Randomization in Adjudication

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This article investigates randomization as a decision rule in adjudicative institutions. It begins by identifying different concepts of randomization and overlapping justifications for its use in social decisions. The article then evaluates the judicial position on randomization. Judges publicly punish other judges for overtly randomizing merits decisions. Yet judges tend to tolerate or even encourage deliberate randomization in nonjudicial institutions, in situations ranging from housing lotteries to military drafts. And judges now embrace randomization when they decide how to assign incoming cases to each other. This last commitment creates particular tension within the system. Given substantial differences in competence and ideology among judges — differences that the new wave of empirical legal studies is confirming — randomizing case assignments will effectively randomize merits outcomes in some cases. The article then offers a defense for this awkward combination of positions. It defends merits randomization bans as crude yet understandable self-restraints adopted by fallible judges with public relations problems. And it defends assignment randomization from several outsider perspectives: as a lottery among litigants with equal claims to the tragically scarce resource of judicial excellence, as a method for honoring outcomes in the judicial appointments process, and as a natural experiment on the elusive determinants of judicial behavior. These arguments cannot fully explain why adjudicative institutions developed as they did. But they can exploit benefits that the system’s designers produced, in a sense, randomly.

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INTRODUCTION

A perceived 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 scatters her rewards without any such guide. The cultural situation is not radically different today. In the United States, the favored icon for justice remains the same: a decision-maker veiled from irrelevant facts and attuned to law rather than whim or chance.

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

Despite these first impressions, judicial opposition to randomization turns out to be modest. It is nearly impossible to locate a case invalidating an official decision because it was deliberately randomized. True, pervasive randomization would often bump into generally accepted judicial commitments. Flipping coins to determine guilt in every criminal case is incompatible with a commitment to judgments based on legally relevant evidence. But such incidental conflicts do not entail judicial opposition to randomization per se. In fact, courts might be as likely to order randomization as to forbid it. For instance, it seems that nobody even asked a judge to condemn the 1969 Vietnam military draft lottery for relying on randomization — and yet this lottery was attacked for being not random enough. A federal court took the argument quite seriously.

Is it possible to distinguish situations in which courts are likely to resist randomization (e.g., capital sentencing) from those in which they are likely to be indifferent or even promote it (e.g., military drafts)? High stakes cannot be the distinguishing feature. Randomization is sometimes

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.
5 See Stodolsky v. Hershey, 2 Selective Serv. L. Rptr. 3527, 3528–29 (W.D. Wis. 1969); infra Part II.B.2 (examining Stodolsky and examples of court support for randomization).
tolerated in matters of life and death. A far better predictor, I will argue, is institutional location. Although relevant cases are few, judicial opposition to randomization looks parochial: judges strongly condemn randomization for their own merits decisions, to the point of imposing professional sanctions, but judges are nonetheless likely to retreat when other officials consciously randomize. If this is the pattern, judicial opposition to randomization is restricted to self-regulation.

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

Can we defend an adjudicative system that habitually randomizes its decision-makers but never their decisions? The question is worth asking because we can imagine a system closer to the opposite of the status quo. Cases could be assigned to judges based on their perceived expertise, or the combined preferences of the litigants; and these non-random assignment systems could be accompanied by a modest domain of merits

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

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


decisions that are concluded by lot. If there is a convincing defense of the current arrangement, moreover, it should rest on more than judges’ preferences. Random case assignment ignores important differences among judges, while refusing to randomize merits decisions encourages the proliferation of other contestable tiebreakers.10

My defense of the system’s design comes in several steps. As to the ban on randomizing merits decisions, it is the only acceptable rule for when to randomize and, I will suggest, a flexible standard is problematic. This conclusion is not firm but it draws on a reasonable view of imperfect judges and their public relations challenges. However, opposing merits randomization only complicates the argument for assignment randomization. One response is to cut the tension by claiming that randomizing judges does not count as randomizing merits decisions, whatever the effect on outcomes. But there are other defenses. First, we should see the assignment process as matching judges to litigants, not only cases to judges. This outsider perspective can accept randomization as a method for allocating a scarce and indivisible resource: judicial excellence. Second, we should expand the frame further to consider the appointments process. The larger system of matching judges to litigants includes the random assignment process now popular with judges as well as the appointments process that gave them their offices. Randomizing at the assignment stage can rightly bow to decisions at the appointments stage regarding the proper mix of adjudicators. Third, random assignment creates a natural experiment. Trustworthy empirical study may depend on such lotteries for insight into judicial behavior. Indeed, these studies are one way to better learn how judges are different and, therefore, how the judge assignment system can drive case outcomes.

Part I is largely theoretical and it continues modern efforts to demystify randomization. The discussion highlights several overlapping justifications for lotteries and examples of their use in social decisions. Part II sorts out the judicial position on randomization. Judicial skepticism of deliberate randomization in other institutions is difficult to find, and judges regularly adopt modified lotteries to assign cases among themselves. Yet judges almost never overtly randomize their merits decisions, and those who do risk sanctions beyond reversal. Part III offers a functional defense for this pattern.11 Randomizing decision-makers effectively randomizes outcomes for a class of cases, but without tracking the ideal domain for randomization indicated by abstract normative theory. Not without accounting for the institutional setting of adjudication, anyway. The closing pages therefore suggest that a merits randomization

10 See infra notes 111–119 and accompanying text (collecting tiebreakers).

11 I mean a normative defense based on the beneficial consequences of an arrangement — not a positive explanation of behavior that works backward from beneficial consequences. See Jon Elster, Explaining Social Behavior: More Nuts and Bolts for the Social Sciences 14 (2007) (discussing the latter). The normative defense will be difficult enough without going on to establish that any net benefit was the reason for the arrangement’s establishment.
ban might be the best approach for fallible judges; but that assignment randomization is nevertheless a sensible lottery of judges given the competing claims of litigants, the character of the appointments process, our desire for information on judicial behavior, and the feasible alternatives. This defense is not restricted to the purposes of the system’s designers, however. It turns to the 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 procedures 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 given positions of power, the pool of affected subjects must be determined, and a decision rule must be selected. The last point deserves emphasis. Randomization might be adopted as a decision rule for good reasons, for bad reasons, or for no discernible reason, but randomization in this context is always the outcome of a prior decision-making process. The task is to understand when this anterior process should select randomization — that is, when decision-makers should decide to decide by randomization.

A. Three Concepts of Randomization

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

An initial distinction lies between processes and outcomes. Either can be characterized as random.12 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.13 Because our focus is decision-making protocols, process-oriented concepts of randomness are most pertinent. Certainly these processes will be evaluated with reference to their consequences, and the character of a process can be tested by the pattern of its outcomes;14 but the topic of ultimate concern will remain decision-making processes designed to generate results randomly.

13 The sequence 01001111 is more random in this sense of the word than is 11111111, regardless of the process by which these numbers were selected for inclusion in this sentence. See Gregory J. Chaitin, Exploring Randomness 111 (2001). I chose them deliberately.
14 See Bennett, supra note 12, at 169–73 (describing tests based on distributions).
Within the domain of processes, however, randomization can have more than one meaning. Two leading academic concepts of process randomization are statistical and epistemic. A statistically random process is probably the more intuitive concept. It refers to a process that affords equal probability to all outcomes within a given set. The set of possible outcomes must be chosen somehow. But, once specified, any member of the outcome set must be equally likely to occur when the process is used. This notion of randomization is commonplace, even if the resulting distributions do not fit common expectations for “randomness.” There is also the familiar idea of a weighted lottery, which is a variation on statistical randomization. It is a compromise process intermediate between equal chances and other decision rules, 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. Dice can be engineered only so well, and approaching statistical randomness will always depend on the procedure for rolling them. Computer-administered algorithms generate numbers with incredible efficiency, but they depend on a seed to get them started. If the seed is not appropriately selected, statistical randomness can be compromised. In fact, perfect statistical randomization might not be even theoretically possible. Perhaps adequate information before a randomizing process finishes would invariably preclude the assurance of equal probabilities. Enough knowledge about physics and the manner in which a die is rolled should enable an observer

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17 This point will be crucial. See infra Part III.A.2–C (assessing random case assignment).


19 See Elster, supra note 12, at 113–14; Douglas C. Wilms, *Georgia’s Land Lottery of 1832, 52 Chronicles of Okla. 52, 54 (1974) (describing a lottery that doubled the chances for veterans, orphans, family heads, and others to win acquired Indian land). For a scheme weighted as to one class yet unweighted as to another, see Akhil Reed Amar, *Lottery Voting: A Thought Experiment*, 1995 U. CHI. L. REV. 193 (exploring election of representatives from single member districts by randomly selecting a ballot cast by a voter in each district).

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

to calculate odds different from one in six.\textsuperscript{22} To be sure, many randomization devices are good enough for their assigned purposes in light of limited observer information. Yet the role of ignorance in preserving equal probability assumptions leads to a distinct concept.

An epistemically random process generates outcomes that are equally probable as far as an observer can tell.\textsuperscript{23} This happens whenever a person is sufficiently ignorant such that it becomes attractive for her or him to assign equal probabilities to a set of possible outcomes, regardless of what omniscience would reveal. This estimation is most understandable when a process appears designed to approximate statistical randomization, as with an apparently unweighted die rolled fairly. But epistemic randomness reaches further. Think about an observer who is accurately informed that a die is loaded, but not told how. “For all he knows, no number is more likely than any other to come up,”\textsuperscript{24} even though the device is certainly not statistically random in any objective sense. A real world example is the New York City subway search program, which attempts to maintain only “the veneer of random deployment.”\textsuperscript{25} The epistemic concept is thus subjective and allows randomness to vary across observers.

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

There is a third concept worth mentioning. Use of a decision rule might be considered randomization if the rule is unrelated to any normatively sound basis for decision.\textsuperscript{28} Such decision processes can be

\begin{itemize}
\item \textsuperscript{22} Cf. 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 ancient refusals to accept the existence of chance, when doing so threatened a powerful view of divine will or divine planning. See REITH, supra note 4, at 13–15 (discussing shifts in acceptance over time).
\item \textsuperscript{23} See BENNETT, supra note 12, at 154; ELSTER, supra note 12, at 43.
\item \textsuperscript{24} ELSTER, supra note 12, at 43.
\item \textsuperscript{25} See MacWade v. Kelly, 460 F.3d 260, 264 (2d Cir. 2006) (noting the difference between the intended appearance and the actual basis for choosing subway checkpoints).
\item \textsuperscript{26} See ELSTER, supra note 12, at 43.
\item \textsuperscript{27} See, e.g., REITH, supra note 4, at 175 (discussing gamblers).
\item \textsuperscript{28} 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”). I would add to Heyd’s discussion that a process can be meaningfully “random”
\end{itemize}
called *orthogonally random*. True, some decision rules are considered both unrelated to a proper view of the merits and normatively prohibited, like choosing the outcome that will maximize harm to race minorities. But other grounds for decision have no such taint. An example familiar to legal scholars is the convention of listing contributing colleagues’ names alphabetically in the star footnote, which is a decision rule thought utterly uncorrelated with merit. The subway search program provides a more serious illustration. Police officers are instructed to search the bags of every *n*th passenger who passes the checkpoint.

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

None of these three concepts is a priori superior. They are significant for different purposes, and concentrating on one will spotlight some normative questions to the exclusion of others. For example, thinking about statistical randomization prompts consideration of the circumstances in which decision-makers should deliberately make outcomes equally probable, despite numerous alternatives. In contrast, the existence of epistemic randomness can present transparency issues regarding the propriety of keeping one class of people ignorant of the operative decision rule. Those questions are the same as asking when and what kinds of substitutes are appropriate for statistical randomization. These issues are suggested by the possibility of orthogonal randomization.

All three concepts will be touched on below. Government decision-making has incorporated each. But to simplify matters without losing significance, the focus will be on attempts at statistical randomization with a secondary concern for orthogonal randomization. An attempt to assure equal probabilities will be sufficient, understanding that literal equiprobability might be impossible, that lack of relevant information might be required, and that orthogonal randomization might be an acceptable substitute. Although much of the analysis will apply to

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

30 See MacWade, 460 F.3d at 264 (noting the number is specified by a supervisor).
epistemic randomness, the issues surrounding deliberate statistical and orthogonal randomization are important enough and can be more cleanly analyzed on their own.

B. Randomization’s Features and Justifications

People have turned to deliberate randomization in various situations and for thousands of years. It has been used to drive shuffle play on iPods, to enhance digital audio processing, to initiate sporting contests and presidential debates, to resolve casual disagreements, to create samples for opinion polling and to measure the unemployment rate, to make clinical drug trials more reliable, to pick out travelers for extra law enforcement screening, to promote electronic security through cryptography, and to allocate housing vouchers, charter school slots, immigration visas, and the burden of military service. But pervasive statistical randomization would be calamitous. It would yield indefensible rewards and punishments, destabilize patterns of behavior, and kill socially valuable incentives. Imagine systematic randomization of the decisions whether to provide a benefit like health insurance, the scope of socially valuable incentives. Imagine systematic randomization of the benefit, and the recipient class. The results would be unjustifiable.

Randomization has many alternatives, of course. Among them are (1) judgment based on perceptions of merit, need, or desert and the related option of delegation to experts; (2) politics, including collective deliberation and the aggregation of judgments by voting rules; (3) markets, which translate demand and ability to pay into resource allocations; (4)

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31 See 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).
32 See Levy, supra note 4, at 227–54 (regarding the initial version of shuffle play).
33 See John Watkinson, An Introduction to Digital Audio 120–22 (2002) (regarding the dithering process).
40 See United States v. Marquez, 410 F.3d 612, 615–16, 618 (9th Cir. 2005) (upholding random selection of airline passengers for handheld magnetometer scanning).
41 See Knudson, supra note 21, at 22–24.
42 See Sara Olkon, Chicago Housing Authority to Hold Lottery for Section 8 Voucher Waiting List, Chi. Trib., Apr. 16, 2008.
43 See 20 U.S.C. § 7225d(c) (regarding oversubscribed charter schools receiving grants).
44 See 80 U.S.C. § 1153(c) (regarding allocation of “excess” visas).
45 See infra text accompanying note 78 (discussing the 1969 military draft lottery).
equal shares, whether by physical partition or temporal rotation; and (5) first-in-time rules, which often reward knowledge, speed, and desire unrelated to wealth.\textsuperscript{46} Intelligent selection of randomization over these alternatives requires a decision-maker to pinpoint randomization’s peculiar features.

In so doing, it should be understood that randomization is fully compatible with modernist rationality. Twentieth-century modernists made room for randomization by better specifying the concept, incorporating it into theories of rational choice, and harnessing it to make experiments more reliable. So randomization need not involve a belief in divine will revealed by lot,\textsuperscript{47} nor does it bypass the issue of how to make contested decisions. It is one decision strategy among many.\textsuperscript{48} And while there might not be an uncontested boundary to its optimal domain, there is an emerging group of rational justifications for resort to lots.

1. Equal opportunity and other features

As a decision rule, randomization has one particularly special feature: it represents a certain version of equal opportunity.\textsuperscript{49} Statistically random processes guarantee an equal chance of yielding any outcome within a predetermined outcome set. The connection to equal opportunity is probably most apparent when the possible outcomes are associated with individual persons, as with a lottery for a benefit in which each pool member receives one ticket.

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

\textsuperscript{46} Cf. Guido Calabresi & Philip Bobbitt, Tragic Choices 18–19, 31–50 (1978) (investigating quantity and allocation decisions, and comparing markets, political processes, custom, and “lotteries” defined to include both equal chances and equal payouts); Elster, supra note 12, at 69–78 (comparing lotteries to absolute equality, queuing, rotation, need, productivity, contribution, desert, and auctions).

\textsuperscript{47} 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.”).

\textsuperscript{48} 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).

next section describes occasions on which granting equal chances is nevertheless desirable. For now, it is enough to recognize this feature as a source of difference for randomization.

Randomization has other notable features, but they turn out to be less unique. Theorists tend to stress that randomization can (1) economize on decision costs,⁵⁰ (2) tie the hands of decision-makers,⁵¹ and (3) dampen behavioral incentives all around, if compared to decisions based on merit, willingness to pay, and so forth.⁵² Lotteries indeed can be run quickly with modest expenditures — although high costs can arise from deciding whether to randomize, which outcomes to randomize, and how to safeguard the randomization process from corruption. It is also true that honestly conducted lotteries place results beyond anyone’s influence, including error-prone decision-makers. As such they might reduce incentives to curry or solicit favor. But many rules share these qualities.⁵³ Consider “equal shares for everyone” and “oldest people win.”⁵⁴ These, too, are easily administered flat rules that leave little room for personal influence when honestly executed. Because randomization is a semi-exotic practice in official decisions, perhaps it is easy to forget that it is simply one of many possible rules.⁵⁵

That said, randomization does have a peculiar relationship to uncertainty. Inflexible rules tend to be allied with predictability and planning, even if they do not always match up in practice. Lotteries are distinct. Statistical randomization assures that no potential outcome is more likely than any other, meaning that observers can, at best, plan for equal chances. Whether imperfect predictability is undesirable depends on the needs of decision-makers. Either way, it helps set randomization apart. And so 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 notable degree of unpredictability.

2. Overlapping justifications

Although randomization has been around for many centuries, there seems to be no precise and concise restatement of when it is normatively

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⁵⁰ See Duxbury, supra note 8, at 54.
⁵¹ See Calabresi & Bobbitt, supra note 46, at 44; Duxbury, supra note 8, at 51–53.
⁵² 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. But randomization can preserve incentives, compared to a different baseline. See infra text accompanying note 69.
⁵⁴ Not all of these alternative rules can be described as orthogonally random. Some of them will aim to approximate normatively defensible grounds for decision.
superior to alternative decision strategies. This might be the consequence of its relatively rare use in significant social decisions, or it could be that an easily executed restatement is not possible. Ultimately the superiority of randomization depends on a normative orientation and factual premises over which people will disagree, along with a contestable review of the feasible alternatives. Instead of fabricating a universal prescription, we can gather arguments that are appealing from several perspectives.

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

Three overlapping justifications for randomization then stand out. The first involves equally strong claims to some outcome. Claims might seem equally strong because of an egalitarian commitment or because of irreducible uncertainty. Either way, randomization becomes plausible at least if the resource in question is indivisible. A second justification is less connected to any particular normative vision and more of a pragmatic concession to brute fact. It invokes lotteries as the least-bad option when behavior might otherwise be socially destructive. A third justification is informational or experimental. Random sampling and random interventions offer hope of eliminating uncertainty for the future. These arguments are sometimes set apart from others, but the popularity of natural experiments today makes any such division artificial.

   a. *Equal claims and indivisibility.* Because randomization represents a form of equal opportunity, it can be a logical response from decision-makers confronted with equally plausible courses of action. More than one factor influences whether a decision-maker views a set of choices as equally justified. Among them is a commitment to some version of egalitarian justice that aims to afford people equal dignity and respect. Even with full information, egalitarians can be attracted to randomization

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

57 For a sophisticated contractarian defense of the lottery as an impartial method of distribution when competing claims are equally strong, see Peter Stone, Why Lotteries Are Just, 15 J. POL. PHI. 276 (2007).
as a method for providing people respect in the form of equal chances to enjoy a benefit or to avoid a burden. Barbara Goodwin pushes far in this direction. She considers a “total social lottery” to better mix life chances when scarcity and structured inequality thwart that goal. We can conclude that the proper domain for differentiating merits judgments is much larger, and the domain for randomization far smaller, without overlooking the latter’s equalizing potential. Such moderation helps explain limited lotteries for housing vouchers and charter school slots, but not for ordinary hiring decisions.

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

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

Another perspective from which to see equally strong claims requires

58 See, e.g., Bruce Ackerman, Social Justice in the Liberal State 285–89, 298 (1989); Greely, supra note 49, at 141. To reiterate, an egalitarian randomizer still must choose the pool of outcomes using indications of merit, need, and so on.
59 See Goodwin, supra note 49, at 102–03.
60 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). Scarcity indicates an allocation problem rather than a solution to it, so it is not a helpful argument for randomization over other decision strategies.
61 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).
no such background commitment to treating people equally. It follows from twentieth century theories of instrumentally rational choice. This might seem counterintuitive insofar as randomization has been associated with mindlessness or frivolity. But rational choice theorists understand randomization’s power to enhance one player’s strategic position with respect to another and, more generally, to respond cheaply to situations of indifference and uncertainty. “In the absence of reasons for choosing one alternative . . . rather than another,” Jon Elster writes, “we might as well select one at random.” This sense can arise naturally for theorists who still believe that “[r]ationalism sees its chief triumph in the clear recognition of the limits of actual insight,” as Otto Neurath put it in 1913.

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

b. Pragmatism and incentives. This brings us to the incentive effects of randomization and pragmatic attempts to account for them. Although pragmatism needs a normative direction, this justification does not depend on a special value for human equality. Nor does it run on uncertainty. It aims to use a sophisticated understanding of human behavior in light of identifiable incentives for the purpose of optimal legal design. The resulting lessons might suggest randomization in several different ways.

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

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

66 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); see also Elster, supra note 12, at 122; Harcourt, supra note 48, at 316 (claiming that modernists nevertheless continue to take leaps of faith).

67 See, e.g., Elster, supra note 12, at 1–122 (making the attempt from a rational choice perspective); Goodwin, supra note 49, at 45–46 (similar, from an egalitarian perspective).
and settings. In fact, there is no simple description of the incentive effects of randomization: even when human behavior is predictable, the perceived effect of randomization depends on the point of comparison.

Consider the common claim that randomization eliminates behavioral incentives and, as such, is a tool for fighting corruption. 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. However much we 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, therefore, instituting randomization seems to eliminate incentives.

But randomization can preserve incentives, compared to a different baseline. It can be used to cheaply influence large groups. Decision-makers might eschew pervasive monitoring, randomly sample from the target population, and increase the penalty for noncompliance relative to a regime with 100% detection. This kind of logic explains the value of random sampling for auditing in various settings. In addition, randomization can encourage decisive action by softening decision-maker responsibility for particular outcomes. 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 settlements. Granting equally probable claims to an entitlement can facilitate efficient bargaining by hoisting a veil of ignorance, thereby minimizing the significance of private valuation information and strategic behavior. Thus randomization can reduce incentives for action

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68 See DUXBURY, supra note 8, at 51–56. However, a dysfunctional decision environment can undermine confidence that randomization can be honestly performed. This is a way in which the case for lotteries can rest on self-defeating assumptions. See also infra note 70.


70 A greater spread of potential sacrifice can have political effects congenial to egalitarian projects. With shared risks come shared interests, and the possibility of an engaged class of citizens who demand public interested policy. See DUXBURY, supra note 8, at 56–57; GOODWIN, supra note 49, at 95–96. But such large-pool lotteries must be constructed in the first place. Implementing risk expansions to engineer a political environment is impossible if it requires the political environment meant to be created by the expansion.

71 Accord GOODWIN, supra note 49, at 97–99 (asserting relief from responsibility as a benefit of lotteries).

72 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).
(compared to merits judgments) or increase them (compared to blanket enforcement, handwringing, or game-playing).

c. Information and experimentation. Finally, randomization is a foundation for learning and experimentation. It provides a way to convert difficult choices into intermediate steps. As the modern analogue to divination, today’s best empirical studies on causation often rely on random assignment to treatment and control groups. Random assignment across a sufficient number of cases should equalize unaccounted-for variables, which helps explain its promotion by FDA for use in clinical drug trials. This experimental function holds even when lotteries are chosen for other reasons. Thus the Vietnam draft lottery was not chosen because of what researchers might learn about the effects of military service on later life, but it did offer up a natural experiment. Similarly, randomization can be used intentionally to draw representative samples from a population of interest. The samples can be studied at lower cost than can the entire population. Many government agencies use sampling for this informational purpose, starting with a measurement of the nation’s monthly unemployment rate in 1939. Whether by policy intervention or statistical sampling, randomization can serve the function of information collection in the hope of improving future decisions.

Of course, randomized decision-making has serious drawbacks. Statistical randomization is a freakishly effective leveler that cannot distinguish the good, the bad, and the ugly. It might reduce incentives to merely appear needful, but also to actually become meritorious. Randomization may undermine planning in destructive ways as well, and it will not offer reasons for particular outcomes. One can argue with a decision-maker’s decision to randomize but not with a randomization device’s output. This can be distressing to the subjects of decision. Furthermore, the semi-mindlessness of randomization separates individual

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decision-makers from particular outcomes. People still bear responsibility for deciding to randomize but randomization interferes with a regime of accountability and associated effort. And randomization’s nifty slicing power in situations of indivisibility might be distracting. We should not neglect the possibility that scarcity can be ameliorated at tolerable cost, just as we should remember that randomization requires normative judgments about what to randomize. Indeed, preserving large domains for merits and markets can prevent scarcity in the first place.

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

3. Three examples in government

Although restating the proper domain for randomization in decision-making is challenging, it is more than a parlor game. Even government decision-making has a modest tradition of deliberate randomness. In the United States, it dates back to the organization of government in 1789. Allocation of the first Senators to three different election classes was done, in part, by lot.\footnote{See Adam M. Samaha, Originalism’s Expiration Date, 30 Cardozo L. Rev. ___ (2008) (noting the combination of deliberation with chance).}

Among the best known contemporary instances is the military draft for the Vietnam War. The decision to compel people to serve comes with the issue of whom to compel. One option is to rely on officials to choose conscripts based on fitness. The Vietnam draft relied in part on this model, but there was room for abuse, with different draft boards using different tests and affording preferential treatment among equally fit conscripts. In 1969, the President ordered the next round of conscripts to be chosen randomly from a pool of 19–25 year olds.\footnote{See Executive Order 11,497, 34 Fed. Reg. 19019 (Nov. 26, 1969); George Q. Flynn, The Draft, 1940–1973 ch. 9 (1993) (discussing the political back story).} Of course discretion and gaming were not eliminated, and many thought the war misguided in the first place. Yet randomization becomes palatable when a national obligation requires resources from many but not all people, each of whom are presumptively equally entitled to avoid service. If the government could acquire reliable information at no cost, it might conscript only the fittest people with the lowest opportunity costs. But a crudely defined lottery pool might be the best first step.\footnote{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).}

A second example comes from the same era, but it was a conscious effort to experiment. By the 1960s, some welfare-state reformers were pushing a negative income tax, with reduced benefits as income from other
sources increased. 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 various levels of guaranteed income.\(^{(80)}\) Although the experiments have been criticized,\(^{(81)}\) they were an effort at informed policymaking with intriguing results. They suggested the labor supply effect was not dramatic across different benefit-reduction rates, though beneficiaries did participate in the labor market less than those who received no welfare assistance.\(^{(82)}\) We can debate the propriety of experimenting on (only) low-income people,\(^{(83)}\) but we can also sympathize with random policy intervention to acquire knowledge.

A third example shows randomization in an arguably less flattering light. From 1960 until 1987, the federal government used lotteries to distribute oil and gas leases for certain government-owned land. Leases for lands with a known potential were supposed to be auctioned; other never-leased land was given first-in-time to qualified applicants; and the remainder was distributed by lottery to applicants who paid a nominal fee.\(^{(84)}\) It is difficult to see why auctions were not the better solution, even if large amounts of government land would remain unleased. A lottery will not reward knowledge about drilling prospects, and it awards leases regardless of applicant need or ability. Those who applied for leases were often unable to exploit any resources present; those who were had to track down the leaseholder 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 the disadvantaged or to anyone else.\(^{(85)}\)

II. RANDOMIZATION AND THE JUDICIARY


\(^{(82)}\) See Moffitt, supra note 80, at 509.

\(^{(83)}\) See David Greenberg, Mark Shroder & Matthew Onstott, *The Social Experiment Market*, 13 J. ECON. PERSPECTIVES 157, 159, 162 (1999) (finding that, when the government uses randomized trials, it tends to test proposals aimed at the disadvantaged).


\(^{(85)}\) The best defense of this lottery probably involves incentives and politics. Perhaps officials could not be trusted to appropriately allocate the proceeds from an auction and, with the risk of untapped land remaining in government hands, a lottery for applicants was a convenient compromise to achieve a measure of useful privatization.
We have seen that randomization is normatively plausible in certain decision situations and unacceptable in others. Given a sufficient number of decisions, randomization ought to comprise a nontrivial fraction of decision rules selected, assuming that decision-makers are rational. With hundreds of thousands of disputes adjudicated in the administrative state and in various judiciaries every year, one might anticipate coin flipping becoming standard in a number of close merits questions. But it has not. In fact, government decision-making is rarely randomized, and nearly never for the purpose of adjudicating merits issues. Yet when push comes to shove, judges have not seriously resisted randomization, either. Sometimes judges actually encourage it. This Part attempts to sort out the judicial position on randomization.

A. Judicial Self-Regulation

1. Sanctions and general opposition

For judges, flipping coins is an easy way to draw misconduct sanctions. It is a basis for penalties well beyond mere reversal by an appellate court. Every decade or so, a judge overtly randomizes a merits decision and the reaction from those who punish judicial misconduct is uniformly negative. Much of this aversion involves public relations. Arbiters of judicial discipline are convinced that citizens will not tolerate merits randomization. “A court of law is not a game of chance,” as one misconduct commission put it. “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.”86 On a public relations theory, moreover, it makes sense to sanction a judge for simply appearing to randomize merits issues even if the judge actually decides the case on other grounds. This has been done.87

Perhaps any judicial tolerance for randomization in adjudication is incompatible with survival-level legitimacy for the court system. A public with little information about judicial performance might see coin flips as a sign that judges are not taking their jobs seriously, that law often can do no better than chance, or that judges enjoy lording the power of chance over hapless litigants.88 In addition, banning merits randomization could bolster an image of courts as unique systems of reason set apart from other

87 See In re Daniels, 340 So. 2d 301, 307–09 (La. 1976) (sanctioning a trial judge who appeared to decide guilt by coin flip, regardless of the actual basis for decision).
88 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 86, at 84–86 (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”).
public offices, and from arbitration. Instead of metaphorically splitting babies, courts might fashion themselves as institutions that not only offer decisive resolution of contested issues upon request, but that provide rational explanations for every significant decision that they make.

In fact, judges can be sanctioned for randomization even if they first make efforts to decide a contested issue on other grounds and even if they show respect for the difficulties of judgment. Consider the disciplinary proceedings against Judge Helen Brown, a family court judge in Michigan. 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,” 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 the disciplinary record, her resort to randomization seems perfectly rational. As far as we can tell, she faced two options that were equally supported on the available information. She was not charged with sloth or misunderstanding the arguments. And she faced a choice that other judges might have decided on questionable grounds: for example, by a tiebreaking preference for older couples over fathers, or vice versa. Publicly flipping a coin to resolve this merits issue was nevertheless intolerable to the state’s high court — threatening enough to warrant discipline rather than mere reversal and remand. In this way, Elster’s hope for randomization in certain custody disputes fell to Neurath’s feared “reproach of frivolity or cynicism.”

Judicial opposition to randomization extends further. It reaches statistical sampling of contested cases, even when doing so could save substantial decision costs. Lower federal courts seem unwilling to

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89 See In re Brown, 662 N.W.2d 733, 734, 736 (Mich. 2003).
90 Id. at 736 (quoting the adopted findings of the Judicial Tenure Commission).
91 Judge Brown’s coin flip did attract local media attention. See David Ashenfelter, Judge Uses Coin Flip to Decide Custody, DETROIT FREE PRESS, Feb. 8, 2002 (reporting that a chief judge in the county indicated that the coin flip showed a lack of seriousness); see also Brown, 662 N.W.2d at 737 (Weaver, J., concurring) (“The press coverage surrounding the misconduct greatly increased both the public’s knowledge of the incident and, consequently, the public’s trust and confidence in the judiciary was damaged.”); id. at 742 (reporting a Commission conclusion that Judge Brown had “denigrated the judicial process and legal system”). It should be noted that Brown faced a second misconduct charge, see id. at 734 (regarding involvement with a charitable organization), which might or might not make her randomization look worse.
92 See ELSTER, supra note 12, at 163–74 (defending randomization in some cases of real uncertainty as to the best parent where children will likely be hurt by delay).
93 Neurath, supra note 66, at 9 (discussing the prospect of officials drawing lots).
randomly sample from a plaintiff class to resolve similar issues for all plaintiffs.\textsuperscript{95} 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.\textsuperscript{96} 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.\textsuperscript{97} Yet judicial willingness to expedite bellwether trials means that, practically speaking, a deliberate lottery will influence outcomes.

The best-known judicial statements on individualized case assessment in opposition to 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”\textsuperscript{98} — “a capriciously selected random handful” more or less “struck by lightning.”\textsuperscript{99} 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, which must have prompted the analogy.

Later, a new coalition of justices accepted capital sentencing with additional guidance to decision makers.\textsuperscript{100} Yet the Court opposed flat

\begin{itemize}
\item \textsuperscript{96} 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); FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION 223–24, 360 (4th ed. 2004) [hereinafter MANUAL] (recommending random sampling or agreement on typicality for bellwether trials).
\item \textsuperscript{97} See MANUAL, supra note 96, at 437.
\item \textsuperscript{98} Furman v. Georgia, 409 U.S. 238, 293, 304–05 (1972) (Brennan, J., concurring); see also id. at 295 (criticizing unguided jury discretion); id. at 313 (White, J., concurring) (finding “no meaningful basis for distinguishing the few cases in which it is imposed”).
\item \textsuperscript{99} 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).
\item \textsuperscript{100} See Gregg v. Georgia, 428 U.S. 153, 195–207 (1976) (joint opinion).
\end{itemize}
rules mandating the imposition of death, such as executing everyone convicted of first-degree murder. This suggested that the justices now favored rarity over clarity. 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 an overarching commitment to individualized adjudication and inconsistent with the crudeness of flat rules. And statistical randomization is a rule.

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, not to mention contradictory. For their part, courts regularly produce rules, trading decision costs for error costs across time. Consider judicially imposed limits on punitive damages. Recently the Court estimated the median ratio of punitive to compensatory damages in past cases and used that number to set a ceiling for future maritime cases involving recklessness. In capital sentencing, the true test of judicial opposition to randomization would be a trial system that accurately identified a small set of the most deserving defendants and then randomly selected half of them for life sentences. This lottery would impose a kind of rule favoring leniency without necessarily setting off alarms under established doctrine.

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

102 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.
103 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.”).
105 Cf. ANTHONY EVERITT, AUGUSTUS: THE LIFE OF ROME’S FIRST EMPEROR 70 (2006) (explaining the ancient practice of decimation, which involved execution of 10% of a pool). Contrast the position of the justices who indicated that a purely random clemency process in the executive branch would violate due process. See infra note 127 and accompanying text.
rules or vague standards, and even if litigated cases are more likely to be hard cases. 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 adjudication. In some states, courts may partition jointly owned land into plots of roughly equal value and then allocate these plots across owners by lot. The owners might trade their plots after this initial allocation, but courts have orchestrated land partition lotteries. Some of this practice fits with the overlapping justifications for randomization presented above; we could say that those who become joint owners are presumptively equally entitled to any given plot, that figuring out who might have a stronger claim to any particular plot is not worth the effort, that the partitioned lots cannot be sensibly divided further, and that permitting bargains after the lottery limits its significance anyway. But this judicial use of randomization is also revealing. First, the practice is salient because so exceptional. It is the only arguably consistent use of randomization in the courts on the merits, and one can wonder whether this exception would have persisted absent biblical support. Second, these lotteries are sometimes expressly authorized by state statute. 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.

2. Problems with a randomization ban

Banning randomization in adjudication has downsides. It cannot be that the theoretically optimal number of occasions for randomization on a merits question, across the millions of cases annually adjudicated in courts and administrative agencies, is zero. In a subset of these cases, however small, randomization will be the theoretically superior option for reasons of equality norms, nagging uncertainty, 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. Similarly, they might hold to initial impressions and avoid working too hard on difficult questions in order to

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108 See Numbers 26:52–56 (King James) (relating God’s instructions to Moses regarding land allocation across tribes).

109 See, e.g., ALA. CODE § 35-6-48; ARIZ. REV. STAT. § 12-1216; HAW. REV. STAT. § 668-7(4).
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 defensible on consequentialist grounds, but they suggest the debatable status of a merits randomization ban.

This raises the question how decision-makers deal with uncertainty that they are willing to accept when randomization is out of the question. A possibility is that legally prohibited grounds of decision creep in. If the rules of the game truly result in more than one possible outcome, 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. As well, lower court judgments are affirmed when the appellate panel is equally divided. 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. On the other hand, states are free to mandate a death sentence when a jury concludes that aggravating and mitigating evidence are in equipoise. Relatively general rules of decision have similar tiebreaking qualities. We might see presumptions of constitutional validity, review restricted to clear error, and other

110 I thank Mark Kelman for suggesting this point.
111 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.”); Harcourt, supra note 48, at 316, 334 (criticizing repeated leaps of faith).
112 But cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 279–90 (1977) (arguing that there is a single correct answer, even in hard cases, for each decision-maker; and counting a conclusion that a case is “tied” as a single correct answer).
114 See, e.g., D.H. Kaye, The Error of Equal Error Rates, 1 Law, Prob. & Risk 3, 6 n. 10 (2002) (“[S]ome supplementary argument, such as avoiding transaction costs or a preference for the status quo, is required to choose between a \( p > 1/2 \) rule and a \( p \geq 1/2 \) rule.”).
115 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).
supplemental decision rules as akin to tiebreakers. These rules are
telling. They indicate deep background commitments. 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.

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.

But at the 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 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. Whatever is the appropriate method of decision in
such situations, it cannot escape difficult judgments. Given such
controversial choices, it remains hard to believe that randomization is
categorically less acceptable as a theoretical matter than all of the
tiebreakers currently in operation.

B. Judicial Oversight

Does judicial opposition to randomization extend further than the
courthouse door? If another institution determines that randomization is
appropriate for its own decisions, will judges intervene? Answering is
difficult, in part because only a small set of past cases are directly relevant.

118 See, e.g., J. Harvie Wilkinson, Of Guns, Abortions, and the Unraveling Rule of Law, 95
V.A. L. REV. (forthcoming 2009) (manuscript at 16) (“When a constitutional question is so
close, . . . the tie for many reasons should go to the side of deference to democratic
processes.”).

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

Nonjudicial officials might not be much more enthusiastic than judges about lotteries, aside from the revenue-generating variety. Even if randomization is seldom used, however, it has been litigated in several different settings. This section attempts to estimate the level of judicial tolerance for nonjudicial government lotteries.

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, 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. Officials are unlikely to suffer public opinion backlash very often for rejecting randomization, and pervasive randomization in decision-making would produce dystopia.

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

Thus one elaboration of equal protection dictates that “like” cases must be treated “alike.” This principle is notoriously vague insofar as it requires additional normative content to identify relevant characteristics for comparison. From one perspective, however, this vagueness is

121 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).


123 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.

124 See Peter Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537, 539–56 (1982) (contending that this version of equality is derivative of substantive-rights arguments); see also Kent Greenawalt, How Empty Is the Idea of Equality?, 83 Colum. L. Rev. 1167, 1168, 1178 (1983) (“In order to decide what persons are relevantly equal or unequal, substantive judgments have to be made about what characteristics count.”); David I. Winston, On Treating Like Cases...
unimportant when it comes to 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 unalike, 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. Perhaps statistical and orthogonal randomization unjustifiably refuse to adjust chances or outcomes according to perceived merit or need or some other metric.\textsuperscript{125}

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 open to debate. Officials usually must exercise some discretion to perform their duties, so its absence cannot be required. However, judicial doctrine may impose a duty of reasoned decision-making or instrumental rationality.\textsuperscript{126} If we focus on the distribution of outcomes, randomization might violate this principle. As a result of randomization, an official will have advantaged pool member $A$ and disadvantaged pool member $B$ without any personalized justification beyond the diktat of an algorithm. This observation does not explain why the relevant timeframe is after distribution rather than before, when chances have been equalized, but the complaint is clear enough.

At times courts have explicitly warned against randomization in constitutional terms. A good illustration comes from due process opinions, where judges have used randomization to indicate the outer boundary of otherwise permissible official discretion. The leading example is probably Justice O’Connor’s discussion of executive clemency.\textsuperscript{127} 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


\textsuperscript{125} This puts aside objections based on who or what is excluded from the pool.


\textsuperscript{127} 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. Justice Stevens dissented. For indication that unfettered official discretion is easier to defend than randomized clemency, see Grennier v. Frank, 453 F.3d 442, 446 (7th Cir. 2006) (illustrating a “wholly arbitrary” decision by reference to a coin flip, but holding that a discretionary parole system does not provide an entitlement on which to ground due process claims).
The same message has been delivered with respect to local zoning decisions, another field in which today’s judges often display restraint. Such statements intimate that randomization exhausts judicial tolerance for official discretion in locations where deference is otherwise likely.

But none of this is enough to establish a judicial policy against randomization outside the courts. The above-noted elaborations of equal protection and due process are insufficiently precise to get much traction on the judicial position. Neither rational choice theorists nor egalitarians have a standing objection to lotteries in social decision-making. Their propriety will depend on factors previously suggested: the strength of any presumption of equality, the degree of uncertainty, the indivisibility of the item to be allocated, behavioral incentives questions, the benefits of experimentation, and the arguments for nonrandom distribution at acceptable decision costs. Nothing in a judge’s offhand disparagement of randomization forecloses these considerations. If decision theorists are correct, then a perfectly well constructed decision process can recommend randomization for a subset of all social decisions. Within that subset, pool members may be equal in fact or equal as far as we know, and the advantages of randomization will outrun the complications.

2. Litigation over randomization

In fact, the most relevant judicial decisions are permissive. When courts have thought through challenges to deliberate randomization in official decision-making, the challenges have failed. Of course, official lotteries may be poorly designed or out of place; 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 for official lotteries. And occasionally judges promote randomization.

Only a handful of judicial opinions confront the validity of random allocation schemes, but existing cases show tolerance. For example, *Schenck v. City of Hudson* upheld a slow-growth ordinance that incorporated a lottery. City officials had capped the number of residential development projects per annum and then used a stratified lottery to allocate development certificates. The Sixth Circuit reasoned that randomization would save administrative costs and prevent uncomfortably...

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129 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).

130 114 F.3d 590 (6th Cir. 1997).

131 See id. at 592–93 & n.4 (describing an 80% set aside for priority projects such as lots with preexisting plat approval, affordable housing, and large-lot developments).
subjective decision-making. Likewise, a state appellate court upheld random selection among civil service applicants. Having received more than 2,000 valid applications for only 20 firefighter positions, city officials decided to randomly select 800 applicants for further competitive testing. The court found this use of randomization to be a fair cost-saving device. In a similar spirit, a district court upheld random selection of ballots as part of a proportional representation plan. Voters would rank all candidates, their ballots would be counted according to a random ordering by polling place, and, as soon as any candidate hit a certain threshold of first-choice votes, second choices would be counted on any subsequent ballots ranking that candidate first. The order of counting could therefore influence results, and yet it was a fairly cheap and tamper-resistant method for a pre-digital age. These cases might show judges fearing corruption, but they display openness to official randomization regardless.

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

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132 See id. at 595 (reversing the grant of a preliminary injunction). The scarcity created by the City’s development cap requires independent justification.
134 See id. at 889 (finding the procedure reasonable and consistent with the City charter). Again, to be a sound policy, the scarcity in firefighter positions must be justified. But we can safely assume that Minneapolis did not need to hire hundreds more firefighters.
136 473 F.2d 1090 (2d Cir. 1973) (Friendly, C.J.).
137 Id. at 1109–10; see also id. at 1109 (observing the usefulness of controlled experiments in medical and social inquiry); Campbell, 310 F. Supp. at 105 (“Chance, if a rational basis exists for its employment, cannot be said to be an irrational factor.”).
138 See Aguayo, 473 F.2d at 1095, 1111–12.
139 Lower courts have themselves instituted experimental procedures that affect litigants. See Kimbrough v. Holliday Inn, 478 F. Supp. 566, 567, 574–75 (D. Pa. 1979) (upholding an arbitration referral experiment adopted in three federal districts against an equal protection
It is possible to see judicial resistance to random sampling in some Fourth Amendment cases, but any opposition is weak. Statistically random invasions 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. Random drug testing cases deliver this message.\(^{140}\) But these 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 asserted that police officers may randomly select which of numerous speeders to stop and ticket, when all cannot feasibly be stopped.\(^{141}\) In fact, a theme in Fourth Amendment cases is discomfort with discretion among beat officers.\(^{142}\) Statistical randomization is a way of constraining discretion within a (chosen) pool, not maximizing it.\(^{143}\)

Our case review would be less impressive were it not for instances of judges reinforcing or encouraging randomization policies. A striking example is \textit{Stodolsky v. Hershey},\(^{144}\) which dealt with the 1969 military draft lottery. The President had ordered “a random selection sequence for induction.”\(^{145}\) When the lottery dealt the plaintiffs relatively low draft numbers, they attacked the process as not truly “random” and claimed that a departure from equal probabilities violated the President’s order and due process requirements. They alleged that lottery numbers representing birthdays were insufficiently mixed together in the urn from which they were drawn, such that later birthdays (e.g., December 31) were more likely to be drawn early than early birthdays (e.g., January 1). In response, a district judge defined randomness for this situation as equal probability, and concluded that the President’s order required it to be “approached as

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\(^{141}\) See \textit{Engquist v. Oregon Dep’t of Agr.}, 128 S.Ct. 2146, 2159 (2008) (Stevens, J., dissenting). The majority opinion struck an even more permissive note, characterizing such decisions as inherently discretionary. \textit{See id.} at 2154.


\(^{143}\) For another set of mixed messages, see the doctrine of “random and unauthorized” deprivations by line officers, which may defeat federal due process claims in favor of state tort or the Federal Tort Claims Act. \textit{See}, e.g., \textit{Hudon v. Palmer}, 468 U.S. 517, 533 (1984); \textit{Lipkin v. SEC}, 468 F. Supp. 2d 614, 617–18 (S.D.N.Y. 2006).

\(^{144}\) \textit{2 Selective Serv. L. Rptr.} 3527, 3528 (W.D. Wis. 1969).

closely as reasonably possible under all the circumstances.”

As a normative matter, it is not clear why statistical randomization should be preferred to the orthogonal randomness of birthdays themselves. The selection process might have been morally acceptable if it picked only December birthdays. But perhaps the plaintiffs’ objection seemed plausible because statistical randomization really was what the President had in mind and procedural regularity was especially important to the public. Regardless, the court showed no antipathy to randomization. Quite the opposite.

In fact, judges occasionally suggest randomization as a solution to controversial allocation problems. One instance involves public housing. The plaintiffs in *Holmes v. New York City Housing Authority* asserted that the City was running a delay-ridden system with no ascertainable method for allocating scarce slots. 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.’”

Likewise, an earlier court of appeals case proposed 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.”

Much more recently, the randomization option arose in affirmative action litigation. Judges opposed to race-based
affirmative action in employment or school admissions episodically point to lotteries as unproblematic solutions.152

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

The last example 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.153 This is not a trend in constitutional litigation. Other courts have denied that random assignment is a matter of litigable constitutional law.154 A refusal to recognize such claims indicates that judges are willing to accept some legislative direction in this field. But whether or not judges feel entitled to fashion a case assignment system, many adjudicative institutions behave consistently with Louisiana’s state courts and randomize the distribution of cases across judges. This requires an explanation, and a defense.

C. The Case Assignment Puzzle

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

Today the process of assigning cases to judges is pervaded with lotteries. This form of randomization takes place in courts across the


153 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”); see also Brown & Lee, supra note 8, at 1099–1103 (attempting to marshal arguments against discretionary case assignment from federal constitutional case law).

nation, and some administrative agencies have followed suit. Lotteries are a key part of the case assignment procedure in many federal district courts, in the federal courts of appeals, in many state trial courts and appellate courts, in federal immigration courts, and elsewhere.\textsuperscript{155} Randomization in this form touches perhaps millions of cases per year.

Offering greater specificity on randomization’s development and impact within case assignment systems is, however, difficult. There seems to be no general historical account of randomization’s rise in so many case assignment protocols, nor an explanation for the holdouts.\textsuperscript{156} Nor is there an easily accessible guide to current case assignment practices in, for example, the federal district courts. Those procedures are curiously decentralized.\textsuperscript{157} Unlike federal jury selection, which is subject to statutory guidance,\textsuperscript{158} judges tend to determine their own case assignment procedures. Federal statutes authorize district courts to divide their business as they see fit,\textsuperscript{159} and the circuit courts to form panels however they choose.\textsuperscript{160} Under this decentralized regime, some courts have not adopted official rules on case assignment. The relatively small Southern District of Alabama has published rules addressing assignment of related and refiled cases, but not ordinary case assignment.\textsuperscript{161} And those courts


\textsuperscript{156} There is accessible information on the development of single-judge case assignments at the trial court level and away from so-called master calendar systems, see, e.g., Richard L. Marcus, Slouching Toward Discretion, 78 NOTRE DAME L. REV. 1561, 1587 (2003); SOLOMON, supra note 9, but that design choice can be made independently of the randomization issue.

\textsuperscript{157} Our picture of case assignment in the federal courts of appeals is clearer thanks to Brown and Lee’s extensive survey. In 2000, they reported that 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.” Brown & Lee, supra note 8, at 1069, 1074.

\textsuperscript{158} See 28 U.S.C. § 1863(a) (requiring random selection of jurors in district courts).

\textsuperscript{159} See id. § 137 (authorizing circuit court judicial councils to make necessary orders when district judges are unable to agree on case assignment rules or orders); see also id. § 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).

\textsuperscript{160} See 28 U.S.C. § 46(b); Western Pac. R. Corp. v. Western Pac. R. Co., 345 U.S. 247, 257–58 (1953) (indicating courts of appeals’ discretion to allocate work). A statutory constraint is imposed on the Federal Circuit, which must rotate judges across panels “to ensure that all of the judges sit on a representative cross section of the cases heard.” 28 U.S.C. § 46(b).

\textsuperscript{161} See S.D. ALA. R. 3.3 (July 11, 2008); 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 District). Random assignment might be less likely in jurisdictions allotted few judges and a large geographic territory. It has been reported that the District of North Dakota assigned its two active duty judges to two different geographic divisions which handled all cases filed in those divisions. See ADVISORY GROUP FOR THE DISTRICT OF NORTH DAKOTA, REPORT OF THE CIVIL JUSTICE REFORM ACT (Sept. 29,
that have formal rules do not necessarily explain in detail how cases and judges are matched and rematched. Somewhat similarly, the Social Security Administration lacks a centralized assignment rule for disability benefits appeals. Assignment mechanics have been devolved to individual hearing offices. Undoubtedly assignment information is available inside each adjudicative system and, at least partly, to local lawyers. But as of today, it appears that no one source effectively aggregates this information for outsiders.

While definitive statements about the particulars of its role cannot yet be made, an example or two can help suggest the influence of randomization. Consider the Southern District of New York. In 2007, it had 28 authorized judgeships and logged over 17,000 case filings. 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 . . . .” 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. An analogue from the administrative law world involves international immigration. The Office of the Chief Immigration Judge has authorized a computerized case assignment system that assigns incoming cases by rotation through lists of available immigration judges in each immigration court.

Still, no existing case assignment system is maximally random across all decision-makers. First of all, a decision-maker might deliberately

163 See JUDICIAL BUSINESS, supra note 161, at 411 (reporting judgeships); id. at 139, 208 (tables C & D) (reporting 1,026 criminal case filings and 16,125 civil case filings).
164 S. & E.D.N.Y. R. 50.2(b) (2008); see id. R. 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); D.D.C. R. 40.3(a) (2008) (similar); N.D. ILL. R. 40.1(a) & 1999 comm. cmt. (2008) (stating that case assignment is by lot except as specifically provided, that cases are randomized only within predefined categories, and that randomization has been part of the process for 50 years).
165 The rules indicate they are for internal management and not the basis for objections by litigants. See S. & E.D.N.Y. R. 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 written local rules).
166 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 . . . .”).
circumvent a formal commitment to randomization. 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. A tactic used in the past was to file multiple complaints involving the same controversy and then voluntarily dismiss the complaints that are assigned to the least sympathetic judges.

Other exceptions to random assignment are officially condoned. Many state court systems permit parties to exercise peremptory strikes on judges initially assigned. In addition, judges might recuse themselves. 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. Moreover, some systems incorporate the possibility of discretionary departures from random assignment. The Southern District of Florida’s rules announce that assignments may be modified “whenever necessary in the interest of justice and expediency.” The Judicial Panel on Multidistrict Litigation, which is itself composed of judges selected by the Chief Justice, determines which district judge will receive transferred actions without any commitment to randomization. Official rules might also enable judges to trade cases. The Southern District of New York’s local rules authorize its chief judge to reassign any case with the consent of the judges involved. And random court of appeals panels are partially checked by nonrandom opinion assignment practices.

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

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


169 See Norwood, supra note 155, at 293 & n. 128 (reporting that 19 states allowed preemoptory strikes but that federal legislation on the matter had failed).


174 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). 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).
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. These boundaries define cohorts of decision-makers who will receive one stream of disputes rather than another. Also worth noting is the norm in the United States of allowing appeals to an authority that is not randomized. Thus the decision of an administrative law judge might be appealed to the unitary head of the relevant department, and state and federal trial court judgments can be appealed to a supreme court that does not sit in panels. Randomization influences case assignment on the front lines of adjudication, while appellate structures offer limited hope of attracting the attention of nonrandomized decision-makers at the back end.

From another perspective, however, the above discussion has greatly understated the role of chance in matching cases to judges. If causal chains in human events are traced back far enough, perhaps an observer can always identify an orthogonally if not statistically random process that helped produce a dispute that ended up before an agency or a court. Everything from outcomes in the gene pool to the concept of moral luck can be associated with lotteries that seriously influence the course of our lives. I do not wish to leave a false impression regarding the degree of human control over adjudication.

But the adjudication systems operating today tend to deliberately inject randomization into disputes at the point of case assignment. However significant are the departures from random assignment, this intentional use of randomization needs a convincing defense. It does come 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. Attempting to appoint multi-talented judges can do only so much. And there is a further complication. Random case

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175 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).


177 See Goodwin, supra note 49, at 24–29 (discussing genetic lotteries and entrenched social structures); John Rawls, A Theory of Justice 63–64 (rev. ed. 1999) (discussing a natural lottery of talents, along with efforts to limit its influence on people’s life chances).


179 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 50 other surveyed offices did not do so).
assignment has to be squared with a long tradition of judges condemning coin flips on merits questions as anathema to justice in the courts.

III. DECISION-MAKERS, DECISIONS, AND RANDOMIZATION

How should we evaluate this combination of positions? One possibility is that the adjudicative system is at war with itself. We should then hope that it retreats from either its practice of randomizing assignments or its aversion to randomizing merits decisions. A second possibility is to deny the conflict. We might see randomized assignment as so qualitatively different from randomized merits decisions that there is no tension created when the former is practiced while the latter is punished. A third possibility is to accept tension in the system and then justify it. We might say that adjudicative institutions are, indeed, effectively randomizing merits decisions in hard cases by randomizing case assignments across a diverse pool of decision-makers, and yet find this result close to ideal. Or we might even deny that the system is approximating ideal merits randomization, but nevertheless find other considerations to support the arrangement and accept the tension. This last possibility is the most complicated to prosecute but, I believe, holds the most promise. I will pursue it with an argument depending heavily on the institutional location of decision and the feasible alternative policies. 180

A. Is the System Effectively Randomizing the Merits?

1. Connecting assignments with outcomes

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

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

180 Much of the analysis below applies to administrative agencies as well as traditional judiciaries, and I will speak to both. By the end of the discussion, however, institutional setting will become sufficiently important that the argument will tend to rest on courts with appointed judges. Likewise, most of the analysis applies to juries as well as judges, but I will refer to judges for the sake of simplicity and to maintain a sharper focus. However, juries might be viewed and even defended as rough substitutes for overt merits randomization in difficult cases that survive dispositive motions.
To put it crudely, decision-makers vary by “competence” and “ideology.” Competence refers to the ability to achieve preferred goals, and ideology to the goals that are preferred by an individual decision-maker. In addition, some decision-makers will be intensely committed to a particular ideology regardless of additional considerations, while others will be open to accommodating the norms of other people or of their institutional position. To be sure, these are simplistic definitions, and articulating the relationships among competence, ideology, ideological intensity, and law is challenging.\textsuperscript{181} The uncontroversial thought is that characteristics of individual decision-makers vary and can influence how they assess the merits of particular cases — especially, but not only, when conventional legal analysis indicates decision-maker discretion.

We also know that cases differ. No institution is sufficiently specialized to face precisely the same questions across the docket and across time. Simplifying again, cases are “hard” or “easy.” Cases might be hard because the historical facts are contested or from an unfamiliar setting, because the appropriate legal norm is unclear, because the relevant consequences of different outcomes are hard to predict, or for another reason.\textsuperscript{182} Perhaps there is an objective sense in which the division between close calls and clear answers can be made, a test detached from individual judgment. But there certainly is a subjective sense in which this division exists. From their personal perspectives, decision-makers will experience varying degrees of difficulty across the questions posed to them.

Occasionally the differences among decision-maker will be irrelevant. A subset of cases might be so difficult by any measure that every available decision-maker would consider them hard, or so simple that everyone would experience them as easy and reach the same result. But the reality is different for every other issue. Less competent decision-makers will probably find a larger fraction of them hard, compared to highly competent decision-makers who might see only easy cases. Hence one group of decision-makers might be able to resolve a given case without much effort, while another group would face extraordinary difficulty in merely understanding the choices to be made. We would expect the error rates of these decision-makers to vary, where an error is simply the inability to achieve a chosen goal.

As for ideology, its relationship to hard and easy cases is less obvious. An intense ideological commitment might convert otherwise hard cases into easy cases. It might eliminate complexities generated by conventional

\textsuperscript{181} For a productive analysis of the links between “law” and “ideology,” see Pauline T. Kim, \textit{Lower Court Discretion}, 82 N.Y.U. L. Rev. 383, 404, 408--17 (2007) (pointing out that preference-driven decisions can be legally authorized through conscious delegation or inevitable vagueness, and that some judges personally prefer to follow legal norms).

\textsuperscript{182} See, e.g., RONALD DWORKIN, LAW’S EMPIRE 254--58 (1986) (discussing efforts to resolve hard cases of interpretation through fit and justification); RICHARD A. POSNER, HOW JUDGES THINK 205–06 (2008) (discussing time constraints and diverse dockets).
legal argument or boundaries of the decision-maker’s role. For the pure ideologue, all of this can be swept away in favor of achieving as much self-defined justice as possible. 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 adjudicators. The answers to some fraction of questions in the pool of cases are probably so clear under the settled norms of legal argument that no one within the institution differs as to their correct resolution, at least after a little effort. An illustration would be a relatively specific rule, such as a filing deadline, that is enforced against a party whose ideological goals otherwise align with the decision-maker.

These stylized categories reflect adjudication in the real world, and it follows that randomized case assignment influences outcomes in some sense. The random element in matching judges to cases means that a class of disputes will be resolved differently depending on which judge the lottery spits out. The probability of a different randomly selected decision-maker producing a different outcome depends on several factors, of course. Extreme variances in ideology, maximum ideological intensity, modest competence levels, nothing but vague standards in substantive law, and an otherwise challenging docket imply that outcomes will be principally determined by case assignment. But random assignment makes no effort to smooth out the differences. And over time, it ensures that very different decision-makers will receive very similar cases. So while measuring the influence of random assignment depends on a comparison to another system, other assignment procedures are unlikely to guarantee such variance; and they do not so tightly link outcomes with randomization.\(^\text{183}\)

The basic point about decision-maker variance is mundane to those who practice law before courts and agencies, where judge-shopping is a real desire. Yet our understanding of adjudicator diversity is deepening with a new wave of empirical studies.\(^\text{184}\) True, the variables for ideology are hardly perfect and measuring competence is not an uncontroversial

\(^{183}\) See infra Part III.C.3 (discussing merit-based and political assignment).

task. 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.

Asylum voting offers a startling example that has received recent attention. One study of immigration judges in New York City shows their asylum grant rates ranging from 90% all the way down to 5%, and filling many gradations in between. Asylum voting on the federal courts of appeals might be less disparate but still markedly different across judges. A study of the Ninth Circuit shows pro-asylum voting rates peaking at over 60% for one judge and falling deep into single-digit percentages for several others. The numbers need not be so dramatic to make the point. On far less variance, we might still charge that the adjudication system’s actual operation is inconsistent with its loud opposition to flipping coins on the merits.

2. On minimizing the significance of assignment

So sometimes a case assignment lottery is, in effect, the method of dispute resolution. But before moving forward, we should acknowledge perspectives on which such consequences might be ignored or minimized. Randomizing judges who are forbidden to randomize merits decisions might be thought categorically different from allowing a judge to flip coins in hard cases. In the alternative, assignment randomization might be placed in the same category as merits randomization, and yet the consequences shrugged off from an ex ante perspective on the system.

The first idea is roughly deontological. Perhaps the consequences for case outcomes from randomizing assignments instead of using another allocation method are irrelevant in light of the reasons why randomized merits decisions can be objectionable. One might believe that overt lotteries to decide merits questions have a uniquely insulting quality, giving rise to an understandable feeling of disrespect. Litigants may have

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186 See Alexander, supra note 155, at 22 (table 2).


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

189 I assume here that a merits randomization ban is possible, ignoring the objection that certain tiebreaking rules in law are essentially orthogonal randomization devices. See supra notes 111–119. For ease of exposition, I have not specified the assignment system at work in the hypothetical merits randomization regime. This should not weaken the arguments being explored here. Note, however, that a random assignment system combined with merits randomization would exacerbate the overuse concerns raised below. See infra Part III.C.1.
a justified expectation that adjudicators will have better grounds for affecting their lives than the dictates of chance. Furthermore, one might believe that such lotteries violate a defensible commitment to reason-giving in adjudication on the merits.\textsuperscript{190} There is no arguing with the results of an honestly conducted lottery. These two beliefs could reinforce each other, with the provision of more reasons averting feelings of disrespect. Flipping coins on the merits implicates these commitments, even if the decision-maker is at a loss for a superior decision rule.\textsuperscript{191}

Random case assignment might sidestep these objections, even if it drives outcomes. The procedure for matching judges to cases can be conceptually separated from the methods used by those judges to resolve disputes. It is not clear precisely how to elaborate this intuition, but it would not be surprising if many people made normative distinctions between forms of randomization in subtly different contexts. Perhaps a robust moral theory would single out judicial dispute resolution as a place where randomization is most likely to be insulting or deficient in rational explanation, and distinguish it from arguably less personal applications such as random sampling for the census, bellwether trials, or even law enforcement auditing. Perhaps people inevitably understand resort to chance in litigation as an inappropriate assertion of power when law’s reasons run out. If merits randomization is qualitatively special, then the mere consequence of assignment randomization on outcomes is not enough to condemn the system. The character and purposes of random assignment are conceivably insulated from their consequences on case outcomes. It could be that assigning cases triggers no obligation of rational explanation and that it has no purpose of disrespecting litigants via inarguable judgments.\textsuperscript{192}

A fully specified argument along these lines might persuade some observers, but its potential is seriously limited. The first limitation is that such deontological distinctions will be unsatisfying to committed consequentialists. Consequentialists cannot ignore the effect on case

\textsuperscript{190} See, e.g., Micah Schwartzman, Judicial Sincerity, 94 VA. L. REV. 987, 1004 (2008) (“When legal and political officials lack sufficient reasons for their decisions, they fail to respect the rational capacities of those subject to their authority.”) (footnote omitted); see also Jody S. Kraus, Legal Determinacy and Legal Justification, 48 WM. & MARY L. REV. 1786 (2007) (arguing that an area of law “can be justified only by identifying moral reasons that fully determine the results of adjudication”).

\textsuperscript{191} These are only some grounds for opposing merits randomization. Another invokes rule of law notions and contends that merits randomization usually ensures that like cases will be treated unalike. \textit{See supra} text accompanying notes 123–129. But this concern seems unrelated to the proposed distinction between the consequences of random assignment and overt merits randomization. Both implicate the rule-of-law objection.

outcomes simply because randomization takes place in another room, or because intent to harm was absent. Even those attracted to double-effect reasoning may consider the proportionality of good and bad consequences in evaluating the morality of a system.\textsuperscript{193}

Moreover, it is quite unclear why case assignment is exempt from norms of reason-giving in adjudication. An exemption would be understandable if decision-makers were interchangeable, but that is not our reality. Even if we assume a basic level of ability shared by all, differences in competence and ideology will make some adjudicators more suited to a given case than others. With so much riding on some case assignments, the demand for reason-giving seems no less strong in this context. In addition, overtly randomizing merits decisions can be a sign of respect rather than insult. It is the mark of humility in decision-making when a conscientious adjudicator openly admits the limits of reason and, considering alternative decision rules, explains that randomization is the rare yet appropriate response. When operationalized in this fashion, the decision to randomize is drenched with reason. It is possible that any offense from randomization expressed by litigants is often feigned, or a product of unwanted outcomes rather than considered moral objection.

Finally, if a respectful purpose is the touchstone of propriety, reviewing the development of random case assignment and non-random merits decisions may leave concerns. That story might not show a public spirited purpose that could insulate random assignment from scrutiny of its consequences.\textsuperscript{194} The system’s designers might have been too self-interested or careless for that. Forbidding merits randomization on public relations grounds would raise similar complications.\textsuperscript{195} Thus deontological arguments for ignoring the influence of random assignment on case outcomes probably have limited value, even for deontologists.

Another way out of the tension can be addressed more briefly. Worries about the consequences of random assignment are reduced if we view adjudicative institutions ex ante. This perspective puts aside distributive concerns and focuses on the ability of people to adjust their behavior in advance of litigation. Insofar as those subject to adjudication have information about the panoply of decision-makers, they can aggregate these data into a composite which will inform them of overall risks and opportunities. Informed observers will be able to predict likely outcomes and plan accordingly, even if decision-makers differ radically.\textsuperscript{196} The case assignment system will provide guidance on the probability of each decision-maker receiving responsibility for the issue of concern. But this is not to imply that there is no basis for protest when cases receive

\textsuperscript{193} See, e.g., Sulmasy, \textit{supra} note 192, at 29.
\textsuperscript{194} See infra Part III.C.2.a.
\textsuperscript{195} See infra Part III.C.1.
different treatment solely because one decision-maker was assigned instead of another. For many of us, the distribution of outcomes is an independent normative concern. And even if it should not be, a case assignment procedure must be chosen. Concluding that you are uninterested in the distributive consequences for litigants does not tell us which of all feasible assignment rules is superior, nor can it resolve the apparent tension within the judicial position on randomization.

Nonetheless, it is worth recounting ways in which the influence of random assignment is already moderated. First, precedent matters. Institutions with a commitment to stare decisis will reduce the influence of decision-maker identity when a decision deemed relevant has already been made. Of course, the character of any such precedent could have been influenced by random assignment. But stare decisis is not the only moderating force. Appeal rights will also have an effect. The pattern in the United States is a right to seek review from non-randomly selected adjudicators.\(^\text{197}\) The preferences of these superiors will likely influence decision-making at lower levels in the hierarchy, depending on how powerful appeal rights are in practice. Finally, the pool of potential adjudicators for any given controversy easily could be more diverse than it is. These officeholders are nothing like a random sample of the adult population, and institutional boundaries indicate a measure of decision-maker specialization. Each of these forces reduces the significance of deliberately random assignment, without eliminating it.

\(B. \text{ Is the System Optimally Randomizing the Merits?}\)

Given that random case assignment will effectively randomize merits decisions with some frequency, is this consequence welcome or unacceptable? For some observers, the answer will be the latter. Those who lean hard against merits randomization have cause for dismay. Most reasons for such opposition carry over to random case assignment. Anti-randomizers might turn to abstract principles such as the rule of law, treating like cases alike, and reasoned decision-making over submission to chance.\(^\text{198}\) At least from a consequentialist perspective, random assignment to a pool of decision-makers with serious differences threatens these principles.

To be clear, the basis for these objections is partly the differences across decision-makers, not random assignment per se. Cases might be assigned according to perceived levels of decision-maker competence without the objection going away. Highly competent decision-makers sometimes differ in their ideologies, and so case assignment would still be related to case outcomes. Thus the above objections might prompt institutional design changes quite apart from case assignment — such as altering the appointments process to minimize decision-maker differences;

\(^{197}\) See supra Part II.C.

\(^{198}\) See supra Part II.B.1 (discussing equal protection and due process principles).
or training, monitoring, and sanctioning decision-makers to achieve greater uniformity in judgment; or further subdividing adjudicative institutions into more specialized tribunals; or revising substantive law toward rules rather than standards. Nevertheless, assignment randomization might be especially troubling to opponents of merits randomization. It virtually guarantees that like cases will be treated unalike over the long run. It lacks any dampening effect of attempting to assign the same kinds of cases to the same subset of more specialized decision-makers, and so it can be especially troubling to anti-randomizers.

A more interesting question is how randomization enthusiasts should react to the reality that, every day, an untold number of merits decisions are being driven by assignment lotteries. Nothing about this fact alone should bother this group. They might be pleased by it, seeing virtues in randomization for a limited domain of difficult merits issues. Randomizing case assignments across a diverse set of decision-makers might appear to be a substitute for randomizing those merits decisions, and perhaps the closest thing to overt merits randomization that proponents can hope for. 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 are where random assignment most likely makes its mark.

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

Equally important, it is the combination of a lottery plus its pool membership that must be justified. There is no reason to believe that the actual pool of adjudicators represents a random distribution in any pertinent sense. Current methods for selecting adjudicators are not well designed to produce, for example, equal probabilities across feasible outcomes on issues that remain debatable after an appropriate investment of effort. The normative theories for randomization canvassed above seem to envision an admirable decision-maker coming to the conclusion that a lottery is the best tool available and then running it with a set of plausible

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199 See, e.g., Ramji-Nogales et al., supra note 188, at 380–89 (regarding immigration judge quality, training, oversight, and norms).

200 This thought is related to John Coons’s argument of twenty years ago: “Randomness may be inevitable, but it must express itself indirectly and even covertly at that point in the process where the human decider is selected.” Coons, supra note 8, at 110.

201 See supra note 111.
outcomes. If we try to compare this ideal randomizer to the effect of random assignment on hard cases, there is an important gap: The set of hard cases susceptible to influence by case assignment will be determined by the competence and ideology of a decidedly non-randomly chosen pool of decision-makers. Objectively identifying the set of hard cases without reference to the existing set of judges might not be possible. Randomization works in conjunction with another variable — the pool of decision-makers — to produce merits outcomes. A simple reference to optimal merits randomization under ideal theory is not enough.

To be fair, those willing to assess the system over more than one generation are less likely to view it as a controversially weighted lottery. Long-term cycles in decision-maker attributes might bring the system closer to idealized merits randomization. A crude measure of judicial ideology suggests oscillation in the federal courts over the years, even if the courts are rarely in ideological equipoise at any one moment. Yet complications remain. One is the morally controversial position that generations ought to be ignored. Some observers will reasonably deny that benefits accruing to people like them in the distant future is on par with benefits accruing to them in the present. Another question is the significance of stare decisis and other ways in which past decisions become privileged. If these forces are influential, then the sequence of decisions will matter.

Finally, the suggested trans-generational timeframe accounts for evolving variance in ideology, but decision-makers differ in competence levels as well. Randomizing case assignment tends to increase errors on the merits compared to a system that pays attention to individual decision-maker skills. It means that some hard cases will be handled by the least equipped decision-maker available, and some cases that would be easy for one set of adjudicators will be resolved by those who find them exceedingly difficult. This is nothing like identifying a justifiable domain for randomization on the merits according to a 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 merits randomization. Institutions that randomize case assignments are working off a peculiar pool with distance from the domain for randomization that ideal theory would recommend. Both randomization enthusiasts and randomization skeptics have reasons to regret the current system’s apparent

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202 See Jonathan P. Kastellec, Partisan Composition and Voting on the U.S. Courts of Appeals Over Time 28 (June 18, 2008) (figure 1) (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).

203 Cf. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 6 THE WORKS OF THOMAS JEFFERSON 3, 8–9 (Paul L. Ford ed., 1904) (“[B]y the law of nature, one generation is to another as one independent nation to another.”).
C. Can the Arrangement Be Defended?

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

1. Forbidding merits randomization

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

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

The alternative is a more flexible standard. Indeed, a somewhat vague set of recommendations for randomization’s proper domain was what Part I offered. Perhaps there exist subclasses of cases in which randomization is plainly appropriate; perhaps this category extends beyond land partition allotments. For the time being, however, it is difficult to restate randomization’s optimal domain any more specifically than a restatement of negligence’s perfected scope, or the exact location at which liability rules should give way to property rules, or even when rules become worse than standards. Consider, for example, lottery recommendations that rest on uncertainty. Before turning to randomization as a tiebreaker, decision-makers must be adequately certain about their uncertainty. And

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204 See supra text accompanying notes 89–91.
205 See supra text accompanying note 107.
206 See supra text accompanying note 63.
they must be prepared to conclude that the decision they face is not worth additional effort, or that relevant information cannot be obtained at a tolerable cost. This is not a self-executing instruction.

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

For those lacking confidence in the relevant decision-makers, supporting a merits-randomization ban is understandable. One concern with discretion is that sloppy adjudicators might over-rely on lotteries. Randomization’s optimal domain is challenging to specify, but lotteries are remarkably easy to run. For those who do not care enough about the quality of their judgments, merits randomization is a low 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. 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, and perhaps in way that comforts the political community that reasoned answers are forthcoming. Finally, it could well be that the justifiable domain for merits randomization is quite small. Perhaps actual situations of indeterminacy after appropriate effort are sufficiently rare such that wrestling with a merits randomization standard is not worth it. Better to forbid the practice and be done with it.

A randomization ban also might have desirable incentive effects, apart from public acceptance. Perhaps decision-makers will work harder to achieve reasonable degrees of certainty in challenging cases. And perhaps they will more often aspire to 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. But there is something to the aspirational view of the ban.

Reintroducing the issue of public relations, however, complicates the matter. Favoring sanctions for fellow judges who randomize is not an

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207 See DWORKIN, supra note 112, at 286–87 (suggesting rarity in developed systems).
entirely autonomous preference. Judges are concerned with negative perceptions generated by coin-flipping colleagues. Public opposition to merits randomization might never abate given limited information about judicial and administrative operations. The public seems to see randomization by judges as a sign of arrogance, incompetence, or trivialization. In the prevailing decision environment, merits randomization is likely underused and almost certainly not overused.

This take on public opinion is too static in one respect. A scenario in which merits randomization can take place on anything like a regular basis presupposes an environment in which the public response is not to shut down those operations. The alternative world must be more accepting of merits randomization. And additional leniency in the general public suggests added risk of over-use. But the deeper problem for pro-randomizers is getting merits randomization jump started. Were merits randomization ever formally authorized by the powers that be, it might not be used. Reputation-conscious judges would probably never draw lots, if for no other reason than the resulting public perceptions in the absence of better information about judicial effort and good faith. Non-randomizing judges would look like good types compared to their conscientious yet randomizing colleagues, and the equilibrium would be little or no overt merits randomization in adjudication — just as it is today.

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 popular resistance to randomization, and that the existing ban is pathological. 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. Moreover, the justified occasions for randomization might well be few, and the likelihood of judges exercising discretion to randomize is fairly low. This is enough to assess the merits randomization ban as understandable and resilient, even if not plainly best for the long term good.

2. Justifying assignment randomization

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, especially if a merits randomization ban is sound policy. A sensible evaluation of random assignment must be comparative, however, judging it in relation to other options such as merit-based assignment and political assignment according to party preferences. And this comparison.

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208 See supra notes 86–88 and accompanying text.
209 See supra Part II.A.1 (relying on disciplinary authorities’ perceptions of public opinion).
210 See supra Part II.A.2 (vetting the ban’s weaknesses).
ought to take place with careful attention to other institutional details.

a. An internal account

Comfort might be found in an explanation for randomization’s spread into case assignment. Understanding the actual motivations for system’s development might inspire persuasive normative arguments for its retention or expansion.

The hitch is that we lack a comprehensive history of case assignment systems in courts or agencies. Once assignment systems are seen as crucial to sound institutional design, perhaps illuminating historical accounts will emerge. But this has yet to occur on a large scale, and decentralized institutional design makes a comprehensive account difficult. In this space, I can offer thoughts about the system’s development that are a bit deeper than speculation — along with an argument for why understanding the history of case assignment will not exhaust the relevant considerations, anyway.\(^{211}\)

Accounting for random assignment’s emergence in adjudicative institutions 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 trial judge, for example, there can be no case assignment issue for the judge face. Instead case assignment would effectively take place through a combination of jurisdictional and structural boundaries, along with the appointments process for judges.\(^{212}\)

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 the resulting internal political problem is easy to see, especially if the appointments process produces significant differences across judges at any one time. Given multiple judges, growing dockets, and delegation to a group of officials believing themselves entitled to roughly equal status, randomization must have seemed viable against other options. A salient alternative would be to delegate discretionary authority to a chief judge, other administrative officer, or a committee of agents with authority to make judgments on which cases were most appropriate for which judges. But this option would fade with any distrust and disagreement among judges. Agents might use their assignment power to steer cases away from

\(^{211}\) The comments below will fit better with judicial case assignment than with the process in administrative agencies, but there is overlap.

\(^{212}\) See, e.g., Judiciary Act of 1789, 1 Stat. 73, § 3 (Sept. 24, 1789) (authorizing one district judge per district).
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 variety and generalist judgeships among those who found their way to the office. 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 the extreme, and to the extent a party has power over venue, choosing the location for dispute resolution is tantamount to selecting a particular decision-maker.

These internal rationales for randomization — distrust of authority, feelings of equal status, preference for a diverse docket, thwarting strategic behavior by litigants — have been suggested in official and unofficial sources. They resemble the justifications for randomization explored in Part I. But this account of the adoption of random case assignment is, in one regard, quite narrow. Aside from a judge shopping concern, the arguments are steeped in internal management and lack much connection with the interests of the larger public.

This is not to say that judges have no such concern, or that they cannot perceive a relationship between self-engineered institutional design and effects beyond judicial personnel. It does suggest that outsiders to

213 A selection effect from a non-random case assignment process makes this factor less likely to have been influential. At the margin, one could expect a pool of people inclined toward specialization 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 now expect the pool of aspiring judges to slant toward generalism. Random case assignment makes it more difficult to attract experts dedicated to a relatively narrow subject matter, and easier to attract those who feel that their expertise is “judging” more generally.


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. 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 makes an argument for random assignment from the perspective of outsiders. The argument has a simple structure at a general level; it relies on ideas familiar from Part I. Although doubts about the correct answer will persist, we can identify the critical issues, assumptions, and trade-offs.

Assuming the perspective of parties to adjudication and the public at large is an occasion for recharacterizing the issue. Those managing the workload of adjudicative institutions often refer to their procedures for “assignment of cases,” and unsurprisingly so. These insiders are solving division of labor problems by assigning work (cases) to workers (judges). But these workload allocations simultaneously assign judges to cases. And this creates a relationship between those with the responsibility of adjudicating and those who require, or must endure, the service. When inspecting the manner in which 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.

Because adjudicative institutions are often designed such that disputants cannot share all of the available adjudicators, judge assignment lotteries are facially plausible. Not every litigant in the Southern District of New York can share the attention of all judges assigned to that jurisdiction without serious waste. As we have seen, lotteries offer a mechanism for sharing resources that are otherwise indivisible. In addition, first-in-time rules will not solve the case allocation problem. With adverse parties to each case, the system has to confront divergent party preferences regarding the appropriate decision-maker. And of course auctioning judges is dangerous. Outcomes would

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217 Supreme courts and some high-ranking agency officials are an exception, and their nominally broad oversight tends to come with a limited attention span.
be even more related to party wealth and, if judges received the high bids, decision-maker incentives would be influenced in harmful ways.  

But randomization is not the only option. Merit-based assignment is a possibility. The system might attempt to match adjudicator abilities with case characteristics. This is akin to discretionary assignment procedures that were more popular with judges in the past. A second possibility is “political” assignment. That is, judges could be assigned with regard to aggregated party preferences and with less threat than an auction. Selection of arbitrators often includes party preferences, if not by agreement on a particular arbitrator then by a procedure responsive to party objections and desires. In a similar spirit but in more moderate fashion, many states now allow litigants peremptory strikes on the first judge assigned to their case. This makes judge selection a bit more like jury selection. While a political assignment system might operate in conjunction with randomization instead of replacing it, political assignment would allow those directly affected by adjudication to limit the pool of judges who might control their case.

With at least one viable competitor to lotteries, there are two remaining justifications for assignment randomization. They hold to the judge-assignment perspective and they track the two general occasions for randomization identified above: sensible allocation of indivisible resources across apparently equal claims, and reliable experimentation on judicial behavior. To be sure, both justifications suffer shortcomings. But together they offer a formidable argument for assignment randomization in addition to judicial convenience, and even 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. Realistically, however, judges and administrative officials will always vary in competence, in ideology, and in the likelihood that either will

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219 See SOLOMON, supra note 9, at 8, 13, 28–29.

220 American Arbitration Association rules state that, in the absence of party agreement, the parties will each strike and rank order potential arbitrators from a list provided by the Association. See AMERICAN ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES R-11(b) (2007); Smith v. American Arbitration Ass’n, 233 F.3d 502, 504 (7th Cir. 2000) (describing such a process); see also AMERICAN BAR ASS’N, ELKOURI & ELKOURI: HOW ARBITRATION WORKS 185–86 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997) (observing that labor-management arbitration agreements often provide that each party will appoint their preferred arbitrator and then those panel members will agree on a neutral chair); Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, Attorneys as Arbitrators 6–7 (Nov. 2008) (unpublished manuscript) (describing National Association of Securities Dealers arbitration involving lists generated by rotation and party preferences).

221 See Norwood, supra note 155, at 293 & n. 128.

222 Lists of potential judges or the first proposed judge could be selected by lottery.
influence their decisions for some set of cases. Given an irreducible degree of variance among decision-makers on the dimensions of competence and ideology, random allocation of judges to parties and their cases is a plausible response.

The argument is simplest for ideological variance. A constellation of forces produce an ideological composition among decision-makers within a particular institution. In favor of tolerating or even promoting ideological diversity is a list of arguments usually connected with the appointments process. One might conclude that such diversity properly reflects democratic forces and 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. 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 probability of receiving any single decision-maker. Litigants might prefer a different mixture of judges in the pool, but that is an argument at least equally well directed at the appointments process, probably more so. 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 lotteries on judges. This class might well reach the same conclusion if they were able to deliberate together over the matter. Random assignment maintains any behavioral incentives flowing from the overall ideological composition of an adjudicative institution, while offering a method for distributing decision-maker ideology for those controversies that do find their way into the given dispute resolution system. Random assignment tends to follow choices 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 of assignment randomization.

The application to variance in decision-maker competence is less apparent. We have seen that randomization tends to make competence deficits worse than they might otherwise be. Both merit-based and political case assignment systems at least attempt to match decision-maker attributes with case characteristics or party preferences. Unconstrained randomization does not. 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)

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223 I am assuming that incompetence is not occasionally desirable as a way of checking problematic ideological influences — that relatively less competent ideologues are not better than more competent ideologues.
may not be an adequate response. 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 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 wholly incompatible with random assignment. A compromise could be fashioned whereby officials judge which decision-makers are most suited to which case types, and, to the extent that multiple decision-makers fall into a category, they could be allocated randomly. This stratified lottery solution is suited to adjudicative institutions with many decision-makers and large dockets. In those environments, the decision

\[224\] The Patent and Trademark Office is an example of intra-institution specialization. Patent applications are assigned to specialized technology units and then to individual examiners. See U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE ch. 903.08 (2007).
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.\footnote{225}

There is a broader response, however. Random assignment helps solve for uncertainty over what makes a good decision-maker. It obviates the need to build an unavoidably controversial theory of adjudicator excellence into the case assignment stage. Whatever qualities a good judge or administrative decision-maker should have, random case assignment will distribute those qualities roughly equally across disputants. Of course society cannot do without normative models of good and bad decision-maker behavior. At a minimum, such models ought to inform the appointments process and should match the incentives for selection into the pool of potential decision-makers. But if there is value in adjudicative institutions having some control over case assignment systems, it seems 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 might be a way that judges retain control over case assignment in the shadow of legislative intervention.

(2) \textit{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, even for the purpose of matching decision-maker skills to congenial case types. Indeed the experimentation justification indicates random assignment should be not only maintained but spread further.

The basic argument is straightforward: we are still learning about the determinants of judicial behavior and random assignment is one of the best ways to accelerate that learning. 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 outcomes 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

\footnote{225 Similar remarks apply to decision-makers trading cases among themselves, although ideological diversity will probably interfere with trades. Judges with very different worldviews must be less likely to trade with each other when mutually valued outcomes are at stake. On the other hand, intensely ideological judges of the same stripe might trade to maximize their competence with different case types. This could amplify the influence of ideology on outcomes over the baseline of random assignment without trading.}
new drugs. \textsuperscript{226}

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 make themselves guinea pigs and to generate information about their behavior for outsiders. But a natural experiment can be as valuable as a designed experiment. The resulting information about judges can be used to predict future behavior and plan accordingly, to inform the appointments process regarding the likely consequences of choosing one decision-maker over another, and even to make suggestions about the case assignment process itself or the jurisdictional boundaries of adjudicative institutions.

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

Without doubt, the information available 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 institution in question will probably provide better insight than a coefficient indicating how clumps of “Ds” and “Rs” tend to vote in some case category. There is some risk that the new wave of empirical legal studies is an ill-fated fad — “a scientific enterprise that seems to return so little from so much,” as Lon Fuller put it during an earlier surge of legal empiricism. \textsuperscript{227}

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. \textsuperscript{228} Pressing harder for randomization

\textsuperscript{226} See, e.g., Marks, supra note 45, at 132–63.


\textsuperscript{228} In particular, partisan balancing for decision-maker panels. This has been suggested for the federal courts of appeals. See supra note 199. It might not devastate empirical conclusions based on the assumption of random assignment; but partisan balancing would tend to reduce their force. In any event, this suggestion is not exportable to trial courts and other institutions that assign one decision-maker to each case. Moreover, we must be convinced that panels should be constructed to minimize ideological variance in voting, rather than to permit a wider range of outcomes for the purposes of experimentation and debate. And ideological
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.229

For instance, there is little remaining doubt that the policy preferences of at least some judges influence outcomes in at least some cases, but there is much debate over the magnitude of that influence. It has to be 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.230 Few studies seem to deliver decision-maker by decision-maker information,231 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. Their discretion can be exercised poorly, skewed by self-interest, and unsustainable when judges feel equally entitled to cases. 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. It therefore shares with random assignment the aspiration of minimizing variance across judges will not necessarily affect behavior outside the courtroom differently from zero variance. Potential litigants might adjust either way.

See generally Samaha, supra note 196.


For two counter-examples in the immigration field, see supra text accompanying notes 186–187.
adjudicator discretion and its risks. A potential difference with randomization is that political assignment might better serve the general public interest. Political assignment might address the problem of diversity in decision-maker competence, which random assignment tends to exacerbate. And it likewise creates public information about decision-maker characteristics, albeit in a different way.

Although selfish parties presumably most prefer victory regardless of adjudicator competence, a political assignment system would be designed to equalize the influence of all sides to a dispute on the decision-maker’s identity. It should cancel out those desires for victory while retaining the potential to steer cases toward those judges best able to handle them. Judges who display intense ideological commitments in a given field should be less likely to receive such cases, and, to the extent that parties cannot influence the decision-maker’s ideology, they might choose to maximize expected decision-maker efficiency as a second-best. At least one party is likely to prefer competence to incompetence. Furthermore, litigant migration to one judge 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 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.232

Although these difficulties might not be crippling, broader questions must be confronted. The first regards the true public value of litigant

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232 See Klerman, supra note 218, at 1220 (studying English history).
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. The issue is the distance between the aggregated preferences of actual litigants and the resulting quality of law and precedent for everyone else. It is more than possible that the interests of actual litigants are unhappily skewed compared to others influenced by law. Perhaps one party to every dispute will exert whatever influence they have to obtain the least legally competent and most ideological intense decision-maker. This would dampen the public value of information on judge popularity while it drove down the average quality of judging. Litigant migration, when all parties have a hand on the steering wheel, might well systematically arrive at judicial mediocrity. This is a contestable 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 are apparently satisfied with a generally random assignment system, and they could quickly turn skeptical of any serious shift to litigant power or judicial specialization. Matching judges to litigants is something like The Dating Game, where matches were a product of not only player choices but also player screening that took place pre-game and off-screen. A

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

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

Random assignment provides one of the most reliable ways to learn the determinants of judicial behavior. That possibility for insight is already limited by a variety of jurisdictional boundaries. Steering cases to popular judges would further restrict the natural experiment that random assignment provides, similar to the restrictions imposed by a discretionary merit-based assignment process. If the resulting understandings were only useful to potential litigants and their lawyers, random assignment would be a less attractive option. Those classes have alternative and sometimes reliable sources of information. But their 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 suppositions about how potential judges will perform as actual judges in the future. The characteristics of the most popular judges among parties are not what the appointments process does or should value.

This brings us to an uncomfortable reality associated with randomization as a method of experimentation. 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. This is not a reason for entrenching randomization. It is, instead, a recommendation that alternative reforms be seriously considered before a reliable source of information is discarded. For the topic at hand, the operation of adjudicative institutions, there are multiple dimensions of design choices that can achieve similar
results. We should be relatively sure that those alternatives are unacceptable before rolling back random assignment and the growing base of knowledge that it is coincidentally helping to create.

CONCLUSION

With a better understanding of how randomization functions comes a better understanding of when it is beneficial. I have outlined overlapping justifications for the deliberate use of statistically or orthogonally randomized processes. These justifications do not reduce to a simple 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. This is, to some extent, an ineffectual distinction. Yet the vagaries of randomization’s optimal domain make a case for the prohibition, while the advantages in allocation and experimentation provide reasons for encouraging randomization at the point of assignment. More could be said about these policies. 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.