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Macro-Judging and Article III Exceptionalism

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MACRO-JUDGING AND
ARTICLE III EXCEPTIONALISM

Merritt E. McAlister*

Over the last half-century, the federal courts have faced down two competing crises: an increase in small, low-value litigation thought unworthy of Article III attention and an increase in the numbers and complexity of “big” cases thought worthy of those resources. The choice was what to prioritize and how, and the answer the courts gave was consistent across all levels of the federal judiciary. Using what this Article calls “macro-judging,” Article III judges entrenched their own power and autonomy to focus on the work they deemed most “worthy” of their attention, while outsourcing less “important” work to an array of non-Article III decisionmakers (including law clerks, staff attorneys, and magistrate judges). These reforms have prioritized judicial control, power, and autonomy, and they have ensured the maintenance of a small, elite, and selective federal bench focused on only what they deem to be the most “important” federal work.

Ultimately, “macro-judging” has enabled courts to maintain and perpetuate Article III exceptionalism—that is, the view that federal courts should be small, elite, and focused on “big” or “important” cases. Whether Article III exceptionalism comes from the near obsessive focus of scholars on the federal courts or is a byproduct of the commonplace desire to increase power in, recognition for, and autonomy over one’s work, the federal judicial culture of elitism that has developed carries significant risks for democracy. By exalting the federal judiciary as elite and special, the ordinary litigant in the civil system loses out on Article III attention. Article III exceptionalism may also foster a judicial culture that eschews restraint, as judges issue bolder, bigger rulings thought worthy of a high-profile federal judiciary. Each day brings new signs of the costs of unbridled and self-important federal courts: a Supreme Court emboldened to cast aside precedent disfavored by a new majority; intermediate appellate courts dismantling the administrative state; and district courts overriding national public health policy. To combat these challenges, this Article argues for a rethinking of the role of federal courts to reinvigorate their public-service mission—a return, perhaps, to Article III ordinariness.

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INTRODUCTION

Over the last half century, the federal courts faced competing crises: a vast rise in the number of small, seemingly pedestrian federal cases and an increase in both the numbers and complexity of “big” cases.¹ Courts at every level could not sustainably meet both demands while maintaining a small Article III bench or while giving all cases equal (or something close to equal) attention. The courts were at a crossroads: either they had to grow substantially, or they had to change how they do business. For the most part, they did the latter—and that evolution has had profound consequences for how the Article III courts operate today.

Through what I call “macro-judging,” which are judicial decisions at the macro-level to assign judicial work, set judicial priorities, and organize judicial institutions, Article III judges reorganized their institutions to create a differentiated and variegated workforce. Article III judges remained focused on the most “important” matters (however defined by the Article III judges themselves),² and other, non-Article III decisionmakers handled the rest. The innovations Article III courts developed to tackle these problems all share a core common feature: they exalt the federal bench as elite and focused on only the work worthy of their attention. These reforms all have entrenched what I call “Article III exceptionalism,” that is the view that Article III courts are “special” places,³ with elite judges,⁴ whose

¹ See *infra* Part II (chronicling these developments and changes throughout the federal bench in response).

² Importance is a fluid category, but it may be defined as much by what it is not as by what it is: for the most part, the disfavored cases are those ordinary (that is, non-mass tort or class action) civil matters brought by unrepresented litigants, prisoners, or other marginalized litigants. Perhaps the best example contrasting the “ordinary” against the “important” is how the federal appellate courts organize their triage regimes, where (in most circuits) certain classes of cases (like immigration matters, Social Security claims, and claims by unrepresented persons) go to staff attorneys by default for handling in the first instance without oral argument and published decision-making. For more discussion on how the federal triage regime operates, see Marin K. Levy, *Judicial Attention as a Scarce Resource: A Preliminary Defense of How Judges Allocate Time Across Cases in the Federal Courts of Appeals*, 81 GEO. WASH. L. REV. 401 (2013), and RICHARD A. POSNER, REFORMING THE FEDERAL JUDICIARY: MY FORMER COURT NEEDS TO OVERHAUL ITS STAFF ATTORNEY PROGRAM AND BEGIN TELEVISIONING ITS ORAL ARGUMENTS 49-61 (2017).

³ See, e.g., Judith Resnik, *The Mythic Meaning of Article III Courts*, U. COLO. L. REV. 581, 581 (1985) (“Central to the debate [over the role of the federal judiciary] is some shared notion about the special qualities of federal courts. . . . Federal courts and their judges, as created by Article III, are special.”) [hereinafter Resnik, *Mythic*].

⁴ See, e.g., Judith Resnik, *Trial as Error, Jurisdiction as Inquiry: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 929 (2000) (“Federal judges describe their courts as the venue for ‘important’ matters as contrasted (implicitly and sometimes explicitly) with ‘ordinary’ . . . litigation.”) [hereinafter Resnik, *Trial*]; William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 277 (1996)

work should focus on only the most important federal cases.⁵ The narrative of Article III exceptionalism has shaped the federal courts profoundly. For decades, in various ways, at every level of the federal judiciary, Article III judges have organized their internal affairs—and, when necessary, lobbied Congress—to increase their discretion over agenda-setting (that is, how judges spend their time and on what) and to keep the federal judiciary small, elite, and focused only on work worthy of their first-rate abilities.

That Article III exceptionalism has become the norm may have been inevitable. Article III courts are the one percent.⁶ Literally. They see (less than) one percent of litigation nationwide,⁷ yet they receive a vastly disproportionate amount of scholarly (and popular) attention. Even within Article III courts, we're perhaps obsessively focused on the Supreme Court—often for good reason, given that Court's ability to shape our everyday lives in profound ways.⁸ But the same, of course, can be said for state courts of last resort that confront equally important questions within their jurisdictional borders—to say nothing of the smaller, local courts that decide matters of life and death.⁹ Still, scholars exalt the federal bench as supreme—literally and figuratively. Indoctrinated in a culture of Article III exceptionalism—a culture birthed in the legal academy, no doubt—Article III judges have done as good a job perpetuating their specialness as we scholars have.¹⁰

(explaining that transformation in federal appellate courts is “the by-product of the effort to maintain a small, elite federal judiciary”).

⁵ As used throughout, “Article III exceptionalism” captures this broader orientation toward the work and role of the federal courts; it has various component parts—an attitude of elitism, the maintenance of a small federal bench, and the concentration of judicial power and autonomy—that combine to entrench and maintain Article III exceptionalism (as seen, especially, against Article I judges and courts and state judges and courts).

⁶ With thanks to Brooke Coleman for first describing federal civil procedure as “one percent procedure.” Brooke D. Coleman, *One Percent Procedure*, 91 WASH. L. REV. 1005, 1007 (2016) (arguing that “the federal civil litigation system is its own one percent regime”).

⁷ See, e.g., Justin Weinsten-Tull, *The Structures of Local Courts*, 106 VA. L. REV. 1031, 1039-40 (2020) (noting that litigants filed more than 86 million cases in state and local courts in 2015 and less than 350,000 cases in federal court).

⁸ See, e.g., *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade* and holding that there is no constitutional right to terminate a pregnancy).

⁹ See, e.g., Nicole Summers, *Civil Probation*, 75 STAN. L. REV. ____, ____, (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3897493 (discussing inequities in housing court proceedings); Colleen F. Shanahan, Jessica K. Steinberg, Alyx Mark, & Anna E. Carpenter, *The Institutional Mismatch of State Civil Courts*, 122 COLUM. L. REV. 1471, 1473 (2022) (“The millions of people who come to state civil courts each year in the United States are in crisis, and so, too, are the courts that hear their cases.”).

¹⁰ See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CINN. L. REV. 615, 615 (1999) (recognizing that “melange of glorification, celebration, and adoration that pervades much of popular and almost all of academic thinking about the judiciary”).

Federal judges wield enormous control over “macro-judging,” and they have leveraged that control to maintain a self-interestedly powerful, selective, and elite federal judiciary. That is, Article III exceptionalism privileges the handful of big, important cases, while delegating to others the pedestrian mass of common civil litigation (often brought by unrepresented individuals and other marginalized claimants). Consider, for example, the creation and maintenance of a procedural triage system at the federal appellate level that permits the courts of appeals to be exceedingly selective in how they distribute their time and attention.¹¹ That regime saves the best, most interesting cases for judges, while central legal staff handle most of the rest. Judges at the district-court level have relied on magistrates to handle much of their civil docket—a lot of the work they deride as “housekeeping”¹²—while seeking opportunities to serve on rules committees, obtain multidistrict litigation (or “MDLs”), and do other high-profile work.¹³ These influences likewise may even partly explain why the Supreme Court’s docket has shrunk over time,¹⁴ and why (some) Justices have encouraged the development of a judicial cult of personality.¹⁵ Many of the reforms—especially the rise of MDLs and the development of a federal appellate triage system—may offer efficiency benefits.¹⁶ But that’s not the whole story.

¹¹ See, e.g., Merritt E. McAlister, *Rebuilding the Federal Circuit Courts*, 116 NW. U. L. REV. 1137, 1159–61 (2022) (describing triage process); see also WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS*, at xii, 115 (2013) (describing changes in federal appellate court structure and case processing to generate two “tracks” of appellate review as “judicial activism of the highest order” and concluding that this “unilateral change in [their] function . . . is deeply subversive of the entire constitutional scheme”) [hereinafter RICHMAN & REYNOLDS, *INJUSTICE*].

¹² See, e.g., Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909 (1990) (discussing how allocation of work among various federal court constituencies—especially between “Article III” and “Article I” judges—reflects value judgments about what work is “worthy” of Article III courts) [hereinafter Resnik, *Housekeeping*].

¹³ See, e.g., Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. REV. 1, 19 (2021) (“Being selected as an MDL judge confers elite status on the judge in the ranks of the federal judiciary.”).

¹⁴ See, e.g., Michael Heise, Martin T. Wells & Dawn M. Chutkow, *Does Docket Size Matter? Revisiting Empirical Accounts of the Supreme Court’s Incredibly Shrinking Docket*, 95 NOTRE DAME L. REV. 1565, 1567 (2020) (“Today’s Supreme Court decides markedly fewer appeals than its predecessors. . . . 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.”).

¹⁵ See, e.g., Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020) (identifying a “contributing cause” of the Supreme Court being “broken” and having lost “[p]ublic confidence” 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.”).

¹⁶ We should be skeptical about efficiency claims, of course. See Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1797 (2015) (questioning single-minded focus on efficiency calculations that privilege litigation cost only).

This Article argues that there is a darker side to macro-judging—one that, wittingly or not—has permitted judges to structure their institution to increase judicial selectivity and autonomy. These reforms have entrenched Article III exceptionalism; they have helped to maintain a small, elite federal judiciary focused on only “important” work—important, at least, in the eyes of the federal judiciary itself. Perhaps Article III exceptionalism is a necessary feature to keep federal judicial work sufficiently interesting, important, and influential to continue to attract the kind of talent thought necessary and deserving of a lifetime appointment on the federal bench. But it comes with costs: do we want a federal bench focused only on the extraordinary, big cases? And might such a focus lead Article III courts to think they themselves are too “big” or “important” for modest or incremental rulings? There is, this Article argues, a tangible risk that a culture of federal judicial specialness and elitism nurtures something of an attitude problem eschewing judicial restraint among the federal courts.

The signs that these risks are materializing abound. The Article III judiciary sometimes thinks it is above the law. Consider, for example, the persistent refusal of the Supreme Court to adopt ethics rules—a position that maximizes judicial control over agenda-setting in a most self-interested (and potentially quite pernicious) way.¹⁷ Or think of the recent blockbuster reporting that more than one hundred lower-court federal judges had violated federal law¹⁸ by failing to disqualify themselves from cases where they (or close family) held a financial interest in a party.¹⁹ Some Article III judges may think their own work too important to be bogged down with ticky-tacky ethics obligations.

Today’s federal courts—at every level—are not shy in exercising judicial power.²⁰ A particularly muscular form of judicial supremacy has seemingly gripped the courts.²¹ Within a one-month period in

¹⁷ See Bob Bauer, *The Supreme Court Needs an Ethics Code*, THE ATLANTIC (May 18, 2022), <https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/> (discussing failure of the Supreme Court to adopt an ethics code).

¹⁸ 28 U.S.C. § 455(b).

¹⁹ James V. Grimaldi, Coulter Jones, & Joe Palazzo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J., Sept. 28, 2021, https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421?mod=hp_lead_pos5.

²⁰ See, e.g., Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 831 (2022) (observing that “lower federal courts are active and conspicuous these days”); Henry P. Monaghan, *Jurisdiction Stripping Circa 2020: What The Dialogue (Still) Has to Teach Us*, 69 DUKE L.J. 1, 32 (2019) (observing that lower federal courts have “now assumed enormous legal, political, and cultural significance”).

²¹ Those on the political right, of course, would say this is nothing new. See, e.g., Matthew J. Franck, *The Problem of Judicial Supremacy*, NAT’L AFFAIRS, Spr. 2016, <https://www.nationalaffairs.com/publications/detail/the-problem-of-judicial-supremacy> (arguing that Justice Anthony Kennedy’s decision finding a constitutional right to same-sex marriage “exhibited judicial aggrandizement on a truly grand scale”). Calls for judicial restraint flip-flop with the political winds of judicial

spring of 2022, for example, the Supreme Court of the United States appeared poised to overturn *Roe v. Wade*,²² a split panel of an intermediate federal appellate court appeared ready to dismantle administrative enforcement power,²³ and a single district court judge enjoined the nationwide operation of the Centers for Disease Control’s COVID-19 pandemic mask mandate for airports, airplanes, and other modes of interstate travel.²⁴ Merits aside, each was (or would soon be) a bold ruling. These sweeping decisions reflect the raw, muscular power of the federal courts—each an example of what led progressives to begin warning about the dangers of “judicial supremacy” at the turn of the century.²⁵ But debates over judicial supremacy from both sides of the partisan divide²⁶ often overlook how the construction of Article III courts as exceptional may contribute to the muscular forms of judicial supremacy they attack. By keeping the federal judiciary elite and focused on only “important” work, courts have left the humility of a more passive²⁷ (and perhaps more minimalist)²⁸ orientation in the dust.

Article III judges may not be free to rule in ways that directly benefit their own personal, familial, or financial interest, but they are free to influence the structure of the judicial organization to maximize

appointments. See Jack M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 TEX. L. REV. 215, 215-16 (2019) (discussing shifts on judicial supremacy and restraint among liberals and conservatives over time). The call for restraint is the constant.

²² Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, Politico, May 2, 2022, <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>. And it did, of course. *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).

²³ See *Jarkesy v. S.E.C.*, No. 20-61007 (5th Cir. May 18, 2022).

²⁴ *Health Freedom Defense Fund, Inc. v. Biden*, No. 8:21-cv-01693, Order (M.D. Fla. Apr. 18, 2022).

²⁵ Barry Friedman, *The Cycles of Constitutional Theory*, 67 LAW & CONTEMP. PROBS. 149, 162 (2004).

²⁶ These debates are of long-standing, of course, but are re-emerging in the wake of *Dobbs*. See, e.g., Written Statement of Nikolas Bowie, Assistant Professor of Law, Harvard Law School, *The Contemporary Debate over Supreme Court Reform: Origins and Perspectives*, Presidential Commission on the Supreme Court of the United States, June 30, 2021, <https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf>; Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, THE ATLANTIC, June 8, 2022, <https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/>.

²⁷ See *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (recognizing that “courts are essentially passive instruments of government”).

²⁸ The minimalism on which I focus here is what Thomas Schmidt has recently defined as “decisional minimalism,” “which counsel judges to decide cases on narrow and shallow grounds.” Schmidt, *supra* note 20, at 836. Schmidt notes that his description of “decisional minimalism” follows Cass Sunstein’s work most closely. *Id.* (citing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3-6 (1999); Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6-10 (1996)).

their own power and control. That courts might ever exercise their power to preserve and perpetuate their own specialness is sobering,²⁹ but also undoubtedly true.³⁰ Courts have freer rein from institutional norms when engaging in macro-judging—that is, when deciding how the courts should operate, as opposed to deciding the outcome in a case.³¹ Across the federal judiciary—from the bankruptcy court to the Supreme Court—macro-judging has increased judicial autonomy. These structural choices permit judges to focus only on “important” matters worthy of their attention; they give judges more power and influence; and, for some, they create opportunities for prominent speaking gigs, lucrative book deals, and even television appearances. Macro-judging, in short, can be used to perpetuate and maintain the exceptionalism of Article III and its judges.

This work seeks to make two main contributions to the federal courts and judicial decisionmaking literature. The first is to define a field of judicial decisionmaking concerned with “macro-judging.”³²

²⁹ See Gregory C. Sisk, *Judges Are Human, Too*, 83 JUDICATURE 178, 211 (2000) (observing that empirical studies of judicial behavior are “sobering splash in the face with cold reality”).

³⁰ The reputational or self-interested concerns may motivate judicial decisionmaking is now well established. See, e.g., Andrew P. Morriss, Michael Heise & Gregory C. Sisk, *Signaling and Precedent in Federal District Court Opinions*, 13 SUP. CT. ECON. REV. 63, 64-65 (2005); Gregory C. Sisk, Michael Heise & Andrew P. Morriss, *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1487-93 (1998); Mark A. Cohen, *The Motives of Judges: Empirical Evidence from Antitrust Sentencing*, 12 INT’L REV. L. & ECON. 13, 14 (1992); Mark A. Cohen, *Explaining Judicial Behavior or What’s “Unconstitutional” About the Sentencing Commission?*, 7 J.L. ECON. & ORG. 183, 188-90, 193 (1991); see also LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR (2006) (testing empirically claim that Republican appointees to the Supreme Court who are new to the Washington, D.C. scene drift left over time to improve their reputation in national media outlets—the so-called “Greenhouse effect,” named after longtime *New York Times* Supreme Court reporter, Linda Greenhouse); Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574-79 (2010); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 3-4 (1993) (“Politics, personal friendships, ideology, and pure serendipity play too large a role in the appointment of federal judges to warrant treating the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest.”).

³¹ Richard Epstein has recognized that in (what I now call “macro-judging”) judges “are not subject to any exceptional constraints.” Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 B.Y.U. L. REV. 827, 837.

³² I use “macro-judging,” in part, because, as Marin Levy has observed, the term “judicial administration” “has fallen out of favor.” Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2390 n.14 (2014). Crediting Guido Calabresi with the insight, Levy suggests we think of work like this as part of a “new legal process” school. *Id.* I certainly like that term, too, but I use “macro-judging” to refer to what judges—and not academics—do. I use “macro-judging” to focus, in particular, on judicial decisions that reflect structural or systemic choices undertaken collectively as a matter of institution building and judicial policy; these are choices likely not attributable to any one particular judge, nor do these decisions drive any particular case outcome—all of which I would describe as “micro-judging.” Academic work

Most judicial decisionmaking literature focuses instead on what I call “micro-judging”—that is, what explains judges’ decisions in particular cases (e.g., “the law,” the attitudes or experiences of judges, the structure or collegiality of a court).³³ Academic work on micro-judging involves theoretical and empirical accounts of how and why judges decide cases the way they do. At bottom, “micro-judging” operates, primarily, at the case-specific level. “Macro-judging,” on the other hand, involves court structure and influences at a higher level of abstraction. It centers judicial policymaking, institutional design, court structure, and how judges engage in their work.³⁴ Macro-judging can be formal (e.g., the creation of federal rules or local rules), informal (e.g., the Supreme Court’s dwindling merits docket), or somewhere in between (e.g., a recommendation from the Judicial Conference, which is the policy-making body of the federal courts, to Congress).

Second, it collects and centers existing academic critiques from disparate domains—federal courts, civil procedure, and bankruptcy, among others—around a core framework: Article III exceptionalism. It argues that most of the significant “macro-judging” reforms of the last half-century have all advanced and entrenched the specialness of Article III courts; as a result, the federal courts have become more elite, selective, and autonomous. Through macro-judging, they’ve redefined what is worthy of Article III attention and what is not; they’ve established and exercised their own priorities in case-management—priorities that may, at times, conflict with the overall public good or exalt judicial priorities over public service.

Scholars have critiqued various aspects of the practices I discuss here, but this Article is the first to offer a comprehensive account of how and in what ways the federal courts have, themselves, undertaken large-scale procedural reforms to entrench their own power and autonomy—all while enriching their own job experience. This Article argues that federal judges at every level have engaged in macro-

that focuses on questions of judicial institutional design—including in its most formal incarnation, the development of trans-substantive rules—would fall into the “macro-judging” bucket.

³³ See BARRY FRIEDMAN, MARGARET H. LEMOS, ANDREW D. MARTIN, TOM S. CLARK, ALLISON ORR LARSEN, & ANNA HARVEY, *JUDICIAL DECISION-MAKING: A COURSEBOOK 1* (2020) (explaining that the study of judicial decisionmaking examines “internal” and “external” influences on “how judges reach their decisions or the factors that influence the content of judge-made law”).

³⁴ Some may disagree with describing “macro-judging” as a form of “judging,” in so far as macro-level decisions do not directly determine any case outcome (the latter being the province of micro-judging). I use “judging” capaciously to encompass all aspects of judicial decisionmaking; by doing so, I’m also rejecting a more formalistic distinction between deciding a case and designing an institution that (ultimately) will decide a case. Both, I argue, are part of the judicial process, but only one (macro-judging) is subject to plenary control and oversight by Congress. And that’s especially important because it means that if the courts have used macro-judging to further judicial priorities over the public good, then Congress can realign those priorities through reforms that revise and revisit macro-judging.

judging—that is, have shaped the institution of judging itself—to maintain the power and prestige of the Article III judiciary. The macro-judging features I examine all entrench and maintain judicial prestige, give judges greater control over their work, increase that work’s sophistication, attract more recognition for it, or some combination thereof. Where the rewards of federal judicial service are remuneratively slight (at least compared with private sector legal work), the urge to increase the intrinsic worth of the federal judicial post—that is, the power and influence of the position—may be especially great. That many federal judges stay active on the bench long past retirement age suggests that federal judicial power is both rewarding in and of itself and, perhaps, even a bit intoxicating.

I do not focus on macro-judging and Article III exceptionalism to cast aspersions on the federal judiciary. Instead, I think it important to be skeptical and critical of judicial institutions—and to resist the urge to romanticize or canonize the federal judiciary.³⁵ Judges are human;³⁶ like the rest of us, they seek power, influence, and rewarding work. Moreover, some of the features of the exceptional Article III courts may be normatively desirable. But, I argue, ultimately, that’s all for Congress—and not the courts themselves—to decide. The democratic process should set macro-judging priorities; it should not be the other way around. This Article argues for re-invigorated congressional oversight of macro-judging, especially where such judicial decisions subordinate marginalized litigants, where market forces may not operate to correct for inequities, or where macro-judging undermines judicial restraint across all levels of the federal judiciary.

It’s also entirely possible that many of the macro-judging features discussed in this Article developed solely for benign and beneficial reasons—and that judicial self-interest in prestige, power, and autonomy has nothing to do with macro-judging. That’s the more traditional narrative about the federal courts, even while some question whether scholars have inflated the field’s own sense of its importance.³⁷ This Article considers a counter-narrative that may be controversial and contested. I may be wrong—indeed, in some ways I *hope* I’m wrong about the motivations and effects of macro-judging—but I think it’s important, nevertheless, to ventilate this argument in the

³⁵ See, e.g., Schauer, *supra* note 10, at 624 (observing that the “romantic ideal” of the judiciary—that is, the “image of a as someone largely lacking in self-interest”—has been “cultivated by the judiciary, celebrated by the culture of lawyers and law school, and accepted by most members of the public”).

³⁶ See, e.g., Tom S. Clark, Benjamin G. Engst, Jeffrey K. Staton, *Estimating the Effect of Leisure on Judicial Performance*, 47 J. LEGAL STUD. 349, 349 (2018) (“One of the most significant lessons of the social science of law and courts during the 20th century might be summarized as follows: judges are people too.”).

³⁷ On this front, I note that a recent survey of law professors indicates that federal courts, appellate practice, and constitutional law are three of the four most over-rated (or “over-central”) fields in law schools. See Eric Martinez & Kevin Tobia, *What Do Law Professors Believe about Law and the Legal Academy? An Empirical Inquiry*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4182521 (manuscript at 44).

ongoing conversation around federal court reform and judicial legitimacy.

This Article will proceed in three parts. The first part situates the work of the Article III judge. This discussion focuses on the judge as an exceptional worker within a unique workplace—one that may, unwittingly perhaps, encourage and maintain that culture of elitism. The second part identifies features of the federal judicial system at every level—from the Supreme Court to the bankruptcy court—where judges have engaged in macro-judging to maintain Article III power, prestige, and autonomy. The final part launches a normative critique of Article III exceptionalism and macro-judging and offers some prescriptive considerations—aimed, especially, at identifying where legislative intervention may be most needed to combat the harms of Article III exceptionalism and reinvigorate the public-service mission of the federal courts.

I. THE ARTICLE III JUDGE

This Part defines the Article III judge. It describes the federal judge both as a constitutional actor and a federal worker. We rarely think about the judge as a federal worker, but that workplace’s unique structure, this Article argues, shapes the ways in which judges exercise their constitutional judicial power. Throughout this Part, I contrast the role of the “Article III judge” with the role of other appointees within the federal adjudicatory system³⁸—generally referred to as “Article I judges.”³⁹ This comparison is essential to the narrative of Article III exceptionalism.

³⁸ By “federal adjudicatory system,” I mean the entire federal governmental apparatus engaged in receiving evidence, applying law to facts, and rendering legally binding decisions on the rights, benefits, and obligations of the parties before them. *See* Resnik, *Housekeeping*, *supra* note 12, at 911 (similarly using term “federal adjudication”).

³⁹ Throughout, I generally use the terms “Article III judge” and “federal judge” interchangeably to refer only to those judges appointed consistent with the requirements of Article III of the U.S. Constitution. I refer to any judicial appointment not satisfying those requirements by either that position’s title or, collectively, by “Article I judges.” That said, there’s arguably some inaccuracy in the convenient shorthand. First, there’s a debate over whether some adjuncts to Article III appointees—bankruptcy judges and magistrate judges—should be understood as “Article I” judges, in the sense that they do not serve within legislative courts (as administrative law judges do). *See id.* at 910 & n.6 (discussing “imprecise” and “arguably, technically inaccurate” term, but using it as a matter of convenience). Additionally, Congress created some Article I judges using other legislative powers—like the exercise of Article IV plenary power over the territories. *See* F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 763 n.5 (2018) (explaining inaccuracy and using similar terminology to avoid “awkward[ness]” of “non-Article III tribunals”).

A. As Constitutional Actor

Even by the yardstick of constitutional text, Article III is “spare.”⁴⁰ It “vest[s]” the “judicial Power of the United States” in “one Supreme Court” and “such inferior courts as the Congress may from time to time ordain and establish.”⁴¹ Furthermore, “judges”—“both of the supreme and inferior courts”—are to “hold their offices during good behaviour” and receive “compensation . . . not to be diminished during their continuance in office.”⁴² When it comes to the Article III judge, that’s basically it as a matter of constitutional text.⁴³ Although there’s a rich body of scholarship on what “judicial power” means,⁴⁴ and on whom may exercise it,⁴⁵ what matters for our purposes is that Article III creates a constitutional judicial officer whose defining attributes are a protected salary⁴⁶ and a protected job.⁴⁷ These provisions were thought necessary to afford federal judges the independence to

⁴⁰ Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210 (1985) (“Article III lays out the structure and scope of the federal judiciary in spare and succinct language.”).

⁴¹ U.S. Const. art. III, § 1.

⁴² *Id.*

⁴³ The president’s appointment power specifically refers to the appointment of judges to the Supreme Court. U.S. Const. art. II, § 2.

⁴⁴ For a classic treatment of the topic of “judicial power,” see A. Leo Levin & Anthony G. Amsterdam, *Legislative Control Over Judicial Rule-Making: A Problem in Constitutional Revision*, 107 U. PA. L. REV. 1 (1958), and for a more contemporary examination of some of these issues, see Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000).

⁴⁵ For a thorough account of the constitutional issues surrounding Article I courts and judges, see Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233 (1990) (proposing theories to justify Article I tribunals); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV L. REV. 1153, 1186-90 (1992) (arguing that Article III permits no exceptions in vesting judicial power); Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 917-18 (1988) (developing a theory of appellate review to accommodate the Court’s exceptions to Article III); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (arguing that a distinction between “inferior courts” and “inferior tribunals” justifies constitutional exceptions to vesting of “judicial power”).

⁴⁶ Article III judicial pay is “undiminishable.” *O’Donoghue v. United States* 289 U.S. 516, 529-30 (1933).

⁴⁷ Although “[i]t is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge,” the constitutional text does not “expressly” say so. Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 74 (2006). The provision for tenure “during good behaviour” has generally been construed to require removal only through impeachment within the meaning Article II, section 4. *Id.* But others have argued that Congress has the power, through the Necessary and Proper Clause, to “establish any number of mechanisms for determining whether a judge has forfeited her office through misbehavior.” *Id.* at 78.

perform their constitutional function.⁴⁸ Others without those protections may also wield constitutional “judicial power” in some circumstances,⁴⁹ but those non-constitutional actors do so with less independence, for less money, and with less prestige.

There are currently 870 authorized Article III judgeships.⁵⁰ Nine of those Article III appointees sit atop the federal judicial hierarchy at the Supreme Court of the United States.⁵¹ Another 179 authorized federal appellate judges are spread out across twelve geographic circuits and the U.S. Court of Appeals for the Federal Circuit—courts ranging in size from six to twenty-nine judges.⁵² And there are 673 authorized Article III appointees to the U.S. District Courts,⁵³ which are organized into 94 districts in every state, the District of Columbia, and four territories (Puerto Rico, the Virgin Islands, Guam, and the Northern Mariana Islands). Lastly, there are nine judges appointed to lifetime posts on the U.S. Court of International Trade.⁵⁴

There are many more Article III judges than that, however. In 1919, Congress gave Article III judges who had reached retirement age the opportunity to take what is now known as “senior status.”⁵⁵

⁴⁸ See *id.* at 87 (“After all, the purpose of good-behavior tenure, as well as the bar against diminishing judicial salaries, was surely to protect judicial independence.”); see also *O’Donoghue*, 289 U.S. at 531 (“The anxiety of the framers of the Constitution to preserve the independence especially of the judicial department is manifested by the provision now under review, forbidding the diminution of the compensation of the judges of courts exercising the judicial power of the United States.”).

⁴⁹ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64-70 (1982) (recognizing “three narrow situations not subject to th[e] command” that “the judicial power of the United States must be vested in Art. III courts”).

⁵⁰ Authorized Judgeships, Admin. Office of U.S. Cts., at 8 <https://www.uscourts.gov/sites/default/files/allauth.pdf> [hereinafter “Authorized Judgeships”].

⁵¹ A point of some recent debate, of course. Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 *YALE L.J.* 148, 169 (2019) (arguing that significant reform is required to save the Supreme Court); Opinion, *How to Fix the Supreme Court*, *N.Y. Times* (Oct. 27, 2020), <https://www.nytimes.com/interactive/2020/10/27/opinion/supreme-court-reform.html>.

⁵² Authorized Judgeships, *supra* note 45, at 8.

⁵³ *Id.* Ten of the appointees to the district court bench are in “temporary” positions, which only means that the position is temporary but not the appointment; accordingly, when the life-appointee filling the post steps down, he or she may not be replaced. Bruce Moyer, *Will Congress Add More Federal Judgeships?*, *FED. LAW.*, June 2009, at 10 (“Temporary means that when the judge appointed retires or dies, the position would not be refilled.”).

⁵⁴ Authorized Judgeships, *supra* note 45, at 8. For more on the U.S. Court of International Trade and the unique issues related to its status as an Article III court, see Jane Restani & Ira Bloom, *The Nippon Quagmire: Article III Courts and Finality of United States Court of International Trade Decisions*, 39 *BROOK. J. INT’L L.* 1005 (2014).

⁵⁵ By statute, this is called retirement on “senior status.” 28 U.S.C. § 371. For a thorough discussion of the incentives surrounding “taking senior status,” see Marin K. Levy, *The Promise of Senior Judges*, 115 *NW. U. L. REV.* 1227 (2021). I’ve simplified the requirements for obtaining the salary of the office and annual cost-of-living adjustments here, but for a full accounting of the history of senior status and its

“Senior judges” are “a special class of judges who have left regular active service,” but who continue to take on judicial work—on average 40% to 50% of the normal work for an active judge.⁵⁶ Taking senior status creates a judicial vacancy that the president can fill, thereby adding to the ranks of Article III judges without expanding the number of authorized judgeships.⁵⁷ “Senior judges” are still Article III judges but, instead of a salary, they receive a pension in the amount currently set for their office (which carries tax benefits).⁵⁸ Senior judges currently handle approximately 20 percent of the total federal judicial workload,⁵⁹ and there are hundreds of them providing valuable service throughout the federal bench.

Despite the hierarchical structure of the federal courts, as Amanda Frost has observed, “[a]s a constitutional matter, Article III judges are treated alike, in that they all benefit from the same life tenure and compensation guarantees, and they all exercise the same ‘Judicial Power.’”⁶⁰ Justices can serve on lower courts, while lower court judges sit by designation on other lower courts.⁶¹ At some level, a federal judge is a federal judge is a federal judge—the only real difference is the posture of the case before him or her and the geographic or subject-matter scope of his or her jurisdiction.

The Article III judiciary depends, quite literally, on a fleet of Article I decisionmakers to help Article III courts handle federal adjudication. Nearest to the Article III courts are two vital “units” of the district

requirements and benefits, see Stephen B. Burbank, S. Jay Plager & Gregory Ablavsky, *Leaving the Bench, 1970-2009: The Choices Federal Judges Make, What Influences Those Choices, and Their Consequences*, 161 U. PA. L. REV. 1 (2012).

⁵⁶ Levy, *supra* note 55, at 1232; see Burbank, *et al.*, *supra* note 55, at 29; see also Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2007).

⁵⁷ 28 U.S.C. § 371(d). For this reason, Marin K. Levy has argued that providing inducements, and eliminating barriers or disadvantages to taking senior status, offer one potentially significant way to expand the federal appellate courts (without doing so through additions of authorized judgeships). See generally Levy, *supra* note 50.

⁵⁸ See Levy, *supra* note 55, at 1243 (discussing tax advantages); see also *infra* notes 112-119 and accompanying text (discussing same).

⁵⁹ About Federal Judges, Admin. Office of the U.S. Courts, <https://www.uscourts.gov/judges-judgeships/about-federal-judges> (last visited July 14, 2022).

⁶⁰ Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 GEO. J. LEGAL ETHICS 443, 469 (2013).

⁶¹ See *id.* (“In fact, Justices can and do serve as judges on the lower courts. In other words, the Supreme Court’s special constitutional status as an institution does not translate into special constitutional status for the Justices.”); see generally Marin K. Levy, *Visiting Judges*, 107 CAL. L. REV. 67 (2019) (discussing qualitative and quantitative data to discuss practice of visiting judges sitting by designation on the federal appellate courts).

court: the bankruptcy judge⁶² and the magistrate judge.⁶³ At one time, neither was considered a “judge”⁶⁴ at all—a marker meant to distinguish them from the real Article III judiciary alongside which they sit. Today, both wield a complicated version of federal judicial power—resulting from a somewhat incoherent constitutional doctrine⁶⁵—and have a title befitting their role, even if they lack the power, prestige, and protection of Article III judges.

In 1978, Congress overhauled federal bankruptcy law and created the federal bankruptcy judge. Originally, these judges were to be appointed by the president for fourteen-year terms and given “the powers of a court of equity, law and admiralty,”⁶⁶ but the Supreme Court swiftly struck down that provision as an unconstitutional vesting of Article III judicial power in Article I judges.⁶⁷ After a protracted “battle between the bankruptcy bar and Article III judges,”⁶⁸ Congress eventually passed the Bankruptcy Amendments and Federal Judgeship Act of 1984, under which bankruptcy judges would hold office for fourteen-year terms upon appointment by the U.S. Court of Appeals in which the bankruptcy judges sit.⁶⁹ That act bifurcated the jurisdiction of existing bankruptcy courts into “core” and “non-core” bankruptcy proceedings; only in the latter could a bankruptcy judge issue a final order.⁷⁰ The distinction proved beguiling, and, ultimately,

⁶² 28 U.S.C. § 151 (“In each judicial district, the bankruptcy judges in regular active service shall constitute a unit of the district court to be known as the bankruptcy court for that district. Each bankruptcy judge, as a judicial officer of the district court, may exercise the authority conferred under this chapter with respect to any action, suit, or proceeding and may preside alone and hold a regular or special session of the court, except as otherwise provided by law or by rule or order of the district court.”).

⁶³ Federal Magistrates Act, Pub. L. No. 90-578, § 401(b), 82 Stat. 1107, 1118 (1968) (codified as amended at 28 U.S.C. § 631).

⁶⁴ See Troy A. McKenzie, *Judicial Independence, Autonomy, and the Bankruptcy Courts*, 62 STAN. L. REV. 747, 803 (2010) (noting that bankruptcy judges were initially known as “bankruptcy referee[s]”); Resnik, *Trial*, *supra* note 5, at 989 (noting that magistrate judges were not originally called “judges”).

⁶⁵ See, e.g., Erwin Chemerinsky, *Formalism Without a Foundation: Stern v. Marshall*, 2011 SUP. CT. REV. 183, 185 (describing rule in *Stern*, which holds that a bankruptcy judge cannot enter a final judgment consistent with the limitations of Article III, as “mak[ing] little sense and can be understood only as the Court following in a formalistic way a series of decisions that themselves make little sense”).

⁶⁶ 28 U.S.C. § 1481 (repealed 1984).

⁶⁷ *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-87 (1982) (holding that broad grant of authority to bankruptcy judges violates Article III and that the “judicial Power of the United States” must be exercised by judges with life tenure and salary protection).

⁶⁸ Linda Coco, *Stigma, Prestige and the Cultural Context of Debt: A Critical Analysis of the Bankruptcy Judge’s Non-Article III Status*, 16 MICH. J. RACE & L. 181, 183 (2011).

⁶⁹ 28 U.S.C. § 152(a)(1).

⁷⁰ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 340.

the Supreme Court mired its constitutionality in doubt that remains to this day.⁷¹

The history and trajectory of the federal magistrate judge is similar; indeed, the magistrate was modeled after the bankruptcy referee, the predecessor to today's bankruptcy judge.⁷² Introduced as “magistrates” in 1968,⁷³ these non-Article III judges were originally conceived of as “assistants to district judges.”⁷⁴ Most of the first magistrates were part-time—reflecting their assistant-like status—but in the years since both their numbers, position, and powers have grown.⁷⁵ Magistrates were renamed “magistrate judges” in 1990,⁷⁶ and, today, magistrate judges may do all the work of a district court judge except conduct trials for and sentence felony defendants or authorize wiretaps.⁷⁷ Unless the magistrate judge acts with the consent of the parties,⁷⁸ he or she may only make “proposed findings of fact and recommendations” to an Article III district judge for resolution of case-dispositive motions.⁷⁹ Full-time magistrate judges serve renewable eight-year terms, and they are appointed (and renewed) by a majority vote of the district judges of the court.⁸⁰ So long as the services of their office remain needed, a magistrate judge is removable “only for incompetency, misconduct, neglect of duty, or physical or mental disability.”⁸¹

Justice Sonia Sotomayor—herself a former district court judge—once remarked that without magistrate judges and bankruptcy judges “the work of the federal court system would grind nearly to a halt.”⁸² No doubt. The number of these Article III adjuncts exceeds the number of active Article III judges, and they do more work, too. There are 345 authorized and funded bankruptcy judgeships.⁸³ In 2021, those

⁷¹ See *Stern v. Marshall*, 564 U.S. 462 (2011). See Mawerdi Hamid, *Constitutional Authority of Bankruptcy Judges: The Effects of Stern v. Marshall as Applied by the Courts of Appeals*, 27 AM. BANKR. INST. L. REV. 51, 53 (2019) (“*Stern* has left lower courts and litigants without clear guidance on the authority of a bankruptcy judge when finally determining core proceedings.”).

⁷² Peter G. McCabe, *The Federal Magistrate Act of 1979*, 16 HARV. J. LEG. 343, 348 (1979) (observing that magistrate bill was “patterned after the existing statutory arrangements for referees in bankruptcy”).

⁷³ Federal Magistrates Act, Pub. L. No. 90-578, § 401(b), 82 Stat. 1107, 1118 (1968) (codified as amended at 28 U.S.C. § 631). Federal magistrates grew out of the United States commissioners system, which had existed for 175 years. See McCabe, *supra* note 63, at 345 (discussing origins of modern magistrate judge).

⁷⁴ Resnik, *Trial*, *supra* note 4, at 989.

⁷⁵ *Id.*

⁷⁶ Civil Justice Reform Act of 1990, Pub. L. No. 1-650, § 321, 104 Stat. 5089, 5117.

⁷⁷ 28 U.S.C. § 636; 18 U.S.C. § 3401.

⁷⁸ *Id.* § 636(c)(1).

⁷⁹ *Id.* § 636(b)(1)(A)-(B).

⁸⁰ *Id.* § 631(a).

⁸¹ *Id.* § 631(i).

⁸² *Wellness Int'l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015).

⁸³ Status of Bankruptcy Judgeships—Judicial Business 2021, Admin. Off. of the U.S. Courts, <https://www.uscourts.gov/statistics-reports/status-bankruptcy-judgeships-judicial-business-2021>.

judges received more than 400,000 new filings—nearly 100,000 more than the civil filings their Article III colleagues received—and they terminated twice as many cases as the district courts.⁸⁴ The total number of active magistrate judges (673)⁸⁵—including part-time⁸⁶ and recalled⁸⁷ magistrates—is equivalent to the number of authorized Article III district court judgeships (673).⁸⁸ As Tracey E. George and Albert H. Yoon have observed, “[t]he impact of magistrate judges is substantial whether measured in the raw number of cases in which they are involved or in the nature of the work they do”; indeed, they routinely resolve three times the number of matters that district court judges do.⁸⁹

The bankruptcy judge and magistrate judge are just the tip of the Article I judicial iceberg. As of March 1, 2017, there were 1,931 federal administrative law judges⁹⁰ spread across more than 30 agencies.⁹¹ There are approximately 600 immigration judges sitting on 68 immigration courts throughout the country⁹² and another 23 appellate immigration judges on the Board of Immigration Appeals.⁹³ Each

⁸⁴ Compare Bankruptcy Filings, Admin. Off. of the U.S. Courts, tbl.F (Dec. 31, 2021), with Statistical Tables for the Federal Judiciary, Admin. Off. of the U.S. Courts, tbl. C-1 (Dec. 31, 2021). This has generally always been true; Judith Resnik observed in 2000 that bankruptcy judges “have a larger docket than do other judges within Article III and do much of their work without review.” Resnik, *Trial*, supra note 4, at 952 n.96.

⁸⁵ ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS tbl.12 (2021), <https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2021>.

⁸⁶ Under 28 U.S.C. § 631(c), with the approval of the Judicial Conference, a clerk or deputy clerk of a court also may be appointed as a part-time magistrate judge. Those appointed to a part-time position serve a four-year (as opposed to an eight-year) term. See generally 28 U.S.C. § 631 (appointment and tenure procedures for magistrate judges).

⁸⁷ See 28 U.S.C. § 636(h) (authorizing judicial council of the circuit to recall retired magistrate judges upon consent of the district court’s chief judge).

⁸⁸ ADMIN. OFFICE OF THE U.S. COURTS, U.S. DISTRICT COURTS, ADDITIONAL AUTHORIZED JUDGESHIPS, <https://www.uscourts.gov/sites/default/files/districtauth.pdf>

⁸⁹ See Tracey E. George & Albert H. Yoon, *Article I Judges in an Article III World: The Career Path of Magistrate Judges*, 16 NEV. L. J. 823, 824-25 (2016) (discussing importance of magistrate judges and their work).

⁹⁰ That counts those appointed under 5 U.S.C. § 3105 to conduct administrative proceedings in accordance with 5 U.S.C. § 556 & 557.

⁹¹ ALJs by Agency, Federal Administrative Law Judges by agency and level (EHRI-SDM as of March 2017), Office of Personnel Management, <https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency>. Unfortunately, more recent statistics are not available from the Office of Personnel Management.

⁹² U.S. Dep’t of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, <https://www.justice.gov/eoir/office-of-the-chief-immigration-judge>.

⁹³ U.S. Dep’t of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, <https://www.justice.gov/eoir/board-of-immigration-appeals>. For a thorough discussion of the history of the immigration judge, see Nicole

wields federal adjudicatory power.⁹⁴ They resolve more federal law matters than the rest of the Article III judiciary combined; indeed, the backlog of cases pending before immigration judges alone hit nearly 1.1 million in 2020.⁹⁵ And there are still more: judges on military courts, hearing officers, special masters on the Vaccine Court, and judges on the Court of Federal Claims, to name a few.

There's a rich body of law and scholarship on the constitutional bounds of allocating federal judicial work to non-Article III decisionmakers.⁹⁶ That's largely beyond the scope of this Article. What matters is that there are layers, upon layers, of decisionmakers throughout the federal adjudicatory system. My focus is on how the distribution and allocation of federal adjudicatory work reinforces the power, prestige, and autonomy of Article III courts. The construction of Article III exceptionalism begins with the construction of a differentiated and variegated federal judicial workforce. The next part discusses the Article III judge as a worker within that workforce.

B. As Federal Worker

Being an Article III judge is also a job; it's work. It's a good—indeed, an *excellent*—job, to be sure. Job satisfaction among Article III judges appears to be quite high given that many labor well past retirement age and do so largely for free. But it comes with unique constraints and rewards that are worth considering in some depth to understand why judges might be inclined to engage in macro-judging to entrench Article III exceptionalism. I'll discuss the job's features along two dimensions: those features external and internal to the work of judging.⁹⁷ “External” features include judicial pay, policies, and

Sequeira Tashovski, *Immigration Judge Independence Under Attack: A Call to Re-Evaluate the Current Method of IJ Appointment and Create a Separate Immigration Court System*, 19 HASTINGS RACE & POVERTY L.J. 173 (2022).

⁹⁴ Not all are classified as “administrative law judges” for purposes of the Administrative Procedures Act. See Resnik, *Trial*, *supra* note 4, at 954 & n. 102 (discussing role of immigration judge among other administrative judges not classified as “ALJs”).

⁹⁵ *Courts in Crisis: The State of Judicial Independence and Due Process in U.S. Immigration Courts: Hearing Before the Subcomm. on Immigr. & Citizenship of the H. Comm. on the Judiciary*, 116th Cong. 3, 4 (2020) (statement of Hon. A. Ashley Tabaddor, President, National Association of Immigration Judges); see also Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343 (1992) (stating that “ALJs probably decide more ‘cases’ each year than do their federal judicial counterparts”).

⁹⁶ For a discussion of constitutional issues surrounding Article I or legislative courts, see generally, Richard Fallon, *Of Legislative Courts, Administrative Agencies, And Article III*, 101 HARV. L. REV. 915 (1988); Daniel Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L. J. 291 (1990); Resnik, *Mythic*, *supra* note 3.

⁹⁷ Workplace theorists sometimes describe worker motivation along two dimensions: extrinsic factors, which are things like company policies, pay, supervision, status, and security; and intrinsic factors, which are things like achievement, recognition for achievement, responsibility, and growth. See generally FREDERICK HERZBERG, ET AL., *THE MOTIVATION TO WORK* (1959); Frederick

security; “internal” features include the nature of the work itself, as well as the capacity for recognition, autonomy, and growth or advancement.⁹⁸

1. *External Features of Federal Judicial Work*

Although the position of a federal judge is often static, it is incredibly secure. Federal judges can’t be fired—only removed through impeachment.⁹⁹ Congress can decline to give federal judges raises, but it cannot do so selectively.¹⁰⁰ The pay is good, relatively speaking,¹⁰¹ and the retirement perks are even better.¹⁰² Sure, Article III judges could earn more in private law practice, but such work comes with less autonomy, longer hours, and far less security. Table 1 compares salaries for Article III and Article I judges; no Article I judge earns more than an Article III judge.

Table 1: Article III¹⁰³ and Article I Judges’ Salaries

<u>Position</u>	<u>Salary (2022)</u>
Chief Justice of the United States	\$286,700
Associate Justices of the United States	\$274,200
Circuit Judges	\$236,900

Herzberg, *On More Time: How Do You Motivate Employees?*, 81 HARV. BUS. REV. 8 (2003); see also FREDERICK HERZBERG, WORK AND THE NATURE OF MAN (1966); see also Mohammed Alshmemri, Lina Shahwan-Akl, & Phillip Maude, *Herzberg’s Two-Factor Theory*, 14 Life Science Journal 12, 13 (vol. 5, 2017) (“Herzberg’s theory is one of the most significant content theories in job satisfaction.”).

⁹⁸ Herzberg, *One More Time*, *supra* note 97, at 8-9.

⁹⁹ U.S. Const. art. II, § 4.

¹⁰⁰ See Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 S.M.U. L. Rev. 469, 472-73 (1998) (discussing federal judicial constraints).

¹⁰¹ All of this is relative, of course, and it shouldn’t go unremarked that the current salary for a federal district court judge is more than six times the national per capita income average according to the U.S. Census. Compare Admin. Office of U.S. Courts, Judicial Compensation, <https://www.uscourts.gov/judges-judgeships/judicial-compensation> (2021 compensation for district court judge is \$218,600), with U.S. Census Bureau, Quick Facts, <https://www.census.gov/quickfacts/fact/table/US/SEX255219> (2019 per capita income is \$34,103). The average income for a law firm partner at one of the nation’s top 200 law firms exceeded \$1 million in 2019. See Debra Cassens Weiss, *How Much Do Partners Make? The Average at Large Law Firms Tops \$1M, Survey Finds*, ABA JOURNAL, <https://www.abajournal.com/news/article/how-much-do-partners-make-the-average-at-larger-firms-tops-1m-survey-finds> (Dec. 16, 2020).

¹⁰² See *infra* notes 112-119 and accompanying text (discussing tax incentives for taking senior status).

¹⁰³ Admin. Off. of the U.S. Courts, Judicial Compensation, <https://www.uscourts.gov/judges-judgeships/judicial-compensation>.

District Judges	\$223,400
Bankruptcy Judges ¹⁰⁴	\$205,528
Magistrate Judges ¹⁰⁵	up to \$205,528
Administrative Law Judges ¹⁰⁶	\$117,600 to \$176,300
Immigration Judges ¹⁰⁷	Capped at \$187,300

There are some limits on how federal judges can use (and not use) their office. They generally may not rule in cases where they have a direct financial interest,¹⁰⁸ and their income has nothing to do with the quantity or the quality of the cases they resolve.¹⁰⁹ They may not practice law, nor engage in political activity.¹¹⁰ There are limits on how much active judges may earn for outside activities, like teaching (but they may keep all book royalties).¹¹¹

Although judges cannot be forced to retire, the financial incentives for doing so—or for taking senior status—can be substantial. Once federal judges reach the age of 65, and have sufficient years of federal judicial service,¹¹² they may either retire with a full pension—equivalent to the judge’s current salary¹¹³—or take “senior status” and continue to receive the salary of the judicial office.¹¹⁴ Those judges who take “senior status” receive pension payments equivalent to their judicial salary that are not subject to FICA (Social Security and Medicare) taxes, and some state and local taxing authorities treat senior status salaries

¹⁰⁴ See 28 U.S.C. § 153(a) (setting salary of bankruptcy judges at 92% of district judges)

¹⁰⁵ *Id.* § 634(a) (setting salary of magistrate judges at up to 92% of district judges).

¹⁰⁶ E.O. 14061, Adjustments of Certain Rates of Pay, Schedule 10, at 13, <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-2022-adjustments-of-certain-rates-of-pay.pdf>. (setting scale for Administrative Law Judges).

¹⁰⁷ U.S. Dept. of Justice, Exec. Office for Immigration Review, 2020 Immigration Judge Pay Rates, Jan. 5, 2020, <https://www.justice.gov/coir/page/file/1236526/download> (noting that pay is capped at Level III of the Executive Schedule, which is currently \$187,300).

¹⁰⁸ 28 U.S.C. § 455(b)(4).

¹⁰⁹ See Drahozal, *supra* note 100, at 473 (discussing constraints on Article III judges).

¹¹⁰ See Burbank, *et al.*, *supra* note 55, at 4 (discussing constraints on Article III judicial service).

¹¹¹ The cap is 15%. 5 U.S.C. App. § 501.

¹¹² See 28 U.S.C. § 371(c). This is known as the “rule of 80”; the judge’s age and years of service must add up to 80 to trigger retirement benefits. Accordingly, a judge who is appointed to the bench later in life (say, at 55), may retire once her age and years of service add up to 80.

¹¹³ By statute, this is called “retirement on salary.” 28 U.S.C. 371(a). A judge might also resign without a pension, but this is rare.

¹¹⁴ By statute, this is called retirement on “senior status.” 28 U.S.C. § 371.

as retirement (reducing taxes further).¹¹⁵ All told, the financial benefit for senior status (or retirement) is “between \$25,000 to \$30,000” or more than 10% of the current salary for Article III judges.¹¹⁶ Moreover, senior status judges who meet the workload certification to maintain a salary for life, which is currently 25%, are not subject to any limit on teaching income.¹¹⁷ Overall, the incentive for continuing to work in some capacity in retirement (as opposed to retiring on pension outright) is somewhat slight (at least today).¹¹⁸ It’s largely the difference between keeping the judge’s current salary at retirement and any future salary increases for the office.¹¹⁹

All this to say: even if federal judicial pay is not particularly great (compared to the private sector), the financial rewards long-term are significant and secure. But it’s reasonable to conclude that, as a group, judges are less likely to be motivated by financial rewards than the public at large; any judge could earn far more in private practice (or even academia).¹²⁰ That is likewise consistent with popular workplace motivation theories: judges may become dissatisfied with their job because of their pay (and some do),¹²¹ but financial rewards are not themselves likely to be independently rewarding.¹²² Those rewards, as the next part discusses, are more likely to come from the work itself.

¹¹⁵ See Burbank, *et al.*, *supra* note 55, at 33 (discussing tax benefits for senior status judges).

¹¹⁶ *Id.* at 34. Judges who take senior status may continue to receive the same life insurance, health insurance, and survivor benefits, but they may no longer participate in the Thrift Savings Plan, which is the Article III equivalent of a 401(k). *Id.* at 34-35 (discussing consequences of taking senior status).

¹¹⁷ 5 U.S.C. app § 501(a)(1).

¹¹⁸ The financial difference between going senior (and thus qualifying for continued raises and cost of living adjustments) and retirement was particularly steep during the latter half of the Twentieth Century, when judge pay had been frozen and Congress periodically failed to make even cost of living adjustments. See Burbank, *et al.*, *supra* note 55, at 33-34 (discussing history of judicial pay). Judges who take senior status also are free from the ordinary restriction on teaching income imposed on judges who are in active service. See 5a U.S.C. § 502(b). The same tax advantages for federal judges to retire upon eligibility apply, regardless of whether the judge takes senior status or not, but the incentive (especially given the relative dissatisfaction with judicial pay) may be enough to encourage judges to take senior status early, even when they desire to continue working at a full or almost full capacity. See Burbank, *et al.*, *supra* note 55, at 45-47 (discussing strategy around taking senior status and tax advantages, including considering survey responses from federal judges).

¹¹⁹ The benefit of going senior (as opposed to remaining active), mostly inures to the president and the court itself, as the president may appoint a new judge to fill the senior judge’s seat upon retirement in senior status. For an evaluation of the constitutionality of this scheme, see David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453 (2007).

¹²⁰ That is not to suggest that pecuniary rewards play no role in a judicial utility function or are not a part of what judges want. See Posner, *Maximize*, *supra* note 30, at 31-34 (including income/financial rewards in judicial utility function to assess whether changes in income affect judicial behavior).

¹²¹ See *infra* notes 141-147 and accompanying text (discussing reasons federal judges leave the bench).

¹²² Herzberg, *One More Time*, *supra* note 97, at 8-9.

2. *Internal Features of Federal Judicial Work*

They say that true satisfaction comes from within—in this case, from the satisfaction of the work itself.¹²³ It's not the pay, or the retirement benefits, or probably even the job security that draws highly-qualified applicants to seek Article III appointments: it's the rewards—and the power, responsibility, and prestige—of the work. Judges likely value the ability to make meaningful decisions, to use their reasoning and analytical skills to shape the development of law or affect the lives of people in their community. That their work is consequential, and often varied—at least according to subject matter if not, strictly speaking, according to task—no doubt provides further enrichment. It's also likely true that judges who can act more independently or autonomously, who can make more meaningful decisions on consequential legal issues, and who gain more recognition (internally and externally) for their craft are happiest in the judicial role.

On the other hand, we can also readily identify some structural challenges to judicial job satisfaction. Judges generally have little control over *what* work they do. Most Article III judges do not decide which cases they take, and no judge has control over what cases enter the federal system. There is, therefore, a substantial possibility that judicial work becomes rote and routine—and not particularly varied or meaningful to the judge (based on her ideology, personal interest, etc.). Further, although Article III judges act with tremendous autonomy, their individual decisions or opinions do not always carry the day. Lower-court decisions are reviewed by higher courts, and higher-court judges act only in groups of three (or more). Over time, it's conceivable that an appellate judge—especially one in an ideological minority on a court—may grow increasingly frustrated by a *lack* of autonomy or ability to contribute to decisions meaningful to him or her. One can easily imagine the weariness of a perpetual dissenter.

As one ascends through the federal judicial hierarchy, the exercise of judicial power—the ultimate exercise of autonomy—becomes both more and less constrained in different ways. On the one hand, the federal court of last resort—the Supreme Court of the United States—has judicial supremacy over federal constitutional law;¹²⁴ it has the

¹²³ See RICHARD J. HACKMAN & GREG R. OLDHAM, *WORK REDESIGN* 88 (1980) (Where “an individual is fully competent to carry out the work required by a complex, challenging task, *and* has strong needs for personal growth *and* is well satisfied with the work context, then we would expect both high personal satisfaction and high work motivation and performance.”).

¹²⁴ See, e.g., Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 4, 92 (2001) (discussing history of concept of “judicial supremacy,” that is, “the idea that the Supreme Court has the last word when it comes to constitutional interpretation (subject only to formal amendment)”).

power to bind *everyone*,¹²⁵ but (with some notable exceptions)¹²⁶ the justices on that Court cannot act alone. They may act only with the agreement of at least four colleagues—a requirement that, depending on the makeup of the Court,¹²⁷ may be more constraining or less.¹²⁸ Moreover, the justices have nearly unbridled power (again, with the agreement of colleagues) to engage in their own agenda-setting, as their docket is almost entirely discretionary unlike any other Article III or Article I court.¹²⁹

The middle child of the federal judiciary—the U.S. Courts of Appeals—wields nearly as much power as the U.S. Supreme Court with similar (but arguably more robust) constraints. Although the U.S. Courts of Appeals are the courts of last resort for many appellants (because of how few cases the Supreme Court hears),¹³⁰ their supremacy is, for the most part, circumscribed geographically,¹³¹ and their judgments are (at least in theory) subject to further review by the *en banc* court or by the Supreme Court or both.¹³² Although judges on

¹²⁵ See, e.g., 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 347 (Boston, Hilliard, Gray & Co. 1833) (“[I]t is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by that constitution.”); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (describing modern understanding of judicial supremacy).

¹²⁶ Individual justices have the power to act alone on matters that come before them as applications to the circuit justice. See Sup. Ct. R. 22. Although many such applications are routine matters, including requests for extensions of time, Sup. Ct. R. 13.5, an individual justice also has the power to stay a lower court ruling, Sup. Ct. R. 23.

¹²⁷ Justice Brennan famously quipped: “[W]ith five votes you can do anything around here!” H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008).

¹²⁸ See Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CAL. L. REV. 1493, 1501 (2012) (“The nature of the decisions that a judge on a multimember court faces is considerably different than that faced by a judge sitting alone. Not only are the types of cases quite different but the very nature of working closely with other judges creates both opportunities for, and constraints on, additional action.”).

¹²⁹ See Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.) (eliminating remaining vestiges of the U.S. Supreme Court’s mandatory appellate docket).

¹³⁰ See, e.g., Emily Hughes, *Investigating Gideon’s Legacy in the U.S. Courts of Appeals*, 122 YALE L.J. 2376, 2379 (2013) (describing U.S. Courts of Appeals as “the de facto courts of last resort for litigants claiming ineffective assistance of counsel”).

¹³¹ 28 U.S.C. § 41; 28 U.S.C. § 1291; 28 U.S.C. § 1292(c), (d); 28 U.S.C. § 1295.

¹³² These are relatively weak constraints, of course. Even though the Supreme Court has a particularly high reversal rate (for an appellate court), it only reverses a tiny number—less than 1%—of the cases on its docket. Barry C. Edwards, *Why Appeals Courts Rarely Reverse Lower Courts: An Experimental Study to Explore Affirmation Bias*, 68 EMORY L.J. ONLINE 1035, 1039 (2019). *En banc* review is equally rare. See Ryan W. Copus, *Statistical Precedent: Allocating Judicial Attention*, 73 VAND. L. REV. 605, 608 (2020) (noting that courts review only 0.19% of appeals *en banc*). For more on

these courts generally sit in panels of three (and thus only need to convince a single colleague to join a result),¹³³ those panels change frequently—a different kind of constraint than where panel membership is both stable and of long standing.¹³⁴

Although it is the “lowest” rung on the Article III ladder, federal district court judges have more autonomy than do judges at any other level within the federal judiciary.¹³⁵ District court judges act alone—they do not sit in panels, except on rare occasions¹³⁶—and some of their decisions are either protected by substantial deference or are functionally unreviewable by higher courts (especially where they can frame matters as issues of fact, not law).¹³⁷ But nearly all of their final judgments are subject to appeal as of right to the U.S. Courts of Appeals.¹³⁸ That said, over the last half-century these trial-level judges have increasingly become active case managers, as Judith Resnik first described, wielding “greater power” and actively shaping case outcomes “beyond the public view . . . and out of reach of appellate review.”¹³⁹ In at least some circumstances, the Article III district judge exercises nearly autonomous judicial power over the matters before her.

We largely lack data on federal judicial job satisfaction, but anecdotal evidence on judicial retirement and resignation suggests that federal judges, overall, are an extremely satisfied lot.¹⁴⁰ The vast majority who “retire” elect to become senior judges, where they are, essentially, working for free (though there are financial incentives both to “retire” and to continue working in at least a marginally part-time capacity).¹⁴¹ During Stephen B. Burbank, S. Jay Plager, and Greg

modern en banc practices across the federal appellate courts, see Neal Devins & Allison Orr Larsen, *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373 (2021).

¹³³ 28 U.S.C. § 46.

¹³⁴ See, e.g., Evan H. Caminker, *Sincere and Strategic Voting Norms on Multimember Courts*, 97 MICH. L. REV. 2297 (1999); Harry T. Edwards, *The Effects of Collegiality on Judicial Decision Making*, 151 U. PA. L. REV. 1639, 1657–58 (2003) (“Judges are constrained by, and responsive to, the behavior of other judges.”); Harry T. Edwards, *Collegiality and Decision Making on the D.C. Circuit*, 84 VA. L. REV. 1335 (1998).

¹³⁵ See Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 846 (1984) (“Single judges have an independence not permitted other members of complex, hierarchical institutions.”) [hereinafter Resnik, *Tiers*].

¹³⁶ 28 U.S.C. § 2284.

¹³⁷ See, e.g., Resnik, *Tiers*, *supra* note 135, at 861 (recognizing that “[e]ven in cases where appeal is available, many of the decisions of the first tier [which includes the federal district court] are given great deference”).

¹³⁸ 28 U.S.C. § 1291.

¹³⁹ Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 377-78 (1982) [hereinafter Resnik, *Managerial*].

¹⁴⁰ See Burbank, *et al.*, *supra* note 55, at 84 tbl.28 (discussing survey results of federal judges eligible for retirement or senior status who have elected to remain active judges because, foremost, they “like the judicial work of a judge” and “like the working conditions of a judge”).

¹⁴¹ As of May 7, 2022, among the 62 Article III judicial vacancies created by retirements or resignations (as opposed to elevations or death), only six of those 62 vacancies were created by an outright retirement and only one was created by a

Ablavsky's comprehensive forty-year study of federal judicial retirements and resignations, 2,143 judges served on the lower federal courts; 1,006 of those judges served in senior status during some portion of that time.¹⁴² On the other hand, only 101 of those judges retired (or 4.7% of those judges eligible to do so),¹⁴³ and an even smaller number—80 judges—resigned without receiving their pensions.¹⁴⁴

Although the numbers of retirements and resignations were small (compared to the number of senior status judges), the apparent reasons for retirements and resignations are telling. Both those judges who retired shortly after becoming pension eligible and those who resigned from office without receiving a pension did so for reasons that would be familiar to most workers: they were generally either dissatisfied with their pay or they sought new challenges. Overall, retirements were driven foremost by a desire for more income, and, secondarily, by a desire to seek new challenges.¹⁴⁵ Although a smaller category of retirements appeared to be for health reasons, approximately 69% of retirements were for financial reasons or to obtain both financial rewards and a more diverse and challenging experience outside of judicial service.¹⁴⁶ Likewise, judges who resigned largely complained about “low” pay as well.¹⁴⁷ Of the 80 federal judicial resignations during the study, 36 judges resigned either to return to private practice or because of inadequate salary.¹⁴⁸ Eleven cited “dissatisfaction with the office,” and 18 received appointments to another office (also reflecting some measure of judicial dissatisfaction, given the choice to leave a life-tenured-position before their pension vested).¹⁴⁹ Of those who specifically expressed dissatisfaction with the judicial office, those judges complained about the workload, constraints on judging

resignation. Admin. Office of U.S. Courts, Current Judicial Vacancies, <https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies> (last visited May 7, 2022). Thus, nearly 90% of the current judicial vacancies created by retirement or resignation involve judges electing to go senior rather than to retire outright.

¹⁴² Burbank, *et al.*, *supra* note 55, at 21.

¹⁴³ *Id.* at 56.

¹⁴⁴ *Id.* at 12-13.

¹⁴⁵ *Id.* at 71, tbl.21. Notably, this factor was far more significant to district court judges than it was to circuit court judges, who predominately were driven to retire to find “new challenges.” *Id.*

¹⁴⁶ *Id.* at 63.

¹⁴⁷ *Id.* at 12-13 (noting “overlap” between decision to return to private practice and being motivated by inadequate salary); *see also id.* at 15 (noting that most resignations during study period were related to “inadequate salary” and identifying at least 42 of 80 judges who resigned for that reason).

¹⁴⁸ *Id.* at 13 fig.1.

¹⁴⁹ *Id.* Even for some resignations for other offices, salary may have played a role; three federal judges departed for the California state bench, where they received more pay. *Id.* at 13 n.69.

imposed by the Sentencing Guidelines, dissatisfaction with the monastic lifestyle, and a desire to seek “new challenges.”¹⁵⁰

But retirements and resignations were the exceptions and far more judges remained active in “senior status” instead. And they did so, predominately, because of the love of the work: the number one reason why judges remained in senior status (instead of seeking full retirement) was that they “like[d] the judicial work of a judge.”¹⁵¹ The same was true for judges who elected to stay active judges well past the age when they could qualify for retirement or senior status.¹⁵² All told, it’s nice work if you can get it. And, as the next Part considers, judges have used macro-judging to make the job even better—especially in the face of caseload demands that threatened to dilute the prestige of the position and overwhelm the courts with humdrum matters.

II. HOW MACRO-JUDGING HAS CONSTRUCTED AND ENTRENCHED ARTICLE III EXCEPTIONALISM

As good as Article III judicial work is, throughout the last half-century or so, Article III judges have faced down at least two major demons: rising caseloads and intensifying case complexity. Each placed a heavy burden on the courts and, as a result, threatened—at least in the view of some—to “less[en] the prestige and attractiveness of the office.”¹⁵³ These problems were largely orthogonal. In the words of one federal judge, a lot of “small cases” and an “ever-increasing caseload with an ever-larger percentage . . . of relatively routine work which neither requires nor engages the abilities of a first-rate judge” were strangling Article III courts.¹⁵⁴ That left these “first-rate” judges, in words of another lifetime Article III appointee, with little time for the “big case[s]”—which were the “major commercial litigation[s]” or federal actions under “laws regulating interstate commerce.”¹⁵⁵ At the same time, those “big cases” were increasing in complexity while our

¹⁵⁰ *Id.* at 15 (collecting publicly stated reasons for dissatisfaction with federal judicial office as reason for resignation).

¹⁵¹ *Id.* at 53 tbl.9.

¹⁵² *Id.* at 84 tbl.28.

¹⁵³ See Frank M. Coffin, *Grace Under Pressure: A Call for Judicial Self-Help*, 50 OHIO ST. L.J. 399, 399 (1989) (“In both state and federal courts caseloads have increased exponentially in quantity and complexity. These trends have inexorably led not only to vastly heavier demands on each judge but also to increased numbers of judges at every level, a development viewed by some as ‘cheapening the currency,’ or lessening the prestige and attractiveness of the office. Exacerbating these stresses are the dramatically increasing gap between the compensation of the rest of the legal profession and that of judges . . .”).

¹⁵⁴ RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 11, at 214 (quoting William H. Rehnquist, Remarks at the Annual Dinner of the American Bar Association (Aug. 9, 1976), in Carolyn Dineen King, *A Batter of Conscience*, 28 HOUS. L. REV. 955, 961 (1991); internal quotation marks omitted).

¹⁵⁵ *Id.* (quoting Justice Antonin Scalia, *Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents* (Feb. 15, 1987); internal quotation marks omitted).

economy and the body of federal regulatory law grew. By the 1950s, Article III judges expressed grave concerns about the growth of complex litigation—especially complex antitrust matters—describing that caseload as an “acute problem in the administration of justice.”¹⁵⁶ So, the big cases were getting bigger, while the small cases were getting smaller and more numerous, and the Article III judiciary didn’t have the resources to handle them both.

The answer to each problem was basically the same albeit with wildly different effects—increased “case management.”¹⁵⁷ As Judith Resnik’s groundbreaking work first described, federal judges became active “managers” of their dockets, giving them “greater power” outside “circumscribed judicial authority.”¹⁵⁸ District judges began working “beyond the public view, off the record, with no obligation to provide written, reasoned opinions, and out of reach of appellate review.”¹⁵⁹ Pretrial discovery and judicial workload both pressed district court judges into new, more active roles, where they engaged early and often with the parties to drive towards a speedy resolution of the litigation.¹⁶⁰ This active, managerial stance carried over to the federal appellate courts, too, where judges began delegating work to others and developing triage regimes for sorting wheat from chaff (that is, important cases from the less so).¹⁶¹ As a result, Article III judges became more hands-on (and exerted more power) over the “big” complex cases, while using those new-fangled managerial powers to direct others to handle the “small” matters no longer deemed worthy of an Article III judge’s attention.

The modern story of “case management” is ultimately a story of Article III exceptionalism—a perpetuation and preservation of an elite or “special”¹⁶² federal judiciary that should be devoted to the “big” cases, while delegating away smaller nuisances. Article III judges at every level of the federal judiciary have used macro-judging to entrench Article III exceptionalism—that is, to maintain a small, prestigious, and powerful federal judiciary focused on the “big” cases worthy of a “first-rate” Article III judiciary. These reforms may have benefitted the system in at least some respects, but they may also reflect a procedural judicial power grab.

¹⁵⁶ *Judicial Conference of the U.S., Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 41, 64 (1951).

¹⁵⁷ Resnik, *Managerial*, *supra* note 139, at 378 (internal quotation marks omitted).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *See id.* at 379-80 (discussing reasons for managerial turn).

¹⁶¹ RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 11, at 115 (explaining how “[j]udges on the federal courts of appeals now run something that resembles an office in a large law firm”).

¹⁶² *Id.* at 214 (quoting REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT TO THE JUDICIAL CONFERENCE COMMITTEE ON LONG RANGE PLANNING 5 (Feb. 16, 1993); internal quotation marks omitted).

This Part will move from the bottom up within Article III—from the district courts to the Supreme Court—to describe how macro-judging within Article III has entrenched a culture of Article III specialness and elitism. Although I organize this discussion by court, these examples of macro-judging share more in common than this structure might otherwise suggest. Ultimately, I bring these themes together by focusing on the Article III judiciary’s collective opposition to meaningful Article III expansion—an objection that is rooted in and ultimately perpetuates Article III exceptionalism.

A. The District Court

Two significant macro-judging features at the district-court level have entrenched Article III exceptionalism: the reliance on and increased use of judicial adjuncts (magistrate judges and bankruptcy judges), and the so-called “MDL revolution.”¹⁶³ Both developments are quintessential examples of macro-judging; these are structural developments that judges initiated, propelled, or have strengthened over time. They may have been born from necessity and even addressed systemic need in some desirable ways. But they also have given Article III judges more autonomy (including more control over the kind of work they do and how they do it), reduced low-value or drudge work, and increased judicial prestige. They have, in short, made the job of judging better for the Article III judge—especially in the wake of greater demands on judicial time and attention.

1. *The Rise of Adjuncts*

District court judges have outsourced their least desirable work to Article I adjuncts.¹⁶⁴ By developing a corps of Article I decisionmakers to work alongside Article III courts, the Article III district court judges have maintained and consolidated their power by keeping their ranks small and focused on “big” cases.¹⁶⁵ Although Article I judges are “indispensable” to the federal system,¹⁶⁶ there’s a darker side to the rise of Article I labor within Article III courts. The rise of adjuncts is intimately intertwined with efforts to maintain and entrench a small,¹⁶⁷

¹⁶³ Gluck & Burch, *supra* note 13, at 1 (capitalization omitted).

¹⁶⁴ See *supra* notes 66-89 and accompanying text (discussing history of federal magistrate judge, bankruptcy judge, and their current use).

¹⁶⁵ To be sure, this narrative is perhaps most convincing when assessing the district courts’ civil docket. District court judges surely might say they face heavy criminal caseloads that they are unable to share or offload on Article I adjuncts and that involve lower-profile or even low-value work. That district court judges spend so much of their time interacting with vulnerable communities through the criminal process (and not in defense of civil rights), is its own, separate problem—one that is bound to have spill-over effects in terms of how much attention those courts give to civil claims from marginalized communities.

¹⁶⁶ *Peretz v. United States*, 501 U.S. 923, 928 (1991).

¹⁶⁷ Resnik, *Trial*, *supra* note 4, at 992.

elite, and exceptional federal judiciary. Adding adjuncts allowed the Article III judiciary to more than double¹⁶⁸ its resources without diluting an ounce of Article III prestige.

In her work cataloguing a century's worth of what I might now describe as "macro-judging" by the federal judiciary, Judith Resnik observed that the development of the magistrate judge, in particular, reflected a collective view that the Article III judiciary was "important and should be reserved for special assignments," and that, to avoid expanding the ranks of constitutional judges to meet demand, "adjudication by non-life-tenured judges" could handle less important work.¹⁶⁹ Resnik elsewhere explained that the rise of Article I judges, and the delegation of low-value "housekeeping" work to them, reflected core judgments about what is and is not work "worthy" of an Article III judge: "The sense . . . is that those cases [including "'routine' tort cases" or "cases challenging government decisions under certain federal regulatory schemes"] are somehow beneath the dignity of the Article III judiciary."¹⁷⁰ It is no surprise, then, that Article III judges themselves have been instrumental in developing and shaping the role of the magistrate and bankruptcy judges.

Let's begin with the story of the federal magistrate judge. At every turn, the Judicial Conference of the United States—the policy-making body of the federal judiciary that is, as Resnik has described it, the "voice" of the Article III judiciary before Congress¹⁷¹—influenced the development of the modern magistrate judge.¹⁷² Most significantly, perhaps, was Judicial Conference support for the expansion of the magistrate judges' duties with respect to pretrial civil litigation.¹⁷³ The Civil Justice Reform Act of 1990, which ultimately expanded magistrate judicial authority, originally required a "judge and not a magistrate" to preside over the "mandatory discovery-case management conference."¹⁷⁴ Citing concerns raised by the Judicial Conference, and other witnesses, then-Senator Biden (who was serving as the Chair of the Senate Judiciary Committee) introduced a revised

¹⁶⁸ See *supra* notes 83-89 (discussing numbers of Article I adjuncts and volume of their workload).

¹⁶⁹ Resnik, *Trial*, *supra* note 4, at 992.

¹⁷⁰ Resnik, *Housekeeping*, *supra* note 139, at 940.

¹⁷¹ See Resnik, *Trial*, *supra* note 4, at 929 (discussing role of Judicial Conference).

¹⁷² See McCabe, *supra* note 72, at 344-50 (discussing involvement of Judicial Conference); see also Douglas A. Lee & Thomas E. Davis, "Nothing Less Than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century, 16 NEV. L. J. 845, 849-50 (2016) (discussing importance of the Federal Courts Study Committee—an entity within the Judicial Conference—in recommending expansion of duties and clarification of constitutional authority for federal magistrates).

¹⁷³ See Lee & Davis, *supra* note 172, at 852 (discussing Judicial Conference support for "pretrial role for magistrate judges").

¹⁷⁴ MAGISTRATE JUDGES DIV., ADMIN. OFFICE OF THE U.S. COURTS, A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 88 (2009) [hereinafter "LEGISLATIVE HISTORY"].

bill that authorized magistrate judges to take part in pretrial proceedings.¹⁷⁵ Although the Committee’s report gave several reasons for the change—including litigants’ desire to avoid prejudicing a judge who might ultimately rule on the case—among those reasons offered was a desire to “provide district judges with more time to conduct other adjudicatory matters.”¹⁷⁶ That view was not new: the Federal Magistrates Act of 1968 promised “to cull from the ever-growing workload of the U.S. district courts matters that are more desirably performed by a lower tier of judicial officers.”¹⁷⁷ The idea, then, in creating magistrate judges and expanding their authority was, as Resnik observed, that “some work is to be avoided if possible” and “some cases are of ‘lesser order’ than others.”¹⁷⁸ If Article III judges could give that disfavored work to others, while keeping their focus on more “important” matters, all the better.

The story of the bankruptcy judge is similar in important ways. Despite the Constitution providing for Congress to create a uniform law of bankruptcy,¹⁷⁹ bankruptcy has, in the words of one bankruptcy judge, “always been the step-child of the federal judiciary.”¹⁸⁰ Originally, Article III district judges appointed “referees-in-bankruptcy, who were paid a portion of the assets that passed through their administration” to handle “the mundane business affairs of the cases.”¹⁸¹ The “referees” had no library, no law clerks, and no robes; they did not handle the more sophisticated bankruptcy issues that went, instead, to Article III judges.¹⁸² But that more limited role expanded over time, and by the 1950s and 1960s, referees had become fulltime employees of the federal judiciary and “the Article III judiciary

¹⁷⁵ See Lee & Davis, *supra* note 172, at 853 (discussing revisions to the Civil Justice Reform Act and Judicial Conference opposition to early draft) (citing 136 Cong. Rec. S6473 (daily ed. May 17, 1990)).

¹⁷⁶ *Id.* at 853 (citing LEGISLATIVE HISTORY, *supra* note 169, at 89). As one Article III judge succinctly observed: “All judges (and their law clerks) hate discovery disputes.” Hon. James G. Carr, *Fixing Discovery: The Judge’s Job*, 100 JUDICATURE 10, 11 (no. 3, 2016).

¹⁷⁷ S. Rep. No. 90-371, at 9 (1967).

¹⁷⁸ Resnik, *Trial*, *supra* note 4, at 963. Resnik, of course, is not alone in expressing concern about the two-tier system of justice this scheme might create. See also McCabe, *supra* note 72, at 384 (acknowledging concerns that expansion of magistrate judge authority creates a “dual system of justice” or raises “the specter of a federal poor people’s court”); Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y 475, 477 (2002) (recognized that system with special magistrate to handle pro se cases may be viewed “as a way to funnel unimportant matters that society regards as annoying away from Article III judges to magistrate judges without life tenure, and so raise concerns about second class justice for unrepresented litigants”).

¹⁷⁹ U.S. Const. art. I, § 8, cl. 4.

¹⁸⁰ The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part One: Outside Looking In*, 81 AM. BANKR. L.J. 1, 3 (2007). Judge Mund’s article provides a comprehensive account of the history of the bankruptcy judge—much of which is beyond the scope of this work.

¹⁸¹ *Id.* at 3.

¹⁸² *Id.*

acknowledged this upgraded position by providing the referees with the trappings of judicial office”—things like robes, courtrooms, and court reporters (at least for some).¹⁸³

Even still, Article III judges resisted efforts to give Article III status to their bankruptcy colleagues—even though doing so might have drastically simplified existing law. In 1982, the Supreme Court held that Congress had violated Article III in enacting comprehensive bankruptcy reforms in 1978 that gave bankruptcy judges too much “judicial power” without the protections of Article III.¹⁸⁴ The most expedient (and perhaps obvious) solution would have been to extend Article III protections to bankruptcy judges. The infrastructure to do so was already in place, and it would have avoided a messy constitutional thicket that persists to this day.¹⁸⁵ But there had been long-standing hostility among the Article III judiciary to that kind of solution, as Chief Justice Warren Burger, who by virtue of his position also led the Judicial Conference, had steadfastly lobbied Congress against giving bankruptcy judges Article III status.¹⁸⁶ According to many, Chief Justice Burger feared giving former bankruptcy lawyers, who he thought of as “low-caliber legal professionals,” the prestige of an Article III appointment;¹⁸⁷ he decried “grade creep,” as he told President Jimmy Carter in an extraordinary letter urging the President to veto the 1978 law creating the modern bankruptcy courts.¹⁸⁸ Indeed, the battle between the bankruptcy judges and Article III judges had become so “embittered” that in at least one district court, bankruptcy referees (as they were known at that time) were not permitted “to use the title ‘judge’, wear robes, or ride the judges’ elevator in the courthouse.”¹⁸⁹

Ultimately, when it came time to fix the constitutional problems with the 1978 bankruptcy act, Congress blinked, and acceded to the wishes of the Article III bench by maintaining a “clear demarcation between Article III judges and bankruptcy judges.”¹⁹⁰ Article III judges maintained the “status . . . they [were] guarding so carefully,” according

¹⁸³ *Id.* at 3-4 (discussing upgrades in connection with 1938 legislative expansion of the referee’s role).

¹⁸⁴ See *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 57-87 (1982) (holding that broad grant of authority to bankruptcy judges violates Article III and that the “judicial Power of the United States” must be exercised by judges with life tenure and salary protection).

¹⁸⁵ See *supra* note 64-71 and accompanying text (discussing effects of *Stern v. Marshall*).

¹⁸⁶ See The Honorable Geraldine Mund, *Appointed or Anointed: Judges, Congress, and the Passage of the Bankruptcy Act of 1978 Part Five: Inside the White House*, 82 AM. BANKR. L.J. 175, 182 (2008) (describing Chief Justice Burger’s extraordinary opposition in great depth).

¹⁸⁷ Coco, *supra* note 68, at 195.

¹⁸⁸ Mund, *supra* note 186, at 183 (quoting letter to President Carter).

¹⁸⁹ Coco, *supra* note 68, at 195.

¹⁹⁰ *Id.* at 200.

to one key congressional representative,¹⁹¹ while ushering in decades of confusion for bankruptcy and Article III courts alike over the jurisdictional and constitutional authority of these Article I judges. But at least the Article III bench remained small, elite, and unsullied by pedestrian bankruptcy work.¹⁹² Having resisted efforts to dilute the Article III bench, the Article III courts succeeded in not just maintaining their small, elite size but also in entrenching their specialness by differentiating themselves from and delegating disfavored work to Article I adjuncts.

2. *The Rise of the MDL*

Delegation to Article I adjuncts has enabled Article III courts to focus their attention on the “big” cases on their dockets—on the civil side, at least. And when it comes to “big” cases, there’s perhaps nothing bigger than the MDL or “multidistrict litigation.”¹⁹³ That profoundly important federal procedural device has transformed Article III judicial power at the district court level. The statute seems benign and beneficial: it authorizes a judicial panel on multidistrict litigation to transfer and consolidate for coordinated pretrial

¹⁹¹ 130 Cong. Rec. H1847 (daily ed. March 21, 1984) (statement of Representative Don Edwards).

¹⁹² Lest one think I’m being particularly harsh on Article III judges, it turns out at least some bankruptcy judges themselves are guilty of the same-kind of prestige-seeking. A small handful of bankruptcy judges have been competing for the highest-profile and largest bankruptcy cases by taking advantage of flexible bankruptcy venue rules. See, e.g., Lynn M. LoPucki, *Chapter 11’s Descent into Lawlessness*, 96 AMER. BANKRUPTCY L.J. ___, ___ (forthcoming 2022) (manuscript at 4) (describing “four decades of competition among the bankruptcy courts for big cases”). According to Lynn LoPucki, “[a] liberal venue law adopted in the 1970s,” which has been pushed to the max, has “led to competition among some bankruptcy courts to attract the big cases.” *Id.* at 4. The competition advantages the judges themselves and the jurisdictions in which they sit: “Those [big] cases offered prestige to the judges who attracted them, a billion-dollar-a-year restructuring industry to the jurisdiction that attracted them, and prosperity to the bankruptcy lawyers in those jurisdictions.” *Id.*; see also *id.* at 19-24 (discussing advantages to bankruptcy judges and others for successful competition). Although only a handful of bankruptcy judges currently compete for these “big cases,” those judges dominate the high-end bankruptcy market; together, the five bankruptcy courts in the competition “attract more than ninety percent of the big cases nationally.” *Id.* at 4. They compete, moreover, on the promise that they will “routinely bend and break [bankruptcy] law” in favor of those who place cases in the relevant jurisdictions. *Id.*

Moreover, bankruptcy judges aren’t the only judges who compete for big cases. District judges also actively court litigants to file patent cases in their judicial divisions—a phenomenon especially prevalent in some districts in Texas. See J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 635 (2015).

¹⁹³ 28 U.S.C. § 1407. Although a handful of MDLs are gargantuan proceedings involving “our most public controversies” like litigation over opioids and NFL concussions, Zachary Clopton has shown that “MDLs vary widely” in their structure and use. Zachary D. Clopton, *MDL as Category*, 105 CORNELL L. REV. 1297, 1298-97 (2020).

proceedings any federal cases with similar facts.¹⁹⁴ Today, “a whopping *twenty-one* percent of all newly filed federal civil cases and, by some estimates, nearly forty percent of the pending civil caseload” are MDL proceedings.¹⁹⁵

Selection as a transferee judge for an MDL confers “elite status” on a federal district court judge.¹⁹⁶ And scholars have long recognized the tremendous—and largely un-checked¹⁹⁷—power that MDLs confer on transferee judges.¹⁹⁸ Indeed, Brian Fitzpatrick has described MDLs as “concentrat[ing] more power in the hands of a single person than perhaps any other part of our judicial system.”¹⁹⁹ Under the MDL, he says, “one judge” can end up handling “tens of thousands or even hundreds of thousands of cases” in one fell swoop, whereas, ordinarily, such decisionmaking power would be spread throughout the Article III bench.²⁰⁰ And because nearly all of the pretrial decisions the MDL judge makes are practically unreviewable, Fitzpatrick points out that “the decisions of the single MDL judge are usually the only decisions *any* federal judge at *any* level will render in MDL cases.”²⁰¹

A small group of (mostly) federal judges²⁰² drafted and successfully lobbied for this 1968 “sleeper”²⁰³ statute with a mind to do just that: that is, to “reshape federal litigation” by conferring tremendous power on the transferee judge.²⁰⁴ “The guiding light,” as Andrew D. Bradt has explained, “of the [drafting and lobbying] judges’ efforts was their perception that power of litigation must be centralized in the hands of

¹⁹⁴ 28 U.S.C. § 1407(a).

¹⁹⁵ Gluck & Burch, *supra* note 13, at 3.

¹⁹⁶ Gluck & Burch, *supra* note 13, at 19; *see also* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CAL. L. REV. 1713, 1722 (2019) (“[T]he selection of the transferee judge is among the most momentous decisions made in the entire litigation”).

¹⁹⁷ Little of what happens in MDLs is or can be appealed. *See* Gluck & Burch, *supra* note 13, at 20 (explaining why “few MDL issues ever reach the appellate courts”).

¹⁹⁸ *See, e.g.*, Clopton & Bradt, *supra* note 196, at 1725 (“Transferee judges wield enormous authority . . .”); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CINN. L. REV. 389, 424 (2012) (“The MDL statute and MDL procedure was never intended to confer such broad power and authority on a federal court . . .”).

¹⁹⁹ Brian T. Fitzpatrick, *Many Minds, Many MDL Judges*, 84 LAW & CONTEMP. PROBS. 107, 107 (2021) (“A single judge can end up resolving hundred, thousands, or even hundreds of thousands of individually viable cases.”).

²⁰⁰ *Id.* at 108.

²⁰¹ *Id.* at 109.

²⁰² Andrew D. Bradt, “*A Radical Proposal*”: *The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831, 838-39 (2017) (identifying handful of judges who worked with Dean Phil C. Neal of the University of Chicago School of Law to draft MDL statute). Ultimately, that small group of judges secured the support of the Judicial Congress—the policy-making organ of the federal courts—thereby ensuring their proposal would be submitted to Congress. *Id.* at 883.

²⁰³ Judith Resnik, *From “Cases” to “Litigation”*, 54 LAW & CONTEMP. PROBS. Summer 1991, at 5, 47 (identifying MDL as a “sleeper”).

²⁰⁴ Bradt, *supra* note 202, at 839.

a single judge with national authority and maximum flexibility.”²⁰⁵ The judges who crafted the MDL statute designed it to confer something like “authoritarian . . . power,”²⁰⁶ or, we might say, to give maximum autonomy to the transferee judge. That power or autonomy is the fulcrum of existing scholarly criticism of the MDL itself: as Bradt succinctly explained, “what makes MDL such an effective means of resolving mass litigation is also what provokes intense criticism: the almost unlimited discretion of the district judge that the Panel puts in charge of the litigation.”²⁰⁷ Ultimately, we may see the MDL device as an “intentional power grab” by a handful of district court judges who believed in “judicial control of cases.”²⁰⁸

The “MDL Revolution,” as Abbe Gluck and Elizabeth Chamblee Burch recently described it, is another chapter in a larger story of Resnik’s “managerial judging.”²⁰⁹ Even as the “managerial” stance of federal judges has increased their power, it has also increased their workload. Gone are the days where judges passively waited for parties to file motions or proceed to trial.²¹⁰ Enter, then, the need for more magistrate judicial labor across all civil cases and especially in MDL proceedings, where transferee judges have turned not only to magistrate judges but to various private actors for help.²¹¹ Even in the most complex and high-profile district court litigation, judges outsource or delegate much of their work to others, which, in the context of MDL proceedings, raises a host of issues about oversight and accountability (among others) that Elizabeth Chamblee Burch and Margaret S. Williams have recently explored.²¹²

All this to say: district court judges over the last fifty years have acted collectively to consolidate their authority, delegate their least sophisticated or valued work to others, and attract higher-profile, more elite civil work for themselves. To the extent Article III judges continue to toil with “low value” or “unimportant” work, that work arises mostly on the criminal side of the docket, where Article III judges have less statutory authority to delegate. But that arrangement,

²⁰⁵ *Id.* at 840.

²⁰⁶ *Id.* at 841.

²⁰⁷ *Id.* at 847.

²⁰⁸ *Id.* at 907. Bradt is careful to say that his description is not meant “to cast aspersions on the judges’ good intentions,” but it is to say that the judge’s aims “were to profoundly change the way the courts process what they believed would be the lion’s share of federal civil cases.” *Id.* at 907-08. My point is only that the shift also aligned with judicial self-interest to exert greater control over many of the most “important” issues that would be filed in federal courts.

²⁰⁹ Resnik, *Managerial*, *supra* note 139, at 378.

²¹⁰ *See id.* at 384 (describing district court judges traditional, passive role in litigation).

²¹¹ *See generally* Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation*, 120 COLUM. L. REV. 2129 (2020) (examining use of various judicial adjuncts in MDL litigation).

²¹² *See id.* at 2214-24 (discussing implications of privatized judicial assistance in MDLs).

too, is revealing. Marginalized litigants may have meaningful access to Article III courts only when they are on the blunt-force end of punitive governmental authority. Their access is far more circumscribed—and their matters deemed far less important—when petitioning courts for redress of civil wrongs. The “ordinary” civil claim receives far less Article III attention than the “ordinary” criminal one—a telling fact about how Article III power operates vis-à-vis the ordinary individual civil litigant.

B. The U.S. Courts of Appeals

The same trends that drove innovation in the federal district courts have shaped the U.S. Courts of Appeals in equally profound ways. On the one hand, the patina of Article III only enhances at each step in the Article III hierarchy. On the other, federal appellate judges have far less individual control over the work they do and how they do it; collaborative decisionmaking dilutes their power. Moreover, the “big” civil cases in MDLs do not make their way into the appellate courts, having been steered to settlement in lower courts. Most of the federal appellate judge’s work—indeed, sometimes as much as 90% of it—is seen by these Article III judges as so routine, boring, or low-value that it doesn’t even warrant much, if any, judicial attention.²¹³ And so the federal appellate courts have used macro-judging to mostly avoid that work that might otherwise make their work far less interesting, varied, and sophisticated.

If the MDL revolution is the most significant macro-judging development over the last half-century in the district courts, the development of a selective federal appellate triage regime²¹⁴ is the most significant macro-judging reform at the federal appellate courts. Both reforms, fundamentally, have given courts more control over the kind of work they do and how they do it, while privileging the extraordinary over the ordinary and relying on non-Article III decisionmakers for help. Federal appellate judges, on average, have a greater concentration of “low value” pro se litigation than we see in the district courts; in some circuits, nearly 60% of docketed cases are from unrepresented appellants.²¹⁵ Just like district court judges turned to magistrate judges to reduce their “low value” work, federal appellate judges have made a

²¹³ See McAlister, *supra* note 11, at 1179-80 tbl.5 (discussing oral-argument and publication rates across the circuits to demonstrate size of second-tier process for less favored appeals).

²¹⁴ The most comprehensive discussion of the intersecting features of these macro-judging choices appears in William M. Richman and William L. Reynolds’s career capstone, *Injustice on Appeal*. RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 11.

²¹⁵ See McAlister, *supra* note 11, at 1185 tbl.7 (observing that across all circuits five-year means for pro se appellant filings was 49.1% in the year ending in 2020; in three circuits the means were at or near 60%). In district courts, the percentage of pro se litigation by volume is closer to 20%, but sometimes as much as 30% depending on the district. Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 *FORD. L. REV.* 2689, 2691 (2022).

similar move.²¹⁶ Beset with worries over rising caseloads,²¹⁷ federal appellate judges transformed their historical model for adjudication—one where judges read briefs, heard argument, and wrote decisions²¹⁸—into a two-tiered bureaucratic machine.²¹⁹ In the first tier, judges continue to hear oral argument, oversee cases, and write precedential decisions; in the second tier, central staff primarily evaluate cases on briefs without argument and draft non-precedential opinions that judges rubber-stamp.²²⁰ In some circuits, the volume of second-tier work is enormous, accounting for upwards of 80% to 90% of appeals, as oral argument rates and publication rates have plummeted over time.²²¹

The federal appellate courts engaged in these reforms almost entirely on their own²²²—albeit with the help of Congress to authorize

²¹⁶ But the move was not *quite* the same; it's worth noting that there has been some judicial opposition to creating "federal appellate magistrates" who would operate like federal magistrate judges in the district courts. See Richard S. Arnold, *The Future of the Federal Courts*, 60 MO. L. REV. 533, 542 (1995) (explaining that the idea of an "appellate magistrate . . . makes my blood run cold" and noting that "[i]f I've got an appeal, I want a judge to decide it"); see also Stephen Reinhardt, *Surveys without Solutions: Another Study of the Courts of Appeals*, 73 TEX. L. REV. 1505, 1512 (1995) (similar). But there are transparency and quality reasons to think such a system might be preferable to the current one. See, e.g., David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 89 (2013) (discussing benefits of federal appellate magistrates). Unlike federal magistrate judges, who are formal (albeit inferior) judicial officers, who make public decisions, and who are appointed through an open, transparent and rigorous process, the central staff attorneys who assist federal appellate courts toil behind the scenes, may be recent law school graduates without significant experience, and are selected by court staff (and not judges). See generally McAlister, *supra* note 11, at 1158-59 (discussing some of the structural concerns with staff attorneys).

²¹⁷ See, e.g., Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634, 642 (1974).

²¹⁸ Richman & Reynolds, *Elitism*, *supra* note 4, at 278 (describing traditional appellate process as the "Learned Hand Tradition").

²¹⁹ RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 11, at 115 ("Judges on the federal courts of appeals now run something that resembles an office in a large law firm.").

²²⁰ See McAlister, *supra* note 11, at 1159-61 (discussing tiers of federal appellate process and review).

²²¹ See *id.*, at 1180 tbl.5 (current publication and oral argument rates based on five-year means); *id.* at 1178-80 (discussing trends in oral argument and publication); *id.* at 1153 (discussing reduction in oral argument).

²²² The changes discussed here were "unilateral"—that is, they were entirely court-initiated and driven. REYNOLDS & RICHMAN, *INJUSTICE*, *supra* note 11, at 115. Early experiments in a few circuits quickly expanded to all circuits. See, e.g., Charles R. Haworth, *Screening and Summary Procedures in the United States Courts of Appeals*, 1973 WASH. U. L.Q. 257, 264 (discussing one circuit's early experiments with "screening and summary procedures and warning that "dramatic innovations . . . may be the standard procedure for all appeals . . . within the next five years"). Scholars have described these reforms as "judicial activism of the highest order." REYNOLDS & RICHMAN, *INJUSTICE*, *supra* note 11, at xii, 115.

and fund new staff positions.²²³ These intersecting macro-judging decisions—reducing oral argument, increasing non-publication, and hiring and relying on central judicial staff—have given federal appellate judges far more control over the kinds of cases they hear and how much decisional effort they put into resolving them. Judges can focus on what interests them most; they let their central staff—none of whom they directly oversee²²⁴—handle the rest of the boring, uninteresting work. As one scholar has explained: “Structurally, staff attorneys do the work that judges don’t want to do so that judicial time may be spent on other, more ‘important’ matters (that judges work on with elbow clerks). Their job, fundamentally, is to take work off a judge’s plate”²²⁵

Just as with the macro-judging reforms in the district court, the development of the federal appellate triage system may have been both entirely necessary and even (at least partially) beneficial.²²⁶ But those reforms also took off like a runaway train, propelled by convenience as much as need.²²⁷ Appeals have dropped over the last decade, while rates of non-publication remain high.²²⁸ Recent empirical work confirms that this system produces unequal results, as “low-value” appeals from unrepresented litigants and prisoners are far less likely to receive oral argument and precedential treatment, and far more likely

²²³ See McAlister, *supra* note 11, at 1154-58 (discussing development of law clerk and central staff attorneys and history of congressional authorization).

²²⁴ See DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, *APPELLATE COURTS IN THE UNITED STATES* 108 (“Central staff attorneys are lawyers employed by an appellate court to work for the court as an entity. . . . [T]hey have no close relationship to any particular judge. They are organized centrally under the supervision of a lawyer who is the head of the staff and who in turn is answerable to the court.”).

²²⁵ McAlister, *supra* note 11, at 1159-59.

²²⁶ See, e.g., RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 168-69 (1996) (“Given the workload of the federal courts of appeals today, the realistic choice is not between limited publication, on the one hand, and, on the other, improving then publishing all the opinions that are not published today; it is . . . between giving the parties reasons for the decision of their appeal and not giving them reasons even though the appeal is not frivolous.”); Hon. Jon O. Newman, *The Second Circuit’s Expedited Adjudicate of Asylum Cases*, 74 *BROOKLYN L. REV.* 429, 437 (2008) (explaining and defending Second Circuit’s use of non-argument calendar as a “fair[], effective[], and efficient[]” respond to “an extraordinary challenge”); Hon. Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 *OHIO ST. L.J.* 177, 178-79 (1999) (“Whereas academicians tend to see unpublished opinions as causing a variety of systemic problems, judges tend to see them as a necessary, and not necessarily evil, part of the job.”).

²²⁷ See McAlister, *supra* note 11, at 1169-75 (discussing judicial incentives to maintain federal appellate triage system despite reduction in caseload volume).

²²⁸ See *id.* at 1170-71 (arguing that “caseload volume alone can no longer account for the continued reliance on unpublished decisions” and observing that “in 1992, when the U.S. Courts of Appeals heard around 48,000 (roughly the volume they hear today), the courts were publishing approximately 29% of their work nationwide,” whereas today they publish only 13%).

to receive shorter written decisions (even compared to other, similar “easy” or “low-value” appeals).²²⁹

At this point, those who benefit the most from these macro-judging reforms are likely the federal appellate judges themselves. They can operate more like the choosy court of last resort that sits atop the federal judicial hierarchy, exercising autonomy over which cases receive their time and attention.²³⁰ They can—and seemingly do—spend more time crafting longer, more attention- and headline-grabbing decisions.²³¹ At bottom, the federal appellate triage system minimizes the risk that federal appellate judges become bored with the humdrum appeals of (mostly) pro se litigants, while conserving their time and attention for the work they deem most befitting their position and authority—the most “important” or significant cases percolating through the federal judicial system, which receive extraordinary judicial attention compared to the average appeal.

C. The Supreme Court of the United States

We can readily identify some of the same trends we’ve seen in the lower federal courts at the Supreme Court. In particular, the Court lobbied Congress for decades to expand its discretion over its merits docket.²³² The reason, by now, should be familiar: The Supreme Court

²²⁹ See Rachel Brown, Jade Ford, Sahrula Kubie, Katrin Marquez, Bennett Ostdiek, & Abbe R. Gluck, *Is Unpublished Unequal? An Empirical Examination of the 87% Nonpublication Rate in Federal Appeals*, 107 CORNELL L. REV. 1, 37 (2022) (concluding that “the federal judiciary is disproportionately and systematically not publishing cases brought by certain types of litigants—namely litigants representing themselves and incarcerated individuals”); see also Merritt E. McAlister, *Bottom-Rung Appeals*, ___ L. Rev. ___ (forthcoming 2023) (manuscript at 3) (unpublished manuscript on file with author) (demonstrating that “decisions in unrepresented appeals are, on average, about half the length of decisions in counseled appeals when controlling for publication status, outcome, and oral argument”).

²³⁰ See RICHMAN & REYNOLDS, *INJUSTICE*, *supra* note 11, at 118 (arguing that federal appellate courts no longer are courts of mandatory jurisdiction and review but operate more like *certiorari* courts).

²³¹ See Gluck, *et al.*, *supra* note 229, at 71 & fig. 17 (observing that an “increase in the average length of published opinions seems almost entirely responsible for” a “widening” gap between published and unpublished decisions over time, where the average length of published decisions has swelled from 2000 words in 1990 to more than 5000 words in 2017, while unpublished decisions have held steady at, on average 1000 words).

²³² Most recently, the Supreme Court Case Selections Act of 1988 eliminated virtually all the Supreme Court’s remaining mandatory jurisdiction. Pub. L. No. 100-352, 102 Stat. 662 (codified in scattered sections of 28 U.S.C.). That legislation resulted from over a decade of correspondence from all nine justices to Congress, complaining about the difficulties of its remaining mandatory review docket. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 91-94 (1988) (discussing letters from the Court to Congress and collecting the Court’s public statements on the problems). But even before that, Chief Justice Taft and a committee of Supreme Court justices “suggested to Congress that [its docket crisis in the 1920s] be addressed by reducing the mandatory docket

had too much work on its mandatory docket that was not sufficiently significant or important.²³³ Congress eliminated the last remnants of the Court’s mandatory appellate jurisdiction in 1988, freeing the Court to select for itself nearly every case it hears.²³⁴ It has exercised that discretion with enthusiasm and by taking fewer and fewer cases over time.²³⁵ Recent empirical work confirms that the elimination of the Supreme Court’s remaining mandatory jurisdiction had a “persistent and strong downward influence on the number of appeals the Court decided each Term.”²³⁶ After the jurisdictional change, “the Court, on average, decided 71.2 fewer appeals per Term,” leading researchers to conclude that it was “difficult to overstate the importance” of the change in the law.²³⁷ Whether the Supreme Court’s reduced merits docket matters or not,²³⁸ the dramatic reduction in the Court’s workload over time—coupled with technological efficiencies—have given a Court that already operates with great autonomy even more independence to structure its work as it chooses. Justices now have more time to devote to their merits docket (including writing longer decisions or more separate decisions)²³⁹ and to engage in other pursuits (like seeking public recognition, getting book advances, and doing high-profile speaking gigs in far-flung locales).

and expanding the discretionary docket,” which Congress did, “largely in the terms suggested by the Court.” *Id.* at 85-86.

²³³ To this end, in a 1982 letter to Congress signed by all nine Justices, the Court explained: “At present, the Court must devote a great deal of its limited time and attention on cases which do not, in Chief Justice Taft’s words, ‘involve principles, the application of which are of wide public importance or governmental interest, and which should be authoritatively declared by the final court.’” *Id.* at 91 (quoting H. Rep. No. 100-660 (May 26, 1988), at 27-28, U.S. Code Cong. & Admin. News 1988, pp. 766, 781).

²³⁴ The development of the so-called “cert pool,” which has been described as a “time-saving mechanism for the Justices’ chambers” to share in the labor of sorting through petitions for writs of *certiorari*, is also a macro-judging feature that undoubtedly conserves judicial (and law clerk) labor. Ryan J. Owens & David A. Simon, *Explaining the Supreme Court’s Shrinking Docket*, 53 WM. & MARY L. REV. 1219, 1235 (2012). Scholars have suggested that the development of the “cert pool” itself also has led to a decline in the Supreme Court’s merits docket. *See, e.g.*, David R. Stras, *The Supreme Court’s Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151, 160 (2010) (observing that cert pool may contribute to reduction in merits docket). *But see* Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737, 791 (2001) (arguing that cert pool did not have much systemic effect on volume of merits docket).

²³⁵ *See* Heise, *et al.*, *supra* note 14, at 1579 fig.3 (establishing downward trend in merits cases).

²³⁶ *Id.* at 1581.

²³⁷ *Id.*

²³⁸ There is some debate about whether this is normatively problematic or not. *Compare* Owens & Simon, *supra* note 234, at 1251-60 (making the case for why shrinking docket matters), *with* Heise, *et al.*, *supra* note 14, at 1588-90 (identifying some positive or at least “nonnegative” aspects of dwindling docket).

²³⁹ The Supreme Court “decide[s] half as many cases as it did a generation ago, and [is] using twice as many pages to do so.” Sherry, *supra* note 15, at 183.

One wonders whether that increased sense of autonomy has, at times, lead the Court to believe its own affairs—that is, its own macro-judging—are beyond congressional purview. Consider, for example, the Chief Justice’s recent (albeit somewhat veiled) suggestion that Congress may lack the authority to require the Court to adopt ethics rules.²⁴⁰ The Court’s current policy is wholly lacking,²⁴¹ and its failure to enact binding ethical rules on its own is deeply troubling. The Court has seemingly bought into the idea that its work is just too important to be hampered by silly things like ethics rules that might leave it short a justice every now and then, thus forcing it to bypass a case the Court wants to take or leaving it unable to reach a decision in another. The Supreme Court, one might say, is the most exceptional of the exceptional Article III courts.

While the Court’s macro-judging no doubt has ensured the independence of the Third Branch, it may also have given birth to a culture of judicial celebrity that is itself corrosive. Suzanna Sherry recently linked the Supreme Court’s central dysfunctions to the Justices’ emerging “status as celebrities.”²⁴² On both the right and the left, in recent years, Justices have made tv appearances, written books, been the subject of movies, made “stump speeches,” and drafted “separate opinions aimed at [their] polarized fan bases.”²⁴³

What Sherry identifies—the judicial cult of personality that has developed around the Court—has been made possible, at least in part, by macro-judging.²⁴⁴ With a reduced docket, and more and better staff,²⁴⁵ the Justices have more time for pursuits that exalt themselves. This “[u]nseemly celebrity-seeking by Supreme Court Justices,” Sherry

²⁴⁰ Hon. John G. Roberts, Jr., Chief Justice of the United States, 2021 Year-End Report on the Federal Judiciary, at 5 (Dec. 31, 2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> (identifying “need for the Judiciary to manage its internal affairs, both to promote informed administration and to ensure independence of the Branch”). To be sure, Congress may lack the authority to do so directly. See Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181. But see Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 656-61 (1987) (arguing Congress can regulate Supreme Court recusals).

²⁴¹ See Virelli, *supra* note 240, at 1186-88 (explaining that “Supreme Court recusal jurisprudence during the Court’s first century-and-a-half was entirely individual, independent, and unreviewable” and observing even after Congress legislated to include “justices” in the federal recusal statute, “the Justices have a far narrower view of recusal” than appears in federal law).

²⁴² See Sherry, *supra* note 15, at 182.

²⁴³ *Id.* at 185-87 (collecting examples).

²⁴⁴ Posner observed that one reasons Supreme Court justices have become more engaged in “public intellectual activity”—including television appearances and media engagement—was because “they ha[d] more time on their hands,” thanks to their smaller merits docket. Richard A. Posner, *The Supreme Court and Celebrity Culture*, 88 CHI.-KENT L. REV. 299, 301 (2013).

²⁴⁵ See *id.* (“With larger and better staff and a lighter caseload the justices have more time for travel, public intellectual activities, writing books, whatever it is they like to do. The opportunity costs of being a public intellectual Supreme Court justice thus have fallen.”).

argues, “raises the suspicion that their actions are self-serving rather than evidence of a commitment to impartial judging and the rule of law.”²⁴⁶ It also creates additional incentives for “attention-seeking” that may increase the polarization of the Court, as the Justices play to their respective bases.²⁴⁷

One might imagine that Sherry would argue that the recent and unprecedented leak of a draft decision overruling *Roe v. Wade* is all part of the same²⁴⁸—and the leak very well may have been intended as another play to the base. The cultural shift that Sherry traces—one that, broadly speaking, puts the individual Justice above the institution—is a cultural shift that makes a once unthinkable act (to say nothing of a once-unthinkable opinion) almost expected. If Sherry’s right, this won’t be the only such breach of the institution’s norms, and perhaps it’s likely that the culture of Supreme Court exceptionalism—a distinct and special form of Article III exceptionalism—has something to do with it.

D. The Article III Judiciary

Throughout the various crises chronicled in this Part, the Article III bench collectively has objected—repeatedly and “vociferously”—to the most obvious solution to many of these problems: doubling the Article III bench to increase judicial capacity.²⁴⁹ To be sure, such an investment would be expensive (in terms of both infrastructure and salaries) and politically challenging. But one of the main objections to judicial expansion has been, in the words of one former federal judge, that doing so would “dilute prestige,” making it “harder to recruit first-rate lawyers” into federal judicial service.²⁵⁰ Another Article III judge put it this way: “A federal judiciary of 3,000 to 4,000 . . . would also include an unacceptable number of mediocre and even a few unqualified people.”²⁵¹ That might, he says, reduce the “quality of the

²⁴⁶ Sherry, *supra* note 15, at 188.

²⁴⁷ *Id.*

²⁴⁸ Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO, May 2, 2022, <https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473>.

²⁴⁹ RICHMAN & REYNOLDS, INJUSTICE, *supra* note 11, at 167 (“The judicial establishing has consistently acted and lobbied against the single most obvious solution to the caseload glut—the creation of additional judgeships. Ironically, the judiciary has opposed this solution vigorously.”). I should note, of course, that not all federal judges shared this opposition to substantial judicial expansion. *See, e.g.*, Alvin B. Rubin, *Views from the Lower Court*, 23 UCLA L. Rev. 448, 459 (1976) (“It is time to face the real problem. If we are not to abandon the tradition of ‘one appeal as of right,’ and if we are to make this a true appeal in the traditional sense—one to be heard and decided by judges—we need both more judges and more circuits.”).

²⁵⁰ Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 234.

²⁵¹ Hon. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 72 JUDICATURE 187, 188 (1993).

federal judiciary,” rendering it “indistinguishable from the most pedestrian of state judiciaries.”²⁵²

Think for a minute about what that view says about the role of Article III courts—especially vis-à-vis their state-court counterparts. Gone, I suppose, are the somewhat “cheerful” days when Justice Story cheekily stated that “the judges of state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States.”²⁵³ The dim view of state courts is part-and-parcel of the modern story of Article III exceptionalism. Indeed, those who generally oppose substantial Article III expansion often advocate for federal “jurisdictional contraction,” a process that, of course, would send some of that low-value work (those “small” cases) to state courts (or Article I tribunals).²⁵⁴ As William Richman and William Reynolds have explained, this debate, too, is rife with elitism (to say nothing of its ignorance of the existing burden on state courts): “The elitism of the jurisdiction retrenchment argument also appears in the proposed destination for these trivial cases—the state courts. The idea seems to be that penny-ante federal cases, while unworthy of the federal courts, are fine for the state courts.”²⁵⁵ The state courts and their pedestrian judges, that is.

The fear is that if the federal bench grows too big, it will not be sufficiently special, important, and prestigious to attract the kind of legal minds thought worthy of big, important Article III cases. I don’t mean to sound overly dismissive of the genuinely held belief of lots of Article III judges that too many authorized judgeships might be a bad thing. Judges on the federal courts who all know far more than I do about what it’s like to be a judge on a federal court argue that growing the federal bench will hurt it: it will diminish the quality of justice and dilute the quality of its judges; it will make the courts less collegial; it will make the law more unstable because too many different judges will be writing opinions, and courts will grow too large to keep track of all those decisions.²⁵⁶

Many of the long-standing objections to substantial judicial expansion—especially those rooted in fears about diluting the prestige, collegiality, and quality of the Article III bench—sound like Article III judges are more worried about themselves than the experience of the

²⁵² *Id.*

²⁵³ *Martin v. Hunter’s Lessee*, 14 U.S. 304, 346 (1816).

²⁵⁴ RICHMAN & REYNOLDS, INJUSTICE, *supra* note 11, at 207.

²⁵⁵ *Id.* at 214. This view of what’s the province of federal power, versus state power, is resonant with how Jill Hasday describes the construction of the family law “canon” against the oft-repeated (and quite inaccurate) mantra that the federal courts have no jurisdiction over family law. See generally Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004).

²⁵⁶ See RICHMAN & REYNOLDS, INJUSTICE, *supra* note 11, at 173-206 (collecting various objections to significant Article III expansion at the federal appellate level); see also McAlister, *supra* note 11, at 1198-1200 (discussing judicial opposition to adding judges to the federal appellate bench).

litigants before them or the quality of judicial process those litigants receive. Richman and Reynolds have responded thoroughly to these various objections in their thoughtful career capstone devoted to what I've identified as macro-judging reforms at the federal appellate courts, and I see little in their response with which to disagree.²⁵⁷ The problem is, as they explain, that the Article III courts “exist for the good of the nation, not the professional satisfaction of the judges.”²⁵⁸

What's perhaps most troubling about the persistent judicial opposition to Article III expansion is what it reveals about Article III exceptionalism. Federal judges may not be drawn to the bench for reasons of salary and security—given, especially, the likelihood that they could earn more in the private sector or even in legal academia (the latter of which would also provide a substantial measure of workplace security and autonomy).²⁵⁹ Perhaps it's the power and prestige of the position that is its most enduring and important feature as a recruitment and retention tool, and substantial judicial expansion threatens each.

Adding more judges to any court will dilute the power and prestige of current Article III judges. Although some judges have argued that “[i]f the work is rewarding and important, there will be more than sufficient prestige” in the appointment,²⁶⁰ others have acknowledged that the “attraction of exclusivity is only human.”²⁶¹ And even if the work is sufficiently rewarding in itself, that's only true if Article III judges are free to focus their attention on what they deem to be the most important work, which is exactly what macro-judging across the federal courts has permitted them to do. Exclusivity, autonomy, prestige—none of these are values that necessarily serve the public good, but they do serve the interest of the Article III judiciary.

To the extent a culture of Article III exceptionalism, and the elitism that accompanies it, is necessary to cultivate and maintain a top-flight Article III judiciary, then it's time to consider the long-term costs of cultivating Article III exceptionalism. The next Part begins to consider those harms, as well as how Congress might engage more in areas where Article III exceptionalism has free rein.

²⁵⁷ RICHMAN & REYNOLDS, INJUSTICE, *supra* note 11, at 173-06 (describing and refuting nearly every aspect of the various judicial objections to substantial growth of the Article III intermediate federal appellate courts).

²⁵⁸ *Id.* at 206.

²⁵⁹ Indeed, Richard Posner once argued that the only way to maintain high-quality judicial candidates while substantially increasing the numbers of Article III judges is to increase federal judicial salaries dramatically (thus, of course, making the position more attractive). RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS & REFORM 99 (1985).

²⁶⁰ Frank M. Coffin, *Research for Efficiency and Quality: Review of Managing Appeals in Federal Courts*, 138 U. PA. L. REV. 1857, 1867 (1990).

²⁶¹ Irving R. Kaufman, *New Remedies for the Next Century of Judicial Reform: Time as the Greatest Innovator*, 57 FORD. L. REV. 253, 261 (1988).

III. CHECKING ARTICLE III EXCEPTIONALISM

This Part considers how Congress might address entrenched Article III exceptionalism when exercising its constitutional authority over macro-judging. It begins by considering some of the consequences of entrenched Article III exceptionalism, before turning to Congress's role in regulating macro-judging. The risk, ultimately, is that unchecked macro-judging tips the playing field in ways that render micro-judging—or judicial decision-making in individual cases—hazardous or subject to fewer (or no) guardrails.

My critique is that “judicial domination” in the design process not only isolates designers from the system's users,²⁶² but it also risks macro-judging based on judicial priorities that may not align with the public interest. Where judges design their own institution, there is a risk of the fox guarding the hen house. Scholars have expressed concern before about judicial domination in the federal rule-making process—which is macro-judging at its most formal—albeit largely for different reasons.²⁶³ Whenever there is just one voice—and not, as Resnik has advocated, a “cacophony”²⁶⁴—representing the various constituencies within and without the Article III judiciary, there is a risk of judicial aggrandizement in macro-judging.

These risks are greatest where the macro-judging process is both highly informal and entirely contained within the judiciary itself. That's where macro-judging may advance judicial priorities over the public good. Those risks are even greater where a single judge or small group of judges has the power to act at the macro-level.²⁶⁵ But, by its nature,

²⁶² Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998) (arguing that “judicial domination of rulemaking isolates procedural designed, who today are mostly judges, from procedural consumers—lawyers and litigants”).

²⁶³ See Resnik, *Trial*, *supra* note 4, at 1030 (arguing that “Article III judiciary should structure even its permissible collective action inclusively . . . to avoid judicial domination of policy decision-making about issues affecting courts,” like the creation of federal rules); Yeazell, *supra* note 262, at 231.

²⁶⁴ I agree with Resnik that encouraging a “cacophony” of voices within “the federal judiciary” may be at least one solution to the problems discussed here. See Resnik, *Trial*, *supra* note 4, at 1020-22.

²⁶⁵ These structures also raise other important concerns, too, including about how the Chief Justice wields his appointment power in the context of formal macro-judging. See, e.g., STEPHEN B. BURBANK & SEAN M. FARHANG, RIGHTS AND RETRENCHMENT 244 (2017) (“Since the reconstitution of the Advisory Committee in 1971, a series of Chief Justices, all of whom were appointed by Republican presidents, have not only ensured that Article III judges dominated the committee. They have ensured that a greatly disproportionate share of those appointments went to judges who were themselves appointed by Republic presidents.”); James E. Pfander, *The Chief Justice, The Appointment of Inferior Officers, and the “Court of Law” Requirement*, 107 NW. U. L. REV. 1125 (2013). The lack of representation in macro-judging from those with diverse viewpoints, life experiences, and backgrounds is also problematic. See, e.g., Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407 (2018) (explaining that of the 136 individuals who have served

little macro-judging is the product of a single judicial actor; even when a small handful of judges may be responsible for generating a recommendation or changing a court policy, many judges usually perpetuate those systems.

Macro-judging may be most problematic when judges change processes in ways that advantage more powerful constituencies to the disadvantage of others who lack political voice. Where the burdens are felt by the powerful, we might expect market forces to correct imbalances or operate as informal “checks” on some forms of self-interested macro-judging. That’s why, for example, the abuse of bankruptcy court procedures by bankruptcy judges who “compete”²⁶⁶ for high-profile bankruptcy cases is not nearly as problematic as the Supreme Court’s informal (and unreviewable) decision to reduce its merits docket. Large bankruptcy proceedings involve sophisticated players with political capital to get congressional attention to redress that problem (were those players convinced that the competition was deleterious, of course). Those who lose out on Supreme Court review, on the other hand, are litigants who can’t afford to attract the attention of the high-powered (and elite) Supreme Court bar that increasingly drives the Supreme Court’s docket.²⁶⁷

Where the constituencies on the losing end of macro-judging reforms are vulnerable litigants, Congress should be especially sensitive to how courts have consolidated their power and autonomy—including by revisiting existing structures or instituting new reforms or oversight. MDLs are a good example, as are the mixture of macro-judging decisions at the heart of the federal appellate courts’ unilateral development of a triage system. Both involve formal and informal macro-judging and risk harm to vulnerable litigants. Take, for example, the federal appellate system’s unilateral triage reforms. The constituents on the losing end of those reforms were mostly pro se litigants, prisoners, criminal defendants, asylum seekers, and Social Security disability claimants—all of whom lack political power. Imagine a world where instead of privileging the elite handful of sophisticated disputes, federal appellate judges decided to privilege only federal question cases involving issues of purported government over-reach. It’s easy to see how sophisticated litigants—the businesses often on the other side of the “v.” in complex civil litigation—might

on the Civil Rules Advisory Committee since its inception, 116 are white men and exploring why that lack of diversity matters).

²⁶⁶ See *supra* note 192 discussing this phenomenon.

²⁶⁷ See, e.g., Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1903–04 (2016) (“[T]he real story in the growth and especially the influence of amicus filings is the dramatic spike in activity by the so-called Supreme Court Bar. Today, elite, top-notch lawyers help shape the Court’s docket by asking other elite lawyers to file amicus briefs requesting that the Court hear their case. When the Court grants certiorari (or “cert”), these very lawyers strategize about which voices the Court should hear and they pair these groups with other Supreme Court specialists to improve their chances with the Court.”).

use their influence to change even the most informal of court procedures through congressional action, were the federal appellate system to turn upside-down and inside-out. The most important and enduring macro-judging acts discussed above—the rise of MDLs, reliance on Article I judges, and the creation of an appellate triage system—all impose uneven burdens on vulnerable litigants to the benefit of Article III judges (and more sophisticated court players). That’s reason enough for more aggressive congressional oversight and lawmaking in these areas.

What that oversight looks like may depend on the nature of macro-judging. Where it is at its most formal, Congress is already involved in those efforts, but it must act with greater sensitivity to the possibility of judicial aggrandizement—including, especially, by inviting dissenting voices and different constituencies into what formal processes exist. In theory, the more formal the process, the more structural precautions against judicial power grabs in macro-judging exist, if only because another actor—Congress, in particular—is involved in that process. But these processes are far from perfect—and risk something like judicial capture when Congress defers to judicial priorities.

At bottom, Congress should be establishing macro-judging priorities through the democratic process—and not the other way around (where the courts create macro-judging priorities). Moreover, congressional oversight should be more robust where reforms may impose greater burdens on vulnerable litigants, like unrepresented litigants. Whenever Congress legislates in and around areas of macro-judging, it should inquire of the courts how judicial recommendations have been developed, whether and to what extent dissenting voices and other constituencies have been involved in that process, and, in the end, it should invite those other voices into the process. Where the Judicial Conference process may be particularly vulnerable to judicial domination—that is, where the process has been dominated by judicial actors, as will usually be the case—Congress should take its recommendations with at least a large grain of salt (and resist efforts to defer to judicial recommendations based on nothing more than deference to a co-equal branch of government).

To make these recommendations more concrete, consider judicial opposition to Article III expansion—a process that runs through the Judicial Conference. Congress should not defer to persistent judicial objections to expand the federal courts because those objections are shaped, in no small part, by entrenched (and rampant) elitism in the federal courts.²⁶⁸ The process for generating a Judicial Conference recommendation to Congress for more judges for a particular court

²⁶⁸ See McAlister, *supra* note 11, at 1198-1200 (discussing historical objections to adding judges to the courts of appeals).

relies entirely on a majority vote of judges from a circuit or district.²⁶⁹ Because there's no public record memorializing that court's consideration and no opportunity to raise an objection to the majority's view, judicial recommendations on this front will almost always be tainted by self-interested judicial priorities. At a minimum, Congress should require courts considering the possibility of expansion to memorialize dissenting views on those courts and engage with litigants (represented and not) on these questions (including the quality of existing judicial process and judicial opinions and their timeliness).²⁷⁰

Given that I am both inviting and relying on Congress to exercise active oversight of the judicial institution, as an institution, it is appropriate to address, at least briefly, possible concerns about separation of powers and an independent judiciary. Ultimately, “micro-judging” and “macro-judging” map onto some of the limits of legislative interference with constitutional judicial power. “Macro-judging” is within the purview congressional review; “micro-judging,” that is, how to decide a case, is not.²⁷¹ Congress certainly has the power—both with respect to lower courts, over which it enjoys plenary control²⁷² but also as to the Supreme Court²⁷³—to adopt laws related to “the operations of the judicial department.”²⁷⁴ The question, then, is whether separation-of-powers principles set some outer limit on the extent to which Congress can interfere with internal court operations—ranging from recusal rules for Supreme Court justices,²⁷⁵ for example, to the decisional practices of the lower federal courts (e.g., setting limits on how many unpublished decisions may be issued). To

²⁶⁹ The Judicial Conference's Recommendation for More Judgeships: Hearing Before the S. Comm. on the Judiciary, 116th Cong. 3 (2020) (statement of Hon. Miller, J., U.S. District Court for the Eastern District of Arkansas, Chair, Judicial Resources Committee, Subcommittee on Judicial Statistics).

²⁷⁰ See McAlister, *supra* note 11, at 1214-15 (discussing ways to increase transparency and diversify voices in the process for making Judicial Conference recommendations for adding authorized judgeships).

²⁷¹ Suzanna Sherry reaches a similar conclusion as she surveys literature analyzing congressional limits on interference with judicial decisionmaking: “the process of effectual decisionmaking must be protected from congressional interference.” Sherry, *supra* note 15, at 212. Congress, therefore, “cannot tell the courts how to decide cases, nor can it deprive them of the power to make *final* judgments.” *Id.*

²⁷² U.S. Const. art. III, § 1; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850).

²⁷³ See U.S. Const. art III, § 2, cl. 2 (“exceptions” clause).

²⁷⁴ See Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 198 (2001) (observing that it is “beyond cavil” that the Necessary and Proper Clause gives Congress authority “for congressional legislation with respect to the operations of the judicial department”); see also John Harrison, *The Power of Congress Over the Rules of Precedent*, 50 DUKE L.J. 503, 532-35 (2000); William Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of “The Sweeping Clause,”* 36 OHIO ST. L.J. 788, 807 (1975).

²⁷⁵ This is a “narrow” issue subject to its own academic debate. See Sherry, *supra* note 15, at 210 & n.146 (collecting sources).

the extent macro-judging decisions involve expenditures, Congress undoubtedly can control those choices indirectly with the power of the purse; it can reduce the number of magistrates or reduce the number of appellate staff attorneys, as it sees fit. No doubt, Congress can likewise require the federal appellate courts to create magistrates and abandon their staff attorney project altogether; or it can afford presidential appointment, life tenure, and salary protections to lesser Article I judges (thus transforming them into Article III appointees). Congress could also require the Supreme Court to take more, and more uninteresting, cases, should it so choose, without running afoul of any separation-of-powers concerns.²⁷⁶ Congress has substantial leeway to exercise control over macro-judging without running afoul of the separation-of-powers concerns that limit its reach into micro-judging.

But there is a deeper problem—one congressional engagement may not be able to solve directly. The greatest harm of Article III exceptionalism, in my view, is how it endangers judicial humility,²⁷⁷ or, to put it differently, how it engenders judicial maximalism.²⁷⁸ Taken to its most extreme, Article III judges convinced of their own specialness may act recklessly and dangerously; they may jeopardize their own legitimacy by acting immodestly—that is, by deciding more than is needed.²⁷⁹ The only real constraint on judicial power in the constitutional sphere is self-restraint; it is the decision of one judge to act or not to act on the power he or she has—that is, to decide more than what is needed or only what is needed.²⁸⁰ The most urgent problem, then, is one of attitude or orientation—and that’s one that

²⁷⁶ See U.S. Const. art. III, § 2 (exceptions clause); see also Ortman & Epps, *supra* note 24, at 707 (proposing that the Supreme Court “or Congress by statute” institute a “lottery docket,” whereby the Court “supplement[s] the traditional certiorari docket with a small number of cases randomly selected from final judgments of the civil courts”).

²⁷⁷ Judicial humility or judicial modesty is the subject of its own robust scholarly treatment, which is beyond my scope here. For a somewhat recent overview of the different treatments of the topic (especially among jurists), see Michael J. Gerhardt, *Constitutional Humility*, 76 U. CINN. L. REV. 23 (2007) (Robert S. Marx Lecture).

²⁷⁸ See generally Schmidt, *supra* note 20 (identifying a more maximalist turn among lower federal courts and advocating for structural reforms to enculturate a “mood” of judicial minimalism).

²⁷⁹ This argument echoes the call for “minimalist” judicial rulings to preserve Supreme Court legitimacy. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 69-72, 132, 250-56 (2d ed. 1986); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 3-23, 39-41 (1999). Tara Leigh Grove has argued recently, however, that where concerns about sociological legitimacy cause the Supreme Court to issue “narrow decisions” or “deny certiorari in high-profile cases,” it puts significant pressure on the lower federal courts in ways that jeopardize, in turn, their legitimacy. See Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1559 (2021).

²⁸⁰ See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2311 (2022) (Roberts, C.J., concurring in the judgment) (“If it is not necessary to decide more to dispose of a case, then it is necessary not to decide more.”).

may be particularly difficult to address through legislative reforms. But it may not be impossible.

Sherry's solution, for example, offers one possibility. She suggests that Congress address the Supreme Court's attitude problem, if you will, by, in effect, re-invigorating judicial modesty through legislative fiat. If we have a Kardashian Court today, as Sherry evocatively calls it, we might be better off with something of a Public-Service Court tomorrow—one that exalts the ordinary over the extraordinary. Sherry would require the court to “issue one, and only one, per curiam opinion” to resolve every case; where five justices cannot agree, the Court would have to state the outcome and that the justices cannot agree on the reasoning; hers is a world without dissents and concurrences; there are no plays to the base, no grandstanding, and no separate writing to invite certain causes or issues to reach the Court.²⁸¹ Sherry argues that her proposal would avoid the dangers of minimalism by encouraging the justices to reach consensus on decisions that are “maximalist enough to provide guidance.”²⁸² Over time, she envisions these restrictions as encouraging something of a culture shift. The Justices might begin to view themselves less as individual actors and more as part of an institution.²⁸³ What Sherry wants, ultimately, is to make the Supreme Court a bit less exceptional and the Justices themselves a bit less special.

Thomas Schmidt's recent work on judicial minimalism in the lower federal courts offers another note of optimism. He advocates, among other things, for structural reforms that would de-emphasize the power of individual judges (to issue nationwide judges, to receive plumb litigation through related case rules and divisions assignments) and increase the size of the federal bench.²⁸⁴ The latter—growing the size of the federal bench—would reduce the urge toward judicial maximalism in the handful of cases that, in particular, the federal appellate courts devote their time and attention (those that the select as sufficiently important).²⁸⁵ Increasing judicial capacity permits the federal courts to distribute resources in a more egalitarian manner—a move that undermines the present temptations of exceptionalism and maximalism.

There's every reason to think reforms that disturb the exceptionalism narrative of Article III might return the courts to a

²⁸¹ Sherry, *supra*, note 15, at 197 (discussing solutions).

²⁸² *Id.* at 203.

²⁸³ *Id.* (“And if the proposal works as expected, the Justices should eventually view themselves as intended—more as part of an institution and less as individual actors.”).

²⁸⁴ *See* Schmidt, *supra* note 20, at 906-911 (discussing structural reforms to increase opportunities for judicial decisional minimalism in the lower federal courts).

²⁸⁵ *Id.* at 911-12 (observing that “bifurcation” of work at the federal appellate courts, where judges focus on the select few, published decisions “undermines judicial minimalism by inducing judges to widen and deepen the few opinions that are published”).

more passive, minimalist, or public-service orientation. Macro-judging may afford a judge more (or less) discretion; it may create more (or less) autonomy; it may even instill more (or less) humility in the Article III judge. Design features can encourage or discourage boldness and aggrandizement; they can elevate or diminish the public-service orientation of the federal courts; they, ultimately, have the power to define what is important to our judicial institutions. My point is this: it's time for the people—acting through our elected representatives—to set our own judicial priorities for the Article III courts. Greater regulation of macro-judging may be one way to re-align those priorities to privilege the public-service mission of the judiciary—that is, a mission that heeds the priorities set by a democratic process—over the aggrandizement of Article III.

CONCLUSION

We may be at an inflection point. Every generation surely lobs cheers or boos at one or more of the Article III courts. Some see today's Article III courts as the culmination of a dream; others feel they have awakened from a nightmare. Perhaps it's not that extreme; perhaps it is. Time will tell. In the meantime, though, we should take a hard look at how we—all of us, but especially us academics—have constructed the Article III courts as marble palaces reserved for only the most important matters. It may be too extreme to say that all that power has gone to Article III's head. But it may not be.

Those who question judicial supremacy should take heed of how we have exalted the judicial institution through procedural innovations. Those innovations have given judges more power and autonomy; they have insulated more decisions from appellate review; they have given courts more discretion to set their own agendas and priorities. They have all conveyed and confirmed Article III's overriding feature: its specialness. Perhaps reorienting the Article III courts to elevate the ordinary over the extraordinary may enculturate a different attitude than the one that now predominates in Article III courts. Just as procedural reforms can entrench Article III exceptionalism, they can also invigorate something new: Article III ordinariness, perhaps.