

Randomization in Adjudication

Adam M. Samaha*

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* Visiting Professor of Law, Stanford Law School; Assistant Professor of Law, The University of Chicago Law School. Thanks to Adam Cox, Richard Craswell, Mariano-Florentino Cuéllar, Rosalind Dixon, Jake Gersen, Joseph Grundfest, Bernard Harcourt, Richard Helmholz, Daniel Ho, Pam Karlan, Mark Kelman, Evan Lee, Ethan Leib, Saul Levmore, Richard Marcus, Richard McAdams, Peter Stone, Lior Strahilevitz, David Strauss, Cass Sunstein, and William K.S. Wang for helpful conversations and comments, and to workshop participants at the University of California–Hastings College of the Law, Stanford Law School, and the University of Virginia Law School. Aditi Paranjpye and Tina Shen provided excellent research assistance. I am also indebted to Kate M. Wilko of the Stanford Law Library. Mistakes are mine.

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INTRODUCTION

A divide between randomization and justice is centuries old in the West. Both the Goddess of Fortune and the Goddess of Justice have been depicted as blindfolded, but Justitia holds a scale while Fortuna issues 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 legally irrelevant facts and guided by law rather than preference or chance.

Randomization has a poor reputation in judicial rhetoric, as well. “The decision of a contested case by lot or chance,” it was written in 1811, “must be reprobated by every honest man.”² More recently, judges have sanctioned other judges for flipping coins, warned executive officials that their discretion cannot extend to decision by lot, and condemned an entire system of capital punishment for resembling random lightning strikes.³ Rolling dice may entertain or guide individuals in their personal lives,⁴ but perhaps it is inconsistent with the rudiments of constitutional 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 commitments made in supreme law and elsewhere. Flipping coins to determine outcomes in every criminal case is incompatible with a commitment to judgments based on relevant evidence. But such incidental conflicts do not entail judicial opposition to randomization *per se*. In fact, courts might be as likely to order randomization as to forbid it. For instance, it seems that no one sued to invalidate the 1969 Vietnam military draft for relying on randomization, but the draft lottery was attacked for being not random enough. A lower court took the argument seriously.⁵

Is it possible to distinguish situations in which courts are likely to resist randomization (e.g., death sentencing) from those in which they are likely to be indifferent or even promote it (e.g., military drafts)? High

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

² *Cluggage’s Lessee 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 & B.1.

⁴ See, e.g., Steven Levy, *The Perfect Thing* 227-54 (2006) (discussing shuffle play on the iPod and its evolution to suit consumer preferences); 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*).

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

stakes cannot be the distinguishing feature. Instead, the best first cut emphasizes institutional location. Although relevant cases are few, judicial opposition to randomization looks parochial: judges may oppose randomization for court decisions, but they are likely to retreat when other officials consciously randomize. If this is the pattern, then judicial opposition to deliberate randomization is restricted to self-regulation.

But this raises core normative questions of institutional design. We have to wonder whether it is appropriate to expel randomization from merits decisions in adjudication and not elsewhere. A good defense is challenging because, in one respect, *the judiciary is shot through with deliberate randomization*. The decision-makers themselves — judges and jurors — are typically assigned their cases by lottery within their respective cohorts. Random 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 an allergy to randomization. But because decision-makers in these pools differ in their competence and ideology, sometimes the randomized assignment process will contribute to the outcome of a case.⁷ This is true even if the system is dead-set against overtly randomizing merits decisions. The greater the diversity across decision-makers, the larger the assignment lottery's influence is likely to be.

Can we account for and defend a 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 expertise, or the combined preferences of the litigants, or the desire for ideological diversity when judges sit in panels;⁹ and these non-random assignment

⁶ See *infra* Part II.C (describing some current case assignment systems).

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

⁸ For recognition of the combination without much defense, see Neil Duxbury, *Random Justice* 74-75 (1999) (discussing jury selection and acceptance by litigants). For brief arguments 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 acquiring or assigning cases to influence outcomes), 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 courts). For a provocative defense along the lines of decentralized decision-making, democratic values, and deliberation, see John E. Coons, *Consistency*, 75 *Cal. L. Rev.* 59, 110-13 (1987).

⁹ See, e.g., Maureen Solomon, *Caseflow Management in the Trial Court* 8, 13, 28-29 (1973) (describing older assignment systems, sometimes involving discretionary judgments by the chief judge); Michael Hasday, *Ending the Reign of Slot Machine Justice*, 57 *N.Y.U. Ann. Surv. Amer. L.* 291, 298, 310 (2000) (advocating the assignment of appellate judge panels partly by the rank-order preferences of the parties to a case); 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, to reduce variance in voting across judges).

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 extend beyond the preferences of judges themselves. Randomizing case assignments ignores important differences among judges, while refusing to randomize merits decisions encourages the proliferation of other contestable tiebreakers.¹⁰

My defense comes in several steps. As to the ban on randomizing merits decisions, it is the only possible hard-line rule for when to randomize and, I will suggest, a flexible standard is problematic in an imperfect world.¹¹ As to randomizing assignments, we can view the process as assigning judges to cases, not simply cases to judges. This outsider perspective on the process can then accept randomization as a sensible method for distributing irreducible judicial error and scarce judicial excellence across litigants. It also connects random assignment systems now popular with judges to the appointments procedures that gave them their offices. Appointing judges is one part of a system by which decision-makers and cases are paired, in the same way that *Dating Game* matches depended on participant screening as well as participant choices. In the adjudicative context, moreover, reasons exist for limiting participant influence over the matching process. Randomizing at the assignment stage can rightly follow judgments at the appointments stage about the proper composition of judges. In addition, random assignment amounts to a natural experiment. Some trusted empirical methods depend on randomization for insight into judicial behavior. Indeed, these studies are one way to confirm that the judge assignment system affects outcomes. The difficulty involves ascertaining when these benefits are outrun by other concerns within a particular institutional setting.

Part I is largely theoretical and it continues modern efforts to demystify randomization. It elaborates randomization as a concept and its incorporation into rational thought. The discussion also highlights two typical applications for lotteries, allocation and experimentation, and provides concrete examples from the United States government. Part II sorts out the judicial position on randomization. Judicial skepticism of deliberate randomization in other institutions is difficult to find, and courts regularly adopt lotteries to assign cases, albeit with serious limitations. Yet judges almost never overtly randomize their merits decisions, and those who do risk rebuke. Part III offers a functionalist defense for this awkward pattern. Randomizing decision-makers effectively randomizes outcomes for a class of cases, but without tracking the ideal domain for randomization indicated by abstract normative

¹⁰ See *infra* notes 93-98 and accompanying text (collecting tiebreakers).

¹¹ Another defense is more deontological. Certain moral theories might indicate that overt merits randomization, at least during judicial adjudication, inflicts a special harm — a harm which is not associated with the consequential effect on the merits when decision-makers are randomized across cases. This argument will be briefly addressed below in Part III.C.1.

theory. Not without accounting for the imperfections and institutional settings of adjudication, anyway. The closing pages therefore suggest that a merits randomization ban might be the best available approach for fallible judges; and, in any event, that assignment randomization is a sensibly weighted lottery of judges. This defense does not fully follow the motivations of the system’s designers, however. It looks to the allocational and experimental benefits that these decision-makers 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 processes to generate outcomes that affect a pool of subjects. It should be emphasized just how many decisions must be made for this structure to function. Among other choices, the decision-makers must be afforded a position of power, the pool of potentially affected subjects must be determined, and a decision rule must be selected. This last point is important. 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 get clearer on what version of randomization is worth analyzing. Sometimes the term “random” is used to refer to ideas not central to the inquiry here, and sometimes terms like “arbitrary” refer to ideas that are within the heartland of our concern.

An initial distinction lies between processes and outcomes. Either can be characterized as random.¹² Thus we can describe the process of rolling an unweighted die as “random” without commenting on the pattern of numbers that come up. And we can describe certain numerical sequences as more random than others without saying anything about the process for generating them. The sequence 01001111 is more random in this sense of the word than 11111111, regardless of the process by which these numbers were selected for inclusion in this sentence.¹³ Because our focus is on decision-making protocols, process-oriented concepts of randomness are most pertinent. These processes will be evaluated with reference to their consequences, and a random

¹² See Deborah J. Bennett, *Randomness* 165-67 (1998); Jon Elster, *Solomonic Judgements: Studies in the Limitations of Rationality* 40-41 (1989).

¹³ See Gregory J. Chaitin, *Exploring Randomness* 111 (2001) (defining maximum randomness as “algorithmically incompressible”); see also Bennett, *supra* note 12, at 161-64 (tracing the idea to unpredictability and complexity).

process can be tested by the pattern of its outcomes;¹⁴ but the topic is decision-making processes that are designed to generate results randomly and not simply patterns that appear random.

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 The idea of a *statistically random* process is probably the more intuitive concept. It refers to a process that generates outcomes within a given set with equal probability.¹⁶ The set of possible outcomes must be chosen somehow, but, once specified, any member of the outcome set must be equally likely to occur with each use of the process. This notion of randomization is commonplace, even if the resulting distributions do not fit common expectations for “randomness.”¹⁷ There is also the familiar notion of a weighted lottery, which is a variation on statistical randomization.¹⁸ It can be treated as a compromise process intermediate between strictly equal chances and other decision-making methods, such as merit or market allocations.

However intuitive, statistical randomization might be purely theoretical. Innovators have been striving for decades to create devices that are demonstrably random in a statistical sense.¹⁹ Dice can be engineered only so well and their ability to achieve statistical randomness will always depend on the mechanism for rolling them. The digital age has not solved the problem. Computer-administered algorithms efficiently generate numbers in bulk, yet these devices depend on a seed to get them started. If the seed is not appropriately selected,

¹⁴ See Bennett, *supra* note 12, at 169-73 (describing tests based on the distributions).

¹⁵ Cf. Ian Hacking, *The Emergence of Probability: Ideas About Probability, Induction, and Statistical Inference* 12-13 (1975) (exploring probability theory as related to distributions from chance processes and to degrees of uncertainty); David Wasserman, *Let Them Eat Chances: Probability and Distributive Justice*, 12 *Econ. & Phil.* 29, 30 (1996).

¹⁶ See Bennett, *supra* note 12, at 155 (discussing John Venn and Charles Pierce); see also Stephen E. Feinberg, *Randomization and Social Affairs: The 1970 Draft Lottery*, *Science*, vol. 171, Jan. 22, 1971, at 255, 258 (describing statisticians’ idea of an ideally random process).

¹⁷ See, e.g., Elster, *supra* note 12, at 41-42; 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.”); Amos Tversky & Daniel Kahneman, *Subjective Probability: A Judgment of Representativeness*, in *Judgment Under Uncertainty: Heuristics and Biases* __, 36-37 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982) (discussing a common expectation that “random” processes will yield local representativeness).

¹⁸ See, e.g., Elster, *supra* note 12, at 113-14; Douglas C. Wilms, *Georgia’s Land Lottery of 1832*, 52 *Chronicles of Okla.* 52, 54 (1974) (doubling the chances for veterans, orphans, family heads, and others to win newly acquired Indian land).

¹⁹ See Bennett, *supra* note 12, at 132-51 (reviewing twentieth-century efforts); Feinberg, *supra* note 16, at 258 (calling perfect independence and equal probability “impossible”).

statistical randomness can be compromised.²⁰ The concern can be pushed further. Is statistical randomization even theoretically possible, given sufficient foreknowledge about the process? With the possible exception of quantum mechanics, it could be that adequate information before the randomizing process finishes would invariably preclude the assurance of equal probabilities. With enough knowledge about physics and the manner in which a die is rolled, an observer should be able to calculate odds far different from one in six.²¹

To be sure, many randomizers are good enough for their assigned purposes, and many or all observers will lack the information necessary to defeat a working assumption of equal probabilities. Yet the role of human ignorance in preserving equal probability assumptions leads to a distinct concept of randomization. It expands the conceptual territory by taking advantage of uncertainty.

An *epistemically random* process generates outcomes that are equally probable as far as an observer can tell.²² Whatever an omniscient being could see, a process is epistemically random when an actual human being is sufficiently ignorant such that it becomes attractive for him or her to assign equal probabilities to a set of possible outcomes. This is most understandable when the process appears designed to approximate statistical randomness, as with a “fair” 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,” even though the device is certainly not statistically random.²³ Hence the epistemic concept is subjective and allows randomness to vary across observers. A future occurrence might be unpredictable and in that sense random with respect to observer *X*, while at the same time highly predictable and in no sense random with respect to observer *Y*.

To move in this direction, however, epistemic randomness might require a tendentious model of proper rationality or actual human behavior. Something like the principle of insufficient reason would have to be accepted, whereby the observer should or will assume

²⁰ See, e.g., Jonathan Knudson, *Java Cryptography* 22-24 (1998) (defining randomness in terms of unpredictability). A web service advertising “true random numbers” based on seeds from atmospheric noise is available at <http://www.random.org>.

²¹ See, e.g., Xitao Fan et al., *SAS for Monte Carlo Studies: A Guide for Quantitative Researchers* 25 (2002) (asserting that “[n]o events in nature are truly random”). There is an odd relationship here to refusals to accept the existence of chance in centuries past, when doing so threatened a powerful view of divine will or planning. See, e.g., Reith, *supra* note 4, at 13-15 (discussing denial and acceptance over time of chance as a real phenomenon).

²² See Bennett, *supra* note 12, at 154 (discussing a “subjective definition” of randomness); Elster, *supra* note 12, at 43 (discussing “[e]pistemic randomness” and perceived fairness).

²³ Elster, *supra* note 12, at 43.

equiprobability despite total uncertainty about the probabilities (and potential difficulty specifying the set of possible outcomes).²⁴ In any event, epistemic randomness captures something useful by underscoring the role of uncertainty, and perhaps by suggesting that “randomness” is all around us rather than hopelessly out of reach.

This presents an additional question: Does a decision maker engage in randomization when she chooses a decision rule that is irrelevant to any normatively sound basis for decision?²⁵ True, some decision rules are considered both irrelevant and normatively prohibited, but what of decision rules with no arguable taint? An example familiar to legal scholars is the convention of listing contributing colleagues’ names alphabetically in the star footnote. Here a determinate and predictable decision rule is thought uncorrelated with merit.²⁶ A higher stakes illustration is rationing a scarce resource according to the distance of each person’s birthday from January 1, and without any hint of animosity on the part of the decision-maker.²⁷

We could call this process *orthogonally random*. This is a spin-off of epistemic randomization, assuming the decision-maker had no reason to believe that any identifiable person in the pool was more likely to receive the benefit at the time she chose the decision rule. And the process can be seen as a convenient substitute for statistical randomization, insofar as the rule was intended to mindlessly allocate resources without favoritism toward any individuals in the pool. Rules utterly detached from normative considerations might be more difficult to identify and administer than are pseudo-random number generators, but all might be conveniently categorized together.

None of these three concepts of process randomness (statistical, epistemic, orthogonal) is a priori superior. They are specifications of ideas that are each significant for some purpose. Furthermore, concentrating on one concept of randomness to the exclusion of others

²⁴ See Elster, *supra* note 12, at 43.

²⁵ See Lewis A. Kornhauser & Lawrence G. Sager, Just Lotteries, 27 Soc. Sci. Info. 483, 479-80 (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”). Heyd connects epistemic gaps to what I am calling orthogonal randomization. But a process can be orthogonally random when the decision rule is *known not* to correlate with any plausible normative basis for making distinctions.

²⁶ Like statistical randomization, this ordering delivers no information about the relative quality of comments provided. For an apparent instance of authors statistically randomizing the order of their names, perhaps to equalize the chance of recognition in short citation form, see Jan B. Heide et al., Exclusive Dealing and Business Efficiency: Evidence from Industry Practice, 41 J.L. & Econ. 387, 387 n.* (1998) (“[A]ll contributed equally to the article.”).

²⁷ Cf. *infra* text accompanying notes 61-62 (discussing the 1969 Vietnam draft lottery).

will help spotlight some normative questions while setting aside others. For example, thinking about statistical randomization prompts consideration of the circumstances under which decision-makers should deliberately make outcomes equally probable. There are a multitude of alternative decision rules that might be normatively superior to equal probabilities. In some contrast, the existence of epistemic randomness can present issues regarding the propriety of keeping one class of people ignorant of the operative decision rule, and the propriety of unpredictable decision protocols more generally.²⁸ These are issues under the rubric of transparency. None of those questions is the same as asking when and what kinds of substitutes are appropriate for statistical randomization. These questions are suggested by the possibility of orthogonal randomization. Hence the normative issues related to these three concepts of randomness cannot be analyzed in precisely the same way.

In the pages below, each concept will be touched on. After all, government decision-making has incorporated each of the three concepts. But to simplify without losing policy significance, the focus will be on attempts at statistical randomization with a secondary concern for orthogonal randomization. The discussion will be most interested in identifying when decision-making processes should be designed to offer equal probabilities across some set of predetermined outcomes. An attempt to assure equal probabilities will be sufficient, understanding that literal equiprobability might be impossible, that some lack of information might be required, and that orthogonal randomization techniques might be acceptable alternatives serving the same purpose. Although much of the analysis will apply to epistemic randomness, the issues surrounding deliberate statistical and orthogonal randomization are important and cleanly analyzed.

B. Randomization's Features and Justifications

Deliberate randomization has found a place in various situations and for thousands of years.²⁹ It drives shuffle play on iPods, it can motivate the dithering process in digital processing, it initiates presidential debates, it is a mechanism for resolving casual disagreements, it has been used to select bidders for livestock sales, it creates representative samples for opinion polling, it makes clinical drug trials more reliable, it can promote electronic security through cryptography, it has been used to award immigration visas and to select military conscripts.³⁰ But

²⁸ Cf. Kimberly A. Moore, *Judges, Juries, and Patent Cases — An Empirical Peek Inside the Black Box*, 99 Mich. L. Rev. 365, 365 & n.2 (2000) (noting various criticism of jury trials).

²⁹ See, e.g., Bennett, *supra* note 12, at 11-13, 17-44 (describing ancient gaming and divination); Duxbury, *supra* note 8, at 43-84 (collecting examples involving social choice).

³⁰ See, e.g., Levy, *supra* note 4, at 227-54 (regarding the initial version of shuffle play); John Watkinson, *An Introduction to Digital Audio* 120-22 (2002) (regarding

pervasive statistical randomization in decision-making would be calamitous. It would yield indefensible rewards and punishments, destabilize patterns of behavior, and kill socially valuable incentives. Imagine the 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.

There are, of course, many alternatives to randomization. Among them are: (1) judgment based on perceptions of merit, need, or desert, defined somehow and applied through some process, and the related option of delegation to experts; (2) politics, including deliberation among parties or their representatives and the aggregation of judgment through voting rules; (3) markets, which translate individual demand and ability to pay into resource allocations; (4) equal outcome guarantees, such as partition of a benefit into equal shares or time-sharing; and (5) first-in-time rules, which often reward knowledge, speed, and desire unrelated to wealth.³¹ Intelligent selection of randomization over these familiar alternatives requires us to pinpoint randomization's peculiar features.

In exploring how randomization is special and when it might be appropriate, it should be remembered that randomization is compatible with modern rationality. Twentieth-century modernism 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,³² nor does it bypass the difficult issue of how to make contested

dithering; Kerry-Edwards '04, Inc. & Bush-Cheney '04, Inc. Memorandum of Understanding, Sept. 20, 2004, at 5-6, <http://www.gwu.edu/~action/2004/deb04main/debateagreement.pdf> (regarding the first question in presidential debates); Douglas Walker & Graham Walker, *The Official Rock Paper Scissors Strategy Guide* ch. 4 (2004) (discussing the game as one of skill); *Corona Livestock Auction, Inc. v. U.S. Dep't of Agr.*, 607 F.2d 811, 813 n.3 (9th Cir. 1979) (regarding selection of potential buyers for "private treaties"); Alec Gallup & Frank Newport, *The Gallup Poll: Public Opinion 2005*, at 378-79 (2006) (investigating public opinion on sampling by sampling the public); Henry M. Marks, *The Progress of Experiment* 132-63 (1997) (regarding clinical drug trials); Knudson, *supra* note 20, at 22-24 (regarding cryptography); 8 U.S.C. § 1153(c) (regarding excess visas); *infra* note 61 (regarding conscription).

³¹ Such alternatives are detailed in Guido Calabresi & Philip Bobbitt, *Tragic Choices* 18-19, 31-50 (1978) (investigating quantity and allocation decisions, and comparing market mechanisms, accountable political processes, "lotteries," including both equal chances and equal payouts, and custom), and Elster, *supra* note 12, at 69-78 (comparing lotteries to absolute equality, queuing, rotation, need judgments, productivity, contribution, desert, and auctions). See also Bruce Ackerman, *Social Justice in the Liberal State*, 285-89, 298 (1989) (briefly comparing majority voting and lotteries of voter preferences). Calabresi and Bobbitts' reference to custom could be expanded into a group of default rules, including status quo bias or innovation bias. On tie-breakers in adjudication, see *infra* text accompanying notes 93-98.

³² 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.").

decisions. It is no more and no less than one decision strategy among many.³³ There might not be a clear boundary to its optimal domain, but there are 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 version of equal opportunity. Statistically random processes guarantee an equal chance of yielding any outcome within a predetermined outcome set.³⁴ The connection to equal opportunity is 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, of course, and not necessarily the most compelling. Other versions bracket a limited number of characteristics possessed by the pool members, such as race or sex, while allowing them to compete on other grounds. Statistical randomness is different. It aims to equalize chances across the board and thereby prevents distinctions based on skills, endowments, desire, or anything else. In addition, statistical randomness is just one version of equality. Only chances are equalized, not necessarily outcomes. Giving each of 100 pool members a 1% *chance* of receiving a benefit is obviously not the same as giving each of them 1% of the benefit itself. Randomization makes outcome distributions less predictable than guaranteed even splits, and therefore statistical randomness is not only a profound leveler of individual difference but also a source of unsettling drama.

Yet there are situations in which statistical randomization emerges as a uniquely plausible decision rule. They often involve scarcity and, more importantly, indivisibility.³⁵ Here “scarcity” just means that the legitimate demands of all cannot be met, and “indivisibility” means that the item cannot be literally or sensibly subdivided. Scarcity indicates an allocation problem rather than a solution to it, so randomization is not suggested by scarcity alone. But randomization can be a sound response to indivisibility. A benefit might be too costly to produce for everyone and to partition into 1% shares, while randomization allows each of 100 pool members to obtain a 1% chance of receiving the benefit.³⁶ A classic

³³ 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 *Social Res.* 307, 328-34 (2007).

³⁴ See, e.g., Barbara Goodwin, *Justice by Lottery* 39-40, 92-93 (1992); Hank Greely, *The Equality of Allocation by Lot*, 12 *Harv. C.R.-C.L. L. Rev.* 113, 122, 141 (1977).

³⁵ See Elster, *supra* note 12, at 69-70; John Broome, *Weighing Goods: Equality, Uncertainty, and Time* 196 (1991) (characterizing lotteries as providing “surrogate satisfaction” for equal claims to scarce indivisible goods).

³⁶ The analogue for a burden is that it can be too costly to avoid or to partition, but

case involves passenger space on a lifeboat. If more space cannot be constructed and passengers cannot share the existing space without jeopardizing the well-being of everyone, the survivors might draw lots to allocate limited seating.³⁷

Randomization has other significant features but they are less unique. Theorists point out that randomization can (1) economize on decision costs,³⁸ (2) tie the hands of decision-makers,³⁹ and (3) dampen behavioral incentives all around, compared to decision rules calling for distinctions based on merit, need, desert, willingness to pay, and so forth.⁴⁰ There is truth to these observations. Lotteries can be run quickly with modest expenditures. It is also true that honestly conducted lotteries place results beyond anyone's influence, including error-prone decision-makers. As such they might be characterized as reducing incentives to curry or solicit favor. To be sure, large costs may arise from deciding whether to randomize, what to randomize, and safeguarding the randomization process from corruption. But the possible advantages are clear.

None of this makes randomization categorically special, however. Many other decision rules share these qualities. Consider "equal shares for everyone" and "oldest people win."⁴¹ These, too, are easily administered flat rules that leave little room for personalized influence when honestly executed. Because randomization is a semi-exotic practice in official decisions, perhaps it is easy to forget that it is one of many possible rules.⁴² It is randomization's rule-like quality that slashes

randomization can spread equally the chances of suffering the burden.

³⁷ See A.W. Brian Simpson, *Cannibalism and the Common Law* 166-76 (1984) (describing suggestions that lots be drawn to select persons to be thrown overboard); *United States v. Holmes*, 26 Fed. Cas. 360, 367 (Cir. Ct. E.D. Pa. 1842) (Baldwin, J.) (instructing the jury that "[i]n no other than this [drawing lots] or some like way are those having equal rights put upon an equal footing, and in no other way is it possible to guard against partiality and oppression, violence and conflict"). A contrary 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).

³⁸ See Duxbury, *supra* note 8, at 54.

³⁹ See Calabresi & Bobbitt, *supra* note 31, at 44; Duxbury, *supra* note 8, at 51-53; accord Goodwin, *supra* note 34, at 97-99 (noting relief from responsibility as a possible benefit).

⁴⁰ See Duxbury, *supra* note 8, at 56; Elster, *supra* note 12, at 109-13. The baseline of merits decisions might be implicit in these writings. Note that randomization can *preserve* incentives, compared to a different baseline. See *infra* text accompanying note 55 (discussing sampling).

⁴¹ Not all of these alternative rules can be described as orthogonally random. Some of them will aim to approximate normatively defensible grounds for decision.

⁴² See, e.g., Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and Life* (1991); Isaac Erlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. Legal Stud. 257 (1974) (distinguishing rules from standards); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557, 559-63, 586-96 (1992) (adding the dimension of complexity).

decision costs at the time of execution, that constrains decision-makers, and that, in part, may cut incentives to adjust behavior.⁴³

To put the point modestly, randomization scores high on these measures without being different in kind from other rules. Compared to many other rules, guaranteeing equal probabilities has relatively special incentive effects. Pool members cannot acquire attributes that influence outcomes, as with many merit-oriented rules, nor can decision-makers influence outcomes after the randomization device is set in motion. Moreover, randomization is a rule with a peculiar relationship to predictability and reliance. Most rules hope to advance these values, even if they fail, while randomization partly retards them. Statistical randomization assures that no potential outcome is more likely than any other, meaning that observers can plan for equal chances but no further.

The upshot is that it randomization's uniqueness does not come from its rule-like character. It arises elsewhere. The source is a combination of features, starting where we began: a principle of equal opportunity joined with a hard-line rule of decision and a mixed kind of unpredictability, once the potential outcome set is chosen.

2. Plausible occasions

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. Furthermore, randomization might trigger quite different evaluations depending on the setting in which it happens. Ultimately the superiority of randomization depends on a normative orientation and factual premises over which people will disagree. Instead of fabricating a universal prescription, then, we can less ambitiously collect arguments that are appealing from several perspectives.

Two reasons for randomizing will be set aside up front, however: divination and aesthetics. This is not meant to downplay either. They have motivated randomization over an impressively long period of time. But divination is effectively foreclosed on the type of modernist rationality by which this paper intends to abide. It seems 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 arational about choosing randomization because it produces drama and mystery, or because it feels appropriately humble and fair in challenging decision situations. Yet arguments exist that reinforce such intuitions

⁴³ Cf. John Broome, *Selecting People Randomly*, 95 *Ethics* 38, 41-42 (1984) (recognizing decision cost considerations, but rightly noting cheap alternatives to lotteries).

without depending on a particular aesthetic sensibility or thrill-seeking decision-makers.

Four overlapping justifications for randomization then stand out. The first is a reaction to irreducible uncertainty. It follows theories of rational choice and a commitment to instrumental rationality. The second justification is more philosophically partisan. It relies on egalitarian principle to promote equal chances, and it might be persuasive even if a decision-maker has perfect information. The third justification is less connected to a particular normative vision and more of a concession to brute fact. It invokes randomization as the least-bad option when human behavior might otherwise become socially destructive. For lack of a better label, it can be called pragmatic. Finally, there is an experimental justification for randomization. It returns to the significance of uncertainty but offers hope of eliminating it over the long run. The experimental justification is sometimes set apart from others,⁴⁴ but the popularity of natural experiments today makes any such division artificial.

(a) *Rationalism and uncertainty.* By the twentieth century, randomization entered theories of instrumentally rational choice. This development might seem counterintuitive insofar as randomization has been associated with mindlessness or frivolity. But rational choice theorists understood the power of randomization to enhance one player's strategic position with respect to another⁴⁵ and, more generally, to respond logically and cheaply to situations of indifference and uncertainty.⁴⁶ "In the absence of reasons for choosing one alternative . . . rather than another," Jon Elster writes, "we might as well select one at random."⁴⁷ So the uncertainty justification arises when rational choice theorists reach the end of their rope, and randomization can follow an honest acceptance of reason's limits.⁴⁸

⁴⁴ Duxbury and Elster mention randomized trials in discussing the control of personal bias, see *id.* at 100-02; Elster, *supra* note 12, at 53-54, but it is not a theme for either of them.

⁴⁵ See Eric Talley, *Interdisciplinary Gap Filling: Game Theory and the Law*, 22 *Law & Soc. Inquiry* 1055, 1058, 1059 n.6 (1997) (book review) (describing randomization strategies as one equilibrium in a noncooperative coordination game).

⁴⁶ See Heyd, *supra* note 25, at 62, 66 (exploring lotteries as a rational second-order solution when practical reason breaks down).

⁴⁷ Elster, *supra* note 12, at 38; see *id.* at 54, 73, 75, 107-09 (exploring indifference, uncertainty, indeterminacy, and incommensurability, and 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 *Social Res.* 757, 758-65, 773-74 (1977) (analyzing "picking" as opposed to "choosing" based on preferences and reasons).

⁴⁸ See Elster, *supra* note 12, at 122; Otto Neurath, *The Lost Wanderers of Descartes and the Auxiliary Motive* (1913), in Otto Neurath, *Philosophical Papers, 1913-1946*, at 1, 8 (Robert S. Cohen & Marie Neurath trans., 1983) ("Rationalism sees its chief triumph in the clear recognition of the limits of actual insight."); see also Harcourt, *supra* note 33, at 316

More specifically, prescriptive theories for rational decisions can run out before they identify one uniquely superior choice. They may then turn to randomization as an inexpensive mechanism for making necessary decisions. One problem for rational choice is indifference across some number of feasible options, even with perfect information. Total indifference might be rare but a lack of relevant information is not. Information can be too costly to be worth acquiring or impossible to obtain. This deficit can inhibit prediction of payoffs or knowledge of probabilities. In addition, a decision-maker might be unable to rank order options when they differ along sufficiently different dimensions. Finally, the correct normative goal 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 when a decision is unavoidable and particularly in cases of scarcity and indivisibility, as with the lifeboat example, statistical randomness gains ground.

(b) Egalitarianism and equal chances. In contrast, egalitarians can be attracted to randomization when they are at the top of their game. They do not need uncertainty for statistical randomness to become plausible. As indicated above, randomization is one version of equal opportunity, coming in the form of chances rather than outcomes. For some moral theorists, each person is entitled to equal respect, somehow specified, and equalizing chances is one method of delivering it.⁴⁹ Consider again the overcrowded lifeboat. Equal shares of space are unworkable and more space presumably cannot be generated, but equal chances can be distributed. The passengers might use deliberation and a sense of merit to ensure that some stay aboard, such as navigators who can increase everyone's probability of survival, and then allocate remaining space by lot. There are other possibilities but few will suggest auctioning off the space.

Barbara Goodwin has perhaps pushed furthest in this egalitarian direction. She considers a "total social lottery" as a procedural device to mix and equalize life chances when scarcity and structured inequality thwart that goal.⁵⁰ One can be shier than Goodwin about the proper domain of randomization in social decisions without overlooking its equalizing potential. If, for example, one is willing to presume equality of merit among pool members in the absence of costly additional information, offering random chances might be in accord with that

(claiming that modernists nevertheless continue to take leaps of faith when reason runs out).

⁴⁹ See, e.g., Ackerman, *supra* note 31, at 289; Greely, *supra* note 34, at 141. For a contractarian defense of lotteries as an impartial method of distribution across persons with equally strong claims, see Peter Stone, *Why Lotteries Are Just*, 15 *J. Pol. Phil.* 276 (2007).

⁵⁰ See Goodwin, *supra* note 34, at 102-03.

egalitarian sense. Furthermore, randomization can effectively spread benefits and burdens that ought to be shared. If a benefit, such as lifeboat seats, cannot be equally shared then randomization allows the chances of acquiring the benefit to be spread across a wider class.⁵¹ And an increased spread of potential sacrifice can have political effects considered desirable. With shared risk come shared interests, and the possibility of an engaged class of effected citizens who will better demand public interested policy.⁵²

(c) Pragmatism and incentives. The last thought brings us to the incentive effects of randomization and pragmatic attempts to account for them. Although pragmatism needs a normative direction, the pragmatic justification for randomization does not depend on a special value for equality of chances or anything else. But like the egalitarian argument, the pragmatic justification does not run on uncertainty either. Instead, it tends to assume predictable human behavior in accord with the incentives created by one decision rule over another. The aim is to acquire a sophisticated understanding of how people act under given conditions and to incorporate this learning into legal design.⁵³ These behavioral understandings might suggest randomization in several different ways and settings. In fact, there is no simple description of the incentive effects of statistical randomization.

Even when human behavior is predictable, the perceived effect of randomization depends on the point of comparison. Consider the common claim is that randomization eliminates behavioral incentives and, as such, is a tool for fighting corruption. 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 cutting incentives of potential beneficiaries to curry favor with them, all with the bonus of low decision costs once the rule is in place.⁵⁴ However much we

⁵¹ To reiterate, a decision-maker must choose what to randomize. She must determine the scope of the pool using indications of merit, need, desert, and so on. In addition, weighted lotteries can moderate the commitment to equality of chances. For a scheme weighted as to one class of people yet unweighted as to another, see Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. Chi. Legal F. 193 (exploring election of representatives from single member districts by randomly selecting a ballot cast by a voter in each district).

⁵² See Duxbury, *supra* note 8, at 56-57; Goodwin, *supra* note 34, at 95-96. It is worth stressing, however, that such large-pool lotteries must be constructed in the first place. Implementing risk-spreading for the purpose of engineering a political environment is impossible if it requires the political environment meant to be created by the lottery.

⁵³ See generally Elster, *supra* note 12, at 1-122; see also Goodwin, *supra* note 34, at 45-46 (noting the anti-corruption rationale and benefits of dampening individual responsibility).

⁵⁴ See Duxbury, *supra* note 8, at 51-56. Note, however, that a seriously dysfunctional decision environment undermines confidence that randomization can be honestly performed. This is another way in which justifications for randomization can be self-defeating.

might like decision-makers to reward skill or effort, we might lack confidence that the system can do so adequately at a tolerable cost. From the baseline of merit allocation, instituting randomization seems to “eliminate” incentives.

But randomization can help “preserve” incentives, compared to a different baseline. It can be used to influence large groups with modest resources. Decision-makers might eschew pervasive monitoring, randomly sample from the target population, and increase the penalty for noncompliance relative to a regime with 100% enforcement.⁵⁵ This kind of logic explains the value of random sampling for auditing and law enforcement purposes in various settings. In addition, note that randomization can encourage decisive action by softening decision-maker responsibility for particular outcomes. Occasionally this is beneficial. One can imagine lifeboat passengers feeling like murderers if they vote on whom to cast overboard, and like fair people making the best of a tragic situation if they draw lots. It also has been argued that randomization occasionally prompts amicable settlement of disputes. Granting equally probable claims to an entitlement can facilitate efficient bargaining by effectively hoisting a veil of ignorance, thereby minimizing the significance of private valuation information and strategic behavior.⁵⁶ Thus randomization can reduce incentives for action (compared to merits judgments) or increase them (compared to blanket enforcement, handwringing, or gameplaying).

(d) Experimentalism and randomized trials. Randomization is also a foundation for experimentation. The modern analogue to divination, randomizing outcomes is a way of converting difficult choices into intermediate steps toward better-informed decisions. Today’s best empirical studies on causation often rely on random assignment to treatment and control groups.⁵⁷ Random assignment across a sufficient number of cases should equalize unaccounted-for variables thereby

⁵⁵ Cf. Gary Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 177-81 (1968) (attempting to mathematically model such trade-offs). Getting this right depends on, among other factors, the degree of risk aversion expected in the monitored class. See generally Harcourt, *supra* note 33, at 336-37 (discussing sentencing lotteries).

⁵⁶ See Ian Ayers & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 *Yale L.J.* 1027, 1034-36, 1073-78 (1995) (arguing that ownership ambiguity can dampen incentives to over- or understate private valuation, though emphasizing that other transaction costs might be more important).

⁵⁷ See, e.g., Gary Burtless, *The Case for Randomized Field Trials in Economic and Policy Research*, 9 *J. Econ. Perspectives* 63, 66-67 (1995); Donald T. Campbell, *Legal Reforms as Experiments*, *J. Legal Ed.* 217 (1970). 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 (1989) (discussing use of randomizers, by 1912, to assign subjects to treatment or control groups). 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 (finding use of matching).

treating like cases unlike. This experimental function holds even when lotteries are chosen for other reasons. The Vietnam draft lottery was not chosen because of what later researchers might learn about the effects of military service on later life, but the draft did provide that opportunity.⁵⁸ Indeed, reliance on natural experiments is a theme in contemporary empirical studies. On a related note, randomization can be used to draw a representative sample from a larger population. Subsamples can be studied more closely at lower cost than the entire pool. A variety of agencies take advantage of sampling.⁵⁹ In any event, randomization can serve the function of information collection in the hope of improving future decisions of the same kind.

Of course randomized decision-making has serious drawbacks. Like the asserted benefits, the concerns follow randomization's features. First, a statistically randomized decision cannot distinguish the good, the bad, and the ugly. It is a freakishly effective leveler. Randomization might reduce incentives to appear needful, but also to be meritorious. Second, randomization may heighten uncertainty and undermine planning. Randomized decisions are largely unpredictable decisions. Third, randomization does not offer reasons for particular outcomes. One can argue with a decision-maker's decision to randomize but not a randomization device's output. This can be distressing. Fourth, the semi-mindlessness of randomization separates individual decision-makers from particular outcomes. People still bear responsibility for deciding to randomize, but randomization interferes with a regime of accountability. Perhaps no decision maker is in sufficient control of a situation to rightfully own all responsibility for an outcome, but assigning them some responsibility might enhance their effort. Fifth, 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 and when to randomize. 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 it will often be undesirable. Randomization will seem most plausible when a decision is required yet the correct choice is uncertain on reasonably available information, when randomization's particular type of equal opportunity is normatively attractive (for example, when people have presumptively equal claims to indivisible goods), when decision-makers or affected parties will be less

⁵⁸ See Joshua D. Angrist, *Lifetime Earnings and the Vietnam Draft Lottery: Evidence from Social Security Administrative Records*, 80 *Amer. Econ. Rev.* 313, 313-14 (June 1990).

⁵⁹ See, e.g., [cites]. For an insightful inquiry into possibilities for auditing agencies themselves, see Mariano-Florentino Cuéllar, *Auditing Executive Discretion*, 82 *Notre Dame L. Rev.* 227 (2006) (addressing executive discretion).

trustworthy operating under an alternative decision rule, and when experimentation is likely to yield insights useful for making similar choices in the future.

3. Three examples in government

Attempting to restate the proper domain for randomization in decision-making is challenging, but it is more than a parlor game. Even government decision-making has a modest tradition of deliberate randomness. In the United States, it dates back to the organization of government in 1789.⁶⁰

Among the best known contemporary instances of randomized government decision-making is the military draft for the Vietnam War.⁶¹ The decision to compel people to serve in the military comes with the issue of whom to compel. The selection task can be monumental. One option is to rely on officials to choose individual conscripts based on fitness. The military draft for Vietnam 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. In 1969, the President ordered the next round of conscripts to be chosen randomly from a pool of 19- through 25-year-old registrants. Of course discretion and gaming were not eliminated in deferments and elsewhere, some prefer a market-driven volunteer military, 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 manner of moving forward.⁶²

A second example comes from the same era, but it was an effort to experiment rather than simply allocate. By the 1960s, some welfare-state reformers were pushing a negative income tax, whereby the government would ensure a survival-level income and then reduce benefits as income from other sources increased. One debatable concern was that a guarantee would reduce work incentives to an unacceptably low level. In response, large-scale randomized trials costing about \$100 million were run to test certain effects of the idea. Random samples of households receiving AFDC were either kept within the existing system or given

⁶⁰ Allocation of the first Senators to three election classes was done, in part, by lot. See Adam M. Samaha, *Originalism's Expiration Date*, 30 *Cardozo L. Rev.* __ (forthcoming 2008).

⁶¹ See Executive Order 11,497, 34 *Fed. Reg.* 19019 (Nov. 26, 1969); George Q. Flynn, *The Draft, 1940-1973* ch. 9 (1993).

⁶² See, e.g., Harvard Study Group, *On the Draft*, 9 *The Public Interest* 93, 95 (1967) (supporting a lottery for the Vietnam draft and opposing student deferments).

various levels of guaranteed income.⁶³ Although the experiments have been criticized,⁶⁴ they were a constructive effort at informed policymaking with intriguing results. They suggested that the labor supply effect on beneficiaries was not dramatic across different benefit-reduction rates, though beneficiaries did participate in the labor market less than those who received no welfare assistance.⁶⁵ We can debate the propriety of experimenting (only) on low-income people,⁶⁶ but we can also understand random policy intervention to acquire knowledge about human behavior.

If the preceding examples are at least plausible applications, a third 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 land.⁶⁷ Leases for lands with a known potential were supposed to be auctioned off; other land that had never been leased was allocated first-in-time to qualified applicants; and the remainder was subject to lottery distribution to applicants who paid a nominal fee.⁶⁸ It is difficult to see why auctions were not a better method of allocation, even if large amounts of government land would have remained unleased. A lottery will not reward knowledge about drilling prospects, and it awards leases regardless of applicant need or ability. An additional objection was that swindlers cheated optimistic consumers into investing in the lottery, and applicants used stalking horses to effectively multiply their lottery tickets. Regardless, those who applied for leases were often unable to exploit any resources present, and those

⁶³ See Robert A. Moffitt, *The Role of Randomized Field Trials in Social Science Research*, 47 *Am. Behavioral Scientist* 506, 509-10 (2004); see also *id.* at 529 (noting the possibility of studying entry effects in samples of low-income people not receiving AFDC).

⁶⁴ See Gary Burtless, *The Work Response to a Guaranteed Income: A Survey of Experimental Evidence*, in *Lessons from the Income Maintenance Experiments* 22 (Alicia H. Munnell ed., 1987) (reviewing the debate).

⁶⁵ See Moffitt, *supra* note 63, at 509.

⁶⁶ See David Greenberg, Mark Shroder & Matthew Onstott, *The Social Experiment Market*, 13 *J. Econ. Perspectives* 157, 159, 162 (Summer 1999) (finding that, when the government uses randomized trials, it tends to test proposals aimed at the disadvantaged). By the early 1990s, randomized trials in the federal welfare system became standard yet more modest in scope, see Moffitt, *supra* note 63, at 520, and then waned after 1996 legislation decentralized more decisions, see *id.* at 523, 533; see also Carol Harvey et al., *Welfare Reform Evaluation Under Section 1115*, 14 *J. Econ. Perspectives* 165, 170-74, 180-82 (2000).

⁶⁷ See Carl J. Mayer & George A. Riley, *Public Domain, Private Dominion: A History of Public Mineral Policy in America* 3, 197-200, 318 (1985) (recommending abolition); 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 (1990) (describing statutory elimination of the lottery).

⁶⁸ Apparently, high potential land sometimes fell into the first come first serve category, which led to “mob scenes.” Meyer & Riley, *supra* note 67, at 198 (quoting General Accounting Office, *Onshore Oil and Gas Leasing: Who Wins the Lottery?* 3 (1979)). Approximately 97% of all leases ended up allocated by lottery. See *id.* at 197.

who were had to track down the owner of the lease and negotiate. This might be a small transaction cost, but an auction skips that step, and the government would remain free to distribute the proceeds to disadvantaged prospectors or anyone else.⁶⁹

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, then, randomization ought to comprise a nontrivial fraction of the decision rules selected, assuming that decision-makers are instrumentally rational. Thus, with hundreds of thousands of disputes adjudicated in the administrative state and in various judiciaries every year, one might anticipate coin flipping becoming standard in some number of close merits questions. But it has not. In fact government decision-making of all kinds is rarely randomized, and nearly never for the purpose of adjudicating merits issues. On the other hand, when push comes to shove, judges have not seriously resisted randomization. Indeed sometimes they encourage it. This Part attempts to sort out the judicial position on randomization, as a matter of constitutional principle and beyond.

A. Judicial Self-Regulation

1. Sanctions and general opposition

For judges, flipping coins is an easy way to draw misconduct sanctions. Every so often a judge overtly randomizes a merits decision and the reaction from those who punish judicial misconduct is uniformly negative.

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 commission put it. “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.”⁷⁰ 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 take coin flips as a sign that judges are not treating their jobs seriously, that adjudication and law often can do no

⁶⁹ The best defense of the leasehold 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.

⁷⁰ Annual Report of the New York State Commission on Judicial Conduct 84 (1984) (In re Friess), available at 1983 WL 189799, at *4; see also Coons, *supra* note 8, at 110 (“People resist having their noses rubbed in the randomness of the system.”); Judith Resnik, *Precluding Appeals*, 70 *Cornell L. Rev.* 603, 610-11 (1984) (similar). In 1913, Otto Neurath warned of “the reproach of frivolity or cynicism” were public officials to draw lots. See Neurath, *supra* note 48, at 9.

better than chance, or perhaps that they enjoy lording the power of chance over hapless citizens.⁷¹ Banning merits randomization might also bolster an image of courts as unique systems of reason set apart from other public offices, and from arbitration. On an institutional self-preservation theory, moreover, it makes sense to sanction judges for appearing to randomize merits issues even if they actually decide cases on other grounds.⁷²

In fact, judges might be sanctioned for randomization even if they first make efforts to decide the issue on other grounds and show respect for the difficulties of judgment. Consider the disciplinary proceedings against Judge Helen Brown, a family court judge in Michigan.⁷³ In a divorce case, she had temporarily placed two children with their maternal grandparents and the biological father later renewed his demand for custody. While that issue was pending, the father and the grandparents argued over where the children should spend Christmas Eve as opposed to Christmas Day. Despite Judge Brown's encouragement, the parties could not resolve this relatively minor dispute on their own. With each side's arguments "equally compelling,"⁷⁴ the judge ordered the question resolved by a coin flip and the father was awarded custody for Christmas Eve.

Judge Brown was censured. But as a matter of decision theory and based on the disciplinary record, the judge's use of randomization seems perfectly rational. The judge faced two options that were equally supported on the available information. She was not charged with sloth or misunderstanding the arguments. 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. Nevertheless, publicly flipping a coin to resolve this merits issue was intolerable to the state's high court, threatening enough to warrant discipline rather than mere reversal and remand.⁷⁵

⁷¹ See, e.g., *Judicial Inquiry & Review Comm'n v. Shull*, 651 S.E.2d 648, 663-64, 674 (Va. 2007) (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 70, at *2-*4 (barring a judge from office for using a coin toss to decide whether to sentence a defendant to 20 days in jail rather than 30 days, which assertedly "undermined public respect for the judiciary"). In the misconduct cases cited here, the sanctioned judges were charged with more than one form of misconduct.

⁷² See *In re Daniels*, 340 So. 2d 301, 307-09 (La. 1976) (doing so where a trial judge appeared to decide guilt by coin flip, regardless of the actual basis for decision).

⁷³ See *In re Brown*, 662 N.W.2d 733, 734, 736 (Mich. 2003).

⁷⁴ *Id.* at 736 (quoting the adopted findings of the Judicial Tenure Commission). This is the type of situation analyzed in Elster, *supra* note 12, at 163-74 (promoting randomization).

⁷⁵ 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 co-chief judge in the county indicated that the coin flip showed a lack of seriousness); see

Indeed, judicial opposition to randomization extends to statistical sampling of contested cases, even when doing so could save substantial decision costs.⁷⁶ Lower federal courts seem unwilling to randomly sample from a plaintiff class to resolve similar issues for all plaintiffs.⁷⁷ 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.⁷⁸ 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.⁷⁹ Yet judicial willingness to expedite randomly selected bellwether trials means that, practically speaking, a deliberate lottery will influence outcomes.

Perhaps the best-known judicial statements on individualized case assessment in opposition to randomness are in the Eighth 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. The old regime was likened to “a lottery system” executing “a random few”⁸⁰ — “a

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”).

⁷⁶ See Laurens Walker & John Monahan, *Sampling Damages*, 83 *Iowa L. Rev.* 545, 546 (1998) (advocating “randomly sampling damages without apology”).

⁷⁷ See *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 319-20 (5th Cir. 1998) (rejecting, under state law and the seventh amendment, adjudication of all class damages claims based on a random sample of claims); *McLaughlin v. American Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008) (denying class certification), *rev’ing 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). But see *Hilao v. Estate of Marcos*, 103 F.3d 767, 782-87 & nn. 10-11 (9th Cir. 1996) (upholding, against a due process objection, 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).

⁷⁸ See, e.g., *In re Medtronic, Inc. Implantable Defibrillator Prod. Liab., 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* 223-24 (4th ed. 2004) [hereinafter *Manual*] (suggesting bellwether trials in MDLs before remand); *id.* at 360 (recommending random sampling or agreement on typicality for bellwether trials in mass tort). Some third parties might consent to be bound to the results. See *id.* at 224.

⁷⁹ See *Manual*, *supra* note 78, at 437 (“In the absence of consent or a settlement . . . litigants are entitled to full discovery and to adjudication consistent with the U.S. Constitution.”).

⁸⁰ *Furman v. Georgia*, 409 U.S. 238, 293, 304-05 (1972) (Brennan, J., concurring); see

capriciously selected random handful” more or less “struck by lightning.”⁸¹ Part of this criticism seemed to be about rarity; perhaps a punishment seldom used would have little influence on behavior. But a strong theme involved the inability to perceive anything special about defendants selected for execution compared to those who were spared. This distribution is an expected feature of randomization, of course, which must have prompted the analogy. Later, a new coalition of justices accepted capital sentencing with additional guidance to decision makers.⁸² Yet the Court opposed flat rules mandating the imposition of death, such as executing everyone convicted of first-degree murder.⁸³ This suggested that the justices now favored rarity over clarity.⁸⁴ 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 may risk the capriciousness feared in the 1970s, it is consistent with a commitment to individualized adjudication and inconsistent with the crudeness of flat rules — of which statistical randomization is one.

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,⁸⁵ 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. Seeking predictability and low variance, 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.⁸⁶ In capital sentencing, the true test of judicial opposition

also *id.* at 295 (criticizing unguided jury discretion); cf. *id.* at 313 (White, J., concurring) (finding “no meaningful basis for distinguishing the few cases in which it is imposed”).

⁸¹ *Id.* at 309-10 (Stewart, J., concurring) (criticizing a penalty “so wantonly and 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. § 200.033(9); *Leslie v. Warden*, 59 P.3d 440, 445-46 (Nev. 2002).

⁸² See *Gregg v. Georgia*, 428 U.S. 153, 195-207 (1976) (joint opinion).

⁸³ See *Woodson v. North Carolina*, 428 U.S. 280, 301-05 (1976) (joint opinion).

⁸⁴ 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). Flat rules *prohibiting* death sentences are apparently permissible.

⁸⁵ 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.”).

⁸⁶ See *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2624-27, 2632-34 (2008). I will

to randomization would be a trial system that accurately identified a relatively 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.⁸⁷

That said, statistical randomness is not the kind of rule that judges ordinarily tolerate for their merits decisions. Assuring adverse parties a 50-50 chance of victory is anathema, and several commitments in adjudication do incidentally conflict with randomization. A straightforward 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% chance of victory regardless. This is true whether or not the elements at issue are hard-line rules or vague standards, and even if litigated cases are more likely to be hard cases.⁸⁸ When demand is strong for judgment based on evidence relevant to a given law, the plausibility of randomization fades.

One small exception exists to the strong judicial norm against overt merits randomization. In some states, courts may partition jointly owned land into plots of roughly equal value and then allocate these plots across owners by lot.⁸⁹ The owners might trade their plots after this initial allocation, but courts have orchestrated land partition lotteries. This judicial use of randomization is revealing. First, the practice is salient because so exceptional. It seems to be the only consistent use of randomization in the courts on the merits, and one can wonder whether this exception would have persisted absent biblical support.⁹⁰ Second, these lotteries are sometimes expressly authorized by state statute.⁹¹ Although the tradition of partition by lot might reach back further than these statutory authorizations, perhaps the endorsement of another political institution helps sustain the practice.⁹²

2. Problems with a randomization ban

not square this with lower court unwillingness to resolve mass tort claims by random sampling.

⁸⁷ Contrast the justices who indicated that a purely random clemency process in the executive branch would violate due process. See *infra* note 106 and accompanying text.

⁸⁸ 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).

⁸⁹ See, e.g., *Robertson v. Robertson*, 484 S.E.2d 831, 835 (N.C. App. 1997); Jay M. Zitter, *Judicial Partition of Land by Lot or Chance*, 32 *A.L.R.* 4th 909 (1984) (collecting cases).

⁹⁰ See Numbers 26:52-56 (King James) (relating God's instructions to Moses regarding land allocation across tribes).

⁹¹ See, e.g., Ala. Code § 35-6-48; Ariz. Rev. Stat. § 12-1216; Haw. Rev. Stat. § 668-7(4).

⁹² See also 28 U.S.C. § 1863(a) (requiring random selection of grand and petit jurors in the federal district courts).

A flat ban on randomization in adjudication has downsides. It cannot be that the optimal number of occasions for randomization on a merits question, across the millions of cases adjudicated in traditional courts and administrative agencies every year, is zero. In a subset of these cases, however small, randomization will be the theoretically superior option for reasons of uncertainty, equality, incentive effects, 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 manufacture false certainty. This can happen in at least three ways: adjudicators might convince themselves that they have ascertained the relevant norms, historical information, and predictions with greater confidence than they are rationally entitled to have; second and a similarly, they might hold to initial impressions and avoid working too hard on difficult questions in order to avoid the conclusion of indeterminacy; 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 nevertheless defensible on consequentialist grounds, but they suggest the debatable status of a merits randomization ban.⁹³

This also raises the general question how decision-makers deal with uncertainty when randomization is out of the question. One response is for legally prohibited grounds of decision to creep into adjudication. If the rules of the game truly result in more than one possible outcome,⁹⁴ 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.

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.⁹⁵ As well, lower court judgments are affirmed when the

⁹³ See Duxbury, *supra* note 8, at 115-16 (following Pierre Schlag, *The Enchantment of Reason* 17, 21 (1998)); Elster, *supra* note 12, at 122 ("Honesty requires us to recognize the pervasiveness of uncertainty and incommensurability, rather than deny or avoid it."); see also Harcourt, *supra* note 33, at 316, 334 (criticizing repeated leaps of faith).

⁹⁴ But cf. Ronald Dworkin, *Taking Rights Seriously* 279 (1977).

⁹⁵ 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

appellate court is equally divided.⁹⁶ In partial contrast, habeas corpus applicants are supposed to prevail if the judge is in equipoise on the question whether a constitutional error at trial was harmless.⁹⁷ Other relatively general rules of decision have similar tiebreaking qualities. We might think of presumptions of constitutional validity, deference to reasonable statutory interpretation by agencies, review restricted to clear error, and a range of other supplemental decision rules as akin to tiebreakers. These rules are telling. They indicate relatively broad commitments to guide decision-makers in the absence of clearer indications. Hence we can characterize 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.⁹⁸

This proliferation of nominally non-random 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. For instance, a 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. At the very least, 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

preference for the status quo, is required to choose between a $p > 1/2$ rule and a $p \geq 1/2$ rule.”).

⁹⁶ See, e.g., *Warner-Lambert Co., LLC v. Kent*, 128 S.Ct. 1168, 1168 (2008) (per curiam); see also 28 U.S.C. § 2109 (similarly treating 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).

⁹⁷ See *O'Neal v. McAninch*, 513 U.S. 432 (1995). But cf. *Kansas v. Marsh*, 548 U.S. 163, 181 (2006) (holding that states may mandate a death sentence when a jury concludes that aggravating and mitigating evidence is in equipoise).

⁹⁸ Rarely will a court overtly split differences as a tiebreaker, opting for more visibly decisive outcomes. Recall the prohibition on compromise verdicts. Nor do courts engage in weighted lotteries on the merits: After concluding that a plaintiff is 75% likely entitled to compensation, a judge will not give the defendant a 25% chance of walking away scot-free. A rare counterexample is the litigation over ownership of Barry Bonds' record-breaking home run baseball. The trial judge was uncertain as to 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 with 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.

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, whose claim is denied by a court of appeals and affirmed by the Supreme Court on an equally divided vote.⁹⁹ 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 their own decisions, will judges intervene? Answering with confidence is difficult, in part because only a small set of past cases are directly relevant and in part because randomization is used in diverse decision situations. Nonjudicial officials might not be much more enthusiastic than judges about lotteries, except in the form of a gambling industry for the purpose of revenue collection. Even if randomization is seldom used in official decision-making, however, it is used for multiple purposes in multiple settings. This section attempts to estimate the level of judicial tolerance for nonjudicial lotteries in general.

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,¹⁰⁰ and maybe they are sufficiently unorthodox to be disfavored when courts read statutes. Assuming randomization is a controversial decision rule, it might be appropriate to lean against conclusions that favor official lotteries.¹⁰¹

⁹⁹ See *Tompkins v. Texas*, 490 U.S. 754 (1989) (per curiam); cf. J. Harvie Wilkinson, *Of Guns, Abortions, and the Unraveling Rule of Law*, __ Va. L. Rev. __ (forthcoming 2008) (manuscript at 16), available at <http://ssrn.com/abstract=1265118> (“When a constitutional question is so close, . . . the tie for many reasons should go to the side of deference to democratic processes.”).

¹⁰⁰ See, e.g., 8 U.S.C. § 1153(c) (regarding excess immigration visas); 20 U.S.C. § 7225d(c) (regarding admission to oversubscribed charter schools receiving federal grants); 43 U.S.C. § 1353(b)(2) (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) (regarding audits of lobbyist compliance with disclosure rules); 6 U.S.C. § 923 (regarding a plan for random inspection of containers at ports); 42 U.S.C. § 15603(b)(4) (regarding a study of prison rape).

¹⁰¹ 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, 479 (2002) (holding that “hot-deck imputation” for missing data was not prohibited

Officials are unlikely to suffer public opinion backlash very often if they choose other decision rules, and pervasive randomization in decision-making would produce a dystopia of instability, uncertainty, and indefensible outcomes.

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. 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 enforceable by courts.

Thus one elaboration of equal protection dictates that all officials treat like cases alike.¹⁰² This principle is notoriously vague insofar as it requires additional normative content to identify relevant characteristics for comparison.¹⁰³ From one perspective, however, this vagueness is unimportant when it comes to statistical randomization. Equiprobabilistic 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. And unalikes will have been treated alike at the time that equal chances were distributed, unless everyone in the pool was, in fact, relevantly alike. This might violate an equal protection principle as well. Statistical randomization distributes both chances and outcomes without adjustment.¹⁰⁴

Precisely this disconnect could be restated as a due process problem. One elaboration of due process resists “arbitrary” decisions. The meaning of this admonition is also open to debate; officials usually must enjoy some discretion so that cannot be the polestar. But constitutional doctrine may impose a duty of reasoned decision-making or instrumental rationality.¹⁰⁵ If we focus the distribution of outcomes, randomization

“sampling” and was a permissible method of “actual enumeration,” without judging the constitutional validity of statistical sampling).

¹⁰² See, e.g., *Engquist v. Oregon Dep’t of Agr.*, 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 persuasive but because it survives in judicial materials and arguably interferes with official preferences for lotteries.

¹⁰³ The classic attack is 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) (acknowledging that “[i]n order to decide what persons are relevantly equal or unequal, substantive judgments have to be made about what characteristics count.”); David I. Winston, *On Treating Like Cases Alike*, 62 *Cal. L. Rev.* 1, 7-9 (1974).

¹⁰⁴ And this puts aside objections based on who/what is excluded from the pool altogether.

¹⁰⁵ See, e.g., *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (using “arbitrary” to characterize a rule of evidence, in the sense of failing to identify a rational relationship

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.

At times, the courts have warned against randomization in constitutional terms. A good illustration comes from due process cases. On more than one occasion, judges have used randomization to indicate the outer boundary of otherwise permissible official discretion. A leading example is Justice O'Connor's discussion of executive clemency.¹⁰⁶ 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 wanted to preserve judicial oversight for exceptional situations. When might judges intervene? "[A] state official flipping a coin to determine whether to grant clemency" was one possibility.¹⁰⁷ The same message has been delivered with respect to local zoning decisions, another field in which today's judges often display restraint.¹⁰⁸ Such statements indicate that randomization exhausts judicial tolerance for official discretion in locations where deference is otherwise likely.

But none of this is enough to establish a hard-line 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 every egalitarian has a standing objection to lotteries in social decision-making; it will depend on factors previously suggested: the degree of

between the rule in question 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. Railway Labor Executives' Ass'n*, 489 U.S. 602, 621-22 (1989) (referring to "random or arbitrary" acts in a discussion of the warrant clause, suggesting concern about unchecked officer discretion).

¹⁰⁶ See *Ohio 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 three other justices and Justice Stevens dissented. For indication that unfettered official discretion is better than randomized clemency, see *Grenier 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).

¹⁰⁷ *Id.* 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).

¹⁰⁸ 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). But cf. *Schenck v. City of Hudson*, 114 F.3d 590, 595 (6th Cir. 1997) (upholding as rational a slow growth ordinance that included a lottery for remainder certificates: "it avoids beauty contests between property owners and is more efficient for the City to administer").

uncertainty, the indivisibility of the item to be allocated, the strength of any presumption of equality at the stage of distributing chances, the countervailing arguments for nonrandom distribution at acceptable decision costs, behavioral incentives questions, and the benefits of experimentation. Nothing in the courts' constitutional rhetoric forecloses these considerations, which might override any presumptive resistance in general constitutional principle. 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 cases are permissive. When courts have confronted direct challenges to deliberate randomization in official decision-making, the challenges have failed. Of course, official lotteries may be poorly designed and ill-suited to serving the general good; the oil and gas lease lottery program might be an example. 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 of official lotteries. And occasionally judges will promote randomization.

Only a handful of litigated challenges to random allocation schemes seem to exist, but there are indications of tolerance in that set. For example, a state appellate court upheld random selection in the civil service application process as a fair cost saving device.¹⁰⁹ With over 2,000 valid applications for 20 firefighter positions, the city decided to randomly select 800 applicants for competitive testing. In such situations, we would like to be confident that randomization will not distract us from the possibility of easily eliminating scarcity, but, in any event, courts are able to credit lotteries as a rational option for allocation.¹¹⁰ Similarly, a federal district court upheld random selection of ballots as part of a proportional representation plan in the pre-digital age.¹¹¹ Voters would rank order 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, the voters' second choice would be counted on any subsequent ballots ranking that candidate first. The order of counting could therefore influence results.

Judicial treatment is similar in the few cases examining randomized

¹⁰⁹ See *Anderson v. City of Minneapolis*, 363 N.W.2d 886, 889 (Minn. Ct. App. 1985) (finding the procedure reasonable and consistent with the City's charter), pet. for rev. denied (Minn. May 31, 1985).

¹¹⁰ See *Campbell v. Board of Ed.*, 310 F. Supp. 94, 105 (E.D.N.Y. 1970) ("Chance, if a rational basis exists for its employment, cannot be said to be an irrational factor.").

¹¹¹ See *id.* at 98-100, 102-05 (denying a preliminary injunction on equal protection and due process claims).

policy experiments. The leading case is a 1973 court of appeals decision that struck a compromise in the welfare benefits context.¹¹² In one experiment approved by the federal government, New York officials would require training and/or work for certain family members in AFDC households. The requirements would be imposed on only a subset of all social service districts in the State. Although the opinion does not explain precisely how districts were selected for inclusion, the court did endorse a “random but rational” selection criterion designed to gain information for future and general policy judgments: “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.”¹¹³ The court did, however, grant a preliminary injunction against the State’s plan to suspend benefits if an experimental recipient is thought to be out of compliance with the program, requests a pre-termination hearing, does not conform to the compliance demands in the interim, and then receives an adverse ruling after the hearing.¹¹⁴ This softened the State’s preferred experiment, at least until the due process arguments were developed, while permitting an experiment of some kind.¹¹⁵

It is possible to see judicial resistance to random sampling in some Fourth Amendment cases, but the opposition is not acute. Statistically random invasions of privacy for law enforcement purposes can trigger adverse judicial reactions depending on the pool subject to search or seizure. 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. This is the message of random drug testing cases, to put it roughly.¹¹⁶ But those are not objections to randomization per se. They involve combinations of low ex ante suspicion followed by random selection. Courts may act with concern in that domain without repudiating 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 indicated that police officers may randomly select which of numerous speeders to stop

¹¹² See *Aguayo v. Richardson*, 473 F.2d 1090 (2d Cir. 1973) (Friendly, C.J.).

¹¹³ *Id.* at 1109-10; see also *id.* at 1109 (observing the usefulness of controlled experiments in medical and social inquiry).

¹¹⁴ See *id.* at 1095, 1111-12.

¹¹⁵ Lower courts have themselves instituted experimental procedures that affect litigants. See Hans Zeisel et al., *Delay in the Court* 244-45 (rev. ed. 1978) (citing an expert witness experiment, and noting the selective nature of any small scale innovation); *Kimbrough v. Holliday Inn*, 478 F. Supp. 566, 567, 574-75 (D. Pa. 1979) (upholding an arbitration referral experiment adopted in just three federal districts against an equal protection challenge).

¹¹⁶ See, e.g., *Board of Ed. v. Earls*, 536 U.S. 822, 826-27 (2002) (upholding random drug testing for students in extracurricular activities); *United States v. Marquez*, 410 F.3d 612 (9th Cir. 2005) (upholding random selection of airline passengers for additional screening).

and ticket, when all cannot feasibly be stopped.¹¹⁷ In fact, a theme in Fourth Amendment cases is discomfort with discretion among beat officers.¹¹⁸ Statistical randomization is a way of constraining such discretion within the chosen pool, not maximizing it. At most, and in contrast to capital sentencing, search and seizure cases send mixed signals about the judicial position on randomization.¹¹⁹

Our case review would be less impressive were it not for instances of judges reinforcing or encouraging randomization policies. There are several. A striking example dealt with the 1969 military draft lottery. To help allocate the burdens of military service beyond volunteers, the president ordered “a random selection sequence for induction” by conscription.¹²⁰ The plaintiffs received relatively low draft numbers. They attacked the process as not truly “random,” and therefore in violation of the president’s order and the due process clause of the Fifth Amendment. The allegation was that lottery numbers representing birthdates were insufficiently mixed together in the urn from which they were drawn, such that later birthdates (e.g., December 31) were more likely to be drawn early than early birthdates (e.g., January 1). A district judge defined randomness for this situation as equal probability across possible outcomes, and concluded that the order required randomness to be “approached as closely as reasonably possible under all the circumstances.”¹²¹ As a matter of theory, it is not clear why statistical randomness of the kind sought by the court was necessary as opposed to the orthogonal randomness of birthdays themselves. The selection process might have been morally acceptable if it picked *only* December birthdates.¹²² Perhaps plaintiffs’ objection was plausible because statistical randomness really was what the president had in mind and

¹¹⁷ See *Engquist v. Oregon Dep’t of Agr.*, 128 S.Ct. 2146, 2159 (2008) (Stevens, J., dissenting). The majority opinion struck a more permissive note, characterizing such decisions as inherently or by nature discretionary and largely insulated from review. See *id.* at 2154.

¹¹⁸ See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 650-51, 655-57, 662-63 (1979) (discussing automobile stops without individualized reasonable suspicion and fearing unguided discretion).

¹¹⁹ 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 litigation in state tort or under 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).

¹²⁰ Executive Order 11,497, 34 Fed. Reg. 19019 (Nov. 26, 1969).

¹²¹ See *Stodolsky v. Hershey*, 2 Selective Serv. L. Rptr. 3527, 3528 (W.D. Wis. 1969) (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 two studies finding that the selection process was probably not random in the statistical sense of equal probabilities, see Feinberg, *supra* note 16, at 259-60, and Jorge Mateu et al., *The 1970 US Draft Lottery Revisited: A Spatial Analysis*, 53 *Applied Statistics* 219, 220, 229 (2004).

¹²² Cf. Elster, *supra* note 12, at 45-46 (claiming epistemic randomness was adequate).

procedural regularity was especially important to the public here. Regardless, the important thought is that the court showed no antipathy to randomization of some sort. Quite the opposite.¹²³

More significantly, judges sometimes suggest statistical or orthogonal randomness as a solution to controversial allocation problems. One instance comes from the field of public housing. Plaintiffs asserted that New York City was running a delay-ridden system with no ascertainable method for allocating scarce slots in certain housing projects, and the court of appeals responded that they 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.’”¹²⁴ Likewise, an earlier court of appeals case suggested randomization for the allocation of scarce liquor licenses. That court perceived a lottery as superior to official discretion and the risk of “graft, corruption, and other abuses.”¹²⁵ Much more recently, the randomization option arose in affirmative action litigation. Judges opposed to race-based affirmative action in employment or admissions episodically indicate that lotteries are constitutionally unproblematic solutions.¹²⁶

¹²³ 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. Rptr. 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. Kotrlik*, 465 F.2d 976, 977 (9th Cir. 1972) (per curiam) (indicating the drawing was fair, non-discriminatory, and without deliberate selection of the litigants’ birthdates), cert. denied, 409 U.S. 1043 (1972); see also *United States v. Proceeds of Sale of 9,312 Lbs. of Scallops, to Wit, \$31,938.84*, 738 F. Supp. 598, 601-03 (D. Mass. 1990) (interpreting a regulation requiring random sampling in advance of seizure and refusing to impose scientific standards of randomness).

¹²⁴ *Holmes v. New York City Housing Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (citation omitted); see also *id.* at 263-64 & n.4 (noting the possibility of a scoring system based on the state of applicants’ current housing, though warning against the risk of “arbitrary action”); see also Greely, *supra* note 34, at 126-30 (endorsing a lottery or first-in-time rule).

¹²⁵ *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir.) (condemning uncontrolled official discretion as a violation of due process), rehearing denied, 330 F.2d 55, 55 (5th Cir. 1964) (per curiam) (suggesting stricter eligibility standards, or a lottery or first-in-time rule for any equally qualified applicants).

¹²⁶ See *Taxman v. Board of Ed. of Twnshp. of Piscataway*, 91 F.3d 1547, 1551 & n.4 (3d Cir. 1996) (addressing 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); cf. *Lehr v. Robertson*, 463 U.S. 248, 265 & n. 24 (1983) (suggesting that, as an alternative to sex discrimination, a coin flip would have served an asserted state interest in cheaply reducing the size of the pool of potential administrators in *Reed v. Reed*). But cf. *Grutter v. Bollinger*, 539 U.S. 306, 340 (2004) (stating that a law school could choose not to use a lottery in light of risks to both student

If we take these suggestions seriously, we are now able to identify a smattering of situations in which courts oppose, permit, and encourage randomization. Judges certainly will attempt to restrict the use of lotteries by other officials on occasion. It is quite possible for allocation or experiment-oriented 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. Sometimes judges review lotteries in the way that decision theorists do: as an attractive solution for a class of challenging decision situations.

The last example 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 they preferred in felony cases. The calendaring system could be exploited such that the State had an advantage in the judge-shopping game. As a possible remedy, and as a requirement of state constitutional law, the court recommended randomized case assignment.¹²⁷ This is not any kind of trend in constitutional litigation. Other courts have denied that random assignment is a matter of supreme constitutional law, at least insofar as it would give parties an opportunity to litigate their objections.¹²⁸ A refusal to recognize such claims indicates that judges are willing to accept some legislative direction. But whether or not judges feel entitled to fashion a case assignment system on their own, many adjudicative institutions behaves consistently with Louisiana's state courts and randomize the distribution of cases across judges. This design choice requires an explanation, and a defense.

C. The Case Assignment Puzzle

The story so far is courts vigorously and publicly 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. In the least charitable terms, courts exemplify what they condemn.

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 engaged in adjudication have followed suit.

quality and diversity, and permitting “nuanced judgment” that takes race into account).

¹²⁷ See *State v. Simpson*, 551 So. 2d 1303, 1304 (La. 1989) (per curiam) (requiring felony cases to be assigned “on a random or rotating basis or under some other procedure . . . which does not vest the district attorney with power to choose the judge”); see also *Brown & Lee*, supra note 8, at 1099-1103 (attempting to marshal arguments against discretionary case assignment from precedent in federal constitutional case law).

¹²⁸ See, e.g., *United States v. Claiborne*, 870 F.2d 1463, 1467 (9th Cir. 1989); *United States v. Keane*, 375 F. Supp. 1201 (N.D. Ill. 1974).

Lotteries are a key part of the case assignment procedure in many federal district judges, in the federal courts of appeals, in many state trial courts and appellate courts, in federal immigration courts, in federal administrative appeals dealing with disability benefits, and elsewhere.¹²⁹ Randomization in this form touches perhaps millions of cases per year. For ordinary courts and some administrative agencies, practice has coalesced around randomization as an important element in case assignment.

Being more specific about randomization's development and impact within case assignment systems is, however, difficult. I am aware of no general historical account of how randomization came to be a significant factor in so many case assignment protocols, nor an explanation for the remaining holdouts.¹³⁰ Nor is there an easily accessible guide to case assignment practices in, for example, the federal district courts, where case assignment processes are curiously decentralized. Unlike jury selection, which is now subject to statutory guidance,¹³¹ judges tend to determine their own case assignment procedures. Current federal statutes declare that "[t]he business of a [district] court having more than one judge shall be divided among the judges as provided by the rules and orders of the [district] court";¹³² and they authorize circuit courts to create panels of judges that hear "the cases and controversies assigned as the [circuit] court directs."¹³³ Under this formally decentralized regime,

¹²⁹ See, e.g., Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 *Geo. Immigr. L.J.* 1, 24 (2006) (noting random case assignment to immigration judges within each jurisdiction); Brown & Lee, *supra* note 8, at 1069 (studying the federal circuit courts); Kimberly Jade Norwood, *Shopping for Venue: The Need for More Limits on Choice*, 50 *U. Miami L. Rev.* 267, 292 (1996).

¹³⁰ There is some easily 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); Solomon, *supra* note 9, but that design choice might be made independently of the randomization issue. Additionally, our picture of case assignment in the federal courts of appeals is clearer thanks to Robert Brown and Allison Herren Lee. In 2000, they reported that randomization is typically used to compose three-judge panels and to assign appeals to those panels, but with important exceptions. See Brown & Lee, *supra* note 8, at 1069, 1074 (concluding that all 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").

¹³¹ See 28 U.S.C. § 1863(a) (requiring random selection of jurors in district courts).

¹³² 28 U.S.C. § 137; see also *id.* (authorizing circuit court judicial councils to make necessary orders when district judges are unable to agree on case assignment rules or orders). But cf. La. Code Civ. P. art. 253.1 (requiring random assignment of cases to particular divisions or sections in Louisiana's state district courts).

¹³³ 28 U.S.C. § 46(b); see *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 257-58 (1953) (indicating courts of appeals' discretion to allocate work); see also 28 U.S.C. § 2071 (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). A 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).

some courts have not adopted official rules on case assignment.¹³⁴ And those that have do not necessarily explain in detail how cases and judges are matched and rematched. Somewhat similarly, the Social Security Administration appears not to have a centralized assignment rule for disability benefits appeals decided by its Administrative Law Judges. Assignment mechanics are delegated to individual hearing offices.¹³⁵ Undoubtedly this information is available inside each adjudicative system and, at least partly, to local lawyers and others affiliated with these institutions. But as of today, it appears that no one source effectively aggregates this information for outsiders.

While definitive statements about the particulars of its role cannot be made without additional effort, an example or two can help suggest the influence of randomization. Consider the Southern District of New York. In 2007, it had 28 authorized judgeships and logged over 17,000 case filings.¹³⁶ The local rules declare that randomization is a component in 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”¹³⁷ In addition, parties and their attorneys may ask to be present during case selection. 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.¹³⁸ An analogue from the

¹³⁴ See, e.g., S.D. Ala. R. 3.3 (July 11, 2008) (addressing assignment of related and refiled cases, but not ordinary case assignment); see also Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts: 2007 Annual Report of the Director* 411, 414 (2007) [hereinafter *Judicial Business*] (reporting only three authorized judgeships for the Southern District of Alabama); *id.* at 141, 210 (tables C & D) (reporting only 346 criminal case filings and 980 civil case filings in the Southern District of Alabama for 2007).

¹³⁵ 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 ALJs is controlled by each Hearing Office’s Chief Administrative Law Judge). Some SSA hearing offices may employ a random element in their assignment procedure. See Paul R. Verkuil, *Reflections upon the Administrative Judiciary*, 39 *UCLA L. Rev.* 1341, 1354 (1992).

¹³⁶ See *Judicial Business*, *supra* note 134, at 411 (reporting judgeships and weighted and unweighted filings per judgeship for the Southern District of New York); *id.* at 139, 208 (tables C & D) (reporting 1,026 criminal case filings and 16,125 civil case filings).

¹³⁷ S. & E.D.N.Y. Rule 50.2(b) (2008); see *id.* Rule 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, e.g., N.D. Cal. Order 44 (2003) (describing a random case assignment system, at least for civil cases, and exceptions thereto); D.D.C. Rule 40.3(a) (2008) (similar); N.D. Ill. Rule 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 50 years).

¹³⁸ The preface to this set of rules announces that they are for “internal management” and not the basis for objections by litigants. S. & E.D.N.Y. Rule 50.2 (2008) (preface); see also *In re Yagman*, 796 F.2d 1165 (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 local rules).

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.¹³⁹

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 randomness.¹⁴⁰ 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. And litigants may attempt to otherwise game a random assignment system.¹⁴¹ Other exceptions to random assignment are officially condoned. Many state court systems permit parties to exercise peremptory strikes on judges initially assigned.¹⁴² In addition, judges might recuse themselves. Staff attorneys might influence outcomes in a subset of cases regardless of the judge assigned. And “related cases” might be assigned to the same judge. In fact, the Southern District of New York rule assigns all habeas petitions and pro se civil suits filed by the same litigant to the same judge.¹⁴³ Moreover, some systems incorporate the possibility of discretionary departures from random assignment.¹⁴⁴ 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 a commitment to randomization.¹⁴⁵ Official rules might also enable judges to trade cases. The Southern District’s local rules authorize its chief judge to reassign any case with the consent of the judges involved.¹⁴⁶ And random court of appeals panels are partially checked by nonrandom opinion assignment practices.

¹³⁹ See Office of the Chief Immigration Judge, U.S. Dep’t of Justice, Uniform Docketing System Manual III-1 (July 2008) (“In multiple Immigration Judge courts, cases are assigned to each Immigration Judge’s Master Calendar on a random rotational basis . . .”).

¹⁴⁰ See, e.g., Lynn M. LoPucki, *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts* 46 (2005) (describing reasons to doubt that certain big 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).

¹⁴¹ One tactic has been to file multiple complaints involving the same controversy and then voluntarily dismiss the complaints assigned to the least sympathetic judges. See [cite].

¹⁴² See Norwood, *supra* note 129, at 293 & n. 128 (reporting that nineteen states allowed preemptory strikes but that federal legislation on the matter had failed).

¹⁴³ See S. & E.D.N.Y. Rule 50.3(e) (2008).

¹⁴⁴ See S.D. Fla. Rule 3.4(A) (2008) (prescribing random case assignment but, “whenever necessary in the interest of justice and expediency, the Court may modify the assignments”).

¹⁴⁵ See 28 U.S.C. § 1407(b), (d); 3 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 9:17 (4th ed. 2002). On the Chief Justice’s appointment powers, see Theodore W. Ruger, *The Judicial Appointment Power of the Chief Justice*, 7 U. Pa. J. Const. L. 341 (2004).

¹⁴⁶ See S. & E.D.N.Y. Rule 50.4 (2008).

More broadly, adjudicative institutions are structured in ways that delimit random assignment. These boundaries are part of the debate over specialization in adjudication.¹⁴⁷ Cases are certainly not randomly assigned across all government adjudicators. The labor is divided among institutions, such as the immigration system and the traditional court system. And it 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.¹⁴⁸ These jurisdictional boundaries define cohorts of decision-makers who will receive one stream of disputes rather than another. Even a fully randomized case assignment system within each cohort would not reach beyond those boundaries.¹⁴⁹ 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.¹⁵⁰ In this way, randomization is moderated. It influences case assignment on the front lines of adjudication, while the rules offer a faint hope of attracting the attention of nonrandomized decision-makers.

Perhaps, if causal chains in human events are traced back far enough, one can always identify an orthogonally if not statistically random process that helped produce a dispute in question. Everything from the gene pool to the concept of moral luck can be associated with lotteries that seriously influence the course of our lives.¹⁵¹ But the adjudication

¹⁴⁷ 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); Simon Rifkind, *A Special Court for Patent Litigation? The Danger of a Specialized Judiciary*, 37 *A.B.A. J.* 425 (1951); Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 *U. Pa. L. Rev.* 1111 (1990); Jeffrey Stempel, *Two Cheers for Specialization*, 61 *Brook. L. Rev.* 67 (1995). My point is that institutional boundaries are forms of specialization, and that intra-institution case assignment systems can retard further specialization (i.e., random assignment) or advance it (e.g., merit-driven assignment).

¹⁴⁸ See, e.g., Herbert Jacob, *The Governance of Trial Judges*, 31 *L. & 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).

¹⁴⁹ Random assignment might be less likely in jurisdictions that are 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 geographic divisions which handled all cases filed in those divisions. See Advisory Group for the District of North Dakota, *Report of the Civil Justice Reform Act* (Sept. 29, 1993), reprinted in 69 *N.D. L. Rev.* 739, 752-53 (1993) (stating that random assignment was foreclosed by a lack of courtrooms suitable for jury trials).

¹⁵⁰ 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).

¹⁵¹ Cf. Thomas Nagel, *Mortal Questions* 28 (1979) (discussing connections between luck and moral assessment); John Rawls, *A Theory of Justice* 63-64 (rev. ed. 1999)

systems operating today tend to deliberately inject randomness into disputes at the point of matching cases with judges. However significant the departures from random assignment, this intentional use of randomization needs a convincing defense. Because it comes with disadvantages: randomization fails to match individual decision-maker strengths with case attributes. 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.¹⁵² Attempting to appoint multi-talented judges can do only so much. And there is a further complication. Random case assignment has to be squared with a long tradition of judges disparaging coin flips on merits questions.

III. DECISION-MAKERS, DECISIONS, AND RANDOMIZATION

The judiciary's position on randomization is now arguably schizophrenic. Courts carry on the tradition of forbidding randomization on nearly every merits decision, but they have developed a widespread practice of randomizing part of their case assignment procedures. Now the question is how we should evaluate this kind of settlement. One possibility is that the system is at war with itself and that it ought to give up either randomizing case assignments or not randomizing merits decisions. A second possibility is that adjudicative institutions are effectively and desirably — even if opaquely — randomizing merits decisions in difficult cases by randomizing case assignments.¹⁵³ A third possibility is that the current settlement is not randomizing merits decisions in accord with existing ideal theory, but that other justifications support the arrangement. It is this third possibility that I will attempt to defend, albeit with an argument that heavily depends on the institutional location of decision.¹⁵⁴

A. Is the System Effectively Randomizing the Merits?

If all decision-makers were exactly the same, then case assignment

(discussing a natural lottery of talents and efforts to limit its influence on people's life chances).

¹⁵² For an exceptional instance of random case assignment in a public defender's office, see David S. Abrams, *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 use random assignment).

¹⁵³ Another reaction is that randomizing case assignments is qualitatively different from randomizing merits decisions, even if the consequences for case outcomes are the same. If so, the current settlement might escape criticism for hypocrisy. See *infra* Part III.C.1.

¹⁵⁴ Most of the analysis below applies to juries as well as judges, but I will refer to judges for the sake of simplicity and to maintain a sharper focus. Likewise, much of the analysis applies to administrative agencies as well as traditional judiciaries, and I will speak to both. By the end of the discussion, however, institutional setting and detail will become sufficiently important that the argument will tend to rest on courts with appointed judges.

would be irrelevant to outcomes. We could look at the adjudicative system as if it had only one decision-maker and case assignment would be decoupled from the distribution of merits decisions. Randomizing decision-makers certainly would not mimic flipping coins on the merits, and so there would be no serious conflict between a formal ban on merits randomization and a lottery-influenced case assignment system.

But of course the truth is that decision-makers are different. Even within the same institution, such as a federal circuit or an administrative agency, decision-makers can differ dramatically along many dimensions. These personnel might have wildly different knowledge bases, intelligence levels, skill sets, subject matter interests, work ethics, amenability to corruption, and worldviews or ideologies. The mixture depends on the appointments mechanism and various selection effects.

To simplify, we can say that decision-makers tend to vary in terms of “competence” and “ideology.” Here competence just 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 adopting the norms of others or of their institutional position. To be sure, these are crudely defined concepts, and articulating the relationship among competence, ideology, and “the law” can be challenging.¹⁵⁵ The simple thought is that certain characteristics of individual decision-makers vary and, at the same time, can influence how these decision-makers assess the merits of particular cases — especially, but not only, when conventional legal analysis uncontroversially indicates decision-maker discretion.

We also know that cases differ. As with decision-makers, the character of the decisions they face can vary substantially even within a single institution. Probably no institution is sufficiently specialized and finely calibrated such that its agenda comprises precisely and only the same questions across the docket and across time. To simplify again, we can say that cases are “hard” or “easy.” Perhaps there is an objective sense in which this division can be made, a test detached from personal judgment by which close calls may be separated from clear-cut answers. But regardless of that possibility, there must be a subjective sense in which this division can be made from the perspective of each decision-maker.

Some cases are hard because the historical facts are reasonably contested as far as a decision-maker can discern, because the appropriate legal norm is somehow unclear to the judge, because the relevant

¹⁵⁵ On 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 delegation of discretion or inevitable vagueness in formal law, and that some judges prefer to follow “legal norms” regardless of (other) policy preferences).

consequences of one decision over another are hard to see, or for some other reason. A subset of these issues might be so difficult by any measure that every available decision-maker would consider them hard.¹⁵⁶ Another subset might be so simple that everyone would experience them as easy and reach the same result. In those situations, the identity of the decision-maker is irrelevant.

The reality is different for every other issue. In the remaining cases, the less competent decision-maker will probably find a larger fraction of them hard, compared to highly competent decision-makers who might see only easy cases in this set. So there might be a number of cases that one set of decision-makers could resolve without being challenged, while another set would face extraordinary difficulty in merely understanding the decision they face. We would expect the error rates of these decision-makers to vary, where an error is just the inability to achieve a chosen goal.

As for ideology, its relationship to hard and easy cases is perhaps more difficult to understand. An adequately intense ideological commitment might convert otherwise hard cases into easy cases. A deep commitment to achieving specified goals might clear away complexities generated by conventional legal argument or contested questions regarding the proper boundaries of the decision-maker's role in society. Perhaps for the pure ideologue, all of this is swept away in favor of achieving as much self-defined justice as humanly possible. But it also seems plausible that only some cases are amenable to ideological influence, either because of their character or the character of those who become and serve as adjudicators. The answer 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 effort, even though these decision-makers have different ideologies. An illustration would be a relatively specific rule, such as a filing deadline, that is enforced against a party whose goals otherwise align with the decision-maker.

These categories for decision-makers and cases reflect adjudication in the real world, and it follows that randomized case assignment influences outcomes to an extent. 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. Other than a (mythical?) subset of exceptionally easy cases that will be decided the same way regardless of variance in decision-maker competence, ideology, and ideological intensity, the choice of decision-maker might effectively choose outcomes on the merits. The probability of a different randomly selected decision-maker producing a different outcome depends on several factors, of course. Extreme variances in ideology, maximum

¹⁵⁶ The caveat is that some incompetent decision-makers confuse hard cases for easy ones.

ideological intensity, embarrassingly low competence levels, nothing but vague standards in substantive law, and an especially challenging case set imply that outcomes will be principally determined by case assignment. One might then suggest that a case assignment lottery is effectively the method of dispute resolution.¹⁵⁷

The basic point is mundane to those who practice law before courts and agencies with multiple available decision-makers, where judge-shopping is a real desire. Yet our understanding of diversity across judges is gaining strength with a new wave of empirical studies.¹⁵⁸ The variables for ideology are hardly perfect and measuring competence is not an uncontroversial task.¹⁵⁹ But we can be quite sure that judges differ in ideology and competence; that in some percentage of cases the outcome will be influenced by the identity of the decision-maker at some probability level; and, to the extent this is so, that random case assignment drives results. Hence we might charge that the adjudication system's actual operation is inconsistent with its stated opposition to flipping coins on the merits.

B. Is the System Optimally Randomizing the Merits?

¹⁵⁷ Cf. Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 *Stan. L. Rev.* 295, 302 (2007) ("When an asylum seeker stands before an official or court who will decide whether she will be deported or may remain in the United States, the result may be determined as much or more by who that official is, or where the court is located, as it is by the facts and law of the case."). Note the title of this study.

¹⁵⁸ For a review of studies on judicial behavior accessible to non-quants, see Barry Friedman, *The Politics of Judicial Review*, 84 *Tex. L. Rev.* 257, 272-329 (2005). For some intriguing recent efforts, see, for example, Frank B. Cross, *Decision Making in the U.S. Courts of Appeals* (2007); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 *Colum. L. Rev.* 1, 18-49 (2008); William M. Landes & Richard A. Posner, *Rational Judicial Behavior: A Statistical Study* (Apr. 2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1126403>; Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 *U. Chi. L. Rev.* 823 (2006); Ramji-Nogales et al., *supra* note 157. A sophisticated recent study of state trial judge sentencing practices is David S. Abrams et al., *Do Judges Vary in Their Treatment of Race?* 3-4 (2008) (unpublished manuscript) (relying on random assignment, running Monte Carlo simulations, and concluding that some judges were even more likely to incarcerate African American defendants than were other judges, at least for non-drug crimes; but finding no statistically significant difference in sentence length across judges), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=2568&context=alea>. Perhaps the first study of judicial behavior 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 in some fashion, though also noting attempts at judge shopping).

¹⁵⁹ 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, productivity in published opinions, and "independence" of federal 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).

Given that randomized case assignment will effectively randomize merits decisions with some frequency, the next question is whether this consequence is beneficial or unacceptable.

For some observers, the answer will be the latter. Putting aside objections based on false advertising, those who lean hard against merits randomization have cause for dismay. Most reasons for such opposition carry over to randomized case assignment given decision-maker diversity. Anti-randomizers might roll out abstract principles such as the rule of law, consistency across like cases, rational deliberation over submission to chance, and so on. Any number of remedies will come to mind as well. Perhaps decision-maker attributes should be better standardized and quality demands increased through a reformed appointments process; or decision-makers subject to enhanced training, monitoring, and sanctions in accord with a uniform test of merit; or substantive law revised toward rules over standards; or the case assignment system altered in some way.¹⁶⁰

It is worth noting that these concerns about randomization are reduced if we view adjudicative institutions holistically and *ex ante*. Insofar as those potentially subject to outcomes in adjudication act logically and have information about the panoply of decision-makers, they can aggregate these data into a composite which will inform them of overall risks and opportunities. Extremely well-informed observers will be able to estimate likely outcomes in adjudication before the fact, even if decision-makers differ radically.¹⁶¹ Those differences help make up the universe of possible outcomes, and the case assignment system will provide guidance on the probability of each decision-maker receiving responsibility for the issue of concern. Observers can then arrange their affairs accordingly. Now, this is not to imply that there is no basis for protest when cases are adjudicated and receive different treatment solely because one decision-maker was assigned instead of another. We should nevertheless place rule-of-law objections in perspective and understand that they weaken *ex ante*.

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 case assignment lotteries. Nothing about this fact should bother this group *per se*. In fact, they might be pleased, seeing virtues in randomization for a limited domain of merits issues grounded in rational choice theory operating under serious uncertainty, egalitarian

¹⁶⁰ See, e.g., Ramji-Nogales et al., *supra* note 157, at 380-89 (regarding immigration judge quality, training, oversight, and norms); Tiller & Cross, *supra* note 9, at 216, 233 (recommending partisan balancing on appellate court panels); Thomas J. Miles & Cass R. Sunstein, *Depoliticizing Administrative Law* (2008) (unpublished manuscript), available at <http://ssrn.com/abstract=1150404>.

¹⁶¹ See generally Adam M. Samaha, *Judicial Transparency in an Age of Prediction*, 52 *Vill. L. Rev.* (forthcoming 2008).

commitments to equal opportunity, pragmatic considerations of likely human behavior, and the other arguments.¹⁶² Randomizing case assignments across a diverse set of decision-makers might appear to be a substitute for randomizing a subset of merits decisions, and perhaps the closest thing to overt merits randomization that proponents can hope for. 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 randomizers try to solve, and hard cases might be where random assignment makes its mark.¹⁶³

But if the system is a substitute for merits randomization, it is a rough substitute. At least it operates quite differently from the visions of optimal merits randomization indicated by the normative theories that we have seen so far. Most important, there is no reason to believe that the current mix of officeholding decision-makers represents a random distribution in any pertinent sense of the word. Neither the federal judicial appointments process nor other methods for selecting the adjudicators are 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 decision-making tool available and then running it with some set of outcomes, allowing chance to take over. But even if we compare this ideal randomizer only to the effect of random assignment on hard cases, there is an important gap: Those hard cases will be influenced by the mix of incompetence and ideological commitment among decision-makers. Quick measures of decision-maker ideology in institutions like the federal courts suggest oscillation over the years, lagging contemporary political preferences and perhaps rarely in equipoise.¹⁶⁴

Instead, it might be best to think of the current system as a weighted lottery.¹⁶⁵ For hard cases, surely the probability of any feasible outcome will not be equal, nor could we say that the effective decision rule in those cases is orthogonal to anything approaching the merits. Indeed the set of hard cases susceptible to influence by the case assignment system will be influenced by a non-randomly chosen group of decision-makers; in fact,

¹⁶² See *supra* Part I.B.2.

¹⁶³ See *supra* text accompanying notes 45-48, 57-59 (discussing rational choice and experimentalism). This thought is related to analysis that John Coons offered twenty years ago. See Coons, *supra* note 8, at 110 (“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.”).

¹⁶⁴ See Jonathan P. Kastellec, *Partisan Composition and Voting on the U.S. Courts of Appeals Over Time* 28 fig. 1 (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).

¹⁶⁵ See *supra* note 18.

objectively identifying the set of hard cases without reference to the existing set of judges might not be possible. It seems fair to say that, in these cases, randomization works in conjunction with another variable to produce merits outcomes. Any equiprobable element in case assignment procedures is partly modified by the prevailing mix of ideology and competence on the bench. It is this combination of lottery plus pool membership that has to be justified, and 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 weighted lottery. For them, long-term oscillations in decision-maker attributes might be closer to idealized merits randomization and might come closer to evening out in the aggregate once the passage of time is ignored. Yet complications remain. The suggested timeframe accounts for evolving variance in ideology, but decision-makers differ in competence levels as well. Randomizing case assignment thus 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 consequence is nothing like identifying a justifiable domain for randomization on the merits according to a thoughtful normative theory. It tends to expand the domain of randomization beyond what is recommended by ideal theorizing.

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

C. Can the Arrangement Be Defended?

A plausible defense for something like today’s settlement might yet be constructed. The first stage of the defense tries to loosen the logical attraction of randomizing merits decisions in adjudication. It is more suggestive than conclusive. The second stage involves the case assignment system. It presents educated guesses on why such randomization became attractive to adjudicators, which might produce sympathy for their choices even if merits randomization is unacceptable. This internal account is supplemented by an outsider argument for random assignment. The analysis thus turns from internal management issues to focus on the perspective of litigants as a class and society as a whole, within a particular 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 correct number of lotteries in merits adjudication is zero, even if none of us can easily describe that class of issues. Based on available information and putting aside public relations problems, Judge Brown's determination to randomize one narrow and equally matched child custody argument seems like a better candidate for encouragement than for rebuke.¹⁶⁶ A firm judicial commitment against merits randomization could instead be related to realistically imperfect rather than ideal worlds.

The first step is to remember that adjudicators cannot rationally adhere to a flat rule in favor of deliberate randomization on all issues. That would be catastrophic. Assuming statistical randomness, adjudicative institutions would offer all parties an equal chance of prevailing (somehow defined) without any quality control on the claims. Indeed the system would effectively encourage the proliferation of outlandish claims following the wildest dreams of every pleader. No rational proponent of merits randomization would tolerate this. If there is to be a relatively clean rule in this field, it would have to flatly prohibit merits randomization.

The alternative is a more flexible standard. Indeed, a somewhat vague set of recommendations for randomization's proper domain in social decisions 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. 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, rational choice based lottery recommendations that rest on uncertainty.¹⁶⁷ Before turning to randomization as a possible tiebreaker, decision-makers must be adequately certain about their uncertainty and 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.

What should be compared, then, is a simple prohibition as against a standard of some kind 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

¹⁶⁶ See supra text accompanying notes 73-75.

¹⁶⁷ See supra text accompanying note 45.

we have now in which deliberate merits randomization is forbidden. Serious guesswork might be necessary on this score 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 adjudicators might over-rely on lotteries. Randomization's optimal domain is challenging to specify, but lotteries are remarkably easy to run. This is especially true for sloppy decision-makers. For those who do not care enough about the quality of their judgments, merits randomization is a low decision 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.

A randomization ban also might have desirable incentive and behavioral effects, apart from public acceptance of debatable judgments. Perhaps decision-makers will work harder to achieve reasonable degrees of certainty in challenging cases. And perhaps they will more often aspire to rationally defensible outcomes. The ban might be a mechanism for constructing good judges by envisioning a high standard for judgment and influencing their self-perception 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; and we could imagine judges acting with less care under a randomization ban in order to retain the guidance of underinformed first impressions and to avoid the recognition of hard cases.¹⁶⁸ But perhaps there is something to the aspirational view of the ban. At least it recalls the fact that lotteries can only tie decision-maker hands after decision-makers choose lotteries as the decision rule.

Reintroducing the issue of public relations, however, complicates these concerns. After all, the practice of sanctioning fellow judges for merits randomization is not solely an autonomous internal preference. Judges are concerned with negative perceptions generated by their coin-flipping colleagues.¹⁶⁹ Public opposition to merits randomization might never abate given limited information about judicial and administrative operations and the message that a general audience tends to take from such lotteries. They probably see it as a sign of arrogance, incompetence, or trivialization. In the prevailing decision environment, we might be concerned that merits randomization is underused and unlikely to be overused.

But this take on public opinion is too static. A scenario in which

¹⁶⁸ I thank Mark Kelman for suggesting this point.

¹⁶⁹ See *supra* notes 70-71 and accompanying text.

merits randomization can take place in courts and agencies on anything like a regular basis presupposes an environment in which the public response is not to shut those operations down. The alternative world must be more accepting of merits randomization for it to happen. Added leniency in the general public suggests added risk of over-use. Furthermore, it might be that the institution of law or government needs at least one outfit that refuses or denies the role of chance. Adjudicators fill that role now and perhaps they do so in way that comforts the political community that reasoned answers are forthcoming.

This leads to a final thought about the psychological and moral qualities of overt randomization in merits adjudication. It is possible that lotteries in these settings have a uniquely insulting quality, at least for litigants who draw the short straw, and that the sense of insult or disrespect is defensible on some version of deontology. Perhaps a robust moral theory would single out judicial dispute resolution as it has developed, and distinguish it from arguably less personal or troubling applications of randomization such as random sampling for the census or even law enforcement auditing. The argument might be that human beings today inevitably or even rationally understand resort to chance in litigation as an inappropriate assertion of power when the reason of the law runs out. It is not obvious how this argument ought to be elaborated. But if merits randomization is qualitatively special, then perhaps the mere consequence of assignment randomization on case outcomes is not enough to condemn the system. The character and purposes of random assignment are conceivably insulated from their consequences on outcomes, at least for a certain strain of deontological moral theory.¹⁷⁰

Considering the development of our adjudicative institutions, however, such deontological arguments probably have limited value even for deontologists. The next section discusses a likely story for the inclusion of randomization in case assignment and it might not show a public spirited purpose that could insulate it from scrutiny of consequences. The objectives of the system's designers might be too self-interested or careless for that. Moreover, overtly randomizing merits decisions can be characterized as a sign of respect rather than insult. It is sometimes 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. It is also possible that offense taken at randomization in adjudication is feigned or largely a product of unwanted outcomes rather than considered moral objection.

The conclusion here is not particularly firm. Merits randomization offers a constructive and honest solution for a slice of issues in challenging cases. One could conclude that adjudicators face too much

¹⁷⁰ See [cite – double effect literature]; see also [cite – reason-giving norms].

present-moment popular resistance to the authorization of randomization. Yet if this resistance were to dissipate, there is a risk that decision-makers will turn to merits randomization too quickly absent a preset category of issues for which it is the best response, and an effective strategy for monitoring judicial effort. 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 have reason to believe that forbidding merits randomization is a plausible if questionable response from roughly self-regulating adjudicators operating with imperfect personnel. But we also know that the system is effectively randomizing outcomes in a subset of cases through the lottery element of case assignment. So there must be substantial concern with assignment randomization as it now functions, whether or not a merits randomization ban is sound policy.

a. An internal account

Perhaps comfort will be found in a positive account of randomization's spread into case assignment. Understanding the system's development might inspire persuasive normative arguments for the retention or expansion of random assignment.

The hitch here is that there appears to be no comprehensive history, official or unofficial, of the case assignment systems in ordinary courts or administrative agencies that perform adjudicative functions. Once assignment systems are seen as an important element in institutional design, perhaps illuminating historical accounts will emerge. No doubt each system has an institutional memory that can be tapped to some extent. 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 a bit deeper than speculation, along with an argument for why understanding the history of case assignment will not suggest all relevant normative considerations.¹⁷¹

Accounting for random assignment's emergence in many adjudicative institutions surely requires reference to several other design choices. First of all, 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 judge, for example, there is no per se case assignment issue for the judge face. Case assignment would take place through a combination of jurisdictional and structural

¹⁷¹ The comments below will fit better with judicial case assignment than with the assignment process in administrative agencies. But there is overlap, and the normative argument will remain incomplete regardless.

boundaries, however contested, and the appointments process for judges.¹⁷² 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 they will not share all filed cases.

In these settings, judges face an allocation issue. And we can see the internal political problem that the issue implicates, 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 standard 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 could be weakened by 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.

There are additional reasons for multi-decision-maker groups to choose random assignment over the alternatives. There might be a preference for case variety and generalist judgeships among those who found their way to the office.¹⁷³ Variety will usually follow random assignment over time and 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

¹⁷² See [cite].

¹⁷³ A selection effect from a non-random case assignment process makes this factor less likely to have been influential in producing assignment randomization; at the margin, one could expect a pool of people somewhat inclined toward specialization finding their way to the bench. But other factors were sufficiently powerful to produce the spread of random case assignment and, once randomization becomes the norm, a self-reinforcing selection effect might take place; at the margin, one could 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. The strength of these selection effects is another question.

the extreme, to the extent a party has power over venue, choosing the location for dispute resolution is tantamount to selecting a particular decision-maker.

These kinds of 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 some official¹⁷⁴ and unofficial sources.¹⁷⁵ They are not far from the normative arguments for randomization explored above. But this semi-speculative account of the adoption of random case assignment is, in one regard, quite narrow. Aside from a judge shopping concern, the other arguments are steeped in internal institutional management and lack much or any connection with the interests of the public at large.

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 a dampening effect on judge shopping. For skeptics, there are alternatives to randomization and to the complications of discretionary merits-based assignment.¹⁷⁶ But 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 takes on the case for random assignment from the perspective of outsiders to adjudicative institutions. The argument has a simple structure at a general level — it relies on ideas familiar from Part I — although doubts will remain. At a minimum, we can identify the critical issues, assumptions, and trade-offs.

¹⁷⁴ See, e.g., N.D. Ill. Rule 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 where the prosecutor moved for reassignment without explicit authority in the local rules, and adding that courts recognize 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 serves two important goals: preventing judge shopping by litigants and ensuring “an equitable distribution of the case load among the judges of this court”).

¹⁷⁵ See Susan Willett 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).

¹⁷⁶ One such option is discussed below. See *infra* Part III.C.2.c.

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 procedures for “assignment of cases,”¹⁷⁷ and unsurprisingly so. They are solving division of labor problems by assigning work (cases) to workers (judges). But of course these workload allocations simultaneously assign judges to cases. And this creates a relationship between those entrusted with the responsibility of adjudicating and those who require or must endure the service. When looking at how this relationship is formed between decision-makers and the people seeking decisions, “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. Both are happening at the same time; we simply want to make sure that inwardly looking design choices account for the impact on outsiders.

It should be conceded, however, that randomizing judge assignments is not the only imaginable answer. More than one allocation rule is available.¹⁷⁸ The choice is only partly constrained by the presence of adverse parties who will share decision-maker(s). We can still envision a judge assignment system attempting to implement a rule of merit, need, or desert depending on case characteristics and the interests of others who might be affected by conclusions of fact or law in the case. This is akin to discretionary assignment that attempts to suitably match cases with judges.¹⁷⁹ A second possibility is to assign judges with regard to party preferences. True, probably no defensible system would grant unfettered power over judge assignment to one side of a dispute. Likewise, auctioning judges is a dangerous idea. Case outcomes would be even more related to party wealth and, if judges received the high bids, decision-maker incentives would be skewed in harmful ways.¹⁸⁰ But a “political” solution to the problem of allocating judges could incorporate user preferences with less threat. The selection of arbitrators often includes party preferences,¹⁸¹ and many states allow litigants peremptory

¹⁷⁷ See, e.g., N.D. Ill. R. 40.1 (1999).

¹⁷⁸ Some standard allocation rules are out. All available judges will not share all cases in every adjudicative institution. Supreme courts and some high-ranking agency officials are an exception, and their nominally broad oversight tends to come with a limited attention span. In addition, first-in-time rules will not solve the allocation problem. With adverse parties affiliated with each case, the system would need a way to deal with divergent preferences among each set of parties. Hence first-in-time is at most part of the answer.

¹⁷⁹ See Solomon, *supra* note 9, at 8, 13, 28-29.

¹⁸⁰ 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).

¹⁸¹ See, e.g., *Smith v. American Arbitration Ass’n*, 233 F.3d 502, 504 (7th Cir. 2000) (briefly describing a process of striking and ranking potential arbitrators listed by AAA).

strikes on the first judge assigned to their case.¹⁸² A political assignment system along these lines would not necessarily abandon randomization; political assignment might operate in conjunction with it. But it would allow those directly affected by adjudication to place boundaries on the judges who might control their case.

With at least one potentially viable competitor, there are two remaining justifications for assignment randomization. They hold fast to the “judge assignment” perspective and they track the two general occasions for randomization identified above: sensible allocation of indivisible resources across presumptively equal claimants, and reliable experimentation on judicial behavior. Both justifications suffer shortcomings and depend on certain assumptions, but together they offer a formidable argument for assignment randomization in addition to judicial convenience and in the absence of a commitment to randomizing merits decisions.

(1) Allocation. 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 it. But to be realistic, judges and administrative officials will always vary in competence, in ideology, and in the likelihood that either will influence their decisions for some set of cases in ways troubling to substantial parts of our population. 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, and we might debate whether that composition is acceptable. 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 their changing balance over time, or that it equitably distributes positions of authority across groups in society, or that it generates healthy debate within institutions and the possibility of small-scale innovations from multiple sources. Or one might simply surrender to the inescapable reality of ideological diversity in some degree. 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 follows a given mix of ideology and then equally distributes across litigants the chances 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

¹⁸² See Norwood, *supra* note 129, at 293 & n. 128. I return to political assignment procedures in Part III.C.2.c, below.

appointments process, probably more so. And if the mixture is acceptable, it is reasonable to conclude that a fair way of treating the entire class of litigants is to run a lottery on judges. This class of people 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. So we might conclude that random assignment tends to follow choices made about 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 served by 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. 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.¹⁸³ One might be tempted to contend that assignment randomization 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. But 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

¹⁸³ I am assuming that incompetence is not occasionally desirable as a way of checking problematic ideological influences — i.e., that relatively less competent ideologues are better than more competent ideologues and are sometimes the best we can hope for.

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 possibility of non-assignment 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, because change is infeasible or because they serve essential functions. Third, assume that at least one other assignment system is possible, such as officials assigning judges to cases based on their skill sets, or a political assignment system involving party preferences. What is left to be said for random assignment?

As an initial matter, adjustment for differing decision-maker skill sets is not totally inconsistent with random assignment. A compromise could be fashioned under which officials make judgments about which decision-makers are most suited to which case types,¹⁸⁴ and, to the extent that multiple decision-makers fall into a category, they could be allocated randomly to incoming cases. This stratified lottery solution is suited to 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. Likewise, the burdens of decision are more likely to leave several decision-makers within less-than-fine-grained categories of competence. 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.¹⁸⁵

There is a broader response, however. Random assignment helps solve for uncertainty over what makes for a good decision-maker. It obviates the need to build an unavoidably controversial theory of adjudicator excellence into the case assignment stage. Whatever

¹⁸⁴ The Patent and Trademark Office is an example of intra-institution specialization. Patent applications are assigned to more specialized technology units and then to individual examiners. See U.S. Patent and Trademark Office, *Manual of Patent Examining Procedure* ch. 903.08 (2007).

¹⁸⁵ Similar remarks apply to decision-makers trading cases among themselves, although ideological diversity will probably interfere with trades that would thwart the random distribution of decision-maker ideology. Judges with very different worldviews must be less likely to trade with each other. 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.

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. But if there is value in adjudicative institutions having some control over case assignment systems, it might be best if they avoid interjecting their own sense of excellence through a merits-based allocation rule that they fashion and implement. Indeed, adoption of random case assignment where feasible and within given jurisdictional boundaries might be a way that judges retain control over case assignment in the shadow of legislative intervention.

(2) *Experimentation.* A final response is grounded in the value of experimentation. It is at least as broad as any justification thus far, and it presses against compromise on random assignment, perhaps even for the purpose of matching decision-maker skills to congenial case types. If taken to the limits of its implications, 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. By randomly assigning a large number of cases to the pool of available decision-makers, confidence increases that each decision-maker sees a roughly similar mixture of controversies. Differences in outcome become more easily attributable to differences in decision-makers, once observable and theoretically relevant factors are held constant to the extent possible. The power of randomization in experimentation is logically similar to its usefulness in clinical trials of new drugs.¹⁸⁶

Of course, in the judge assignment application, the actual motivation for randomization is hardly the development of experimental knowledge. I am aware of no indication that judges chose random assignment to provide anyone information on their behavior. But a natural experiment can be just 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.

In this respect, note that the results of empirical studies on judicial behavior provide some support for complaints about it. Thus we can become more confident about variation in decision-maker competence

¹⁸⁶ See, e.g., Marks, *supra* note 30, at 132-63.

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.

Without doubt, the information we can acquire from random assignment comes with disadvantages and perhaps diminishing value. Some studies on judicial behavior do seem to have a flair for the obvious. And the best information on judges might never be held by professional empiricists. Access to a lawyer who practices before the adjudicative institution in question will probably provide better insight into decision-maker proclivities than a coefficient indicating how clumps of “Ds” and “Rs” tend to vote in some case category. So perhaps 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.¹⁸⁷

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.¹⁸⁸ At least, the thought would run, anti-randomization compromises are worth entertaining. 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. But my view is that much is left to learn about adjudicator behavior and that random assignment is an important grounding 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 with each other.¹⁸⁹ For

¹⁸⁷ Lon L. Fuller, *An Afterword: Science and the Judicial Process*, 79 *Harv. L. Rev.* 1604, 1622 (1966).

¹⁸⁸ In particular, partisan balancing in decision-maker panels. This has been suggested for the federal courts of appeals. See *supra* note 160. It might not devastate empirical conclusions based on the assumption of random assignment; but partisan balancing would tend to reduce their force. Still, this suggestion is not plainly 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 permit a wider range of outcomes for the purpose of experimentation and debate. And ideological variance across judges will not necessarily affect behavior outside the courtroom differently from zero variance; potential litigants might adjust either way.

¹⁸⁹ See generally Samaha, *supra* note 161.

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 compared to conventional legal authorities and argument, 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 group judges into ideological categories by identity of the appointing president or some other attenuated proxy.¹⁹⁰ Few studies seem to deliver decision-maker by decision-maker information,¹⁹¹ 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; it is a possible alternative but political assignment has hopes of outperforming it on certain measures. Political assignment in this context means that judges receive less control over which cases they receive while litigants enjoy more. Political assignment therefore shares with random assignment the aspiration of minimizing decision-maker discretion and its risks. A potential difference with randomization is that political assignment might better serve the general public interest. Both assignment systems begin to solve a division of labor issue faced by adjudicators. But political assignment might address the problem of diversity in decision-maker competence, which random assignment tends to exacerbate, and it also creates public information about decision-maker characteristics.

Although parties presumably most prefer victory regardless of adjudicator competence, a political assignment system would be

¹⁹⁰ See, e.g., Jeffrey A. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* 321 (2002) (using 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) (using 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 (Oct. 4, 2008) (unpublished manuscript) (finding problems of under-specification, observable proxies, and unidimensional assumptions in existing empirical research on judicial ideology), available at <http://ssrn.com/abstract=1121228>.

¹⁹¹ For two interesting counter-examples in the immigration field, see Alexander, *supra* note 129, at 22 tbl. 2 (reporting immigration judge-by-judge data on asylum grants in New York City); David S. Law, *Strategic Judicial Lawmaking: Ideology, Publication, and Asylum Law*, 73 *U. Cin. L. Rev.* 817, 852 fig. 8 (2005) (reporting appellate judge-by-judge data on asylum voting in the Ninth Circuit).

designed to equalize the influence of all sides to a dispute on the decision-maker's identity. It should cancel out those desires 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. And at least one party is likely to prefer competence to incompetence. Furthermore, litigant migration to one judge and not another reveals outsider perceptions about how those judges process a particular type of case. If that information is accessible, the aggregation of litigant choices presents a rough index of the ex ante desirability of each decision-maker to those who would be subject to their judgment. The details of a political assignment procedure — such as whether to follow arbitration models or how peremptory strikes are allotted — must be resolved. 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. And 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 added relative power and prestige. Others, we must worry, will increase their leisure time by developing 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 the 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 their jurisdiction.¹⁹²

Although these difficulties for political assignment might not be crippling, broader questions must be confronted. The first regards the true public value of litigant preferences for individual decision-makers. It is not obvious that the most popular judges among this cohort 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. It is the potential distance between the aggregated preferences of actual litigants and the resulting quality of law and precedent for everyone else. It is possible that the interests of actual litigants are unhappily skewed compared to others influenced by law. Perhaps at least one party to every dispute will exert

¹⁹² See Klerman, *supra* note 180, at 1220 (studying English history).

whatever influence they have to obtain the least competent and most ideological decision-maker. This would dampen the public value of information on judge popularity. Litigant migration, when all parties have a hand on the steering wheel, might systematically land in judicial mediocrity. This is itself a controversial supposition, but it should be investigated with reference to another component of institutional design: the appointments process for adjudicators.

With respect to the federal courts, a political judge assignment system should be squared with the judicial appointments process. That process creates a shifting mix of personnel based on decisions of the Senate, the President, and the political forces that influence them. 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 parties who retain them. This is no objection standing alone. Rather, it is a suggestion of deep questions 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 might be more satisfied with a generally random assignment system and skeptical of a serious shift to litigant power or to specialization.¹⁹³

At this point, institutional designers must face rather 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 adjudication. Random assignment and political assignment are just two imaginable choices with two distinct sets of implications for the remainder of that system. 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 process options themselves be randomized.

Instead, I will suggest 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

¹⁹³ Analyses of 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.

be a less attractive option. Those classes have alternative and sometimes reliable sources of information. But their judgment about sitting judges for whom experience-based evaluations are available will at least occasionally misfire. When those judgments are accurate, moreover, they will not always line up with the informational needs of others. Perhaps most important, the process of appointing judges operates on assumptions about how potential judges will perform as actual judges. The characteristics of the most popular judges among parties are not necessarily what the appointments process does or should value.

This brings us to an uncomfortable reality associated with randomization as a method of experimentation. It applies beyond judicial assignments and it 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 as a whole. 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 or refusing to push forward with random assignment and the growing base of knowledge that it is coincidentally helping to create.

CONCLUSION

With a better understanding of what randomization means and how it functions comes a better understanding of when it is beneficial. I have outlined overlapping justifications for the deliberate use of statistically or orthogonally randomized processes in social decision-making. These justifications do not reduce to a hard prescription, but they do provide guidance. And the character of these justifications helps us investigate what might appear to be an incoherent approach to randomization in adjudication.

Many adjudicative institutions have settled on randomizing their decision-makers across cases but not randomizing merits decisions in those cases. To a degree, this is 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. But 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.