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RETHINKING THE FEDERAL COURTS: WHY NOW IS TIME
FOR CONGRESS TO REVISIT THE NUMBER OF JUDGES THAT SIT
ON FEDERAL APPELLATE PANELS

MITCHELL W. BILD*

I. INTRODUCTION

“Ambition must be made to counteract ambition. . . . In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself.”¹ James Madison’s words reflect the understanding that the separation of powers principle enshrined in the United States Constitution is not mere decoration; it is the deep-rooted foundation in our governmental structure that results from well-understood limitations on the people’s ability to govern.² Accordingly, the Framers erected walls of separation between the three federal branches to compel the branches to control themselves. The exceptions that overcome this structural framework are few and well-defined.

The walls separating the judiciary are particularly impenetrable.³ While the Executive and Legislative Branches exercise political ambition,⁴ the Judicial Branch was intended to exercise wholly independent and non-partisan judgment.⁵ The Framers made it clear that the importance of judi-

* *Juris Doctor*, Chicago-Kent College of Law, May 2020; *Bachelor of Arts*, Michigan State University. I would like to thank Professor Kent Streseman for his support, encouragement, and advice throughout the completion of this note, as well as his instruction on how to become an effective persuasive writer and advocate. I would also like to thank Professor Elizabeth De Armond for teaching me how to write clearly and analytically at the highest level and for her unwavering support and confidence in me as a legal writer. Finally, I would like to thank Professor Hal R. Morris for his advice and suggestions as I moved toward the final version of this note.

1. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

2. See *I.N.S. v. Chadha*, 462 U.S. 919, 946 (1983) (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976)).

3. See *Mistretta v. United States*, 488 U.S. 361, 385, 407 (1989) (identifying a distinction between the nonpartisan Judicial Branch and the other “political branches”); THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution.”).

4. See THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to the executive branch as having “force” and the legislature as having “will”).

5. See *id.* (“The judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment[.] DOUBLE CHECK”); Henry J.

cial independence and impartiality cannot be understated.⁶ In recent years, and especially since Senate Republicans refused to hold judicial confirmation hearings for Judge Merrick Garland, the federal courts have come to the fore of national discourse.⁷ Yet this national discourse is overwhelmingly negative.⁸ Supreme Court justice nominations have elevated into incredibly controversial political events, which bring into the spotlight the ways in which the courts have become analogous to the political branches. Because this flies in the face of the Framers' most basic worries about the Judicial Branch, it deserves our immediate attention.

This Note illuminates how political influence has breached the walls containing the judiciary's enormous power, and why that breach requires an immediate solution. It then proposes that increasing the number of judges that sit on each federal appellate panel from three to five is a practical solution that would restore judicial integrity and independence across the board. It will become clear that, while increasing the number of judges on each appellate panel also increases the caseload of an already overworked federal judiciary (and raises other notable concerns), such a solution is necessary to preserve the Constitution's most sacred principles.

Part II of this Note introduces the history of the federal courts and what led to the adoption of three-judge appellate panels. Part II also compares different judicial systems that already utilize five-judge panels. Part III explains why three-judge federal appellate panels should no longer be the norm. Lastly, Part IV proposes that five-judge federal appellate panels become the norm as a means of restoring and preserving judicial integrity and independence.

Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 653 (1995) (noting that the Constitution secures judicial independence first by requiring life tenure, and second by prohibiting decreases in judges' salaries).

6. See, e.g., U.S. CONST. art. III, § 1 (granting Article III judges life tenure); THE FEDERALIST NO. 78, at 464-65, 468-70 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (explaining the importance of judicial independence).

7. See Ron Elving, *What Happened With Merrick Garland in 2016 and Why It Matters Now*, NPR (June 29, 2018, 5:00 AM), <https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now> [<https://perma.cc/9SBK-J348>] (explaining the rise in national discourse about judicial nominations since 2016).

8. See, e.g., Sean Illing, *The Case for Abolishing the Supreme Court*, VOX (Oct. 12, 2018, 8:10 AM), <https://www.vox.com/2018/10/12/17950896/supreme-court-brett-kavanaugh-constitution> [<https://perma.cc/BD6F-Q5N2>] (discussing the harmful effects of the Supreme Court's political influence); Lawrence Weschler, *How the US Supreme Court Lost Its Legitimacy*, THE NATION (Sept. 17, 2018), <https://www.thenation.com/article/how-the-us-supreme-court-lost-its-legitimacy/> [<https://perma.cc/MXH3-QKC4>].

II. HISTORY OF THE FEDERAL COURTS

A. Basic Structure of the Federal Courts and Three-Judge Appellate Panels

Congress first established the judiciary's framework in the Judiciary Act of 1789.⁹ The original structure of the federal court system, however, was drastically different than modern-day federal courts, with the most notable difference being the absence of intermediate appellate courts altogether.¹⁰ The Judiciary Act of 1789 initially established a three-tiered judicial system comprised of one Supreme Court, three circuit courts, and fifteen district courts.¹¹ As opposed to the current judicial framework—which consists of a trial level, appellate level, and the Supreme Court—the original framework had two trial levels; the district courts handled “issues of relative triviality,” whereas the circuit courts dealt with more notable trial matters as well as appellate matters.¹² Because the circuit courts did not have designated judges, any combination of two Supreme Court justices and a district judge within a circuit heard appeals at each of the circuit courts.¹³ This is the first sign that Congress favored three-judge appellate panels.

After several congressional acts modified the Supreme Court's composition and jurisdiction over federal questions,¹⁴ Congress passed the Judiciary Act of 1891 (the “Evarts Act”) to restructure the federal courts.¹⁵ The Evarts Act marked the inception of the federal intermediate appellate courts,¹⁶ though Congress's vision of the intermediate appellate courts in 1891 focused primarily on “harmoniz[ing] and unify[ing] the national law.”¹⁷

9. 46 DONALD J. SAVERY, FRANK C. CORSO & WILLIAM T. HARRINGTON, *MASS. PRACTICE, FEDERAL CIVIL PRACTICE* § 1:2 (2d ed. 2017).

10. ERIC J. MAGNUSON & DAVID F. HERR, *FEDERAL APPEALS JURISDICTION AND PRACTICE* § 7:1 (2018 ed.).

11. SAVERY, *supra* note 9, § 1:2 (citing Judiciary Act of 1789, 1 Cong. ch. 20, §§ 2-3, 1 Stat. 73, 73-74 (1789) (prior to amendments)).

12. *Id.* (citing Judiciary Act of 1789, §§ 9-11, 1 Stat. at 76-79).

13. *Id.*

14. *Id.*

15. *Id.* (citing Judiciary Act of 1891, 51 Cong. ch. 517, 26 Stat. 826 (1891)).

16. *See* Judiciary Act of 1891, § 2, 26 Stat. at 826 (“[T]here is hereby created in each circuit a circuit court of appeals . . .”).

17. Martha Dragich, *Back to the Drawing Board: Re-Examining Accepted Premises of Regional Circuit Structure*, 12 J. APP. PRAC. & PROCESS 201, 230 (2011) (quoting Paul D. Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 602-03 (1969)); *see* Martha Dragich, *Uniformity, Inferiority, and the Law of the Circuit Doctrine*, 56 LOY. L. REV. 535, 580 (2010) (“[T]he whole point of the Evarts Act [Judiciary Act of 1891] was to restore the Supreme Court's ability to enunciate and develop federal law.”). That

From this point forward, Congress required that three judges hear appeals.¹⁸ Without any recorded legislative history to show the Fifty-First Congress's intention, Alexander Lamar, Jr. uncovered what is apparently the prevailing explanation behind having three appellate decisionmakers in 1891: *tradition*.¹⁹ Even after Congress passed the Evarts Act, "[t]he framework of the courts" remained "fundamentally unchanged since the Judiciary Act of 1789,"²⁰ at least in part because "[t]hree-judge tribunals had decided appeals since the circuit courts were created in 1789."²¹ Even as Congress re-codified the Judiciary Acts into the Judicial Code of 1948, it sought to preserve the "*three-judge tradition*."²²

Yet over the next few decades this "tradition" became more resolute. Whereas for over 150 years Congress blindly adhered to the three-judge tradition, by 1981 it expressed an intention to safeguard institutional legitimacy by imposing more stringent requirements as to the number of the judges that adjudicate federal appeals.²³

B. Moving Toward Codifying Three-Judge Panels

Throughout the twentieth century, Congress refined the three-judge tradition to become more meaningful. Congress first recognized the practical benefits of three-judge courts in 1903, and therefore began its departure from blindly adhering to the three-judge tradition. It determined, for example, that certain antitrust and railroad disputes were of such public importance that they deserved expedited resolution before a panel of at least three circuit judges.²⁴ And in 1906, Congress determined that challenges of orders handed down by the Interstate Commerce Commission deserved similar treatment before three circuit judges.²⁵

Congress enacted its most sweeping legislation favoring three-judge determinations with the Three-Judge Court Act of 1910, though the Act

Congress's vision of the federal appellate courts has changed—in a manner that supports this Note's conclusion—is discussed *infra* Section II.B.

18. See *Back to the Drawing Board*, *supra* note 17, at 231, 231 n.183.

19. Alexander Lamar, Jr., *En Banc Hearings in the Federal Courts of Appeals: Accommodating Institutional Responsibilities (Part I)*, 40 N.Y.U. L. REV. 563, 571, 573, 591 (1965) (noting that three judges had been hearing appeals since 1789 because of "tradition").

20. *Id.* at 568.

21. *Id.* at 571.

22. *Id.* at 573 (emphasis added).

23. See S. REP. NO. 97-275, at 9 (1981).

24. *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L., CRIMINOLOGY, AND POL. SCIENCE 205, 205 n.1 (1971) (citing Act of Feb. 11, 1903, Pub. L. No. 57-82, ch. 544, § 1, 32 Stat. 823, 823 (1903)).

25. *Id.* (citing Pub. L. No. 59-337, ch. 3591, § 5, 34 Stat. 584, 592 (1906)).

established a three-judge *trial* procedure instead of a three-judge *appellate* procedure.²⁶ The Three-Judge Court Act is instructive nonetheless, as it stemmed from the states' strong dislike of deference to only a single district judge with the power to enjoin entire state regulatory schemes in the name federal interstate commerce interests.²⁷ In other words, the states wanted more legitimacy in federal court decisions that dealt with particularly sensitive and important issues, such as interstate commerce disputes. The goal of the Three-Judge Court Act, then, was to "offer[] the states the more thorough deliberation of three federal judges" with respect to issues states thought were vital to their own interests.²⁸ As Senator Overman remarked in support of the Act, "[w]henver one judge stands up in a state and enjoins the [state], the people resent it . . . whereas if three judges declare that a statute is unconstitutional the people would rest easy."²⁹ Decades later, the public still saw the three-judge option "as an important palliative" to concerns about the federal judiciary's power.³⁰

Congress abolished the old circuit courts one year after enacting the Three-Judge Court Act and permitted the judges on those courts to serve on the circuit courts of appeals.³¹ Congress there reiterated that the courts of appeals would hear appeals as a three-judge court. Yet although the 1911 Act added judgeships in the Second, Seventh, and Eight Circuits, it failed to address whether courts of appeals with more than three assigned judges would sit in "divisions" (or panels) of three or if they would sit en banc for every appeal.³² By 1938, however, the concept of separate three-judge divisions implicitly developed with an increase in judgeships because nine of the eleven circuit courts of appeals sat more than three judges.³³ Since the 1911 Act permitted only three judges to hear each case, "divisional hear-

26. Three-Judge Court Act of 1910, Pub. L. No. 61-218, ch. 309, § 17, 36 Stat. 539, 557 (1910) (also codified as an amendment to the judicial code at Pub. L. No. 61-475, ch. 231, § 266, 36 Stat. 1087, 1162-63 (1911)).

27. *Three-Judge Court Act*, *supra* note 24, at 206 (citing *Ex parte Young*, 209 U.S. 123 (1908)).

28. *Id.* (citing the remarks of Senator Brown, 45 Cong. Rec. 7257 (1910), and Senator Overman, 45 Cong. Rec. 7256 (1910)).

29. *Id.* at 206 n.10 (citing 45 Cong. Rec. 7256 (1910)); *see also* *Swift & Co. v. Wickham*, 382 U.S. 111, 127 (1965) ("Requiring the collective judgment of three judges . . . [was] designed to safeguard important state interests."); 17A CHARLES ALAN WRIGHT, ET AL., *FED. PRAC. & PROC. JURIS.* § 4234 (3d ed. 2018) ("It was thought of Congress that there would be less public resentment if enforcement of the state statute were stayed by three judges rather than one . . .").

30. *See Three-Judge Court Act*, *supra* note 24, at 207; *see also* *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (noting that the congressional policy behind three-judge courts was "the saving of state and federal statutes from improvident doom at the hands of a single judge").

31. *Lamar, Jr.*, *supra* note 19, at 570 (citing Judicial Code of 1911, Pub. L. No. 61-475, ch. 231, § 297, 36 Stat. 1087, 1168 (1911)).

32. *Id.*

33. *Id.*

ings had in effect developed within most circuit courts of appeals.”³⁴ Because “[t]hree-judge tribunals had decided appeals since the circuit courts were created in 1789[,] three-judge decisions therefore were acceptable even after three judges had in effect become a division of the court.”³⁵ This was especially true given Congress’s newfound belief that seating more decisionmakers legitimized the outcome of cases.³⁶

Congress amended the Judicial Code again in 1913 to require three-judge district courts when “enjoin[ing] enforcement of an administrative order made by an administrative board or commission acting under a state statute.”³⁷ Congress amended the Code once more in 1925 to require three district judges when deciding on a motion for a permanent injunction, whereas they were previously required for only interlocutory injunctions.³⁸ And in 1937, Congress imposed a three-judge requirement to enjoin Acts of Congress on grounds of unconstitutionality.³⁹ While the Acts between 1910 and 1948 centered on three-judge *trial* court panels, they suggest that Congress chose to increase the number of decisionmakers for each case because doing so demonstrated institutional legitimacy in the face of polarizing and controversial legal problems, whereas the original goal was to simply “harmonize and unify the national law.”⁴⁰

Congress solidified the modern conception of three-judge appellate panels, as opposed to three-judge courts, when it established Title 28 of the United States Code in 1948.⁴¹ This Act permitted each circuit court of appeals to “authorize the hearing and determination of cases and controversies by separate divisions, each consisting of three judges,”⁴² and provided for the courts of appeals’ ability to hear cases en banc,⁴³ among other provisions. Despite extensive legislative actions taken between the Judiciary Act of 1789 and the establishment of Title 28 of the United States Code, there is little, if any, legislative history to explain with any certainty the

34. *Id.* at 570-71.

35. *Id.* at 571.

36. See *Three-Judge Court Act*, *supra* note 24, at 207; see also *MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975) (noting that the congressional policy behind three-judge courts was “the saving of state and federal statutes from improvident doom at the hands of a single judge”).

37. WRIGHT, *supra* note 29, § 4234.

38. *Id.* (citing Judicial Code Amendments, Pub. L. No. 68-415, ch. 229, 43 Stat. 936, 938 (1925)).

39. *Id.* (citing Act of Aug. 24, 1937, Pub. L. No. 75-352, ch. 754, § 3, 50 Stat. 751, 752 (1937)); *Three-Judge Court Act*, *supra* note 24, at 206 n.9 (same).

40. *Back to the Drawing Board*, *supra* note 17, at 230 (quoting Carrington, *supra* note 17, at 602-03).

41. Act of June 25, 1948, Pub. L. No. 80-773, ch. 646, 62 Stat. 869, 869 (1948) (codified as 28 U.S.C. § 1, *et seq.*).

42. *Id.* at 871 (codified as 28 U.S.C. § 46(b)).

43. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 255 (1953).

reasons behind selecting three judges—as opposed to any other number—to hear appeals.⁴⁴

But the Supreme Court provided much needed clarity on this point just five years after Congress created Title 28 in *Western Pacific Railroad Corp. v. Western Pacific Railroad Co.*⁴⁵ There, the Court relied on the Reviser’s Notes to the 1948 codification of Title 28 to explain the provisions requiring three-judge divisions and permitting en banc review.⁴⁶ The Reviser’s Notes suggest that those provisions—28 U.S.C. § 46(b) and (c), respectively—“continue[] the *tradition* of a three-judge appellate court . . . unless rehearing [e]n banc is ordered.”⁴⁷ The Reviser’s Notes shed light on the particular reasons for continuing that tradition by explaining that such a number “makes judges available for other assignments, and permits a rotation of judges in such a manner as to give to each a maximum of time for the preparation of opinions.”⁴⁸ Because this language sought to explain the benefits of permitting en banc review, the Reviser’s Notes simply explained three-judge divisions as necessary to distinguish ordinary appellate hearings from full-court hearings.⁴⁹

Without clearly pointing to a reason for *starting* with three-judge appellate courts in 1891, *Western Pacific Railroad* provides insight as to why Congress has not *changed* the number of judges that hear ordinary appeals.⁵⁰ It recognized that the Judiciary Committee, when recommending codification of three-judge divisions under the new Title 28, took “‘great care . . . to make no changes in the existing law’”⁵¹ because Congress should accord significant deference to “‘the judges whose day to day administration of the various provisions of the Judicial Code gives them a special knowledge of these matters.’”⁵² Put differently, laws about judicial administration should center on the needs of the Judiciary itself and, absent

44. Note that this proposition assumes a distinction between Congress’s desire to increase the number of judges that hear particular cases and Congress’s cognizant determination that three is the proper number of judges to hear appeals. This proposition suggests that the former is clear, but that the latter is inconclusive.

45. See 345 U.S. at 254-58.

46. See *id.* at 255-57 (citing H.R. REP. NO. 80-308, at A6-A7 (1947)).

47. *Id.* at 256 n.13 (emphasis added) (quoting H.R. REP. NO. 80-308, at A7).

48. *Id.* (quoting H.R. REP. NO. 80-308, at A7).

49. See *id.*

50. See *id.* at 256-57; see also Whitney R. Harris, *Survey of the Federal Judicial Code – The 1948 Revision and First Interpretive Decisions*, 3 SMU L. J. 229, 248 (1949) (citing congressional records) (“The purpose of the 1948 revision of the judicial code was not to change, but to clarify and simplify the law.”).

51. *Western Pac. R. Corp.*, 345 U.S. at 257 (quoting S. REP. NO. 80-1559, at 2 (1948)).

52. *Id.* (quoting *Revision of Titles 18 and 28 of the United States Code: Hearings on H.R. 1600 and H.R. 2055 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 80th Cong. 19 (1947) (statement of Hon. Albert B. Maris, United States Circuit Judge for the Third Circuit)).

a reason to deviate from three-judge appellate courts, Congress has deferred to tradition.⁵³ This Note explains *infra* Part III why circumstances today provide plenty of reasons to deviate from this longstanding norm.⁵⁴

C. Existing Five-Judge Panel Systems

Several judicial systems have already adopted five-judge panels that assemble for particular purposes, which provide helpful insight into the benefits and the intentions behind increasing the number of judges that hear appeals. Louisiana, for instance, utilizes five-judge appellate panels in the most expansive manner, while the United States Court of Appeals for the Federal Circuit exemplifies Congress's willingness to increase the number of judges that hear appeals.⁵⁵

1. Louisiana's Appellate Court System

The Louisiana Constitution requires review before a five-judge appellate panel where "a judgment of a district court . . . is to be modified or reversed and one [appellate] judge dissents."⁵⁶ In 1973, Louisiana held a constitutional convention where it emphasized the need for such a requirement.⁵⁷ According to the convention's delegates, the trial judge in practice "count[s] as a vote during the initial three-judge court of appeal panel."⁵⁸ In actuality, then, a two-to-one decision to reverse the trial judge operates as a tie when including the district judge's decision as a dissent.⁵⁹ The reasoning was further explained at the convention by the provision's sponsor:

53. *See id.*

54. It is worthwhile to mention that the three subsequent amendments to the three-judge panel statute (and their respective legislative records) did nothing substantive with the statute as it relates to this Section. The 1978 amendment merely renamed appellate "divisions" as "panels." Act of Oct. 20, 1978, P.L. 95-486, § 5, 92 Stat. 1629 (1978) (amending 28 U.S.C. § 46(c)). The 1996 amendment added a clause permitting senior judges to sit on en banc panels in certain circumstances. Act of Aug. 6, 1996, P.L. 104-175, § 1, 110 Stat. 1556 (1996) (amending 28 U.S.C. § 46(c)). The 1982 amendment, however, is discussed *infra* Section II.C.2.

55. This Note addresses only two of the expanded panel systems in the United States. Louisiana and the Federal Circuit are not, by any means, the only judicial institutions that substantiate this Note's ultimate conclusion. *See, e.g.*, Ill. S. Ct. R. 22(i) (eff. July 1, 2017) (requiring a five-judge appellate panel to hear Workers' Compensation Commission appeals); Josephine Linker Hart & Guilford M. Dudley, *The Unpublished Rules of the Arkansas Court of Appeals: The Internal Rules and Procedures of the Arkansas Court of Appeals*, 33 U. ARK. LITTLE ROCK L. REV. 109, 109, 114, 116-17 (2011) (discussing the use of six- and nine-judge appellate panels).

56. LA. CONST. art. V, § 8(B); LA. CT. APP. UNIF. R. 1-5.

57. *See Parfait v. Transocean Offshore, Inc.*, 980 So.2d 634, 642 (La. 2008) (Victory, J., dissenting) (discussing legislative history of the five-judge panel provision Louisiana's Constitutional Convention of 1973).

58. *Id.*

59. *See id.*

Since the courts of appeal sit in rotating panels of three, never the same three judges at the same time, we are getting out of the same court of appeal sometimes different results in almost identical cases. That is compounded when you think of the fourth circuit having nine judges and they sit in panels of three. . . . [This provision] allows the verdict, the judgment of that district judge to be entitled to a little more weight than it's got now. As [of] right now you can simply disagree with the district judge, two reversing, and that is the end of it. . . .

. . . .

. . . [N]o two judges on an appellate court who read a cold record should be able to take what a district court has done after hearing a case for three days and subvert it by simply outvoting another judge. . . .

. . . [I]n the interest of justice, it is not too much to ask an appellate court to have two more judges come in and read a record where one judge vehemently dissents and says you have done the wrong thing by reversing the district judge. . . . [W]hen two judges can take a district court and reverse it simply almost on a whim, that is not justice. . . .

. . . .

. . . [T]he more people you have looking at the record the better chance that justice will prevail. . . . If we are going to review then let's have as many possible [judges] which doesn't impede the efficient operation of the court look at it. . . .⁶⁰

Article V, § 8(B) of the Louisiana Constitution not only codified a means of improving institutional legitimacy consistent with this Note's recommendations, but it is also consistent with the recent trends of Congress as described *supra* Section II.B.

What is more, Louisiana's five-judge appellate panels are a product not of mere legislative discretion, but of constitutional mandate.⁶¹ The Louisiana Supreme Court has noted that this procedure is an immensely far-reaching requirement that has no articulable limitations other than the necessary predicate circumstances.⁶² In *Bank of New Orleans and Trust Company v. Seavey*, for example, Louisiana's High Court recognized that the five-judge appellate system is necessary in all circumstances involving a two-to-one appellate decision to reverse or modify a decision.⁶³ Assuming that this threshold prerequisite is satisfied, it is immaterial whether the appeal was interlocutory or from a final judgment, or whether the appeal involves legal or factual issues, or whether the appellate court exercises

60. Perkins v. Entergy Corp., 782 So.2d 606, 621 n.3 (La. 2001) (Knoll J., dissenting) (quoting TRANSCRIPTS FROM THE LOUISIANA CONSTITUTIONAL CONVENTION OF 1973 VOL. VI, at 756 (1973)).

61. See LA. CONST. art. V, § 8(B); see also State v. Allen, 84 So.3d 1288, 1288-89 (La. 2012) (emphasizing that there is no excuse for failing to adhere to the five-judge mandate in the state constitution).

62. See Bank of New Orleans & Trust Co. v. Seavey, 383 So.2d 354, 356-57 (La. 1980).

63. See *id.*

supervisory or appellate jurisdiction, for the constitution's language "is broad and bears no limitations."⁶⁴

That Louisiana made such a permanent and wide-ranging procedural change emphasizes not only the feasibility of this type of system, but also the critical importance of making such a radical change.

2. The Federal Circuit's Five-Judge Panel System

Congress, too, has imposed a system of five-judge appellate panels. The United States Court of Appeals for the Federal Circuit has different panel rules than the rest of the circuit courts of appeals.⁶⁵ Section 46(c) of the Judicial Code says that the Federal Circuit "may sit in panels of more than three judges if its rules so provide," but that the rest of the appellate courts may not utilize panels of more than three judges except with respect to en banc proceedings.⁶⁶

Congressional proceedings leading up to the enactment of the Federal Courts Improvement Act of 1982⁶⁷ suggest that Congress has shifted its attitude regarding the number of judges that should serve on each appellate panel. Specifically, they provide additional support for the proposition that the federal appellate courts need *at least* three judges per panel.⁶⁸ The Senate Report for this 1982 enactment explains that the Federal Circuit could seat more than three judges on each panel because the nature of cases it was created to hear are of particular difficulty or importance.⁶⁹ The Report declared that, because "to persevere both the appearance and the reality of justice . . . the disposition of an appeal should be the collective product of at least three minds."⁷⁰ The Report also criticized existing law for permitting federal appellate panels of fewer than three judges in certain circumstances,⁷¹ concluding that "such a practice should not become institutionalized" with respect to the Federal Circuit.⁷²

The Senate Report even intimated that interests serving the Federal Circuit regarding the size of each panel may also extend to the rest of the

64. *Id.*

65. *See* 28 U.S.C.A. § 46(c) (Westlaw through Pub. L. No. 116-5).

66. *Id.*

67. Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified in 28 U.S.C. §§ 176-77, 462-63, 714-15, 1295, 1631, 2077, and 2522).

68. *See* S. REP. NO. 97-275, at 9 (1981).

69. *Id.*

70. *Id.*

71. *See* 28 U.S.C.A. § 46(a) (Westlaw through Pub. L. No. 116-56).

72. S. REP. NO. 97-275, at 9.

federal circuits.⁷³ It explained that, under § 46, “some federal appellate courts have used panels of two judges for motions and for dispositions” in relatively insubstantial cases.⁷⁴ But “[b]ecause of apprehensions that decisions at the appellate level by fewer than three judges carry the risk of being less sound or less balanced, there is a widespread belief that every decisions [sic] of an appeal should be the collective product of *at least three minds*.”⁷⁵

The Federal Circuit did not ignore the option to expand appellate panels either; it sat expanded panels of five, seven, and even nine judges several times since its creation.⁷⁶ In 1997, pursuant to § 46(c), the Federal Circuit promulgated its own rule providing for the case-by-case determination of the number of judges that serve on each appellate panel.⁷⁷ Admittedly, however, the practice of seating panels of more than three judges has waned.⁷⁸ Significantly, though, this practice has waned only because the problems that necessitated expanded panels in the first place have largely vanished. Namely, that the Federal Circuit’s judges have built such a respectable reputation among legal scholars and practitioners negates any concerns over institutional legitimacy.⁷⁹

Part III next discusses why the reasons supporting five-judge appellate panels in Louisiana and in the Federal Circuit Court of Appeals apply to the entirety of the federal appellate system.

III. WHY THE THREE-JUDGE PANEL SYSTEM IS NO LONGER THE BEST PROCEDURE IN THE FEDERAL APPELLATE COURTS

This Note undeniably faces a steep uphill battle. Not only has the three-judge system remained traditional practice for well over 200 years, scholars and practitioners have never seriously questioned it on a broad scale.⁸⁰ But frightening trends in the federal judiciary today oblige us to take a closer look at whether the justifications for keeping the three-judge tradition remain valid. Section III.A revives the notion first suggested by

73. *Id.* at 9.

74. *Id.*

75. *Id.*

76. Elizabeth I. Winston, *Differentiating the Federal Circuit*, 76 MO. L. REV. 813, 822 (2011).

77. U.S. CT. APP. FED. CIR. R. 47.2(a).

78. Winston, *supra* note 76, at 823.

79. *See id.* at 824 (“As the Federal Circuit has matured; gaining experience, prominence, and acceptance by the bar; these concerns have diminished.”).

80. Research has uncovered only one scholarly article that proposes expanding federal appeals court panels to five judges. *See generally* Sidney A. Shapiro & Richard Murphy, *Politicized Judicial Review in Administrative Law: Three Improbable Responses*, 19 GEO. MASON L. REV. 319, 355-61 (2012). This article is discussed more thoroughly *infra* Part III.

Alexander Hamilton that the Judicial Branch can, under the right circumstances, be the most dangerous branch of government. Section III.B then advocates that we should focus our attention on the federal appellate courts, not the Supreme Court, when considering solutions to the problem posed in Section III.A.

A. The Federal Judiciary Is the Most Dangerous Branch of Government

1. The Original Understanding of Article III Suggests That the Judiciary Ought to Be Feared.

The Framers, via the Constitution, set up robust structural protections to free judges from external influences.⁸¹ Concurring in *Perez v. Mortgage Bankers Association*, Supreme Court Justice Clarence Thomas discussed at length the judiciary's role as a check on the political branches.⁸² He explained that the Framers worried the courts would "be induced to embark too far in the political views" of the other branches,⁸³ and would thus become less of an impartial "check" on the other branches.⁸⁴ He provided this insight to undermine courts' longstanding deference to executive agency determinations.⁸⁵

The most basic, but important, assumption underlying the Framers' creation of the judiciary was that "Article III judges would exercise independent judgment."⁸⁶ Yet this assumption was simply the Federalists' justification for opposing the Anti-Federalists' concerns about the inherent dangers of the judiciary's interpretive power.⁸⁷ The Anti-Federalists feared that "judges 'w[ould] not confine themselves to any fixed or established rules, but w[ould] determine, according to what appears to them, the reason and spirit of the constitution.'"⁸⁸ The Federalist response, however, "assur[ed] the public that judges would be guided 'by strict rules and prece-

81. *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1215-22 (2015) (Thomas, J., concurring) (discussing protections to ensure that the judiciary does not get too powerful).

82. *Id.* at 1217.

83. *Id.* at 1218.

84. *See id.* at 1217 ("[Deference to agency interpretations] represents a transfer of judicial power to the Executive Branch, and it amounts to an erosion of the judicial obligation to serve as a 'check' on the political branches.").

85. *See id.* at 1213.

86. *See id.* at 1217.

87. *See id.* (explaining the back-and-forth debate between the Anti-Federalists and the Federalists).

88. *Id.* (quoting 2 Essays of Brutus (Jan. 31, 1788), *THE COMPLETE ANTI-FEDERALIST*, at 420 (H. Storing ed. 1981)).

dents which serve to define and point out their duty in every particular case that comes before them.”⁸⁹ The debate between Federalists and Anti-Federalists, then, was about how best to tame the “dangers inherent in the [interpretive] power” that “made the Judiciary the most dangerous branch.”⁹⁰

The Federalists acknowledged, however, that the concept of judicial independence did not refer only to independence from “external threats,” such as political influence, but also “from the ‘internal threat’ of ‘human will.’”⁹¹ They recognized that truly “[i]ndependent judgment required judges to decide cases in accordance with the law of the land, not in accordance with pressures placed upon them.”⁹² The Framers therefore wrote into the Constitution impenetrable walls—or what were at least *believed* to be impenetrable—around Article III judges to insulate them from any external political influences, such as lifetime tenure and fixed compensation.⁹³ And the safeguards to protect against internal influences—force of will, not of judgment—included the rules of interpretation and precedent that have always applied to judicial bodies.⁹⁴ Upon the Constitution’s ratification, the judiciary became a branch insulated from internal and external political influences⁹⁵ and tamed to fulfill its constitutional duty and nothing more.⁹⁶

This framework begs the question: What becomes of the Judiciary if internal or external political influences breach the walls erected by the Framers? The answer is that the Judicial Branch of the federal government would quickly transform from the weakest branch to the most dangerous branch. To be sure, Alexander Hamilton warned of this in FEDERALIST PAPER 78.⁹⁷ There, Hamilton explained the Federalists’ response to Anti-

89. *Id.* (quoting THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

90. *Id.* (citing Letters from the Federal Farmer XV (Jan. 18, 1788), in 2 THE COMPLETE ANTI-FEDERALIST 315-16 (H. Storing ed., 1981)).

91. *Id.* at 1217-18 (citing THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

92. *Id.* at 1218.

93. *See id.*

94. *See id.* at 1217 (citing, *inter alia*, 1 W. Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, at 59-61 (1765)); *see also* Jonathan T. Molot, *Principled Minimalism: Restriking the Balance Between Judicial Minimalism and Neutral Principles*, 90 VA. L. REV. 1753, 1764 (2004) (explaining that the most important internal constraints on judicial power were stare decisis and canons of construction).

95. *See Perez*, 135 S. Ct. at 1219 (“[T]he Judiciary[is] insulated from both internal and external sources of bias . . .”).

96. *See id.* at 1218 (citing THE FEDERALIST NO. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

97. *See* FEDERALIST NO. 78, at 464-65 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Federalist concerns over the broad interpretive power given to the judiciary.⁹⁸ He added that the Federalists' response "proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power," and that "liberty of the people can never be endangered from" it.⁹⁹ But he qualified these bold assertions by pointing out that they remain true only "so long as the judiciary remains truly distinct from both the legislature and the executive."¹⁰⁰ Hamilton's warning continued by explaining the consequences of breaching the judiciary's insulation:

[T]here is no liberty if the power of judging be not separated from the legislative and executive powers. And it proves, in the last place, that as *liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments*; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality [separation of the judiciary from the other branches] may therefore be justly regarded as *an indispensable ingredient in its constitution*, and, in a great measure, as *the citadel of the public justice and the public security*.¹⁰¹

Hamilton concluded that "[t]he complete independence of the courts of justice is peculiarly essential in a limited Constitution."¹⁰² Given the grave unease in Hamilton's warning, it follows that the Judicial Branch of the United States Government was, still is, and must continue to be but a tamed beast.¹⁰³

2. The Supreme Court's Shift in Stare Decisis Analysis Suggests That Political Influence Has Breached the Barriers Separating the Judicial Branch.

The first major indication that Hamilton's fears became reality arose in the 1980s and 1990s. Before 1984, the Supreme Court gave little weight to stare decisis in constitutional cases.¹⁰⁴ As Justice Brandeis famously put

98. See generally *id.*

99. *Id.* at 464 (citing 1 MONTESQUIEU, SPIRIT OF THE LAWS 181 (1748)).

100. *Id.* at 464-65.

101. *Id.* at 465 (emphasis added) (internal citation and quotation marks omitted).

102. *Id.*

103. See, e.g., *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1216-20 (2015) (Thomas, J., concurring); *Stern v. Marshall*, 564 U.S. 462, 483-84 (2011) (quoting FEDERALIST NO. 78 (Alexander Hamilton)) (explaining the necessity for judicial independence).

104. See *Smith v. Allwright*, 321 U.S. 649, 665 (1944) ("[W]hen convinced of former error, this Court has never felt constrained to follow precedent.").

it, whether to affirm prior decisions was “entirely within the discretion of the court.”¹⁰⁵ But the Supreme Court has, over the last few decades, gradually adjusted its stare decisis jurisprudence to block politics from influencing that discretion (to the extent possible).¹⁰⁶ In so doing, the Court has professed the necessity for a more rigid adherence to stare decisis.¹⁰⁷ It predicted that a decision “to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court’s legitimacy beyond any serious question” because it would appear that the Court is susceptible to political pressures.¹⁰⁸

Threats to the Court’s institutional legitimacy in the 1980s and 1990s—threats similar to those the Court faces today—caused members of the Court to fear just as Alexander Hamilton had. Following five successful Supreme Court nominations by Presidents Reagan and Bush, many feared “that the Court would be perceived as political in overruling precedents,” especially “liberal precedents.”¹⁰⁹ This is primarily because discretionary stare decisis analysis—which relied on whether individual justices believed precedents were rightly decided—begged justices to apply their subjective preferences on what the law *should* be.¹¹⁰ Yet this type of analysis runs contrary to the well-settled notion that “judicial review rests on the ability of Justices to interpret the written constitution definitively, ‘to say what the law *is*,’”¹¹¹ not what the law should be. To avoid this problem, the Court adopted a “special justifications” approach, which gives significant weight to precedent absent a “special justification” to overrule.¹¹²

The Supreme Court’s shifted stare decisis jurisprudence, though not immediately on point, instructs that the dangers enunciated by Alexander

105. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting).

106. *Compare Burnet*, 285 U.S. at 405-09 (Brandeis, J., dissenting), with *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 798 (2014) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)) (“[A]ny departure from [precedent] demands special justification.”); see also *Williams-Yulee v. Fla. Bar.*, 135 S. Ct. 1656, 1666 (2015) (quoting THE FEDERALIST NO. 78, at 465 (A. Hamilton) (C. Rossiter ed., 1961)); *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (explaining that the courts’ limited role—judgment, not force of will—plays a large role in the courts’ institutional authority and legitimacy); Emery G. Lee, *Overruling Rhetoric: The Court’s New Approach to Stare Decisis in Constitutional Cases*, 33 U. TOL. L. REV. 581, 586-87 (2002) (discussing how polarizing ideological differences in the courts “undermine the legitimacy judicial review” and, thus, influenced the Court’s decision to adopt a more rigid test to reconsider constitutional precedents).

107. See *Planned Parenthood v. Casey*, 505 U.S. 833, 867 (1992).

108. *Id.* (citing *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955) (“It should go without saying that the vitality of the constitutional principles . . . cannot be allowed to yield simply because of disagreement with them.”)).

109. Lee, *supra* note 106, at 587.

110. *Id.* at 586.

111. *Id.* (emphasis added).

112. *Id.* at 587.

Hamilton in the eighteenth century are not merely theoretical; they are real and worthy of our immediate attention.

3. Federal Judges Are Now Tools to Accomplish Political Agendas.

Few would doubt that federal judicial nominations, and the hearings resulting therefrom, have become major political events. One need only make a simple Google search for the Merrick Garland, Neil Gorsuch, and Brett Kavanaugh nominations to learn the nature of their immensely contentious proceedings (or lack thereof). The public outcry about the individuals selected to serve on the Supreme Court does, however, provide clear insight into the role judges now play. They are no longer seen as passive advocates of the law, for “the idea of ‘Obama judges and Trump judges’ is entrenched in the public consciousness.”¹¹³ Rhetoric by those on both sides of the political aisle confirms this terrifying attitude toward what is supposed to be the only impartial and nonpartisan branch of government.¹¹⁴

Federal courts’ favorable attitude toward functionalist jurisprudential philosophy¹¹⁵ certainly does not help tame the judicial beast. The Seventh Circuit’s en banc decision in *Hively v. Ivy Tech Community College of Indiana*¹¹⁶ provides valuable insight in this regard. Hively, an adjunct professor at Ivy Tech Community College, sued Ivy Tech pursuant to Title VII of the Civil Rights Act of 1964 for denying her full-time employment and promotion opportunities because of her sexual orientation.¹¹⁷ But Title VII did not expressly prohibit employers from discriminating on the basis of

113. Sandeep Gopalan, *Trump v. Roberts Amplifies Public’s Loss of Trust in Institutions*, THE HILL (Nov. 26, 2018, 8:00 AM), <https://thehill.com/opinion/judiciary/418155-trump-v-roberts-amplifies-publics-loss-of-trust-in-institutions> [https://perma.cc/7GVE-5ZPW].

114. See, e.g., @realDonaldTrump, TWITTER (Nov. 21, 2018, 2:51 PM), <https://twitter.com/realDonaldTrump> [https://perma.cc/U3YW-4GLX] (criticizing “Obama judges”); Andrew Cohen, *Trump vs. John Roberts*, BRENNAN CENTER FOR JUSTICE (Nov. 26, 2018), <https://www.brennancenter.org/blog/trump-vs-john-roberts> [https://perma.cc/KL7J-P4TR] (asserting that Chief Justice Roberts “helped give conservatives access to their dark money in political campaigns via *Citizens United*” and “helped them suppress Democratic votes by killing the preclearance provision of the Voting Rights Act”).

115. “In contrast to the nonpolitical, immanent nature of formalism,” functionalism—also called pragmatism—is a more politicized form of jurisprudence, viewing the law instead “as an instrument for forwarding some independently desirable purpose given to it from the outside.” Elizabeth Bahr & Josh Blackman, *Youngstown’s Fourth Tier: Is There a Zone of Insight Beyond the Zone of Twilight?*, 40 U. MEM. L. REV. 541, 549 (2010) (quoting Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 955 (1988)). Functionalist judges, when it comes to respecting precedent, “want[] to come up with the best decision having in mind present a future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case.” *Id.* (quoting Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1, 5 (1996)).

116. 853 F.3d 339 (7th Cir. 2017) (en banc).

117. *Id.* at 341.

sexual orientation.¹¹⁸ Hearing the case en banc, the Seventh Circuit reversed the district court and the Seventh Circuit panel rulings to hold that sexual orientation discrimination is necessarily sex discrimination contemplated by Title VII.¹¹⁹

As Judge Posner admitted in his concurring opinion in *Hively*, the majority's conclusion is the product of "imposing" a modern will upon Title VII¹²⁰ because the statute simply required an update.¹²¹ Instead of interpreting Title VII based on what Congress actually enacted, the eight judges who joined the court's judgment apparently believed that it need not wait for Congress to impose the will of the people on the statute. Recognizing the "robust debate" and "striking cultural change" associated with recognition of homosexuals' rights,¹²² the three dissenters believed that the power to determine whether sexual orientation ought to be prohibited by Title VII laid with Congress, not with the courts, because "sexual-orientation discrimination is broadly recognized as an independent category of discrimination."¹²³ Judge Sykes' dissent acknowledges that sexual orientation discrimination is unjust,¹²⁴ but clarifies that "[o]ur constitutional structure requires [courts] to respect the difference" between areas of law that permit judge-made law and those that defer to the people's elected representatives.¹²⁵

Of course, *Hively*'s holding itself is immaterial here. How the judges came to their respective conclusions, on the other hand, highlights how functionalist judicial decisionmaking tends to unilaterally settle controversial political debates, thus raising separation of powers concerns. To be clear, those on both sides of the political aisle, and their corresponding judicial philosophies, have this problem. The risk that judges will impose their will when deciding cases, as opposed to mere judgment, leads candidates for political office to vow to nominate and support only those judges likely to rule in favor of politically desirable results. While federal judicial nominations and confirmations are necessarily political at some basic level,

118. See 42 U.S.C.A. § 2000e-2(a)(1) (Westlaw through Pub. L. No. 116-56) (as initially amended in 1991); *Hively*, 853 F.3d at 343.

119. See *Hively*, 853 F.3d at 351-52 (holding that "a person who alleges that she experienced employment discrimination on the basis of her sexual orientation has put forth a case of sex discrimination for Title VII purposes").

120. *Id.* at 357 (Posner, J., concurring).

121. *Id.* at 353.

122. *Id.* at 361 (Sykes, J., dissenting).

123. *Id.* at 364-65.

124. *Id.* at 372.

125. *Id.* at 373.

judicial confirmation proceedings have only recently become major nationwide political spectacles.¹²⁶

Take Judge Merrick Garland's Supreme Court nomination as an example. Judge Garland's nomination, and the lack of subsequent confirmation hearings, "undoubtedly will go down as not only a transparently political act on the part of the majority but also as a precedent upholding a majority's entitlement to paralyze the Supreme Court selection process until or unless a president to its liking comes into office."¹²⁷ And after President Trump and Senate Republicans successfully placed then-Judge Neil Gorsuch on the Supreme Court instead of Judge Garland, they set a precedent that effectively permits the majority party to "reserve seats [on the Supreme Court] for the nominees of [its] political party."¹²⁸ Notably, one of the most outspoken critics of Donald Trump's presidential campaign, Senator Lindsey Graham, did not shy away from emphasizing his political gain resulting from now-Justice Brett Kavanaugh's confirmation to the Supreme Court: "When the GOP maintains control of the Senate, the conservative judicial train is going to keep running!"¹²⁹

This attitude proves that politicians seek to use lifetime judicial tenure to impose their political platforms. To bring it full circle, the functionalist tendency exhibited in *Hively* fuels this attitude by assuring that sitting federal judges (or potential future judges) will unilaterally impose these political platforms in their respective judicial roles.

These hyper-partisan tendencies in the judicial confirmation process have escalated into a situation where we care little about what makes nominees qualified; we care instead about how nominees may be *disqualified*.¹³⁰ This is the attitude that led to the hotly-contested Brett Kavanaugh nomination in 2018. And it is the attitude that Chief Justice John Roberts

126. See Michael J. Gerhardt & Richard W. Painter, *Majority Rule and the Future of Judicial Selection*, 2017 WIS. L. REV. 263, 275 (2017) ("While politics has always been a significant element in the confirmation process for judges, the process has become increasingly infused with partisan politics, and public confidence in government—particularly in the Congress—falters and erodes.").

127. *Id.* at 272.

128. *Id.*

129. Megan Keller, *Graham Lauds GOP Senate Results: 'Conservative Judicial Train Is Going to Keep Running!'*, THE HILL (Nov. 6, 2018) (internal quotation marks omitted), <https://thehill.com/homenews/senate/415396-graham-lauds-gop-senate-results-conservative-judicial-train-is-going-to-keep> [<https://perma.cc/Y8EZ-QDUV>].

130. Aimee Brown, *Judicial Confirmation Through the Lens of Constitutional Interpretive Theory*, 80 ALB. L. REV. 807, 815-16 (2017) (citing STEPHEN L. CARTER, *THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS* 159, 206 (1994)) (discussing and criticizing "the search to disqualify"). As a point of clarification, Aimee Brown's discussion about "the search to disqualify" uses examples from Justice Clarence Thomas's contentious confirmation hearings in 1991. See *id.* This Note argues that this "search to disqualify" approach has only worsened since 2016.

has attempted to halt in its tracks. The Chief Justice has tried to paint the Roberts Court as one that reins in the judicial beast, whereas the two political branches seem to enable it. Most recently, the Chief Justice publicly declared that “[p]eople need to know that [judges are] not doing politics,” but that they are “doing something different, that [they’re] applying the law.”¹³¹ As one journalist noted, Chief Justice Roberts “has made little secret of his desire to protect the federal judiciary’s institutional reputation amid increasingly partisan confirmation battles.”¹³²

More concretely, the Chief Justice has deviated from the unwritten rules of judicial conduct in the name of institutional integrity: he confronted the President of the United States.¹³³ In response to President Trump’s criticism of an “Obama judge” on the Ninth Circuit Court of Appeals, the Chief Justice remarked that “[w]e do not have Obama judges or Trump judges, Bush judges or Clinton judges. What we have is an extraordinary group of dedicated judges doing their level best to do equal right to those appearing before them. That independent judiciary is something we should all be thankful for.”¹³⁴ Given that even a Supreme Court justice’s *passive* expressions of disagreement with the President are considered “unbecomingly political for a Supreme Court justice,”¹³⁵ the Chief Justice’s *direct* response to President Trump is undoubtedly a momentous affair.¹³⁶

Chief Justice Roberts’ reproach of President Trump for the sake of “the independent judiciary” only confirms the suspicion that the walls of separation surrounding the Judicial Branch need immediate repairs (and that he might even entertain this Note’s proposal). The Chief Justice has also decided cases in recent years with an eye toward restoring judicial independence and confidence in the judiciary’s ability to fulfill its constitutional duties with the utmost impartiality. In 2012, for example, Chief Justice Roberts announced the judgment of the court in *National Federation of Independent Business v. Sebelius*, which upheld the highly controversial

131. Greg Stohr, *Hold the Revolution: Roberts Keeps Joining High Court Liberals*, BLOOMBERG (Mar. 1, 2019, 3:00 AM), <https://www.bloomberg.com/news/articles/2019-03-01/hold-the-revolution-roberts-keeps-joining-high-court-liberals> [<https://perma.cc/FHN8-5L3J>].

132. *Id.*

133. See Joan Biskupic, *Why Chief Justice John Roberts Spoke Out*, CNN (Nov. 22, 2018, 3:26 PM), <https://www.cnn.com/2018/11/21/politics/trump-roberts-judges-judiciary/index.html> [<https://perma.cc/8ZB2-T5U9>].

134. *Id.* (internal quotation marks omitted).

135. Scott Stossel, *Trump Versus the Judiciary*, THE ATLANTIC (Jan. 13, 2019), <https://www.theatlantic.com/politics/archive/2019/01/chief-justice-roberts-corrects-president-trump/579997/> [<https://perma.cc/XJJ9-CMFC>] (noting Justice Samuel Alito’s outward reaction to President Obama’s criticism of *Citizens United* in his 2010 State of the Union address).

136. See *id.* (calling Roberts’ response as “an unprecedented reproach by a sitting chief justice of a sitting president”).

Affordable Care Act.¹³⁷ Siding with the Court’s “liberal wing,” the Chief Justice advocated that the Court not get involved in political decisionmaking because doing so would be outside the bounds of the judiciary’s carefully delineated constitutional role.¹³⁸ Reasoning that the Framers intended clear distinctions between the branches of government, he concluded that it is Congress—not the judiciary—that holds the power to judge the “wisdom of the Affordable Care Act.”¹³⁹ As perhaps his most popular vote contrary to his fellow conservative justices, the Chief Justice in *Sebelius* sought to stop political influence from breaching the walls of separation between the judiciary and Congress.

Especially after *Sebelius*, Chief Justice Roberts has continued to champion judicial independence and institutional integrity in the face of mounting threats of internal and external political influence. For what it is worth, the Chief Justice “provided the fifth vote for a liberal outcome in a case argued before the [Supreme C]ourt only four times” in his first *twelve years* on the Court.¹⁴⁰ Yet he has already provided this swing vote three times in the year and a half between October 2017 until March 2019.¹⁴¹ Given the hot judicial confirmation processes that have taken place since President Obama nominated Judge Garland to the Supreme Court, the Chief Justice’s attitude is no coincidence; it is a deliberate effort to act on the fears first theorized by Alexander Hamilton.¹⁴²

B. Problems of Institutional Legitimacy Are Better Addressed at the Appellate Court Level, Not at the Supreme Court.

1. The Courts of Appeals Are the Court of Last Resort for the Vast Majority of Litigants.

The Supreme Court of the United States is, for the most part, a court of discretionary review.¹⁴³ But it was not always able to choose the cases

137. 567 U.S. 519, 528-29 (2012).

138. *See id.* at 588.

139. *See id.*

140. Stohr, *supra* note 131.

141. *Id.*

142. *See also id.* (quoting Cato Institute lawyer, Ilya Shapiro, arguing that Roberts’ behavior does not “mean[] he’s changing his mind on the substance of big important issues on which he’s written opinions. . . . But at the margin he’s trying to make fewer partisan splits”).

143. *See* Arthur D. Hellman, *Error Correction, Lawmaking, and the Supreme Court’s Exercise of Discretionary Review*, 44 U. PITT. L. REV. 795, 799 (1983) (explaining the 1978 legislation that granted the Supreme Court “almost total discretion to select the cases it will hear and decide”); *see generally* Caseloads: *Supreme Court of the United States, Appeals and Petitions for Certiorari, 1970-2017*, FED. JUDICIAL CTR., <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-appeals-and-petitions-certiorari-1970-2017> [<https://perma.cc/G5PK-TXGB>] (last visited Sept. 12, 2019) (compiling

that comprise its docket; before 1891, the Court's primary efforts were that of reviewing cases for error¹⁴⁴ according to statutes that provided for compulsory Supreme Court review.¹⁴⁵ This changed, however, upon creation of the intermediate appellate courts.¹⁴⁶

As one commentator points out, the Evarts Act of 1891, which created the modern intermediate appellate courts, "marked the first stage in the attrition of the error-correcting function of the Supreme Court."¹⁴⁷ The first actual change in the Supreme Court's docket, however, came with the Judiciary Act of 1925, which "rested explicitly on a theory of the Supreme Court's role that excluded the mere correction of error."¹⁴⁸ The Chief Justice at the time acknowledged that the Supreme Court's job was not simply to resolve disputes, but to consider only those "cases whose decision involves principles, the application of which are [sic] of wide public or governmental interest."¹⁴⁹ The 1925 Act codified this mode of thinking by granting rights of appeal that seek to correct errors in the circuit courts of appeals¹⁵⁰ and by "limiting the classes of cases to which review was available as of right" to the Supreme Court.¹⁵¹ Appeals therefore became an insignificant portion of the Supreme Court's docket.¹⁵²

Since 1925, then, the Supreme Court's focus on discretionary review has fixated on answering "questions of constitutionality and like problems of essentially national importance."¹⁵³ Nevertheless the Supreme Court remained unnecessarily obligated to hear appeals in many situations.¹⁵⁴ So starting again in 1970, and ultimately culminating in 1988,¹⁵⁵ Congress and

petitions and appeals granted from 1970 through 2017 from the Journal of the Supreme Court of the United States); *see also, e.g.*, JOURNAL OF THE SUPREME COURT OF THE UNITED STATES, OCTOBER 2016 TERM, at II, <https://www.supremecourt.gov/orders/journal/Jnl16.pdf> [<https://perma.cc/4JKC-SNHT>] (last visited Mar. 9, 2019) (74 of the 75 cases granted review came from petitions for certiorari).

144. Hellman, *supra* note 143, at 797.

145. *See id.* at 799 n.27 (citing statutes).

146. *See id.* at 797.

147. *Id.*

148. *Id.* at 797-98.

149. *Id.* at 798 (alteration in original).

150. *See* Act of Feb. 13, 1925, Pub. L. No. 68-415, ch. 229, 43 Stat. 936, 936-37 (1925).

151. Hellman, *supra* note 143, at 798.

152. *Id.*

153. *Id.*

154. *See, e.g.*, *United States v. Singer Mfg. Co.*, 374 U.S. 174, 175 n.1 (1963) (opposing direct appeals in antitrust cases); *Brown Shoe Co. v. United States*, 370 U.S. 294, 364-65 (1962) (Harlan, J., dissenting in part and concurring in part) (same).

155. *See* Act of June 27, 1988, Pub. L. No. 100-352, §§ 1-6, 102 Stat. 662, 662-64 (1988) (eliminating the three provisions that provided for the majority of the Supreme Court's obligatory jurisdiction—28 U.S.C. §§ 1252, 1254(2), and 1257(2), and amending language of Supreme Court review elsewhere); *see also* Hellman, *supra* note 142, at 799 n.27 (explaining §§ 1252, 1254(2), and 1257(2)).

the Supreme Court coordinated efforts to rid the Court of its “obligatory jurisdiction.”¹⁵⁶ The 1988 law that “provid[ed] greater discretion to the Supreme Court in selecting cases it will review”¹⁵⁷ started as an unquestioned proposal in 1978.¹⁵⁸ Though many believed that the Supreme Court should not be a court of complete discretion,¹⁵⁹ there remained a “consensus of Congress, the bar, and the judiciary that review for error should play, at best, a minor part in the Court’s work.”¹⁶⁰ In fact, the Supreme Court expressed its unanimous support for the removal of their mandatory jurisdiction four times between 1978 and 1988.¹⁶¹ The major part of the Supreme Court’s work should instead “correspond to the specific functions entrusted to the Court in the American system of government,” such as “[1] delineating the limits of governmental authority as against claims of individual liberty; [2] marking the boundaries between state and national power; [3] interpreting and clarifying the vast body of federal statutory and common law; and [4] supervising the operation of the federal courts.”¹⁶²

In eliminating the Supreme Court’s mandatory appellate jurisdiction, Congress intended to place the burden of maintaining systemic judicial integrity and confidence, at least in large part, with the federal appellate courts. Reasoning that the appellate courts are better equipped to resolve many of the cases that the Supreme Court had historically decided, Congress concluded that affording nearly complete discretionary review to the Supreme Court would have little impact on the orderly resolution of cases.¹⁶³

What is more, the Supreme Court has heard an average of about eighty-three cases each term since 2000; it has heard no fewer than sixty-six and no more than ninety-nine.¹⁶⁴ This number, compared with the number of cases entertained by the intermediate appellate courts—average of 54,050 each year from 2013 to 2018¹⁶⁵—and the number of requests for

156. Hellman, *supra* note 143, at 798-99.

157. 102 Stat. at 662 (title of the Act).

158. Hellman, *supra* note 143, at 799-800.

159. *Id.* at 799 n.33 (comparing Chief Justice Warren and Justice Frankfurter’s opposing views on the role of the Supreme Court).

160. *Id.* at 799.

161. See 134 Cong. Rec. 4465 (1988); see also H.R. REP. 100-660, at 2, 2 n.1 (1988).

162. Hellman, *supra* note 143, at 801.

163. See H.R. REP. 100-660, at 12.

164. See *Caseloads*, *supra* note 143.

165. *U.S. Court of Appeals – Judicial Caseload Profile*, FEDERAL COURT MANAGEMENT STATISTICS, SEPTEMBER 2018 (Sept. 30, 2018), http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appprofile0930.2018.pdf [<https://perma.cc/W3UZ-KYA3>].

review *filed* in the Supreme Court—average of about 7,073 from the 2010 term through the 2017 term¹⁶⁶—is miniscule. Therefore, as important and powerful as the Supreme Court’s role may be—which is certainly not to be diminished—it is not necessarily the best target to effect institutional reforms since having the opportunity to be heard before the Supreme Court is so rare. Unlike much of this Note’s discussion thus far, there is little, if any, debate that the appellate courts are the critical level of the federal court system.¹⁶⁷ When rehabilitating the judiciary’s reputation, then, we should focus our attention on the appellate courts, where litigants may be heard on appeal *as of right*.¹⁶⁸

2. Reforming the Appellate Courts Is More Worthy of Congress’ Efforts Because It Is More Realistic.

Unlike changes to the makeup of the Supreme Court, changes to the lower courts go largely unnoticed by the general public. While a large chunk of Donald Trump’s presidency has been spent examining, and ultimately confirming, his two Supreme Court nominees, he successfully nominated eighty-three other federal judges in just his first two years in office, thirty of which now sit on courts of appeals all over the country.¹⁶⁹ Though it may well be true that President Trump is seating federal judges at a record pace,¹⁷⁰ it is not unusual for presidents to nominate, and for the Senate to confirm, large numbers of district court and appellate court judges over the course of a presidency.¹⁷¹ The public is simply unaware of these nominations and confirmations because they are not publicized in the way that Supreme Court nominees are roped into the national spotlight.

The public is less aware of lower court confirmation proceedings perhaps because the vetting process is much quicker and less controversial, but more importantly because they cause elected officials to risk less political capital than with Supreme Court confirmation battles. It is these qualities

166. *Chief Justice’s Year-End Reports on the Federal Judiciary, Appendices to the 2013-17 Year-End Reports*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/publicinfo/year-end/year-endreports.aspx> [<https://perma.cc/PU73-ZRD6>] (last visited Sept. 15, 2019).

167. See Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883, 905-06 (2018) (“[A]ppellate court openings remain more critical because circuit judges are fewer, their opinions cover several jurisdictions and consistently enunciate greater policy, and lawmakers continually insist on assigning nearly every appellate vacancy to the identical state where openings arise.”).

168. See 28 U.S.C.A. § 1291 (Westlaw through Pub. L. No. 116-56); *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691 (2015).

169. See *Judgeship Appointments by President*, USCOURTS.GOV, <https://www.uscourts.gov/sites/default/files/apptsbypres.pdf> [<https://perma.cc/6M3S-GBJ9>] (last visited Mar. 9, 2019).

170. See *id.*

171. See generally *id.*

that show why structural reform in the courts of appeals is much more worthy of Congress's efforts instead of trying to manipulate Supreme Court processes (such as scathing, nationally-televised confirmation hearings). Put differently, congresspersons are much more willing to undertake reforms that are outside the public eye and which, therefore, do not compromise political capital.

To put it more concretely, lower court confirmation proceedings are less substantive than Supreme Court proceedings.¹⁷² In recent years, the Senate Judiciary Committee's vetting process for lower court judgeships "lacked important content and context."¹⁷³ And members on the Committee "rarely engaged on substantive issues, even on matters which distinctly involved qualifications essential to public office who hold unlimited tenure."¹⁷⁴ Moreover, the majority party in the Senate can unilaterally decide not to follow the traditions and rules of confirmation proceedings.¹⁷⁵ In sum, and especially with respect to proceedings that lack substance and public accountability, the Senate's majority party has the power to accomplish agendas regarding the lower courts without risking political accountability. Notwithstanding the wisdom of this kind of arbitrary rule, such happenings suggest that Congress need not fear structural reforms to the appellate court system.

IV. WHY THE FIVE-JUDGE SYSTEM IS THE SOLUTION

This Note proposes two reasons as to why Congress should at least begin considering an increase in the number of circuit judges that sit on federal appellate panels: first, five-judge panels promote more ideologically

172. In keeping with the spirit of this Note, congresspersons ought to spend more time and effort considering the qualifications of lower court judicial nominees because they impact the lives of litigants much more regularly than do Supreme Court justices. But that is not the subject of this Note, and other commentators have already addressed this issue. *See generally, e.g.*, Carl Tobias, *Curing the Federal Court Vacancy Crisis*, 53 WAKE FOREST L. REV. 883 (2018). Given that this is the modern practice during lower court confirmation proceedings, this Note suggests that congresspersons use that practice to reform the appellate courts.

173. Tobias, *supra* note 171, at 900.

174. *Id.*

175. *See, e.g., id.* at 900-01 (refusing to wait for ABA evaluations and ratings before voting on nominees); Salvador Rizzo, *Are Senate Republicans Killing 'Blue Slip' for Court Nominees?*, WASH. POST (Feb. 21, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/02/21/are-senate-republicans-killing-blue-slip-for-court-nominees/?utm_term=.4ffe280aea80 [https://perma.cc/BG8A-WWV7] (noting that Senate Democrats ended the 60-vote confirmation requirement when they controlled the Senate in 2013, and that Senate Republicans ended the filibuster power when they were in the majority in 2017).

balanced decisions;¹⁷⁶ and second, five-judge panels keep with Congress's tradition of using panel size to improve institutional legitimacy.

A. Five-Judge Appellate Panels Encourage Mixture of More Jurisprudential Philosophies.

Despite what Alexander Hamilton said in FEDERALIST 78, studies show that there is of course some basic level of political influence in judicial decisionmaking, for “the outcome of a case often depends in part on whether a Republican or Democratic president appointed the judges.”¹⁷⁷ This conclusion is not just dependent on whether there are two republican appointees and one democratic appointee on a particular panel; it makes a difference whether there is a two-to-one majority panel or a 3-0 unanimous panel.¹⁷⁸ This is the first element of discussion that must be hashed out.

Studies conclude that a 3-0 decision by judges with the same basic jurisprudential philosophy (conservative or liberal) is driven by partisanship to a much greater extent than a two-to-one ideologically mixed panel.¹⁷⁹ To solve the problem of ideological partisanship in the appellate courts, Professors Shapiro and Murphy recommend expanding panel size, albeit for only a small portion of especially important cases.¹⁸⁰ Despite their narrow approach to five-judge panels, their reasoning holds true regardless the scope of the five-judge panel scheme. Professors Shapiro and Murphy introduce their proposal by explaining that selecting five judges from a pool of active and senior judges increases the likelihood of having a mixed panel than with selecting only three judges.¹⁸¹ Of course the likelihood differs depending on the ideological makeup of each circuit, but “[e]ven for a

176. Section IV.A relies primarily on an article focusing on the impact that five-judge appellate panels would have on administrative law decisions. *See generally* Shapiro & Murphy, *supra* note 80. While this Note does not have such a narrow focus, administrative law studies and analysis provide the best insight into how to counteract ideologically polarized panels because administrative law cases require more political decisionmaking than most other types of cases, such as contract disputes.

177. Shapiro & Murphy, *supra* note 80, at 323-27 (explaining a study about ideological influence in administrative law decisions).

178. *See id.* at 323-24.

179. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L. J. 2155, 2173 (1998); Shapiro & Murphy, *supra* note 80, at 323-24; *see also* Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 784-85 (2008) (suggesting that voting patterns depend on the initial makeup of court panels); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 870-71 (2006) (explaining that democratic appointees are more likely to uphold liberal decisions and republican appointees are more likely to uphold conservative decisions).

180. Shapiro & Murphy, *supra* note 80, at 356.

181. *Id.* at 356-57.

quite-lopsided pool, however, the effect of increasing panel size can be substantial.”¹⁸² Consider the following:

[I]n a hypothetical Twelfth Circuit composed of nothing but ten Republicans, increasing panel size for the court would not reduce the likelihood that a random draw of judges would produce an unmixed panel—the likelihood would remain 100 percent. Add just one Democrat to the mix, however, and the likelihood of randomly selecting a three-Republican panel is about 73 percent; increase panel size to five judges, and this likelihood drops to about 55 percent.¹⁸³

Given that even one judge with an opposing ideological stance can impact how judges vote,¹⁸⁴ a system that increases the likelihood of sitting mixed ideological panels is something to strive for.

Following this proposal addresses the concerns described *supra* Part III. As previously discussed, Alexander Hamilton greatly feared a judicial department that would accept internal or external political influences. To the extent that judges have inherent political tendencies that they cannot easily detach from their judicial decisionmaking, however, the solution should rest on minimizing the impact of those tendencies to the extent possible. With the understanding that mixed three-judge panels “behave in a less ideological manner than purely partisan panels do,” we have “little reason to think that this mixed-panel effect would not translate (at least in large part) from a three-judge to a five-judge setting.”¹⁸⁵ A five-judge panel system, then, “provides a means to depoliticize” the appellate courts without disturbing the separation of powers balance among the three branches of government.¹⁸⁶

B. Five-Judge Panels Would Improve the Legitimacy of Court Decisions.

In combating fears over the judiciary’s dangerousness, the appearance of legitimacy is just as important as balancing judges’ inherent political

182. *Id.*

183. *Id.* at 357.

184. *See id.* at 323-24.

185. *Id.* at 361.

186. *See id.* That this solution does not disturb the powers of the other branches refers specifically to the suggestion that Congress could simply require three-judge panels to be mixed. But as Shapiro and Murphy argue, such a solution would disturb the well-understood notion that judges do not impose will, but merely judgment. *See id.* at 359-60. This solution would, in other words, constitute “a frontal assault” that “would likely raise constitutional issues of legislative control over the judiciary.” *Id.* at 360.

tendencies.¹⁸⁷ Congress itself has recognized as much.¹⁸⁸ The same logic that Congress relied on to permit expanded panels on the Federal Circuit Court of Appeals and require, at a minimum, three-judge panels on all other appellate courts flows to five-judge panel systems. As discussed *supra* Section II.C.2,¹⁸⁹ Congress permits Federal Circuit judges to assemble expanded panels depending on the circumstances because of the particular importance of those cases.¹⁹⁰ Congress has even expanded the reach of this reasoning to include all appellate courts, such that hearing appeals with less than three judges should not become the norm.¹⁹¹

Congress came to these conclusions for the sake of improving the legitimacy of judicial decisions. As the legislative history to the Federal Courts Improvement Act of 1982 confirms, “*to persevere both the appearance and the reality of justice . . . the disposition of an appeal should be the collective product of at least three minds.*”¹⁹² One commentator points out that this thought process has faded only because lawyers, public officials, and the public at large have come to trust the Federal Circuit’s operation.¹⁹³ For this reason, the Federal Circuit has largely stopped using expanded panels. It follows, though, that when concerns over the judiciary’s institutional legitimacy again come to the fore, Congress ought to consider expanding panel size once again. That time has come.

Some may argue, however, that more judges on each case would lead to more dissenting and concurring opinions, thus leading to less certainty in what the law is or what the law should be. This has, for example, been the case in the Supreme Court, where there are regularly numerous opinions on individual cases. But given the evidence supporting mixed ideological panels and providing the benefits of more perspectives on individual cases, the development of the what the law is and should be deserves more opinions. This has been true with the Supreme Court, as we want nine judges to opine in each important and impactful case in that Court, and is likely to be true with added judges in federal appellate court cases.

187. See, e.g., MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS’N 2013) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

188. See *supra* Sections II.B and II.C.2.

189. This Section pertains to much of the background explained in Section II.C.2 regarding the Federal Courts Improvement Act of 1982. Accordingly, this Section ought to be read in conjunction with Section II.C.2 above.

190. See 28 U.S.C.A. § 46(c) (Westlaw through Pub. L. No. 116-56).

191. See S. REP. NO. 97-275, at 9 (1981) (emphasis added).

192. *Id.* (emphasis added).

193. See Winston, *supra* note 76, at 823.

The public is also more likely to see judicial decisions as “correct” when there are more judges that contemplate them.¹⁹⁴ This theory has not only been applied to appellate panel decisionmaking,¹⁹⁵ but has been applied in the context of juries.¹⁹⁶ Since the instructions contained in Article III and FEDERALIST 78 require a truly independent judiciary, it is imperative that the public sees that judges are not merely tools to accomplish political agendas; they must be seen as making respectable and prudent judgments. Chief Justice Roberts has attempted to make this become reality, but the people need more. Implementing a five-judge panel system across all courts of appeals faithfully follows the Framers’ instructions while bringing us closer to a truly independent and trustworthy judiciary once again.

C. Compromise May Be Necessary for the Sake of Practicality

If this proposal is such a common-sense idea given the way Congress has acted in the past, then why has it never even been seriously discussed? There are many legitimate objections to such a broad application of a five-judge panel system. But because the five-judge system is so malleable, Congress has no reason to refuse to consider it. In any event, Congress will need to clear several sizable hurdles to implement this reform.

The first, and most obvious, is that such a system may not be statistically possible. It is beyond doubt that the lower federal courts are already massively overworked.¹⁹⁷ Not twenty years ago, and lasting for over seven years, the Fifth Circuit went so far as to declare a “Judicial Emergency” under 28 U.S.C. § 46(b) because they did not have enough active judges assigned to the Fifth Circuit to adequately staff their ever-growing docket.¹⁹⁸ The Eleventh Circuit declared a similar state of emergency in 2013.¹⁹⁹

194. See *Three-Judge Court Act*, *supra* note 24, at 206 (citing the remarks of Senator Brown, 45 Cong. Rec. 7257 (1910), and Senator Overman, 45 Cong. Rec. 7256 (1910)) (“Whenever one judge stands up in a state and enjoins the [state], the people resent it . . . whereas if three judges declare that a statute is unconstitutional the people would rest easy.”).

195. See Shapiro & Murphy, *supra* note 80, at 359-60 (“[E]specially important cases should have large panels to increase the likelihood of correct results.”).

196. See Philip J. Boland, *Majority Systems and the Condorcet Jury Theorem*, 38 THE STATISTICIAN, no. 3, 1989, at 181, 188 (“[M]ajority systems can achieve . . . high reliability (or high probability of making the correct decision) as the size of the system (decision body) increases . . .”).

197. See David R. Cleveland, *Post-Crisis Reconsideration of Federal Court Reform*, 61 CLEV. ST. L. REV. 47, 61-62 (2013) (acknowledging the growing concern of federal caseloads); Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control: Federalism as Dock Control*, 94 N.C. L. REV. 7, 63 (2015) (discussing the growth of federal court dockets).

198. See Order Vacating a Declaration of Judicial Emergency Under 28 U.S. Code, Section 46(b), 2007 WL 43971 (Jan. 8, 2007). Note that the Fifth Circuit’s 1999 emergency declaration was the second emergency declared in just six years.

The Eleventh Circuit there exempted itself out of the § 46(b) requirement that a majority of its panels consist of Eleventh Circuit judges so it could establish “emergency panels consisting of one Eleventh Circuit judge and two visiting judges.”²⁰⁰ These emergency panels sat throughout the 2014 calendar year and resolved over 100 cases for the circuit.²⁰¹ Even more frightening, however, is that these two examples are only microcosms of the broader issue about overloaded federal dockets.²⁰²

Given the indisputable facts surrounding federal appellate caseloads, a compromise is probably necessary; it may well be plainly unrealistic to add two judges to every single federal appeal. This is especially true since most appeals are either unanimous decisions or easily disposed of, for not every appeal necessarily deserves a form of heightened review.²⁰³ At least until federal court vacancy problems are resolved and courts can stabilize their dockets, Congress could simply expand the language of § 46(c) to permit not only the Federal Circuit to sit in expanded panels at their election, but also permit the other twelve circuit courts of appeals to so elect. In the meantime, this solution need not worsen the docket situation, and yet would permit courts to reap the benefits of seating five-judge panels in particularly important or complex cases if they so choose.

But doesn’t the en banc system authorized by § 46(c) already permit this type of elective expansion of appellate panels? Section 46(c), after all, authorizes the courts of appeals to order a hearing or rehearing before all active circuit judges and any senior judges that originally heard the appeal. The problem is that federal rules disfavor en banc hearings across the board.²⁰⁴ Under the Federal Rules of Appellate Procedure, en banc hearings should be ordered only for the purposes of obtaining circuit uniformity and

199. Andrew L. Adler, *Extended Vacancies, Crushing Caseloads, and Emergency Panels in the Federal Courts of Appeals*, 15 J. APP. PRAC. & PROCESS 163, 163-64 (2014).

200. *Id.*

201. *Id.*

202. *See id.* at 165 (explaining the courts of appeals’ “crisis in volume”). Note that the caseload issue also introduces concerns that judges will issue more unpublished, nonprecedential opinions for efficiency’s sake. *See, e.g., Williams v. Dall. Area Rapid Transit*, 256 F.3d 260, 261 (5th Cir. 2001) (mem.) (Smith, J., dissenting from the denial of rehearing en banc) (noting that the primary purpose for issuing unpublished opinions is to promote more efficient resolution of cases).

203. *See Harry T. Edwards & Michael A. Livermore, Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1898-99 (2009) (explaining that about one-half of court of appeals cases are “easy,” and that cases “more often than not lead to a unanimous judgment”).

204. FED. R. APP. P. 35(a) (“An en banc hearing or rehearing is not favored and ordinarily will not be ordered . . .”).

addressing exceptionally important issues.²⁰⁵ But the five-judge panel system proposed here suggests institutional concerns not involving circuit uniformity or important legal issues generally. Rather, this Note is concerned with the merits of individual cases and the appearance of impropriety stemming therefrom. Accordingly, this Note proposes using expanded panels to decide cases even where there is no worry over circuit uniformity or issues of broad applicability. Moreover, given the admittedly legitimate concerns over adding just two judges to appellate panels, it follows that it would be even more unrealistic to simply use the en banc system more frequently, for the latter system adds *all* active judges on the circuit to the case.

Yet another concern worries that the president in office at the time Congress adopts the five-judge panel system would be able to take advantage of the large number of appellate court vacancies to stack the expanded panels. Given that the appellate courts are already overworked, Congress would likely establish new active seats on the courts of appeals at the same time it expands appellate panels. But Congress has established new seats on federal courts many times without worrying that the president would revive attempts to recklessly stack the federal courts.²⁰⁶ And where Congress is concerned with court-packing, it can—and indeed has—set a limit on how many judges the president can nominate before the next president is inaugurated.²⁰⁷ Therefore, this concern lacks merit sufficient to invalidate this Note's proposition.

These worries are no doubt genuine ones, but they are worries common to our long-standing maintenance of the judiciary. Case overloads are commonly addressed by local administrative resolutions or by congressional intervention. And if five-judge panels are unnecessary for the vast majority of easy cases, for instance, Congress can prescribe the framework for utilizing five-judge panels such that they become an effective and malleable administrative tool. In any event, these concerns cannot outweigh the horrifying consequences of standing idly by and watching the walls of separation fall, alongside our liberty.

205. *Id.*; see also *United States v. Rosciano*, 499 F.2d 173, 174 (7th Cir. 1974) (citing *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 256-59 (1953)) (“The function of en banc hearings is not to review alleged errors for the benefit of losing litigants.”).

206. See generally, e.g., H.R. REP. 101-733 (1990) (accompanying the Judicial Improvements Act of 1990, focusing on filling vacancies and solving the case overload problem without regard to giving President Bush the power to appoint nine circuit judges and fifty district judges).

207. See, e.g., *Bankruptcy Amendments and Federal Judgeship Act of 1984*, Pub. L. No. 98-353, § 201(a), (c), 98 Stat. 333, 346-48 (1984) (permitting the President to nominate no more than eleven circuit judges and no more than twenty-nine district judges prior to January 21, 1985, which would be the second day of the new presidential term).

V. CONCLUSION

This Note proposes a system that would drastically impact the daily life of not only circuit judges, but also their law clerks, other staff members, individual litigants, and the public at large. These concerns are, however, in conflict with what Alexander Hamilton tokened the most perilous risk to liberty: attrition of the independent judiciary. Whether Congress decides to require five-judge panels for all appeals, adopt a five-judge system similar to that in Louisiana or the Federal Circuit, or implement some other form of five-judge system, it is time to do something to rehabilitate the walls of separation that insulate the federal judiciary. But given the present tumultuous political culture, Congress's options are significantly curtailed. As a practical and malleable solution, however, Congress can, and should, feel comfort in taking up the proposal suggested in this Note to restore the federal judiciary to its once-independent and nonpartisan roots.