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DRAWING LESSONS FROM THE U.K. CONSTITUTIONAL REFORM ACT OF 2005

*Terence J. Lau*φ*

In this CITY SQUARE dialogue, Professor Judith Maute provided the initial spark in her important 2007 article on reforms to judicial selection in the United Kingdom.¹ In her article, Professor Maute outlined the breathtaking and daring changes implemented in the U.K. that upended centuries of tradition to modernize and strengthen public confidence in the judiciary. Most significant among these changes were the creation of a Supreme Court and dramatically moving the process of becoming a judge away from a secretive appointment to a professional Judicial Appointments Commission.² The reforms eschew direct affirmative action, but place an explicit value on diversity among judges.³ At the time, Professor Maute spoke admiringly of the reforms and suggested some of them might work well in the United States:

“To restore public confidence in the courts, people must believe that judges exercise legitimate authority, undistorted by personal or partisan preferences. . . . We could learn much from Britain’s modernized appointive system that aims to be open, transparent, accountable, and more diverse.”⁴

In reply, Executive Director of the Indiana Pro Bono Commission and former Supreme Court Fellow, Monica Fennell, questioned the

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1. See Judith L. Maute, *English Reforms to Judicial Selection: Comparative Lessons for American States?*, 34 FORDHAM URB. L.J. 387 (2007) (analyzing provisions of the new judicial selection system adopted in the Constitutional Reform Act of 2005 in Britain as intending to boost transparency, accountability and diversity among judges).

2. See *id.* at 390.

3. See *id.* at 411.

4. *Id.* at 423.

assumption that political, professional, and social connections in judicial selection affect judicial outcomes.⁵ She further questions the specifics of how changes in the United Kingdom can increase judicial diversity in the United States, assuming such an outcome is desired.⁶ Professor Maute acknowledges the importance of the questions raised by Ms. Fennell. She points out that in many ways, the lofty ideals in the 2007 reforms have failed to materialize and that it is probably too soon for the United States to consider adopting similar reforms.⁷ On diversity, Professor Maute yields little on its importance. Instead, she argues that “while there is continued utility in keeping track of diversity in numbers, it would be unfortunate to expect that each person bearing physical attributes suggesting diversity is a fungible stand-in for the perspectives and life experiences of that group.”⁸ Although Professor Maute agrees that nose-counts are not helpful, she does believe that diversity assures “intellectual, cultural, and affiliational group sensitivity or empathy to ensure a wider exchange of legal perspectives improving the quality of justice in ways that reflect society as a whole.”⁹ Simply because a judge is female, for example, does not mean she will advance feminist law.¹⁰

In his reply to Professor Maute and Ms. Fennell, Professor Jeffrey Jackson makes two important points, one substantive and one structural. Structurally, Professor Jackson argues that the commission-based system used in many states to make judicial appointments is fundamentally sound, including the use of lawyers on such commissions.¹¹ He believes, however, that adopting some reforms from the U.K. might be helpful in the United States. These reforms include reducing the number of lawyers on a nominating committee (to reduce charges of elitism) and selecting lay members

5. Monica A. Fennell, *Beyond the City Square: Fishing in Wider Pools Without Soundings*, 39 FORDHAM URB. L.J. CITY SQUARE 11 (2012), <http://urbanlawjournal.com/?p=402>.

6. *Id.*

7. Judith L. Maute, *Against Overreliance on Nose-Counts*, 39 FORDHAM URB. L.J. CITY SQUARE 81 (2012), <http://urbanlawjournal.com/?p=586>.

8. *Id.* at 88.

9. *Id.* at 89.

10. See Rosalind Dixon, *Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination*, 21 YALE J.L. & FEMINISM 297, 338 (2010) (urging feminists to “reconsider the priority they give to symbolic concerns on the one hand and substantive gender justice on the other”).

11. Jeffrey D. Jackson, *Fishing Lessons Across the Atlantic: Where is the Spot Between “Elitism” and Politics?*, 40 FORDHAM URB. L.J. CITY SQUARE 57, 59-64 (2013), <http://urbanlawjournal.com/fishing-lessons/>.

through selection panels (to reduce the perception that non-lawyer members of commissions are political pawns of the appointing governor).¹²

Substantively, Professor Jackson asks a very important question: why is diversity important in judges? He argues that its importance is part of judicial legitimacy, and that the principle of “representativeness” promotes a better vision of justice.¹³ In making this argument, however, he also points out that judges “do not spend the majority of their time making pronouncements regarding the law on controversial subjects.”¹⁴ Since much of a judge’s work is uncontroversial, when is diversity important?

The question of when diversity among judges becomes important is what my reply will pick up on. As Professor Maute points out, diversity, along with transparency and accountability, is part of the three-goal approach in the British reforms to their judiciary.¹⁵ I do not mean to shortchange the important issues of transparency and accountability by focusing on diversity. As Professor Maute illustrates, however, the British are moving from a centuries-old system of appointments through the Lord Chancellor to a newly independent Supreme Court and sharply curtailed appointment power, while the experience in the United States is much different.¹⁶ While the federal judiciary process of appointment by the President in the U.S. can seem mysterious, in reality the relative openness of political dialogue, as well as intense public scrutiny and media reporting, means that these appointments are not made in the “smoke-filled rooms of gentlemen’s clubs or in the Temple corridors”¹⁷ as they were in the United Kingdom until 2007. Once an individual is nominated, of course, transparency comes into the fore as the confirmation process gears up with multiple parties scrutinizing a candidate’s suitability for the bench. Background checks are completed, financial disclosure forms filed, and the American Bar Association conducts an exhaustive review of qualifications that includes a review of the candidate’s writings. Additionally, dozens of interviews are held with lawyers and judges who know the nominee, where the candidates are rated as “not qualified,” “qualified,” or

12. *Id.* at 64-65.

13. *Id.* at 58.

14. *Id.* at 61.

15. Maute, *supra* note 1, at 404.

16. Maute, *supra* note 7, at 82-84.

17. Maute, *supra* note 1, at 396.

“well qualified.”¹⁸ The importance of judicial independence means that “accountability” is not generally compatible with our tradition (setting aside ill-conceived initiatives such as South Dakota’s “Jail 4 Judges” voter referendum or Arizona’s proposed law to remove three state judges for unpopular decisions),¹⁹ but the process of impeachment does provide for the removal of corrupt judges.

Professor Jackson points out that judging can be mundane, and that therefore diversity may be less important than in other sectors of public office.²⁰ He is right, but judges are not mindless robots. If they were, software engineers clever enough to design a computer with enough artificial intelligence to win a round of *Jeopardy* could replace judges with machines. Instead, we expect judges to judge, and although their subject matter may not always be controversial, reasonable judges will disagree even on the mundane. Indeed, the creation of the United States Sentencing Commission was an explicit recognition of this fact, and a Congressional attempt to ameliorate its undesirable effects on criminal sentencing.²¹ Even so, scholarship in recent years suggests statistically relevant links between a judge’s appointing President and his or her criminal sentencing ideology.²² A judge’s background, then, necessarily impacts her judgment.²³ Judicial diversity is desirable because it brings a “gradient of views and experiences.”²⁴ For litigants, having a judiciary that fairly represents a country as large and diverse as the United States becomes a linchpin of legitimacy and faith in the legal system.

Background, however, is much more than a numerical nose-count or immutable characteristic. Undoubtedly, race, gender, religion, and sexual identity play a critical role in developing one’s ideology.

18. This process has been at times embraced and ignored by nominating Presidents. Most recently, it has caused President Obama some chagrin because the American Bar Association gave many of his nominees, mainly female or minority, a “Not Qualified” rating. See Charlie Savage, *Ratings Shrink President’s List for Judgeships*, N.Y. TIMES, Nov. 22, 2011, at A1.

19. Julie Delcour, *The ‘Incursion’*, TULSA WORLD, Apr. 11, 2010, at G6.

20. Jackson, *supra* note 11, at 61-62.

21. OFFICE OF LEGISLATIVE AND PUBLIC AFFAIRS, *An Overview of the United States Sentencing Commission*, available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

22. See, e.g., Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715 (2008).

23. For an exposition on how race and gender impact judicial legitimacy, see generally Kevin R. Johnson & Luis Fuentes-Rohwer, *A Principled Approach to the Quest for Racial Diversity on the Judiciary*, 10 MICH. J. RACE & L. 5 (2004).

24. Maute, *supra* note 7, at 89.

However, as legions of liberals and conservatives who place their faith on certain judges based on those characteristics can attest, these are not necessarily predictive of a judge's outcome in a particular case.²⁵ African-Americans may want Justice Clarence Thomas to vote a certain way in cases involving racial bias, while women may want Justice Elena Kagan to vote a certain way in a case involving women, while Hispanics may want Justice Sonya Sotomayor to vote a certain way in cases involving immigration. These desires quickly run into a brick wall of reality when it becomes apparent that immutable characteristics alone cannot predict outcome. So, although Ms. Fennell correctly argues that numerical nose-counts are not helpful in lending diversity to the bench, I agree with Professor Jackson that representativeness is important.

In terms of demographic representativeness, the U.S. judiciary is doing better than the U.K. judiciary, but there is room for improvement. While 18% of Britain's judges are women,²⁶ 30% of U.S. federal judges are women.²⁷ That number is disappointing given that 47.2% of the 2009-2010 J.D. class was comprised of women,²⁸ but looks more encouraging when compared to the 31.5% of all lawyers who were female in 2010.²⁹ Racial diversity paints a better picture. Although federal judges in the United States remain overwhelmingly white,³⁰ 23% of U.S. active federal judges are minorities (187 are African-American, 31 are Asian-American, and 115 are Hispanic),³¹ almost mirroring the number of minority J.D. students at 22.4% for

25. See Thomas R. Marshall, *Symbolic Versus Policy Representation on the U.S. Supreme Court*, 55 J. Pol. 140, 140 (1993) ("Evidence from 107 rulings during the Warren, Burger, and Rehnquist Courts indicates that most symbolic appointees to the Courts do not vote for their own group's attitudes on specific Court cases any more often than do their remaining brethren.").

26. Maute, *supra* note 1, at 407.

27. *Biographical Directory of Federal Judges*, FEDERAL JUDICIAL CENTER, available at http://www.fjc.gov/history/home.nsf/page/research_categories.html (last visited Oct. 4, 2013) [hereinafter *Directory*].

28. American Bar Association, *First Year and Total J.D. Enrollment by Gender 1947 - 2010*, available at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/council_reports_and_resolutions/1947_2010_enrollment_by_gender.pdf.

29. Catalyst, *Women in Law in the U.S.* (Mar. 11, 2013), <http://www.catalyst.org/knowledge/women-law-us>.

30. See generally Barbara L. Graham, *Toward an Understanding of Judicial Diversity in American Courts*, 10 MICH. J. RACE & L. 153 (2004).

31. *Directory*, *supra* note 27.

the academic year 2009 - 2010.³² The figure compares very favorably to Britain's dismal 3.8% figure,³³ and even compares favorably to the 38.5% minority population in the United States.³⁴

Professor Jackson believes that we need to look beyond these demographics. I will take it a step further – I believe that representativeness creates judges with different life experiences, and it is life experiences that lead to good judging. Diversity of life experiences can bring tremendous benefits to the judiciary, including better decisions, more legitimacy, and greater impartiality.³⁵

As I see it, life experiences involve much more than one's gender, race, religion, or sexual identity. Numerous other factors, such as where one grew up, went to school, discovered their own moral compass, and found their calling in family and professional life, all matter as well. Class, income, status, and family all play significant roles. These life experiences are not static, either. They change with each passing day, just as judges mature even while they are on the bench.³⁶

It is this diversity of life experience that the U.K. reforms ultimately seek to achieve, and I believe it is a laudable goal. I also believe it is here that these reforms are ultimately instructive for the United States. So much of modern judicial politics (the term itself is troubling) is poisoned by a political atmosphere that poses a new threat to the U.S. judiciary: over-politicization, which in turn leads to a decline in judicial legitimacy and a crisis in the administration of justice.³⁷ The solution, I suggest, is to learn from the British how to professionalize the process of judicial appointments at lower courts, while maintaining the constitutional scheme at the Supreme Court.³⁸

32. American Bar Association, *First Year J.D. and Total J.D. Minority Enrollment for 1971 - 2012*, available at http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_8.pdf.

33. Maute, *supra* note 1, at 407.

34. *State & County QuickFacts*, U.S. CENSUS BUREAU, available at <http://quickfacts.census.gov/qfd/states/00000.html>.

35. See Johnson & Fuentes-Rohwer, *supra* note 23, at 24.

36. See generally Lee Epstein et al., *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) (arguing that ideological drift is the rule, not the exception, among Supreme Court Justices).

37. See, e.g., Jerry Markon & Shailagh Murray, *Federal Judicial Vacancies Reaching Crisis Point*, WASH. POST, Feb. 8, 2011, at A1.

38. The British do not claim to have perfected this process. Interestingly, there is increasing support in Great Britain for adding greater public voice to the judicial appointment commission scheme by introducing open hearings in Parliament, much like confirmation hearings in the United States. See Owen Bowcott, *UK Supreme Court's Only Female Judge Calls for more Diversity in Appointments*, THE

Let us accept first that the Supreme Court is a political institution, regardless of whether the Founders intended it to be or not. It is certainly perceived as political by the public – in one national poll, 60% of respondents believed that Supreme Court justices have their own political agendas, while just 23% believe they remain impartial.³⁹ John Marshall’s ink was barely drying on *Marbury v. Madison* when the Court first injected itself into national politics by declaring itself the final arbiter of the validity of laws.⁴⁰ From there, the often-told tale of seminal cases that led the country to fight a civil war, then to desegregate, and then to regulate abortion and marital relations, and even to settle national Presidential elections, is well-known. Most recently, we have seen the Court inject itself into highly controversial cases involving Congressional redistricting, health care reform, and immigration.⁴¹ It is hardly a surprise that the appointment process for Justices is political, with the high-drama specter of confirmation hearings that then-Senator Joe Biden once called a kabuki dance,⁴² or that the Justices themselves are politically inclined. The degree to which Supreme Court nominees share the political values of their nominating Presidents is higher now than it was three decades ago, and ideological compatibility is the most important criteria in Senate confirmation of those nominees.⁴³ It is also hardly a surprise that when Justices rule the “wrong” way, such as conservatives would call the failure to overrule *Roe v. Wade* even after decades of Republican-appointed majorities on the Court, that political attacks on the Court increase. In late 2011, former House Speaker Newt Gingrich launched an astonishing attack on judicial independence,

GUARDIAN, Oct. 25, 2011, <http://www.guardian.co.uk/law/2011/oct/25/uk-supreme-court-diversity>.

39. *60% Believe Supreme Court Justices Have Their Own Political Agendas*, RASMUSSEN REPORTS, June 16, 2008, http://www.rasmussenreports.com/public_content/archive/mood_of_america_archive/supreme_court_ratings/60_believe_supreme_court_justices_have_their_own_political_agendas.

40. See *Marbury v. Madison*, 5 U.S. 137 (1803).

41. See, e.g., Adam Liptak, *Court to Weigh Arizona Statute on Immigration*, N.Y. TIMES, Dec. 12, 2011, at A1, available at http://www.nytimes.com/2011/12/13/us/supreme-court-to-rule-on-immigration-law-in-arizona.html?pagewanted=all&_r=0.

42. Charles Babington & Jo Becker, *Roberts Frustrates Committee Democrats; GOP Optimistic on Confirmation*, WASH. POST, Sept. 15, 2005, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401195.html>.

43. See Lee Epstein, Jeffrey A. Segal, & Chad Westerland, *The Increasing Importance of Ideology in the Nomination and Confirmation of Supreme Court Justices*, 56 DRAKE L. REV. 609, 610 (2008).

suggesting the president could send federal law enforcement authorities to arrest judges who make controversial rulings in order to compel them to justify their decisions before congressional hearings.⁴⁴ In fact, given the political nature of how Supreme Court Justices become Justices, and the cases they decide to inject themselves into, the only real surprise is that members of the modern Court have avoided the sad deterioration of personal relationships that politicians on the Hill have, by remaining collegial and friendly towards each other.

The result is a mess of competing interests and a politically rigged system of judicial appointment. Parties seek to please their base, thus drawing crude lines between a populist and a merit approach. Republicans gain the reputation for being the party of white males, while Democrats seek to cast themselves as the party of diversity. A crude nose-count bears some startling facts. Democratic presidents appointed 200 (64%) of the 312 women sitting on the federal bench, while Republican presidents appointed 112 (36%).⁴⁵ Republicans appointed 28 active African American judges, 4 Asian Americans, 34 Hispanics, and 325 White judges.⁴⁶ Democratic presidents appointed 68 African American judges, 17 Asian Americans, 40 Hispanics, and 261 White judges.⁴⁷ In percentage terms, among current active judges Republican Presidents appointed 31% of African Americans, 19% of Asian Americans, 46% of Hispanics, and 55% of White judges.⁴⁸ While it is doubtful that racial animus drives Republican Presidents to nominate fewer minorities, especially considering that Republican Presidents are actually more likely to nominate Hispanics than Democrats, these statistics become fodder for special interest groups, especially when nominations are made.

Professor Jackson describes the bulk of a judge's work as "mundane," involving statutory interpretation more than anything else.⁴⁹ Consequently, the argument goes, the demographics of a particular judge matter little in terms of the quality or result of judging. A number of studies examining a judge's political ideology

44. Matt DeLong, *Gingrich: Send U.S. Marshals to Compel 'Radical' Judges to Explain Rulings*, WASH. POST, Dec. 19, 2011, http://www.washingtonpost.com/blogs/election-2012/post/gingrich-send-us-marshals-to-arrest-uncooperative-judges/2011/12/18/gIQAIYUg2O_blog.html?fb_ref=NetworkNews.

45. *Directory*, *supra* note 27.

46. *Id.*

47. *Id.*

48. *Id.*

49. Jackson, *supra* note 11, at 61.

on cases involving gender and civil rights,⁵⁰ as well as copyright,⁵¹ fail to find a clear predicting line between ideology and result. On the other hand, studies have shown that Democratic appointees are more likely than Republican appointees to find for plaintiffs in Voting Rights Act cases, and minority judges vote more than twice as often as white judges in favor of liability.⁵² Significantly, white judges are substantially more likely to vote for plaintiffs when they sit with at least one minority judge,⁵³ suggesting that judges are amenable to changing their minds based on the life experiences of other members on a multi-member panel. On environmental law cases, judges typically vote in their perceived ideological directions.⁵⁴ These studies suggest that even in cases involving mere statutory interpretation, a judge's background has a material impact on result.

The handful of politically charged cases the Court does take on leads to a fair criticism of how a Justice's personal ideologies shape their outcomes. We want to believe that the nine Justices are wise oracles who can lead our country through tumultuous moral quagmires to the safe shores afforded by the Constitution, but the temptation to advance an agenda may be too strong for any human to resist. Important new scholarship suggests that the party of the appointing President and membership in a particular Circuit Court of Appeals affect judicial ideology.⁵⁵ The same study found that judges appointed by Republican presidents were more ideological than those appointed by Democrats, that attendance at a higher-ranked law school strongly correlated with liberalism on the bench, and that work experience in the government outside the judiciary indicated liberal

50. See, e.g., Christopher Smith, *Polarized Circuits: Party Affiliation of Appointing Presidents, Ideology, and Circuit Court Voting in Race and Gender Civil Rights Cases*, 22 HASTINGS WOMEN'S L.J. 157 (2011).

51. See, e.g., Barton Beebe, *Does Judicial Ideology Affect Copyright Fair Use Outcomes?: Evidence From the Fair Use Case Law*, 31 COLUM. J.L. & ARTS 517 (2008).

52. See, e.g., Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence*, 75 U. CHI. L. REV. 1493, 1494 (2008).

53. *Id.* at 1494.

54. See Jason Czarnecki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 769 (2008). But see Peter A. Appel, *Wilderness, The Courts, and the Effect of Politics on Judicial Decisionmaking*, 35 HARV. ENVTL. L. REV. 275 (2011) (finding no correlation between ideology and outcome in wilderness cases).

55. See Corey Rayburn Yung, *Judged by the Company You Keep: An Empirical Study of the Ideologies of Judges of the United States Courts of Appeals*, 51 B.C. L. REV. 1133 (2010).

judicial voting.⁵⁶ In reviewing agency decisions, Supreme Court justices tend to apply “deference doctrine inconsistently, responding to their ideological preferences” instead.⁵⁷ Conservative judges are more likely to use judicial review to declare laws unconstitutional.⁵⁸ Liberal Justices may be more likely to cite legislative history than conservative Justices.⁵⁹ Ideology even plays a role in how a judge uses legal scholarship – conservative judges tend to cite legal scholarship less often than liberal judges.⁶⁰ The problem of politicizing the bench extends beyond the Supreme Court – one recent study found that even at the District Court level, the perception of political orientation among judges leads to “judge shopping” and affects which cases settle and the terms of those settlements.⁶¹

Consequently, an extraordinary amount of time and effort has been expended towards increasing accountability, transparency, and diversity on the Supreme Court, from calls for retention elections,⁶² to televised broadcasts of oral arguments,⁶³ to a return of circuit riding,⁶⁴ to the application of the Code of Conduct that applies to all other judges to the Justices themselves,⁶⁵ to Congressional funding of a golden parachute to persuade older Justices to retire.⁶⁶ I do not

56. *Id.* at 1139, 1201.

57. Connor N. Raso & William N. Eskridge, Jr., *Chevron as a Canon, Not a Precedent: An Empirical Study of What Motivates Justices in Agency Deference Cases*, 110 COLUM. L. REV. 1727, 1817 (2010).

58. Jeffrey A. Segal & Chad Westerland, *The Supreme Court, Congress, and Judicial Review*, 83 N.C. L. REV. 1323, 1340 (2005).

59. See David S. Law & David Zaring, *Law Versus Ideology: The Supreme Court and the Use of Legislative History*, 51 WM. & MARY L. REV. 1653, 1696-97 (2010).

60. David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1368 (2011).

61. Ahmed E. Taha, *Judge Shopping: Testing Whether Judges’ Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1011-1012 (2010).

62. See generally Rachel Paine Caufield, *Reconciling the Judicial Ideal and the Democratic Impulse in Judicial Retention Elections*, 74 MO. L. REV. 573 (2009).

63. See Adam Liptak, *Supreme Court TV? Nice Idea, But Still Not Likely*, N.Y. TIMES, Nov. 29, 2011, at A18, available at <http://www.nytimes.com/2011/11/29/us/supreme-court-tv-still-not-likely-sidebar.html>.

64. See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007).

65. *Bill Puts Ethics Spotlight on Supreme Court Justices*, NATIONAL PUBLIC RADIO (Aug. 17, 2011), available at <http://www.npr.org/2011/08/17/139646573/bill-puts-ethics-spotlight-on-supreme-court-justices>.

66. See generally David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L.Q. 1397 (2005).

address here the merits of these arguments, other than to observe that elections have consequences, and that one of the enduring features of our republic has been the ability of Presidents to leave a lasting mark on the nation through their Supreme Court appointments. It seems like a natural outcome of the constitutional scheme for this process to be tinged with political hues.

The Supreme Court, however, is established by the Constitution. Likewise, although the Constitution is remarkably bereft of specifics such as qualifications or experience, Justices must be named by the President and confirmed by the Senate. Given the partisan and political nature of the modern Supreme Court, perhaps the time has come to re-examine the makeup of the judiciary and to professionalize the lower courts using the lessons learned from the U.K.'s Judicial Appointments Commission, among others. Perhaps the political appointment process should be left to the Supreme Court itself.

This suggestion is not without precedent. The country's first Congress was torn on whether there should be courts lower than the Supreme Court, or whether to rely on state courts to exercise federal jurisdiction.⁶⁷ The Judiciary Act of 1789 created a three-tiered system with the Supreme Court sitting in Washington with a Chief Justice and five associate Justices, meeting just twice a year to hear appeals from lower federal courts and state supreme courts and exercise limited original jurisdiction.⁶⁸ Each state would get a single district court judge to hear trials over admiralty and minor criminal and civil cases⁶⁹ Circuit courts were established, but with budget for the young nation a concern, there were no judges on these courts. Instead, circuit courts were comprised of the local district judge and two Supreme Court justices riding circuit. Circuit courts were both trial and appellate courts, with principal jurisdiction over most federal crimes, diversity cases, and appeals from the district courts.⁷⁰ Faced with many complaints about workload and the rigors of circuit riding, Congress finally repealed circuit duties and abolished circuit courts in 1911.⁷¹

67. See generally Wythe Holt, "To Establish Justice": Politics, The Judiciary Act of 1789, and the Invention of the Federal Courts, 1989 DUKE L.J. 1421 (1989).

68. See *id.* at 1486, 1493-94.

69. See *id.* at 1424-25, 1430.

70. See Stras, *supra* note 64, at 1715.

71. *Id.* at 1726-27.

The power of Congress over the judiciary is vast. In addition to the creation and abolishment of lower courts, Congress also funds the court system (subject to the prohibition against lowering salaries) and ever since *Ex parte McCordle*, it can establish or take away subject matter jurisdiction from the courts.⁷² The 875 authorized Article III judges today are comprised of the judges on the District, Circuit, and Supreme courts, as well as the U.S. Court of International Trade. There are many thousands of other judges in the federal government who are not Article III judges, including magistrates, bankruptcy, Tax Court, and agency judges such as immigration judges. I propose that the government maintain the Supreme Court as the only remaining Article III court, subject to the political storms of appointment and confirmation. Under this scheme, lower judges would then move toward a professional judicial corps. By adopting standards and processes suggested by the British experience, the appointment to a district or appellate judgeship would be driven solely by merit, and a bipartisan and nonpolitical commission, without regard to politics or fear of confirmation pitfalls, would make the selections.

Such a system would accomplish three primary goals. First, it would create a judiciary that better reflects modern society. Although federal judges in the United States are not appointed in the same secretive manner as judges in the United Kingdom were, they still must meet standards of legitimacy and representativeness in order to effectively administer justice. The relative lack of bad behavior, as demonstrated by the extremely low incidences of impeachment, does not mean that judges are as effective as they could be. Instead, the current system of Presidential appointment and Senate confirmation of lower court judges means that the process of becoming a federal judge is still inherently political. The concerns expressed by Senator George Badger when Congress debated eliminating circuit riding now ring true; judges became “philosophical and speculative in their inquiries as to law – becoming necessarily more and more dim as to the nature of the law of the various States, from want of familiar and daily connection with them – unseen, final arbiters of justice, issuing their decrees as it were from a secret chamber – moving invisibly amongst us.”⁷³

Second, by focusing on merit and removing political considerations from the equation, such a U.S. Judicial Appointments Commission can take into account Congressional policy mandates for judicial

72. 74 U.S. 506, 513-14 (1869).

73. Stras, *supra* note 64, at 1710.

diversity. As this conversation on *City Square* has repeatedly stressed, diversity of life experiences can have a huge impact on society. Consider, for example, the recent case involving a Tyson chicken plant in Alabama where a white manager repeatedly called adult black men working there “boy.”⁷⁴ In a subsequent hostile work environment suit, a panel of the Eleventh Circuit Court of Appeals found nothing racist about using that term.⁷⁵ On reconsideration and after an amicus brief signed by various parties including Alabama’s first black federal judge, the panel reversed itself.⁷⁶ This reversal, on the same record without additional evidence, is proof positive that life experiences, or “representativeness” as Professor Jackson calls it, matter greatly. The Eleventh Circuit did not need former chicken plant workers as judges to arrive at a different conclusion – it needed the voice of experience.

Finally, it would resolve the problems associated with political appointments, including judicial emergencies. The current mechanism for appointing federal judges is broken. The cause of the dysfunction lies with the Senate’s rule for a sixty-vote majority to invoke cloture, a rule that is not required by the Constitution. Past attempts to limit the rule for judicial confirmations only to extraordinary cases failed in late 2011 when Republicans filibustered a former New York Solicitor General for an appellate judgeship.⁷⁷ The result is empty judgeships all around the country, with concomitant slowdowns and delays to justice.⁷⁸ Moving toward a U.K.-style system of appointment would ensure that those vacancies are eliminated, and that the judiciary will remain fully staffed at all times.

This scheme would properly maintain the role of the Supreme Court and can be implemented without Constitutional amendment. Early experience with Congressional mandates that Supreme Court

74. Adam Liptak, *Rare but Grudging Judicial About-Face in Bias Case*, N.Y. TIMES, Dec. 26, 2011, at A16, available at <http://www.nytimes.com/2011/12/27/us/tyson-discrimination-verdict-restored-by-appeals-court.html>.

75. *Id.*

76. *Id.*

77. Charlie Savage & Raymond Hernandez, *Filibuster by Senate Republicans Blocks Confirmation of Judicial Nominee*, N.Y. TIMES, Dec. 6, 2011, at A16, available at <http://www.nytimes.com/2011/12/07/us/senate-gop-blocks-confirmation-of-caitlin-halligan-as-judge.html>.

78. According to the Administrative Office of U.S. Courts, there were 35 judicial emergencies throughout the country as of July 11, 2013. *Judicial Emergencies*, ADMIN. OFFICE OF U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited July 11, 2013).

Justices ride circuit were driven in large part by the sense that Justices needed to see and hear firsthand from individual voices in the vast country.⁷⁹ The Supreme Court would continue to be the final arbiter of the meaning of law and Constitutionality, and would continue to be comprised of Presidential appointees. Presidents would continue to leave their legacy through their Supreme Court nominations. That is all the Constitution requires.

Some might wonder if moving towards a professional judicial corps makes judging too much like a career rather than a calling, much like judges in Germany, Hungary, or South Korea. Common law tradition requires judges to use their powers in equity, as well as law, in the administration of justice. We have seen that common law countries can, however, successfully implement such reforms. In Malaysia, Australia, Canada, and as Professor Maute spells out, now the United Kingdom, a judicial appointments scheme is not incompatible with common law traditions.

What is incompatible with our tradition is a politicized three-ring circus where judicial nominees are caught in the middle of warring factions. After Samuel Chase's failed impeachment following the hyper-partisan Presidential election in 1800,⁸⁰ judicial nominations followed a largely genteel and non-political approach. The last thirty years have seen a sad return to partisanship in the administration of justice.⁸¹ As the U.K. experience demonstrates, drastic situations call for drastic measures, and we should begin the conversation now.

79. Stras, *supra* note 64, at 1716-17.

80. See generally Terence J. Lau, *Judicial Independence: A Call for Reform*, 9 NEV. L.J. 79 (2008).

81. See Epstein, Segal, & Westerland, *supra* note 43, at 635.