal precedents, both as to matters of substance and procedure. Expanding its oversight of Federal Circuit decisions would bring a variety of new issues to its attention, including matters of tort, contract, property, and employment that so rarely attract its attention today. By assigning three-judge courts responsibility for universal injunctions, Congress would enable the Court to conduct a more structured form of as-of-right review that should lessen the need for emergency oversight on the shadow docket.

Tinkering with the Court's docket necessarily may appear to threaten the quality of its decisions. But the Court might gain something of lasting value if compelled to handle a broader range of legal questions. As others have observed, a broader docket would better acquaint the Court with the range of proceedings and the quality of decision-making in the lower courts.²⁵⁰ So acquainted, the Court might play a constructive role in recommending improvements.²⁵¹ Similarly, a broader docket might encourage the Court to economize by assigning some matters to three-judge panels or by writing shorter, less fractured decisions where Justices suppress dissents and concurrences in service of resolving the case at hand. As Justice Kagan explained, the Court does its best work when called upon to act like a Court.²⁵² Jurisdiction stuffing might provide it with more opportunities to solve legal problems, a change that could ensure more diffuse popular support for its role at the top of the

248. See GOU ET AL., *supra* note 228 (showing focus on public law matters in Court's merits docket).

249. See *supra* Section II.B.3; see generally Barry P. McDonald, *SCOTUS's Shadiest Shadow Docket*, 56 WAKE FOREST L. REV. 1021 (2021) (detailing the evolution of the shadow docket and explaining its use in the current Roberts Court).

250. See Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1254 (2012) ("Not only does a depleted docket leave important issues unresolved, it also can lead to an out-of-touch Court.").

251. See *id.* at 1251–52 ("[A] Court that hears few cases leaves important legal questions on the table. This can increase uncertainty among the lower court judges who must apply the law and parties who must operate within its confines.").

252. McGinnis, *supra* note 133.

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Article III pyramid.²⁵³

253. *See supra* Section III.A.

VI. APPENDICES

A. Appendix A. State Courts

1. Courts of Appeals²⁵⁴

As of 2021, 90% of cases in the state appellate court system are appellate matters.²⁵⁵ The remaining 10% of cases concern matters of original jurisdiction.²⁵⁶ Cases in the intermediate court of appeals make up 68% of the caseload.²⁵⁷ Courts of last resort hear the remaining 32% of cases.²⁵⁸

Table 1. State Appellate Courts (Total Incomings)²⁵⁹

2018	2019	2020	2021
205,870	198,372	160,821	166,488

Table 2. Intermediate Court of Appeals Caseload (Total Incomings)²⁶⁰

2018	2019	2020	2021
138,662	138,889	108,347	113,342

Table 3. Court of Last Resort Caseload (Total Incomings)²⁶¹

2018	2019	2020	2021
67,208	59,483	52,474	53,146

254. S. Gibson, et al., *CSP STAT Appellate Overview*, CT. STAT. PROJECT, www.courtstatistics.org (last updated July 2022) (last visited Sept. 23, 2023).

255. *Id.*256. *Id.*257. *Id.*258. *Id.*259. *Id.* Kansas, Nebraska, and Oklahoma did not report in 2021. *Id.*260. *Id.*261. *Id.*

Table 4. Court of Last Resort Caseload (Total Incoming, Excludes Territories)²⁶²

2018	2019	2020	2021
64,679	57,459	50,830	50,745

2. Trial Courts²⁶³**Table 5. State Trial Courts (Total Incoming)**²⁶⁴

2018	2019	2020	2021
72,982,690	75,954,014	53,613,355	56,012,265

Table 6. State Trial Courts (Total Incoming, Excluding Territories)²⁶⁵

2018	2019	2020	2021
72,982,690	75,954,014	53,613,355	56,007,651

B. Appendix B. Federal Courts

1. Supreme Court of the United States

Table 1. Merits Docket Dispositions²⁶⁶

	2018	2019	2020	2021

262. *Id.* This table excludes data reported for Guam, the Northern Mariana Islands, the Virgin Islands, and Puerto Rico. Guam and the Northern Mariana Islands only provided data for courts of last resort. *Id.*

263. S. Gibson, et al., *CSP STAT Trial Court Caseload Overview*, CT. STAT. PROJECT, <https://www.courtstatistics.org/court-statistics/interactive-caseload-data-displays/csp-stat-nav-cards-first-row/cspstat-overview> (last visited Sept. 20, 2023) (covering trial courts data).

264. *Id.* Alabama did not report in 2019. Kansas, Mississippi, Tennessee, and Virginia did not report in 2018–2021. Oklahoma only reported in 2019. South Dakota did not report in 2021. Washington did not report in 2020 and 2021. *Id.*

265. *Id.* This table excludes data reported for Guam and the Northern Mariana Islands. Puerto Rico did not report. *Id.*

266. *Stat Pack Archives*, SCOTUSBLOG, <https://www.scotusblog.com/reference/stat-pack/> (last visited Sept. 2023).

Appeals from U.S. Courts of Appeals	60	57	61	56
Appeals from District Courts	3	N/A	1	4
Appeals from Armed Forces	N/A	N/A	1	N/A
Appeals from State Courts	11	11	4	5
Original Jurisdiction	N/A	N/A	2	1
Total Merits Docket	74	68	69	66
Petitions Considered (Appellate Docket Only)²⁶⁷	1,634	1,531	1,782	1,749
Total Petitions Considered²⁶⁸	6,581	5,718	5,257	5,103

267. *The Statistics*, 133 HARV. L. REV. 412, 420 (2019); *The Statistics*, 134 HARV. L. REV. 610, 618 (2020); *The Statistics*, *supra* note 96, at 498; *The Statistics*, 136 HARV. L. REV. 500, 508 (2022).

268. See *supra* sources cited in note 267.

2. Other Federal Courts²⁶⁹**Table 2. United States Court of Appeals Caseload²⁷⁰**

	2018	2019	2020	2021	2022
Filings	49,276	48,486	48,190	44,546	41,839
Terminations	50,428	47,889	48,300	47,748	44,902
Pending	38,232	38,837	38,731	35,552	32,512

Table 3. United States Court of Appeals for the Federal Circuit²⁷¹

	2018	2019	2020	2021	2022
Filings	1,530	1,511	1,456	1,582	1,414
Terminations	1,626	1,602	1,568	1,370	1,460
Pending	1,446	1,355	1,243	1,449	1,404

Table 4. United States District Courts Caseload²⁷²

	2018	2019	2020	2021	2022
Filings	352,580	372,906	530,465	403,391	329,702
Terminations	339,786	381,022	329,845	322,922	365,044
Pending	425,598	443,042	642,628	723,605	688,528

269. *Judicial Facts and Figures 2022*, U.S. CTS., <https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2022> (last updated Sept. 30, 2023).

270. *Table 2.1—U.S. Courts of Appeals Judicial Facts and Figures (September 30, 2022)*, U.S. CTS., <https://www.uscourts.gov/statistics/table/21/judicial-facts-and-figures/2022/09/30> (last visited Sept. 24, 2023). Reports a 12-month period ending September 30. *Id.*

271. *Table 3.1—U.S. Court of Appeals for the Federal Circuit Judicial Facts and Figures (September 30, 2022)*, U.S. CTS., <https://www.uscourts.gov/statistics/table/31/judicial-facts-and-figures/2022/09/30> (last visited Sept. 24, 2023). Reports a twelve-month period ending September 30. *Id.*

272. *Table 6.1—U.S. District Courts—Combined Civil and Criminal Judicial Facts and Figures (September 30, 2022)*, U.S. CTS., <https://www.uscourts.gov/statistics/table/61/judicial-facts-and-figures/2022/09/30> (last visited Sept. 24, 2023). Reports a twelve-month period ending September 30. *Id.*

Table 5. United States Bankruptcy Courts²⁷³

	2018	2019	2020	2021	2022
Filings	773,375	776,674	612,561	434,540	383,810
Terminations	816,006	788,667	721,251	579,469	467,522
Pending	1,027,477	1,015,179	906,738	761,709	677,108

C. Appendix C. Federal Agencies

Table 1. Social Security Administration²⁷⁴

	2019	2020	2021
Number of Administrative Law Judges	1,420	1,315	1,235
Hearing Filings	510,901	428,810	382,870
Hearing Dispositions	793,863	585,918	451,046
End-of-Year Pending Cases	575,421	418,313	350,137

273. Table 7.1—U.S. Bankruptcy Courts Judicial Facts and Figures (September 30, 2022), U.S. CTS., <https://www.uscourts.gov/statistics/table/71/judicial-facts-and-figures/2022/09/30> (last visited Sept. 24, 2023). Reports a twelve-month period ending September 30. *Id.*

274. Program Provisions and SSA Administrative Data, SOC. SEC. ADMIN., <https://www.ssa.gov/policy/docs/statcomps/supplement/2022/2f8-2f11.html> (last visited Sept. 24, 2023) (see Tables 2.F8 and 2.F9).

Table 2. Securities and Exchange Commission

According to the U.S. Office of Personnel Management, the Securities and Exchange Commission employs five Administrative Law Judges.²⁷⁵

	2019	2020	2021	2022
Initial Decisions ²⁷⁶	49	12	6	2
Orders Issued ²⁷⁷	297	84	31	58

Table 3. National Labor Relations Board

The National Labor Relations Board (NLRB) currently employs thirty-six Administrative Law Judges (ALJs).²⁷⁸ The number of ALJs has decreased from thirty-nine in Fiscal Year 2010 due to budget constraints.²⁷⁹ The thirty-six judges are divided among three offices: Washington, D.C., San Francisco, and New York City. Nineteen ALJs sit in Washington, D.C., twelve in San Francisco, and five in New York City.²⁸⁰

	2019	2020	2021	2022
Unfair Labor Practice Charges ²⁸¹	18,552	15,869	15,081	17,998
Complaints ²⁸²	916	809	678	738
Decisions Issued ²⁸³	157	79	122	119

275. *ALJs by Agency*, U.S. OFF. PERSONNEL MGMT., <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=By-Agency> (last visited Mar. 1, 2023) (figures are current as of March 2017).

276. *ALJ Initial Decisions: Administrative Law Judges*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/alj/aljdec?aId=edit-year&year=All&month=All> (last visited Sept. 23, 2023).

277. *ALJ Orders: Administrative Law Judges*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/alj/aljorders?aId=edit-year&year=All&month=All> (last visited Sept. 23, 2023).

278. *NLRB Appoints Six New Administrative Law Judges*, NAT'L LAB. REL. BOARD (July 17, 2023), <https://www.nlr.gov/news-outreach/news-story/nlr-appoints-six-new-administrative-law-judges>.

279. *NLRB Appoints Two New Administrative Law Judges, Judge Christal Key and Judge Brian Gee*, NAT'L LAB. REL. BOARD (May 23, 2022), <https://www.nlr.gov/news-outreach/news-story/nlr-appoints-two-new-administrative-law-judges-judge-christal-key-and>.

280. *Division of Judges Directory*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/about-nlr/who-we-are/division-judges/division-judges-directory> (last visited Sept. 23, 2023).

281. *Unfair Labor Practice Charges Filed Each Year*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/reports/nlr-case-activity-reports/unfair-labor-practice-cases/intake/unfair-labor-practicecharges> (last visited Sept. 23, 2023).

282. *Id.*

283. *Administrative Law Decisions*, NAT'L LAB. REL. BOARD, <https://www.nlr.gov/casesdecisions/decisions/administrative-law-judge-decisions> (last visited Sept. 23, 2023) (“After a Regional

Table 4.1 Executive Office for Immigration Review

The Executive Office for Immigration Review currently employs four ALJs; Jean King serves as Chief Administrative Law Judge.²⁸⁴

	2019	2020	2021	2022
Published Decisions ²⁸⁵	34	66	75	167

Table 4.2 Immigration Judge Docket Statistics²⁸⁶

The Office of the Chief Immigration Judge also “employs 350 immigration judges who conduct removal hearings.”²⁸⁷

	2019	2020	2021	2022
Filings ²⁸⁸	547,311	369,758	244,140	706,558
Terminations ²⁸⁹	277,083	232,252	115,897	314,310
Number of Courtrooms ²⁹⁰	445	474	523	565

Director issues a complaint in an unfair labor practice case, [an ALJ] hears the case and issues a decision.”).

284. *Meet the Administrative Law Judges*, U.S. DEP’T JUSTICE, <https://www.justice.gov/eoir/meet-administrative-law-judges> (last updated Sept. 27, 2021).

285. *OCAHO Decisions*, U.S. DEP’T. JUSTICE, <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions> (last updated Oct. 11, 2023).

286. *Workload And Adjudication Statistics*, U.S. DEPT. JUSTICE, <https://www.justice.gov/eoir/workload-and-adjudication-statistics> (last visited Sept. 22, 2023).

287. U.S. DEP’T OF JUSTICE, EXECUTIVE OFFICE FOR IMMIGRATION REVIEW: AN AGENCY GUIDE 1 (2017), https://www.justice.gov/eoir/page/file/eoir_an_agency_guide/download.

288. *Executive Office for Immigration Review Adjudication Statistics: New Cases and Total Completions*, U.S. DEP’T JUSTICE, <https://www.justice.gov/eoir/page/file/1060841/download> (last updated July 13, 2023).

289. *Id.*

290. *Executive Office for Immigration Review Adjudication Statistics: Number of Courtrooms*, U.S. DEP’T JUSTICE, <https://www.justice.gov/eoir/page/file/1248526/download> (last updated July 2023).

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