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RANDOMIZATION IN ADJUDICATION

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ABSTRACT

Flipping a coin to decide a case is among the most serious forms of judicial misconduct. Yet judges react quite differently to other types of lotteries. Judges tend to tolerate or encourage deliberately random decisions in nonjudicial settings ranging from military drafts to experimental welfare requirements. Equally striking, most adjudicators now embrace randomization within their own institutions: they commonly use lotteries to assign incoming cases to each other. This practice creates a remarkable tension. Because adjudicators vary in competence and ideology, randomizing their case assign-

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ments will effectively randomize outcomes in a subset of merits decisions. We might then ask whether the typical adjudicative system is sometimes at war with itself, condemning courtroom coin flips while operating backroom lotteries with similar effects.

This Article attempts to defend the judicial treatment of randomized decisions. The Article begins by investigating the concept of randomization and the leading justifications for randomizing social decisions. It then offers a consequentialist defense for the pattern of judicial reactions to official lotteries. This defense admits that case-assignment lotteries have merits-randomizing effects, and it accepts that a merits-randomization ban might be the best rule for fallible judges facing public relations problems. Even so, random case assignment can be justified based on three consequences, aside from the convenience of judges: (1) fairly allocating to litigants the tragically scarce and indivisible resource of judicial excellence, (2) roughly honoring the politics of the judicial appointments process, and (3) continuing a natural experiment on the determinants of judicial behavior. These arguments cannot explain why adjudicative institutions developed as they did. But they can exploit various social benefits that the system has produced, in a sense, randomly.

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INTRODUCTION

A perceived divide between randomization and justice is centuries old in the Western world. Both the Goddess of Fortune and the Goddess of Justice have been depicted as blindfolded, but Justitia holds a scale while Fortuna scatters her rewards without any such guide.¹ The cultural situation is not radically different today. In the United States, the favored icon for justice remains the same: a decision maker veiled from irrelevant facts and attuned to law rather than whim or chance.

Randomization has a poor reputation in judicial rhetoric as well. As early as 1811 an American judge wrote that “[t]he decision of a contested case by lot or chance must be reprobated by every honest man.”² More recently, judges have sanctioned other judges for flipping coins to resolve disputes, intimated that executive discretion should not extend to decision by lot, and invalidated an entire system of capital punishment for resembling random lightning strikes.³ Although rolling dice may entertain or guide individuals in their personal lives,⁴ it might be considered inconsistent with the rudiments of a just government.

Despite these first impressions, judicial opposition to randomization turns out to be modest. It is nearly impossible to locate a case invalidating an official decision because it was deliberately randomized. True, pervasive randomization would often bump into generally accepted judicial commitments; flipping coins to determine guilt in every criminal case is incompatible with a commitment to judgments based on legally relevant evidence. But such incidental conflicts do not entail judicial opposition to randomization

1. See Lorraine Daston, *Life, Chance & Life Chances*, DÆDALUS, Winter 2008, at 5, 6 (“Fortuna is a powerful goddess, but it is Justitia who commands the moral high ground.”).

2. *Lessee of Cluggage v. Swan*, 4 Binn. 150, 153 (Pa. 1811) (Yeates, J.) (discussing verdicts, but concluding juror testimony should not be admissible to prove lot-drawing).

3. See *infra* Part II.A.1, II.B.1.

4. See, e.g., STEVEN LEVY, *THE PERFECT THING: HOW THE IPOD SHUFFLES COMMERCE, CULTURE, AND COOLNESS* 227-54 (2006) (discussing randomization and shuffle play on the iPod); GERDA REITH, *THE AGE OF CHANCE: GAMBLING IN WESTERN CULTURE* 127-55 (1999) (discussing gambling as, in part, thrill-seeking through uncertainty and its resolution); cf. *Farnsworth v. Sanford*, 115 F.2d 375, 377 (5th Cir. 1940) (reporting that the petitioner flipped a coin to decide whether to plead *nolo contendere*).

per se. In fact, courts might be as likely to order randomization as to forbid it. Apparently no one even asked a judge to condemn the 1969 Vietnam military draft lottery for relying on randomization—but this lottery actually was challenged for being not random enough, and a federal judge took the complaint quite seriously.⁵

Is it possible to distinguish situations in which courts are likely to resist randomization (for example, capital sentencing) from those in which they are likely to be indifferent or even promote it (for example, military drafts)? High stakes cannot be the distinguishing feature; randomization is sometimes tolerated in matters of life and death. A far better predictor, I will argue, is institutional location. Although relevant cases are few, judicial opposition to randomization looks parochial. Judges strongly condemn randomization for their own merits decisions to the point of imposing professional sanctions, yet judges are likely to retreat when other officials consciously randomize. If this is the pattern, then judicial opposition to randomization is restricted to self-regulation.

The question is whether judges are right to expel randomization from their merits decisions and not elsewhere. A defense of this pattern has become more challenging because, in an important respect, *adjudication is now shot through with randomization*. The decision makers themselves—judges and jurors—are typically assigned their cases through lotteries. Random case assignment takes place hundreds of thousands of times every year in courts across the country, and many administrative agencies follow suit.⁶ Only later stages of adjudication provoke allergies to randomization. But because the pool of decision makers differs in competence and ideology, random case assignment will influence an untold number of case outcomes.⁷ The greater the diversity across decision makers, the greater the likely influence of a case assignment lottery. This is true even if the system is dead-set against overtly randomizing merits decisions. In the least charitable terms, then, courts have come to exemplify what they so loudly condemn.

5. See *Stodolsky v. Hershey*, 2 Selective Serv. L. Rptr. 3527, 3528-29 (W.D. Wis. 1969); *infra* Part II.B.2 (examining *Stodolsky* and examples of court support for randomization).

6. See *infra* Part II.C (describing some case assignment systems, the murky history of their development, and the limits on randomization within these systems).

7. See *infra* Part III.A (discussing the interaction of “ideology,” “competence,” assignment systems, and case outcomes).

Can we defend an adjudicative system that habitually randomizes its decision makers but never their decisions?⁸ The question is worth asking because we can imagine a system closer to the opposite of the status quo. Cases could be assigned to judges based on their perceived expertise, or the combined preferences of the litigants,⁹ and these nonrandom assignment systems could be accompanied by a modest domain of merits decisions that are concluded by lot. If there is a convincing defense of the current arrangement, moreover, it should rest on more than judges' preferences. Random case assignment ignores important differences among judges, while refusing to randomize merits decisions encourages the proliferation of other contestable tiebreakers.¹⁰

My defense of the system's design comes in several steps. As to the ban on randomizing merits decisions, it is the only acceptable flat rule for when to randomize and, I will suggest, a flexible standard is problematic. This conclusion is not firm but it draws on a reasonable view of imperfect judges and their public relations

8. For recognition of the combination without much defense, see NEIL DUXBURY, *RANDOM JUSTICE: ON LOTTERIES AND LEGAL DECISION-MAKING* 74-75 (1999) (discussing litigant acceptance of jury selection). For a brief argument in favor of "neutral" case assignment standing alone, see J. Robert Brown & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 *TEX. L. REV.* 1037, 1040-41 & n.16, 1066-69 (2000) (arguing that a neutral assignment system restrains judges from deliberately influencing outcomes via assignment) and Sheldon Goldman, *Conflict and Consensus in the United States Courts of Appeals*, 1968 *WIS. L. REV.* 461, 481-82 (discussing advantages of dialogue within a court system). For the thought that random assignment, unlike randomization on the merits, preserves "the opportunity to persuade a rational arbiter" in controversial cases, see John E. Coons, *Consistency*, 75 *CAL. L. REV.* 59, 110 (1987). Coons's article is an extended meditation on the value of consistency in law. More specifically, he identifies and evaluates legal rules that seem to authorize inconsistent remedies across similar cases, *see id.* at 76-92, and he offers justifications for "inconsistency-by-rule" based on the virtues of decentralized decision making, participation, and viewpoint diversity on contested issues, *see id.* at 109-13. His article is thought-provoking, but his focus was neither randomization nor the relationship between random case assignment and merits judgments.

9. *See, e.g.*, MAUREEN SOLOMON & DOUGLAS K. SOMERLOT, *CASEFLOW MANAGEMENT IN THE TRIAL COURT: NOW AND FOR THE FUTURE* 8, 13, 28-29 (1973) (describing older assignment systems with discretionary judgments by the chief judge); Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 *N.Y.U. ANN. SURV. AM. L.* 291, 298, 310 (2000) (advocating the assignment of appellate judge panels partly by the rank-order preferences of the parties to a case); *see also* Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 *COLUM. L. REV.* 215, 216, 233 (1999) (suggesting balancing of federal circuit court panels by an ideological proxy).

10. *See infra* notes 140-47 and accompanying text (collecting tiebreakers).

challenges. Opposing merits randomization, however, only complicates the argument for assignment randomization. One response is to cut the tension by claiming that randomizing judges does not count as randomizing merits decisions, whatever the effect on outcomes. But there are other defenses. First, we should view the assignment process as matching judges to litigants, not only cases to judges. This outsider perspective can accept randomization as a fair method for allocating a scarce and indivisible resource: judicial excellence. Second, we should expand our frame of analysis further to consider the appointments process. The larger system of matching judges to litigants includes the random assignment process now popular with judges as well as the appointments process that gave them their offices. Randomizing at the assignment stage can rightly bow to decisions at the appointments stage regarding the proper mix of adjudicators. Third, random assignment creates a natural experiment. Trustworthy empirical study may depend on such lotteries for insight into judicial behavior. Indeed, these studies are one way to better learn how judges are different and, therefore, how the judge assignment system can drive case outcomes.

Part I is largely theoretical and continues modern efforts to demystify randomization. The discussion highlights several overlapping justifications for lotteries and examples of their use in social decisions. Part II sorts out the judicial position on randomization. Judicial skepticism of randomization in other institutions is difficult to find, and judges regularly adopt modified lotteries to assign cases among themselves. Yet judges almost never overtly randomize their merits decisions, and those who do risk sanctions beyond reversal. Part III offers a functional defense for this pattern.¹¹ The analysis in this Part accepts that randomizing decision makers effectively randomizes outcomes for a class of cases, and it admits that the affected class does not match the ideal domain for merits randomization indicated by abstract normative theory. But the system can be defended by stressing the institutional setting and practical

11. I mean a normative defense based on the beneficial consequences of an arrangement—not a positive explanation of behavior that works backward from beneficial consequences. See JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 14 (2007) (discussing the latter). Establishing the normative defense will be difficult enough without proceeding to establish that any net social benefit was the actual reason for the arrangement's establishment.

realities of adjudication. A merits randomization ban might well be the best approach for fallible judges and, in any event, assignment randomization probably amounts to a sensible lottery of judges given the competing claims of litigants, the character of the appointments process, our desire for information on judicial behavior, and the feasible alternatives. This defense does not track the actual motives of the system's designers, who were likely driven by other forces. But the rest of us can appreciate the social benefits that the system has produced, in a sense, randomly.

I. UNDERSTANDING RANDOMIZATION

Our concern is randomization in decisions that affect third parties. This indicates a structure of interest: decision makers using procedures to generate outcomes that affect a pool of subjects. It should be understood just how many decisions must be made for this structure to function. Among other choices, the decision makers must be given positions of power, the pool of affected subjects must be determined, and a decision rule must be selected. The last point deserves emphasis. Randomization might be adopted as a decision rule for good reasons, for bad reasons, or for no discernible reason, but randomization in this context is always the outcome of a prior decision-making process. The task is to understand when this anterior process should select randomization—that is, when decision makers should decide to decide by randomization.

A. Three Concepts of Randomization

Before addressing that normative question, we should be clear on which version of randomization is worth analyzing. Sometimes the term “random” is used to refer to ideas not central to the inquiry here, such as the absence of a detectible purpose or pattern. Sometimes terms like “arbitrary” refer to ideas within the heartland of our concern.

An initial distinction lies between processes and outcomes. Either can be characterized as random.¹² We can describe the process of

12. See DEBORAH J. BENNETT, RANDOMNESS 165-67 (1998); JON ELSTER, SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY 40-41 (1989) [hereinafter ELSTER,

rolling an unweighted die as “random” without commenting on the pattern of numbers that come up, just as we can describe certain numerical sequences as more random than others without saying anything about the process for generating them.¹³ Because our focus is decision-making protocols, process-oriented concepts are most pertinent. Certainly these processes will be evaluated with reference to their consequences,¹⁴ but the topic of ultimate concern will remain the decision-making processes designed to generate results randomly.

Within the domain of processes, however, randomization can have more than one meaning. Two leading academic concepts of process randomization are statistical and epistemic.¹⁵ A *statistically random* process is probably the more intuitive concept. It refers to a process that affords equal probability to all outcomes within a given set.¹⁶ The set of possible outcomes must be chosen somehow,¹⁷ but, once specified, any member of the outcome set must be equally likely to occur when the process is used. This notion of randomization is commonplace, even if the resulting distributions do not fit common expectations for “randomness.”¹⁸ There is also the familiar idea of a weighted lottery, which is a variation on statistical randomization.¹⁹

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13. The sequence 01001111 is more “random” in this sense than is 11111111, regardless of the process by which these numbers were selected for inclusion in this sentence. See GREGORY J. CHAITIN, *EXPLORING RANDOMNESS* 111 (2001).

14. Cf. BENNETT, *supra* note 12, at 169-73 (describing tests for random processes that are based on outcome distributions).

15. See David Wasserman, *Let Them Eat Chances: Probability and Distributive Justice*, 12 *ECON. & PHIL.* 29, 30 (1996); cf. IAN HACKING, *THE EMERGENCE OF PROBABILITY: A PHILOSOPHICAL STUDY OF EARLY IDEAS ABOUT PROBABILITY, INDUCTION, AND STATISTICAL INFERENCE* 12-13 (1975) (exploring probability theory as related to distributions from chance processes and degrees of uncertainty).

16. See BENNETT, *supra* note 12, at 155; Stephen E. Feinberg, *Randomization and Social Affairs: The 1970 Draft Lottery*, *SCI.*, Jan. 22, 1971, at 255, 258 (describing the statistician’s idea of an ideally random process).

17. This point will become crucial in the analysis below. See *infra* Part III.A.2-C (assessing random case assignment).

18. See, e.g., 1 WILLIAM FELLER, *INTRODUCTION TO PROBABILITY THEORY AND ITS APPLICATIONS* 161 (1967) (“[T]o the untrained eye randomness appears as a regularity or tendency to cluster.”); Daniel Kahneman & Amos Tversky, *Subjective Probability: A Judgment of Representativeness*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 32, 36-37 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (similar).

19. See ELSTER, *SOLOMONIC JUDGEMENTS*, *supra* note 12, at 113-14; Douglas C. Wilms, *Georgia’s Land Lottery of 1832*, 52 *CHRON. OF OKLA.* 52, 54 (1974) (describing a lottery that

It is a compromise process intermediate between equal chances and other decision rules, such as merit or market allocations.

Statistical randomization, however intuitive, might be purely theoretical. Innovators have been striving for decades to create devices that are demonstrably random in a statistical sense.²⁰ Dice can be engineered only so well, and approaching statistical randomness will always depend on the procedure for rolling them. Computer-administered algorithms generate numbers with incredible efficiency, but they depend on a seed to get them started. If the seed is not appropriately selected, statistical randomness can be compromised.²¹ In fact, perfect statistical randomization might not even be theoretically possible. Perhaps adequate information before a randomizing process finishes would invariably preclude the assurance of equal probabilities. Enough knowledge about physics and the manner in which a die is rolled should enable an observer to calculate odds different from one in six.²² To be sure, many randomization devices are good enough for their assigned purposes in light of limited observer information. The role of ignorance in preserving equal probability assumptions does, however, lead to a distinct concept.

An *epistemically random* process generates outcomes that are equally probable as far as an observer can tell.²³ This happens whenever a person is sufficiently ignorant such that it becomes attractive for her or him to assign equal probabilities to a set of

doubled the chances for veterans, orphans, family heads, and others to win acquired Indian land). For a scheme weighted as to one class yet unweighted as to another, see Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. LEGAL F. 193, 195 (exploring election of representatives from single member districts by randomly selecting a ballot cast by a voter in each district).

20. See BENNETT, *supra* note 12, at 132-51; see also Feinberg, *supra* note 16, at 258 (calling perfect independence and equal probability “impossible”).

21. See, e.g., JONATHAN KNUDSEN, JAVA CRYPTOGRAPHY 22-24 (1998). A web service advertising “true random numbers” based on seeds from atmospheric noise is available at <http://www.random.org>.

22. Cf. XITAO FAN ET AL., SAS FOR MONTE CARLO STUDIES: A GUIDE FOR QUANTITATIVE RESEARCHERS 25 (2002) (asserting that “no events in nature are truly random”). There is an odd relationship here to ancient refusals to accept the existence of chance when doing so threatened a powerful view of divine will or divine planning. See REITH, *supra* note 4, at 13-15 (discussing shifts in acceptance over time).

23. See BENNETT, *supra* note 12, at 154; ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 43.

possible outcomes, regardless of what omniscience would reveal. This estimation is most understandable when a process appears designed to approximate statistical randomization, as with an apparently unweighted die rolled fairly, but epistemic randomness reaches further. Think about an observer who is accurately informed that a die is loaded but not told how. “For all he knows, no number is more likely than any other to come up,”²⁴ even though the device is certainly not statistically random in any objective sense. A real world example is the New York City subway search program, which attempts to maintain only “the veneer of random deployment.”²⁵ The epistemic concept is thus subjective and allows randomness to vary across observers.

To be a useful concept, however, epistemic randomness seems to rely on a tendentious model of ideal rationality or actual human behavior. Something like the principle of insufficient reason would have to be accepted, whereby an observer should or will assume equiprobability across specified outcomes despite uncertainty on just that point.²⁶ It is not clear that people assume equal probabilities even when a process appears well designed to produce them.²⁷ In any event, epistemic randomness captures a useful thought by underscoring the role of uncertainty in efforts at statistical randomization. It also suggests that “randomness” might be all around us rather than hopelessly out of reach. Given the difficulties of prediction in a complex world, perhaps epistemic randomness is pervasive.

There is a third concept worth mentioning. Use of a decision rule might be considered randomization if the rule is unrelated to any normatively sound basis for decision.²⁸ Such decision processes can be called *orthogonally random*. True, some decision rules are

24. ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 43.

25. See *MacWade v. Kelly*, 460 F.3d 260, 264 (2d Cir. 2006) (noting the difference between the intended appearance and the actual basis for choosing subway checkpoints).

26. See ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 43.

27. See, e.g., REITH, *supra* note 4, at 175 (discussing gamblers).

28. See Lewis A. Kornhauser & Lawrence G. Sager, *Just Lotteries*, 27 SOC. SCI. INFO. 483, 489-90 (1988) (arguing that a lottery may be fair if “impersonal” in this sense); see also David Heyd, *When Practical Reason Plays Dice*, in REASONING PRACTICALLY 58, 62 (Edna Ullmann-Margalit ed., 2000) (discussing mechanisms “not known to be correlated in any way to the issue at hand”). I would add to Heyd’s discussion that a process can be meaningfully “random” when the decision rule is *known not* to correlate with any normative basis for decision.

considered both unrelated to a proper view of the merits and normatively prohibited, like choosing the outcome that will maximize harm to race minorities. But other grounds for decision have no such taint. An example familiar to legal scholars is the convention of listing contributing colleagues' names alphabetically in the star footnote, which is a decision rule thought utterly uncorrelated with merit.²⁹ The subway search program provides a more serious illustration: police officers are instructed to search the bags of every n th passenger who passes the checkpoint.³⁰

Orthogonal randomization is a spin-off of epistemic randomness, assuming the decision maker had no reason to believe that any identifiable pool member was more likely to receive the benefit when the decision rule was chosen. The process can also be seen as a convenient substitute for statistical randomization, insofar as the decision rule is intended to mindlessly allocate resources without advantage purposefully given to any outcome in the set. Rules truly detached from normative considerations might be more difficult to identify and administer than are pseudo-random number generators, but both can be grouped together.

None of these three concepts is a priori superior. They are significant for different purposes, and concentrating on one will spotlight some normative questions to the exclusion of others. For example, thinking about statistical randomization prompts consideration of the circumstances in which decision makers should deliberately make outcomes equally probable, despite numerous alternatives. In contrast, the existence of epistemic randomness can present transparency issues regarding the propriety of keeping one class of people ignorant of the operative decision rule. Those questions are not the same as asking when and what kinds of substitutes are appropriate for statistical randomization. These issues are suggested by the possibility of orthogonal randomization.

29. Like statistical randomization, this ordering delivers no information about the quality of comments provided, but breaking the alphabetizing convention requires an explanation to avert confusion, and in this Article I have followed the convention. For an instance of co-authors statistically randomizing the order of their names, perhaps to equalize the chance of recognition in short citation form regardless of entrenched alphabetical advantage, see Jan B. Heide et al., *Exclusive Dealing and Business Efficiency: Evidence from Industry Practice*, 41 J.L. & ECON. 387, 387 n.* (1998) (stating that "all contributed equally to the article").

30. See *MacWade*, 460 F.3d at 265 (noting the number is specified by a supervisor).

All three concepts will be touched on below. But to simplify matters, the focus will be on attempts at statistical randomization with a secondary concern for orthogonal randomization. A decision maker's attempt to assure equal probabilities will be sufficient to attract our attention—understanding that literal equiprobability might be impossible, that lack of relevant information might be required, and that orthogonal randomization might be an acceptable substitute. Although much of the analysis will apply to epistemic randomness, the issues surrounding deliberate statistical and orthogonal randomization are important enough and can be more cleanly analyzed on their own.

B. Randomization's Features and Justifications

People have turned to deliberate randomization in various situations and for thousands of years.³¹ Randomization has been used to drive shuffle play on iPods,³² to enhance digital audio processing,³³ to initiate sporting contests³⁴ and presidential debates,³⁵ to order candidate names on ballots,³⁶ to resolve election ties³⁷ and more casual disagreements,³⁸ to create samples for opinion polling,³⁹

31. See BENNETT, *supra* note 12, at 11-12, 17-44 (describing ancient gaming and divination); DUXBURY, *supra* note 8, at 43-84 (collecting examples involving social choice).

32. See LEVY, *supra* note 4, at 177-204 (regarding the initial version of shuffle play).

33. See JOHN WATKINSON, AN INTRODUCTION TO DIGITAL AUDIO 120-22 (2002) (regarding the dithering process).

34. See INT'L TENNIS FED'N, RULES OF TENNIS 6 (2009) (prescribing a coin toss to allocate the power to choose serving order); 2003-2004 OFFICIAL PLAYING RULES OF THE NATIONAL FOOTBALL LEAGUE 168 (Larry Upson ed., 2003) (similar).

35. See *The First Presidential Debate*, N.Y. TIMES, Sept. 26, 2008 (transcript), available at <http://elections.nytimes.com/2008/president/debates/transcripts/first-presidential-debate.html>.

36. See Daniel E. Ho & Kosuke Imai, *Randomization Inference with Natural Experiments: An Analysis of Ballot Effects in the 2003 California Recall Election*, 101 J. AM. STAT. ASS'N 888, 889 (2006).

37. See, e.g., FLA. STAT. ANN. § 105.051(1)(c) (West 2009); WIS. STAT. ANN. § 5.01(4)(a) (West 2009); Randal C. Archibold, *Election at a Draw, Arizona Town Cuts a Deck*, N.Y. TIMES, June 17, 2009, at A1.

38. See DOUGLAS WALKER & GRAHAM WALKER, THE OFFICIAL ROCK PAPER SCISSORS STRATEGY GUIDE 61-73 (2004) (treating the game as one of skill). I consider Rock-Paper-Scissors an orthogonal randomization device, at least when only one round is played by amateurs.

39. See THE GALLUP POLL: PUBLIC OPINION 2005, 378-79 (Alec Gallup & Frank Newport eds., 2006) (investigating public opinion on sampling by sampling public opinion).

to measure the unemployment rate,⁴⁰ to make clinical drug trials more reliable,⁴¹ to pick out travelers for extra law enforcement screening,⁴² to promote electronic security through cryptography,⁴³ and to allocate housing vouchers,⁴⁴ charter school slots,⁴⁵ immigration visas,⁴⁶ and the burden of military service.⁴⁷ Yet pervasive statistical randomization would be calamitous; it would yield indefensible rewards and punishments, destabilize patterns of behavior, and kill socially valuable incentives. Imagine systematic randomization of the decisions whether to provide a benefit like health insurance, the scope of the benefit, and the recipient class. The results would be unjustifiable.

Randomization has many alternatives, of course. Among them are (1) judgment based on perceptions of merit, need, or desert and the related option of delegation to experts; (2) politics, including collective deliberation and the aggregation of judgments by voting rules; (3) markets, which translate demand and ability to pay into resource allocations; (4) equal shares, whether by physical partition or temporal rotation; and (5) first-in-time rules, which often reward knowledge, speed, and desire unrelated to wealth.⁴⁸ Intelligent selection of randomization over these alternatives requires a decision maker to pinpoint randomization's peculiar features.

40. See U.S. BUREAU OF LABOR STATISTICS, DESIGN AND METHODOLOGY: CURRENT POPULATION SURVEY 3-4 to 3-13 (2006) (Technical Paper 66) (describing stratified random sampling).

41. See HENRY M. MARKS, THE PROGRESS OF EXPERIMENT: SCIENCE AND THERAPEUTIC REFORM IN THE UNITED STATES, 1900-1990, at 132-63 (1997).

42. See *United States v. Marquez*, 410 F.3d 612, 615-16, 618 (9th Cir. 2005) (upholding random selection of airline passengers for handheld magnetometer scanning).

43. See KNUDSEN, *supra* note 21.

44. See Sara Olkon, *Many Seek Section 8 Help: CHA Holding Lottery for Waiting List Spots*, CHI. TRIB., Apr. 17, 2008, at Metro 1.

45. See 20 U.S.C. § 7225d(b) (2006) (regarding oversubscribed charter schools receiving grants); see also Peter Stone, *What Can Lotteries Do for Education?*, 6 TH. & RES. IN ED. 267, 268 (2008) (collecting examples of school admissions lotteries).

46. See 8 U.S.C. § 1153(e)(2) (2006) (regarding allocation of certain excess visas to "diversity immigrants").

47. See *infra* text accompanying note 88 (discussing the 1969 military draft lottery).

48. Cf. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 18, 31-50 (1978) (investigating quantity and allocation decisions, and comparing markets, political processes, custom, and "lotteries" defined to include both equal chances and equal payouts); ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 69-78 (comparing lotteries to absolute equality, queuing, rotation, need, productivity, contribution, desert, and auctions).

In so doing, it should be understood that randomization is fully compatible with modernist rationality. Twentieth-century modernists made room for randomization by better specifying the concept, incorporating it into theories of rational choice, and harnessing it to make experiments more reliable. Randomization need not involve a belief in divine will revealed by lot,⁴⁹ nor does it bypass the issue of how to make contested decisions. Randomization is one decision strategy among many,⁵⁰ and although there might not be an uncontested boundary to its optimal domain, there is an emerging group of rational justifications for resort to lots.

1. Equal Opportunity and Other Features

As a decision rule, randomization has one particularly special feature: it represents a certain version of equal opportunity.⁵¹ Statistically random processes guarantee an equal chance of yielding any outcome within a predetermined outcome set. The connection to equal opportunity is probably most apparent when the possible outcomes are associated with individual persons, as with a lottery for a benefit in which each pool member receives one ticket.

This is only one version of equal opportunity, however, and not necessarily the most compelling. Other versions bracket a limited number of characteristics, such as race or sex, while allowing pool members to compete on other grounds. Statistical randomization is different. It aims to equalize chances across the board and prevents distinctions based on skills, endowments, desire, or anything else. In addition, only chances are equalized, not necessarily outcomes. Giving each of 100 pool members a 1 percent chance of receiving a benefit is obviously not the same as giving each of them 1 percent of the benefit. Statistical randomization thus makes outcomes less

49. See, e.g., *Joshua* 7:11-22 (King James) (involving the identification of Achan the thief); *Proverbs* 16:33 (“The lot is cast into the lap; but the whole disposing thereof *is* of the LORD.”).

50. For a distinct claim that dedication to critical reason mandates randomization in situations of uncertainty involving human behavior and punishment policy, see Bernard E. Harcourt, *Post-Modern Meditations on Punishment: On the Limits of Reason and the Virtues of Randomization*, 40 SOC. RES. 307, 328-34 (2007).

51. See, e.g., BARBARA GOODWIN, JUSTICE BY LOTTERY 39-40 (1992) (stressing an equalization role for lotteries); Hank Greely, Comment, *The Equality of Allocation by Lot*, 12 HARV. C.R.-C.L. L. REV. 113, 122, 141 (1977) (similar).

predictable than equal shares, and it is therefore not only a profound leveler of individual difference but also a source of unsettling drama. The next section describes occasions when granting equal chances is nevertheless desirable. For now, it is enough to recognize this feature as a source of difference for randomization.

Randomization has other notable features, but they turn out to be less unique. Theorists tend to stress that randomization can (1) cut decision costs,⁵² (2) tie the hands of decision makers,⁵³ and (3) dampen behavioral incentives all around, if compared to decisions based on merit, willingness to pay, and so forth.⁵⁴ Lotteries indeed can be run quickly with modest expenditures—although high costs can arise from deciding whether to randomize, which outcomes to randomize, and how to safeguard the randomization process from corruption. It is also true that honestly conducted lotteries place results beyond anyone's influence, including error-prone decision makers, and therefore lotteries might reduce incentives to curry or solicit favor. But many rules⁵⁵ share these qualities. Consider "equal shares for everyone" and "oldest people win."⁵⁶ These, too, are easily administered flat rules that leave little room for personal influence when honestly executed. Because randomization is a semi-exotic practice in official decisions, perhaps it is easy to forget that it is simply one of many possible rules.⁵⁷ That said, randomization does have a peculiar relationship to uncertainty. Inflexible rules tend to be allied with predictability and planning, even if they do not always match up in practice. Lotteries are distinct. Statistical

52. See DUXBURY, *supra* note 8, at 54.

53. See CALABRESI & BOBBITT, *supra* note 48, at 44; DUXBURY, *supra* note 8, at 51-53.

54. See DUXBURY, *supra* note 8, at 56; ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 109-13. The comparative baseline of merits decisions might be implicit in these writings, which make the point about dampening incentives. But it should be stressed that randomization can instead *preserve* incentives, at least for lottery pool members, when compared to a different baseline. See *infra* text accompanying note 72.

55. See generally Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974) (distinguishing specific rules from flexible standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-63, 586-96 (1992) (adding the dimension of complexity/simplicity).

56. Not all of these alternative rules can be described as orthogonally random. Some of them will aim to approximate normatively defensible grounds for decision.

57. See, e.g., John Broome, *Selecting People Randomly*, 95 ETHICS 38, 41-42 (1984) (recognizing decision cost considerations in favor of lotteries, but rightly noting cheap alternatives).

randomization assures that no potential outcome is more likely than any other, meaning that observers can, at best, plan for equal chances. Whether imperfect predictability is undesirable depends on the needs of decision makers. Either way, it helps set randomization apart. Thus randomization's distinctiveness does not come from its rule-like character, but rather from a combination of features that starts where we began: a principle of equal opportunity, joined with a hard-line rule of decision and a notable degree of unpredictability.

2. Overlapping Justifications

Although randomization has been around for many centuries, there seems to be no precise and concise restatement of when it is normatively superior to alternative decision strategies. This might be the consequence of its relatively rare use in significant social decisions, or it could be that an easily executed restatement is not possible. Ultimately, the superiority of randomization depends on a normative orientation and factual premises over which people will disagree, along with a contestable review of the feasible alternatives. Instead of fabricating a universal prescription, we can gather arguments that are appealing from several perspectives.

Two reasons for randomizing will nonetheless be set aside: divination and aesthetics. This is not to downplay the influence of either; they have motivated randomization for an impressively long time. But divination is foreclosed under the type of modernist rationality by which this Article intends to abide. It might be possible for a modernist to recommend randomization because others will believe the outcomes reveal divine will, but not because she believes this to be true. The reason for bracketing aesthetics is different. There is nothing nonrational about choosing randomization because it produces drama and mystery, or because it feels appropriately humble in challenging decision situations. Yet such intuitions can be reinforced with arguments that do not depend on a particular aesthetic sensibility or thrill-seeking decision makers.

Three overlapping justifications for randomization then stand out. The first involves equally strong claims to some outcome. Claims might seem equally strong because of an egalitarian commitment or because of irreducible uncertainty. Either way, randomization be-

comes plausible at least if the resource in question is indivisible. A second justification is less connected to any particular normative vision and is more of a pragmatic concession to brute fact. It invokes lotteries as the least-bad option when behavior might otherwise be socially destructive. A third justification is informational or experimental. Random sampling and random interventions offer the possibility of eliminating uncertainty for the future. These arguments are sometimes set apart from others,⁵⁸ but the popularity of natural experiments today makes any such division artificial.

a. Equal Claims and Indivisibility

Because randomization represents a form of equal opportunity, it can be a logical response from decision makers confronted with equally plausible courses of action.⁵⁹ More than one factor influences whether a decision maker views a set of choices as equally justified. Among them is a commitment to some version of egalitarian justice that aims to afford people equal dignity and respect. Even with full information, egalitarians can be attracted to randomization as a method for providing people respect in the form of equal chances to enjoy a benefit or to avoid a burden.⁶⁰ Barbara Goodwin pushes far in this direction. She considers a “Total Social Lottery” to better mix life chances when scarcity and structured inequality thwart that goal.⁶¹ We can conclude that the proper domain for differentiating merits judgments is much larger, and the domain for randomization far smaller, without overlooking the latter’s equalizing potential.

58. Duxbury and Elster do mention randomized trials in discussing the control of decision-maker bias, but it is not a theme for either of them. See DUXBURY, *supra* note 8, at 100-02; ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 53-54; cf. Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480, 552-53 (2008) (examining briefly the option of randomized policy intervention in an extended argument for policy variation when decisions are reversible).

59. For a sophisticated contractarian defense of the lottery as an impartial method of distribution when competing claims are equally strong, see Peter Stone, *Why Lotteries Are Just*, 15 J. POL. PHIL. 276 (2007).

60. See, e.g., BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 285-89, 298 (1980); Greely, *supra* note 51, at 141. To reiterate, an egalitarian randomizer still must choose the *pool* of outcomes using indications of merit, need, and so on.

61. See GOODWIN, *supra* note 51, at 101-03.

Such moderation helps explain limited lotteries for housing vouchers and charter school slots, but not for ordinary hiring decisions.

If equality across some chosen set of people is ever a commitment, why prefer merely equal chances to actually equal shares? Lotteries offer only the former along with uncertainty in the interim. It turns out, however, that randomization is uniquely suited to the goal of equalization for a class of decision situations. These situations involve indivisibility, by which I mean that an item slated for allocation cannot be literally divided or cannot be divided without an intolerable loss of value.⁶² Randomization allows each pool member to obtain an equal chance of receiving a benefit even if the benefit cannot be partitioned. Unwanted burdens can be viewed as the flipside of scarce benefits, and randomization likewise spreads burdens without forcing each pool member to suffer.

A classic illustration is the overcrowded lifeboat. If more space cannot be constructed and passengers cannot share the existing space without jeopardizing the well-being of everyone, the passengers might justly draw lots to allocate limited seating.⁶³ Although passengers might use deliberation to ensure that some stay aboard, such as navigators who can increase everyone's probability of survival, they might allocate the remaining space by lot so that "those having equal rights [are] put upon an equal footing."⁶⁴ There are other possibilities, but few will suggest auctioning off the space. The analysis for subsidized housing and public education is not much different for the egalitarian.

Another perspective from which to see equally strong claims requires no such background commitment to treating people equal-

62. See JOHN BROOME, *WEIGHING GOODS: EQUALITY, UNCERTAINTY AND TIME* 196 (1991) (characterizing lotteries as providing "surrogate satisfaction" for equal claims to scarce indivisible goods); ELSTER, *SOLOMONIC JUDGEMENTS*, *supra* note 12, at 69-70. Scarcity indicates an allocation problem rather than a solution to it, so it is not a helpful foundation for promoting randomization over other decision strategies.

63. See A.W. BRIAN SIMPSON, *CANNIBALISM AND THE COMMON LAW: A VICTORIAN YACHTING TRAGEDY* 166-76 (1984) (describing suggestions that lots be drawn to select persons to be thrown overboard).

64. *United States v. Holmes*, 26 F. Cas. 360, 367 (C.C.E.D. Pa. 1842) (No. 15,383) (instructing a jury that drawing lots "or some like way" guarantees equal rights and "guard[s] against partiality and oppression, violence and conflict"). A different view is EDMOND CAHN, *THE MORAL DECISION: RIGHT AND WRONG IN THE LIGHT OF AMERICAN LAW* 71 (1956), calling for group death in the absence of an individual sacrifice by free will.

ly. It follows from twentieth-century theories of instrumentally rational choice. This might seem counterintuitive insofar as randomization has been associated with mindlessness or frivolity. But rational choice theorists understand randomization's power to enhance one player's strategic position with respect to another⁶⁵ and, more generally, to respond cheaply to situations of indifference and uncertainty.⁶⁶ "In the absence of reasons for choosing one alternative ... rather than another," Jon Elster writes, "we might as well select one at random."⁶⁷ This sense can arise naturally for theorists who still believe that "[r]ationalism sees its chief triumph in the clear recognition of the limits of actual insight."⁶⁸

More specifically, prescriptive theories for rational decisions can run out before they identify a uniquely superior choice. One problem is decision-maker indifference, even given perfect information. Real cases of perfect equipoise might be rare, but lack of relevant information is not. Key information can be too costly to be worth acquiring or impossible to obtain, thereby inhibiting the prediction of payoffs or the estimation of probabilities. In addition, a decision maker might be unable to rank his feasible options when they differ along sufficiently different dimensions. Finally, the correct normative goal for decision might be unsettled. Without knowing the appropriate objective, instrumental rationality cannot function. Now, sometimes these decision situations can be avoided and sometimes alternatives to randomization will seem at least equally attractive. But if a decision is unavoidable, and particularly in cases

65. See Eric Talley, *Interdisciplinary Gap Filling: Game Theory and the Law*, 22 LAW & SOC. INQUIRY 1055, 1058, 1059 n.6 (1997) (reviewing DOUGLAS BAIRD ET AL., *GAME THEORY AND THE LAW* (1994)) (describing randomization strategies as one equilibrium in a noncooperative coordination game).

66. See Heyd, *supra* note 28, at 62, 66.

67. ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 38, 54, 73, 75, 107-09 (noting the potentially prohibitive costs of "fine-tuned ... screening"); see also DUXBURY, *supra* note 8, at 70-71 (noting the issue of information overload); Edna Ullmann-Margalit & Sidney Morgenbesser, *Picking and Choosing*, 44 SOC. RES. 757, 758-65, 773-74 (1977) (analyzing "picking" as opposed to "choosing" based on preferences and reasons).

68. Otto Neurath, *The Lost Wanderers of Descartes and the Auxiliary Motive*, in OTTO NEURATH, *PHILOSOPHICAL PAPERS: 1913-1946*, at 1, 8 (Robert S. Cohen & Marie Neurath trans., eds., 1983); see Harcourt, *supra* note 50, at 316 (claiming that modernists nevertheless continue to take leaps of faith); see also ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 122.

of indivisibility, statistical randomization gains ground when sound reasons for choosing run short.

b. Pragmatism and Incentives

This brings us to the incentive effects of randomization and pragmatic attempts to account for them. Although pragmatism needs a normative direction, this justification does not depend on a special value for human equality, nor does it run on uncertainty. Pragmatism aims to use a sophisticated understanding of human behavior in light of identifiable incentives for the purpose of optimal legal design.⁶⁹ The resulting lessons might suggest randomization in several different ways and settings. In fact, there is no simple description of the incentive effects of randomization; even when human behavior is predictable, the perceived effect of randomization depends on the point of comparison.

Consider the common claim that randomization eliminates behavioral incentives and, as such, is a tool for fighting corruption.⁷⁰ One might expect people to act in socially destructive ways in the absence of special care and then find comfort in the rule-like character of a lottery. A guarantee of equal probabilities ties the hands of error-prone decision makers while apparently cutting incentives of potential beneficiaries to curry favor with them, all with the bonus of low decision costs once the rule is in place.⁷¹ However much we might like decision makers to reward skill or effort, we may lack confidence that the system can do so adequately at a tolerable cost. From the baseline of merit allocation, therefore, instituting randomization seems to eliminate incentives.

69. See, e.g., ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 1-122 (making the attempt from a rational choice perspective); see also GOODWIN, *supra* note 51, at 45-46 (similar, from an egalitarian perspective).

70. See GOODWIN, *supra* note 51, at 45.

71. See DUXBURY, *supra* note 8, at 51-56. Note, however, that a dysfunctional decision environment may undermine confidence that randomization can be honestly performed. This is one way in which the case for lotteries can rest on self-defeating assumptions. For a random case assignment system that was apparently corrupted by a bribe-taking court official, see DAVID C. STEELMAN & JAMES R. JAMES, ASSURING RANDOMNESS AND SECURITY IN THE INDIVIDUAL-CALENDAR ASSIGNMENT OF CASES TO JUDGES IN THE CUYAHOGA COUNTY (OH) COURT OF COMMON PLEAS 1-2, 6 (1988) (National Center for State Courts Technical Assistance Report) (recognizing that “any system for random case assignment can be subverted”).

But randomization can instead preserve incentives among pool members when compared to a different baseline. Randomization can be used as part of a strategy to cheaply influence large groups. Decision makers might eschew pervasive monitoring, randomly sample from the target population, and increase the penalty for noncompliance relative to a regime with 100 percent detection.⁷² This kind of logic explains the value of random sampling for auditing in various settings.⁷³ In addition, randomization can encourage decisive action by softening decision-maker responsibility for particular outcomes.⁷⁴ One can imagine lifeboat passengers feeling like murderers if they vote on whom to cast overboard, and feeling like fair people making the best of a tragic situation if they draw lots.⁷⁵ It also has been argued that randomization occasionally prompts amicable settlements. Granting entitlements to equal probabilities can facilitate efficient bargaining by hoisting a veil of ignorance, thereby minimizing the significance of private valuation information and strategic behavior.⁷⁶ Thus, randomization can reduce incentives for action (compared to merits judgments) or

72. Cf. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 177-81 (1968) (attempting to model such trade-offs). Getting the penalty right depends on, among other factors, the degree of risk aversion expected in the monitored class, see generally Harcourt, *supra* note 50, at 336-37 (discussing sentencing lotteries), and whether the risk of penalty increases with the amount of regulated conduct, see Richard Craswell & John E. Calfee, *Deterrence and Uncertain Legal Standards*, 2 J.L. ECON. & ORG. 279, 280-83, 298-99 (1986) (analyzing the effect of legal uncertainty on overcompliance, undercompliance, and the optimal penalty multiplier).

73. See, e.g., 6 U.S.C. § 923 (2006) (regarding random inspection of containers at ports). On the possibilities of auditing government agencies as well, see Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 NOTRE DAME L. REV. 227 (2006). It is worth noting that a greater spread of potential sacrifice can have political effects congenial to egalitarian projects. With shared risks come shared interests and the possibility of an engaged class of citizens who demand policies that serve the broad public interest. See DUXBURY, *supra* note 8, at 56-57; GOODWIN, *supra* note 51, at 95-96. But such large-pool lotteries must be constructed in the first place. Implementing risk expansions to engineer a different political environment is impossible if successful implementation requires the political environment meant to be created by the expansion.

74. See GOODWIN, *supra* note 51, at 97-99.

75. *Accord id.* (asserting relief from responsibility as a benefit of lotteries).

76. See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1034-36, 1073-77 (1995) (arguing that ownership ambiguity can dampen incentives to over- or understate private valuation, though emphasizing that other transaction costs might be more important).

increase them (compared to incomplete enforcement, handwringing, or game-playing).

c. Information and Experimentation

Finally, randomization is a foundation for learning and experimentation. It provides a way to convert difficult choices into intermediate steps. As the modern analogue to divination, today's best empirical studies on causation often rely on random assignments to treatment and control groups.⁷⁷ Random assignment across a sufficient number of cases should equalize unaccounted for variables,⁷⁸ which helps explain its promotion by the U.S. Food and Drug Administration for use in clinical drug trials.⁷⁹ This experimental function holds even when lotteries are chosen for other reasons. For example, the Vietnam draft lottery was not chosen because of what researchers might learn about the effects of military service on later life, but it did offer up a natural experiment.⁸⁰ Similarly, randomization can be used intentionally to draw representative samples from a population of interest.⁸¹ The samples can be studied at lower cost than can the entire population. Many government agencies use sampling for this informational purpose, starting with a measurement of the nation's monthly unemployment rate in 1939.⁸² Whether by policy intervention or survey sampling,

77. See, e.g., 21 C.F.R. § 314.126 (2008) (noting that a characteristic of adequate and well-controlled clinical studies is assignment by randomization).

78. See, e.g., Gary Burtless, *The Case for Randomized Field Trials in Economic and Policy Research*, J. ECON. PERSP., Spring 1995, at 63, 66-67 (offering a brief restatement); Donald T. Campbell, *Legal Reforms as Experiments*, 23 J. LEGAL EDUC. 217, 217-18 (1970) (offering a classic endorsement); see also Ann Oakley, *A Historical Perspective on the Use of Randomized Trials in Social Science Settings*, 46 CRIME & DELINQ. 315, 316-25 (2000) (offering a brief history). It appears that the first uses of randomization in experiments did not occur until the late nineteenth century. See Ian Hacking, *Telepathy: Origins of Randomization in Experimental Design*, 79 ISIS 427, 431-34, 438-40, 447-49 (1988) (discussing use of randomizers to test telepathic abilities). Experimental trials are much older, in agriculture for example, but randomization does not seem to be part of that history. See *id.* at 430-31.

79. See 21 C.F.R. § 314.126(a), (b)(2)(i)-(iv), (b)(4) (2008).

80. See Joshua D. Angrist, *Lifetime Earnings and the Vietnam Era Draft Lottery: Evidence from Social Security Administrative Records*, 80 AM. ECON. REV. 313, 313-14 (1990).

81. See Martin R. Frankel & Lester R. Frankel, *Fifty Years of Survey Sampling in the United States*, PUB. OPINION Q., Winter 1987, at S127, S128.

82. See *id.*; see also JOSEPH W. DUNCAN & WILLIAM C. SHELTON, U.S. DEP'T OF COMMERCE, *REVOLUTION IN UNITED STATES GOVERNMENT STATISTICS 1926-1976*, at 50 (1978); Sarah B.

randomization can serve the function of information collection in the hope of improving future decisions.

Of course, randomized decision making has serious drawbacks.⁸³ Statistical randomization is a freakishly effective leveler that cannot distinguish the good, the bad, and the ugly. It might reduce incentives not only to appear needful but also to actually become meritorious. Randomization may undermine constructive planning as well, and it will not provide reasons for particular outcomes. One can argue with a decision maker's decision to randomize but not with a randomization device's output. This can be distressing. Furthermore, the semi-mindlessness of randomization separates individual decision makers from particular outcomes. People still bear responsibility for deciding to randomize, yet randomization interferes with a regime of accountability and associated effort. In addition, randomization's nifty slicing power in situations of indivisibility might be distracting. We should not neglect the possibility that scarcity can be ameliorated at tolerable cost, just as we should remember that randomization requires normative judgments about what to randomize.⁸⁴ Indeed, preserving large domains for merits and markets can prevent scarcity in the first place.

Randomization's flight from individualized merits judgments and decision-maker responsibility suggests that often it will be undesirable. But randomization should be most attractive when competing claims to an indivisible good appear equally strong, when people will behave in socially destructive ways under an alternative decision rule, and when randomizing is likely to yield insights for future decision making.

3. *Three Examples in Government*

Although restating the proper domain for randomization in decision making is challenging, it is more than a parlor game. Even government decision making has a modest tradition of deliberate

Lawsky, *Fairly Random: On Compensating Audited Taxpayers*, 41 CONN. L. REV. 161, 166-68 (2008) (stating that randomized tax audits are essential information gathering tools).

83. See, e.g., GOODWIN, *supra* note 51, at 46-47 (listing objections to lotteries).

84. Accord Carol Necole Brown, *Casting Lots: The Illusion of Justice and Accountability in Property Allocation*, 53 BUFF. L. REV. 65, 73 (2005).

randomness. In the United States, official randomization dates back to the organization of government in 1789.⁸⁵ Allocation of the first Senators to three different election classes was done, in part, by lot.⁸⁶

Among the best known contemporary instances is the military draft for the Vietnam War. The decision to compel people to serve comes with the issue of whom to compel. One option is to rely on officials to choose conscripts based on fitness. The Vietnam draft relied in part on this model, but there was room for abuse, with different draft boards using different tests and affording preferential treatment among equally fit conscripts.⁸⁷ In 1969, the President ordered the next round of conscripts to be chosen randomly from a pool of nineteen to twenty-five year olds.⁸⁸ Of course, discretion and gaming were not eliminated, and many thought the war was misguided in the first place. Yet randomization becomes palatable when a national obligation requires resources from many, but not all people, each of whom are presumptively equally entitled to avoid service. If the government could acquire reliable information at no cost, it might conscript only the fittest people with the lowest opportunity costs, but a crudely defined lottery pool might be the best first step.⁸⁹

A second example comes from the same era, but it was a conscious effort to experiment. By the 1960s, some welfare-state reformers were pushing a negative income tax, with reduced benefits as income from other sources increased.⁹⁰ One debatable concern was that a guarantee would reduce work incentives to an unacceptably low level.⁹¹ In response, large-scale randomized trials costing hun-

85. See Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. 1295, 1357 (2008).

86. See *id.* at 1357-58 (noting the combination of deliberation with chance).

87. See GEORGE Q. FLYNN, *THE DRAFT 1940-1973*, at 169-70, 172-73, 180, 231 (1993).

88. See Exec. Order No. 11,497, 34 Fed. Reg. 19,019 (Nov. 26, 1969); FLYNN, *supra* note 87, at 224-58 (discussing the political back story).

89. See, e.g., Harvard Study Group, *On the Draft*, 9 PUB. INT. 93, 95 (1967) (supporting a lottery for the Vietnam draft and opposing student deferments).

90. See Robert A. Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, J. ECON. PERSP., Summer 2003, at 119, 120 [hereinafter Moffitt, *Negative Income Tax*].

91. See Robert A. Moffitt, *The Role of Randomized Field Trials in Social Science Research: A Perspective From Evaluations of Reforms of Social Welfare Programs*, 47 AM. BEHAV. SCIENTIST 506, 509 (2004) [hereinafter Moffitt, *Role of Randomized Field Trials*].

dreds of millions of dollars were run to test certain effects of the idea.⁹² Random samples of households receiving support from Aid to Families with Dependent Children (AFDC) were either kept within the existing system or given various levels of guaranteed income.⁹³ Although the experiments have been criticized,⁹⁴ they were an effort at informed policymaking with intriguing results. The experiments suggested to some observers that the labor supply effect was not dramatic across different benefit-reduction rates, though beneficiaries did participate in the labor market less than those who received no welfare assistance.⁹⁵ We can debate the propriety of experimenting on (only) low-income people,⁹⁶ but we can also sympathize with random policy intervention to acquire knowledge.

A third example shows randomization in an arguably less flattering light. From 1960 until 1987, the federal government used lotteries to distribute oil and gas leases for certain government-owned lands.⁹⁷ Leases for lands with known resource potential were supposed to be auctioned while other never-leased land was given first-in-time to qualified applicants and the remainder was distributed by lottery to applicants who paid a nominal fee.⁹⁸ It is difficult to see why auctions were not the better solution, even if large amounts of government land would remain unleased. A lottery will not reward knowledge about drilling prospects and it awards leases regardless of applicant need or ability. Those who applied for leases

92. See WILLIAM M. EPSTEIN, *WELFARE IN AMERICA: HOW SOCIAL SCIENCE FAILS THE POOR* 90-91 (1997); Moffitt, *Negative Income Tax*, *supra* note 90, at 120.

93. See Moffitt, *Role of Randomized Field Trials*, *supra* note 91, at 509-10.

94. See Gary Burtless, *The Work Response to a Guaranteed Income: A Survey of Experimental Evidence*, in *LESSONS FROM THE INCOME MAINTENANCE EXPERIMENTS* 22-25 (Alicia H. Munnell ed., 1987) (reviewing the debate).

95. See Moffitt, *Role of Randomized Field Trials*, *supra* note 91, at 509.

96. See David Greenberg, Mark Shroder & Matthew Onstott, *The Social Experiment Market*, *J. ECON. PERSP.*, Summer 1999, at 157, 159, 162 (finding that, when the government uses randomized trials, it tends to test proposals aimed at the disadvantaged rather than existing programs or proposals aimed at other groups).

97. See Thomas L. Sansonetti & William R. Murray, *A Primer on the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Its Regulations*, 25 *LAND & WATER L. REV.* 375, 380-82 (1990).

98. See *id.* at 380-81. Apparently, high potential land had sometimes fallen into a first-in-time category, which led to "mob scenes." CARL J. MAYER & GEORGE A. RILEY, *PUBLIC DOMAIN, PRIVATE DOMINION: A HISTORY OF PUBLIC MINERAL POLICY IN AMERICA* 198 (1985) (citation and internal quotation marks omitted). Later, approximately 97 percent of all leases were allocated by lottery. See *id.* at 318.

were often unable to exploit any resources present; those who were had to track down the leaseholder and negotiate.⁹⁹ This might be a small transaction cost, but an auction skips that step and the government would remain free to distribute the proceeds to the disadvantaged or to anyone else.¹⁰⁰

II. RANDOMIZATION AND THE JUDICIARY

We have seen that randomization is normatively plausible in certain decision situations and unacceptable in others. Given a sufficient number of decisions, randomization ought to comprise a nontrivial fraction of decision rules selected, assuming that decision makers are rational. With hundreds of thousands of disputes adjudicated in the administrative state and in various judiciaries every year, one might guess that coin flipping would become standard in a number of close merits questions. But it has not. In fact, government decision making is rarely randomized, and nearly never for the purpose of adjudicating merits issues. Yet when push comes to shove, judges have not seriously resisted randomization either. Sometimes judges actually encourage it.¹⁰¹ This Part attempts to sort out the judicial position on randomization.

A. *Judicial Self-Regulation*

1. *Sanctions and General Opposition*

For judges, flipping coins is an easy way to draw misconduct sanctions. It is a basis for penalties well beyond mere reversal by an appellate court. Every decade or so, a judge overtly randomizes a merits decision and the reaction from those who punish judicial misconduct is uniformly negative.¹⁰²

99. See MAYER & RILEY, *supra* note 98, at 198 (noting that many lease winners sold their leases to oil and gas companies).

100. The best defense of this lottery probably involves incentives and politics. Perhaps officials could not be trusted to appropriately allocate the proceeds from an auction and, with the risk of untapped land remaining in government hands, a lottery for applicants was a convenient compromise to achieve a measure of useful privatization.

101. See *infra* notes 161-95 and accompanying text.

102. See, e.g., *In re Daniels*, 340 So. 2d 301, 302, 307 (La. 1976); *Judicial Inquiry and*

Much of this aversion involves public relations. Arbiters of judicial discipline are convinced that citizens will not tolerate merits randomization. “A court of law is not a game of chance,” as one misconduct commission put it.¹⁰³ “The public has every right to expect that a jurist will carefully weigh the matters at issue and, in good faith, render reasoned rulings and decisions.”¹⁰⁴ On a public relations theory, moreover, it makes sense to sanction a judge for simply appearing to randomize merits issues even if the judge actually decides the case on other grounds. This has, in fact, been done.¹⁰⁵

Perhaps any judicial tolerance for randomization in adjudication is incompatible with survival-level legitimacy for the court system. A public with little information about judicial performance might see coin flips as a sign that judges are not taking their jobs seriously, that law often can do no better than chance, or that judges enjoy lording the power of chance over hapless litigants.¹⁰⁶ In addition, banning merits randomization could bolster an image of courts as unique systems of reason set apart from other public offices, and from arbitration. Instead of metaphorically splitting babies, courts might fashion themselves as institutions that not only offer decisive resolution of contested issues upon request, but that provide rational explanations for every significant decision they make.

In fact, judges can be sanctioned for randomization even if they first make efforts to decide a contested issue on other grounds and even if they show respect for the difficulties of judgment. Consider the disciplinary proceedings against Judge Helen Brown, a family

Review Comm'n of Va. v. Shull, 651 S.E.2d 648, 650, 652, 658 (Va. 2007).

103. ANNUAL REPORT OF THE NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT 84, 88 (1984) [hereinafter ANNUAL REPORT] (*In re Friess*).

104. *Id.*; see Coons, *supra* note 8, at 110 (“People resist having their noses rubbed in the randomness of the system.”); see also Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 610-11 (1985) (similar).

105. See *Daniels*, 340 So. 2d at 307 (sanctioning a trial judge who appeared to decide guilt by coin flip, regardless of the actual basis for decision).

106. See, e.g., *Shull*, 651 S.E.2d at 658 (concluding that “tossing a coin in a courtroom to decide a legal issue pending before the court denigrated the litigants whose case he decided and subjected our justice system to ridicule”); ANNUAL REPORT, *supra* note 103, at 86-87 (barring a judge from office for using a coin toss to decide whether to sentence a defendant to twenty days in jail rather than thirty days, which assertedly “undermined public respect for the judiciary”).

court judge in Michigan.¹⁰⁷ In a divorce case, she had temporarily placed two children with their maternal grandparents; later, the biological father renewed his demand for custody.¹⁰⁸ While that issue was pending, the father and the grandparents argued over where the children should spend Christmas Eve as opposed to Christmas Day.¹⁰⁹ Despite Judge Brown's encouragement, the parties could not resolve this relatively minor dispute on their own.¹¹⁰ With each side's arguments "equally compelling,"¹¹¹ the judge ordered the question resolved by a coin flip, and the father was awarded custody for Christmas Eve.¹¹²

Judge Brown was censured,¹¹³ but as a matter of decision theory and the disciplinary record, her resort to randomization seems perfectly rational. As far as we can tell, she faced two options that were equally supported on the available information. She was not charged with sloth or misunderstanding the arguments.¹¹⁴ And she faced a choice that other judges might have decided on questionable grounds—for example, by a tiebreaking preference for older couples over fathers, or vice versa. Publicly flipping a coin to resolve this merits issue was nevertheless intolerable to the state's high court, and threatening enough to warrant discipline rather than mere reversal and remand.¹¹⁵ In this way, Elster's hope for randomization

107. See *In re Brown*, 662 N.W.2d 733, 734 (Mich. 2003).

108. See *id.* at 736.

109. See *id.*

110. See *id.*

111. *Id.* (quoting the adopted findings of the Judicial Tenure Commission).

112. See *id.*

113. See *id.* at 733.

114. See *id.* at 737.

115. Judge Brown's coin flip did attract local media attention. See David Ashenfelter, *Judge Uses Coin Flip to Decide Custody*, DETROIT FREE PRESS, Feb. 8, 2002 (reporting that a chief judge in the county indicated that the coin flip showed a lack of seriousness); see also *Brown*, 662 N.W.2d at 737 (Weaver, J., concurring) ("The press coverage surrounding the misconduct greatly increased both the public's knowledge of the incident and, consequently, the public's trust and confidence in the judiciary was damaged."); *id.* at 742 (reporting a Commission conclusion that Judge Brown had "denigrated the judicial process and legal system"). It should be noted that Brown faced a second misconduct charge, see *id.* at 734 (regarding involvement with a charitable organization), which might or might not make her randomization look worse.

in certain custody disputes¹¹⁶ fell to Neurath's feared "reproach of frivolity or cynicism."¹¹⁷

Judicial opposition to randomization extends further. It reaches statistical sampling of contested cases, even when doing so could save substantial decision costs.¹¹⁸ Lower federal courts seem unwilling to randomly sample from a plaintiff class to resolve similar issues for all plaintiffs.¹¹⁹ This is true despite the possibility that collateral estoppel will have a similar effect. In fact, lower courts are open to early scheduling of randomly selected bellwether trials with the expectation that similar cases will thereafter settle accordingly or be subject to preclusion.¹²⁰ The resort to rough substitutes for outright resolution by random sampling reinforces a sense of judicial aversion to randomizing merits questions. Parties are entitled to believe that their situations are special, or will otherwise be advantaged by additional process, and seek a more personalized trial.¹²¹ Yet judicial willingness to expedite bellwether trials means that, practically speaking, a deliberate lottery will influence outcomes.

The best-known judicial statements on individualized case assessment in opposition to randomization are found in the Eighth

116. See ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 163-74 (defending randomization in some cases of real uncertainty as to the best parent where children will likely be hurt by delay).

117. Neurath, *supra* note 68, at 8-9 (discussing the prospect of officials drawing lots).

118. See Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 546 (1998) (advocating "randomly sampling damages without apology").

119. See McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 219-20 (2d Cir. 2008) (denying class certification), *rev'g* Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1022 (E.D.N.Y. 2006) (approving sampling to prove plaintiff class reliance on "light" cigarette messages); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319-21 (5th Cir. 1998) (rejecting, under state law and the Seventh Amendment, adjudication of all class damages claims based on a random sample of claims). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 783-87 & nn.10-11 (9th Cir. 1996) (upholding, against a due process objection, the use of a random sample to determine the fraction of valid claims for purposes of recovery from a common pool). For a claim that the trend is toward adjudication by sampling in mass tort, see Laurens Walker & John Monahan, *Sampling Evidence at the Crossroads*, 80 S. CAL. L. REV. 969, 970 (2007).

120. See, e.g., *In re Medtronic, Inc. Implantable Defibrillator Prod. Liab. Litig.*, No. CIV 05MD1726, 2007 WL 846642, at *3-4 (D. Minn. Mar. 6, 2007) (ordering bellwether trial proceedings by random sampling of plaintiffs and a peremptory strike process); MANUAL FOR COMPLEX LITIGATION (Fourth) §§ 20.132, 22.315 (2004) [hereinafter MANUAL] (recommending random sampling or agreement on typicality for bellwether trials).

121. See MANUAL, *supra* note 120, § 22.81.

Amendment field. A coalition of justices in the early 1970s repudiated capital sentencing for inadequately identifying those defendants who were the most appropriate candidates for death sentences.¹²² The old regime was likened to “a lottery system” executing “a random few”¹²³ and “a capriciously selected random handful” more or less “struck by lightning.”¹²⁴ Part of this criticism seemed to be about rarity; perhaps a punishment seldom used would have little influence on behavior.¹²⁵ But the justices in the majority emphasized the problem of imperceptible differences between the defendants selected for execution and those who were spared. This distribution is an expected feature of randomization, which must have prompted the analogies to lotteries and lightning strikes.

Later, a new coalition of justices accepted capital sentencing with additional guidance to decision makers,¹²⁶ yet they did not rush to impose flat rules on the sentencing process. In fact, the Court invalidated state laws that automatically imposed a death sentence on anyone convicted of first-degree murder,¹²⁷ without suggesting that flat exemptions from the death penalty were constitutionally problematic. The emerging case law thereby indicated that the justices favored rarity over clarity in death sentencing.¹²⁸ Sentencers would have to consider the facts of individual cases, including the personal story of the defendant and his argument for mercy. Although this injection of open-ended standards risks the capri-

122. See generally *Furman v. Georgia*, 408 U.S. 238 (1972); *id.* at 249, 253 (Douglas, J., concurring).

123. *Id.* at 293, 304-05 (Brennan, J., concurring); see *id.* at 295 (criticizing unguided jury discretion); see also *id.* at 313 (White, J., concurring) (finding “no meaningful basis for distinguishing the few cases in which it is imposed”).

124. *Id.* at 309-10 (Stewart, J., concurring) (criticizing a penalty “so wantonly and so freakishly imposed,” although suggesting race bias as an explanation). Note that the “random” or apparently purposeless or patternless selection of a *victim* has been used as an aggravating circumstance that justifies *imposition* of a death sentence. See NEV. REV. STAT. ANN. § 200.033(9) (2009); *Leslie v. Warden*, 59 P.3d 440, 445-46 (Nev. 2002).

125. See *Furman*, 408 U.S. at 293-94, 299-302 (Brennan, J., concurring).

126. See *Gregg v. Georgia*, 428 U.S. 153, 195-206 (1976) (Stewart, Powell, and Stevens, JJ., joint opinion).

127. See *Woodson v. North Carolina*, 428 U.S. 280, 301-05 (1976) (Stewart, Powell, and Stevens, JJ., joint opinion).

128. See *id.* at 304 (calling for individualized assessments within classes of convicted defendants); see also *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650 (2008) (reiterating that the death penalty must be reserved for the most serious crimes and the most deserving perpetrators).

ciousness feared in the 1970s, it is consistent with an overarching commitment to individualized adjudication and inconsistent with the crudeness of flat rules. Randomization is compatible with rarity in executions; officials could randomly select very few offenders for death sentences. But statistical randomization is a rule. It cannot rank defendants on merits or demerits.

A commitment to personalized adjudication should not be taken too seriously, however. *Every* adjudication is personalized in the sense that a decision rule is brought to bear on a particular case. Nothing changes if the decision rule is flat and broad rather than flexible and case-sensitive. Second, to the extent that personalization means a preference for standards over rules, it will have only limited force. An unbending rule in favor of standards is naïve,¹²⁹ not to mention contradictory. For their part, courts regularly produce rules, trading decision costs for error costs across time. Consider judicially imposed limits on punitive damages. Recently, the Court estimated the median ratio of punitive to compensatory damages in past cases and used that number to set a ceiling for future maritime cases involving recklessness.¹³⁰ In capital sentencing, the true test of judicial opposition to randomization would be a trial system that accurately identified a small set of the most deserving defendants and then randomly selected half of them for life sentences. This lottery would impose a kind of rule favoring leniency without necessarily setting off alarms under established doctrine.¹³¹

That said, statistical randomization is not the type of rule that judges ordinarily tolerate for their merits decisions. Assuring adverse parties a 50-50 chance of victory happens to conflict with several conventional commitments in adjudication. A straightfor-

129. *Cf.* *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 41-42 (1928) (Holmes, J., dissenting) (“Looked at by itself without regard to the necessity behind it the line or point seems arbitrary.”).

130. *See Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2624-27, 2632-34 (2008). I will not attempt to square this rulemaking with lower court unwillingness to resolve mass tort claims by sampling.

131. *Cf.* ANTHONY EVERITT, *AUGUSTUS: THE LIFE OF ROME'S FIRST EMPEROR* 70 (2006) (explaining the ancient practice of decimation, which involved execution of 10 percent of a pool). Contrast the position of the justices who indicated that a purely random clemency process in the executive branch would violate due process. *See infra* note 157 and accompanying text.

ward conflict occurs with respect to the imposition of proof burdens attached to particular elements of a claim or defense. Requiring proof more likely than not on relevant evidence is plainly different from offering a 50 percent chance of victory regardless. This is true whether the elements at issue are hard-line rules or vague standards, and even if litigated cases are more likely to be hard cases.¹³² When demand for judgment based on evidence relevant to a given law is strong, the plausibility of randomization fades.

There is one exception to the strong judicial norm against overt merits randomization in adjudication. In some states, courts may partition jointly owned land into plots of roughly equal value and then allocate these plots across owners by lot.¹³³ The owners might trade their plots after this initial allocation, but courts have orchestrated lotteries to facilitate land partition.¹³⁴

Depending on the objectives of property law in this context, a lottery may fit well with the overlapping justifications for randomization presented in Part I. If we generously assume that a physical partition is justified, then the joint owners face a kind of indivisibility problem. Sharing plots is off the table and they need a method for allocating each portion of the land to one owner. Furthermore, opting into joint ownership might entail at least presumptively equal claims to any given plot upon partition. This could be the advertised consequence of choosing this form of ownership (along with disincentives for personalizing plots). In any event, figuring out who has the strongest claim to any particular plot will sometimes be impossible or not worthwhile. A lottery is a low-cost decision rule, once equally valued plots are identified. Information problems can also animate unfortunate strategic behavior, which can exacerbate the information problems. For instance, if judges were asked to allocate parcels according to the highest value user, a low value user might attempt to appear most deserving in order to obtain a particular parcel for the purpose of selling it. Finally, permitting negotiation and transfer of parcels after a lottery will limit its

132. Cf. George L. Priest, *Reexamining the Selection Hypothesis: Learning from Wittman's Mistakes*, 14 J. LEGAL STUD. 215, 216-19 (1985) (exploring determinants of settlement).

133. See Jay M. Zitter, Annotation, *Judicial Partition of Land by Lot or Chance*, 32 A.L.R. 4th 909, 910-15 (1984).

134. See *Robertson v. Robertson*, 484 S.E.2d 831, 835 (N.C. Ct. App. 1997).

significance. In this setting, any unsettling drama associated with randomization is ameliorated by the opportunity of affected parties to adjust allocations afterward.

The partition exception is not curious because it is especially difficult to justify, but because it is so isolated. With respect to judicial decisions on the merits, partition lotteries are the only arguably consistent use of randomization. Outside of this exception, judges risk not only reversal but professional sanctions for randomizing on the merits. It could be that land partition lotteries enjoy unique staying power based on biblical support.¹³⁵ In addition, these lotteries are sometimes expressly authorized by state statute.¹³⁶ Perhaps the endorsement of another political institution helps sustain the practice. But none of this explains the otherwise virulent judicial resistance to merits randomization in court, a resistance that comes with costs.

2. Problems with a Randomization Ban

It cannot be that the theoretically optimal number of occasions for randomization on a merits question, across the millions of cases annually adjudicated in courts and administrative agencies, is zero. In a subset of these cases, however small, randomization will be the theoretically superior option for reasons of practical indivisibility, equality norms, nagging uncertainty, incentive effects, and/or experimental value. That we have difficulty identifying this class of cases with precision is no reason to think it is an empty set. A strict prohibition on randomization, moreover, is likely to have problematic side effects.

The first worry is that adjudicators will manufacture false certainty.¹³⁷ This can happen in at least three ways. Adjudicators

135. See *Numbers* 26:52-56 (King James) (relating God's instructions to Moses regarding land allocation across tribes).

136. See, e.g., ALA. CODE § 35-6-48 (1975); ARIZ. REV. STAT. ANN. § 12-1216 (2009); HAW. REV. STAT. § 668-7(4) (2008).

137. Cf. Charles E. Clark & David M. Trubek, *The Creative Role of Judge: Restraint and Freedom in the Common Law Tradition*, 71 YALE L.J. 255, 270 (1961) (indicating that judges might acquire false confidence in their judgments and be less on guard against "bias and prejudice" if they unrealistically believe in the power of their "objective" analysis to close all cases).

might convince themselves that they have ascertained the relevant norms, historical information, and predictions with greater confidence than they should rationally possess. Similarly, they might hold to initial impressions and avoid working too hard on difficult questions in order to avoid the conclusion of indeterminacy.¹³⁸ Or they might privately accept the uncertainty but attempt to convince observers that conventional legal argument yields a single superior outcome. The first reaction is a form of denial, the second is avoidance, and the third is false advertising. Perhaps these reactions are defensible on consequentialist grounds, but they suggest the debatable status of a merits randomization ban.¹³⁹

This raises the question of how decision makers deal with uncertainty that they are willing to accept when randomization is out of the question. A possibility is that legally prohibited grounds of decision creep in. If the rules of the game truly result in more than one possible outcome,¹⁴⁰ the tiebreaker must come from outside of those rules. One such source is the personal predilections of the decision maker in the form of impermissible bias, whether consciously recognized or more implicit in form.¹⁴¹

In the alternative, decision makers might generate official tiebreakers that are worse than randomization. If law and available information leave uncertainty, adjudicators might simply produce more rules to eliminate discretion and to avoid flipping coins. Existing adjudicative systems are littered with such tiebreakers. Plaintiffs ordinarily are supposed to lose unless they prove liability by a preponderance of the evidence; if a defendant's liability is a 50-50 proposition, the tie goes to the defendant.¹⁴² Similarly, lower

138. I thank Mark Kelman for suggesting this point.

139. See DUXBURY, *supra* note 8, at 114-16 (following PIERRE SCHLAG, THE ENCHANTMENT OF REASON 17, 21 (1998)); ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 121 ("Honesty requires us to recognize the pervasiveness of uncertainty and incommensurability, rather than deny or avoid it."); Harcourt, *supra* note 50, at 316, 334 (criticizing repeated leaps of faith).

140. *But cf.* RONALD DWORIN, TAKING RIGHTS SERIOUSLY 279-90 (1977) (arguing that there is a single correct answer, even in hard cases, for each decision maker; but counting a conclusion that a case is "tied" as a single correct answer).

141. *Cf.* Micah Schwartzman, *The Completeness of Public Reason*, 3 POL. PHIL. & ECON. 191, 211-14 (2004) (analyzing randomization as a way to avoid resort to nonpublic reasons).

142. See, e.g., D.H. Kaye, *The Error of Equal Error Rates*, 1 LAW, PROB. & RISK 3, 6 n.10 (2002) ("[S]ome supplementary argument, such as avoiding transaction costs or a preference for the status quo, is required to choose between a $p > 1/2$ rule and a $p \geq 1/2$ rule.").

court judgments are affirmed when the appellate panel is equally divided.¹⁴³ In partial contrast, habeas corpus applicants are supposed to prevail if the judge is in “equipoise” on whether a constitutional error at trial was harmless.¹⁴⁴ On the other hand, states are free to mandate a death sentence if a jury concludes that aggravating and mitigating circumstances are in “equipoise.”¹⁴⁵

Relatively general rules of decision have similar tiebreaking qualities. We might characterize canons of interpretation, presumptions of constitutional validity, review restricted to clear error, and other supplemental decision rules as akin to tiebreakers.¹⁴⁶ These rules are telling. They indicate deep background commitments. Hence we can view the defendants’ edge in civil litigation as a background preference for private ordering, and the equally divided affirmance rule as a sign of confidence in the lower courts.¹⁴⁷

This proliferation of nominally nonrandom tiebreakers is not necessarily tragic, but it is vulnerable to criticism. First is the attack from indeterminacy enthusiasts, who can attempt to show that every tiebreaking decision rule has a hazy boundary that could call for the production of yet another tiebreaker.¹⁴⁸ For instance, a

143. See, e.g., *Warner-Lambert Co., LLC v. Kent*, 128 S. Ct. 1168, 1168 (2008) (per curiam); see also 28 U.S.C. § 2109 (2006) (similar result in the absence of a quorum in the Supreme Court, except in cases of direct appeal from district courts); *Morrison Knudsen Corp. v. Fireman’s Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999) (holding that the appellant loses when the appendix is incomplete and prevents review).

144. *O’Neal v. McAninch*, 513 U.S. 432, 435 (1995).

145. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006).

146. See, e.g., Michael P. Healy, *Communis Opinio and the Methods of Statutory Interpretation: Interpreting Law or Changing Law*, 43 WM. & MARY L. REV. 539, 570-74 (2001) (discussing the use of canons of statutory interpretation as tiebreakers in cases of ambiguity); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 267 (2009) (“When a constitutional question is so close, ... the tie for many reasons should go to the side of deference to democratic processes.”).

147. Rarely will a court overtly split differences as a tiebreaker. Judges opt for more visibly decisive outcomes, perhaps leaving difference-splitting to the arbitration system. A rare counterexample is the litigation over ownership of Barry Bonds’s record-breaking home run baseball. The trial judge was uncertain whether one claimant had achieved adequate possession before being assaulted by a mob, and he granted equal and undivided shares to that claimant and a second claimant who ended up holding the ball. See *Popov v. Hayashi*, No. 400545, 2002 WL 31833731, at *3, *7-8 (Cal. Super. Ct. Dec. 18, 2002) (finding the two claims to be “of equal quality” and ordering the ball sold). (I thank Lior Strahilevitz for this example.) However one evaluates judicial aversion to splitting differences, merits randomization is still possible and it can be used to decisively award victory to one party over others.

148. There is a connection here to the observation that indeterminacy in legal rules cannot

decision maker must know that the substantive law and relevant evidence actually yields equipoise or less before awarding victory to a civil defendant. The boundary of equipoise may be no clearer than the boundary of preponderance or anything else. If that critique is not entirely successful, there still may be situations in which tiebreaking decision rules are in tension or conflict.

In addition, nonrandom tiebreakers must be justified as a normative matter insofar as they are meant to reflect background assumptions or preferences for legal institutions. These rules might be constructed to tie up loose ends at the fringes of adjudication, but they can be linked to the deepest and broadest issues of legal design. Consider a prisoner on death row challenging the constitutional validity of his sentence; his claim is denied by a court of appeals and affirmed by the Supreme Court on an equally divided vote.¹⁴⁹ Whatever is the appropriate method of decision in such situations, it cannot escape difficult judgments. Given such controversial choices, it remains hard to believe that randomization is categorically less acceptable as a theoretical matter than all of the tiebreakers currently in operation.

B. Judicial Oversight

Does judicial opposition to randomization extend further than the courthouse door? If another institution determines that randomization is appropriate for its own decisions, will judges intervene? Answering is difficult, in part because only a small set of past cases are directly relevant. Nonjudicial officials might not be much more enthusiastic than judges about lotteries, aside from the revenue-generating variety. Even if randomization is seldom used, however, it has been litigated in several different settings. This section attempts to estimate the level of judicial tolerance for nonjudicial government lotteries.

always be resolved by resort to legal principle, which can reproduce uncertainty. See H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 6-8, 153-58 (1983).

149. See *Tompkins v. Texas*, 490 U.S. 754, 754 (1989) (per curiam).

1. Possibilities for Global Opposition

As an initial matter, perhaps courts may fairly conclude that randomization in official decision making is usually prohibited by statute. Scattered statutes do explicitly authorize lotteries,¹⁵⁰ and maybe they are sufficiently unorthodox to be disfavored when courts read vague statutes. Assuming randomization is a controversial decision rule, it might be appropriate to lean against conclusions that favor official lotteries.¹⁵¹ Officials will not often suffer public opinion backlash for rejecting randomization, and pervasive randomization in decision making would produce dystopia.

Regardless of the proper interpretive presumption, a key question is whether the judiciary will oppose randomization for other institutions when nonjudicial officers plainly prefer it. Existing judicial doctrine does include abstract principles that might be converted into an opposition to randomization per se; and some of these principles have been categorized as supreme constitutional law.

One elaboration of equal protection dictates that “like” cases must be treated “alike.”¹⁵² This principle is notoriously unhelpful insofar as it requires additional normative content to identify relevant

150. *See, e.g.*, 8 U.S.C. § 1153(e)(2) (2006) (regarding excess immigration visas); 20 U.S.C. § 7225d(b) (2006) (regarding admission to oversubscribed charter schools receiving federal grants); 43 U.S.C. § 1353(b)(2) (2006) (regarding government oil sales to help small refiners). Actually, the search term “random!” appears in the text of over 100 statutory sections in the U.S. Code, many addressing random sampling. *See, e.g.*, 2 U.S.C. § 1614(a) (West 2009) (regarding audits of lobbyist compliance with disclosure rules); 6 U.S.C. § 923 (2006) (regarding a plan for random inspection of containers at ports); 42 U.S.C. § 15603(a)(4) (2006) (regarding a study of prison rape).

151. *Cf.* U.S. Dep’t of Commerce v. U.S. House of Representatives, 525 U.S. 316, 338 (1999) (holding that a federal statute prohibited sampling for congressional apportionment); *Advanced Bodycare Solutions, LLC v. Thione Int’l, Inc.*, 524 F.3d 1235, 1239 n.3 (11th Cir. 2008) (dictum) (asserting that a contract to be bound by a coin flip could not be enforced under the Federal Arbitration Act). *But cf.* *Utah v. Evans*, 536 U.S. 452, 457 (2002) (holding that “hot-deck imputation” for missing data was not prohibited “sampling” and was a permissible method of “actual Enumeration,” without judging the constitutional validity of statistical sampling).

152. *See, e.g.*, *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2153 (2008); *Vacco v. Quill*, 521 U.S. 793, 799 (1997) (similar); *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (similar). I discuss this notion of equal protection not because it is especially attractive, but because it survives in judicial materials.

characteristics for comparison.¹⁵³ From one perspective, however, this vagueness is unimportant when it comes to randomization. Equiprobablistic lotteries are designed such that all arguably relevant differences among pool members are blinkered. As to the distribution of outcomes, likes will almost certainly end up treated unlike, no matter what basis is chosen for judging similarity. Furthermore, unalikes will have been treated alike at the time that equal chances were distributed, unless everyone in the pool was, in fact, relevantly alike. Perhaps statistical and orthogonal randomization devices unjustifiably omit considerations of merit or need (or some other metric) from the allocation of chances or outcomes.¹⁵⁴

Precisely this disconnect can be restated as a due process problem. One elaboration of due process resists “arbitrary” decisions.¹⁵⁵ The meaning of this admonition is open to debate. Officials usually must exercise some discretion to perform their duties, so its absence cannot be required across the board. But judicial doctrine might sometimes impose a duty of reasoned decision making or instrumental rationality.¹⁵⁶ If we focus on the distribution of outcomes, randomization might violate this principle. As a result of randomization, an official will have advantaged pool member *A* and disadvantaged pool member *B* without any personalized justification beyond the diktat of an algorithm. This observation does not explain why the relevant timeframe is after distribution rather than before, when chances were equalized, but the complaint is clear enough.

153. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 539-56 (1982) (contending that this version of equality is derivative of substantive-rights arguments); see also Kent Greenawalt, *How Empty Is the Idea of Equality?*, 83 COLUM. L. REV. 1167, 1168, 1178 (1983) (“In order to decide what persons are relevantly equal or unequal, substantive judgments have to be made about what characteristics count.”); Kenneth I. Winston, *On Treating Like Cases Alike*, 62 CAL. L. REV. 1, 7-9 (1974).

154. This puts aside objections based on who or what is excluded from the pool.

155. *E.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

156. See, *e.g.*, *id.* at 325, 331 (using “arbitrary” to characterize a rule of evidence, in the sense of failing to identify a rational relationship between the rule and a legitimate goal); see also *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954) (rejecting segregation in D.C. public education as arbitrary in this sense); *Thunberg v. Strause*, 682 A.2d 295, 299 (Pa. 1996) (defining “arbitrary” in an attorney misconduct statute partly in terms of randomness). *But cf.* *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 621-22 (1989) (referring to “random or arbitrary” acts in a discussion of the warrant clause and suggesting concern about unchecked officer discretion).

At times, courts have explicitly warned against randomization in constitutional terms. A good illustration comes from due process opinions, where judges have used randomization to indicate the outer boundary of otherwise permissible official discretion. The leading example is probably Justice O'Connor's discussion of executive clemency.¹⁵⁷ Although she and her fellow concurring justices wanted to allow states a variety of procedural options for deciding when to soften criminal penalties, these justices also wanted to preserve judicial oversight in exceptional situations. When might judges intervene? "[A] state official flip[ping] a coin to determine whether to grant clemency" was one possibility.¹⁵⁸ The same message about lotteries has been delivered with respect to local zoning decisions, another field in which today's judges often display restraint.¹⁵⁹ Such statements intimate that randomization exhausts judicial tolerance for official discretion in locations where deference is otherwise likely.

But none of this is enough to establish a judicial policy against randomization outside the courts. The above-noted elaborations of equal protection and due process are insufficiently precise to get much traction on the judicial position. Neither rational choice theorists nor egalitarians have unqualified objections to lotteries in social decision making. The propriety of randomization will depend on factors previously suggested: the indivisibility of the item to be allocated, the strength of any equality presumption, the degree of uncertainty, behavioral incentives, the benefits of experimentation, and the counterarguments for nonrandom distribution at accept-

157. See *Oh. Adult Parole Auth. v. Woodard*, 523 U.S. 272, 289-90 (1998) (O'Connor, J., concurring) (concluding that due process was afforded in this case, however). Justice O'Connor's concurrence was joined by Justice Souter, Justice Ginsburg, and Justice Breyer. See *id.* at 288. Justice Stevens dissented. For indication that unfettered official discretion is easier to defend than randomized clemency, see *Grennier v. Frank*, 453 F.3d 442, 446 (7th Cir. 2006) (illustrating a "wholly arbitrary" decision by reference to a coin flip, but holding that a discretionary parole system does not provide an entitlement on which to ground due process claims).

158. *Woodard*, 523 U.S. at 289; see also *Nixon v. United States*, 506 U.S. 224, 253-54 (1993) (Souter, J., concurring) (stating that judicial intervention might be warranted if the Senate "tried" an impeached official by coin flip); *United States v. Raddatz*, 447 U.S. 667, 698 (1980) (Marshall, J., dissenting) (stating that a judge could neither blindly rely on a magistrate nor flip a coin).

159. See *Lemke v. Cass County*, 846 F.2d 469, 472 (8th Cir. 1987) (Arnold, J., concurring) (referring to such a decision as "truly irrational" and a violation of substantive due process).

able decision costs.¹⁶⁰ Nothing in a judge's offhand disparagement of randomization forecloses these considerations. If decision theorists are correct, then a perfectly well constructed decision process can recommend randomization for a subset of all social decisions. Within that subset, pool members may be equal in fact or equal as far as we know, and the advantages of randomization will outrun the complications.

2. *Litigation over Randomization*

In fact, the most relevant judicial decisions are permissive. When courts have examined challenges to deliberate randomization in nonjudicial official decision making, the challenges have faltered. Of course, official lotteries may be poorly designed or out of place—the oil and gas lease lottery program might be an example.¹⁶¹ But that is true of government decision making in general. There seems to be nothing in the scarce randomization case law to indicate a unique level of judicial skepticism for official lotteries, and occasionally judges promote randomization.

Only a handful of judicial opinions confront the validity of random allocation schemes, but existing cases show tolerance. For example, *Schenck v. City of Hudson* upheld a slow-growth ordinance that incorporated a lottery.¹⁶² City officials had capped the number of residential development projects per annum and then used a stratified lottery to allocate development certificates.¹⁶³ The Sixth Circuit reasoned that randomization would save administrative costs and prevent uncomfortably subjective decision making.¹⁶⁴ Likewise, a state appellate court upheld random selection among civil service applicants.¹⁶⁵ Having received more than 2000 valid applications for only twenty firefighter positions, city officials decided to randomly select 800 applicants for further competitive

160. *See supra* Part I.B.2.

161. *See supra* notes 97-100 and accompanying text.

162. 114 F.3d 590 (6th Cir. 1997).

163. *See id.* at 592-93 & n.4 (describing an 80 percent set aside for priority projects such as lots with preexisting plat approval, affordable housing, and large-lot developments).

164. *See id.* at 595 (reversing the grant of a preliminary injunction). The scarcity created by the city's development cap requires independent justification.

165. *See Anderson v. City of Minneapolis*, 363 N.W.2d 886 (Minn. Ct. App. 1985).

testing.¹⁶⁶ The court found this use of randomization to be a fair cost-saving device.¹⁶⁷ In a similar spirit, a district court upheld random selection of ballots as part of a proportional representation plan.¹⁶⁸ Voters would rank all candidates, their ballots would be counted according to a random ordering by polling place, and as soon as any candidate hit a certain threshold of first-choice votes, second choices would be counted on any subsequent ballots ranking that candidate first.¹⁶⁹ The order of counting could therefore influence results, and yet it was a fairly cheap and tamper-resistant method for a pre-digital age. These cases might show judges fearing corruption, but they display openness to official randomization regardless.

Judicial treatment is similar in the few cases examining randomized policy experiments. The leading case is *Aguayo v. Richardson*, which presented a compromise in the welfare benefits context.¹⁷⁰ In one experiment, New York officials could require training and/or work for certain family members in AFDC households; but these requirements could be imposed on only a subset of all social service districts in the state.¹⁷¹ Although the opinion does not explain precisely how districts were selected for inclusion, the court of appeals did endorse a “random but rational” criterion designed to gain information: “The Equal Protection clause does not place a state in a vise where its only choices in dealing with the problems of welfare are to do nothing or plunge into statewide action.”¹⁷² The court did, however, grant a preliminary injunction against the State’s plan to suspend benefits for certain experimental recipients who did not conform to compliance demands during a

166. *See id.* at 887.

167. *See id.* at 889 (finding the procedure reasonable and consistent with the city charter). Again, to be a sound policy, the scarcity in firefighter positions must be justified. We can safely assume that Minneapolis did not need to hire hundreds more firefighters.

168. *See Campbell v. Bd. of Educ.*, 310 F. Supp. 94, 102-05 (E.D.N.Y. 1970) (denying a preliminary injunction on equal protection and due process claims).

169. *See id.* at 98-99.

170. 473 F.2d 1090 (2d Cir. 1973).

171. *See id.* at 1094-96.

172. *Id.* at 1109-10; *see also id.* at 1109 (observing the usefulness of controlled experiments in medical and social inquiry); *Campbell*, 310 F. Supp. at 105 (“Chance, if a rational basis exists for its employment, cannot be said to be an irrational factor.”).

dispute resolution process.¹⁷³ This ruling softened the State's preferred experiment, at least until the due process arguments were developed, while permitting an experiment of some kind.¹⁷⁴

It is possible to see judicial resistance to random sampling in some Fourth Amendment cases, but any opposition is weak. Depending on the pool subject to search or seizure, statistically random invasions for law enforcement purposes can trigger adverse judicial reactions. If officials lack probable cause with respect to everyone in the pool, then randomized searches are vulnerable to judicial rebuff in the absence of special circumstances. Random drug testing cases deliver this message.¹⁷⁵

However, the objection here is not to randomization per se. These cases involve combinations of low ex ante suspicion followed by random selection; they do not repudiate random sampling when suspicion is stronger for the entire class. Justice Stevens made this point in a recent dissent that provoked no objection from the majority. He asserted that police officers may randomly select which of numerous speeders to stop and ticket when all cannot feasibly be stopped.¹⁷⁶ In fact, a theme in Fourth Amendment cases is discomfort with discretion among beat officers.¹⁷⁷ Once a pool of potential

173. See *Aguayo*, 473 F.2d at 1095, 1111-12.

174. Lower courts have themselves instituted experimental procedures that affect litigants. See *Kimbrough v. Holiday Inn*, 478 F. Supp. 566, 567, 574-75 (E.D. Pa. 1979) (upholding an arbitration referral experiment adopted in three federal districts against an equal protection challenge); HANS ZEISEL ET AL., *DELAY IN THE COURT* 244-45 (2d ed. 1978) (citing an expert witness experiment); Laurens Walker, *Perfecting Federal Civil Rules*, LAW & CONTEMP. PROBS., Summer 1988, at 67, 79-80 (collecting a few examples of randomized experiments).

175. See, e.g., *Bd. of Educ. v. Earls*, 536 U.S. 822, 826-29 (2002) (upholding random drug testing for students in extracurricular activities given the "special needs" of public schools); see also *MacWade v. Kelly*, 460 F.3d 260, 263-65 (2d Cir. 2006) (upholding orthogonally random searches of subway passenger containers to prevent terrorist attacks); *United States v. Marquez*, 410 F.3d 612, 614-16, 618 (9th Cir. 2005) (upholding random selection of airline passengers for handheld magnetometer scanning).

176. See *Engquist v. Or. Dep't of Agric.*, 128 S.Ct. 2146, 2159-60 (2008) (Stevens, J., dissenting). The majority opinion struck an even more permissive note, characterizing such decisions as inherently discretionary. See *id.* at 2154.

177. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 655-57, 662-63 (1979) (discussing automobile stops without individualized reasonable suspicion). Compare an officer's occasional decision to release an apprehended suspect based on a coin flip. See PETER MOSKOS, *COP IN THE HOOD: MY YEAR POLICING BALTIMORE'S EASTERN DISTRICT* 114-15 (2008) (reporting a Baltimore police officer's practice with respect to loitering).

targets is chosen, statistical randomization is a way of constraining official discretion, not enhancing it.¹⁷⁸

Our case review would be less impressive were it not for instances of judges reinforcing or encouraging randomization policies. A striking example is *Stodolsky v. Hershey*, which dealt with the 1969 military draft lottery.¹⁷⁹ The President had ordered “a random selection sequence for induction.”¹⁸⁰ When the lottery dealt the plaintiffs relatively low draft numbers, they attacked the process as not truly “random” and claimed that a departure from equal probabilities violated the President’s order and due process requirements.¹⁸¹ They alleged that lottery numbers representing birthdays were insufficiently mixed together in the urn from which they were drawn, such that later birthdays (for example, December 31) were more likely to be drawn early than earlier birthdays (for example, January 1).¹⁸² In response, a district judge defined randomness for this situation as equal probability, and concluded that the President’s order required it to be “approached as closely as reasonably possible under all the circumstances.”¹⁸³

As a normative matter, it is not clear why statistical randomization should be preferred to the orthogonal randomness of birthdays themselves. The selection process might have been morally acceptable if it picked *only* December birthdays.¹⁸⁴ Perhaps the plaintiffs’ objection seemed plausible because statistical randomization really was what the President had in mind and procedural regularity was

178. For another set of mixed messages, see the doctrine of “random and unauthorized” deprivations by line officers, which may defeat federal due process claims in favor of state tort or the Federal Tort Claims Act. *See, e.g.*, *Hudson v. Palmer*, 468 U.S. 517, 533 (1984); *Lipkin v. SEC*, 468 F. Supp. 2d 614, 617-18 (S.D.N.Y. 2006).

179. 2 Selective Serv. L. Rep. 3527, 3528 (W.D. Wis. 1969).

180. Exec. Order No. 11,497, 34 Fed. Reg. 19,019 (Nov. 26, 1969).

181. *Stodolsky*, 2 Selective Serv. L. Rep. at 3527.

182. *See id.*

183. *Id.* at 3528 (denying a motion to dismiss). The court bracketed the due process claim, noting that it would have “little chance to succeed” if the sequence was “random” within the meaning of the executive order. *Id.* at 3527 n.2. For studies finding that the selection process was probably not statistically random, see Feinberg, *supra* note 16, at 259-60, and Jorge Mateu et al., *The 1970 US Draft Lottery Revisited: A Spatial Analysis*, 53 APPLIED STAT. 219, 220, 229 (2004).

184. *Cf.* ELSTER, SOLOMONIC JUDGEMENTS, *supra* note 12, at 45-46 (claiming epistemic randomness was adequate).

especially important to the public. Regardless, the court showed no antipathy to randomization—quite the opposite.¹⁸⁵

In fact, judges occasionally suggest randomization as a solution to controversial allocation problems. One instance involves public housing. The plaintiffs in *Holmes v. New York City Housing Authority*¹⁸⁶ asserted that the City was running a delay-ridden system with no ascertainable method for allocating scarce slots.¹⁸⁷ The court of appeals responded that the plaintiffs had stated a viable due process claim. A system of official discretion was disparaged as “an intolerable invitation to abuse,” and, if many applicants were judged equally qualified under prescribed standards, the court suggested that “further selections be made in some reasonable manner such as ‘by lot or on the basis of the chronological order of application.’”¹⁸⁸ Likewise, an earlier court of appeals case proposed randomization for the allocation of scarce liquor licenses.¹⁸⁹ That court perceived a lottery as superior to official discretion and the risk of “graft, corruption, and other abuses.”¹⁹⁰ Much more recently, the randomization option arose in affirmative action litigation. Judges opposed to race-based affirmative action in employment or school admissions episodically point to lotteries as unproblematic solutions.¹⁹¹

185. *Accord* *Freeman v. Schoen*, 370 F. Supp. 1144, 1148 (D. Minn. 1974) (addressing a due process objection to departure from random selection for consideration in a parole program). The *Stodolsky* court did deny plaintiffs a temporary restraining order. *See Stodolsky*, 2 Selective Serv. L. Rep. at 3528 (citing widespread reliance on the existing sequence). Later, a court of appeals concluded that the process was sufficiently “random” in common parlance. *See United States v. Kotrlík*, 465 F.2d 976, 977 (9th Cir. 1972) (per curiam) (indicating the drawing was fair, nondiscriminatory, and without deliberate selection of the litigants’ birthdays), *cert. denied*, 409 U.S. 1043 (1972); *see also United States v. Proceeds of Sale of 9,312 Lbs. of Scallops*, 738 F. Supp. 598, 601-03 (D. Mass. 1990) (interpreting a regulation requiring pre-seizure random sampling and refusing to impose scientific standards of randomness).

186. 398 F.2d 262 (2d Cir. 1968).

187. *See id.* at 264.

188. *Id.* at 265 (citation omitted); *see also id.* at 265 & n.4 (noting the option of a scoring system based on each applicant’s current housing situation, but warning about the risk of “arbitrary action”).

189. *See Hornsby v. Allen*, 326 F.2d 605 (5th Cir. 1964).

190. *Id.* at 609 (condemning uncontrolled official discretion as a due process violation), *reh’g denied*, 330 F.2d 55, 56 (5th Cir. 1964) (per curiam) (suggesting stricter eligibility standards, a lottery, or a first-in-time rule for any equally qualified applicants).

191. *See Taxman v. Bd. of Educ.*, 91 F.3d 1547, 1551 & n.4 (3d Cir. 1996) (addressing

If we take these suggestions seriously, we are now able to identify a smattering of situations in which courts permit or encourage randomization by other officials. It is quite possible for randomization to contradict judicial conceptions of supreme law, but those conceptions do not rule out randomization. Nor is it apparent that randomization receives especially skeptical treatment. Judges seem willing to view lotteries in the way that decision theorists do: as an attractive solution for a class of challenging decision situations.

The last example that I will give is an outlier but it provides a useful transition. It involves case assignment. The Louisiana Supreme Court became concerned that prosecutors were effectively able to choose the judges that they preferred in felony cases.¹⁹² The calendaring system could be exploited such that the State had an advantage in the judge-shopping game.¹⁹³ As a possible remedy, and as a requirement of state constitutional law, the court recommended randomized case assignment.¹⁹⁴ This is not a trend in constitutional litigation. Other courts have denied that random assignment is a matter of litigable constitutional law.¹⁹⁵ A refusal to recognize such claims indicates that judges are willing to accept some legislative direction in this field. But whether judges feel entitled to fashion a case assignment system, many adjudicative institutions behave consistently with Louisiana's state courts and randomize the distribution of cases across judges. This requires an explanation, and a defense.

layoffs of employees tied in seniority and deemed equally qualified, noting prior lotteries, and quoting *Proverbs* 18:18 (New American)), *cert. dismissed*, 522 U.S. 1010 (1997); Pauline T. Kim, *The Colorblind Lottery*, 72 *FORDHAM L. REV.* 9, 12-17 (2003) (collecting such arguments). *But cf.* *Grutter v. Bollinger*, 539 U.S. 306, 340 (2004) (stating that a law school could avoid a lottery in light of risks to both student quality and diversity, and permitting "nuanced judgment" that takes race into account).

192. *See State v. Simpson*, 551 So. 2d 1303, 1304 & n.1 (La. 1989) (per curiam).

193. *See id.* at 1303-04.

194. *See id.* at 1304 (requiring felony cases to be assigned "on a random or rotating basis or under some other procedure"); *see also* Brown & Lee, *supra* note 8, at 1099-1103 (attempting to marshal arguments against discretionary case assignment from federal constitutional case law).

195. *See, e.g.*, *United States v. Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989); *United States v. Keane*, 375 F. Supp. 1201, 1204 (N.D. Ill. 1974).

C. *The Case Assignment Puzzle*

The pattern thus far is courts vigorously self-regulating against randomization on merits questions, while moderating that opposition when they are occasionally asked to second-guess the randomization policies of other institutions. Thus judicial opposition to randomization looks parochial—and yet courts themselves provide a leading example of systematic randomization in American government.

Today the process of assigning cases to judges is pervaded with lotteries. This form of randomization takes place in courts across the nation, and some administrative agencies have followed suit. Lotteries are a key part of the case assignment procedure in many federal district courts, in the federal courts of appeals, in many state trial courts and appellate courts, in federal immigration courts, and elsewhere.¹⁹⁶ Randomization in this form touches perhaps millions of cases per year.

Unfortunately, greater specificity about randomization's development within case assignment systems is difficult to offer. There seems to be no general historical account of randomization's rise in case assignment protocols, nor an explanation for the holdouts.¹⁹⁷ Nor is there an easily accessible guide to current case assignment practices in, for example, the federal district courts. Those procedures are curiously decentralized.¹⁹⁸ Unlike federal jury selection, which is subject to statutory guidance,¹⁹⁹ judges tend to determine their own case assignment procedures. Federal statutes authorize

196. See, e.g., Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 24 (2006) (regarding immigration judges); Brown & Lee, *supra* note 8, at 1069 (regarding federal circuit courts); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 292 (1996) (regarding state courts).

197. There is accessible information on the development of single-judge case assignments at the trial court level and away from so-called master calendar systems, see, e.g., Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1587 (2003) (recognizing the shift), but that design choice can be made independently of the randomization issue.

198. Our picture of case assignment in the federal courts of appeals is clearer thanks to Brown and Lee's extensive survey. In 2000, they reported that "[a]ll circuits purport to use a system of random assignment of judges and cases" but also "permit a significant amount of discretion in the assignment process." Brown & Lee, *supra* note 8, at 1069, 1074.

199. See 28 U.S.C. § 1863(a) (2006) (requiring random selection of jurors in district courts).

district courts to divide and conduct their business as they see fit,²⁰⁰ and allow the circuit courts to form panels howsoever they choose.²⁰¹ Under this decentralized regime, some courts have not adopted official rules on case assignment. The relatively small Southern District of Alabama is one. It has published rules addressing assignment of related and refiled cases, but not ordinary case assignment.²⁰² Those courts that have formal rules do not necessarily explain in detail how cases and judges are matched and re-matched. Somewhat similarly, the Social Security Administration lacks a centralized assignment rule for disability benefits appeals. Assignment mechanics have devolved to individual hearing offices.²⁰³ Undoubtedly, assignment information is available inside each adjudicative system and, at least partly, to local lawyers. But as of today, it appears that no one source effectively aggregates this information for outsiders.

Although definitive statements about the particulars of randomization's role cannot yet be made, an example or two can help suggest the influence of randomization. Consider the Southern District of New York. In 2007, it had twenty-eight authorized judge-

200. See 28 U.S.C. § 137 (2006) (authorizing circuit court judicial councils to make necessary orders when district judges are unable to agree on case assignment rules or orders); see also 28 U.S.C. § 2071 (2006) (authorizing court rules "for the conduct of their business" that are not inconsistent with federal statute or rules issued by the Supreme Court); FED. R. CIV. P. 83(a)(1) (authorizing local rules by majority vote of district judges).

201. See 28 U.S.C. § 46(b) (2006); *W. Pac. R.R. Corp. v. W. Pac. R.R. Co.*, 345 U.S. 247, 257-58 (1953) (indicating courts of appeals' discretion to allocate work). A statutory constraint is imposed on the Federal Circuit, which must rotate judges across panels "to ensure that all of the judges sit on a representative cross section of the cases heard." 28 U.S.C. § 46(b) (2006).

202. See S.D. ALA. R. 3.3; see also JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2007 ANNUAL REPORT OF THE DIRECTOR 414 (2007) [hereinafter JUDICIAL BUSINESS] (reporting only three authorized judgeships for the Southern District of Alabama); *id.* at 141, 210 tbls.C, B & D (reporting only 346 criminal case filings and 980 civil case filings in the district). Random assignment might be less likely in jurisdictions allotted few judges and a large geographic territory. It has been reported that the District of North Dakota assigned its two active duty judges to two different geographic divisions which handled all cases filed in those divisions. See ADVISORY GROUP FOR THE DIST. OF N.D., REPORT OF THE CIVIL JUSTICE REFORM ACT (1993), reprinted in 69 N.D. L. REV. 739, 752-53 (1993). This is not to say that the Southern District of Alabama has rejected random assignment, only that its practice is not as formalized in official rules as it might be.

203. See OFFICE OF DISABILITY ADJUDICATION & REVIEW, HEARINGS, APPEALS AND LITIGATION LAW MANUAL I-2-0-2, I-2-0-5 (2005) (stating that assignment to Administrative Law Judges is controlled by each Hearing Office's Chief ALJ). Some SSA hearing offices may employ a randomization element in their assignment procedure.

ships and logged over 17,000 case filings.²⁰⁴ The local rules declare that randomization is a component of case assignment: “All cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk’s offices in such a manner that each active judge shall receive as nearly as possible the same number of cases.”²⁰⁵ Parties and their attorneys may ask to be present during case selection.²⁰⁶ Here the commitment to random case assignment is very public, even if the court will not entertain formal objections from litigants based on the local rule.²⁰⁷ An analogue from the administrative law world involves international immigration. The Office of the Chief Immigration Judge has authorized a computerized case assignment system that assigns incoming cases by rotation through lists of available immigration judges in each immigration court.²⁰⁸

Still, no existing case assignment system is maximally random across all decision makers. First of all, a decision maker might deliberately circumvent a formal commitment to randomization.²⁰⁹ In addition, litigants may influence case assignment. To the extent a plaintiff or prosecutor has discretion over venue, choosing a place to file is also choosing a pool of judges. Litigants may also attempt

204. See JUDICIAL BUSINESS, *supra* note 202, at 411 (reporting judgeships); *id.* at 139, 208 tbls. C & D (reporting 1026 criminal case filings and 16,125 civil case filings).

205. S. & E.D.N.Y. R. 50.2(b) (2009); see *id.* at 50.2(h) (allowing judges who are ill or “overburdened” with cases to be removed from the wheel, and the chief judge and senior judges to elect a reduced caseload); see also N.D. CAL. ORDER 44 (2003) (describing a random case assignment system, at least for civil cases, and exceptions); D.D.C. R. 40.3(a) (2008) (similar); N.D. ILL. R. 40.1(a) & 1999 comm. cmt. (2008) (stating that case assignment is by lot except as specifically provided, that cases are randomized only within predefined categories, and that randomization has been part of the process for fifty years).

206. See S. & E.D.N.Y. R. 50.2(b) (2009).

207. The rules indicate they are for internal management and not the basis for objections by litigants. See S. & E.D.N.Y. R. 50.1 (2008) (preface); see also *In re Yagman*, 796 F.2d 1165, 1176-80 (9th Cir. 1986). *But cf.* *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972) (issuing a writ of mandamus against a chief judge who reassigned a randomly assigned case in contravention of written local rules).

208. See OFFICE OF THE CHIEF IMMIGRATION JUDGE, U.S. DEP’T OF JUSTICE, UNIFORM DOCKETING SYSTEM MANUAL III-1 (2009) (“In multiple Immigration Judge courts, cases are assigned to each Immigration Judge’s Master Calendar on a random rotational basis.”).

209. See LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 46 (2005) (describing reasons to doubt that certain major bankruptcy cases were randomly assigned to bankruptcy judges in New York in the 1980s); see also *Brown & Lee*, *supra* note 8, at 1044-65 (discussing allegations that certain civil rights cases were assigned in the Fifth Circuit to influence outcomes).

to game an otherwise random assignment system. A tactic used in the past was to file multiple complaints involving the same controversy and then voluntarily dismiss the complaints that were assigned to the least sympathetic judges.²¹⁰

Other exceptions to random assignment are officially condoned. Many state court systems permit parties to exercise peremptory strikes on judges initially assigned.²¹¹ Judges also tend to retain a measure of control. A judge might recuse from a case or be assigned all “related cases.” The Southern District of New York’s rule assigns all habeas petitions and pro se civil suits filed by the same litigant to the same judge.²¹² Moreover, some systems incorporate the possibility of discretionary departures from random assignment. The Southern District of Florida’s rules announce that assignments may be modified “whenever necessary in the interest of justice and expediency.”²¹³ The Judicial Panel on Multidistrict Litigation, which is itself composed of judges selected by the Chief Justice, determines which district judge will receive transferred actions without any commitment to randomization.²¹⁴ Official rules might also enable judges to trade cases. The Southern District of New York’s local rules authorize its chief judge to reassign any case with the consent of the judges involved.²¹⁵ Additionally, random court of appeals panels are partially checked by nonrandom opinion assignment practices.²¹⁶

More broadly, adjudicative institutions are structured in ways that delimit random assignment. These boundaries are part of the debate over specialization in adjudication.²¹⁷ Cases are certainly not

210. See, e.g., David Heckelman, *2 Lawyers Censured for Multiple-Suit Forum Shopping*, CHI. DAILY L. BULL., Mar. 28, 1995, at 1.

211. See Norwood, *supra* note 196, at 293 & n.128 (reporting that nineteen states allowed preemptory strikes but that federal legislation on the matter had failed).

212. See S. & E.D.N.Y. R. 50.3(e) (2008).

213. S.D. FLA. R. 3.4(A) (2008).

214. See 28 U.S.C. § 1407(b), (d) (2006); 3 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 9:17 (4th ed. 2002); see also Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. PA. J. CONST. L. 341, 364 (2004).

215. See S. & E.D.N.Y. R. 50.4 (2008).

216. See Edward K. Cheng, *The Myth of the Generalist Judge*, 61 STAN. L. REV. 519, 526-48 (2008) (concluding that federal appellate judges commonly specialize via opinion-writing assignments).

217. The literature on specialized tribunals is extensive and longstanding. See, e.g., Erwin N. Griswold, *The Need for a Court of Tax Appeals*, 57 HARV. L. REV. 1153 (1944); Richard L.

randomly assigned across all government adjudicators. The labor is divided among institutions, such as the immigration system and the traditional court system. Labor is partitioned again within institutions, such as the various districts within the federal court system and the divisions and specialized judge assignments within certain trial courts.²¹⁸ These boundaries define cohorts of decision makers who will receive one stream of disputes rather than another.

Also worth noting is the norm in the United States of allowing appeals to an authority that is *not* randomized. Thus the decision of an administrative law judge might be appealed to the unitary head of the relevant department, and state and federal trial court judgments can be appealed to a supreme court that does not sit in panels.²¹⁹ Randomization influences case assignment on the front lines of adjudication, while appellate structures offer the limited hope of attracting the attention of nonrandomized decision makers at the back end.

From another perspective, however, the above discussion has greatly understated the role of chance in matching cases to judges. If causal chains in human events are traced back far enough, perhaps an observer can always identify an orthogonally if not statistically random process that helped produce a dispute that ended up before an agency or a court. Everything from outcomes in

Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. PA. L. REV. 1111 (1990); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 A.B.A. J. 425 (1951). My point is that institutional boundaries are forms of specialization, and that intra-institution case assignment systems can retard further specialization (for example, random assignment) or advance it (for example, merit-driven assignment).

218. See, e.g., Herbert Jacob, *The Governance of Trial Judges*, 31 LAW & SOC'Y REV. 3, 11-13, 21 (1997) (investigating the Cook County Chief Judge's power to assign judges to different courtrooms entertaining different subject matter at different prestige levels).

219. Contrast the Grand Chamber of the European Court of Human Rights, which is a panel. See Andrew Drzemczewski, *The Internal Organisation of the European Court of Human Rights: The Composition of Chambers and the Grand Chamber*, 3 EUR. HUM. RTS. L. REV. 233, 234-35, 239-42 (2000).

the gene pool²²⁰ to the concept of moral luck²²¹ can be associated with lotteries that seriously influence the course of our lives.

That said, adjudicative institutions often deliberately inject randomization into disputes at the point of case assignment. Regardless of the uncontrolled forces that influence adjudication, this intentional use of randomization needs a convincing defense. Randomization does come with disadvantages. Most obviously, case assignment lotteries fail to match decision makers with the cases for which they are best suited. Partly for this reason, other organizations are not wedded to this form of labor allocation; it is not as if practicing lawyers normally receive their paid work at random.²²² Attempting to appoint multi-talented judges can accomplish only so much. And there is a further complication: random case assignment must be squared with a long tradition of judges condemning coin flips on the merits.

III. DECISION MAKERS, DECISIONS, AND RANDOMIZATION

How should we view this combination of judicial positions? Surely some part of the combination is understandable. If we focus on the many modern justifications for randomization combined with selective use by nonjudicial officials, there is nothing very surprising about judges accepting the validity of lotteries in other institutions. Furthermore, judicial tolerance for nonjudicial randomization rests easily with the spread of case assignment lotteries within the judiciary. Judges could have adopted their assignment lotteries based on the same sort of judgment that they respect in nonjudicial institutions. Moreover, it might make sense for judges to respect the ability of nonjudicial officials to decide when lotteries are appropriate while simultaneously taking a hard line against

220. See GOODWIN, *supra* note 51, at 24-29 (discussing genetic lotteries and entrenched social structures); JOHN RAWLS, *A THEORY OF JUSTICE* 63-64 (rev. ed. 1999) (discussing a natural lottery of talents, along with efforts to limit its influence on people's life chances).

221. See THOMAS NAGEL, *MORTAL QUESTIONS* 28 (1979) (discussing arguable connections between bad luck and moral assessment).

222. For an exceptional instance of random case assignment in a public defender's office, see David S. Abrams & Albert H. Yoon, *The Luck of the Draw: Using Random Case Assignment to Investigate Attorney Ability*, 74 U. CHI. L. REV. 1145, 1149, 1160-61, 1164 & n.61 (2007) (noting, however, that the large majority of fifty other surveyed offices did not do so).

randomization on the merits in a courtroom. Perhaps judges can find something especially problematic about merits randomization on their home turf without imposing a similar conclusion on other institutions.

Even if each of these conclusions is correct, however, we are left with an especially awkward combination: judges habitually randomize case assignments while they routinely punish merits randomization. The problem is that case assignments and merits decisions are connected, as Part III.A.1 explains. Case assignment lotteries have a randomizing effect on merits decisions in hard cases. In its worst light, then, the adjudicative system is at war with itself. There are perspectives from which this conflict might be denied, and they are explored in Part III.A.2. But in my judgment, the more fruitful course is to accept tension within the system and attempt to justify it. This path is admittedly complicated. Part III.B acknowledges that case assignment lotteries do not effectively randomize the same class of decisions recommended by ideal theory. The task, therefore, is to recognize that the system neither eliminates deliberate randomization nor approximates ideal randomization, and nevertheless defend the arrangement. Part III.C makes the attempt. The argument depends heavily on the institutional setting of adjudication and the needs of those who do not wear robes.²²³

A. Is the System Effectively Randomizing the Merits?

1. Connecting Assignments with Outcomes

If all decision makers were exactly the same, then case assignment would be irrelevant to outcomes. We could treat the adjudicative system as if it had only one decision maker, and case assignment would be decoupled from the distribution of merits

223. Much of the analysis below applies to administrative agencies as well as traditional judiciaries, and I will speak to both. By the end of the discussion, however, institutional setting will become sufficiently important that the argument will tend to rest on courts with appointed judges. Likewise, most of the analysis applies to juries as well as judges, but I will refer to judges for the sake of simplicity and to maintain a sharper focus. Juries might be viewed and even defended as rough substitutes for overt merits randomization in difficult cases that survive dispositive motions.

decisions. Randomizing decision makers certainly would not mimic flipping coins on the merits, and there would be no serious conflict between a formal ban on merits randomization and a lottery-influenced case assignment system.

The truth is that decision makers are different in outcome-relevant ways. Within the same institution, such as a federal circuit or an administrative agency, decision makers can seriously differ along many dimensions. These personnel might have wildly different knowledge bases, skill sets, subject matter interests, effort levels, corruption tolerance levels, and worldviews or ideologies. The mixture depends on the appointments mechanism and various selection effects.

To simplify, decision makers vary by “competence” and “ideology.”²²⁴ Competence refers to the ability to achieve preferred goals and ideology to the goals that are preferred. In addition, some decision makers will be intensely committed to a particular ideology regardless of additional considerations, while others will be open to accommodating the norms of other people or of their institutional position. To be sure, these are simplistic definitions, and articulating the relationships among competence, ideology, ideological intensity, and law is challenging.²²⁵ The uncontroversial thought is that characteristics of individual decision makers vary and these characteristics can influence how decision makers assess the merits of particular cases—especially, but not only, when conventional legal analysis indicates decision-maker discretion.²²⁶

We also know that cases differ. No institution is sufficiently specialized to face precisely the same questions across the docket and across time. Simplifying again, cases are “hard” or “easy.” Cases

224. Cf. Eric A. Posner, *Does Political Bias in the Judiciary Matter? Implications of Judicial Bias Studies for Legal and Constitutional Reform*, 75 U. CHI. L. REV. 853, 860, 866-67 (2008) (discussing appointments considerations and judges' ideology, legislative competence, and judicial competence).

225. For a productive analysis of the links between “law” and “ideology,” see Pauline T. Kim, *Lower Court Discretion*, 82 N.Y.U. L. REV. 383, 404, 408-17 (2007) (pointing out that preference-driven decisions can be legally authorized through conscious delegation or inevitable vagueness, and that some judges personally prefer to follow legal norms).

226. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 93-121 (2008) [hereinafter POSNER, HOW JUDGES THINK]; see also FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 69-93 (2007) (finding modest effects of certain background characteristics—beyond the proxy for ideology—on judicial votes in the federal courts of appeals).

might be hard because the historical facts are contested or derive from an unfamiliar setting, because the appropriate legal norm is unclear, because the relevant consequences of different outcomes are difficult to predict, or for another reason.²²⁷ Perhaps there is an objective sense in which the division between close calls and clear answers can be made, a test detached from individual judgment. But there certainly is a subjective sense in which this division exists. From their personal perspectives, decision makers will experience varying degrees of difficulty in addressing questions posed to them.

Occasionally, the differences among decision makers will be irrelevant. A subset of cases might be so difficult by any measure that every available decision maker would consider them hard, or so simple that everyone would experience them as easy and reach the same result—but the reality is different for every other issue.

Less competent decision makers will probably find a larger fraction of cases hard, compared to highly competent decision makers who might see only easy cases. Hence one group of decision makers might be able to resolve a given case without much effort, whereas another group would face extraordinary difficulty in merely understanding the choices to be made. We should expect the error rates of these decision makers to vary, regardless of how “error” is defined.

As for ideology, its relationship to hard and easy cases is less obvious. An intense ideological commitment might convert otherwise hard cases into easy cases. Ideology might eliminate complexities generated by conventional legal argument or boundaries of the decision maker’s role. For the pure ideologue, all of this can be swept away in favor of achieving as much self-defined justice as possible. It also seems plausible, however, that only some cases are amenable to ideological influence, either because of their character or the character of those who become adjudicators. The answers to some fraction of questions in the pool of cases are probably so clear under the settled norms of legal argument that no one within the institution differs as to their correct resolution, at least after a little

227. See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* 254-58 (1986) (discussing efforts to resolve hard cases of interpretation through fit and justification); POSNER, *HOW JUDGES THINK*, *supra* note 226, at 205-06 (discussing time constraints and diverse dockets).

effort. An illustration would be a relatively specific rule, perhaps a filing deadline, that is enforced against a party whose ideological goals otherwise align with the decision maker.

These stylized categories reflect adjudication in the real world, and it follows that randomized case assignment influences outcomes in some sense. The random element in matching judges to cases means that a class of disputes will be resolved differently depending on which judge the lottery spits out. The probability of a different randomly selected decision maker producing a different outcome depends on several factors, of course. Extreme variances in ideology, maximum ideological intensity, modest competence levels, vague standards in substantive law, and an otherwise challenging docket imply that outcomes will be principally determined by case assignment. But random assignment makes no effort to smooth out the differences, and over time, it ensures that very different decision makers will receive very similar cases. So although measuring the influence of random assignment depends on a comparison to another system, other assignment procedures are unlikely to guarantee such variance because they do not so tightly link outcomes with randomization.²²⁸

The basic point about decision-maker variance is mundane to those who practice law before courts and agencies, where judge-shopping is a real desire. Yet our understanding of adjudicator diversity is deepening with a new wave of empirical studies.²²⁹ True, the variables for ideology are hardly perfect and measuring com-

228. See *infra* Part III.C.2.c (discussing merit-based and political assignment).

229. See Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 272-329 (2005) (reviewing studies). For intriguing recent efforts, see, for example, CROSS, *supra* note 226; Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 18-49 (2008); Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823 (2006); David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?* 3-4 (Amer. Law & Econ. Ass'n, Working Paper No. 93, 2008), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=2568&context=alea> (concluding that some state trial judges were even more likely to incarcerate African American defendants than were other judges, but finding no statistically significant difference in sentence length across judges); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (U. Chi. Law Sch. Working Paper Series, Paper No. 404, 2008), available at <http://ssrn.com/abstract=1126403>. Perhaps the first study to capitalize on (orthogonally) random case assignment is Frederick J. Gaudet et al., *Individual Differences in the Sentencing Tendencies of Judges*, 23 J. CRIM. L. & CRIMINOLOGY 811, 812-13 (1933) (stating that sentencing judges rotated).

petence is not an uncontroversial task.²³⁰ But we can be quite sure that judges differ in ideology and competence, and that in some percentage of cases the outcome will be influenced by the identity of the decision maker. To the extent this is so, we can be sure that random case assignment drives results.

Asylum voting offers a startling example. One recent study of immigration judges in New York City shows their asylum grant rates ranging from 90 percent all the way down to 5 percent, and filling many gradations in between.²³¹ Asylum voting on the federal courts of appeals might be less disparate but is still markedly different across judges. A study of the Ninth Circuit shows pro-asylum voting rates peaking at over 60 percent for one judge and falling deep into single-digit percentages for several others.²³² The numbers need not be so dramatic to make the point. On far less variance, we might still charge that the adjudicative system's actual operation is inconsistent with its loud opposition to flipping coins on the merits—opposition that manifests itself in professional sanctions, not simply error correction on appeal. Sometimes a case assignment lottery is, in effect, the method of dispute resolution.²³³

2. *On Minimizing the Significance of Assignment*

Before moving on, however, we should entertain perspectives on which certain consequences of assignment randomization might be ignored or minimized. One such perspective is roughly deontological: perhaps a system that randomizes judges who are then forbidden to randomize their merits decisions should be conceptually separated from a system that allows its judges to flip coins in

230. See, e.g., Stephen J. Choi & G. Mitu Gulati, *Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance*, 78 S. CAL. L. REV. 23, 32 (2004) (measuring citations, published opinions, and the “independence” of appellate judges); Daniel A. Farber, *Supreme Court Selection and Measures of Past Judicial Performance*, 32 FLA. ST. U. L. REV. 1175, 1176-92 (2005) (questioning the usefulness of these measures).

231. See Alexander, *supra* note 196, at 22-23 tbl.2.

232. See David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law in the Ninth Circuit*, 73 U. CIN. L. REV. 817, 852 fig.8 (2005).

233. Cf. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 302 (2007) (stating that asylum results “may be determined as much or more by” the decision maker’s identity or the court’s location as by the case facts and law).

hard cases.²³⁴ The alternative perspective is consequentialist but *ex ante* in orientation: perhaps the consequences of assignment randomization should be treated like overt merits randomization, and the consequences shrugged off from an *ex ante* perspective on the system.

As for the deontological perspective, it depends on the reasons why merits randomization might be objectionable. Some plausible objections might apply only to merits randomization and not to assignment randomization. This would provide a basis for ignoring the randomizing effects of assignment lotteries on merits outcomes.

To be sure, some potential objections to merits randomization apply perfectly well to assignment randomization given diversity among decision makers. If we simply value like cases being treated alike, in the sense that the outcomes in adjudication ought to be similar, then both merits randomization and assignment randomization are threats. If we value predictability in adjudication, then both practices are problematic. These commitments offer no reason for blinding ourselves to the consequences of random assignment.

But other complaints have a better chance of making the distinction. Suppose that overt merits lotteries have a uniquely insulting quality that gives rise to a justified feeling of disrespect. This complaint might be especially compelling when a judge randomizes on the merits to avoid excessive decision costs, but it might be similarly persuasive when a judge is simply uncertain about the correct result after an exhaustive effort. In either situation, litigants might have a justified expectation that adjudicators will have better grounds for affecting their lives than the dictates of chance. Furthermore, one might believe that such lotteries violate a sound commitment to reason in merits decisions.²³⁵ The basic thought is that officials, and perhaps especially

234. I assume here that a merits randomization ban is possible, ignoring the objection that certain tiebreaking rules in law are essentially orthogonal randomization devices. *See supra* notes 142-49 and accompanying text. For ease of exposition, I have not specified the assignment system at work in the hypothetical merits randomization regime. This should not weaken the arguments explored here. Note, however, that a random assignment system combined with merits randomization would exacerbate the overuse concerns raised below. *See infra* Part III.C.1.

235. *See, e.g.*, Micah Schwartzman, *Judicial Sincerity*, 94 VA. L. REV. 987, 1004 (2008) (“When legal and political officials lack sufficient reasons for their decisions, they fail to respect the rational capacities of those subject to their authority.”) (footnote omitted); *see also*

judges, ought to have rational reasons for decisions that influence the lives of otherwise nonconsenting persons. This preference for reasons might go beyond reason-having to actual reason-giving, which lotteries themselves cannot offer. In other words, adjudicators might feel a moral obligation to provide adequate reasons for their merits decisions to losing parties, in order to respect those parties as rational agents. These commitments to respect and to reason-giving could then reinforce each other, with the provision of reasons averting feelings of disrespect.

At the same time, random case assignment might sidestep these objections regardless of its influence on case outcomes. It is not clear how to elaborate this intuition, but it would not be surprising if many people made normative distinctions between forms of randomization in subtly different contexts. Perhaps a robust moral theory would single out judicial dispute resolution as a place where randomization is most likely to be insulting²³⁶ or deficient in rational explanation, and distinguish it from arguably less personal applications such as random sampling for the census, bellwether trials, or even law enforcement auditing. Perhaps people understand resort to chance in litigation as an inappropriate assertion of power when law's reasons run out. If merits randomization is qualitatively special, then the mere influence of assignment randomization on outcomes is not enough to condemn the system. Thus it could be that assigning cases neither triggers an obligation of rational explanation nor otherwise disrespects the affected litigants.²³⁷

Jody S. Kraus, *Legal Determinacy and Legal Justification*, 48 WM. & MARY L. REV. 1773, 1786 (2007) (arguing that an area of law "can be justified only by identifying moral reasons that fully determine the results of adjudication").

236. See, e.g., *Judicial Inquiry & Review Comm'n v. Shull*, 651 S.E.2d 648, 652, 674 (Va. 2007) (finding a "grave and substantial" violation of the Canons of Judicial Conduct, in part because the judge's coin flip in a custody matter "denigrated the litigants whose case he decided").

237. Compare the philosophical doctrine of double effect, which can eliminate moral culpability for the consequences of certain actions. See, e.g., THE DOCTRINE OF DOUBLE EFFECT: PHILOSOPHERS DEBATE A CONTROVERSIAL MORAL PRINCIPLE (Paul A. Woodward ed., 2001); Christopher Kaczor, *Double-Effect Reasoning from Jean Pierre Gury to Peter Knauer*, 59 THEOLOGICAL STUD. 297, 297-99 (1998) (describing an evolution in reasoning that lifts blame from some injurious consequences of human action); Daniel P. Sulmasy, *Commentary: Double Effect—Intention Is the Solution, Not the Problem*, 28 J.L. MED. & ETHICS 26, 27-28 (2000) (distinguishing culpability for intended harms from responsibility for consequences of

A fully specified argument along these lines might persuade some observers, but its potential is seriously limited. The first limitation is that such distinctions will be unsatisfying to committed consequentialists. Consequentialists cannot ignore the effect on case outcomes simply because randomization takes place in another room, or because intent to harm was absent. Even those attracted to “double-effect” reasoning may consider the proportionality of good and bad consequences in evaluating the morality of a system.²³⁸

Moreover, it is quite unclear why case assignment is exempt from norms of reason-having or reason-giving in adjudication. An exemption would be understandable if decision makers were fully interchangeable, but that is not our reality. Even if we assume a basic level of ability shared by all, differences in competence and ideology will make some adjudicators more suited to a given case than others. With so much riding on some assignments, and with assignment systems often controlled by the same officials who will decide the assigned cases, the demand for reasons seems no less strong in this context. The reply cannot simply be that there are good moral reasons for randomizing assignments; there are good moral reasons for randomizing *merits* decisions, as we have seen.

In any event, it is hard to discern a universal commitment to reason-giving (or even reason-having) in a system that still occasionally relies on black-box jury verdicts, that permits snap judgments from trial judges on certain evidentiary questions, and that allows supreme courts unexplained discretion over part of their dockets. There is no reason to believe that our adjudicative systems are committed to reasons at all costs, and no obvious way to categorically distinguish assignments from merits decisions once we understand that the commitment is qualified.

Objections based on the value of respect are equally contestable. Overtly randomizing merits decisions can be a sign of acute rationality and respect for the parties, rather than an insult. This depends on the manner in which lotteries are executed,²³⁹ but I see

action in a true dilemma); *see also* JOHN FINNIS, JOSEPH BOYLE & GERMAIN GRISEZ, NUCLEAR DETERRENCE, MORALITY, AND REALISM 310 (1987) (distinguishing chosen consequences from unintended yet foreseen side effects, including death).

238. *See, e.g.*, Sulmasy, *supra* note 237, at 29.

239. For a rather insulting use of orthogonal randomization to resolve a scheduling dispute between two “bickering attorneys,” see Roger Parloff, *Judge Orders Lawyers to Play Game*,

nothing inherently disrespectful about randomizing after an appropriate level of effort on the merits. Randomization is the mark of humility in decision making when a conscientious adjudicator openly admits the limits of reason and, considering alternative decision rules, explains that randomization is the rare yet appropriate response. When operationalized in this fashion, the decision to randomize is drenched with reason. And the alternative might be impermissible grounds for decision dressed up as convincing rationales, or the covert use of arbitrary decision methods, or the multiplication of contestable tiebreakers.²⁴⁰ Of course, randomizing a merits decision for no good reason would be disrespectful and there might be few justified occasions for it. But no one is proposing uninhibited merits randomization. To the extent that merits lotteries are seldom justified, pervasive assignment randomization begins to look that much worse in a system with decision-maker diversity.

Finally, if a respectful purpose is the touchstone of propriety, reviewing the development of random case assignment and nonrandom merits decisions may cause concern. The story of this development might not show a public spirited purpose that could insulate random assignment from scrutiny of its consequences.²⁴¹ The system's designers might have been too self-interested or careless for that. Forbidding merits randomization on public relations grounds would raise similar complications.²⁴² Thus, deontological arguments for ignoring the influence of random assignment on case outcomes probably have limited value, even for deontologists.

Another way to resolve the tension can be addressed more briefly. Worries about the consequences of random assignment are reduced if we view adjudicative institutions *ex ante*. This perspective puts aside distributive concerns and focuses on the ability of people to adjust their behavior in advance of litigation. Insofar as those subject to adjudication have information about the panoply of decision makers, they can aggregate these data into a composite

FORTUNE, June 7, 2006.

240. *See supra* Part II.A.2. It is also possible that offense from randomization expressed by litigants is feigned or a product of unwanted outcomes.

241. *See infra* Part III.C.2.a.

242. *See infra* Part III.C.1.

which will inform them of overall risks and opportunities. Informed observers will be able to predict likely outcomes and plan accordingly, even if decision makers differ radically.²⁴³ The case assignment system will provide guidance on the probability of each decision maker receiving responsibility for the issue of concern.

This is not to imply that there is no basis for protest when cases receive different treatment solely because one decision maker was assigned instead of another. For many people, the distribution of outcomes is an independent normative concern. Even if it should not be, a case assignment procedure must be chosen. Concluding that we are uninterested in the distributive consequences for litigants does not tell us which of all feasible assignment rules is superior, nor can it resolve the apparent tension within the judicial position on randomization. In this respect, the *ex parte* perspective is nonresponsive

Nonetheless, it is worth recounting ways in which the influence of random assignment is already moderated. First, precedent can matter. Institutions with a commitment to *stare decisis* will reduce the influence of decision-maker identity when a decision deemed relevant has already been made. Of course, the character of any such precedent could have been influenced by random assignment. But *stare decisis* is not the only moderating force; the right to appeal will also have an effect. The pattern in the United States is a right to seek review from nonrandomly selected adjudicators.²⁴⁴ The preferences of these superiors will likely influence decision making at lower levels in the hierarchy, depending on how powerful appeal rights are in practice. Finally, the pool of potential adjudicators for any given controversy easily could be more diverse than it is. These officeholders are nothing like a random sample of the adult population, and institutional boundaries indicate a measure of decision-maker specialization. Each of these forces reduces the significance of deliberately random assignment, without eliminating it.

243. See generally Adam M. Samaha, *Judicial Transparency in an Age of Prediction*, 53 VILL. L. REV. 829, 830-35 (2008) [hereinafter Samaha, *Judicial Transparency*].

244. See *supra* Part II.C.

B. Is the System Optimally Randomizing the Merits?

Given that random case assignment will effectively randomize merits decisions with some frequency, is this consequence welcome or unacceptable? For some observers, the answer will be the latter. Those who lean hard against merits randomization have cause for dismay, because most reasons for such opposition carry over to random case assignment. Anti-randomizers might turn to abstract principles such as the rule of law, treating like cases alike, and reasoned decision making over submission to chance.²⁴⁵ At least from a consequentialist perspective, random assignment to a pool of decision makers with serious differences threatens these principles.

To be clear, the basis for these objections is partly the differences across decision makers, not random assignment per se. Cases might be assigned according to perceived levels of decision-maker competence without eliminating the objection. Highly competent decision makers sometimes differ in their ideologies, and so case assignment would still be related to case outcomes. Thus, the above objections might prompt institutional design changes quite apart from case assignment—such as altering the appointments process to minimize decision-maker differences; or training, monitoring, and sanctioning decision makers to achieve greater uniformity in judgment; or further subdividing adjudicative institutions into more specialized tribunals; or revising substantive law toward rules rather than standards.²⁴⁶ Nevertheless, assignment randomization might be especially troubling to opponents of merits randomization. A case assignment lottery virtually guarantees that like cases will be treated unlike over the long run, making no attempt to assign the same kinds of cases to the same subset of semi-specialized decision makers.²⁴⁷

A more interesting question is how randomization enthusiasts should react to the reality that, every day, an untold number of merits decisions are being driven by assignment lotteries. Nothing about this fact alone should bother this group. They might be

245. See *supra* Part II.B.1 (discussing equal protection and due process principles).

246. See, e.g., Ramji-Nogales et al., *supra* note 233, at 380-89 (regarding immigration judge quality, training, oversight, and norms).

247. Cf. Cheng, *supra* note 216, at 555-56 (discussing the benefits of judicial specialization).

pleased by it, seeing virtues in randomization for a limited domain of difficult merits issues. Randomizing case assignments across a diverse set of decision makers might appear to be a substitute for randomizing those merits decisions, and perhaps the closest thing to overt merits randomization that proponents can hope for.²⁴⁸ This is more likely true if hard cases are most susceptible to differential treatment by different judges in the case assignment pool. Hard cases are a class of problems that merits randomizers try to solve, and hard cases are where random assignment most likely makes its mark.

But if the existing system functions as a substitute for ideal merits randomization, it is a rough substitute. The system operates much differently from the visions of optimal merits randomization indicated by the normative theories reviewed so far. First of all, the existing system will not confess the absence of rationally explicable reasons for some of its results. There are theorists who demand an acknowledgment of indeterminacy along with resort to chance.²⁴⁹ In contrast, when random assignment drives results, reasons are nevertheless provided in an attempt to justify every significant merits determination, sometimes with certitude.

Equally important, it is the combination of a lottery *plus* its pool membership that must be justified. There is no reason to believe that the actual pool of adjudicators represents a random distribution in any pertinent sense. Current methods for selecting adjudicators are not well designed to produce, for example, equal probabilities across feasible outcomes on issues that remain debatable after an appropriate investment of effort. The normative theories for randomization canvassed above seem to envision an admirable decision maker coming to the conclusion that a lottery is the best tool available and then running it with a set of plausible outcomes. If we try to compare this ideal randomizer to the effect of random assignment on hard cases, there is an important gap: the set of hard cases susceptible to influence by case assignment will be determined by the competence and ideology of a decidedly nonrandomly chosen

248. Compare John Coons's argument of twenty years ago: "Randomness may be inevitable, but it must express itself indirectly and even covertly at that point in the process where the human decider is selected." Coons, *supra* note 8, at 110.

249. See *supra* note 139.

pool of decision makers. Objectively identifying the set of hard cases without reference to the existing set of judges might not be possible. Randomization works in conjunction with another variable—the pool of decision makers—to produce merits outcomes. A simple reference to optimal merits randomization under ideal theory is not enough.

To be fair, those willing to assess the system over more than one generation are less likely to view it as a controversially weighted lottery. Long-term cycles in decision maker attributes might bring the system closer to idealized merits randomization. A crude measure of judicial ideology suggests oscillation in the federal courts over the years, even if the courts are rarely in ideological equipoise at any one moment.²⁵⁰

Yet complications remain. One is the morally controversial position that generations ought to be ignored. Some observers will reasonably deny that benefits accruing to people like them in the distant future is on par with benefits accruing to them in the present.²⁵¹ Another question is the significance of *stare decisis* and other ways in which past decisions become privileged. If these forces are influential, then the sequence of decisions will matter.

Finally, the suggested transgenerational timeframe accounts for evolving variance in ideology, but decision makers differ in competence levels as well. Randomizing case assignment tends to increase errors on the merits compared to a system that pays attention to individual decision-maker skills. It means that some hard cases will be handled by the least equipped decision maker available, and some cases that would be easy for one set of adjudicators will be resolved by those who find them exceedingly difficult. This is nothing like identifying a justifiable domain for randomization on the merits according to a well thought out normative theory. The current system tends to expand the domain of randomization beyond what is recommended by ideal theorizing.

250. See Jonathan P. Kastellec, *Partisan Composition and Voting on the U.S. Courts of Appeals over Time* 28 (June 18, 2008) (unpublished manuscript, on file with the author) (showing the mix of Democratic- and Republican-nominated appointees on the federal courts of appeals by year since the 1920s).

251. Cf. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 *THE WORKS OF THOMAS JEFFERSON* 3, 8-9 (Paul L. Ford ed., 1904) (“[B]y the law of nature, one generation is to another as one independant [sic] nation to another.”).

If there is a convincing defense for random assignment, it cannot be a quick reference to approximating optimal merits randomization. Institutions that randomize case assignments are working off a peculiar pool with distance from the domain for randomization that ideal theory would recommend. Both randomization enthusiasts and randomization skeptics have reasons to regret the current system's apparent schizophrenia, on a first take.

C. Can the Arrangement Be Defended?

A plausible defense for something like today's system might yet be constructed, even if it is suboptimally randomizing merits decisions. The first stage of the defense loosens the attraction of randomizing merits decisions in adjudication, although it is more suggestive than conclusive. The second stage turns to case assignment. It presents educated guesses on why such randomization became appealing to adjudicators, which might produce sympathy for their choices. This internal view is then supplemented by an outsider argument for random assignment. The analysis thus moves from internal management issues to focus on the perspective of litigants as a class and society as a whole within a particular institutional setting.

From this broader perspective, random assignment can be defended as (1) fairly allocating to litigants the tragically scarce and indivisible resource of judicial excellence, (2) roughly honoring the politics of the judicial appointments process, and (3) continuing a natural experiment on the determinants of judicial behavior. Although these social benefits do not resolve all tension with a merits randomization ban, they do not entail a preference for merits randomization either. The benefits follow whether or not adjudicators flip coins on the merits. Finally, an alternative to random assignment will be compared: litigants might be authorized to choose judges more like they choose juries. This "political" allocation option has advantages, but probably is outperformed by random assignment in certain key respects. More important than this specific conclusion, however, is the general point that randomization in adjudication can be thoroughly evaluated only in relation to its larger institutional setting.

1. Forbidding Merits Randomization

In a more perfect world, we might believe merits randomization would have a foothold in courts resolving difficult controversies. It is extremely unlikely that the theoretically correct number of lotteries in merits adjudication is zero. Based on available information and putting aside public relations problems, Judge Brown's determination to randomize one narrow and equally matched child custody argument is a better candidate for encouragement than for rebuke.²⁵² A firm judicial commitment against merits randomization could instead be founded on a realistically imperfect rather than an ideal world.

The first step is to remember that adjudicators cannot rationally adhere to a flat rule in favor of deliberate randomization on all issues. This would be catastrophic. Adjudicative institutions would be offering all parties an equal chance of prevailing without any quality control on the claims. Indeed, the system would encourage the proliferation of outlandish claims following the wildest dreams of every pleader. If there is to be a relatively simple rule in this field, it must flatly prohibit merits randomization.

The alternative is a more flexible standard. Indeed, a somewhat vague set of recommendations for randomization's proper domain was what Part I offered. Perhaps there exist subclasses of cases in which randomization is plainly appropriate; perhaps this category extends beyond land partition allotments.²⁵³ For the time being, however, it is difficult to restate randomization's optimal domain any more specifically than a restatement of negligence's perfected scope, or the exact location at which liability rules should give way to property rules, or even when rules become worse than standards. Consider, for example, lottery recommendations that rest on uncertainty.²⁵⁴ Before turning to randomization as a tiebreaker, decision makers must be adequately certain about their uncertainty. They must be prepared to conclude that the decision they face is not worth additional effort, or that relevant information cannot be obtained at a tolerable cost. This is not a self-executing instruction.

252. See *supra* text accompanying notes 107-15.

253. See *supra* text accompanying notes 133-36.

254. See *supra* text accompanying note 63.

What should be compared, then, is a simple prohibition with a loose standard within a particular institutional setting. Assuming that the choice between these two legal regimes will not influence the composition of decision makers and holding all else equal, we can speculate about how actual judges would conduct themselves in a hypothetical universe in which merits randomization was open to them based on their best judgment, and compare that picture to the situation we have now. Guesswork might be necessary, but it is the correct inquiry.

For those lacking confidence in the relevant decision makers, supporting a merits-randomization ban is understandable. One concern with discretion is that sloppy adjudicators might over-rely on lotteries. Randomization's optimal domain is challenging to specify, but lotteries are remarkably easy to run. For those who do not care enough about the quality of their judgments, merits randomization is a low cost tool for docket clearing. Of course randomizers must compose a list of outcomes on which the lottery will run, but careful itemization need not bother a decision maker seeking convenient ways to resolve cases that seem difficult. Without effective monitoring of judicial effort, perhaps randomization would become too tempting in too many instances. Furthermore, it might be that government needs at least one outfit that refuses or denies the role of chance. Adjudicators fill that role, and perhaps they comfort the political community by assuring its members that reasoned answers are forthcoming.²⁵⁵ Finally, it could well be that the justifiable domain for merits randomization is quite small. Perhaps actual situations of indeterminacy after appropriate effort are sufficiently rare such that wrestling with a merits randomization standard is not worth it.²⁵⁶ Better to forbid the practice and be done with it.

A randomization ban also might have desirable incentive effects apart from public acceptance. Perhaps decision makers will work harder to achieve reasonable degrees of certainty in challenging cases, and perhaps they will more often aspire to craft rationally defensible outcomes. The ban might be a mechanism for construct-

255. Cf. Lewis A. Kornhauser & Lawrence G. Sager, *Unpacking the Court*, 96 YALE L.J. 82, 92 (1986) (noting the importance of an appearance that adjudicatory results are proper).

256. See DWORKIN, *supra* note 140, at 286-87 (suggesting rarity in developed systems).

ing good judges by envisioning a high standard for judgment and influencing judges' self-perceptions within the office, even if the standard is sometimes impossible to meet. This view is awkwardly optimistic and skeptical about decision-maker behavior at the same time. Plus we could imagine judges acting with less care under a randomization ban in order to retain the guidance of underinformed first impressions. But there is something to the aspirational view of the ban.

Reintroducing the issue of public relations, however, complicates the matter. Favoring sanctions for fellow judges who randomize is not an entirely autonomous preference. Judges are concerned with negative perceptions generated by coin-flipping colleagues.²⁵⁷ Public opposition to merits randomization might never abate given limited information about judicial and administrative operations. The public seems to see randomization by judges as a sign of arrogance, incompetence, or trivialization.²⁵⁸ In the prevailing decision environment, merits randomization is likely underused and almost certainly not overused from the perspective of ideal theory.

In one respect, this take on public opinion is too static. A scenario in which merits randomization can take place on anything approaching a regular basis presupposes an environment in which the public response is not to shut down the practice. The alternative world must be more accepting of merits randomization. Indeed, additional leniency in the general public suggests added risk of overuse. An even deeper problem is getting merits randomization jump started. Were merits randomization ever formally authorized, it might not be used. Reputation-conscious judges would probably never draw lots, if for no other reason than the resulting public perceptions in the absence of better information about judicial effort and good faith. Nonrandomizing judges would appear admirable compared to their randomizing colleagues, however conscientious the latter group might be. The equilibrium would be little or no overt merits randomization in adjudication, just as it is today.

The conclusion here is not firm. Merits randomization offers a constructive and honest solution for a slice of issues in challenging

257. See *supra* notes 104-06 and accompanying text.

258. See *supra* Part II.A.1 (relying on disciplinary authorities' perceptions of public opinion).

cases. One could conclude that adjudicators face too much popular resistance to randomization, and that the existing ban is pathological.²⁵⁹ Yet if this resistance were to dissipate, there is a risk that decision makers would turn to merits randomization too quickly, absent a preset category of issues for which randomization is the best response and an effective strategy for monitoring judicial effort. Moreover, the justified occasions for randomization might well be few, and the likelihood of judges exercising discretion to randomize is fairly low. This is enough to assess the merits randomization ban as understandable and resilient, even if not plainly best for the long term good.

2. Justifying Assignment Randomization

We also know that the system is effectively randomizing outcomes in a subset of cases through the lottery element of case assignment, and that this subset seems less than ideal. So there must be substantial concern with assignment randomization as it now functions, especially if a merits randomization ban is sound policy. A sensible evaluation of random assignment must be comparative, however, judging it in relation to other options such as merit-based assignment and political assignment according to litigant preferences. This comparison ought to take place with careful attention to other institutional details.

a. An Internal Account

Comfort might be found in an explanation for randomization's spread into case assignment. Understanding the actual motivations for the system's development might inspire persuasive normative arguments for its retention or expansion. The hitch is that we lack a comprehensive history of case assignment systems in courts or agencies. Once assignment systems are seen as crucial to sound institutional design, perhaps illuminating historical accounts will emerge. But this has yet to occur on a large scale, and decentralized institutional design makes a comprehensive account difficult. In this space, I can offer thoughts about the system's development that are

259. See *supra* Part II.A.2 (vetting the ban's weaknesses).

a bit deeper than speculation—along with an argument for why understanding the history of case assignment will not exhaust the relevant considerations.²⁶⁰

Accounting for random assignment's emergence in adjudicative institutions requires reference to several other design choices. First, legislatures had to draw some jurisdictional boundaries and then populate the resulting institutions with multiple decision makers unable or unauthorized to hear all filed cases. Until a geographically bounded district is assigned more than one trial judge, for example, no case assignment issue can possibly exist. Instead, case assignment would effectively take place through a combination of jurisdictional and structural boundaries, along with the appointments process for judges.²⁶¹ True, appointed judges in this setting might yet influence the mix of cases they receive and might find ways of coordinating or competing with other judges. But that situation is different from typical designs today, in which multiple judges are deliberately stationed under one institutional roof and do not share all filed cases.²⁶²

In these settings, judges face an allocation issue. The resulting internal political problem is easy to see, especially if the appointments process produces significant differences across judges at any one time. Given multiple judges, growing dockets, and delegation to a group of officials believing themselves entitled to roughly equal status, randomization must have seemed viable against other options. A salient alternative would be to delegate discretionary authority to a chief judge, other administrative officer, or a committee of agents with authority to make judgments on which cases were most appropriate for which judges. But this option would fade with any distrust and disagreement among judges. Agents might use their assignment power to steer cases away from a disfavored class of judges or, at the very least, to maintain an existing pecking order or division of expertise that incoming judges might prefer to disrupt. Unease with a relatively discretionary system is likely to have been greater in groups with serious ideological disagreements.

260. The comments below will fit better with judicial case assignment than with the process in administrative agencies, but there is overlap.

261. *See, e.g.*, Judiciary Act of 1789, 1 Stat. 73, § 3 (1789) (authorizing one district judge per district).

262. *See* SOLOMON & SOMERLOT, *supra* note 9, at 33-34.

There are additional reasons for multi-decision-maker groups to choose random assignment over the alternatives. There might be a preference for variety and generalist judgeships among those who find their way to the office.²⁶³ Variety will usually follow random assignment over time, to the degree that the institution is otherwise built to capture a diverse docket. Furthermore, a lottery system is relatively cheap to conduct. It allows for less or no thinking about which judges should get which cases, it need not require the collection of any information about incoming cases, and, to the extent that trading cases is restricted, it avoids those transactions as well. Finally, the judge shopping risk is worth mentioning. Parties will have less certainty about which decision maker will be assigned to their dispute if assignment is random rather than matched to observable decision-maker attributes. At the extreme, and to the extent a party has power over venue, choosing the location for dispute resolution is tantamount to selecting a particular decision maker.

These internal rationales for randomization—distrust of authority, feelings of equal status, preference for a diverse docket, thwarting strategic behavior by litigants—have been suggested in official²⁶⁴ and unofficial sources.²⁶⁵ They resemble the justifications for randomization explored in Part I.

263. A selection effect from a nonrandom case assignment process makes this factor less likely to have been influential. At the margin, one could expect a pool of people inclined toward specialization to find their way to the bench. However, other factors were sufficiently powerful to produce the spread of random case assignment and, once randomization became the norm, a self-reinforcing selection effect might have taken place. At the margin, one could now expect the pool of aspiring judges to slant toward generalism. Random case assignment makes it more difficult to attract experts dedicated to a relatively narrow subject matter, and easier to attract those who feel that their expertise is “judging” more generally. Cf. POSNER, *HOW JUDGES THINK*, *supra* note 226, at 165-67 (describing the potential advantages of a federal judgeship over specialized legal careers in academia or in practice).

264. See, e.g., N.D. ILL. R. 40.1 comm. cmt. (1999) (discussing equitable division of labor); *United States v. Phillips*, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999) (offering an anti-judge shopping rationale when a prosecutor moved for reassignment, and adding that random assignment can promote “fairness and impartiality” and reduce “favoritism and bias”); *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992) (asserting that random assignment prevents judge shopping and ensures “an equitable distribution of the case load among the judges of this court”).

265. See Susan Willet Bird, Note, *The Assignment of Cases to Federal District Judges*, 27 STAN. L. REV. 475, 475-76 & n.2 (1975) (relying partly on interviews of court personnel and citing concerns about discretionary assignment and judge shopping).

But this account of the adoption of random case assignment is, in one regard, quite narrow. Aside from a judge shopping concern, the arguments are steeped in internal management and lack much connection with the interests of the larger public. This is not to say that judges have no such concern, or that they cannot perceive a relationship between self-engineered institutional design and effects beyond judicial personnel. It does suggest that outsiders to adjudicative institutions will not find complete satisfaction with the case assignment system by investigating the reasons for its creation. One must seriously wonder whether the downsides of randomization—if nothing else, the mistakes on the merits associated with a roughly even spread of subject matter across all decision makers—could be overcome simply by judicial convenience and the dampening of judge shopping. For skeptics, there are alternatives to randomization and to the complications of discretionary merits-based assignment. And even if the only feasible options were merit assignment and random assignment, additional justifications for randomization ought to be explored.

b. An Outsider Defense

Only so much support for the system can be built by pointing at improvements in the lives of judges, and random assignment has costs for the rest of us. The discussion below argues for random assignment from the perspective of outsiders. The argument's overall structure is simple; it relies on ideas familiar from Part I. Although doubts about the correct answer will persist, we can identify the critical issues, assumptions, and trade-offs.

Assuming the perspective of parties to adjudication and the public at large is an occasion for recharacterizing the issue. Those managing the workload of adjudicative institutions often refer to their procedures for "assignment of cases,"²⁶⁶ and unsurprisingly so. These insiders solve division of labor problems by assigning work (cases) to workers (judges). But of course these workload allocations simultaneously assign judges to cases, and cases are associated with litigants. Assignment systems create relationships between those

266. See, e.g., N.D. ILL. R. 40.1 (1999).

with adjudicative responsibility and those who require, or must endure, the service. When evaluating the manner in which this relationship is formed, “judge assignment” might be a better label than “case assignment.” The issue for institutional designers is not only how judges prefer to get their cases, but how parties ought to get their judges.

Because adjudicative institutions are often designed such that disputants cannot share all of the available adjudicators,²⁶⁷ judge assignment lotteries are facially plausible. Not every litigant in the Southern District of New York can share the attention of all judges assigned to that jurisdiction without serious waste. As we have seen, lotteries offer a mechanism for sharing resources that are otherwise indivisible.²⁶⁸ In addition, first-in-time rules will not solve the case allocation problem. With adverse parties to each case, the system has to confront divergent party preferences regarding the identity of the appropriate decision maker. Of course, auctioning judges is dangerous. Outcomes would bear an even greater relation to party wealth and, if judges received the high bids, decision-maker incentives would be influenced in harmful ways.²⁶⁹

But randomization is not the only option. Merit-based assignment is also a possibility; the system might attempt to match adjudicator abilities with case characteristics. This is akin to discretionary assignment procedures that were more popular with judges in the past. A second possibility is “political” assignment. That is, judges could be assigned with regard to aggregated litigant preferences and with less threat than an auction. Selection of arbitrators often includes party preferences, if not by agreement on a particular arbitrator then by a procedure responsive to party objections and desires.²⁷⁰ In a similar spirit, but in more moderate fashion, many

267. Supreme courts and some high-ranking agency officials are an exception, and their nominally broad oversight tends to come with a limited attention span.

268. See *supra* Part I.B.2.a.

269. See Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1220 (2007) (connecting jurisdictional expansion to fee-based judging and competition among courts).

270. American Arbitration Association rules state that, in the absence of party agreement, the parties will each strike and rank order potential arbitrators from a list provided by the Association. See AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-11(b) (2007), available at <http://www.adr.org/sp.asp?id=22440>; *Smith v. Am. Arbitration Ass'n*, 233 F.3d 502, 504 (7th Cir. 2000) (describing such a process); see also

states now allow litigants peremptory strikes on the first judge assigned to their case.²⁷¹ This makes judge selection a bit more like jury selection. Although a political assignment system might operate in conjunction with randomization instead of replacing it,²⁷² political assignment would allow those directly affected by adjudication to limit the pool of judges who might control their case.

With at least one viable competitor to lotteries, there are two remaining justifications for assignment randomization. These justifications adhere to the judge-assignment perspective, and they track general justifications for randomization identified above: sensible allocation of indivisible resources across apparently equal claims, and reliable experimentation on judicial behavior. Together with sensitivity to the judicial appointments process, they offer a formidable argument for assignment randomization—even absent any commitment to randomizing merits decisions.

First, random case assignment is an attractive way to distribute a scarce and indivisible resource: decision-maker excellence. We can always demand more of it, according to our own conceptions of excellence. Realistically, however, judges and administrative officials will vary in competence, in ideology, and in the likelihood that either attribute will influence their decisions. Given an irreducible degree of variance among decision makers on the dimensions of competence and ideology, random allocation of judges to parties and their cases is a plausible response.

The argument is simplest for ideological variance. A constellation of forces produce an ideological composition among decision makers within a particular institution. In favor of tolerating or even promoting ideological diversity is a list of arguments usually connected with the appointments process. One might conclude that such diversity properly reflects democratic forces and the changing

FRANK ELKOURI, HOW ARBITRATION WORKS 185-86 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (observing that labor-management arbitration agreements often provide that each party will appoint their preferred arbitrator and then those panel members will agree on a neutral chair); Stephen J. Choi, Jill E. Fisch & Adam C. Pritchard, *Attorneys as Arbitrators* 6-7 (University of Michigan Law School, Olin Working Paper No. 09-001), available at <http://ssrn.com/abstract=1086372> (describing National Association of Securities Dealers arbitration involving lists generated by rotation and party preferences).

271. See Norwood, *supra* note 196, at 293 & n.128.

272. Lists of potential judges or the first proposed judge could be selected by lottery.

balance over time, that it equitably distributes positions of authority across groups in society, or that it generates healthy debate within institutions and fosters small-scale innovations from multiple sources. Alternatively, one might simply surrender to the inescapable reality of ideological diversity. Even if one believes that variance should be minimized through any possible means, a degree of diversity will persist so long as our judges are human beings.

Randomized assignment plays off of a given mix of ideology and equally distributes the probability of receiving any single decision maker. Litigants might prefer a different mixture of judges in the pool, but that is an argument at least equally well directed at the appointments process, probably more so. If the mixture is acceptable, it is reasonable to conclude that a fair way to treat the entire class of litigants is to run lotteries on judges. This class might well reach the same conclusion if they were able to deliberate together over the matter. Random assignment maintains any behavioral incentives flowing from the overall ideological composition of an adjudicative institution, while offering a method for distributing decision-maker ideology for those controversies that do find their way into the given dispute resolution system. Random assignment tends to follow choices concerning the appropriate mix of decision-maker ideology, sensibly allocates those decision makers, and refers objections to the mixture elsewhere. This reasoning is admittedly parasitic, but it clarifies the functions of assignment randomization.

The application to variance in decision-maker competence is less apparent. We have seen that randomization tends to make competence deficits worse than they might otherwise be. Both merit-based and political case assignment systems at least attempt to match decision-maker attributes with case characteristics or party preferences. Unconstrained randomization does not.²⁷³ Furthermore, the possibility of addressing competence deficits at a location other than case assignment (such as the creation of specialized courts, the appointments stage, on appeal, through sanctions, or by the creation of crude rules over open-ended standards) may not be an adequate response. One might be tempted to contend that assignment ran-

273. I am assuming that incompetence is not occasionally desirable as a way of checking problematic ideological influences—that relatively less competent ideologues are not better than more competent ideologues.

domization equally distributes the possibility of judicial error across all litigants at the time of filing. In a sense this is true, although the likely error rate is bound to differ across different types of cases. The more fundamental objection is that error rates can be so tightly connected to how judges are assigned to cases that randomization makes the problem worse than it ought to be.

Insofar as random judge assignment is a more palatable allocation rule for ideological variance than for competence variance, it follows that support for randomization should partly depend on the mix of characteristics among judges. In one circumstance, competence will be of relatively minor concern while ideological differences persist; in a different circumstance, diversity in competence will be the leading problem. Many factors can influence this mix. For example, an appointments process that does not screen well for competence or that allows for specialists to succeed, coupled with wide jurisdictional boundaries allowing for serious differences in case type, will make random assignment more problematic. Either the appointments process or jurisdictional boundaries can be renovated to minimize the competence problem, but case assignment is another tool for responding to the same issue. Ultimately, then, the social desirability of random assignment will probably turn on the feasibility of nonassignment design choices to address low and diverse competence issues and the relative merits of alternative case assignment systems.

For the sake of argument, we can adopt a few assumptions that are charitable to an anti-randomization position. First, assume that decision makers differ in competence levels and in which cases they can resolve easily and correctly. Second, assume that the appointments process, the removal process, the jurisdictional boundaries, and the substantive law are fixed—either because changing these features is infeasible, or because they serve essential functions. Third, assume that at least one other assignment system is possible, such as assignment of judges to cases based on their skill sets or political assignment involving party preferences. Under these conditions, what is left to be said for the status quo of random assignment over reform?

As an initial matter, adjustment for differing decision-maker skill sets is not wholly incompatible with random assignment. A com-

promise could be fashioned whereby officials judge which decision makers are best suited to which case types,²⁷⁴ and, to the extent that multiple decision makers fall into a category, they could be allocated randomly. This stratified lottery solution could work in adjudicative institutions with many decision makers and large dockets. In those environments, the decision costs of ranking the suitability of each available decision maker with respect to every incoming case will be prohibitive. In fact, a rough and roughly stable categorization of decision makers might ameliorate worries of abuse that come with official discretion over judge assignment, and that motivate arguments for randomization.²⁷⁵

There is a broader response, however. Random assignment helps resolve the problem of uncertainty over what makes a good decision maker. It obviates the need to build an unavoidably controversial theory of adjudicator excellence into the case assignment stage. Whatever qualities a good judge or administrative decision maker should have, random case assignment will distribute those qualities roughly equally across disputants. Of course society cannot do without normative models of good and bad decision-maker behavior. At a minimum, such models ought to inform the appointments process and should match the incentives for selection into the pool of potential decision makers. If, however, there is value in adjudicative institutions controlling their assignment systems, it seems best that the institutions avoid interjecting their own senses of excellence through a merits-based allocation rule that they fashion and implement. Indeed, adoption of random case assignment, where feasible, might be a way that judges retain control over case assignment in the shadow of legislative intervention.

A final response is grounded in the value of experimentation. It is at least as broad as any justification thus far, and it presses

274. The Patent and Trademark Office is an example of intra-institution specialization. Patent applications are assigned to specialized technology units and then to individual examiners. See U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE ch. 903.08 (2008).

275. Similar remarks apply to decision makers trading cases among themselves, although ideological diversity will probably interfere with trades. Judges with very different worldviews must be less likely to trade with each other when mutually valued outcomes are at stake. On the other hand, intensely ideological judges of the same stripe might trade to maximize their competence with different case types. This could amplify the influence of ideology on outcomes over the baseline of random assignment without trading.

against compromise on random assignment, even for the purpose of matching decision-maker skills to congenial case types. Indeed, the experimentation justification indicates random assignment should be not only maintained but spread further.

The basic argument is straightforward. We are still learning about the determinants of judicial behavior, and random assignment is one of the best ways to accelerate that learning.²⁷⁶ By randomly assigning a large number of cases to the pool of available decision makers, confidence increases that each decision maker will see a roughly similar mixture of controversies. Differences in outcomes become more easily attributable to differences in decision makers once observable and theoretically relevant factors are held constant. The power of randomization in experimentation is logically similar to its usefulness in clinical trials of new drugs.²⁷⁷

Of course, in the judge assignment application, the actual motivation for randomization is hardly the development of experimental knowledge. There is no indication that judges chose random assignment to make themselves guinea pigs or to generate information about their behavior for outsiders. But a natural experiment can be as valuable as a designed experiment. The resulting information about judges can be used to predict future behavior and plan accordingly, to inform the appointments process regarding the likely consequences of choosing one decision maker over another, and even to make suggestions about the case assignment process itself or the jurisdictional boundaries of adjudicative institutions.

Hence the results of empirical studies on judicial behavior provide support for complaints about it. We become more confident about variation in decision-maker competence and ideology when empiricists capitalize on assignment randomization to make observations about the relationship between decision makers and outcomes. The mildly perverse upshot is that a target of understandable complaint—random assignment in the face of diversity among decision makers—is also one basis for testing those complaints.

276. See IAN AYRES, *SUPER CRUNCHERS* 71-72 (2007) (characterizing random case assignment across judges as a natural experiment on judicial behavior); Lynn M. LoPucki, *Court-System Transparency*, 94 IOWA L. REV. 481, 495 (2009) (same).

277. See, e.g., MARKS, *supra* note 41, at 132-63.

Without doubt, the information made available by random assignment comes with disadvantages and perhaps diminishing value. Some studies on judicial behavior seem to have a flair for the obvious. Moreover, the best information on judges might never be available to professional empiricists. Access to a lawyer who practices before the institution in question will probably provide better insight than a coefficient indicating how clumps of “Ds” and “Rs” tend to vote in some case category. There is some risk that the new wave of empirical legal studies is an ill-fated fad, “a scientific enterprise that seems to return so little from so much,” as Lon Fuller put it during an earlier surge of legal empiricism.²⁷⁸ Even those who maintain relatively high hopes for sophisticated empirical inquiry into judicial behavior might not believe random assignment is necessary. Other techniques could be adequate given what is already known and what is lost with randomization. In any event, these empirical studies concern behavior in cases that are actually filed, and retaining randomization might thwart progress available through modification of assignment systems.²⁷⁹ Pressing harder for randomization threatens to convert the outsider perspective on assignment into an academic perspective that is uniquely committed to satisfying scholarly curiosity.

There is room for debate here, and it could be that any scholar’s judgment on the question is compromised. My view is that much is left to learn about adjudicator behavior and that random assignment is an important foundation for progress. Scholars are still working out which factors are truly influential in judicial decision making, the relative strength of those factors, and how they interact

278. Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 HARV. L. REV. 1604, 1622 (1966).

279. In particular, partisan balancing for decision-maker panels holds the potential for progress. This has been suggested for the federal courts of appeals. See Tiller & Cross, *supra* note 9. Partisan balancing might not devastate empirical conclusions based on the assumption of random assignment, but it would tend to reduce their force. In any event, this suggestion is not exportable to trial courts and other institutions that assign one decision maker to each case. Moreover, we must be convinced that panels should be constructed to minimize ideological variance in voting, rather than to permit a wider range of outcomes for the purposes of experimentation and debate. Furthermore, ideological variance across judges will not necessarily affect behavior outside the courtroom differently from zero variance. Potential litigants might adjust either way.

with each other.²⁸⁰ For instance, there is little remaining doubt that the policy preferences of at least some judges influence outcomes in at least some cases, but there is much debate over the magnitude of that influence.²⁸¹ It has to be compared to conventional legal authorities, attorney quality, strategic considerations involving nonjudicial institutions and public opinion, parochial institutional or professional norms, and so on. As well, common proxies for variables of interest are imperfect by definition and feed an irreducible margin of error. In this vein, many studies use attenuated proxies, such as the identity of the appointing president, to group judges into ideological categories.²⁸² Few existing studies seem to deliver individualized information,²⁸³ leaving us with imprecise measures of decision-maker variation within institutions.

c. A Political Allocation Alternative

With all of this in mind, probably the strongest competitor to random assignment is a political assignment system that incorporates litigant preferences. We have seen the problems of a merit-based assignment system whereby officials attempt to match judge skills with case characteristics. Official discretion can be exercised poorly, skewed by self-interest, and unsustainable when judges feel equally entitled to cases. Political assignment, however, has hopes of outperforming merit-based systems on certain measures.

Political assignment in this context means that judges receive less control over which cases they receive while litigants enjoy

280. See generally Samaha, *Judicial Transparency*, *supra* note 243.

281. See *id.*

282. See, e.g., JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 321 (2002) (using newspaper editorials); 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, 2168 (1998) (assigning political party affiliation by reference to the nominating president); see also Robert Anderson IV & Alexander M. Tahk, *Institutions and Equilibrium in the United States Supreme Court*, 101 *AM. POL. SCI. REV.* 811, 811-12 (2007) (noting common simplifying assumptions of one-dimensional policy space and binary choices); Joshua B. Fischman & David S. Law, *What Is Judicial Ideology, and How Should We Measure It?* 3-4 (San Diego Legal Studies Paper No. 08-47), available at <http://ssrn.com/abstract=1121228> (finding problems of underspecification, observable proxies, and unidimensional assumptions).

283. For two counterexamples in the immigration field, see *supra* text accompanying notes 231-32.

more. It therefore shares with random assignment the aspiration of minimizing adjudicator discretion and its risks. A potential difference is that political assignment might better serve the general public interest. Political assignment might address the problem of diversity in decision-maker competence, a problem which random assignment tends to exacerbate. It likewise creates public information about decision-maker characteristics, albeit in a different way.

Although selfish parties presumably prefer victory regardless of adjudicator competence, a political assignment system would be designed to equalize the influence of all sides to a dispute on the decision maker's identity. It should cancel out those desires for victory while retaining the potential to steer cases toward those judges best able to handle them. Judges who display intense ideological commitments in a given field should be less likely to receive such cases. And, to the extent that parties cannot influence the decision maker's ideology, they might choose to maximize expected decision-maker efficiency as a second-best. At least one party is likely to prefer competence to incompetence. Furthermore, litigant migration to one judge instead of another reveals outsider perceptions about how those judges process a particular type of case. If that information were accessible, the aggregation of previous litigant choices would present a rough index of the *ex ante* desirability of each decision maker to prospective litigants and other observers. The details of a political assignment procedure must be resolved—such as whether to follow arbitration models and how to allot peremptory strikes. But the general virtues of political assignment are clear enough.

Random assignment still enjoys advantages, however, at least if we take elements of the current adjudication system as given. First, the benefits of political assignment are more pronounced when workload can vary across decision makers. If workload must be evenly distributed, then a ceiling is imposed on the influence of party preferences. If workload is allowed to vary, then the most popular and hopefully the most excellent judges are “rewarded” with a larger docket. Some decision makers will be perfectly happy with that result; they will appreciate the relative power and prestige. Others, we must worry, will increase their leisure time by develop-

ing a subpar reputation and frightening litigants away from their chambers. If we are considering political assignment for federal judges, there is the question whether the impeachment process is adequate to temper that threat. One immediate reaction to this complication is to compensate judges more generously for performing more work. But the dangers of that response are also apparent: judges then have an incentive, even beyond reputation and prestige, for maximizing jurisdiction.²⁸⁴

Although these difficulties might not be crippling, broader questions must be confronted. The first regards the true public value of litigant preferences. It is not clear that the most popular judges among litigants are the best judges in the best sense of that word, or the best fit for the cases they receive. The basic concern is not that lawyers will give poor advice to their clients about which judges to strike; the issue is the distance between the aggregated preferences of actual litigants and the resulting quality of law and precedent for everyone else. It is more than possible that the interests of actual litigants are unhappily skewed compared to others influenced by law. Perhaps one party to every dispute will exert whatever influence they have to obtain the least legally competent and most ideologically intense decision maker. This would dampen the public value of information on judge popularity while driving down the average quality of judging. Litigant migration, when all parties have a hand on the steering wheel, might well systematically arrive at judicial mediocrity.²⁸⁵

In any event, the likely distributional outcomes of a political assignment system should be evaluated with reference to another

284. See Klerman, *supra* note 269, at 1220 (studying English history).

285. Predicting which decision-maker types are most likely to be selected depends, in part, on whether litigants and their lawyers tend to be optimistic. Compare Linda Babcock & George Loewenstein, *Explaining Bargaining Impasse: The Role of Self-Serving Biases*, 11 J. ECON. PERSP. 109, 109-12 (1997) (comparing self-serving biases to uncertainty and strategic behavior), and Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1501-04 (1996) (similar), with Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2498-2504 (2004) (suggesting effects of overconfidence, self-serving biases, and denial on plea bargaining outcomes across different defendants). If all sides are, for some reason, optimistic about their chances for victory, then the result might be an extremely competent though ideologically moderate decision maker in charge of their dispute. This suggests a positive role for a cognitive bias. However, even if optimism is widespread in litigation, it likely generates other, potentially costly consequences—such as inhibition of settlement.

component of institutional design: the appointments process for adjudicators. The proposal for reform would have to square with the assumptions of the appointments process as we know it. That process creates a shifting mix of personnel based on decisions of the Senate, the president, and the political forces that influence them. In fact, the appointments process cannot be separated from the post-appointment assignment system. Appointment is, functionally speaking, the first step in the process of matching decision makers to decisions. Thus matching judges to litigants is something like *The Dating Game*, where matches were not only a product of player choices but also player screening that took place pre-game and off-screen.

In this regard, random assignment tends to follow the mixture of judges produced by the appointments process, while political assignment will probably not. In an important sense, political assignment moves some power over the character of the federal courts from the appointments system to lawyers and the litigants who retain them. This power shift is no objection standing alone. Rather, it is a suggestion of deep issues tightly linked to seemingly mundane questions of institutional detail.

Equally important, the impact on the appointments process implicates the feasibility and stability of a substantially revised judge assignment process. Members of Congress are apparently satisfied with a generally random assignment system, and they could quickly become skeptical of any serious shifts to litigant control or judicial specialization in the assignment process. A sensible judge assignment system within the courts must be consistent with the assumptions of the “pre-game” appointments process.²⁸⁶

At this point, institutional designers must face deep and complicated questions of value and strategy. The process by which judges are matched with cases might be viewed as a tedious and uninteresting issue of paper-pushing. The truth is that the assignment process is an influential component in the overall system of

286. Assignment systems for elected judges and for administrative officials are distinct, but the basic questions are similar. Assignment systems should be evaluated in conjunction with other design choices, including the appointments process, as well as our goals for the institution in question.

adjudication. Random assignment and political assignment are just two imaginable choices with two distinct sets of implications for the system as a whole. Given debatable goals for adjudicative institutions and some uncertainty about likely outcomes following from different assignment systems, it might be tempting to suggest that the viable assignment options themselves be randomized. Instead, I would return to a different tiebreaker.

Random assignment provides one of the most reliable ways to learn the determinants of judicial behavior. That possibility for insight is already limited by a variety of jurisdictional boundaries. Steering cases to popular judges would further restrict the natural experiment that random assignment provides, similar to the restrictions imposed by a discretionary merit-based assignment process. If the resulting understandings were only useful to potential litigants and their lawyers, random assignment would be a less attractive option. Those classes have alternative and sometimes reliable sources of information. But their judgments about sitting judges for whom experience-based evaluations are available will at least occasionally misfire. Moreover, even when those judgments are accurate, they will not always line up with the informational needs of others. Perhaps most important, the process of appointing judges operates on suppositions about how potential judges will perform as actual judges in the future. The characteristics of the most popular judges among parties are not what the appointments process does or should value.

This brings us to an uncomfortable reality associated with randomization as a method of experimentation. This reality applies beyond judicial assignments and should be accounted for however one wishes to resolve the issues of randomization in adjudication. Randomization promises insights into how systems behave and, at their best, those insights suggest reasons for reform. But sometimes a plausible reform turns away from randomization and thereby eliminates one technique for continued understanding of the system. This is not a reason for entrenching randomization. It is, instead, a recommendation that alternative reforms be seriously considered before a reliable source of information is discarded. For the topic at hand, the operation of adjudicative institutions, there are multiple dimensions of design choices that can achieve similar results. We

should be relatively sure that those alternatives are unacceptable before rolling back random assignment and the growing base of knowledge that it is coincidentally helping to create.

CONCLUSION

With a better understanding of how randomization functions comes a better understanding of when it is beneficial. I have outlined overlapping justifications for the deliberate use of statistically or orthogonally random processes. These justifications do not reduce to a simple prescription. But they do provide guidance, and they help us investigate what might appear to be an incoherent approach to randomization in adjudication. Many adjudicative institutions have committed to randomizing their decision makers across cases and to never randomizing merits decisions in those cases. This is, to some extent, an ineffectual distinction. Yet the vagaries of randomization's optimal domain make a case for the prohibition, while the advantages in allocation and experimentation provide reasons for encouraging randomization at the point of assignment. More could be said about these policies. This much is enough to see that randomization is a fixture in government decision making—even in our judiciaries—and that it can be an element of justice and innovation rather than a surrender to fortune or fate.