

# THE SOUND OF SILENCE: ELIGIBILITY QUALIFICATIONS AND ARTICLE III

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## I. INTRODUCTION

The rise in political fortune of Arnold Schwarzenegger and other foreign-born citizens has invited a re-examination of the purposes, costs, and benefits of the Constitution's eligibility qualifications, contained in Articles I and II of the Constitution.<sup>1</sup> While those provisions contain express eligibility requirements, Article III imposes no similar qualifications for potential members of the federal judiciary. Hence, questions about the proper eligibility constraints on the Article III judges go unasked and unanswered. Limiting the discussion to the first two

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<sup>1</sup> See, e.g., Michael Tager, *Constitutional Reform and the Presidency The Recent Effort to Repeal the Natural-Born Citizen Requirement*, 39 PRESIDENTIAL STUD. Q. 111, 126 (2009) (arguing that "it makes eminent sense to amend the Constitution to allow naturalized citizens to run for president"); Editorial, *The Schwarzenegger Amendment*, N.Y. SUN (Sept. 2, 2004), <http://www.nysun.com/editorials/schwarzenegger-amendment/1223/> (arguing that the justification of the birth-citizen qualification in Article II is no longer plausible); Hendrik Hertzberg, *Strong Man: Arnold Schwarzenegger and California's Recall Race*, THE NEW YORKER, Sept. 29, 2003, at 44 (reporting on Orrin Hatch's attempts to introduce a twenty-eighth amendment that would eliminate the birth-citizen qualification).

Articles excludes a potentially crucial source of insight: the reasons underlying Article III's silence on eligibility qualifications. This article evaluates eligibility qualifications generally by focusing on the omission of eligibility qualifications from Article III. What distinguished the judiciary from the other two branches and prompted the Framers to omit eligibility qualifications from Article III? The answers to this question sheds new light on the wisdom of eligibility qualifications in Articles I and II, as well as the nature of the federal judiciary.

A review of the historical record provides no direct explanation for the Article III omission of eligibility requirements. Whether the omission was the result of simple neglect or shrewd foresight, history confirms the wisdom of that choice. In fact, eligibility qualifications in the federal judiciary would be superfluous if not harmful.<sup>2</sup>

But the question remains: why would the Framers include eligibility qualifications in only two of the three branches of America's fledgling government? After all, many of the reasons underlying eligibility qualifications in the presidency and Congress appear to apply with equal force to the judiciary. The age minimums in Articles I and II, for example, were designed to block the succession of political offices from fathers to unproven sons.<sup>3</sup> In the eighteenth century, however, connected families dominated the judiciary as much as they did the other two branches. Members of the judiciary also enjoyed life tenure and were placed on the bench by peers,<sup>4</sup> thus underscoring the potential usefulness of eligibility constraints in Article III.

Yet there were good reasons not to impose eligibility requirements on the judiciary. For all it shared with the other two branches at the end of the eighteenth century, the judiciary was exceptional in ways relevant to eligibility qualifications. First, the judiciary was designed as a passive branch of government. Limited to interpreting laws created and executed by Congress and the president, Article III judges possessed less power to abuse than members of the other two branches. Second, America's federal and state constitutions included ample jury provisions. Unlike a national legislature or executive, the Framers had experience with a jury system that successfully constrained errant judges. Third, before the doctrines of judicial review<sup>5</sup> or legal skepticism<sup>6</sup> gained credence, judges

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<sup>2</sup> See *infra* Part III.

<sup>3</sup> AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 158 (2005).

<sup>4</sup> U.S. CONST. art. III, §1.

<sup>5</sup> See generally EDWARD SAMUEL CORWIN, THE DOCTRINE OF JUDICIAL REVIEW 75–78 (1914) (describing evolution and acceptance of judicial review in the nineteenth

in the eighteenth century were thought to perform a more limited, technical function. Fourth, the judiciary's displacement from democratic pressures may have strengthened rather than weakened the need for eligibility qualifications.

Part I of this article examines the eligibility qualifications in the first two Articles, and the justifications underlying those qualifications. Part I also explores how those justifications would apply to the judiciary. Part II describes some exceptional aspects of the judiciary that may explain the omission of eligibility qualifications from Article III. Part III assesses the impact of the lack of eligibility requirements, briefly reviewing America's experience with Article III judges.

## II. ARTICLE III: A PRODUCT OF THE EIGHTEENTH CENTURY

Article I restricts Congress to representatives of at least twenty-five years of age who have been a United States citizen for seven years and live in the state they represent.<sup>7</sup> Article II limits the presidency to United States citizens at least thirty-five years old, who were born and resided for at least fourteen years in the United States.<sup>8</sup>

The eligibility qualifications serve populist goals, as lineal entrenchment of political office lingered in America's fledgling democracy. Akhil Reed Amar has described the goals of the eligibility qualifications as the promotion of a "democratic culture of republican merit and equal opportunity."<sup>9</sup> The age minimum ensured that sons of

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century); William E. Nelson, *Changing Conceptions of Judicial Review: The Evolution of the Constitution Theory in the State, 1790–1860*, 120 U. PENN. L. REV. 1166 (1972) (same).

<sup>6</sup> See generally LAWRENCE MEIR FRIEDMAN, *HISTORY OF AMERICAN LAW* 114 (2d ed. 1985) (describing "fundamental change in the concept of law" following the American Revolution, in which "a new set of attitudes developed [that] the primary function of law was . . . to be a utilitarian tool [protecting] property in motion or at risk rather than property secure and at rest"); MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870–1960*, at 25 (1977) (describing growth of legal thought from its "blind veneration for ancient rules, maxims, and precedents").

<sup>7</sup> U.S. CONST. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.").

<sup>8</sup> *Id.* at art. II, § 1, cl. 5 ("No Person except a natural born Citizen...shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.").

<sup>9</sup> AMAR, *supra* note 3, at 160.

famous families would not unfairly benefit from their birth status.<sup>10</sup> In the fifty years before independence, for example, more than 70 percent of New Jersey's elected representatives had family ties to past representatives.<sup>11</sup> In response, the Framers designed the age minimum to grow a republican society open to worthy people of humble origins. The birth-citizen qualification also aims to safeguard democratic values. The Framers reserved the presidency and vice presidency for natural born citizens in order to secure the offices from capture by foreign monarchs.<sup>12</sup> Similarly, the residency provisions ensured that representatives actually had substantial connections to the region they represented. Unlike the property qualifications in England and some state constitutions,<sup>13</sup> the eligibility qualifications in the Constitution appear to advance democratic ends even if they limit the scope of democratic choice.

The eligibility qualifications in Articles I and II evince the founding generation's distrust of centralized government. Each corresponds to the experience under, and appearance of, corrupt English rule. The age requirement reflects an aversion to England's hereditary monarchy and the custom in provincial America of lineal succession of government office from fathers to sons.<sup>14</sup> The residence qualification embodies the American experience an ocean away from their government: a non-resident president or congressman would bear an uncomfortably similar

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<sup>10</sup> *Id.* Age minimums trace back to 180 B.C.E. in the *Lex Villia Annalis*, a body of Roman law which included age minimums for senatorial magistrates. THOMAS BROUGHTON & MARCIA PATTERSON, *THE MAGISTRATES OF THE ROMAN REPUBLIC* 388 (1951).

<sup>11</sup> GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 84 (1991).

<sup>12</sup> JAMES BAYARD, *A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES* 96 (2nd ed., F.B. Rothman & Co. 1992) (1833) ("Were foreigners eligible to the office, it would be an object of ambition, or of policy, with foreign nations to place a dependent in the situation. . . ."). The Framers appreciated the over-inclusiveness of the birth-citizen rule at least to the degree that they carved out an exception for those who were citizens at the time of the Constitution's adoption. U.S. CONST. art. II, § 1, cl. 5; BAYARD, *supra*, at 96 (explaining that the exception was "justly due to those men who had united themselves with the fate of the new nation, and rendered eminent services in achieving its independence; and is, necessarily, of limited continuance.").

<sup>13</sup> H.T. DICKINSON, *Popular Politics*, in *A COMPANION TO EIGHTEENTH-CENTURY BRITAIN* 105 (H.T. Dickinson ed., 2002) (describing property qualifications in eighteenth century Britain).

<sup>14</sup> *See* WOOD, *supra* note 11, at 84 (1991). For example, in the fifty years preceding the Declaration of Independence, over 70 percent of New Jersey representatives elected into office were related to earlier representatives. *Id.* at 48.

appearance to the reign of King George III.<sup>15</sup> Article II's birth-citizenship qualification, although seemingly illiberal,<sup>16</sup> barred the next European nobleman from America's highest office.<sup>17</sup>

Eligibility qualifications in the state constitutions at the time of the federal document's ratification reflect similar democratic goals. Of the thirteen colonies that would comprise the United States in its infancy, four included age minimums<sup>18</sup> and four included residency provisions<sup>19</sup> of varying terms of length for their legislatures and executive officer. That no states imposed birth-citizen requirements on their executive office also appears reasonable as the threat of a foreign monarch

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<sup>15</sup> See generally THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776) ("He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws. . . ."). The residency qualification can be justified on simple efficiency grounds as well—it would eliminate the otherwise considerable time political figures spent travelling from their office to their home. See, e.g., *id.* at para. 6 ("He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.").

<sup>16</sup> Akhil Reed Amar has defended the birth-citizen requirement to the extent it "represented a considerable liberalization of eighteenth-century English practice." AMAR, *supra* note 3, at 164. Unlike England's 1701 Act of Settlement, which barred naturalized foreigners from serving in the Privy Council or Parliament, the U.S. Constitution restricted only the highest executive offices to citizens of foreign birth. *Id.*

<sup>17</sup> Evidence suggests that some Philadelphia delegates had contacted Prince Henry of Prussia to explore the possibility of the prince serving as America's constitutional monarch. See LOUISE BURNHAM DUNBAR, A STUDY OF "MONARCHIAL" TENDENCIES IN THE UNITED STATES, FROM 1776 TO 1801, at 54–75 (1922); WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 42–50 (1972).

<sup>18</sup> DEL. CONST. art. IV, IX (setting a minimum of twenty-five years of age for members of "[t]he council" but not members of the "House of Assembly" or the "President" of Delaware); MD. CONST. §XXX (setting a minimum of twenty-five years of age for Governor); N.C. CONST. §XV (setting a minimum of thirty years of age to be eligible for the position of Governor but no minimum for any representatives); VA. CONST. art. IV (setting a minimum of twenty-five years of age for any Senator but not for Governor or the House of Delegates). Other states set age minimums for office at the voting age and thus have not been counted as having age eligibility qualifications comparable to those in the U.S. Constitution. See, e.g., GA. CONST. art. VI, IX (setting a minimum of twenty-five years of age to both vote and hold political office in Georgia).

<sup>19</sup> N.C. CONST. arts. V, XV (each member of the Senate and House must reside in their district for one year and the Governor must have resided in the North Carolina for five years); PA. CONST. § 42 (every elected position requires a candidate have resided in Pennsylvania for two years); S.C. CONST. art. X (every elected position requires a candidate have resided in South Carolina for one year); VT. CONST. art. XI (every elected position requires a candidate have resided in Vermont for two years). The remainder of the states required either candidates for office to either be a resident eligible to vote or said nothing at all about residency qualifications. See e.g., N.Y. CONST. art V (requiring a citizen to have resided in the state for six months in order to vote but not mandating that candidates for office actually reside in New York).

assuming executive power over a single state presented less of a threat to sovereignty than in the presidency. And, reflecting their federal counterpart, states omitted age, residency, and citizenship qualifications from judiciaries.

The states, however, were not entirely silent on judicial eligibility qualifications. New York mandated retirement at sixty years of age for any state judge but did not set age minimums for any state office.<sup>20</sup> An age maximum reflects an entirely different concern than a minimum—namely, that judges would subvert democracy on account of the vicissitudes of old age rather than youthful inexperience. More importantly, the maximum suggests that at least some states deliberated over qualifications for the judiciary just as they did for the legislative and executive branches. Given states' presumed attention to this issue, it is significant that New York's age maximum remains the only judicial eligibility qualification in the first United States government—state or federal.

The absence of eligibility qualifications in the judiciary is striking because the concerns underlying the qualifications in the legislative and executive organs apply as forcefully in the judicial context. In 1771, two of Massachusetts' five justices on its highest court had fathers who had sat on the same court, and a third was the previous chief justice's younger brother.<sup>21</sup> The familial associations in the Massachusetts court were by no means anomalous among courts.<sup>22</sup> The highest court in South Carolina, for example, had similar family connections among succeeding justices.<sup>23</sup> Including John Jay, Bushrod Washington, James Iredell, and John Marshall, many early Supreme Court justices had close family ties to judges and politicians.<sup>24</sup> Indeed, most early justices, as well as the majority of judges appointed in 1789, came from privileged backgrounds.<sup>25</sup> Yet even though a select gene pool dominated state and federal judiciaries just as it dominated legislative and executive offices,

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<sup>20</sup> N.Y. CONST. art. XXIV (“[T]he judges of the supreme court, and the first judge of the county court in every county, hold their offices during good behavior or until they shall have respectively attained the age of sixty years.”).

<sup>21</sup> PETER E. RUSSELL, *HIS MAJESTY'S JUDGES: PROVINCIAL SOCIETY AND THE SUPERIOR COURT IN MASSACHUSETTS, 1692–1774*, at 52 (1990). One of these sons would be followed on the court by his son, and, on net balance, nine of ten justices on the court between 1746 and 1772 had family ties to others who served on the court. *Id.*

<sup>22</sup> See *id.* (providing South Carolina's highest court as an example of family ties among judges in state courts).

<sup>23</sup> *Id.*

<sup>24</sup> AMAR, *supra* note 3, at 219.

<sup>25</sup> *Id.*

the Constitution placed no eligibility constraint on the selection of federal judges.<sup>26</sup>

The nature of federal judicial service also suggests a need to protect the judiciary from unfit candidates. The Constitution grants Article III judges life tenure on condition of good behavior.<sup>27</sup> Life tenure endows judges with a much greater degree of protection from political accountability than the president or members of Congress. The appointment process further removes the judiciary from popular feedback mechanisms.<sup>28</sup> The presidency and membership in the Senate, offices held in four and six year terms, respectively, place judges on the federal bench without any formal input from the House of Representatives. Hence, democratic accountability is more diffuse in the third Article than in the other two, which may suggest the greatest need for eligibility qualifications among the three branches.

Early Americans were not especially pleased with the performance of the country's judges. Popular dissatisfaction with the perceived arrogance of America's initial judges grew into a movement toward an elected judiciary.<sup>29</sup> Randolph Jonakait has reported that every state as of 1845 had appointed judges, yet on the eve of the Civil War, two-thirds of states elected judges to lower courts and nearly as many states elected judges to their Supreme Courts.<sup>30</sup>

Similarly, evidence beyond the four corners of the Constitution suggests the Framers cared about who would serve in the judiciary. England's Star Chamber haunted the formation of America's judiciary. Initially conceived as a remedy for corruption in the feudal jury system,<sup>31</sup> the Star Chamber operated as a court until 1641 and gained notoriety for its judges conducting secret and politically motivated proceedings against foes of the Crown.<sup>32</sup> A primary goal that emerged in

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<sup>26</sup> The family ties are relevant to age and residency qualifications because they facilitate the placement of candidates in office on account of their kin rather than merit. Less worrisome is the birth-citizen requirement because a foreign monarch sitting on the federal judiciary would be constrained by other Article III judges and the limited role of applying laws created by the other two branches in particular disputes.

<sup>27</sup> U.S. CONST. art. III, §1.

<sup>28</sup> U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to . . . appoint . . . Judges of the Supreme Court. . .”).

<sup>29</sup> RANDOLPH N. JONAKAIT, *THE AMERICAN JURY SYSTEM* 31 (2003).

<sup>30</sup> *Id.* at 32.

<sup>31</sup> SIR JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 170–179 (1883).

<sup>32</sup> *See id.* at 337–57; SIR FREDERICK POLLOCK, *THE GENIUS OF THE COMMON LAW* 66 (1912). The 1765 landmark opinion in *Entick v. Carrington* emphasized the judicial

Constitutional debates was preventing the judiciary from devolving into “America’s Star Chamber.”<sup>33</sup> The Framers even incorporated this goal directly into the Constitution; the Fifth Amendment’s prohibition of “compelled testimony” is commonly interpreted in reference to the Star Chamber’s inquisitorial method.<sup>34</sup> Although corrupt judges led these “English inquisitions,” the Framers did not include any constitutional protection over who would preside in America’s courthouses.

Congress did, however, implement judicial qualifications by statute. In the Judiciary Act of 1789, the First Congress required lower federal court judges to reside in the district or circuit for which they were appointed.<sup>35</sup> The residence requirement likely served the same purposes as it did in Article I—that is, removing the need for judges to travel long distances between their court and home and inspiring public confidence by having a person with local ties serve as a public official. The latter rationale prompts the question of why the founding generation would be concerned about the appearances of impropriety in the federal judiciary, but not enough to include any similar provision in the Constitution. After all, the First Congress passed the Act nearly two years before enacting the Bill of Rights.<sup>36</sup> The Framers thus likely thought about including judicial eligibility qualifications in the Constitution or first ten amendments, yet demurred. On what basis might they have left such an omission?

### III. THE EXCEPTIONAL JUDICIARY

Any attempt to ascertain the intent of the Framers is fraught with hazard, especially when the object is an omission without an accompanying deliberative record. One cannot, for example, entirely

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corruption plaguing the Star Chamber in its avowal “to demolish this monster of oppression, and to tear into rags this remnant of Star Chamber tyranny.” 19 Howell’s State Trials 1029 (1765). The United States Supreme Court supplies some background: “[T]he Star Chamber has, for centuries, symbolized disregard of basic individual rights. The Star Chamber not merely allowed, but required, defendants to have counsel. The defendant’s answer to an indictment was not accepted unless it was signed by counsel. When counsel refused to sign the answer, for whatever reason, the defendant was considered to have confessed.” *Faretta v. California*, 422 U.S. 806, 821–822 (1975).

<sup>33</sup> II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 635 (Max Farrand ed., 1911).

<sup>34</sup> *See Pennsylvania v. Muniz*, 496 U.S. 582, 595–98 (1990).

<sup>35</sup> Judiciary Act of 1789, ch. 20, §3, 1 Stat. 92 (“That there be a court called a District Court, in each of the afore mentioned districts, to consist of one judge, who shall reside in the district for which he is appointed. . .”).

<sup>36</sup> U.S. CONST. amends. 1–10 (ratified 1791).



rule out the possibility that the Framers intended to include eligibility qualifications in Article III but simply forgot.<sup>37</sup> But the lack of direct evidence is not fatal to an understanding of why the Framers left the president and Senate free to appoint whomever they wished to the federal bench. Based on indirect evidence, as well as the text surrounding the Constitution's ratification, a number of possible justifications for the omission emerge. Viewed inclusively, the evidence suggests the Framers deliberately—and wisely—omitted eligibility qualifications from Article III.

The Constitution tailors eligibility qualifications to the nature of a particular branch of government. For example, only Article II includes a birth-citizen requirement. The election of a foreign monarch to the presidency posed a real danger to America's nascent government; but no similar danger existed from a foreign monarch joining Congress. A foreign monarch seeking to usurp American government by sitting on the federal bench poses less danger than one sitting in Congress. The omission of the birth-citizen requirement in Article III thus prompts no further explanation.

Although not as evident as the birth-citizen qualification, the residency and citizenship qualifications in Articles I and II appear ill-suited to the judiciary as well. Residence requirements were designed to reduce travel costs and cultivate at least an appearance of a connection between public officials and their constituency.<sup>38</sup> The judiciary assumes a relatively inconspicuous position in government. As elected officials, presidents and members of Congress have a strong interest in making direct, visible appeals to their constituents. Federal judges do not share this institutional incentive. Article III appointees rely on the president and Senate for investiture, and their confirmation proceedings typically garner minimal fanfare. Appearances thus count for much less in the political qualifications of judges than in those of elected representatives.

The emphasis in America's adjudicative model on detached neutrality rather than advocacy contributes further to the judiciary's isolation from the public. The impartial settlement of disputes, however intractable, rarely place federal judges in the public's eye. Judicial proceedings stress procedural regularity over charismatic pronouncement. The relative obscurity of the judiciary thus undercuts

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<sup>37</sup> Although this possibility cannot be completely ruled out, the absence of judicial eligibility qualifications in state constitutions all but compels the inference that the omission in the federal constitution deliberately followed this pattern.

<sup>38</sup> See *supra* note 10.

the need to have residence qualifications to cultivate the appearance of the connection between a federal judge and their constituency.<sup>39</sup> And, unlike members of Congress, federal judges do not travel as an essential part of their official duties, thereby undermining the need for residency qualifications.<sup>40</sup> The Framers also likely appreciated that travel costs would decrease over time, and thus inserted residency qualifications in a statute<sup>41</sup> that could be revised by a mere majority of Congress rather than in America's founding document.<sup>42</sup>

In one sense, we are now left to reconcile the age qualification against Article III. Yet, in another sense, the age minimum constitutes the tip of the iceberg of potential eligibility qualifications. The Framers were not limited to four types<sup>43</sup> of eligibility qualifications in writing Article III—they could have fashioned qualifications unique to the judiciary just as they did for the presidency. Age qualifications serve as a touchstone for the universe of unwritten eligibility qualifications, because in 1787, the same immediate concerns with lineal succession that justified age minimums in Articles I and II also pertained to Article III. Accordingly, the omission of age qualifications in Article III prompts a deeper inquiry into the nature of the judiciary relative to the other branches. This analysis thus turns to a more general appraisal of the aspects of the judiciary that warranted omitting from Article III both the qualifications in Articles I and II and any other qualification.

#### *A. The Judiciary as a Coordinate Branch*

The Framers may have perceived little need for eligibility qualifications in Article III because they saw the potential abuse of

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<sup>39</sup> See *supra* note 13.

<sup>40</sup> To be sure, federal judges “rode circuit” as part of their duties in America's years. See Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1391 (1996) (describing practice of circuit riding as it existed in the years immediately following ratification). They did not, however, have *de jure* or *de facto* obligations to return to a district they represented, like the members of the House of Representatives and the Senate.

<sup>41</sup> See Judiciary Act of 1789, *supra* note 35.

<sup>42</sup> Lawrence Lessig has elaborated on aspects of the Constitution tailored to accommodate technological innovations. Lawrence Lessig, *The Architecture of Innovation*, 51 DUKE L.J. 1783, 1794 (2002) (describing the purpose of the “progress clause” of the Constitution as to give Congress authority to grant “authors” exclusive rights for their “writings” for a “limited time” to “promote progress”).

<sup>43</sup> The four eligibility qualifications present in the Constitution include: (1) birth-citizenship; (2) citizenship; (3) residency; and (4) age minimums. The total absence of eligibility qualifications in Article III implies that a president had authority to nominate a foreign citizen to the Supreme Court.

power in the judiciary as less potent than in the other branches.<sup>44</sup> The relatively small threat posed by federal judges warranted fewer measures to guard against judicial abuse. In defending the guarantee of life tenure to federal judges, Alexander Hamilton wrote that “the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.”<sup>45</sup> The judiciary lacks such a malignant capacity because it wields no influence over the “sword or the purse” of government.<sup>46</sup>

Further, the judiciary had substantially less influence in the eighteenth century than it did in later centuries. The Supreme Court would not issue collective authoritative opinions but instead followed English custom where each justice offered his own reasoning and spoke solely for himself.<sup>47</sup> The doctrine of judicial review had yet to gain purchase,<sup>48</sup> and enforceable substantive due process rights did not exist. And only in the late twentieth century did the Court assert itself as the “ultimate interpreter” of the Constitution.<sup>49</sup> Confined to adjudicating the particular dispute before its courts, judiciary exercised an inherently limited power. These limits help explain why the Framers were willing to forgive the potential dangers of life tenure and the absence of eligibility qualifications.

*B. The Role of the Judiciary’s “Lower House”: The Jury*

Perhaps even more importantly, America’s judicial system includes a limiting mechanism without parallel in the other branches: the jury. Few political institutions were held in as high regard as the jury system in the late eighteenth century.<sup>50</sup> Indeed, the Framers viewed juries as a

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<sup>44</sup> See, e.g., Alexander Hamilton, Examination of Jefferson’s Message to Congress of December 7, 1801, no. XIV (Mar. 2, 1802), in 8 THE WORKS OF ALEXANDER HAMILTON 246, 249 (Henry Cabot Lodge ed., 1904) (arguing that the judiciary was inevitably the weakest branch of government because it could “ordain nothing”).

<sup>45</sup> THE FEDERALIST, No. 78, at 223 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

<sup>46</sup> *Id.*

<sup>47</sup> AMAR, *supra* note 3, at 216.

<sup>48</sup> Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

<sup>49</sup> See Baker v. Carr, 369 U.S. 186, 211 (1962) (using the phrase “ultimate interpreter” for the first time in Supreme Court history); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 595 (1952) (Frankfurter, J., concurring) (characterizing the “judicial process as the ultimate authority in interpreting the Constitution”).

<sup>50</sup> Jack Rakove comments that the jury system and political representation constitute the two rights of “preeminent importance” for early Americans. JACK N. RAKOVE,

primary constraint on judicial abuse. Elbridge Gerry urged the adoption of a civil jury mandate in the Constitution out of the “necessity of Juries to guard [against] corrupt judges.”<sup>51</sup> Alexander Hamilton affirmed Gerry’s sentiment in Number 83 of the *Federalist Papers*, emphasizing the principal usefulness of juries as providing “a barrier to the tyranny of popular magistrates in a popular government.”<sup>52</sup> The Federal Farmer portrayed the jury as a lower house of the judiciary such that if judges tried to “subvert the laws, and change the forms of government” juries would “check them, by deciding against their opinions and determinations.”<sup>53</sup> Jack Rakove remarked that the jury system enjoyed such esteem at the close of the eighteenth century that early Americans believed full operation of the right to a jury and right to representation “would shelter nearly all the other rights and liberties of the people.”<sup>54</sup>

Juries earned their esteem. The Zenger Trial marked the shining moment of juries in colonial America.<sup>55</sup> The case arose in 1735 when the Governor of New York, William Cosby, arrested John Peter Zenger on the charge of “seditious libel” for printing a criticism of Cosby.<sup>56</sup> To guarantee a favorable outcome, Cosby suspended a political enemy as chief justice of New York and replaced him with a more cooperative ally.<sup>57</sup> The new chief justice tried twice unsuccessfully to convince a

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ORIGINAL MEANING: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 293 (1960).

<sup>51</sup> II THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 587 (Max Farrand ed., 1911).

<sup>52</sup> THE FEDERALIST No. 83, at 229 (Alexander Hamilton) (Roy P. Fairfield ed., 1981). Hamilton elaborated that the jury earned his “high estimation” because it provided “security against corruption in the judiciary.” *Id.* But see THE FEDERALIST No. 65 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (“[J]uries are frequently influenced by the opinions of judges. They are sometimes induced to find special verdicts, which refer to the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?”).

<sup>53</sup> *Letters from the Federal Farmer* (XV), reprinted in 2 THE COMPLETE ANTI-FEDERALIST 315, 320 (Herbert J. Storing ed., 1981). Alexander Hamilton echoed this view of juries as the “lower house” of the judiciary when he denied that the Constitution’s grant of “jurisdiction over all matters of law and fact” to the federal judiciary would permit judges to overturn juries. THE FEDERALIST No. 81, at 43 (Alexander Hamilton) (Roy P. Fairfield ed., 1981).

<sup>54</sup> RAKOVE, *supra* note 50, at 293.

<sup>55</sup> The case earned enough notoriety that James Alexander’s report of the trial (*Brief Narrative*) was reprinted fifteen times before the close of the century.

<sup>56</sup> See JOHN ANDREW DOYLE, ENGLISH COLONIES IN AMERICA: THE COLONIES UNDER THE HOUSE OF HANOVER 130 (1907).

<sup>57</sup> *Id.* at 130–31.

grand jury to indict Zenger, advising the jury that “it is time to break [heavy, half-witted men of rhyming] when they grow abusive, insolent, and mischievous with it.”<sup>58</sup> Yet the grand jury rebuked the heavy hand of the judge, and Cosby proceeded without them, ordering Zenger’s arrest through a procedural alternative. The trial at this point attracted ample publicity, and famed lawyer Andrew Hamilton traveled from Philadelphia to defend Zenger.<sup>59</sup> In the public’s eye and governor’s sights, the jury fully acquitted Zenger.

The verdict itself was momentous, but perhaps its greatest effect lay in its value as precedent that this ambitious colony could use against abuse of both executive and judicial power.<sup>60</sup> Juries began to systematically rebuke English orders.<sup>61</sup> Because juries would not convict smugglers, for example, English customs officials tried to give customs jurisdiction solely to judges, and this move garnered vociferous complaints that England had deprived Americans of their fundamental right to a jury trial.<sup>62</sup> The complaints culminated in the Declaration of Independence’s condemnation of the king and Parliament for attempting to “depriv[e] us, in many Cases, of the Benefits of Trial by Jury.”<sup>63</sup>

Perhaps the best testament to the founding generation’s faith in the jury system lies in America’s founding legal texts. Article III explicitly<sup>64</sup> and implicitly<sup>65</sup> safeguards the role of juries in the American judiciary. But these guarantees did not satisfy Anti-Federalists, who spearheaded the push to include more jury protections in the Bill of Rights.<sup>66</sup> And the

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<sup>58</sup> LIVINGSTON RUTHERFORD, JOHN PETER ZENGER, HIS PRESS, HIS TRIAL AND A BIBLIOGRAPHY OF ZENGER IMPRINTS 39 (1941).

<sup>59</sup> *Id.* at 69.

<sup>60</sup> Gouverneur Morris once described the Zenger Trial as “the germ of American freedom, the morning star of that liberty which subsequently revolutionized America.” *Id.* at 131.

<sup>61</sup> JONAKAIT, *supra* note 29, at 32. For example England’s seditious libel laws were effectively repealed by American juries that refused to convict their fellow citizens under the law. *Id.*

<sup>62</sup> *Id.* at 14.

<sup>63</sup> THE DECLARATION OF INDEPENDENCE para. 15 (U.S. 1776).

<sup>64</sup> U.S. CONST. art. III, §2, cl. 3 (“The Trial of all Crimes . . . shall be by Jury. . .”).

<sup>65</sup> The Constitution only grants the Supreme Court original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party. . . .” U.S. CONST. art. III, §2, cl. 2. One scholar has argued that Article III’s limit on original jurisdiction of the highest court functioned to preserve the juries’ role in deciding questions of fact and credibility in common-law cases. AMAR, *supra* note 3, at 219–33.

<sup>66</sup> 1 THE COMPLETE ANTI-FEDERALIST 64 (Herbert J. Storing ed., 1981) (explaining that the Anti-Federalists considered the trial by jury the most important procedural right omitted from the originally ratified Constitution).

Bill of Rights amply reflects this effort; the jury system is featured in the Fifth, Sixth and Seventh Amendments,<sup>67</sup> but its absence also strongly influences the judge-restricting doctrines in the First, Fourth and Eighth Amendments.<sup>68</sup>

The constitutions of the original thirteen states place even greater emphasis on the essential role of juries in a well-functioning judiciary. Every state constitution at the time of the federal constitution's ratification included provisions guaranteeing a right to a jury trial. These constitutions placed even stronger jury protections than their federal counterpart. The North Carolina Constitution, for example, emphatically provides for absolute jury protections in all criminal and civil cases and in impeachment proceedings against the governor.<sup>69</sup> The United States Constitution, in contrast, merely guarantees a right to a jury trial in all criminal cases.<sup>70</sup>

Structured as complements rather than substitutes, federal and state constitutions' incorporation of juries into America's judicial organs erected a formidable barrier to judicial abuse. With strong jury protections, the Framers had powerful reassurance that "the people" could curb the excesses of the new Article III judiciary.<sup>71</sup> But the

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<sup>67</sup> US CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . ."); *id.* amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...."); *id.* at amend VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

<sup>68</sup> AKIL REED AMAR, *THE BILL OF RIGHTS* 96 (1998) (explaining that the lack of jury protections in these three amendments bolstered the need for other procedural protections in America's courtrooms).

<sup>69</sup> N.C. CONST. § IX ("That no freeman shall be convicted of any crime, but by the unanimous verdict of a jury of good and lawful men, in open court, as heretofore used."); *id.* § XIV ("That in all controversies at law, respecting property, the ancient mode of trial, by jury, is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."); *id.* §XXIII ("That the Governor, and other officers, offending against the State, by violating any part of this Constitution, mal-administration, or corruption, may be prosecuted, on the impeachment of the General Assembly, or presentment of the Grand Jury of any court of supreme jurisdiction in this State.").

<sup>70</sup> U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . .").

<sup>71</sup> Jeremiah Black argued that the jury system "is the best protection for innocence and the surest mode of punishing guilt that has yet been discovered." *Ex parte Milligan*, 71 U.S. 2 (1866). Black continues, "[the jury system] has borne the test of a longer experience, and borne it better than any other legal institution that ever existed among men." *Id.*

Framers' familiarity with juries checking judicial corruption contrasts sharply with the relatively unprecedented federal executive and legislature. In establishing the presidency, the Framers bore a novel task: erecting a republican head of government. At the close of the eighteenth century, the Framers were embarking on uncharted territory, with the tyrannical King George as the most salient example of a national executive.

Similarly, although to a lesser degree, the Framers had little positive experience with national legislatures.<sup>72</sup> England's Parliament was widely viewed as a pawn of the Crown.<sup>73</sup> According to John Joseph Wallis, at the time of the American Revolution, England's executive controlled nearly half of the House of Commons through various patronage systems.<sup>74</sup> In *Common Sense*, Thomas Paine described the British Constitution as consisting of the "base remains of two ancient tyrannies:" "the remains of monarchical tyranny in the person of the king," and "the remains of aristocratical tyranny in the persons of the peers," "compounded with some new republican materials" in the House of Commons.<sup>75</sup>

Hence, the Framers included eligibility qualifications in the first two Articles to guard against monarchical, lineal rule in this brave new republican government. Because the Framers were familiar with the effectiveness of the jury against judicial corruption, the need for added protections against judicial abuse may have appeared less pressing.<sup>76</sup>

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<sup>72</sup> Thomas Bradbury Chandler stoked fears that a federal legislature in America would devolve into the English version, writing that, "[a]n American *House of Lords* is in agitation," to be composed of hereditary "orders of the American nobility." THOMAS BRADBURY CHANDLER, *WHAT THINK YE OF THE CONGRESS NOW?* 34–35 (1775) (emphasis in original); see also JOHN R. ALDEN, *A HISTORY OF THE AMERICAN REVOLUTION* 163 (1989) (describing resistance to the "corruption of Parliament by the King . . .").

<sup>73</sup> John Joseph Wallis, *The Concept of Systematic Corruption in American History*, in *CORRUPTION AND REFORM: LESSONS FROM AMERICA'S ECONOMIC HISTORY* 23, 33 (Edward Ludwig Glaeser & Claudia Dale Goldin eds., 2006) (describing how the Stuart government's creation of a professional standing army threatened the independence of Parliament by filling the House of Commons with soldiers whose careers depended on the executive's patronage); HENRY ST. JOHN BOLINGBROKE, *POLITICAL WRITINGS* 92, 93–94 (David Armitage ed., 1997) (characterizing the views of parliament as an instrument of the executive).

<sup>74</sup> Wallis, *supra* note 73, at 33.

<sup>75</sup> THOMAS PAINE, *COMMON SENSE* 50 (Edward Larkin, ed., 2004).

<sup>76</sup> C.f. WILLIAM D. POPKIN, *EVOLUTION OF THE JUDICIAL OPINION: INSTITUTIONAL AND INDIVIDUAL STYLES* 54, 55 (2007) (explaining that the Articles of Confederation did not have a strong system of federal courts).

The utility of juries as a check on judicial tyranny, however, should not be overstated. The Framers appreciated the lingering danger of abuse in jury-constrained judges. In explaining why courts should not preside over presidential impeachments, Alexander Hamilton noted that even a jury safeguard would be inadequate to guard against judicial misfeasance in impeachment of the president since “juries are frequently influenced by the opinions of judges.”<sup>77</sup> Notwithstanding this inevitable weakness in juries’ ability to protect the president from jealous impeachment, jurors generally serve as an effective constraint against judicial abuse.

### *The “Technocratic” Judiciary*

The Framers’ vision of the technocratic role of the judiciary may also contribute to the omission of eligibility qualifications. Natural Law dominated eighteenth century jurisprudence.<sup>78</sup> Many years before the skepticism of the “legal realism” movement won favor, law was viewed as a science with judges acting as quasi-scientists dedicated to the discovery and application of coherent legal absolutes.<sup>79</sup> Faced with

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<sup>77</sup> THE FEDERALIST No. 78, at 226 (Alexander Hamilton) (Roy P. Fairfield ed., 1981). Hamilton continues, “[J]uries are sometimes induced to find special verdicts, which refer the main question to the decision of the court. Who would be willing to stake his life and his estate upon the verdict of a jury acting under the auspices of judges who had predetermined his guilt?” *Id.*

<sup>78</sup> See, e.g., THE FEDERALIST No. 78, at 227 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (arguing that judges properly function “neither [through] FORCE nor WILL, but merely [through] judgment”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“How immoral to impose [an oath] upon [judges], if they were used as the instruments, and the knowing instruments, for violating what they swear to support?”); EDWARD S. CORWIN, THE “HIGHER LAW” BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 5 (2008) (“The Ninth Amendment . . . illustrates [a theory of an essential and unchanging justice not dependent on any will] perfectly except that the principles of transcendental justice have been here translated into terms of personal and private rights.”); JOHN JOSEPH POWELL, 1 ESSAY UPON THE LAW OF CONTRACTS AND AGREEMENTS 52 (1790) (“[R]ights . . . should . . . depend upon certain and fixed principles of law, and not upon rules and constructions of equity. . . .”). *But see* *Adamson v. California*, 332 U.S. 46, 70 (1947) (asserting that a natural law approach to constitutional interpretation would “degrade the constitutional safeguards of the bill of rights and simultaneously appropriate for this Court a broad power which we are not authorized by the Constitution to exercise”); JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO LEGISLATE 74 (1991) (pointing out that some eighteenth century lawyers disfavored natural law insofar as it was too amorphous to ground laws or rights).

<sup>79</sup> See WILLIAM FORSYTH, HISTORY OF TRIAL BY JURY 8 (James Appleton Morgan ed., Burt Franklin 1971) (1878) (“The law [is] a science which requires laborious study to comprehend it; and without a body of men trained to the task, and capable of applying it, the rights of all would be set afloat—tossed on a wide sea of arbitrary, fluctuating, and



complaints over his nomination of John Marshall as chief justice, John Adams responded that Marshall's "reading in the science [of law] is fresh in his head."<sup>80</sup> The Framers thus envisioned members of the judiciary as highly trained, field-specific experts.<sup>81</sup>

The requirement that judges have "very special talents" limited the pool of qualified candidates and thereby raised search costs for able judges.<sup>82</sup> The Framers appreciated these costs and were willing to take measures they thought necessary to lower them. In Number 78 of *The Federalist Papers*, for example, Alexander Hamilton argued that Article III needed to guarantee life tenure to attract to the bench the "few men in society who will have sufficient skill in the laws to qualify them for the stations of judges."<sup>83</sup> Likewise, the removal of eligibility qualifications was an effective way to clear the path for the best jurists to enter the judiciary.

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contradictory decisions."); see also *Black and White Taxicab & Transfer Co. v. Brown*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting) (describing the prevailing view in 1789 of common law as "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute"). The twentieth century occasioned a "significant rethinking of the role of federal courts" where the "general practice [of judges] has been to look for legislative guidance before exercising innovative authority over substantive law." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694–95 (2004).

<sup>80</sup> DAVID McCULLOUGH, JOHN ADAMS 560 (2001). One scholar comments that until the *Brown v. Board of Education* decision, "the rule of law . . . throughout the nineteenth century . . . [was] a baseline that courts administered until the people changed it." William E. Nelson, *The Historical Foundations of the American Judiciary*, in *THE JUDICIAL BRANCH* 3 (Kermit L. Hall & Kevin T. McGuire eds., 2006).

<sup>81</sup> See, e.g., *THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 188 (Jonathan Elliot ed., Taylor & Maury 1845) (Madison, J.) (objecting to the judicial appointment "by the whole legislature" because they "are incompetent judges of the requisite qualifications" and would favor those to whom the favors were owed but who lacked "any of the essential qualifications for an expositor of the laws").

<sup>82</sup> Chief Justice of a Unified Court, *Selecting and Retiring Judges: Why Popular Election Results in Dissatisfaction—Improvement Through Separate Retirement Elections—Appointment*, 3 J. AMER. JUDICATURE SOCIETY 165, 165 (1920). A metaphor of the time provided that just like very few people can engineer a bridge upon which thousands cross each day, few people possess the technical skill to pass "upon the rights to life, liberty and property of thousands of citizens." *Id.*

<sup>83</sup> *THE FEDERALIST* No. 78, at 226 (Alexander Hamilton) (Roy P. Fairfield ed., 1981). From a modern perspective, the trade-off in attracting a different pool of potential judges by eliminating life tenure may yield dividends by shifting the understanding of the judicial role away from glamorous policymaking towards the "more mundane, record-driven activity of applying fact to law." Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 639 (2005).

*A Popular Buffer*

The judiciary's removal from democratic pressures may also have decreased, rather than increased, the need for eligibility qualifications in the view of the Framers. Eligibility qualifications indirectly enhance democratic goals by directly subverting democratic choice. The age minimum constitutes one example of this democratic trade-off. Even if America's populace would otherwise vote someone below the age of thirty-five into America's highest office, the Framers concern with lineal succession as embodied in the age minimum predominates over the people's will.

Article III's nomination by the president and confirmation by the Senate creates an analogous buffer from potentially counterproductive democratic choice, which may lessen the need for eligibility qualifications. In debates over the appointment of the judiciary, the Framers conceded that the unique nature of judging<sup>84</sup> required some removal from democratic pressures.<sup>85</sup> For this reason, the Framers limited confirmation to the "advise and consent" of the Senate alone, and removed the House of Representatives—the most populist federal body—from the formal process of selecting federal judges.<sup>86</sup> James Madison emphasized this design by describing members of the House of Representatives as "incompetent judges of the requisite qualifications" for federal judges.<sup>87</sup> Hence, the Framers may have preferred avoiding the over-inclusive eligibility qualifications<sup>88</sup> where the appointment process and nature of the judiciary included ready-made restraints on popular will.

## IV. TWO CENTURIES LATER: AN APPRAISAL

Regardless of why the Framers omitted eligibility qualifications from Article III, experience confirms the omission did not undermine

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<sup>84</sup> THE FEDERALIST No. 78 at 226, 233 (Alexander Hamilton) (Roy P. Fairfield ed., 1981) (claiming that "there can be but few men in society who will have sufficient skill in the laws to qualify them for the stations of judges.").

<sup>85</sup> See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 972 (2007).

<sup>86</sup> *Id.*

<sup>87</sup> 5 DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 188 (Debate of June 13, 1787) (Jonathan Elliot ed., Washington D.C., Taylor & Maury 1845). Madison continued to claim that Congressmen would likely favor those they had some connections to but who lacked "any of the essential qualifications for an expositor of the laws." *Id.*

<sup>88</sup> After all, age, birth-citizenship, and residency provisions remain blunt instruments to advance democratic goals.

republican meritocratic values.<sup>89</sup> Judges working when they are too old poses a much bigger problem than judges working when they are too young.<sup>90</sup> Out of all three branches, the judiciary likely has proportionally the fewest corruption scandals and strains of nepotism.<sup>91</sup> Judicial appointments have evolved from dynastic beginnings to a highly meritocratic, albeit partisan, process. As a result, many figures of the federal judiciary in the twentieth century, whether appointed by Democratic or Republican administrations, emerged from humble backgrounds.<sup>92</sup>

The few twentieth-century federal judges with influential familial ties also happen to be some of the most highly regarded. Learned Hand, for example, grew up comfortably in a family with an “almost hereditary” attachment to the legal profession.<sup>93</sup> As an appellate judge, Hand gained ever more prominence “not because of his standing in the judicial hierarchy, but because of the clarity of thought and the cogency of reasoning that shape[d his opinions].”<sup>94</sup> Hand’s cousin Augustus

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<sup>89</sup> But see Sanford Levinson, *Contempt of Court: The Most Important ‘Contemporary Challenge’ to Judging*, 49 WASH. & LEE. L. REV. 339, 342 (1992) (arguing that the 1992 Supreme Court lacked anyone with impressive public service credentials, especially when compared with the Court in 1954 that decided *Brown v. Board of Education*).

<sup>90</sup> See, e.g., Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST., Aug. 9, 2002, at A23 (arguing that the Supreme Court’s seniority system “encourages justices to stay past their prime”); John O. McGinnis, *Justice Without Juries*, 16 CONST. COMM. 541, 543 (1999) (speculating that term limits on the Supreme Court would have “curtailed the effects of senility and the excessive delegation of power to young and energetic law clerks by reducing the temptation to cling to the bench into very old age”). Ironically, some evidence suggests presidents, seeking to maximize their power over the court’s composition, seek to appoint younger judges that will presumably have longer terms given the life tenure guarantee. See, e.g., DWIGHT EISENHOWER, *THE WHITE HOUSE YEARS: MANDATE FOR CHANGE 1953–1956*, at 227 (1963) (detailing how President Eisenhower set an age maximum for Justices of sixty-two years); RICHARD HODDER-WILLIAMS, *THE POLITICS OF THE U.S. SUPREME COURT 183–85* (1980) (documenting that Justice William O. Douglas’s youth was an important factor in his appointment and achievement of longest tenure in Supreme Court history).

<sup>91</sup> One scholar quips that the few corrupt federal judges “eventually get their just deserts and join Congress.” Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 531, 531 (1999).

<sup>92</sup> See, e.g., EARL M. MALTZ, *THE CHIEF JUSTICESHIP OF WARREN BURGER, 1969–1986*, at 14–15, 17–18 (2000) (describing the modest childhoods of late-Justices William Orville Douglas, Thurgood Marshall, Harry A. Blackmun, and Byron White); RICHARD A. BRISBIN, JR., *JUSTICE ANTONIN SCALIA AND THE CONSERVATIVE REVIVAL* 12 (1998) (describing Justice Scalia’s school years in a middle-class immigrant neighborhood in Queens, New York).

<sup>93</sup> KATHRYN GRIFFITH, *JUDGE LEARNED HAND AND THE FEDERAL JUDICIARY* 3 (1973).

<sup>94</sup> GERALD GUNTER, *LEARNED HAND: THE MAN AND THE JUDGE* 574 (1994) (citing editorial, “Judges’ Judge,” *Washington Post*, 28 January 1947, 8). The *Harvard Law*

joined him on the Second Circuit, and independently established himself as an excellent jurist, inspiring the adage to “quote Learned, but follow Gus.”<sup>95</sup> Likewise, yet with perhaps less distinction than the Hands, the Arnold brothers served together on the Eighth Circuit and individually earned reputations as fit and able judges.<sup>96</sup>

Whether due more to prescience or serendipity, the absence of eligibility qualifications in Article III appears prudent in hindsight. The rationales underlying the residency, birth-citizenship, and age requirements would gain little traction in a modern debate about reforming the judiciary.<sup>97</sup> Although debates about the proper judicial philosophy and background remain robust, largely absent from the discussion are charges of nepotism or incompetence. History has thus confirmed the wisdom of the Framers in leaving the president and Senate full discretion in selecting Article III judges.

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*Review* also devoted a section of an entire article to praise its then-living alumnus in 1947. 60 HARV. L. REV. 325 (1947).

<sup>95</sup> Michael E. Solimine, *The Judiciary and Nepotism*, 71 U. CIN. L. REV. 563 (2004). Solimine argues further that the Hand cousin’s relationship may have also created “considerable, positive synergies” in their working together. *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Debates over the rules governing the composition of America’s courts continue today. Many within legal academia have recently urged congressional action to install a “system of rotation to assure some regularity of change in the composition of the [Supreme] Court.” Letter from Paul D. Carrington, Roger C. Cramton, Daniel J. Meador & Alan R. Morrison to AAAL Fellows (July 14, 2009), 4 (1999).