White-Collar Courts

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Article III courts are white-collar courts. They are, scholars have said, "special." They sit atop the judicial hierarchy, and they are the courts of the one percent. We inculcate that sense of specialness in a variety of ways: federal courts are courts of limited jurisdiction; they are the subject of a (perhaps overrated) class in law school; we privilege clerkships with federal judges more than with state-court judges; and we focus more scholarly attention on federal courts than state courts. They are, in short, the courts of the elite—jurisdictionally, doctrinally, and socially. Perhaps the singular importance of federal courts was inevitable, but this Article explores that attitude's darker side. White-collar courts privilege certain kinds of disputes and certain classes of litigants; federal courts prefer white-collar work to blue-collar work. Such privilege, this Article argues, creates expressive and attitudinal harms: it imposes a value judgment about the work of federal courts that denigrates some, while exalting others.

Over the last century, what this Article calls "macro-judging"—a term that, consistent with macroeconomics, describes institution-level judicial decisionmaking—has created opportunities for federal courts to express their preference for white-collar work in a variety of ways. Ostensibly to tackle two competing caseload crises—an increase in small, low-value litigation and an increase in the numbers and complexity of "big" cases—Article III judges have lobbied for, and created, procedural systems that have shifted work to other decisionmakers, increased their agenda-setting power, and entrenched their autonomy. Macro-judging has resulted in necessary and even benign or beneficial judicial programs, policies, and procedures. But these procedural and administrative shifts have also created pathways for preferential treatment of certain classes of cases and litigants, have endangered access to justice in

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federal courts, and may have created an attitudinal foundation for maximalist judicial rulings.

INTRODUCTION

Article III courts are white-collar courts.[1] These courts of limited jurisdiction[2] have always been, as Judith Resnik once observed, "special."[3] They are, quite literally, the one percent.[4] Article III courts

1. Douglas Baird once described the kind of everyday constitutional questions that bankruptcy judges and police officers encounter as "blue-collar constitutional law," which he explained was "different from the stuff that is the focus of constitutional law classes and that populates the law reviews." Douglas G. Baird, *Blue Collar Constitutional Law*, 86 AM. BANKR. L.J. 3, 3 (2012). I am grateful to Rafael Pardo for pointing me to this analogy.

2. *See* U.S. CONST. art. III, § 2; *see also* 28 U.S.C. §§ 1331-1332.

3. *See, e.g.*, Judith Resnik, *The Mythic Meaning of Article III Courts*, 56 U. COLO. L. REV. 581, 581 (1985) [hereinafter Resnik, *Mythic*] ("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.").

4. 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, 1007–08 (2016)

see (less than) one percent of litigation nationwide.[5] And yet they receive a vastly disproportionate amount of scholarly (and popular) attention. We academics teach a—perhaps overrated—class on federal courts,[6] while ignoring state courts as institutions in a variety of ways.[7] Even within Article III courts, we are 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, which confront equally important questions within their jurisdictions—to say nothing of the smaller, local courts that decide matters of life and death.[9]

There is an attitude of federal judicial "specialness" that permeates the discourse on federal courts. Frederick Schauer once described it this way: as a "melange of glorification, celebration, and adoration that pervades much of popular and almost all of academic thinking about the judiciary."[10] Against an educational backdrop that exalts the federal judiciary, it is no surprise that the folks who become federal judges might think of their work as special, elite, and important—as, that is, white-collar judicial work.[11] It's also no surprise

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[hereinafter Coleman, *One Percent*] ("[T]he federal civil litigation system is its own one percent regime.").

5. *See, e.g.*, Justin Weinstein-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).

6. A recent survey of law professors indicates that federal courts, appellate practice, and constitutional law are three of the four most overrated (or "over-central") fields in law schools. *See* Eric Martínez & Kevin Tobia, *What Do Law Professors Believe About Law and the Legal Academy?*, 112 GEO. L.J. (forthcoming 2023) (manuscript at 6, 40 fig.4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4182521 [https://perma.cc/QF74-NXMZ].

7. For example, we privilege judicial clerkships with federal judges over clerkships with state-court judges, both within the academy and without (including in law firms that provide financial incentives for some clerkships and not others).

8. *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (overruling *Roe v. Wade*, 410 U.S. 113 (1973), 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) (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. Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615 (2000).

11. *See, e.g.*, Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 969 (2000) [hereinafter Resnik, *Trial*] ("Federal judges describe their courts as the venue for 'important' matters, as contrasted (implicitly and sometimes explicitly) with 'ordinary' . . . litigation."); 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) (explaining that transformation in federal appellate courts is "the by-product of the effort to maintain a small, elite federal judiciary").

that such elite, important work is part of the appeal of federal judging in the first place. But it is also something of a siren song.

No matter the birthplace of this cultural sense of Article III elitism, it has shaped the contours of the federal courts themselves. Judges do a lot more than decide cases; they also play a substantial role in designing the judicial institution itself. I call that work "macro-judging," which is a term that describes macro-level decisionmaking about how to structure courts, design judicial institutions, and engage in judicial business.[12] Over the last century or so,[13] macro-judging has created pathways to increase federal judicial autonomy, selectivity, and control over how judges do their work.[14] Macro-judging reforms have created opportunities for a preference for white-collar judicial work to emerge and have influenced what federal judges do and how they spend their time. Many of these reforms were needed, important, and even beneficial. But they have also permitted judges to set their own priorities, and those priorities, I argue, have privileged certain kinds of judicial work in certain kinds of ways.

The winners are big, important cases—that is, "white-collar" work. The losers are small, routine matters involving unrepresented and marginalized litigants—that is, "blue-collar" work. Beginning in the 1960s, 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.[15] 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 change how they do business. Mostly, they did the latter—and that evolution has had profound consequences for how Article III courts operate today.

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12. I will explain this term more fully in Part II. For now, think of "macro-judging" like "macroeconomics," the latter of which focuses on system-level economic drivers, as opposed to the actions of individual market participants (the domain of microeconomics). *See, e.g.*, David M. Driesen, *Legal Theory Lessons from the Financial Crisis*, 40 J. CORP. L. 55, 58 (2014) (comparing the fields of macroeconomics and microeconomics).

13. One might date the emergence of macro-judging to the 1922 creation of the Conference of Senior Circuit Judges, which was the predecessor to the modern Judicial Conference. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 398 n.97 (1982) [hereinafter Resnik, *Managerial*]. The Judicial Conference is the policymaking arm of the federal judiciary. *See* 28 U.S.C. § 331.

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

15. *See, e.g.*, WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, INJUSTICE ON APPEAL: THE UNITED STATES COURTS OF APPEALS IN CRISIS 3–4 (2013) [hereinafter RICHMAN & REYNOLDS, INJUSTICE] (describing the "caseload explosion" of the 1960s and 1970s).

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.[16] 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"[17]—while seeking opportunities to serve on rules committees, obtain multidistrict litigation ("MDLs"), and do other high-profile work.[18] A preference for white-collar work may even partly explain why the Supreme Court's docket has shrunk over time[19] and why (some) Justices have encouraged the development of a judicial cult of personality.[20]

That federal judges might favor high-profile work over mundane work is not surprising. Federal judges are human, after all.[21] Empirical studies of judicial behavior suggest that judges may be motivated by the

16. *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* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at xii, 115 (2013) (describing changes in federal appellate court structure and case processing to generate a "two-track" system 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").

17. *See, e.g.*, Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 913–14 (1990) [hereinafter Resnik, *Housekeeping*] (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).

18. *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.").

19. *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.").

20. *See, e.g.*, Suzanna Sherry, *Our Kardashian Court (and How to Fix It)*, 106 IOWA L. REV. 181, 182 (2020) (identifying that 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.").

21. *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.").

same things as the rest of us:[22] they seek recognition for their work, including the possibility of promotion;[23] they seek to increase their reputation;[24] and they may even desire more leisure time.[25] Prioritizing white-collar work over blue-collar work aligns with these goals: it permits judges to focus on the most high-profile work, while delegating away a large volume of work that is of less interest, less prestige, and less value. White-collar work is more interesting and sophisticated—and there is every reason to think some judges might prefer it to work involving more routine and less complex matters.[26]

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22. *See* Joanna Shepherd, *Measuring Maximizing Judges: Empirical Legal Studies, Public Choice Theory, and Judicial Behavior*, 2011 U. ILL. L. REV. 1753, 1757–59 ("[A]lthough the empirical evidence is somewhat mixed, the majority of recent studies find that self-interest concerns, such as promotion desires and reversal aversion, influence the decisionmaking of judges with permanent tenure."); *see also* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, THE BEHAVIOR OF FEDERAL JUDGES (2013); RICHARD A. POSNER, HOW JUDGES THINK 7 (2010) [hereinafter POSNER, HOW JUDGES THINK] ("[J]udges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work."). *But see* Lawrence B. Solum, *The Positive Foundations of Formalism: False Necessity and American Legal Realism*, 127 HARV. L. REV. 2464, 2481 (2014) (reviewing EPSTEIN ET AL., *supra*) (arguing that the labor economics model of judicial decisionmaking Epstein, Landes, and Posner offer is "devoid of content that would enable the derivation of predictions about judicial decisionmaking").

23. *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) [hereinafter Morriss et al., *Signaling and Precedent*] ("Judges were more likely to use written opinions . . . where the potential for promotion to the court of appeals was greater."); 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). District court judges may be more influenced by the possibility of promotion. *See* Morriss et al., *Signaling and Precedent*, *supra*, at 66–68. That said, there is no evidence that the quality of judicial decisions or reversal rates has any effect on promotion prospects. *See* Richard S. Higgins & Paul H. Rubin, *Judicial Discretion*, 9 J. LEGAL STUD. 129, 135–37 (1980).

24. *See* LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 139–55 (2006) (testing the empirical 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); *see id.* at 151 ("[T]he hypothesis of a Greenhouse effect should not be dismissed out of hand. Judges want the approval of individuals and groups that are salient to them, and their interest in approval may affect their judicial behavior."); *see also* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. 1515, 1574–79 (2010).

25. *See, e.g.*, Clark et al., *supra* note 21, at 383 ("[O]ur difference-in-differences design shows that when judges' alma maters appear in the [March Madness] tournament, they divert effort away from judging, as predicted by the literature on judges in the labor market."); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1 (2004).

26. *See, e.g.*, Edith H. Jones, *Back to the Future for Federal Appeals Courts: Rationing Federal Justice by Recovering Limited Jurisdiction*, 73 TEX. L. REV. 1485, 1493 (1995) (reviewing THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL: THE PROBLEMS OF THE U.S. COURTS OF APPEALS (1994))

Let me be clear: this is not a story to disparage federal courts. I teach federal courts—a course I love. I clerked for two federal judges whom I admire and respect beyond measure. I work within an institution—academia—that is as rife with as much elitism, if not more, than any other institution. In short, I am part of the problem too. Let me also be clear: this is not a story of causation. I do not argue that judges have intentionally designed their institution to advance their own agendas or promote their own self-interest. But I do argue that macro-judging reforms have created space for federal courts to become white-collar courts, as they shunt blue-collar work—that is, routine, pedestrian work often involving unrepresented claimants—to other decisionmakers. That such distribution of labor might benefit judges is part of why it is difficult to change the status quo.

This Article aims to attend to some of the consequences of how the federal courts prioritize their work and how the long-festering attitude of judicial elitism has shaped that work. Although the attitude—the sense of judicial elitism—is easy to spot, the harms are more difficult to name. Foremost, structurally, white-collar courts serve an expressive function: they tell litigants (implicitly, often) that some people and issues are "worthy" of their attention, and some are not.[27] There is also a risk that courts develop something of an attitude problem—that is, that white-collar courts grow too big for their britches. 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 self-interested (and potentially quite pernicious) way.[28] Or think of the recent blockbuster reporting that more than one hundred federal judges had violated federal law[29] by failing to disqualify themselves from cases where they (or close family) held a financial interest in a party.[30] Some Article III judges may think their own work too important to be bogged down with ticky-tacky ethics obligations.

(observing that federal appellate judges are at risk of being "dumbed-down" if they have to spend too much time on the "overwhelming number of routine or trivial appeals").

27. *See, e.g.*, Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 837, 838–44 (1984) [hereinafter Resnik, *Tiers*] (exploring procedure's "value-expressive functions").

28. *See* Bob Bauer, *The Supreme Court Needs an Ethics Code*, ATLANTIC (May 18, 2022), https://www.theatlantic.com/ideas/archive/2022/05/supreme-court-roe-leak-ethics-code/629884/ [https://perma.cc/KM7F-MR6U] (discussing the failure of the Supreme Court to adopt an ethics code).

29. 28 U.S.C. § 455(b).

30. James V. Grimaldi, Coulter Jones & Joe Palazzolo, *131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest*, WALL ST. J. (Sept. 28, 2021, 9:07 AM), 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 [https://perma.cc/4JLG-GPPQ].

White-collar courts also might grow to favor maximalist rulings—decisions on par with their own sense of judicial importance. Today's federal courts—at every level—are not shy in exercising judicial power.[31] Within a one-month period in spring of 2022, for example, the Supreme Court of the United States appeared poised to overturn *Roe v. Wade*,[32] a split panel of an intermediate federal appellate court appeared ready to dismantle administrative enforcement power,[33] and a single district court judge enjoined the nationwide operation of the Centers for Disease Control's COVID-19 pandemic mask mandate for modes of interstate travel.[34] Merits aside, each was (or would soon be) a bold ruling. Those on the political right, of course, would say this is nothing new.[35] Calls for judicial restraint flip-flop with the political winds of judicial appointments.[36] The call for restraint is the constant.

No matter the result, sweeping decisions reflect the 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.[37] But debates over judicial supremacy from both sides of the partisan divide[38] often overlook how the construction of Article III courts as special places for important work may create glidepaths for

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31. *See, e.g.*, Thomas P. Schmidt, *Judicial Minimalism in the Lower Courts*, 108 VA. L. REV. 829, 831 (2022) ("[L]ower 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").

32. Josh Gerstein & Alexander Ward, *Supreme Court Has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 2, 2022, 8:32 PM), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/3WF3-PS6Y]. And it did, of course. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

33. *See* Jarkesy v. SEC, 34 F.4th 446 (5th Cir. 2022), *reh'g denied*, 51 F.4th 644 (5th Cir. 2022).

34. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144 (M.D. Fla. 2022).

35. *See, e.g.*, Matthew J. Franck, *The Problem of Judicial Supremacy*, NAT'L AFFS., Spring 2016, at 137 (arguing that Justice Anthony Kennedy's decision finding a constitutional right to same-sex marriage "exhibited judicial aggrandizement on a truly grand scale").

36. *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 shifting views on judicial supremacy and restraint among liberals and conservatives over time).

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

38. These debates are long-standing, of course, but are reemerging in the wake of *Dobbs*. *See, e.g.*, Written Statement of Nikolas Bowie, Assistant Professor of L., Harvard L. Sch., to the Presidential Comm'n on the Sup. Ct. of the U.S. (June 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bowie-SCOTUS-Testimony.pdf [https://perma.cc/B5X5-LE2X] (presenting a progressive argument for Supreme Court reform in order to reinforce democratic ideals); Nikolas Bowie & Daphna Renan, *The Supreme Court Is Not Supposed to Have This Much Power*, ATLANTIC (June 8, 2022), https://www.theatlantic.com/ideas/archive/2022/06/supreme-court-power-overrule-congress/661212/ [https://perma.cc/FC84-44WZ].

maximalist courts. By keeping the federal judiciary elite and focused on "important" work, there is a risk that courts become less passive[39] and less minimalist[40]—to the extent, of course, one thinks judicial passivity and minimalism are virtues.

This Article, then, has two aims: first, to name and identify white-collar courts and trace common themes of privilege and specialness throughout all levels of the federal system; second, to attend to the consequences or the risks of privileging white-collar work over blue-collar work. In the process, it will use a new concept—what I call "macro-judging"—to describe judicial work that involves issues of institutional design, agenda setting, and policymaking. Macro-judging is not inherently problematic; indeed, it is quite necessary. Judges are vital participants in matters of institutional design, agenda setting, rulemaking, and the like. But where those processes have created opportunities for unchecked and even self-interested judicial preference to emerge as a driving force in institutional design, we scholars must interrogate those preferences.

This Article will proceed in three Parts. The first Part situates the work of the Article III judge as a white-collar worker. This discussion focuses on the federal judge as an exceptional worker within a unique workplace—one that, ultimately, differentiates between the work of the white-collar and blue-collar judicial professional. The second Part explains how a half century of "macro-judging"—that is, work at the macro level to shape and design the judicial institution—has created white-collar and blue-collar federal courts. The final Part launches a more normative critique of white-collar courts, and it offers some prescriptions aimed at mitigating those effects.

I. WHITE-COLLAR JUDGES

This Part defines the work of the Article III judge. It describes the federal judge both as a constitutional actor and as an elite 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

39. *See* United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020) ("[C]ourts are essentially passive instruments of government." (alteration in original) (quoting United States v. Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987))).

40. The minimalism on which I focus here is what Thomas Schmidt has recently defined as "decisional minimalism," "which counsels judges to decide cases on narrow and shallow grounds." Schmidt, *supra* note 31, at 836. Schmidt notes that his description of "decisional minimalism" follows Cass Sunstein's work most closely. *Id.* (first citing CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 3–6 (1999), and then citing Cass R. Sunstein, *Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 6–10 (1996)).

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 system,[41] which I generally refer to as "Article I judges."[42] This comparison is essential to understanding the construction of Article III work as "white-collar" and the work of others as "blue-collar."

A. The Federal Judge as Constitutional Actor

Even by the yardstick of constitutional text, Article III is "spare."[43] 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."[44] 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."[45] When it comes to the Article III judge, that's basically it as a matter of constitutional text.[46] Although there is a rich body of scholarship on what "judicial power" means,[47] and

41. 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 17, at 911 (similarly using term "federal adjudication").

42. Throughout, I 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 is arguably some inaccuracy in the convenient shorthand. First, there is 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, 717 n.5 (2018) (explaining inaccuracy and using similar terminology to avoid "awkward[ness]" of "non-Article III tribunals").

43. 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[.]").

44. U.S. CONST. art. III, § 1.

45. *Id.*

46. The President's appointment power specifically refers to the appointment of judges to the Supreme Court. U.S. CONST. art. II, § 2, cl. 2.

47. For a classic treatment of the topic of "judicial power," see generally 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 generally Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535 (2000).

on who may exercise it,[48] what matters for our purposes is that Article III creates a constitutional judicial officer whose defining attributes are a protected salary[49] and a protected job.[50] These provisions were thought necessary to afford federal judges the independence to perform their constitutional function.[51] Others without those protections may also wield constitutional "judicial power" in some circumstances,[52] but those nonconstitutional actors do so with less independence, for less money, and with less prestige.

There are currently 870 authorized Article III judgeships.[53] Nine of those Article III appointees sit atop the federal judicial hierarchy at the Supreme Court of the United States.[54] Another 179 authorized

48. Numerous accounts of the constitutional issues surrounding Article I courts and judges have been written. *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, 646–655 (2004) (arguing that a distinction between "inferior courts" and "inferior tribunals" justifies constitutional exceptions to vesting of "judicial power").

49. Article III judicial pay is "undiminishable." *See* O'Donoghue v. United States, 289 U.S. 516, 529–30 (1933).

50. 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 of Article II, Section 4. *Id.* at 74, 79–82. 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.

51. *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 [F]ramers 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.").

52. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 63–70 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015) (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").

53. *Authorized Judgeships*, ADMIN. OFF. OF THE U.S. CTS. 8, https://www.uscourts.gov/sites/default/files/allauth.pdf (last visited Feb. 27, 2023) [https://perma.cc/3UP7-HTNV] [hereinafter *Authorized Judgeships*].

54. A point of some recent debate, of course. *See, e.g.*, Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 169–205 (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 [https://perma.cc/URS4-SXYA].

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.[55] And there are 673 authorized Article III appointees to the U.S. District Courts, 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).[56] Lastly, there are nine judges appointed to lifetime posts on the U.S. Court of International Trade.[57]

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."[58] As one commentator has explained, "senior judges are a special class of judges who have left regular active service" but who continue to take on judicial work—on average forty to fifty percent of the normal work for an active judge.[59] 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.[60] "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

55. 28 U.S.C. § 44(a); *Authorized Judgeships*, *supra* note 53, at 8.

56. 28 U.S.C. § 133(a); *Authorized Judgeships*, *supra* note 53, at 8. 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. *Authorized Judgeships*, *supra* note 53, at 8; 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.").

57. *Authorized Judgeships*, *supra* note 53, 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).

58. *See* Act of Feb. 25, 1919, ch. 29, 40 Stat. 1156, 1157–58. By statute, this is called retirement in "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, 1227 (2021). I have 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 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).

59. Levy, *supra* note 58, at 1232; *see* Burbank et al., *supra* note 58, at 29; *see also* Frederic Block, *Senior Status: An "Active" Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 540 (2007).

60. 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). Levy, *supra* note 58, at 1251–60.

benefits).[61] Senior judges currently handle approximately twenty percent of the total federal judicial workload.[62]

Despite the hierarchical structure of the federal courts, Amanda Frost has observed that "[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.' "[63] Justices can serve on lower courts, while lower court judges sit by designation on other lower courts.[64] 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. These are, we might say, the blue-collar judicial workforce. Nearest to the Article III courts are two vital "units" of the district court—the bankruptcy judge[65] and the magistrate judge.[66] At one time, neither was considered a "judge" at all[67]—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

61. *See id.* at 1243 (discussing tax advantages); *see also infra* notes 117–124 and accompanying text (discussing same).

62. *About Federal Judges*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/judges-judgeships/about-federal-judges (last visited Feb. 27, 2023) [https://perma.cc/U8UU-JZCD] [hereinafter, ADMIN. OFF. OF THE U.S. CTS., *Federal Judges*].

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

64. *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 CALIF. L. REV. 67 (2019) (discussing qualitative and quantitative data to address practice of visiting judges sitting by designation on the federal appellate courts).

65. 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.

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

67. *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 11, at 989 (noting that magistrate judges were not originally called "judges").

doctrine[68]—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.[69] 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,"[70] but the Supreme Court swiftly struck down that provision as an unconstitutional vesting of Article III judicial power in Article I judges.[71] After a protracted "battle between the bankruptcy bar and Article III judges,"[72] 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.[73] That Act bifurcated the jurisdiction of existing bankruptcy courts into "core" and "non-core" bankruptcy proceedings; only in the former could a bankruptcy judge issue a final order.[74] The distinction proved beguiling, and ultimately, the Supreme Court mired its constitutionality in doubt that remains to this day.[75]

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.[76] Introduced as

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68. *See, e.g.*, Erwin Chemerinsky, *Formalism Without a Foundation:* Stern v. Marshall, 2011 SUP. CT. REV. 183, 185 (describing the 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 asserting that it "can be understood only as the Court following in a formalistic way a series of decisions that themselves make little sense").

69. ADMIN. OFF. OF THE U.S. CTS., *Federal Judges*, *supra* note 62.

70. *Id.*; Act of Nov. 6, 1978, Pub. L. No. 95-598, § 1481, 92 Stat. 2668, 2671 (codified at 28 U.S.C. § 1481) (repealed 1984).

71. N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57–87 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015) (holding that a 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).

72. 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).

73. 28 U.S.C. § 152(a)(1); *see also* Bankruptcy Amendments and Federal Judgeship Act of 1984.

74. 28 U.S.C. § 157.

75. *See* Stern v. Marshall, 564 U.S. 462, 503 (2011) ("The Bankruptcy Court below lacked the constitutional authority to enter a final judgment on a state law counterclaim that is not resolved in the process of ruling on a creditor's proof of claim."); 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.").

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

"magistrates" in 1968,[77] these non-Article III judges were originally conceived of as "assistants to district judges."[78] Most of the first magistrates were part-time—reflecting their assistant-like status—but in the years since, their numbers, position, and powers have grown.[79] Magistrates were renamed "magistrate judges" in 1990,[80] 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.[81] Unless the magistrate judge acts with the consent of the parties,[82] he or she may only make "proposed findings of fact and recommendations" to an Article III district judge for resolution of case-dispositive motions.[83] 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.[84] 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."[85]

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."[86] 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.[87] In 2021, those 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.[88] The total number of active

77. Federal Magistrates Act, Pub. L. No. 90-578, § 401(b), 82 Stat. 1107, 1118 (1968). Federal magistrates grew out of the United States commissioner system, which had existed for 175 years. McCabe, *supra* note 76, at 345 (discussing origins of the modern magistrate judge).

78. Resnik, *Trial*, *supra* note 11, at 988–89.

79. *Id.*

80. Civil Justice Reform Act of 1990, Pub. L. No. 101-650, § 321, 104 Stat. 5089, 5117.

81. *See* 28 U.S.C. § 636; 18 U.S.C. § 3401.

82. 28 U.S.C. § 636(c)(1).

83. *Id.* § 636(b)(1)(A)-(B).

84. *Id.* § 631(a), (e)-(f).

85. *Id.* § 631(i).

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

87. *Status of Bankruptcy Judgeships—Judicial Business 2021*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/statistics-reports/status-bankruptcy-judgeships-judicial-business-2021 (last updated Sept. 30, 2021) [https://perma.cc/27QM-DW7M].

88. *Compare Bankruptcy Filings*, ADMIN. OFF. OF THE U.S. CTS., tbl.F (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/f/bankruptcy-filings/2021/12/31 [https://perma.cc/5TZR-B77C], *with Civil Statistical Tables for the Federal Judiciary*, ADMIN. OFF. OF THE U.S. CTS., tbl.C-1 (Dec. 31, 2021), https://www.uscourts.gov/statistics/table/c-1/statistical-tables-federal-judiciary/2021/12/31 [https://perma.cc/JR2H-4TH5]. This has generally always been true; Judith

magistrate judges (673)[89]—including part-time[90] and recalled[91] magistrates—is equivalent to the number of authorized Article III district court judgeships (673).[92] 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 that they do"; indeed, they routinely resolve three times the number of matters that district court judges do.[93]

The bankruptcy judge and magistrate judge are just the tip of the blue-collar federal judicial iceberg. As of March 1, 2017, there were 1,931 federal administrative law judges[94] spread across more than 30 agencies (but 85 percent of such judges work for the Social Security Administration).[95] There are approximately 600 immigration judges sitting on 68 immigration courts throughout the country[96] and another 23 appellate immigration judges on the Board of Immigration

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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 11, at 952 n.96.

89. *Status of Magistrate Judge Positions and Appointments—Judicial Business 2021*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/statistics-reports/status-magistrate-judge-positions-and-appointments-judicial-business-2021 (last updated Sept. 2021) [https://perma.cc/8TXM-TMAF].

90. 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. 28 U.S.C. § 631 (appointment and tenure procedures for magistrate judges).

91. *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).

92. *U.S. District Courts, Additional Authorized Judgeships*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/sites/default/files/districtauth.pdf (last visited Feb. 28, 2023) [https://perma.cc/XQ6F-GKT7].

93. *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).

94. That counts those appointed under 5 U.S.C. § 3105 to conduct administrative proceedings in accordance with 5 U.S.C. §§ 556-57.

95. *ALJs by Agency, Federal Administrative Law Judges by Agency and Level (EHRI-SDM as of March 2017)*, OFF. OF PERS. MGMT., https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency (last visited Feb. 28, 2023) [https://perma.cc/ZQ52-R8Y9]. Unfortunately, more recent statistics are not available from the Office of Personnel Management.

96. *Office of the Chief Immigration Judge*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/office-of-the-chief-immigration-judge (last updated Jan. 19, 2023) [https://perma.cc/ST8N-H6JR].

Appeals.[97] Each wields federal adjudicatory power.[98] They resolve more federal law matters than the rest of the white-collar Article III judiciary combined; indeed, the backlog of cases pending before immigration judges alone hit nearly 1.1 million in 2020.[99] And there are still more: judges on the U.S. Court of Appeals for the Armed Forces, special masters on the Vaccine Court, and judges on the Court of Federal Claims—to name a few.[100]

There is a rich body of law and scholarship on the constitutional bounds of allocating federal judicial work to non-Article III or blue-collar judicial decisionmakers.[101] That is 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—that is, how the structure of the federal judicial workforce creates white-collar and blue-collar judges and courts. The next Section outlines the contours of the Article III judge as a federal worker—as distinct from his or her blue-collar counterparts.

B. The Federal Judge as Federal Worker

In the same way that hierarchical workplace structures reward white-collar work everywhere, Article III judging is a very good job. 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

97. *Board of Immigration Appeals*, U.S. DEP'T OF JUST., https://www.justice.gov/eoir/board-of-immigration-appeals (last updated Sept. 14, 2021) [https://perma.cc/CRA5-TLF7]. For a thorough discussion of the history of the immigration judge, see Nicole 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).

98. Not all are classified as "administrative law judges" for purposes of the Administrative Procedure Act. *See* Resnik, *Trial*, *supra* note 11, at 954 & n.102 (discussing role of immigration judge among other administrative judges not classified as "ALJs").

99. *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. 52 (2020) (statement of Hon. Andrew R. Arthur, Resident Fellow in Law & Policy, Center for Immigration Studies); *see also* Paul R. Verkuil, *Reflections upon the Federal Administrative Judiciary*, 39 UCLA L. REV. 1341, 1343 (1992) ("ALJs probably decide more 'cases' each year than do their federal judicial counterparts.").

100. *See* 10 U.S.C. § 941 (creating U.S. Court of Appeals for the Armed Forces); 42 U.S.C. § 300aa-12 (stating that judges on Court of Federal Claims will appoint special masters to Vaccine Court); 28 U.S.C. § 171 (describing appointment of judges to Court of Federal Claims).

101. For a discussion of constitutional issues surrounding Article I or legislative courts, see generally Fallon, *supra* note 48; Daniel J. Meltzer, *Legislative Courts, Legislative Power, and the Constitution*, 65 IND. L.J. 291 (1990); and Resnik, *Mythic*, *supra* note 3.

comes with unique constraints and rewards that are worth considering in some depth to understand why Article III judges might prioritize white-collar work over blue-collar work. I will discuss the job's features along two dimensions: those features extrinsic and intrinsic to the work of judging.[102] "Extrinsic" features include judicial pay, policies, and security; "intrinsic" features include the nature of the work itself as well as the capacity for recognition, autonomy, and growth or advancement within the judicial workplace.[103]

1. Extrinsic Features of Federal Judicial Work

Although the position of a federal judge is often static, it is incredibly secure. Federal judges cannot be fired; they can only be removed through impeachment.[104] Congress can decline to give federal judges raises, but it cannot do so selectively.[105] The pay is good, relatively speaking,[106] and the retirement perks are even better.[107] 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.

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102. 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* FREDERICK HERZBERG, BERNARD MAUSNER & BARBARA BLOCH SNYDERMAN, THE MOTIVATION TO WORK (1959); Frederick Herzberg, *One More Time: How Do You Motivate Employees?*, 81 HARV. BUS. REV. 87 (2003) [hereinafter Herzberg, *One More Time*]; *see also* FREDERICK HERZBERG, WORK AND THE NATURE OF MAN (1966); Mohammed Alshmemri, Lina Shahwan-Akl & Phillip Maude, *Herzberg's Two-Factor Theory*, LIFE SCI. J., May 25, 2017, at 12, 13 ("Herzberg's theory is one of the most significant content theories in job satisfaction.").

103. *See* Herzberg, *One More Time*, *supra* note 102, at 91–92.

104. U.S. CONST. art. II, § 4.

105. *See* Christopher R. Drahozal, *Judicial Incentives and the Appeals Process*, 51 SMU L. REV. 469, 473 n.19 (1998) (discussing federal judicial constraints).

106. All of this is relative, of course, and it should not 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 Judicial Compensation,* ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-compensation (last visited Feb. 28, 2023) [https://perma.cc/QAD7-92YW] [hereinafter ADMIN. OFF. OF THE U.S. CTS., *Judicial Compensation*] (2021 compensation for district court judge is $218,600), *with Quick Facts,* U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/SEX255219 (last visited Feb. 28, 2023) [https://perma.cc/P87Y-QA7L] (2021 per capita income is $37,638). 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 Larger Firms Tops $1M, Survey Finds*, ABA J. (Dec. 16, 2020, 3:42 PM), https://www.abajournal.com/news/article/how-much-do-partners-make-the-average-at-larger-firms-tops-1m-survey-finds [https://perma.cc/QF8F-X9JB].

107. *See infra* notes 117–124 and accompanying text (discussing tax incentives for taking senior status).

TABLE 1: ARTICLE III[108] AND ARTICLE I JUDGES' SALARIES

Position	Salary (2023)
Chief Justice of the United States	$298,500
Associate Justices of the United States	$285,400
Circuit Judges	$246,600
District Judges	$232,600
Bankruptcy Judges[109]	$213,992
Magistrate Judges[110]	up to $213,992
Administrative Law Judges[111]	$136,651 to $187,300
Immigration Judges[112]	Capped at $195,000

There are some limits on how federal judges can use (and not use) their offices. They generally may not rule in cases where they have a direct financial interest,[113] and their income has nothing to do with the quantity or the quality of the cases they resolve.[114] They may not practice law nor engage in political activity.[115] There are limits on how much active judges may earn for outside activities, like teaching (but they may keep all book royalties).[116]

Although Article III 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

108. ADMIN. OFF. OF THE U.S. CTS., *Judicial Compensation*, *supra* note 106.

109. *See* 28 U.S.C. § 153(a) (setting salary of bankruptcy judges at ninety-two percent of district judges).

110. *Id.* § 634(a) (setting salary of magistrate judges at up to ninety-two percent of district judges).

111. Exec. Order No. 14061, 86 Fed. Reg. 73601 (Dec. 28, 2021) (setting pay scale for Administrative Law Judges); *Locality Rates of Pay: Administrative Law Judges*, U.S. OFF. OF PERS. MGMT. (2022), https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/salary-tables/pdf/2022/ALJ_LOC.pdf [https://perma.cc/M3L4-6EQJ].

112. *2023 Immigration Judge Pay Rates,* U.S. DEP'T OF JUST., EXEC. OFF. FOR IMMIGR. REV. (Jan. 1, 2023), https://www.justice.gov/eoir/page/file/1236526/download [https://perma.cc/5X7N-JB3Z] (noting that pay is capped at Level III of the Executive Schedule, which is currently $195,000).

113. 28 U.S.C. § 455(b)(4).

114. *See* Drahozal, *supra* note 105, at 472–73 (discussing constraints on Article III judges).

115. *See* Burbank et al., *supra* note 58, at 4 (discussing constraints on Article III judicial service).

116. The cap is fifteen percent. 5 C.F.R § 2636.304 (2023).

years of federal judicial service,[117] they may either retire with a full pension—equivalent to the judge's current salary[118]—or take "senior status" and continue to receive the salary of the judicial office.[119] 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 as retirement (reducing taxes further).[120] All told, the financial benefit for senior status (or retirement) is "between $25,000 to $30,000" or more than ten percent of the current salary for Article III judges.[121] Moreover, senior status judges who meet the workload certification to maintain a salary for life, which is currently twenty-five percent, are not subject to any limit on teaching income.[122] Overall, the incentive for continuing to work in some capacity in retirement (as opposed to retiring on pension outright) is somewhat slight.[123] It is largely the difference between keeping the judge's current salary at retirement and any future salary increases for the office.[124]

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117. *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. Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Law and Policy of Judicial Retirement: An Empirical Study*, 42 J. LEGAL STUD. 111, 114 (2013) ("Under the Rule of 80, a judge receives a full pension—equal to her salary—when the judge's age and the judge's years of experience on the bench equal 80."). 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.

118. By statute, this is called "retirement on salary." 28 U.S.C. § 371. A judge might also resign without a pension, but this is rare.

119. By statute, this is called "retirement in senior status." 28 U.S.C. § 371(b).

120. *See* Burbank et al., *supra* note 58, at 33 (discussing tax benefits for senior status judges).

121. *Id.* at 34; *see* ADMIN. OFF. OF THE U.S. CTS., *Judicial Compensation*, *supra* note 106. 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). Burbank et al., *supra* note 58, at 34–35 (discussing consequences of taking senior status).

122. 28 U.S.C. § 371; 5 C.F.R § 2636.304.

123. 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 58, at 33–34 (discussing history of judicial pay). Judges who take senior status are also free from the ordinary restriction on teaching income imposed on judges who are in active service. *See* 5 C.F.R § 2636.304. 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 58, at 45–47 (discussing strategy around taking senior status and tax advantages, including considering survey responses from federal judges).

124. 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).

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 is 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).[125] That is likewise consistent with popular workplace motivation theories: judges may become dissatisfied with their job because of their pay (and some do),[126] but financial rewards are not themselves likely to be independently rewarding.[127] Those rewards, as the next Subsection discusses, are more likely to come from the work itself. And this is perhaps why judges prefer white-collar work to blue-collar work in the judicial workplace.

2. Intrinsic Features of Federal Judicial Work

White-collar judicial work is likely to be inherently more satisfying to most Article III appointees. True satisfaction, they say, comes from within—in this case, from the satisfaction of the work itself.[128] It is not the pay, or the retirement benefits, or probably even the job security that draws highly qualified applicants to seek Article III appointments. It is 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.[129] 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 is also likely true that judges who can act more independently or autonomously, who can make

125. EPSTEIN ET AL., *supra* note 22, at 31–34. This 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 id.* at 48 (including judicial salary in judicial utility function).

126. *See infra* notes 153–158 and accompanying text (discussing reasons federal judges leave the bench).

127. Herzberg, *One More Time*, *supra* note 102, at 8–9.

128. *See* J. RICHARD 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.").

129. *See* Paul R. Gugliuzza & J. Jonas Anderson, Why Do Judges Compete for (Patent) Cases? 34–56 (Apr. 14, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4331055 [https://perma.cc/96AP-W2BM] (arguing that judges may "compete" for patent cases because such cases are of intellectual interest, increase judicial prestige, popularity, and notoriety, create opportunities to influence the law, provide local economic benefits, generate financial benefits for the courts, and create post-judicial career opportunities for judges).

more meaningful decisions on consequential legal issues, and who gain more recognition (internally and externally) for their craft are happiest in the judicial role.[130]

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.[131] 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 is 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;[132] it has the

130. Studies assessing the perceived "effort-reward" of work suggest that workers may be motivated by the following workplace characteristics or opportunities, among others: the "[c]hance to learn new things," "benefit society," "exercise leadership," "make a contribution to important decisions," and "use . . . special abilities"; the "[f]reedom from supervision" and "from pressures to conform both on and off the job"; "[h]igh prestige and social status"; "[o]pportunity for advancement"; and "[v]ariety in work assignments." Carole L. Jurkiewicz, Tom K. Massey, Jr. & Roger G. Brown, *Motivation in Public and Private Organizations: A Comparative Study*, 21 PUB. PRODUCTIVITY & MGMT. REV. 230, 233–34 tbl.1 (1998); *see also* John B. Miner, ORGANIZATIONAL BEHAVIOR 1: ESSENTIAL THEORIES OF MOTIVATION AND LEADERSHIP 94 (2005) (discussing worker expectancy theory).

131. *But see* Gugliuzza & Anderson, *supra* note 129, at 14–16 (explaining how district court judges have power over what types of cases they hear through division-assignment rules and venue provisions).

132. *See, e.g.*, Larry D. Kramer, *The Supreme Court 2000 Term Foreword: We the Court*, 115 HARV. L. REV. 5, 92 (2001) (discussing history of the 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*,[133] but (with some notable exceptions)[134] 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,[135] may be more constraining or less.[136] 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.[137]

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),[138] their supremacy is, for the most part, circumscribed geographically,[139] and their judgments are (at least in theory) subject to further review by the en

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133. *See, e.g.*, 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 383 (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).

134. 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.

135. Justice Brennan famously quipped: "Five votes can do anything around here." H. JEFFERSON POWELL, CONSTITUTIONAL CONSCIENCE: THE MORAL DIMENSION OF JUDICIAL DECISION 16 (2008).

136. *See* Kevin M. Quinn, *The Academic Study of Decision Making on Multimember Courts*, 100 CALIF. 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.

137. *See* Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662 (eliminating remaining vestiges of the U.S. Supreme Court's mandatory appellate docket). That power also extends to the (questionable) power to select questions for review, including the power to add or remove questions from the Court's consideration. *See generally* Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793 (2022) (discussing origins of Court's question-selection power).

138. *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").

139. *See* 28 U.S.C. §§ 41, 1291, 1292(c)-(d), 1295.

banc court, the Supreme Court, or both.[140] Although judges on these courts generally sit in panels of three (and thus only need to convince a single colleague to join a result),[141] those panels change frequently—a different kind of constraint than where panel membership is both stable and of long standing.[142]

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.[143] District court judges act alone—they do not sit in panels, except on rare occasions[144]—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).[145] But nearly all of their final judgments are subject to appeal as of right to the U.S. Courts of Appeals.[146] 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."[147] 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

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140. These are relatively weak constraints, of course. Even though the Supreme Court has a particularly high reversal rate (for an appellate court), it reverses only a tiny number—less than one percent—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), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1006&context=elj-online [https://perma.cc/UB87-H54G]. 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 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).

141. *See* 28 U.S.C. § 46.

142. *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).

143. *See* Resnik, *Tiers*, *supra* note 27, at 846 ("Single judges have an independence not permitted other members of complex, hierarchical institutions.").

144. 28 U.S.C. § 2284.

145. *See, e.g.*, Resnik, *Tiers*, *supra* note 27, at 861 ("Even in cases where appeal is available, many of the decisions of the first tier [which includes the federal district court] are given great deference.").

146. *See* 28 U.S.C. § 1291.

147. Resnik, *Managerial*, *supra* note 13, at 377–78.

federal judges, overall, are an extremely satisfied lot.[148] 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).[149] During Stephen B. Burbank, S. Jay Plager, and Greg 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.[150] On the other hand, only 101 of those judges retired (or 4.7 percent of those judges eligible to do so),[151] and an even smaller number—80 judges—resigned without receiving their pensions.[152]

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.[153] Although a smaller category of retirements appeared to be for health reasons, approximately sixty-nine percent of retirements were for financial reasons or to obtain both financial rewards and a more diverse and challenging experience outside of judicial service.[154] Likewise, judges who resigned largely complained about low pay as well.[155] Of the eighty

148. *See* Burbank et al., *supra* note 58, 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").

149. As of April 15, 2023, among the sixty-two Article III judicial vacancies created by retirements or resignations (as opposed to elevations or death), only four of those sixty-two vacancies were created by an outright retirement and only five were created by a resignation. *Current Judicial Vacancies*, ADMIN. OFF. OF THE U.S. CTS., https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies (last visited Apr. 15, 2023) [https://perma.cc/KT7U-8KTF]. Thus, over eighty-five percent of the current judicial vacancies created by retirement or resignation involve judges electing to go senior rather than to retire outright. *See id.*

150. Burbank et al., *supra* note 58, at 21.

151. *Id.* at 56.

152. *Id.* at 12–13.

153. *Id.* at 71 tbl.21. Notably, this first 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.*

154. *Id.* at 63.

155. *Id.* at 12–13 (noting "overlap" between the decision to return to private practice and being motivated by inadequate salary); *see also id.* at 12, 15 (noting that most resignations during the

federal judicial resignations during the study, thirty-six judges resigned either to return to private practice or because of inadequate salary.[156] Eleven cited "[d]issatisfaction with [the] office," and eighteen 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).[157] Of those judges who specifically expressed dissatisfaction with the judicial office, most complained about the workload, constraints on judging imposed by the U.S. Federal Sentencing Guidelines, dissatisfaction with the monastic lifestyle, and a desire to seek "new challenges."[158]

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."[159] 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.[160] All told, it's nice work if you can get it. The more varied, the more sophisticated and significant the work is, the more satisfaction may follow. That is to say: White-collar judicial work is more rewarding than blue-collar work. The next Part considers how judicial administrative reforms in response to caseload demands have permitted courts to privilege more rewarding white-collar work.

II. CREATING WHITE-COLLAR COURTS

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 burdens: rising caseloads and intensifying case complexity. Each challenge weighed heavily on the federal courts and, as a result, threatened—at least in the view of some—to "lessen[ ] the prestige and

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study period were related to "inadequate salary," and identifying a minimum of forty-two of eighty judges who at least considered compensation as a factor when resigning).

156. *Id.* at 13 fig.1.

157. *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 14 & n.69.

158. *Id.* at 15 (internal quotation marks omitted) (quoting Kate Coscarelli, *District Judge Will Step Down—Respected Jersey Jurist Becomes 8th in the Court's History to Resign*, STAR-LEDGER, Feb. 20, 2003, at 21) (collecting publicly stated reasons for dissatisfaction with federal judicial office as reason for resignation).

159. *Id.* at 53 tbl.9.

160. *Id.* at 84 tbl.28.

attractiveness of the office."[161] 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" began to strangle Article III courts.[162] That left these "first-rate" judges, in the 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."[163] At the same time, those "big cases" were increasing in complexity while our 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 major problem in the . . . administration of justice."[164] So, the big cases were getting bigger, while the small cases were getting smaller and more numerous, and the Article III judiciary did not have the bandwidth to handle them both.

The answer to each problem was basically the same, albeit with wildly different effects—increased "case management."[165] As Judith Resnik's groundbreaking work first described, federal judges became active "managers" of their dockets, giving them "greater power" outside

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161. *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 . . . .

162. RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 214 (alteration in original) (internal quotation marks omitted) (first quoting Joseph R. Biden, Setting the State for the Nineties—Our Mutual Obligation, Address Before the Third Circuit Judicial Conference (Apr. 19, 1993), *in* WILLIAM W. SCHWARZER & RUSSEL R. WHEELER, FED. JUD. CTR., ON THE FEDERALIZATION OF THE ADMINISTRATION OF CIVIL AND CRIMINAL JUSTICE 30 (Long-Range Planning Series, Paper No. 2, 1994); and then 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)).

163. *Id.* at 214 (alteration in original) (internal quotation marks omitted) (first 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); and then quoting Justice Antonin Scalia, Remarks Before the Fellows of the American Bar Foundation and the National Conference of Bar Presidents (Feb. 15, 1987)).

164. PROCEDURE IN ANTI-TRUST AND OTHER PROTRACTED CASES, JUD. CONF. OF THE U.S. (1951), *reprinted in* 13 F.R.D. 41, 64 (1953).

165. Resnik, *Managerial*, *supra* note 13, at 378 (internal quotation marks omitted).

"circumscribed judicial authority."[166] 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."[167] 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.[168] 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 the important cases from the less so.[169] As a result, Article III judges became more hands-on (and exerted more power) over the "big" complex cases, while using those newfangled 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 the story of white-collar courts—a perpetuation and preservation of an elite or "special" federal court system devoted to big, important cases that delegates away blue-collar, everyday judicial work.[170]

These transformations all employ what I call macro-judging, which is a broad descriptive tool for understanding how judges collectively organize, design, and manage the judicial institution. This Part first defines and explains macro-judging, and then it uses that lens to construct white-collar courts from the bottom up. It will move from the district courts to the Supreme Court to describe how macro-judging decisions have created opportunities for Article III courts to privilege white-collar work. Although I organize this discussion by court, the court-specific acts 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—macro-judging that fuels and perpetuates today's white-collar courts.

A. Macro-Judging

The mechanism through which white-collar courts have emerged is what I call "macro-judging." That term is a descriptive tool

166. *Id.*

167. *Id.*

168. *See id.* at 379–80 (discussing the reasons for managerial turn).

169. RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 115 ("[J]udges on the federal courts of appeals now run something that resembles an office in a large law firm.").

170. *See id.* at 214 (internal quotation marks omitted) (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)).

to capture the institution-level work of federal judges. Judges do a lot more than decide cases. They design judicial institutions and set judicial policy. They sit on rules committees that promulgate local and national rules.[171] Federal judges lobby Congress through the Judicial Conference—the policymaking arm of the federal judiciary.[172] These activities are all "macro-judging." Macro-judging can be formal (e.g., rules creation), informal (e.g., the Supreme Court's certiorari practices and its dwindling docket),[173] or somewhere in between (e.g., a recommendation from the Judicial Conference).[174]

"Macro-judging" pairs with "micro-judging," which I define as case-specific adjudication. That's what we traditionally think of as the work of judges. Most judicial decisionmaking literature focuses on "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).[175] Academic work on micro-judging involves theoretical and empirical accounts of how and why judges decide cases the way they do.[176] "Micro-judging" is, fundamentally, a case-specific activity; it is judicial work within the constraints of law and decisionmaking norms.[177] It is deciding a case.

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171. *See, e.g.*, Brooke D. Coleman, *#SoWhiteMale: Federal Civil Rulemaking*, 113 NW. U. L. REV. 407 (2018) [hereinafter Coleman, *#SoWhiteMale*] (discussing diversity issues surrounding appointment to rules committees).

172. *See* Resnik, *Trial*, *supra* note 11, at 929 (discussing how the Judicial Conference operates as the "voice" of the federal judiciary; it serves as a "means of self-governance, self-administration, and self-promotion").

173. *See infra* Part II.C (discussing Supreme Court's certiorari practices).

174. For example, the decision to ask Congress for additional authorized judgeships. *See The Judicial Conference's Recommendation for More Judgeships: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. 3 (2020), https://www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony2.pdf [https://perma.cc/FM2F-2PRC] (statement of Hon. Brian Stacy Miller, J., U.S. Dist. Ct. for the E. Dist. of Ark., Chair, Jud. Resources Comm., Subcomm. on Jud. Stats.).

175. *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").

176. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 258 (2005) ("Positive theorists ask what motivates judges to decide cases as they do and what forces are likely to influence judges' decisions."); *see also* BAUM, *supra* note 24; POSNER, HOW JUDGES THINK, *supra* note 22, at 19 ("There are many positive (that is, descriptive as distinct from normative) theories of judicial behavior. Their primary focus is, as one would expect, on explaining judges' decisions." (footnote omitted)).

177. *See* Richard A. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, 1990 BYU L. REV. 827, 827 (describing the application of public-choice theory to judicial decisionmaking as a "meager harvest" in the main, given the institutional constraints on judicial decisionmaking (that is, micro-judging)).

At first blush, there may seem something counterintuitive about describing "macro-judging" as "macro" and "micro-judging" as "micro." Some case-specific adjudications are anything but micro. But the term does not refer to the magnitude of the effect such decisions have; it refers to the level at which the decision operates (systemic versus case-specific). Micro-judging and macro-judging echo microeconomics and macroeconomics. As commonly understood, "[m]icroeconomics addresses the behavior of particular market actors or of discrete groups of market actors"[178] and how those "individual economic [actors] respond to market forces."[179] Macroeconomics, on the other hand, "addresses the economy as a whole, including concerns such as economic growth, depressions, and job creation."[180] Microeconomics—like micro-judging—focuses on "[t]he individual transaction."[181] Macroeconomics—like macro-judging—focuses on the system itself.

Some, likewise, may disagree with describing macro-judging as a form of "judging" because it does not involve "judging" in its traditional sense—that is, it is not case-specific adjudication. But I suggest that is a far too narrow view of what the modern judge does; today's federal judge is active across a variety of judicially related tasks—from serving on rules committees to lobbying Congress—that shape the institution itself.[182] That is all the domain of macro-judging. It is part of the judicial role, and it can have a profound effect on case-specific adjudication.

In one sense, the entire field of procedure centers on macro-judging—especially to the extent proceduralists focus on the structural elements of procedural rules-creation and judicial administration.[183] But there are plenty of micro-judging or case-specific ways in which we think about procedure, too, which include considering the effects of discovery rules and pleading standards. The point is that commentary

178. David M. Driesen, *Legal Theory Lessons from the Financial Crisis*, 40 J. CORP. L. 55, 58 (2014). In the legal academy, microeconomics is more familiar. *See* Yair Listokin, *A Theoretical Framework for Law and Macroeconomics*, 21 AM. L. & ECON. REV. 46, 46 (2019) ("Law and economics should really be called 'law and microeconomics.' ").

179. Tianna Larson, *Countercyclical Antitakeover Law*, 21 WAKE FOREST J. BUS. & INTELL. PROP. L. 319, 325 (2021).

180. *Id.*

181. Driesen, *supra* note 178, at 58.

182. For a discussion of the modern interplay between the federal courts and Congress, a collection of some related critiques, and a novel solution, see Charles Gardner Geyh, *Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress*, 71 N.Y.U. L. REV. 1165 (1996).

183. I use "macro-judging," in part, because, as Marin Levy has observed, "the phrase 'judicial administration' has fallen out of favor." Marin K. Levy, *Judging Justice on Appeal*, 123 YALE L.J. 2386, 2390 n.14 (2014).

focused on how and why judges design their institutions as they do is scholarly work on macro-judging. Commentary focused on how and why judges decide cases as they do is about micro-judging.

What's the value in using a label for this kind of structural decisionmaking? I can think of at least three benefits. For starters, I think it helps us commentators find interconnections between and among fields. Those of us who focus on specific judicial policy choices—for me, the structure of the work of the federal appellate courts—can develop more systemic-level insights about how courts operate and the challenges they face structurally and collectively. Such a focus allows us to see, for example, how all courts underserve or structurally exclude unrepresented litigants.

I also think a focus on macro-judging as a field allows us to develop different kinds of questions for purposes of empirical examination: the most pressing questions in procedure, I suggest, have to do with how courts handle large, systemic problems (like MDLs and aggregate litigation, more generally) and the persistent problem that large numbers of lawyerless litigants pose. We are not as focused on micro-level issues in procedure, like individual case management. That was more of a twentieth century problem.[184]

Finally, attention to macro-judging may help courts themselves. Courts experiment with structure frequently, but the channels for learning from those experiments are missing. One reason, I think, is that we do not have a common way to talk about what courts are doing when they engage in structural decisionmaking. Macro-judging can be a lens through which the courts themselves learn from one another—not unlike how they learn from one another's micro-judging (even when they are not bound by it).

If the concept of macro-judging remains elusive, hopefully the next several Sections will illuminate it by focusing on some of the most significant macro-judging reforms over the last seventy years in the federal courts. None of these policy shifts involve individual case-specific adjudication. Yet all have had profound effects on how courts decide cases, what constitutes their docket, and where judges distribute

184. I note that at a recent conference at Yale Law School on the fortieth anniversary of Judith Resnik's pathbreaking work on judicial case management, *Managerial Judges*, *supra* note 13, several commentators suggested that we should be thinking, today, about "managerial courts" or "structural managerialism" instead of "managerial judges." Managerial Judges @ 40: A Conference on the Fortieth Anniversary of Judith Resnik's *Managerial Judges*, sponsored by the Oscar M. Ruebhausen Fund at Yale Law School (Nov. 4, 2022). The evolution is a focus on systemic, and not case-specific, managerialism; that is, today's proceduralists study macro-judging.

their attention. These reforms, thus, have permitted white-collar courts to emerge.

B. The District Courts

White-collar judging in the district court depends on two pivotal macro-judging innovations over the last fifty years: the reliance on and increased use of judicial adjuncts (magistrate judges and bankruptcy judges) and the so-called "MDL revolution."[185] Both are macro-judging reforms that judges have initiated, propelled, or strengthened over time. They may have been born from necessity and even addressed systemic need in some desirable ways. But they also have made it possible for Article III judges to reduce their blue-collar work and privilege white-collar work. 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.[186] By developing a corps of Article I decisionmakers to work alongside Article III courts, the Article III district court judges have differentiated white-collar judging from blue-collar judging (and have reserved for themselves the former).[187] Although Article I judges are "indispensable" to the federal system,[188] there is a darker side to the rise of Article I labor within Article III courts. The rise of adjuncts is intimately intertwined with efforts to

185. *Cf.* Gluck & Burch, *supra* note 18, at 1–4 (describing the transformation that multidistrict litigation has caused in civil procedure).

186. *See supra* notes 65–93 and accompanying text (discussing the history of federal magistrate judge, bankruptcy judge, and their current use).

187. 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, 28 U.S.C. § 636, and that involve lower-profile or even low-value work. *See, e.g.*, John B. Meixner & Shari Seidman Diamond, *Does Criminal Diversion Contribute to the Vanishing Civil Trial?*, 62 DEPAUL L. REV. 443, 448 (2013) ("The [federal] criminal docket has rapidly increased over the past forty years."). 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) may be its own, separate problem—one that could have spillover effects in terms of how much attention those courts give to civil claims from marginalized communities. *See, e.g.*, LYNN S. BRANHAM, LIMITING THE BURDENS OF PRO SE INMATE LITIGATION: A TECHNICAL-ASSISTANCE MANUAL FOR COURTS, CORRECTIONAL OFFICERS, AND ATTORNEYS GENERAL 30 (1997) (acknowledging the "dismissive attitude [of judges] towards prisoners' [civil rights] complaints").

188. Peretz v. United States, 501 U.S. 923, 928 (1991) (internal quotation marks omitted) (quoting Gov't of the Virgin Is. v. Williams, 892 F.2d 305, 308 (3rd Cir. 1989)).

maintain and entrench a small,[189] elite, and exceptional federal judiciary. Adding adjuncts allowed the Article III judiciary to more than double[190] its resources without diluting an ounce of Article III prestige.

In her work cataloguing a century's worth of what I would now call macro-judging reforms, 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, "non-life-tenured judges" could handle less important work.[191] 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 statutes . . . are somehow beneath the dignity of the Article III judiciary."[192] 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 policymaking body of the federal judiciary that is, as Resnik has described it, the "voice" of the Article III judiciary before Congress[193]—influenced the development of the modern magistrate judge.[194] Most significant, perhaps, was Judicial Conference support for the expansion of the magistrate judges' duties with respect to pretrial civil litigation.[195] 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

189. Resnik, *Trial*, *supra* note 11, at 992.

190. *See supra* notes 86–93 (discussing numbers of Article I adjuncts and the volume of their workload).

191. *See* Resnik, *Trial*, *supra* note 11, at 992.

192. Resnik, *Housekeeping*, *supra* note 17, at 913, 940–41.

193. Resnik, *Trial*, *supra* note 11, at 929 (discussing the role of the Judicial Conference).

194. *See* McCabe, *supra* note 76, at 344–50 (discussing involvement of the 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 the 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).

195. *See* Lee & Davis, *supra* note 194, at 852 (discussing Judicial Conference support for a "pretrial role for magistrate judges" (quoting MAGISTRATE JUDGES DIV., ADMIN. OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 88 (2009), https://www.uscourts.gov/sites/default/files/magistrate_judge_legislative_history.pdf [https://perma.cc/46CN-QVXY])).

management conference."[196] 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 bill that authorized magistrate judges to take part in pretrial proceedings.[197] Although the Committee's report gave several reasons for the change—including litigants' desires to avoid prejudicing judges who might ultimately rule on their cases—among those reasons offered was a desire to "provide district judges with more time to conduct other adjudicatory matters."[198] 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."[199] 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."[200] 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,[201] bankruptcy has, in the words of one bankruptcy judge, "always been the step-child of the federal judiciary."[202] Originally,

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196. MAGISTRATE JUDGES DIV., ADMIN. OFF. OF THE U.S. CTS., A GUIDE TO THE LEGISLATIVE HISTORY OF THE FEDERAL MAGISTRATE JUDGES SYSTEM 88 (2009) (internal quotation marks omitted) (quoting S. REP. NO. 101-416, at 20 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6823), https://www.uscourts.gov/sites/default/files/magistrate_judge_legislative_history.pdf [https://perma.cc/46CN-QVXY] [hereinafter MAGISTRATE JUDGES DIV.].

197. *See* Lee & Davis, *supra* note 194, at 852–53 (discussing revisions to the Civil Justice Reform Act and Judicial Conference opposition to early draft).

198. *Id.* at 853 (citing MAGISTRATE JUDGES DIV., *supra* note 196, at 89). As one Article III judge succinctly observed: "All judges (and their law clerks) hate discovery disputes." James G. Carr, *Fixing Discovery: The Judge's Job*, JUDICATURE, 2016, at 10–11.

199. H.R. REP. 90-1629 (1968), *as reprinted in* 1968 U.S.C.C.A.N. 4252, 4255; *see also* Federal Magistrates Act of 1968, Pub. L. 90-578, 82 Stat. 1107.

200. Resnik, *Housekeeping*, *supra* note 17, 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 76, at 384 (acknowledging concerns that the expansion of magistrate judge authority creates a "dual system of justice" or raises "the spectre 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) (recognizing that a system which appoints a 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").

201. U.S. CONST. art. I, § 8, cl. 4.

202. 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.

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."[203] 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.[204] But that more limited role expanded over time. By the 1950s and 1960s, referees had become full-time employees of the federal judiciary, and "the Article III judiciary 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).[205]

Even still, Article III judges resisted efforts to give Article III status to their bankruptcy colleagues[206]—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.[207] 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.[208] 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.[209] According to many, Chief Justice Burger feared giving former bankruptcy lawyers, who he

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203. *Id.* at 3.

204. *Id.*

205. *Id.* at 3–4 (discussing upgrades in connection with 1938 legislative expansion of the referee's role).

206. The bankruptcy judges themselves did not lobby for Article III status. *See* Jonathan Remy Nash & Rafael I. Pardo, *An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review*, 61 VAND. L. REV. 1745, 1755 n.37 (2008) (observing that "bankruptcy judges did not seek Article III status" because "they believed their merit would be properly recognized in a nonpolitical judicial appointment process" and they "feared that sitting judges would lack the political connections necessary for presidential appointment").

207. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–64 (1982), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in* Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665 (2015) (holding that the 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).

208. *See supra* notes 68–75 and accompanying text (discussing effects of *Stern v. Marshall*).

209. *See* 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) [hereinafter Mund, *White House*] (describing Chief Justice Burger's extraordinary opposition in great depth).

thought of as "low-caliber legal professionals," the prestige of an Article III appointment;[210] 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.[211] 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."[212]

Ultimately, when it came time to fix the constitutional problems with the 1978 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."[213] Article III judges maintained the "status . . . they [were] guarding so carefully," according to one key congressional representative,[214] 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.[215] Having resisted efforts to dilute the Article III bench, the Article III courts succeeded in not just maintaining their small size but

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210. Coco, *supra* note 72, at 195.

211. Mund, *White House*, *supra* note 209, at 183 (quoting a letter to President Carter).

212. Coco, *supra* note 72, at 195.

213. *Id.* at 200.

214. 130 CONG. REC. H6242 (daily ed. Mar. 21, 1984), https://www.govinfo.gov/content/pkg/GPO-CRECB-1984-pt5/pdf/GPO-CRECB-1984-pt5-3.pdf [https://perma.cc/26FG-6UXV] (statement of Rep. Don Edwards).

215. 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 AM. BANKR. L.J. 247, 250 (2022) (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.* 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 254–59 (discussing advantages to bankruptcy judges and others for successful competition). Although only a handful of bankruptcy judges currently compete for these "big cases," these 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 250. 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.* at 251.

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).

also in entrenching their specialness by differentiating themselves from and delegating disfavored work to Article I adjuncts.[216]

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 is perhaps nothing bigger than multidistrict litigation ("MDL").[217] That profoundly important federal procedural device—perhaps the most important macro-judging reform of the last half century—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 proceedings any federal cases with similar facts.[218] 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.[219]

Selection as a transferee judge for an MDL confers "elite status" on a federal district court judge.[220] And scholars have long recognized the tremendous—and largely unchecked[221]—power that MDLs confer on transferee judges.[222] Indeed, Brian Fitzpatrick has described MDLs

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216. Some aspects of bankruptcy practice complicate this narrative, however. For example, not all Article III courts have elected to use bankruptcy appellate panels, which are a substitute procedure whereby three-judge panels of bankruptcy judges hear bankruptcy appeals (instead of an Article III district court). *See* Nash & Pardo, *supra* note 206, at 1753–60 (discussing the role of bankruptcy panels); *see also* Jonathan Remy Nash, *Courts Creating Courts: Problems of Judicial Institutional Self-Design*, 73 ALA. L. REV. 1, 19–22 (2021) (discussing the discretion of courts of appeals and district courts to constitute bankruptcy appellate tribunals and to send appeals to such tribunals). Were all bankruptcy work disfavored, one might imagine that Article III courts would be more inclined to authorize bankruptcy appellate panels (thus outsourcing more work to Article I adjuncts).

217. 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, 1298–99 (2020).

218. 28 U.S.C. § 1407(a).

219. Gluck & Burch, *supra* note 18, at 3.

220. *Id.* at 19; *see also* Zachary D. Clopton & Andrew D. Bradt, *Party Preferences in Multidistrict Litigation*, 107 CALIF. L. REV. 1713, 1722 (2019) ("[T]he selection of the transferee judge is among the most momentous decisions made in the entire litigation.").

221. Little of what happens in MDLs is or can be appealed. *See* Gluck & Burch, *supra* note 18, at 20 (explaining why "few MDL issues ever reach the appellate courts").

222. *See, e.g.*, Clopton & Bradt, *supra* note 220, at 1725 ("Transferee judges wield enormous authority . . . ."); Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 424 (2011) ("The MDL statute and MDL procedure was never intended to confer such broad power and authority on a federal court . . . .").

as "concentrat[ing] more power in the hands of a single person than perhaps any other part of our judicial system."[223] 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.[224] 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."[225]

A small group of (mostly) federal judges[226] drafted and successfully lobbied for this 1968 "sleeper"[227] statute with a mind to do just that—that is, to "reshape federal litigation" by conferring tremendous power on the transferee judge.[228] "The guiding light," as Andrew D. Bradt has explained, "of the [drafting and lobbying] judges' efforts was their perception that power over litigation must be centralized in the hands of a single judge with national authority and maximum flexibility."[229] The judges who crafted the MDL statute designed it to confer something like "authoritarian" power,[230] or, I might say, to give maximum autonomy to the transferee judge. That power or autonomy is the fulcrum of existing scholarly criticism of 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."[231] 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."[232]

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

224. *Id.* at 107–08.

225. *Id.* at 109.

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

227. Judith Resnik, *From "Cases" to "Litigation*," 54 LAW & CONTEMP. PROBS. 5, 47 (1991) (identifying MDL as a "sleeper").

228. Bradt, *supra* note 226, at 839.

229. *Id.* at 840.

230. *See id.* at 841.

231. *Id.* at 847.

232. *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

The "MDL Revolution," as Abbe Gluck and Elizabeth Chamblee Burch recently described it,[233] is another chapter in a larger story of Resnik's "managerial judging."[234] 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.[235] 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.[236] 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.[237]

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,[238] where Article III judges have less statutory authority to delegate. But that arrangement, 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.

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908. 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.

233. Gluck & Burch, *supra* note 18, at 4.

234. Resnik, *Managerial*, *supra* note 13, at 380.

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

236. *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).

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

238. It is still worth noting, however, the special solicitude the federal courts have had for "white collar offenders" in the criminal space. Samuel W. Buell, *Is the White Collar Offender Privileged?*, 63 DUKE L.J. 823, 833 (2014) ("White collar offenders used to receive notoriously lighter sentences than street offenders in federal court."); *see also* J. Kelly Strader, *The Judicial Politics of White Collar Crime*, 50 HASTINGS L.J. 1199, 1202–03 (1999) (discussing and defining the so-called "white-collar paradox," where the Supreme Court "[J]ustices' voting in the white collar criminal cases thus often appears to be philosophically at odds with their overall criminal justice philosophies").

C. The U.S. Courts of Appeals

The same macro-judging 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 judges' work—indeed, sometimes as much as ninety percent of it—is seen by these Article III judges as so routine, boring, or low-value that it does not even warrant much, if any, judicial attention.[239] And so the federal appellate courts have mostly avoided the "blue-collar" work that might otherwise make their daily work far less interesting, varied, and sophisticated.

If the MDL revolution is one of the most significant macro-judging developments over the last half-century in the district courts, the development of a selective federal appellate triage regime[240] 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 sixty percent of docketed cases are from unrepresented appellants.[241] Just like district court judges turned to magistrate judges to reduce their "low value" work, federal appellate judges have made a similar move.[242] Beset with worries over

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239. *See* McAlister, *supra* note 16, 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).

240. The most comprehensive discussion of the intersecting features of these design choices appears in William M. Richman and William L. Reynolds's career capstone, *Injustice on Appeal*. *See generally* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15.

241. *See* McAlister, *supra* note 16, 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 FORDHAM L. REV. 2689, 2691 (2022).

242. But the move was not *quite* the same; it is 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 United States Courts of Appeals*, 73

rising caseloads,[243] federal appellate judges transformed their historical model for adjudication—one where judges read briefs, heard arguments, and wrote decisions[244]—into a two-tiered bureaucratic machine.[245] 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 nonprecedential opinions that judges may rubber-stamp.[246] In some circuits, the volume of second-tier work is enormous, accounting for upwards of eighty to ninety percent of appeals, as oral argument rates and publication rates have plummeted over time.[247]

The federal appellate courts engaged in these reforms almost entirely on their own[248]—albeit with the help of Congress to authorize and fund new staff positions.[249] These intersecting policy choices—reducing oral argument, increasing nonpublication, 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

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TEX. L. REV. 1505, 1512 (1995) (similar). But there are transparency and quality reasons to think such a system might be preferrable 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 the 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 16, at 1158–59 (discussing some of the structural concerns with staff attorneys).

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

244. Richman & Reynolds, *supra* note 11, at 278 (describing traditional appellate process as the "Learned Hand model").

245. RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 115 ("[J]udges on the federal courts of appeals now run something that resembles an office in a large law firm.").

246. *See* McAlister, *supra* note 16, at 1159–61 (discussing tiers of federal appellate process and review).

247. *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).

248. The changes discussed here were "unilateral"—that is, they were entirely court-initiated and driven. RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, 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." RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at xii, 115.

249. *See* McAlister, *supra* note 16, at 1154–59 (discussing development of law clerk and central staff attorneys and history of congressional authorization).

oversee[250]—handle the rest of the boring, uninteresting work. As I have previously 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 . . . ."[251]

Just as with the judicial administrative 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.[252] But those reforms also took off like a runaway train, propelled by convenience as much as by need.[253] Appeals have dropped over the last decade, while rates of nonpublication remain high.[254] 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 to receive shorter written decisions (even compared to other, similar "easy" or "low-value" appeals).[255]

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250. *See* DANIEL JOHN MEADOR & JORDANA SIMONE BERNSTEIN, APPELLATE COURTS IN THE UNITED STATES 108 (1994):

> 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.

251. McAlister, *supra* note 16, at 1158–59.

252. *See, e.g.*, RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 168–69 (rev. ed. 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;

Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management*, 74 BROOK. L. REV. 429, 437 (2009) (explaining and defending the Second Circuit's Non-Argument Calendar as a "fair[ ], effective[ ], and efficient[ ]" response to "an extraordinary challenge"); 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." (footnote omitted)).

253. *See* McAlister, *supra* note 16, at 1169–75 (discussing judicial incentives to maintain the federal appellate triage system despite reduction in caseload volume).

254. *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 appeals (roughly the volume they hear today), the courts were publishing approximately 29% of their work nationwide," whereas today they publish only 13%).

255. 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 (2021) ("[T]he 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-*

The appellate judges themselves may benefit from these reforms. 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.[256] They can—and seemingly do—spend more time crafting longer, more attention- and headline-grabbing decisions.[257] 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. It conserves judicial time and attention for the work the judges themselves 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.

D. The Supreme Court of the United States

We can readily identify some of the same macro-judging trends we have 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.[258] The reason, by now, should be familiar: the Supreme Court had too much work on its mandatory docket that was not sufficiently significant or important.[259] Congress

Rung Appeals, 91 FORDHAM L. REV. (forthcoming 2023) ("[D]ecisions in unrepresented appeals are, on average, about half the length of decisions in counseled appeals when controlling for publication status, outcome, and oral argument.").

256. *See* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 118 (arguing that federal appellate courts no longer are courts of mandatory jurisdiction and review but operate more like certiorari courts).

257. *See* Brown et al., *supra* note 255, 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 two thousand words in 1990 to more than five thousand words in 2017, while unpublished decisions have held steady at, on average, one thousand words).

258. Most recently, the Supreme Court Case Selections Act of 1988 eliminated virtually all the Supreme Court's remaining mandatory jurisdiction. *See* Supreme Court Case Selections Act of 1988, Pub. L. No. 100-352, 102 Stat. 662. That legislation resulted from over a decade of correspondence from all nine Justices to Congress complaining about the difficulties of the Court's 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 and expanding the discretionary docket," which Congress did "largely in the terms suggested by the Court." *Id.* at 85–86.

259. 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

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.[260] It has exercised that discretion with enthusiasm and by taking fewer and fewer cases over time.[261] 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."[262] 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.[263] Whether or not the Supreme Court's reduced merits docket matters,[264] 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)[265] and to

court.' " *Id.* at 91 (first set of internal quotation marks omitted) (quoting H.R. REP. NO. 100-660, at 27–28 (1988), *reprinted in* 1988 U.S.C.C.A.N. 766, 781).

260. 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 an administrative choice 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 more Justices participating in the 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 the cert pool did not have much systemic effect on volume of merits docket).

261. *See* Heise et al., *supra* note 19, at 1579 fig.3 (establishing downward trend in merits cases).

262. *Id.* at 1581.

263. *Id.*

264. There is some debate about whether this is normatively problematic or not. *Compare* Owens & Simon, *supra* note 260, at 1251–60 (making the case for why shrinking docket matters), *with* Heise et al., *supra* note 19, at 1587–90 (identifying "*some* positive (or at least some nonnegative) aspects" of dwindling dockets).

265. The Supreme Court "decid[es] half as many cases as it did a generation ago, and [is] using twice as many pages to do so." Sherry, *supra* note 20, at 183.

engage in other pursuits (like seeking public recognition, getting book advances,[266] and doing high-profile speaking gigs in far-flung locales[267]).

One wonders whether that increased sense of autonomy has, at times, led the Court to believe its own affairs 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.[268] The Court's current policy is wholly lacking,[269] and its failure to enact binding ethics rules on its own is deeply troubling. That failure, likewise, has engulfed the Court in controversy over Justice Thomas's receipt of gifts and luxury trips from a wealthy businessman—none of which had been disclosed in the ordinary course.[270] That episode has sparked anew concerns over the failure of the Court to follow ethics rules that bind the rest of the judiciary and the federal government more generally.[271] The Court has

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266. The Justices can earn substantial income from book advances and royalties, and many do. *See* Madeleine Carlisle, *Here's How Much the Supreme Court Justices Made Last Year*, TIME (June 9, 2022, 5:47 PM), https://time.com/6186294/supreme-court-salary-book-deals/ [https://perma.cc/76N7-MSRR] (reporting that Justice Barrett secured a $2 million book advance, that Justice Gorsuch earned $250,000 in book royalties in 2021, and that Justice Sotomayor had disclosed more than $3.3 million in book payments since 2010).

267. Although the Justices cannot earn more than roughly $30,000 in compensation for outside teaching, many of them do supplement their income by teaching courses. *Id.* And before the pandemic, the Justices traveled frequently; in 2018, they collectively took sixty-four trips where others paid for the Justices' food, transportation, and lodging. Karl Evers-Hillstrom, *Supreme Court Justices Continue to Rack Up Trips on Private Interest Dime*, OPEN SECRETS (June 13, 2019, 6:05 PM), https://www.opensecrets.org/news/2019/06/scotus-justices-rack-up-trips/ [https://perma.cc/3QWT-H44Y]. That included trips to Israel, Italy, Switzerland, Spain, and France. *Id.* (click through the link to "Supreme Court justice trips" towards the end of the article).

268. *See* JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/3MMM-K6GP] (identifying the "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, 1185 ("[A]ny legislative interference with Supreme Court recusal decisions is an unconstitutional intrusion into the judicial power vested in the Court by Article III of the Constitution."). *But see* Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 656–61 (1987) (arguing Congress can regulate Supreme Court recusals).

269. *See* Virelli, *supra* note 268, 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).

270. Joshua Kaplan, Justin Elliott, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (Apr. 6, 2023, 5:00 AM), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/BK94-DS3N].

271. *See, e.g.*, Domenico Montanaro, *Justice Thomas Gifts Scandal Highlights 'Double Standard' for Ethics in Government*, NPR (Apr. 24, 2023, 5:00 AM), https://www.npr.org/2023/04/24/1171343472/justice-thomas-gifts-scandal-highlights-double-standard-for-ethics-in-government [https://perma.cc/U8MJ-BHUW] (pointing out double standard governing Supreme Court versus rest of federal government).

seemingly decided its work is too important to be hampered by 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.

While the Court's policies have no doubt 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."[272] 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."[273]

What Sherry identifies—the judicial cult of personality that has developed around the Court—has been made possible, at least in part, through macro-judging.[274] With a reduced docket, and more and better staff,[275] the Justices have more time for pursuits that exalt themselves personally. This "[u]nseemly celebrity-seeking by Supreme Court Justices," Sherry argues, "raises the suspicion that their actions are self-serving rather than evidence of a commitment to impartial judging and the rule of law."[276] It also creates additional incentives for "attention-seeking" that may increase the polarization of the Court, as the Justices play to their respective bases.[277]

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 same[278]—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 shift that makes a once unthinkable act (the leak of a decision in a pending case) almost expected. If Sherry is right, this will not be the only such breach of the institution's norms, and perhaps it's

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272. Sherry, *supra* note 20, at 182.

273. *Id.* at 182, 185–87 (collecting examples).

274. Posner observed that one reason Supreme Court justices have become more engaged in "public intellectual activity"—including television appearances and media engagement—is because "they have more time on their hands," thanks to their smaller merits docket. Richard A. Posner, Judge, U.S. Ct. of Appeals for the 7th Cir., Senior Lecturer, Univ. Chi. L. Sch., Remarks at the Symposium on the Supreme Court and the Public: The Supreme Court and Celebrity Culture (Nov. 15, 2012), *in* 88 CHI.-KENT L. REV. 299, 301 (2013).

275. *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 [J]ustice thus have fallen.").

276. Sherry, *supra* note 20, at 188.

277. *Id.*

278. Gerstein & Ward, *supra* note 32.

likely that the culture of Supreme Court elitism—a distinct and special form of white-collar judging—has something to do with it. Macro-judging at the Supreme Court has insulated the Court from the ethics rules, norms, and jurisdictional constraints that bind lower courts. What has emerged is a polarized Court with waning public confidence (at least from the political left).[279]

E. The Article III Judiciary

Throughout the various crises chronicled in this Part, the Article III bench collectively has objected—repeatedly and "vigorously"—to the most obvious solution to many of these problems: doubling the Article III bench to increase judicial capacity.[280] 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.[281] 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."[282] That might, he says, reduce the "quality of the federal judiciary," rendering it "indistinguishable from the most pedestrian of state judiciaries."[283]

Think for a minute about what that view says about the role of Article III courts—especially vis-à-vis their state-court counterparts.

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279. A recent Pew Research poll finds that "Americans' ratings of the Supreme Court are now as negative as—and more politically polarized than—at any point in more than three decades of polling on the nation's highest court." *Positive Views of Supreme Court Decline Sharply Following Abortion Ruling*, PEW RSCH. CTR. (Sept. 1, 2022), https://www.pewresearch.org/politics/2022/09/01/positive-views-of-supreme-court-decline-sharply-following-abortion-ruling/ [https://perma.cc/J8SU-PPZT].

280. *See* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 167 ("The judicial establishment 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.

281. Robert H. Bork, U.S. Solic. Gen., Dealing with the Overload in Article III Courts, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 79, 234 (1976).

282. Jon O. Newman, *1,000 Judges—The Limit for an Effective Federal Judiciary*, 76 JUDICATURE 187, 188 (1993).

283. *Id.*

Gone, I suppose, are the somewhat "cheerful" days when Justice Story cheekily stated that "the judges of the state courts are, and always will be, of as much learning, integrity, and wisdom, as those of the courts of the United States."[284] The dim view of state courts is part-and-parcel of the modern story of white-collar federal courts. 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).[285] 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."[286] 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 do not mean to sound overly dismissive of the genuinely held belief of many Article III judges that more authorized federal judgeships might be a bad thing. Judges on the federal courts who all know far more than I do about what it is like to be a judge on those courts 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; and 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.[287]

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 litigants before them or the quality of judicial process those litigants receive. Richman and Reynolds have responded thoroughly to these

284. Martin v. Hunter's Lessee, 14 U.S. 304, 346 (1816).

285. RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 207.

286. *Id.* at 214. This view of what is 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* Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870–84 (2004).

287. *See* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 173–206 (collecting various objections to significant Article III expansion at the federal appellate level); McAlister, *supra* note 16, at 1198–1200 (discussing judicial opposition to adding judges to the federal appellate bench).

various objections in their thoughtful career capstone devoted to administrative reforms at the federal appellate courts, and I see little in their response with which to disagree.[288] 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."[289]

What is perhaps most troubling about the persistent judicial opposition to Article III expansion is what it reveals about white-collar courts. 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 legal academia (the latter of which would also provide a substantial measure of workplace security and autonomy).[290] Perhaps the power and prestige of the position are the federal bench's most enduring and important recruitment and retention features, 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;[291] others have acknowledged that "[t]he attraction of exclusivity is only human."[292] And even if the work is sufficiently rewarding in itself, that is 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 the macro-judging reforms I trace have 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 that a culture of white-collar judging, and the elitism that accompanies it, is necessary to cultivate and maintain a top-flight Article III judiciary, then it is time to consider the long-term costs of white-collar courts. The next Part begins to consider those costs as well as how Congress might realign judicial priorities to invigorate blue-collar judging.

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288. *See* RICHMAN & REYNOLDS, INJUSTICE, *supra* note 15, at 173–206 (describing and refuting nearly every aspect of the various judicial objections to the substantial growth of the Article III intermediate federal appellate courts).

289. *Id.* at 206.

290. Indeed, Richard Posner once argued that one way to maintain high-quality judicial candidates while substantially increasing the numbers of Article III judges is to increase federal judicial salaries (thus, of course, making the position more attractive). RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 99 (1st ed. 1985).

291. Frank M. Coffin, *Research for Efficiency and Quality: Review of* Managing Appeals in Federal Courts, 138 U. PA. L. REV. 1857, 1867 (1990) (reviewing FED. JUD. CTR., MANAGING APPEALS IN FEDERAL COURTS (M. Tonry & R. Katzmann eds., 1988)).

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

III. THE COSTS AND CURES OF WHITE-COLLAR COURTS

This Part identifies the costs of white-collar courts, and it begins to offer some suggestions for reform. I identify two core potential problems with white-collar courts: (1) an expressive problem, which is the message sent about the relative value of "blue-collar" work; and (2) an attitudinal problem, which is a kind of toxic elitism. These are problems that some greater attention to macro-judging could begin to address—but such attention is not a cure-all. We will also need something of an attitude shift about the courts themselves and their role in democracy.

A. The Costs of White-Collar Courts

Prioritization of "white-collar" judicial work produces two main ills. The first is expressive: it sends a message that other kinds of work—that is, blue-collar judicial work—are not as important and not as deserving of Article III time and attention. The second is attitudinal: it risks a kind of toxic self-importance. That attitude might be a pathway to bigger, bolder, more attention-seeking rulings, but it is also the foundation for a culture that eschews certain kinds of restraints (like ethics rules and cameras in the courtroom).

Foremost, the most prominent cost of white-collar courts is, in the words of Resnik, its "value-expressive" function.[293] It is the risk that "equal justice under law"—the words etched on the façade of the Supreme Court—is more aphorism than truism. By designating some work worthy of Article III attention and some work not, courts communicate about the relative worth and importance of the issues they encounter: The legal problems of the elite are important; the legal problems of incarcerated persons are not. We have generally accepted that status quo because we have presumed the former is more complex and difficult, while presuming the latter is meritless. No one argues that frivolous prisoner litigation merits the same level of judicial time and attention as the average antitrust matter. But structurally, the system presumes the former frivolous. That is how default rules that shunt some litigation to blue-collar decisionmakers operate.

There are some risks for a judicial system that favors more powerful constituencies to the disadvantage of those 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

293. Resnik, *Tiers*, *supra* note 27, at 841.

white-collar judging. That is why, for example, the abuse of bankruptcy court procedures by bankruptcy judges who "compete"[294] 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 secure 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 cannot attract the attention of the high-powered (and elite) Supreme Court bar that increasingly drives the Supreme Court's docket.[295]

Where the constituencies on the losing end of macro-judging are vulnerable litigants, we should be especially sensitive to how judicial power and autonomy operate to advantage powerful groups. Take, for example, the federal appellate system's unilateral triage reforms. The constituents on the losing end of those reforms are mostly pro se litigants, prisoners, criminal defendants, persons without permanent status in the United States, and Social Security disability claimants—all of whom lack political power.[296] Imagine a world where instead of privileging the elite handful of sophisticated disputes, federal appellate judges privileged only federal question cases involving issues of purported government overreach. It is easy to see how sophisticated litigants—the businesses often on the other side of the "v." in complex civil litigation—might 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 reforms discussed above—the rise of MDLs, reliance on Article I judges, and the creation of an appellate triage system—all have imposed uneven burdens on vulnerable litigants to the benefit of more sophisticated court players.

The second ill is harder to make concrete but potentially more pernicious: it is the risk of a toxic judicial attitude of self-importance.

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294. *See supra* note 215 and accompanying text (discussing this phenomenon).

295. *See, e.g.*, Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1903–04 (2016) (footnotes omitted):

> [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.

296. *See supra* Part II.C.

The fear is that the kind of judicial self-importance at the heart of white-collar judging may lead to judicial aggrandizement across a variety of dimensions. White-collar judging stands in some tension with judicial modesty or humility.[297] The inclination towards self-importance may produce bigger, bolder decisions that play to politically polarized base constituencies;[298] it may encourage judges to write decisions that attract attention to secure appointment to higher courts; and it may lead judges with more time on their hands to eschew judicial minimalism and favor maximalist, comprehensive decisions even when narrow rulings will do.[299] The only real constraint on judicial power in the constitutional sphere is self-restraint;[300] 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.[301] Again, these are *risks*, and the causal relationship between white-collar judging and problematic toxicity is unknowable.

Some commentators may argue that the federal bench has grown more constrained over time—and that, for example, the turn toward constitutional originalism reflects a substantial effort to

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297. 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. CIN. L. REV. 23 (2007).

298. *See generally* Schmidt, *supra* note 31 (identifying a more maximalist turn among lower federal courts and advocating for structural reforms to enculturate judicial minimalism). For a discussion on ways to reduce judicial grandstanding at the Supreme Court, see also Sherry, *supra* note 20, at 197.

299. This argument echoes the call for minimalist judicial rulings to preserve Supreme Court legitimacy. *See* 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. Tara Leigh Grove, *Sacrificing Legitimacy in a Hierarchical Judiciary*, 121 COLUM. L. REV. 1555, 1559 (2021).

300. Admittedly, as David Strauss has argued, " '[j]udicial restraint' is not a well-defined term" and it tends to be "an all-purpose term of praise for judges who have reached decisions that the speaker likes." David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL'Y 137, 137 (2011). Here, I do mean restraint in the way that Strauss does–that is, to not let one's "views of policy or morality displace the law." *Id.* And conversely, I do not mean restraint in the Thayerian sense, where Thayer argued that a statute should only be invalidated if its unconstitutionality is "so clear that it is not open to rational question." *See* Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519, 522–25 (2012) ("[A] statute should be invalidated only if its unconstitutionality is 'so clear that it is not open to rational question.' " (quoting James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893))).

301. *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.").

constrain judicial decisionmaking.[302] Put differently, some will view today's federal courts—especially today's Supreme Court—as more modest, and not less so, because of its (arguable)[303] commitment to an originalist methodology as a constraining principle. Although these are issues for debate—including whether originalism *really* constrains or not[304]—they are also beside the point. My concern is not with substantive outcomes; it is with the pathways that create opportunities for judicial preferences to emerge and steer judicial institutions. One might think of the difference this way: The choice to grant certiorari in a particular case is separable from the merits decision in that case. One can see the former as unwise, immodest, and unconstrainted, even where one may be sympathetic to the decision's outcome (under whatever methodological preference one has for judicial decisionmaking).

Even if that is unconvincing to those who celebrate the turn to originalism as a form of judicial constraint, there are other reasons to worry that judicial elitism may have toxic effects. Consider, for example, the Supreme Court's reluctance to embrace (or self-impose) ethics rules. That Court is the only federal court that has unbound itself from statutory federal recusal rules,[305] and it has no binding Code of

302. *See, e.g.*, Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 134 (Apr. 3, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940215 [https://perma.cc/UXY7-2PBM] (arguing that the Constraint Principle in originalism—which includes the idea that "constitutional practice be consistent with the communicative content of the constitutional text"—"serves the rule of law" and reduces the risk of "judicial tyranny"). *But see* William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2215 (2017) ("[M]any modern originalists have tended to deemphasize the importance of constraining judges.").

303. *See, e.g.*, ERIC J. SEGALL, ORIGINALISM AS FAITH 157 (2018) ("[T]he Supreme Court does not decide cases in an originalist fashion (unless we drain that term of any real meaning).").

304. *See, e.g.*, *id.* at 178 ("Originalism does not take politics or ideology out of constitutional decision making but instead gives judges any number of ways to reach whatever results they choose in virtually any constitutional case."); *see also* Baude, *supra* note 302, at 2214–15 (arguing that originalism "may be much better" at allowing the "interpreter to constrain himself or herself" and less good at helping others judge the interpreter); FRANK B. CROSS, THE FAILED PROMISE OF ORIGINALISM 189 (2013) (using empirical methodology to support the conclusion that "reliance on originalist sources is not [ ] particularly constraining").

305. Although the workhorse of federal recusal law, 28 U.S.C. § 455, applies on its face to Supreme Court Justices, the Justices themselves have concluded that it does not bind them. *See* Memorandum, Sup. Ct. of the U.S., Statement of Recusal Policy (Nov. 1, 1993), http://www.eppc.org/docLib/20110106_RecusalPolicy23.pdf [https://perma.cc/6HDM-5MZJ]; *see also* Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 681 (2005) ("[T]he Supreme Court has made it clear that it has no intention of following the strict proscriptions of [28 U.S.C. § 455], and instead believes that the Court's unique nature justifies a less-demanding recusal standard.").

Conduct for its members.[306] The Court's work, some might say, is too important for ordinary ethics rules to apply. The Court has eschewed the kind of restraint that ethical obligations might impose—restraint that might curtail their extracurricular activities. Those extracurricular activities from Justices on all sides of the ideological spectrum risk privileging judicial individuality over the values of collective, institutionalist decisionmaking.

B. The Cures for White-Collar Courts

Macro-judging reforms that unsettle white-collar judging might return the courts to a more passive, minimalist, or public-service orientation—to the extent that one sees such orientation as a virtue. Such reforms could mitigate the value-expressive effects of a two-tiered justice system (that is, the division between white-collar and blue-collar work) by elevating blue-collar work and de-emphasizing white-collar work. Additional work might, likewise, reduce the toxic urge for judicial maximalism. Greater regulation of macro-judging thus may realign judicial priorities to privilege the public-service mission of the judiciary—that is, to embrace blue-collar and white-collar judicial work with equal favor.

Perhaps the easiest place to start is to bring more voices into the rooms where courts engage in macro-judging. Judicial "domination" in the institutional design process not only isolates designers from the system's users[307] but it also risks setting priorities based on judicial preferences that may not align with the public interest. The risk is, in other words, that courts are designed for the white-collar work that judges themselves prefer. Scholars have expressed concern before about judicial domination in the federal rulemaking process, albeit largely for different reasons.[308] Whenever there is just one voice—and not, as

306. The Code of Conduct for United States Judges does not apply to the Supreme Court Justices. ADMIN. OFF. OF THE U.S. CTS., CODE OF CONDUCT FOR UNITED STATES JUDGES 1 (2019), https://www.uscourts.gov/sites/default/files/code_of_conduct_for_united_states_judges_effective_march_12_2019.pdf [https://perma.cc/L2XH-Z69] ("This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.").

307. Stephen C. Yeazell, *Judging Rules, Ruling Judges*, 61 LAW & CONTEMP. PROBS. 229, 231 (1998) ("[J]udicial domination of rulemaking isolates procedural designers, who today are mostly judges, from procedural consumers—lawyers and litigants.").

308. *See* Resnik, *Trial*, *supra* note 11, at 1030 (arguing that "[t]he 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 307.

Resnik has advocated, a "cacophony"[309]—representing the various constituencies within and without the Article III judiciary, there is a risk that judges prioritize their own values over serving broader institutional needs.[310] We risk creating, and replicating, one percent procedure, as Brooke Coleman has argued—that is, procedure designed by, and designed for, the figurative one percent of litigants.[311]

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 elitism in the federal courts.[312] The process for generating a Judicial Conference recommendation to Congress for more judges for a particular court relies entirely on a majority vote of judges from a circuit or district.[313] Because there is 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 judicial

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309. 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 11, at 1031.

310. These structures also raise other important concerns, too, including about how the Chief Justice wields his appointment power in the context of formal rulemaking. *See, e.g.*, STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION 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 Republican 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 rulemaking from those with diverse viewpoints, life experiences, and backgrounds is also problematic. *See, e.g.*, Coleman, *#SoWhiteMale*, *supra* note 171, at 408 (explaining that of the 136 individuals who have served on the Civil Rules Advisory Committee since its inception, 116 are white men, and exploring why that lack of diversity matters).

311. *See* Coleman, *One Percent*, *supra* note 4, at 1008 (footnote omitted):

> While not a literal one percent, the federal civil litigation system has much in common with the political rhetoric of the one percent because it is guided and controlled by such a small minority. In fact, the same judges, lawyers, and parties that participate in this high stakes, complex litigation are regularly relied upon for their expertise as to how litigation can best function. The result is one percent procedure—a system where the metaphorical ninety-nine percent of relatively small cases that are the bread and butter of federal and state dockets are governed by a set of rules made by and for the elite.

312. *See* McAlister, *supra* note 16, at 1198–1200 (discussing historical objections to adding judges to the courts of appeals).

313. *See id.* at 1197 & nn.282–83 (discussing Judicial Conference process for requesting additional authorized judgeships from Congress).

priorities that may not align with broader public-service goals.[314] Put simply, courts might prefer they remain small, even if that means less judicial attention for blue-collar work. 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, its outputs, and its timeliness).[315]

There are other, bolder structural reforms to reduce white-collar judging that may have greater effect. Congress, for example, could require the Supreme Court to take more, and more uninteresting, cases, should it so choose.[316] That is to say that Congress could mandate the Supreme Court pay attention to its blue-collar docket—those bread-and-butter cases percolating in the lower federal courts. Similarly, Congress could create a "lottery" bench of rotating Supreme Court judges, as Daniel Epps and Ganesh Sitaraman have proposed.[317] Such a process would diminish the significance of any one Justice on the Court, reduce the stakes around such nominations, and "decrease the ideological and idiosyncratic nature of Court decisions."[318] It would, Epps and Sitaraman have argued, "push Justices to more minimalistic, narrow, deferential decisions."[319]

Sherry's solution offers another possibility. She suggests that Congress could address the Supreme Court's attitude problem by, in effect, reinvigorating judicial modesty through legislative fiat.[320] If we have a Kardashian Court today, as Sherry evocatively calls it,[321] we might be better-off with something of a blue-collar court tomorrow. 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

314. *See id.* at 1202 ("[T]he Judicial Conference neither publishes these adjusted-filings numbers nor makes public any part of its deliberative process.").

315. *See id.* at 1214–15 (discussing ways to increase transparency and diversify voices in the process for making Judicial Conference recommendations for adding authorized judgeships).

316. *See* Daniel Epps & William Ortman, *The Lottery Docket*, 116 MICH. L. REV. 705, 707 (2018) (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").

317. Epps & Sitaraman, *supra* note 54, at 181 (explaining that a "lottery" Supreme Court "would sit in panels selected at random from a large pool of potential Justices who would also serve as judges on the U.S. courts of appeals").

318. *See id.* at 182–84 (discussing benefits of a "lottery" court).

319. *Id.* at 183.

320. *See* Sherry, *supra* note 20, at 197 (discussing her proposed solution).

321. *See id.* at 181.

agree on the reasoning.[322] 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. 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."[323] 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.[324] What Sherry wants, ultimately, is to make the Supreme Court and the Justices themselves a bit less special.

Thomas Schmidt's recent work on judicial minimalism in the lower federal courts offers more cures. He advocates, among other things, for structural reforms that would de-emphasize the power of individual judges to issue nationwide injunctions and to receive plumb (or, I might say, "white-collar") cases through related case rules and division assignments.[325] He would also increase the size of the federal bench.[326] 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 to (those that they select as sufficiently important).[327] Increasing judicial capacity permits the federal courts to distribute resources in a more egalitarian manner—a move that undermines the present temptations to differentiate white-collar from blue-collar judicial work.

These cures all invite congressional engagement and oversight of macro-judging. That requires at least a few words about separation of powers and an independent judiciary before I conclude. Ultimately, the legislative process can set judicial institutional design priorities without infringing on constitutional judicial power; Congress can also freely add judges to the federal courts without any constitutional concern. As Sherry has explained, short of telling courts "how to decide cases" or "depriv[ing] them of the power to make *final* judgments," Congress has great leeway in regulating judicial process and setting

322. *Id.* at 197.

323. *Id.* at 203.

324. *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.").

325. *See* Schmidt, *supra* note 31, at 906–11 (discussing structural reforms to increase opportunities for judicial decisional minimalism in the lower federal courts).

326. *Id.* at 911–12.

327. *Id.* (observing that "bifurcation" of work at the federal appellate courts, where judges focus on the select few, published decisions "undermines decisional minimalism by inducing judges to widen and deepen the few opinions that are published").

judicial priorities.[328] Congress certainly has the power—both with respect to lower courts, over which it enjoys plenary control,[329] but also as to the Supreme Court[330]—to adopt laws related to "the operations of the judicial department."[331] 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,[332] for example, to the decisional practices of the lower federal courts (like setting limits on how many unpublished decisions may be issued). To the extent judicial policies involve expenditures, Congress can control those choices indirectly through the power of the purse; it can reduce the number of magistrates or reduce the number of appellate staff attorneys, as it sees fit. 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). Other proposals—including the prospect of a "lottery" Supreme Court[333]—may present closer constitutional questions. For now, what matters is that Congress has a great deal of meaningful control over how Article III courts structure themselves and thus over the extent to which these courts continue to operate as white-collar courts.

CONCLUSION

Macro-judging over the last half-century has diversified the federal judicial workforce and increased the autonomy of Article III courts. Those reforms have given birth to white-collar judging—a

328. Sherry, *supra* note 20, at 212.

329. *See* U.S. CONST. art. III, § 1; Sheldon v. Sill, 49 U.S. 441, 448–49 (1850).

330. *See* U.S. CONST. art III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

331. 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); Willian 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).

332. This is a "narrow" issue subject to its own academic debate. *See* Sherry, *supra* note 20, at 210 & n.146 (compiling sources that address this debate).

333. Epps & Sitaraman, *supra* note 54, at 184–86 (acknowledging that the "lottery" Supreme Court proposal is not a "slam dunk" constitutionally speaking, but a statutory regime like the one they describe is at least plausibly constitutional).

preference among the Article III judiciary that judicial work be important, meaningful, and nonroutine. That is perhaps what each of us desire: a job that challenges, is varied, and makes a difference. That is the call of white-collar judging.

But it has costs. Blue-collar cases—those routine cases involving unrepresented litigants and marginalized claimants—lose out in a system that prioritizes big, important, and well-lawyered matters. The costs of such a system are unknowable in some ways: Do more unrepresented litigants lose because their cases receive less attention? Do judges issue more maximalist rulings because they have more time on their hands? Unknowable or unquantifiable, the risk of such harms exists. And there is a growing body of scholarly work calling attention to a judicial culture that privileges the elite few over the many. Opportunities abound to realign judicial priorities to value blue-collar judging as much as white-collar judging—and Congress should take those reforms (including Article III expansion) seriously.