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### A Tale of Two Courts

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## ESSAY

### A TALE OF TWO COURTS

*Deepa Das Acevedo*<sup>†</sup>

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#### INTRODUCTION

The world's oldest democracy and the world's largest democracy are admittedly different places. One is geographically expansive and demographically changing; it features a presidential system of governance and reflects a general assumption that the state ought to stay out of peoples' lives wherever possible. The other is geographically smaller (though not small) and riven by religious and linguistic divisions more than by race or national origin; it features a parliamentary state that is, in large part, designed to actively reform the society it governs.<sup>1</sup>

Both, however, are experiencing rising tides of nativism and polarization led by genre-defying politicians who command cultish appeal and are widely believed to be weakening the

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<sup>1</sup> GARY JEFFREY JACOBSON, CONSTITUTIONAL IDENTITY 214 (2010) (discussing constitutional identity and, in particular, "the Indian and American cases, both of which contain preservative and transformative elements, the latter predominant in India and the former in the United States").

fundamental principles of democratic governance.<sup>2</sup> Both share a Common Law system rooted in a linked colonial past as well as a strong commitment to judicial review and the rule of law. Most of all, both are facing active and profound crises of confidence regarding their apex courts.

This Essay evaluates a recent pair of proposals for how to fix the Supreme Court of one country (America) in light of the experiences of the Supreme Court of the other country (India).<sup>3</sup> To be sure, we cannot directly transpose best practices from one country to the other, given the contextual differences described above, among others. But—thanks to the different paths taken by the American and Indian courts<sup>4</sup>—we *can* learn something from the comparison, which in a very practical and tangible way reveals complications that as yet may seem purely hypothetical to American audiences. My goal is not to wholly reject either of the proposals so much as it is, in the tradition of comparative legal scholarship, to offer insights and cautionary notes based on lessons learned elsewhere.

Part I briefly recaps four earlier approaches to reforming the U.S. Supreme Court against which the recent proposals measure themselves, and it also highlights some of the objections against those earlier approaches. Part II describes the two proposals in question—the Supreme Court Lottery and the Balanced Bench—and outlines some general concerns one might raise in response. My focus here is on whether the proposals are desirable, not on whether they are constitutional. Part III first sketches an outline of the Indian Supreme Court, before using specific examples from the Court’s history to illustrate potential shortcomings in either the Supreme Court Lottery or the Balanced Bench.

## I

### SAVING THE SUPREMES

Proposals to save the Supreme Court abound. Most fall

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<sup>2</sup> On the growing polarization of politics in America, see Timothy Williams, *With Most States Under One Party’s Control, America Grows More Divided*, N.Y. TIMES (June 11, 2019), <https://www.nytimes.com/2019/06/11/us/state-legislatures-partisan-polarized.html?action=click&module=Top%20Stories&pgtype=Homepage> [https://perma.cc/2RLF-JL68].

<sup>3</sup> Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 181 (2019).

<sup>4</sup> Nick Robinson, *Structure Matters: The Impact of Court Structure on the Indian and U.S. Supreme Courts*, 61 AM. J. COMP. L. 173, 175 (2013) (noting that while both courts share roots and characteristics, “[t]hey have evolved. . . so that today they represent extreme ends of the type of structural characteristics found in supreme courts”).

into one of the following four categories that are distinguished by a single central feature: (1) court-packing,<sup>5</sup> (2) term limits,<sup>6</sup> (3) mimicking the courts of appeal,<sup>7</sup> and (4) jurisdiction-stripping.<sup>8</sup> Each of these proposals can be said to be deficient in some way.

For instance, court-packing, or expanding the size of the Supreme Court in order to accommodate more Justices of a particular persuasion, may be desirable for Republicans and vaguely justified for Democrats. It even has the benefit of being unquestionably constitutional. Nevertheless, it severely violates well-settled norms about American governance.<sup>9</sup> More worryingly, it is extremely difficult to imagine whether court-packing will exacerbate or ameliorate the Court's existing legitimacy deficit. Will breaking the norm once trigger a tit-for-tat war between Democrats and Republicans, or will it, by introducing a new set of actors and their interpretations of the law, change the dynamic around Supreme Court nominations and produce a new equilibrium? It is too hard to tell *ex ante* and consequently, court-packing does not promise the kind of stability that we might look for in any reform proposal.<sup>10</sup>

A similar lack of stability characterizes proposals centered on jurisdiction-stripping, in which Congress would bar the Court from hearing cases on designated issues, like abortion or affirmative action.<sup>11</sup> Moreover, besides instability, there is considerable disagreement among legal scholars as to whether or not jurisdiction-stripping is, in fact, permissible under our existing constitutional structure—and, if it is permissible, which of the federal courts could be subjected to it (and how).<sup>12</sup>

Proposals that advocate term limits for Supreme Court Justices all potentially suffer the same logistical difficulty—

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<sup>5</sup> The proposals for court-packing from the political left are associated with Michael Klarman, Aaron Blake, and Ian Samuel. Epps & Sitaraman, *supra* note 3, at 151 n.5.

<sup>6</sup> Epps and Sitaraman focus on the widely circulated proposal for eighteen-year term limits, most strongly associated with Roger Cramton and Paul Carrington. *Id.* at 173.

<sup>7</sup> This proposal is attributed to Tracey George and Chris Guthrie. *Id.* at 175.

<sup>8</sup> Epps and Sitaraman identify two variants of the jurisdiction-stripping proposal: Samuel Moyn's issue-specific approach and Mark Tushnet's longstanding call for limiting the overall potency of judicial review. *Id.* at 165.

<sup>9</sup> *Id.* at 176–77.

<sup>10</sup> *Id.* at 177.

<sup>11</sup> *Id.* at 178.

<sup>12</sup> For a small sampling of the literature on congressional limitations of federal jurisdiction, see Tara Leigh Grove, *The Supreme Court's Legitimacy Dilemma*, 132 HARV. L. REV. 2240, 2249 n.34 (2019) (reviewing RICHARD H. FALLON, JR., *LAW AND LEGITIMACY IN THE SUPREME COURT* (2018)).

namely, that they may require a constitutional amendment (which is not forthcoming in the foreseeable future) and that even if they can be implemented by statute, they will likely not pass constitutional muster.<sup>13</sup> Aside from this, even the most popular variant of the term limit proposal (each president appoints two Justices for terms of eighteen years each) may present two problems. First, it may ensure the continued politicization of the Court, since every presidential candidate will have to promise to appoint “only the purest ideologues.”<sup>14</sup> And second, term limits would likely transform the Court into a stepping stone to some later position, thereby creating a new and troubling set of incentives for both aspiring and sitting Justices.<sup>15</sup>

The final type of faulty proposal suggests that we reconfigure the Supreme Court in the model of a Court of Appeal: more Justices, panel-hearings, and en banc review. The primary failure of this proposal is that, while it may reduce politicization during the actual adjudication process, it will not have any effect on the appointments process. In order to truly resolve the Supreme Court’s legitimacy crisis, a solution ought to address both adjudication and appointments.

## II

### OF LOTTERIES AND BENCHES

Two new proposals—the Supreme Court Lottery and the Balanced Bench—respond to the strengths and weaknesses of these earlier approaches. Both ideas have received considerable interest from aspiring Democratic presidential nominees, including Pete Buttigieg and Bernie Sanders.<sup>16</sup> In the Lottery scenario, all judges on the federal courts of appeal would become Associate Justices of the Supreme Court and would sit in randomly selected panels of nine Justices for two weeks at a time.<sup>17</sup> Additionally, overturning a federal statute

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<sup>13</sup> Epps & Sitaraman, *supra* note 3, at 173–74.

<sup>14</sup> *Id.* at 174.

<sup>15</sup> *Id.* at 174–75.

<sup>16</sup> Gregory Krieg, *Bernie Sanders Floats Modified Term Limits for Supreme Court Justices*, CNN (Apr. 2, 2019), <https://www.cnn.com/2019/04/01/politics/bernie-sanders-supreme-court/index.html> [<https://perma.cc/7DPF-N2E8>] (suggesting Sanders supports a version of the Supreme Court Lottery); Josh Lederman, *Inside Pete Buttigieg’s Plan to Overhaul the Supreme Court*, NBC NEWS (June 3, 2019), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491> [<https://perma.cc/Z9DB-V3FU>] (suggesting that Buttigieg supports the Balanced Bench).

<sup>17</sup> Epps & Sitaraman, *supra* note 3, at 181.

would require a supermajority of six Justices. In the Bench scenario, an expanded Court of five Republican Justices and five Democratic Justices would have to regularly select five more Justices from federal district and appellate courts to serve for one year on the apex court; the selection would have to be unanimous or by supermajority and would hopefully introduce greater diversity to the Court.<sup>18</sup> If the ten partisan Justices fail to select temporary colleagues, they will lose the ability to hear cases for that year.<sup>19</sup> For their part, the temporary Justices would not be involved in most of the Court's case selection process for their year on the bench.<sup>20</sup>

Responses to the Supreme Court Lottery and Balanced Bench have identified some potential shortcomings associated with each proposal.<sup>21</sup> However, there are other problems as well, and in the remainder of this section, I will sketch out just a few of these with respect to either plan. To be clear, these are not *all* the concerns one might articulate in response to either proposal—nor even the most serious ones—but they are those for which we have something like a natural experiment to learn from courtesy of the Indian Court. Yet these concerns are serious enough.

#### A. Supreme Court Lottery

While the Supreme Court Lottery may be relatively immune to strategic litigation, it is less impervious to strategic adjudication. Imagine that Rotation 10 receives briefs relating to a federal statute case that was granted cert by Rotation 1. Conservative Justices on Rotation 10 want to overturn the statute and know they have five votes but not the required six; instead of deciding the case, they re-calendar it in the hopes that a future bench will have the necessary numbers. Or, the

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<sup>18</sup> *Id.* at 193.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 194–95.

<sup>21</sup> Amanda Frost, *Academic highlight: Epps and Sitaraman on How to Save the Supreme Court*, SCOTUS BLOG (Dec. 18, 2018, 4:15 PM), <https://www.scotusblog.com/2018/12/academic-highlight-epps-and-sitaraman-on-how-to-save-the-supreme-court> [<https://perma.cc/BKW7-MBEA>]; Elie Mystal, *Pete Buttigieg's Court-Reform Plan Is Exciting, Unconstitutional, and a Bit Naïve*, ABOVE L. (June 3, 2019, 5:42 PM), <https://abovethelaw.com/2019/06/pete-buttigieg-s-court-reform-plan-is-exciting-unconstitutional-and-a-bit-naive> [<https://perma.cc/J8RZ-5GBB>]. A third review does not explicitly identify shortcomings in either plan aside from those articulated and refuted by the authors themselves. Howard M. Wasserman, *The Supreme Court is Broke, the Question is How to Fix it: Alternatives to Term Limits*, JOTWELL (June 5, 2019), <https://courtslaw.jotwell.com/?p=1691&preview=true> [<https://perma.cc/5YGH-PYCL>].

case does not concern a federal statute but is nonetheless sufficiently controversial that the conservative Justices want more than the necessary five votes and hope for better numbers on a future bench.<sup>22</sup> Unless something is done to change the fact that appointments “to the federal courts of appeal are already polarized, with Senate Republicans currently working at high speed to fill vacancies with young, ideological appointees,”<sup>23</sup> Rotation 10’s wager is a rational one and becomes increasingly so with each new appellate appointment.<sup>24</sup>

For similar reasons, the Lottery is more susceptible to interpretive swings and an undesirable sort of randomness than may be apparent on first look.<sup>25</sup> Imagine the same Rotation 10 bench receiving briefs—it doesn’t matter now whether or not they are for a federal statute case—and thinking that Rotation 1 was deeply mistaken either in granting cert or in identifying the core legal issues presented by the case. Rotation 10 directs the parties to write briefs for an entirely new set of issues, and eventually, Rotation 17 hears the case. As things stand, this scenario is highly unlikely because the individuals granting cert and hearing cases are largely identical, but in the Lottery universe, this becomes more than plausible. The result is that a case that would have come out one way on one set of issues under Rotation 10 comes out another way on an entirely different set of issues under Rotation 17.<sup>26</sup>

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<sup>22</sup> This is not as unheard of as it may sound, see, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 288–89 (2002) (describing Chief Justice Warren’s consensus-building with regards to *Brown v. Board of Education*, 347 U.S. 483 (1954)).

<sup>23</sup> Epps & Sitaraman, *supra* note 3, at 182–83.

<sup>24</sup> The Brookings Institute estimated that at the halfway point of President Trump’s first term, Republican appointees on the courts of appeal increased from 44% to 54%. By July 1, 2020, an estimated seventy-one more judges are eligible to leave active status and forty of them were Democratic appointees. While those Democratic appointees may choose to stay active through the current administration, a second term would undoubtedly allow President Trump to alter the overall appellate pool enough to make Rotation 10’s wager a more than reasonable risk. Russell Wheeler, *Appellate Court Vacancies May be Scarce in Coming Years, Limiting Trump’s Impact*, BROOKINGS (Dec. 6, 2018), <https://www.brookings.edu/blog/fixgov/2018/12/06/trump-impact-on-appellate-courts/> [<https://perma.cc/G7KH-HMV6>].

<sup>25</sup> Epps & Sitaraman, *supra* note 3, at 170 (“In our current system, far too much turns on essentially random events.”).

<sup>26</sup> This is also not as unheard of as it may sound. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018) (case was briefed on free speech grounds but ultimately decided on free exercise grounds).

## B. Balanced Bench

To begin with, the practice of Justices choosing Justices is not self-evidently desirable. One might counter that all federal judges have undergone a basic vetting process such that the process of choosing five temporary colleagues can be left to the ten partisans without doing any damage to the public image of the Court. This assumption would be true so long as (a) the partisans are all equally assertive and nonidiosyncratic gatekeepers, (b) the partisans are really choosing *five* independent colleagues rather than four more partisans and one independent (thereby replicating the “Kennedy as kingmaker” problem),<sup>27</sup> and (c) the partisans are accurate in their estimation of a potential colleague (“No more Souters” applies here too). This seems like a tall order.

Second, and unlike the Lottery, the Balanced Bench quite likely heightens the probability of strategic litigation because of the timeline according to which independent Justices are announced. There seem to be three options: the slate of independent Justices is made public as soon as it is compiled; the *completion* of the slate is announced, but its composition is kept secret for nearly two years; *neither* the completion *nor* the composition are announced, and the independent Justices simply appear on their appointed date. By introducing a “white smoke” mysteriousness into Court operations, the secrecy attached to options two and three is, perversely, likely to move the Court farther away from being “what it should be—a relatively anonymous group of skilled, thoughtful jurists.”<sup>28</sup> But the first option—full disclosure—means that litigating parties have two years to learn about the Court’s composition and to plan accordingly. (It also shifts part of the appointments process closer to being like a major league sports draft, in which observers debate the odds that a promising pick for either partisan side will turn out to be a lemon.)

Finally, it is difficult to say what effect the introduction of so much internal hierarchy will have on dynamics between the Justices themselves. Independents may indeed bring diversity of background and perspective as well as in-the-trenches adjudication experience to “the Court” as an institution—in fact, this seems unarguable. However, courts are also collections of human beings. Will the new low-profile, non-Ivy-

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<sup>27</sup> Walter Olson, *The Price for Making Justice Kennedy the Top Court’s Kingmaker*, CATO INST. (June 29, 2018), <https://www.cato.org/publications/commentary/price-making-justice-kennedy-top-courts-kingmaker> [<https://perma.cc/6HMH-6ABS>].

<sup>28</sup> Epps & Sitaraman, *supra* note 3, at 183.



pedigreed, temporary (and nonrenewable) trench workers who lack the full powers of Supreme Court Justices (since they do not participate in case selection) function as equals alongside their partisan colleagues once they arrive in Washington?

### III

#### A VOYAGE TO INDIA

By looking outside the United States, we can learn something about aspects of these proposals for which there are no analogs in the American experience. The Indian Supreme Court, like its American counterpart, is the apex judicial body in its country. Also, like the American Court, it is a court of both original and appellate jurisdiction, although both by mandate and by custom, the Indian Court exercises its original jurisdiction far more often.<sup>29</sup> To be sure, there are important differences between these two courts; for the purposes of this Essay I'll describe just three of them at the outset.

First, the Indian Court sits in panels rather than en banc. It is currently at its maximum strength of thirty-four justices, who most often sit in benches of two or three (a "division bench") but occasionally assemble in benches of five or more (a "constitution bench").<sup>30</sup> The Chief Justice has the power to make bench assignments.<sup>31</sup> Smaller benches may refer especially important or complex matters to larger benches, and the decisions of smaller benches may be overturned by larger benches (but not by co-equal benches).<sup>32</sup> Two-judge division benches usually consist of one junior and one senior justice, with the former frequently deferring to the latter.<sup>33</sup>

Second, the Indian Court virtually appoints itself.<sup>34</sup> Three landmark cases—commonly and somewhat unimaginatively nicknamed the *First Judges' Case*,<sup>35</sup> the *Second Judges'*

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<sup>29</sup> *Jurisdiction: Original, Supreme Court*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/jurisdiction-original-supreme-court> [<https://perma.cc/6BSP-XMDM>] (last visited July 6, 2019) (noting that the U.S. Supreme Court has largely restricted exercise of its original jurisdiction to disputes between state governments); INDIA CONST. art. 32 (noting that the Indian Court may exercise original jurisdiction in any case involving the Fundamental Rights section of the Constitution).

<sup>30</sup> *Chief Justice and Judges*, SUP. CT. INDIA, <https://main.sci.gov.in/chief-justice-judges> [<https://perma.cc/EZ58-Z5HB>] (last visited July 6, 2019).

<sup>31</sup> Robinson, *supra* note 4, at 190.

<sup>32</sup> *Id.* at 186.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 190.

<sup>35</sup> S.P. Gupta v. Union of India, AIR 1982 SC 149.

*Case*,<sup>36</sup> and the *Third Judges' Case*<sup>37</sup>—have produced the current “collegium” system.<sup>38</sup> New Supreme Court justices are appointed by the President of India (who, in India’s parliamentary system, is only the ceremonial head of state) in “consultation with” a collegium consisting of the Chief Justice and the four most senior justices.<sup>39</sup> In practice, the President’s role has been minimal, and a candidate’s seniority within the overall pool of High Court judges is an important though not dispositive factor.<sup>40</sup>

Finally, the Indian Court differs in its handling of promotion to Chief Justice and termination of tenure. The incoming Chief Justice of India is appointed by the outgoing Chief Justice shortly before he (and so far it has always been a “he”) departs. By convention, the Chief Justice is the senior-most member of the Court as determined primarily by date of elevation but also based on a succession of other factors in the case of ties.<sup>41</sup> This, combined with mandatory retirement at age sixty-five, means that it is possible to know whether a given justice will eventually ascend to the Chief’s role—and how long he or she will occupy it—at the moment he or she is appointed. It also means that Supreme Court justices and chief justices have relatively short tenures such that the roughly eight-year Supreme Court career of Justice D.Y. Chandrachud stands out as relatively lengthy (appointed May 13, 2016, Chief Justice starting November 8, 2022, retires November 10, 2024).<sup>42</sup>

#### A. Indian Lessons for the Supreme Court Lottery

Part II identified two potential advantages of the Lottery

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<sup>36</sup> *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 1994 SC 868.

<sup>37</sup> *In re: Presidential Reference*, AIR 1999 SC 1.

<sup>38</sup> *See generally* ARGHYA SENGUPTA, INDEPENDENCE AND ACCOUNTABILITY OF THE INDIAN HIGHER JUDICIARY 13–62 (2019) (discussing the Indian Court’s appointments process).

<sup>39</sup> INDIA CONST. art. 124(2).

<sup>40</sup> Soibam Rocky Singh, *Who is Sanjiv Khanna?*, HINDU (Jan. 27, 2019), <https://www.thehindu.com/news/national/sanjiv-khanna-surprise-promotion/article26100824.ece> [<https://perma.cc/LR8N-NSYX>] (noting that the collegium’s disregard of seniority in two recent appointments occasioned critical commentary).

<sup>41</sup> Kian Ganz, *How Supreme Court Chooses the Chief Justice of India*, LIVEMINT (May 17, 2016), <https://www.livemint.com/Politics/NWGQX7AAIv6CDu2T2Nf5gP/How-the-Supreme-Court-chooses-the-Chief-Justice-of-India.html> [<https://perma.cc/N3VY-D3Z9>] (noting that in the event of a tie, these factors are considered, successively, until the tie is broken: (1) time of swearing-in, (2) years of High Court service, (3) bench over bar appointments).

<sup>42</sup> *Id.*

system: less strategic litigation, and no greater interpretive swings or randomness. The Indian Court's experience demonstrates why, for the reasons also described in Part II, these benefits are not as uncomplicated or as plausible as they may seem.

While it is undoubtedly true that—with a given judge rotating onto the Supreme Court once every twelve to thirty-six months<sup>43</sup>—the Lottery makes strategic *litigation* difficult, it may actually heighten the risk of strategic *adjudication*. In both the hypothetical American context and the actual Indian context, this kind of judicial behavior is made possible by the existence of different panels, all of which nonetheless count as “the Supreme Court.” Justices in the Lottery scenario may choose to continue a case either in the hopes of gaining a supermajority to overturn a federal statute or to build more support for a controversial ruling on a nonfederal statute case. Doing so is a risk since the next bench may prove no better (or may be even worse), but, especially for conservative justices, it is likely a very reasonable risk.

Indian justices punt to one another, too. Sometimes benches change because docket overload demands postponement or because the Chief Justice assigns a new bench to hear the case—the latter happened in 2016 with an especially high-profile dispute concerning religion, *Indian Young Lawyers Association v. State of Kerala*.<sup>44</sup> But at other times no such external reasons can be found. Indeed, during its first ten years, ten different justices comprising six benches heard iterations of *IYLA*; in the next two years, at least four more justices rotated on and off.<sup>45</sup> Similarly, it is sometimes

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<sup>43</sup> The 188 justices of the “Lottery Court” would cycle through approximately once every twenty-one rotations. If the Court kept its current practice of hearing oral argument for roughly two weeks per month from October–April, there would be around seven rotations annually. If the Court heard oral argument *constantly* during the same period, there would be around fourteen rotations and the 188 justices would cycle through approximately once every 1.5 years. Of course, these estimates do not account for holidays, so the full cycles may take two to four weeks longer.

<sup>44</sup> *Indian Young Lawyers Association v. State of Kerala*, Writ of Petition (Civil) No. 373/2006 [hereinafter *IYLA*]; see Krishnadas Rajagopal, *New Bench to Hear Sabarimala Entry Case*, HINDU (July 8, 2016), <https://www.thehindu.com/news/national/New-Bench-to-hear-Sabarimala-entry-case/article14476035.ece> [<https://perma.cc/5K72-NKTR>] (noting that the previous division bench “had already heard the case in part and were well-advanced into the arguments”); Deepa Das Acevedo, *Gods’ Homes, Men’s Courts, Women’s Rights*, 16 INT’L J. CONST. L. 552 (2018) (describing the dispute’s background up to the Supreme Court opinion).

<sup>45</sup> Rajagopal, *supra* note 44. The new justices were Ashok Bhushan (on the division bench), and R.F. Nariman, A.M. Khanwilkar, and Indu Malhotra (on the

especially clear (as it was in the final stages of *IYLA*) that the referral is likely being made for strategic reasons.<sup>46</sup>

Even more likely than strategic adjudication, however, is that the Lottery Court will increase interpretive swings and a sense that outcomes are determined by the luck of the draw. The Indian Court's "polyvocality" is by now well-acknowledged; essentially, the system of having most cases heard by two- and three-judge division benches emboldens justices to admit decidedly different kinds of cases and experiment with novel interpretive theories so long as they do not explicitly conflict with the precedent established by a co-equal bench.<sup>47</sup> Admittedly the Lottery Court will still hear cases en banc. Nevertheless, India's experience having a wide rotating cast of potential Supreme Court justices does *not* suggest that this system leads justices to "value narrow decisions and *stare decisis* more."<sup>48</sup> Moreover, the Indian system has an informal control mechanism that the Lottery Court would lack: the deference shown to senior justices by junior justices in determining the outcome of a case.<sup>49</sup>

#### B. Indian Lessons for the Balanced Bench

Part II also identified and questioned three potential arguments in favor of the Balanced Bench: justices will choose good colleagues, predictable tenure timelines are beneficial, and diverse positionality on the Court is a net positive.

As the introduction to this Part noted, the Indian Court is largely self-appointed—but this is not to say that self-selection has been unproblematic. On the contrary, there is a long and continuing history of tension between the Court and the Executive, and the Court's growing defensiveness regarding its

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constitution bench). Krishnadas Rajagopal, *SC Hints at Referring Sabarimala Temple Entry Case to Constitution Bench*, HINDU (Apr. 19, 2017), <https://www.thehindu.com/news/national/sc-hints-referring-sabarimala-temple-entry-case-to-constitution-bench/article17334937.ece1> <https://perma.cc/LVQ9-LXP6>].

<sup>46</sup> This time a different Chief Justice, Dipak Misra, who was on a three-judge division bench hearing *IYLA*, referred the matter to a five-judge constitution bench that he—as Chief Justice—would be able to constitute. Although it was certainly not incorrect to do so, it was also not obviously necessary, short of Misra's desire to achieve a more emphatic articulation of the eventual outcome. In the most recent phase of this dispute, the five-judge bench has referred the matter to a seven-judge bench. *Rajeevaru v. IYLA*, Review Petition (Civil) No. 3358/2018, in the matter of *IYLA v. State of Kerala*, Writ of Petition (Civil) No. 373/2006 (Nov. 14, 2019).

<sup>47</sup> Robinson, *supra* note 4, at 184–86

<sup>48</sup> Epps & Sitaraman, *supra* note 3, at 184 (emphasis added).

<sup>49</sup> Robinson, *supra* note 4, at 186.

powers of self-selection has drawn much criticism.<sup>50</sup> Despite some differences in circumstances, the Indian Court's experiences suggest one major concern regarding the Balanced Bench: judicial personalities and reputations matter more, not less, when judges choose judges.

In India, the Court's eagerness to maintain exclusive authority over appointments has inspired a growing worry that the federal judiciary (including many Chief Justices) are corrupt and nepotistic.<sup>51</sup> Given their explicitly partisan affiliations and obligations, the ten "selecting" justices of the Balanced Bench would likely fare no better reputationally than the explicitly partisan members of Congress, who are similarly obliged to duke it out in order to represent their audiences' interests (and who are occasionally willing to "play chicken" with the federal budget in order to appear to defend those interests). In other words, when justices choose justices, the selection process, both *depends on* the reputation of the court pre-choice and *constructs* the reputation of the court post-choice.

Likewise, India's experience suggests that there are reasons to be wary of regular but predictable turnover on the bench. In the Indian context, much is determined by the Chief Justice's ideology and preferences, and the position of Chief Justice is calculable down to the day. With the Balanced Bench, either the composition of the Court for any given year would be known far enough in advance to engage in some strategic litigation *or* the appointments process for one-third of its membership would be kept in some degree of secrecy. As India's (admittedly extreme) example shows, secrecy is not a positive when it comes to Supreme Court selections. Candidates for Indian federal judgeships do not experience the kind of vetting that American Article III candidates face—much less the televised confirmation hearings of an American Supreme Court candidate—and this has arguably contributed to the corruption problem and damaged the reputation of the Indian Court.<sup>52</sup> If one-third of the American Court no longer

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<sup>50</sup> In addition to the three "Judges' Cases," in 2015 the Court overturned the 99th Amendment to the Indian Constitution, which would have established a power-sharing National Judicial Appointments Commission. The 4-1 opinion held that the Commission violated one of the unamendable aspects of the Constitution's basic structure, judicial independence. SENGUPTA, *supra* note 38, at 46-56.

<sup>51</sup> Shoma Chaudhury, "Half of the Last 16 Chief Justices Were Corrupt," TEHELKA (Sept. 25, 2009), <http://old.tehelka.com/half-of-the-last-16-chief-justices-were-corrupt/> [<https://perma.cc/YCZ2-W9UT>].

<sup>52</sup> Carolyn Shapiro, *Putting Supreme Court Confirmation Hearings in Context*,

experiences the confirmation process, a valuable element of public buy-in (if not actual vetting) will likely be lost.

Finally, one of the advantages of adding term-limited justices to the Court is said to be that they will introduce a “greater diversity of educational, professional, and geographic backgrounds.”<sup>53</sup> That assumption is itself questionable: Indian justices tend to pick colleagues like themselves,<sup>54</sup> and American justices tend to pick clerks who are white males from Harvard or Yale.<sup>55</sup> Justices *may* act differently when selecting colleagues, but—when they only need to choose five individuals annually from a pool of 179—we should not assume that they *would*.

More importantly, the Indian Court’s experience suggests that internal hierarchy beyond the Chief Justice/justice distinction impacts adjudication, and there is plenty of hierarchy baked into the Balanced Bench. “Independent” justices are term-limited and nonrenewable, they are selected by but do not select their colleagues, and they do not even select most of the cases they will hear. If they really are independents and do come from diverse backgrounds—perhaps especially of educational pedigree—they will at once have less social capital (as it is commonly understood in the American legal world) and the heavy responsibility of reining in their elite, partisan, fellow-justices. On the Indian Court, differences in seniority alone are enough to moderate a justice’s independence.

## CONCLUSION

The Lottery Court and the Balanced Bench offer concrete

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SCOTUS BLOG (Aug. 28, 2018, 11:13 AM), <https://www.scotusblog.com/2018/08/putting-supreme-court-confirmation-hearings-in-context> [<https://perma.cc/Y73D-PC6T>] (describing the confirmation process for Supreme Court candidates); Sruthisagar Yamunan, *One of India’s Most Controversial Judges Has Retired*, QUARTZ INDIA (Oct. 2, 2018), <https://qz.com/india/1409917/dipak-misra-indias-controversial-chief-justice-retires> [<https://perma.cc/UQL4-C9L7>] (noting that “Misra’s controversial tenure was in a way foretold” because prior allegations of fraud were known before he became Chief Justice).

<sup>53</sup> Epps & Sitaraman, *supra* note 3, at 195.

<sup>54</sup> George H. Gadbois, Jr., *Indian Supreme Court Judges: A Portrait*, 3 LAW & SOC’Y REV. 317, 317 (1969) (noting that the “homogenous character and similar socialization experiences shared by these men” is “striking”).

<sup>55</sup> Tony Mauro, *Supreme Court Clerks are Overwhelmingly White and Male. Just Like 20 Years Ago.*, USA TODAY (Jan. 8, 2018), <https://www.usatoday.com/story/opinion/2018/01/08/supreme-court-clerks-overwhelmingly-white-male-just-like-20-years-ago-tony-mauro-column/965945001> [<https://perma.cc/722A-C9PP>] (describing the demographics and educational background of clerks).

proposals for a pressing legal problem. However, as this Essay has suggested, there are equally concrete reasons to worry about these proposals that become apparent when we consider the experience of the Indian Supreme Court. The Lottery Court may suffer from the kind of strategic adjudication and significant interpretive swings that characterize India's panel system, while India's experience casts doubt on some assumptions behind the Balanced Bench—namely, that justices should choose justices, predictable tenures are beneficial, and diversity-via-hierarchy is a net positive.