Judicial Duty and the Supreme Court's Cult of Celebrity

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Introduction

The 1987 confirmation fight over Robert Bork gave political salience to the dispute between originalism and living constitutionalism as interpretive methods. Within the academy, that dispute continues, with endless nuances, qualifications, and elaborate theoretical frameworks on both sides. Judging from subsequent confirmation proceedings, however, the debate is no longer relevant to judicial appointments. Nominees of both parties now present themselves as modest and humble servants of the law, respectful of existing precedent and without a desire to move the law in any particular direction. Most Senators on both sides of the aisle accept this as the proper model for judging, and the only real question now seems to be whether a given nominee is *sincerely* pledging allegiance to the accepted ideal.

Nowhere was the new consensus more vividly on display than in the recent Supreme Court confirmation hearings for Justice Sonia Sotomayor. She came before the Senate with a long and fairly bland record as a circuit judge, but also with a history of extrajudicial statements suggesting both that she thinks impartiality is unachievable and that she is untroubled by that reality. When pressed at her hearings, then-Judge Sotomayor repeatedly and resolutely maintained that she would never do anything except impartially apply the law to the facts, that she had no agenda of any sort, and that she would certainly not allow her policy preferences or her own values to have the slightest effect on her decisions.[1] All of her controversial extrajudicial state-

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1 *See Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Asso-*

ments, she claimed, had been misunderstood or were meant to convey the opposite of what she had said. In what may have been a first, she also repudiated the approach to judging that President Obama had said he was looking for in someone who deserved to be appointed.[2]

Predictably, Republican Senators on the Judiciary Committee suspected a feigned confirmation conversion, and Democrats defended the nominee. But none of them opposed her on the ground that she was pledging allegiance to the wrong ideal. Whatever one may think about the sincerity of Justice Sotomayor or the Senators, this performance suggests the existence of deep popular expectations about the distinction between law and politics. The law is supposed to be made by elected officials, including those who ratified the Constitution, and judges are supposed to apply the law in the cases that come before them. Where the law is unclear, judges should do their best to determine what the lawgiver meant and should be cautious and restrained in departing from interpretations already adopted by prior courts. What judges should never do is use the power of their office to change the law to suit their own personal notions of what the law should be.[3]

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ciate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 111th Cong. 120 (2009) (statement of Sonia Sotomayor).

2 *See id.*

3 As this Article was going to press, the Senate Judiciary Committee held hearings on the nomination of Elena Kagan to the Supreme Court. A preliminary review of the unofficial transcripts indicates that she displayed the same reverence for the traditional ideal as other recent nominees. For example:

> Well, Senator Sessions, I'm not quite sure how I would characterize my politics. But one thing I do know is that my politics would be, must be, have to be completely separate from my judging.
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> And I—I agree with you to the extent that you're saying, look, judging is about considering a case that comes before you, the parties that comes [sic] before you, listening to the arguments they make, reading the briefs they file, and then considering how the law applies to their case—how the law applies to their case—not how your own personal views, not how your own political views might suggest, you know, anything about the case, but what the law says, whether it's the Constitution or whether it's a statute.

Elena Kagan—Confirmation Hearings Transcript, Day 2, WashingtonPost.com, June 29, 2010, http://www.washingtonpost.com/wp-srv/politics/documents/KAGANHEARINGSDAY2.pdf. When pressed about President Obama's statement that "the critical ingredient of [difficult] cases is supplied by what is in the judge's heart," Kagan (like Sotomayor) refused to agree with the President who nominated her:

> Senator Kyl, I don't know what was in the—I don't want to speak for the president, I don't know what the president was speaking about specifically. . . .
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> . . . .
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> [A]t the end of the day what the judge does is to apply the law. And as I said, it

In the legal academy, this traditional ideal is considered laughable at best and pernicious at worst. Michael Louis Seidman probably summed up the professional consensus when he said, in the midst of the Sotomayor hearings: "If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court."[4] The theory underlying his view rests on two principal propositions. First, the law, and especially the Constitution, is so vague and ambiguous that it is simply not possible for judges—and especially Supreme Court Justices—to avoid relying on their own moral and political views in a wide range of cases. Second, *Marbury v. Madison*[5] is the foundational precedent for our independent and politically powerful judiciary, which has inevitably become an integral part of the nation's policymaking apparatus.

Philip Hamburger's *Law and Judicial Duty*,[6] to which a panel of this symposium is devoted, argues that the traditional ideal of judging was well established for hundreds of years among very sophisticated common law judges, who were fully aware of the inherent ambiguity of law and the need for an independent judiciary.[7] What is more, the traditional ideal sounds a lot like what Alexander Hamilton promised in *Federalist No. 78*, where he predicted that Supreme Court Justices would be just what today's politicians say they want: scholarly types,

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> might be hard sometimes to figure out what the law requires in any given case, but it's law all the way down.

Id. Asked about "the idea of a living Constitution," Kagan said:

> You know, I—I think that—I—I don't particularly think that the term is apt, and I especially don't like what people associate with it. I think people associate with it a kind of loosey-goosey style of interpretation in which anything goes, in which there are no constraints, in which judges can import their own personal views and preferences. And I most certainly do not agree with that.
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> I think of the job of constitutional interpretation that the courts carry on as a highly constrained one, as constrained by text, by history, by precedent and the principles embedded in that—in that precedent.
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> So the courts are—are—are limited to specifically legal sources. It's a highly constrained role, a circumscribed role. So—so to the extent that that term is used in such a way as to suggest that that's not the case, I—I don't agree with that.
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> But I do think, as—as I just indicated, that the Constitution, and specifically—not the entire Constitution, but the general provisions of the Constitution, that the genius of the drafters was—was to draft those so that they could be applied to new conditions, to new circumstances, to changes in the world.

Id.

4 The Federalist Society Online Debate Series, The Sotomayor Nomination, Part II (July 13, 2009), http://www.fed-soc.org/debates/dbtid.30/default.asp.

5 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

6 PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (2008).

7 For a more detailed discussion of Hamburger's argument, see Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMMENT. 169 (2009).

cautious and profoundly boring, immersed in the tedium of mind-numbing precedents, and deeply self-effacing.[8]

Hamilton's predictions have proven reasonably accurate about most judges in the lower federal courts, as Justice Sotomayor's own record as a circuit judge suggests. But few observers would characterize today's Supreme Court Justices as heirs to the almost unbroken tradition of judicial duty that Hamilton presupposed. Unlike their judicial subordinates—mere district and circuit judges—they are Supreme Court Justices, a semantic distinction that points to a yawning chasm, both in status and in behavior.

The recent bipartisan paeans to precedent and judicial modesty appear to reflect an inchoate political consensus that our Justices should behave more like traditional judges. The bipartisan nature of the consensus also reflects an implicit recognition, by the Senators and the nominees alike, that allegiance to traditional ideals of the judicial role does not imply either a commitment to originalism or a rejection of living constitutionalism (at least in some indefinably restrained form). That recognition is what has allowed the consensus to emerge.[9]

But is this consensus just political theater, with no consequences except to screen out candidates with paper trails like Robert Bork's? We can be sure that hectoring nominees at confirmation hearings, or lauding them for their presumed intent to follow the traditional ideal, will have negligible effects on their future behavior. If the Senators are or become serious about the traditional ideal, can anything more efficacious be done?

Recently, there has been a flurry of proposals to eliminate life tenure for Supreme Court Justices,[10] a reform that was advocated long ago by a young John G. Roberts, Jr.[11] These proposals are motivated by the view that the Court is no longer functioning, according to its original design, as a genuinely judicial institution. Without disputing the diagnosis, we are skeptical about the proposed cure. For one

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8 *See* THE FEDERALIST NO. 78, at 529–30 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

9 Professor Tushnet believes he detects a "rather strong partisan tinge" in the "tone" of our article. Mark Tushnet, *Incentives and the Supreme Court*, 78 GEO. WASH. L. REV. 1300, 1309 n.41 (2010). We confess that we are baffled as to which party we sound like partisans of.

10 For a sample of various proposals, see REFORMING THE SUPREME COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541 (1999); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 568–84 (1999) (book review); Symposium, *Term Limits for Judges?*, 13 J.L. & POL. 669 (1997).

11 *See* David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for the "Golden Parachute,"* 83 WASH. U. L.Q. 1397, 1400 (2005).

thing, it would require a constitutional amendment. More significantly, it does not address the root of the problem and, if adopted, might well merely serve as an incentive for Justices to cram a maximum amount of political activism into a shorter period of time.

Statutes are much easier to enact than constitutional amendments, and Congress could take steps to make our Court less adventurous and more respectful of both law and precedent. This Article sketches some modest measures[12] that would lead in that direction if Congress were serious about curtailing the behavior that so many Senators are pleased to condemn during confirmation proceedings.

But before proposing remedies, we offer a partial account of the origin of the disease. Part I explores the reasons for the rise of what we call the celebrity Justice. One engine in this development was Chief Justice John Marshall's innovative practice of elaborately reasoned opinions for the Court signed by individual Justices. This practice has allowed and encouraged Justices to pursue personal glory through opinions that sometimes read less like the work of judges than like political manifestos or pop philosophy. In the twentieth century, moreover, a number of other developments allowed Supreme Court Justices to shed various onerous judicial responsibilities. As a result, they have been able to focus ever more exclusively on the politically architectonic issues of greatest interest to themselves and to the political, journalistic, and academic elites from whom they seek approval.[13]

We then suggest some correctives aimed at creating incentives for the Supreme Court to behave more like a court and for Supreme Court Justices to behave more like judges than like peers of the realm. Part II proposes that Congress enact a statute forbidding the Supreme Court to issue signed opinions. Standard practice now is for judicial opinions to be signed by the Justice who wrote the opinion, or hired

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12 Our proposals are not modest in the Swiftian sense. After a draft of this Article was posted on the Social Science Research Network, Michael Rush of Melbourne, Australia, called our attention to several features of that nation's practice that resemble some of our proposals. *See generally* THE OXFORD COMPANION TO THE HIGH COURT OF AUSTRALIA (T. Blackshield, M. Coper & G. Williams eds., 2002).

For a proposal that suggests how modest our suggestions are, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (proposing that courts be forbidden to enforce the Constitution, and urging that it be effectively replaced with a different constitution consisting approximately of part of one paragraph from the Declaration of Independence along with selected parts of the current Constitution's Preamble).

13 Empirical evidence about the orientation of the Justices toward elite opinion is developed in Lawrence Baum & Neal Devins, *Why the Supreme Court Cares About Elites, Not the American People*, 98 GEO. L.J. (forthcoming 2010).

the clerk who wrote it. Occasionally, the Justices revert to an older practice of issuing anonymous per curiam opinions. Truly unpretentious judicial servants should have no need to put their personal stamp on the law, and the practice of doing so has contributed to unnecessary and unhealthy flamboyance in the Court's work. This Part advocates that Congress require that all Supreme Court opinions, including concurrences and dissents, be issued anonymously. This should lead to fewer self-indulgent separate opinions, more judicious majority opinions, and more reason for future Justices to treat the resulting precedents respectfully.

The remainder of the Article recommends statutes affecting the jurisdiction and workload of the Justices. Part III proposes that the Justices be required to hear more cases involving issues important to the legal system, as distinguished from the political and media arenas. The Supreme Court, which today has virtually total discretion to choose which cases to hear, once had little or no choice at all. Using the freedom Congress has granted them, the Justices now focus on what they decide are the most interesting constitutional and statutory issues. We would leave them free to decide how many cases to hear, and which ones. But Congress could require them to hear at least one case certified from a circuit court for every federal question case they choose from their discretionary docket. Still free to take all the cases they like on such stimulating topics as nude dancing, flag burning, sodomy, campaign contributions, and abortion, they should have energy left to decide an equal number of cases that their judicial subordinates think are in need of resolution.

Part IV recommends that Congress take the Justices' law clerks away from them. These intelligent, energetic, and intensely ambitious young people are itching to do the hard work of studying precedents and writing opinions. It should be no surprise that modern Justices have frequently assumed the more pleasant role of dictating big thoughts and deep feelings to the clerks, and editing the drafts they write. Truly old-fashioned judges would study the precedents themselves, discuss the law with their colleagues rather than with their handpicked votaries, and write their own opinions. The Supreme Court once heard hundreds of cases each year without law clerks to help. Today's Justices should be able to manage the few dozen with which they now seem comfortable.

Part V proposes to bring back circuit riding. Through the late nineteenth century, Congress required Supreme Court Justices to serve part of their time on lower federal courts, "riding circuit"

around the country. Restoring this practice would expose the Justices to the problems created by muddled Supreme Court decisions. It would also give them some ongoing experience in the role of a judge whose decisions are subject to appellate review.

We recognize that our proposals are unlikely to be adopted. Majorities of Congress would seldom have much to gain politically from imposing restrictions like these on the judiciary.[14] Supreme Court majorities, moreover, are generally very canny in calibrating the extent to which they can afford to provoke the legislature. No surprise, since it ordinarily takes some shrewd maneuvering to navigate the perilous political path to a seat on the Court. Still, it is not impossible that judicial missteps might sometimes trigger a serious political effort to curb the Court. If that were to happen, these proposals could offer a responsible and moderate alternative to other initiatives Congress might consider. Just to take one example, our proposed reforms would approximate the benign effects of judicial term limits. If serving as a Supreme Court Justice were to become a full-time, nondelegable job, fewer people would insist on staying in the saddle past the time when they can even mount the horse.

I. From Obscure Scholar to Global Celebrity

United States Supreme Court Justices enjoy far more power and prestige than their eighteenth-century counterparts. A significant portion of this increase is due to the enormously increased power of the federal government itself, both in absolute terms and in relation to the state governments. It would be surprising if this change were not accompanied by institutional changes in the Court, and one might therefore suppose that the most significant changes in judicial power and prestige have been inevitable concomitants of our increasingly nationalized form of governance. We doubt that things are quite so simple.

First, the Supreme Court seems to have acquired a disproportionately large share of the increase in federal power. Second, the fact that the Court's power and prestige were likely to expand along with that of Congress and the federal executive does not imply that institutional changes in the Court were bound to take the form they did take.

The conventional explanation for the Court's transformation focuses on Chief Justice Marshall. In that story, the heroic Marshall

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[14] We think this point is an obvious one, but we are happy to see it elaborated at some length in Professor Tushnet's response. Tushnet, *supra* note 9, at 1307–09.

skillfully unified his colleagues and boldly led his little band of judges on a successful quest to secure a large and independent role for the Court in the American political system. We have no reason to question that general point. We do believe, however, that the full effects of some Marshall Court innovations have not been fully appreciated. And some of these and other subsequent institutional changes have proven to be more costly than was necessary to enable the Court to perform its constitutionally appropriate role.

This Part begins by sketching the humble status of the early Supreme Court Justices and certain institutional changes that significantly increased their power and status. It then offers a brief account of the modern Supreme Court Justices, celebrities trailed by paparazzi. Finally, this Part uses analytical frameworks developed by Chief Judge Frank Easterbrook and Judge Richard Posner to provide a theoretical basis for the proposals sketched in the following Sections of the Article.

A. The Judges Break Their Chains

In his famous analysis in *The Federalist*, Hamilton invoked Montesquieu for the proposition that the judiciary can threaten the liberties of the people only if judges are controlled by the legislature or the executive.[15] From this it seemed to follow that judicial independence guarantees judicial harmlessness. Mocking fears of an imperial judiciary,[16] Hamilton assured his audience that the judiciary "may truly be said to have neither Force nor Will, but merely judgment."[17] The executive, Hamilton noted, controls the government's coercive force, whereas the legislature commands society's material resources and prescribes the rules to which the community is subjected.[18] By contrast, the judiciary "has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, *and can take no active resolution whatever*."[19]

In Hamilton's account, few men would be qualified to serve on the Supreme Court, and even fewer qualified lawyers would be willing to forego lucrative private careers for public service. Life tenure for judges was necessary, according to Hamilton, to induce qualified law-

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15 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 8, at 523.

16 THE FEDERALIST NO. 81, at 545–46 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

17 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 8, at 523.

18 *Id.* at 522–23.

19 *Id.* at 523 (emphasis added).

yers to serve.[20] In *Federalist No. 78* and again in *No. 81*, Hamilton used the phrase "long and laborious study" in describing the background required for a seat on the Court.[21] The image conjured is of men (and now, of course, women as well) purged by age and arduous study of the fire that drives ambitious politicians.

From today's perspective, it is hard to resist smiling at Hamilton's further suggestion that the President might find it difficult to prevail upon competent lawyers to serve on this new Court.[22] One does not imagine that a President would need to engage in much arm-twisting to persuade any law firm partner to forego a seven-figure salary in private practice to become a Supreme Court Justice.[23] But the considerations to which Hamilton referred may not have been specious at the time. When Justice James Wilson died in 1798, President John Adams offered the position to John Marshall, who declined the position because he was unwilling to leave his successful practice in Richmond.[24] Even some who consented to serve soon quit the job. John Jay, for example, famously left to become a governor, a decision that one would come to expect, according to Felix Frankfurter, only from "a certified madman."[25]

Service on the Supreme Court over the first four decades of the Republic was both physically and mentally demanding, and it enmeshed the Justices in the multivaried intricacies of the legal system. The early Justices enjoyed neither regal accommodations nor a retinue of flunkeys. The courtrooms where they worked varied from drab to uninhabitable.[26] Justices who served on the Marshall Court roomed together in the same boarding house on Capitol Hill over the course of their two-month term in Washington. At least from some accounts,

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20 *Id.* at 529–30.

21 *Id.* at 529; THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 16, at 544.

22 *See* THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 8, at 530.

23 Contrary to Professor Tushnet's mistaken inference, Tushnet, *supra* note 9, at 1301 n.6, we have not implied, in this sentence or anywhere else, that changing the Justices' compensation would have no effect on the willingness of some potential nominees to accept an appointment. *See infra* text accompanying notes 196–97.

24 *See* Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797, 804–05 (2004).

25 Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 884 (1953). Twelve years after Frankfurter's statement, President Lyndon B. Johnson (who wanted to appoint Abe Fortas to the Court) prevailed upon Arthur Goldberg to resign and become our Ambassador to the United Nations. *See* David A. Kaplan, *The Reagan Court—Child of Lyndon Johnson?*, N.Y. TIMES, Sept. 4, 1989, at L27. Goldberg's decision is probably best seen as a monument to Johnson's extraordinary ability to make offers that were hard to refuse.

26 *See* G. Edward White, *The Working Life of the Marshall Court, 1815–1835*, 70 VA. L. REV. 1, 3 (1984).

it appears that the Justices lived, ate, and breathed the law, sitting though interminable oral arguments (there were no time limits) and then debating the issues among themselves.[27] The Justices had no clerks, no secretaries, no librarians; and yet they issued opinions within days, or at most weeks, after oral argument.[28]

The work of the early Supreme Court was very different from that of its modern counterpart. Between 1789 and 1801, the Court took 87 appeals from state and federal courts.[29] Of those, 36 arose via diversity jurisdiction (including state citizenship and alienage), 35 were admiralty cases, and 9 were civil actions brought by the United States; only 7 were federal question cases brought under section 25 of the Judiciary Act.[30] Most of the cases coming before the Court during these years were mundane matters, often involving issues of state law.[31] Although the early Court did hear some cases of wide significance, it typically found itself resolving narrow, commercial matters. This continued for some time, leading one commentator to observe that even under Chief Justice Marshall, the Court's "docket consisted largely of private disputes, and many—at times most—of the cases it decided were 'a mass of humdrum litigation' with little impact beyond the individual litigants."[32]

The Justices were also exposed to a variety of legal issues through the practice of circuit riding, which consumed as much as six months of each year.[33] Circuit riding was an integral part of a Justice's job description because courts of appeals consisted of two Supreme Court Justices and one district judge.[34] In addition to appellate responsibilities, Justices riding circuit also held trials[35] and instructed grand juries.[36] Members of the first Congress argued that one of the benefits of circuit riding was that it exposed the Justices to the day-to-day legal

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27 *Id.* at 34–35.

28 *Id.* at 1, 30.

29 *See* JULIUS GOEBEL JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 665 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vol. 1, 1971).

30 *Id.* app. at 803 tbl.2.

31 *Id.* app. at 804 tbl.3.

32 Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 234 (2004) (quoting CHARLES FAIRMAN, RECONSTRUCTION AND REUNION, 1864–88, PART ONE 6 (The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, vol. 6, 1971)).

33 *See* Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1797–98 (2003).

34 *Id.* at 1757.

35 *Id.* at 1758.

36 *Id.* at 1802–03.

issues confronted by ordinary Americans. Roger Sherman, for example, wrote that Justices "can acquire a knowledge of the rights of the people of these States much better by riding the circuit, than by Staying [sic] at home and reading[ ] British and other foreign Laws."[37]

Supreme Court Justices complained almost immediately about circuit riding, although they did uphold the practice against a constitutional challenge.[38] Despite repeated entreaties from the Justices, Congress insisted that they perform these duties. During debates in the nineteenth century, one Senator remarked that if relieved from circuit-riding responsibilities, Supreme Court Justices would be "completely cloistered within the city of Washington, and their decisions, instead of emanating from enlarged and liberalized minds, will assume a severe and local character."[39] Another worried that the Justices, insulated in the capital, would be subjected to "dangerous influences and strong temptations, that might bias their minds and pollute the streams of national justice."[40] Both Senators—William Smith and Abner Lacock—deserve a place alongside Cassandra in the pantheon of vindicated prophets.

As a practical matter, circuit riding ended when Congress enacted the Evarts Act of 1891.[41] But the Justices were still left with another disagreeable burden: judging lots of dull cases. One might regard this as part and parcel of being a judge, and indeed, during its first century the Supreme Court had almost no discretionary power over its docket.[42] The Evarts Act created the modern courts of appeals, with judges to staff them,[43] and provided that for some cases their decisions would be final.[44] But the courts of appeals could certify a question for decision by the Supreme Court,[45] and the Court's docket remained

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37 Letter from Roger Sherman to Simeon Baldwin (Jan. 21, 1791), *in* 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 550–51 (Maeva Marcus et al. eds., 1992).

38 Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

39 33 ANNALS OF CONG. 126 (1819) (statement of Sen. Smith).

40 *Id.* at 130 (statement of Sen. Lacock).

41 Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826.

42 *See* Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1649 (2000).

43 Evarts Act § 2, 26 Stat. at 826.

44 *Id.* § 6, 26 Stat. at 828.

45 *Id.* In addition, parties could request a writ of certiorari, which was understood "as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates." Hartnett, *supra* note 42, at 1656.

not only enormous in the first decades of the twentieth century, but cluttered with tedious cases.[46]

The Judges' Bill of 1925[47] was a watershed in the history of the Supreme Court. The brainchild of Chief Justice Taft, who ushered it through a Congress that was largely unaware of the stakes, the Judges' Bill expanded the realm of discretionary appeals while contracting the scope of mandatory review.[48] Testifying before Congress, several Justices downplayed the bill's significance, suggesting that it would merely allow the Court to avoid frivolous cases.[49] As Edward Hartnett notes, "they never adequately explained why the power of summary affirmance was not sufficient for this purpose."[50] This power is still routinely exercised by modern courts of appeals as a means of coping with large dockets, and it is at least not obviously inferior to a discretionary docket. In retrospect, it is striking that members of Congress never pressed the Justices to elaborate on the criteria they would use in distinguishing the worthy appeals from the frivolous ones.

Soon after enactment of the Judges' Bill, the Court seized the new mode of discretionary review—through the writ of certiorari—to limit not only the number of cases it would hear, but the nature of its review. Rather than considering an entire case, the Court soon began reviewing only narrow legal questions, leaving aside legal and factual issues in which the Justices were uninterested.[51] This reflected a departure from pre–Evarts Act practice, and it obviously increased the Court's discretion to shape its own agenda. The Supreme Court also used a jurisdictional procedural rule it adopted in 1928 to avoid appeals that seemed to be squarely within its remaining mandatory docket.[52] Over ensuing decades, the Justices effectively eliminated the practice, preserved in the Judges' Bill, of having courts of appeals certify questions for Supreme Court review.[53]

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46 *See* Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970's*, 91 HARV. L. REV. 1711, 1712 (1978).

47 Act of Feb. 13, 1925 (Judges' Bill), ch. 229, 43 Stat. 936.

48 *See* Hartnett, *supra* note 42, at 1704 n.364 ("In 1924, 40% of the cases filed in the Supreme Court were within the Court's obligatory jurisdiction, with 60% of the filings left to the Court's discretion to decide whether to decide. In 1930, the percentage of obligatory filings fell to 15%, with 85% left to the Court's discretion." (citing GERHARD CASPER & RICHARD POSNER, THE WORKLOAD OF THE SUPREME COURT 20 (1976))).

49 *Id.* at 1704–05.

50 *Id.* at 1705.

51 *See id.* at 1705–08 & n.379.

52 *Id.* at 1708 (discussing SUP. CT. R. 12).

53 Unstinting hostility to such certifications depressed the numbers of such appeals from seventy-two during the first decade after the implementation of the Judges' Bill to twenty the

Congress eliminated almost all of the remnants of mandatory Supreme Court review in 1988.[54] As Hartnett notes, "there is (virtually) no law governing the Supreme Court's exercise of power to set its own agenda, and the Court has steadfastly refused to establish any."[55] Thanks to a cooperative Congress, the Justices are now in a position where they could hardly confine themselves to exercising "neither Force nor Will, but merely judgment,"[56] even if they wanted to.

B. Celebrities in Robes

Supreme Court Justices are treated like royalty within the legal profession. But their celebrity stretches beyond that world.[57] They are feted by the ethnic groups that identify with them.[58] They deliver speeches, not only to legal audiences, but also to various other groups of admirers. Recently, they have taken to delivering lectures abroad,[59] and some even promote their books on television.[60]

Today's Justices have a lot of time for extrajudicial matters. From an historical perspective, their workload is extremely light. Some may work relatively hard, but only if they choose to do so, and in many cases only a fraction of their time will be consumed by their work *as judges*. They get more than three months of vacation, during which

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following decade. *Id.* at 1710–11. Such certifications soon became extremely rare. In 1957, the Court rebuked a lower court for bothering the Supreme Court with a legal issue that had merely generated an intracircuit conflict. *See id.* at 1711–12. Recently, Justices Stevens and Scalia rather forlornly objected to the Court's decision to dismiss a certification. *See* United States v. Seale, 130 S. Ct. 12 (2009).

54 Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662; *see* Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 409.

55 Hartnett, *supra* note 42, at 1648.

56 THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 8, at 523.

57 *Cf.* Ray, *supra* note 32, at 238 ("As the Court took on highly divisive issues that directly touch the lives and values of the American people, the Justices found themselves increasingly recognized as individual figures rather than aspects of a remote and undifferentiated government entity."); Jesse J. Holland, *Sotomayor Adds Celebrity to High Court*, MSNBC.COM, Nov. 17, 2009, http://www.msnbc.msn.com/id/33975806 ("Since becoming the first Hispanic Justice, Sotomayor has mamboed with movie stars, exchanged smooches with musicians at the White House and thrown out the first pitch for her beloved New York Yankees.").

58 Justice Ginsburg, for example, was named to the Jewish American Hall of Fame in 1994. Henri Sault, *A Medal for Justice Ginsburg*, PHILA. INQUIRER, Apr. 24, 1994, at E5. Justice Scalia was the Grand Marshall of Manhattan's Columbus Day Parade. Pat Milton, *Scalia Leads Columbus Day Parade in N.Y.; Future Justice Marched as a Kid*, RECORD, Oct. 11, 2005, at A4.

59 *See* Bill Mears, *Supreme Court Justices: Well-Off, Well-Traveled*, CNN.COM, June 8, 2007, http://money.cnn.com/2007/06/08/news/newsmakers/scotus_finances/ (referring to Justices Scalia, Kennedy, Ginsburg, and Breyer as "[g]lobe-trotting Justices").

60 *See, e.g.*, Mark Sherman, *With New Book Coming Out, Scalia Getting Less Camera-Shy; Permits Coverage for "60 Minutes" Profile*, RECORD, Apr. 10, 2008, at A19.

they are free to escape the sweltering Washington summers. And escape they enthusiastically do—not just around the country, but around the world.

Between 1874 and 1924, the Court was burdened with a workload that would be regarded as staggering today, usually hearing more than 200 or even 250 cases per year.[61] Some Justices had a single clerk to assist, but most had none.[62] Today's Supreme Court occupies a brave new world: a docket of eighty-odd cases, with four law clerks and two secretaries assigned to each Justice. Nothing prevents a Justice from delegating virtually all the work of analyzing cases and preparing opinions to the law clerks, and it has long been routine for members of the Court to delegate the most demanding tasks—especially writing first drafts of opinions—to the clerks.

We must emphasize that we do not think a light workload for Supreme Court Justices is inherently a bad thing.[63] The problem is that their escape from some of the onerous tasks that Justices once performed has had undesirable effects on the way these public employees perform the functions that they have chosen to retain for themselves. Apart from voting in cases, the only judicial task deemed nondelegable is questioning the lawyers at oral argument. This task is optional (as Justice Thomas has demonstrated[64]), and those who choose to perform it sometimes look more like self-appointed advocates, or even bullies, than like judges seeking to be educated about the issues at stake in the case.

C. Celebrity Culture and the Utility Functions of Supreme Court Justices

The increased public prominence of Supreme Court Justices appears to be associated with three other widely lamented trends: the Court's ever-more-intrusive role in American political life, the Court's chronic proclivity toward splintered decisions, and a certain easygoing

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61 Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. Sup. Ct. Hist. 1, 5 (2009).

62 *Cf.* Artemus Ward & David L. Weiden, Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court 30 (2006) (stating that in the period of 1882–1918, "Congress provided funds for a single stenographer for each justice").

63 A desire to see the Justices burdened with more work for its own sake would be rather graceless coming from fellow public servants like us, whose workload could not be called unduly oppressive.

64 *See* James C. Phillips & Edward L. Carter, *Source of Information or "Dog and Pony Show"?: Judicial Information Seeking During U.S. Supreme Court Oral Argument, 1963–1965 & 2004–2009*, 50 Santa Clara L. Rev. 79, 91–92 (2010).

attitude toward the precedents that provide our caselaw with what stability it enjoys. Is there a causal relation among these phenomena? Without purporting to prove causality, this Part suggests that Congress could and should provide the Justices with incentives to behave more like traditional judges and less like publicity-hungry politicians or impassioned polemicists.

Many years ago, Frank Easterbrook used Arrow's theorem to argue that structural features of the Supreme Court virtually guarantee that the Court will sometimes issue logically inconsistent decisions, and that the growing stock of such inconsistencies will present the Justices with a choice between (1) disregarding the precedents and revisiting the underlying constitutional and statutory provisions or (2) deciding cases based on the Justices' personal views of what the law should be.[65] Easterbrook believed it was unlikely that the Justices would return to the underlying laws themselves, and likely that they would increasingly substitute their own views of good policy for those of the people's elected representatives.[66] Justice Thomas's frequently solitary expressions of a willingness to revisit precedents that appear inconsistent with the Constitution[67] have tended to confirm Easterbrook's prediction, as has the increasing frequency with which the Court declares important decisions of the other branches unconstitutional.[68]

Easterbrook rightly considered it naïve to expect that the Supreme Court could become perfectly consistent, or to hope that the Court could altogether cease the practice of issuing splintered opinions that expose the complexity of disagreements among its members. The impossibility of perfect consistency and reliably unified majorities on the Court, however, should not be taken to mean that nothing can

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65 Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

66 *Id.* at 831.

67 *See, e.g.*, McDonald v. City of Chicago, No. 08-1531, slip op. at 1 (U.S. June 28, 2010) (Thomas, J., concurring in part and concurring in the judgment) (refusing to apply the Court's well-settled selective incorporation doctrine under substantive due process and reconsidering the original meaning of the Privileges or Immunities Clause); E. Enters. v. Apfel, 524 U.S. 498, 538–39 (1997) (Thomas, J., concurring) (questioning *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798), and its progeny); United States v. Lopez, 514 U.S. 549, 584–602 (1995) (Thomas, J., concurring) (questioning the Court's Commerce Clause jurisprudence, particularly the substantial effects test).

68 There is a conflict, or tradeoff, noted as early as ARISTOTLE, POLITICS 1269a8-24, at 58 (Peter L. Phillips Simpson trans., 1997), between the desirability of improving the law and the undesirability of fostering disrespect for the law by frequent or unnecessary changes in it. This Article does not address that general problem, or the more specific questions about the tradeoffs between principles of stare decisis and principles of fidelity to the original meaning of the Constitution and statutes.

or should be done to discourage excessive and unnecessary fragmentation.

On the contrary, it might be no less naïve to think that the Court can continue indefinitely to expand its power over the lives of the citizenry, misleadingly exercised in the name of the Constitution and the rule of law, while ever more visibly manipulating "inconsistent precedents [that allow] the Justices to 'prove' anything they like."[69] Nowadays, even when there is only *one* precedent on point, the Court can argue without visible embarrassment that it means the opposite of what it says.[70] There may be some kind of tipping point that will be recognized only when the political branches launch a counteroffensive, which could itself be so excessive as to create a constitutional imbalance far worse than the one it means to correct.

It would be rational for members of the Court to worry about such dangers. Chief Justices, who are disproportionately given the credit and blame for the Court's collective failures and successes,[71] would have especially strong reasons to be concerned about the effects of excessive disunity and institutional overreaching. This may partly explain the great emphasis that Chief Justice Roberts placed on judicial modesty during his confirmation hearings.[72] Unfortunately, the Justices face serious collective-action obstacles that may make it impossible for them to place meaningful restraints on themselves.

The collective-action obstacles arise from two main sources. First, the political process that generates appointments to the Court tends to produce a range of jurisprudential views, any of which can be advanced through arguments that are plausibly rooted in some subset of the Court's now-large stock of inconsistent precedents. Second, any sincere attempt to accommodate one's colleagues will ensure that one's own jurisprudential views will lose influence.

It should therefore come as no surprise that, in form and substance both, the Court has become almost totally bereft of the kind of collective identity that Chief Justice Marshall worked so hard to create. The current Court operates, as Justice Powell remarked decades

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69 Easterbrook, *supra* note 65, at 831.

70 For discussion of a recent example, see Nelson Lund, Heller *and Second Amendment Precedent*, 13 LEWIS & CLARK L. REV. 335 (2009).

71 *Cf.* Jeffrey Rosen, *Roberts's Rules*, ATLANTIC, Jan./Feb. 2007, at 104–05 (discussing characterizations of past Chief Justices).

72 *See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) [hereinafter *Roberts's Confirmation Hearing*] (statement of John G. Roberts, Jr.).

ago, "as nine small, independent law firms."[73] The only time the Court meets as a body to discuss cases is in conference after oral argument. According to accounts of the Rehnquist Court, there is apparently no give-and-take in these conferences, simply a short statement by each Justice explaining how he will vote and why.[74] The Justices then retire to their individual offices, and communications between them, if any, are typically mediated through their clerks.[75] There is virtually no deliberation by the Justices *as a court*; whatever deliberation does take place occurs within each Justice's chambers.[76] This is strikingly different from early Supreme Court practice, in which the members of the Court, without clerks and living together through the term, deliberated among themselves and together forged the Court's jurisprudence.[77]

The modern Court is best understood as an aggregation of individuals, each with a personal jurisprudence. Consistent with the isolated working conditions they have chosen to adopt for themselves, the Justices have become noticeably concerned with remaining *personally* consistent over time. It would be an exaggeration to say that traditional principles of stare decisis have been abandoned in the Supreme Court,[78] but it is striking how frequently one sees members of the Court adhering to their own personal "precedents" rather than

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73 DAVID M. O'BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 132 (8th ed. 2008) (internal quotation marks and citation omitted). It is reported that when Potter Stewart joined the Court, he expected to find "one law firm with nine partners." Justice Harlan corrected him: "No, you will find here it is like nine firms, sometimes practicing law against one another." *Id.* (internal quotation marks and citation omitted).

74 *See* Margaret Raymond, *The Importance of Being Important*, 84 IOWA L. REV. 147, 150 & nn.16–17 (1998) (discussing details disclosed in EDWARD LAZARUS, CLOSED CHAMBERS (1998), an exposé written by a former Justice Blackmun clerk). The times being what they are, perhaps we should note that we sometimes use "he" as an indefinite pronoun, referring to people of both sexes, without disrespect to either.

75 *See* Sally J. Kenney, *Puppeteers or Agents? What Lazarus's* Closed Chambers *Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 198–99 (2000).

76 *See id.* at 194–95. This practice may be changing somewhat under the new Chief Justice, who has spoken openly of his desire to persuade his colleagues to subordinate their individual agendas and behave more like a collegial and institutionally oriented body. *See* Rosen, *supra* note 71, at 105–06. Chief Justice Roberts has gone so far as to say (publicly!) that his model is none other than Chief Justice Marshall himself. *Id.* at 106. Admirable as this ambition may be, we are skeptical about his, or any other Chief Justice's, chances of producing major and lasting changes in this direction through his own efforts.

77 *See* White, *supra* note 26, at 34–35.

78 Accusations of insufficient respect for precedent still seem to demand a response. *Compare, e.g.*, Montejo v. Louisiana, 129 S. Ct. 2079 (2009) (Alito, J., concurring) (criticizing the opinion of Justice Stevens in *Arizona v. Gant* for overturning precedent), *with id.* at 2099 n.5 (Stevens, J., dissenting) (responding that his opinion in *Gant* did not in fact overturn earlier

deferring to the Court's actual precedents. And it is even more striking how often one sees majority opinions laden with citations to the concurrences and even dissents of "swing" Justices like O'Connor and Kennedy.

This kind of "judicial individualism" has to some extent become irresistible. At least in part, that is because most or all of the Justices strongly believe that their own jurisprudential views are worth fighting for. We would not advocate an effort to prevent the Justices from adhering to principles they regard as important. What we do suggest, however, is that the Court and the law might be improved if the Justices had fewer incentives to engage in unproductive disputes, let alone unnecessary self-aggrandizement.

An attempt to think systematically about changing the incentives that operate on the Justices requires some sense of how existing incentives shape their behavior. We begin with Richard Posner's provocative economic model of the judicial utility function.[79] As Posner observes, the great project of assuring the independence of federal appellate judges has entailed efforts to strip them of the most common incentives that operate on workplace behavior, such as more pay for more or better work and the threat of losing one's job for poor performance.[80] But that must mean that other incentives take the place of the usual ones.

Posner's most intriguing suggestion is that appellate judges, including most Supreme Court Justices, are motivated to work at their jobs largely because they take pleasure in what they regard as the essential functions of the job. One such function is the very act of voting, i.e., expressing an opinion about which party should win the case, much as ordinary voters seem to take pleasure in expressing their opinion about which candidate should be elected, even when there is almost no chance that one vote will affect the outcome.[81] Another important element, according to Posner, is the pleasure judges take in forming the opinion on which their votes are based, much as spectators of dramatic performances take a disinterested pleasure in making

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precedent and counterclaiming that Alito's claimed fealty to precedent is specious in light of his willingness to overturn precedent in *Montejo*).

79 Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). Posner's views have evolved since this article was published, *see*, *e.g.*, RICHARD A. POSNER, HOW JUDGES THINK (2008), but for our purposes here we think it is more useful to focus on his earlier analysis. Accordingly, all subsequent citations are to Posner's earlier article.

80 *See* Posner, *supra* note 79, at 3, 25.

81 *Id.* at 15–16.

judgments about which characters are right and wrong, in "judging" so to speak between Antigone and Creon, or between Falstaff and Prince Hal.[82] Finally, Posner suggests that judges, who enjoy an extraordinary amount of latitude to define their own jobs as they please, take pleasure in following the conventional rules of judicial behavior, much as chess players take pleasure in following the rules of their game (even when they have an opportunity to cheat), or as poets take pleasure in conforming to the discipline of the sonnet form.[83]

Posner's model also includes more obvious elements of utility, such as leisure, popularity, and prestige, but he argues that these have much less importance than one might suppose, and he consciously "downplays the 'power trip' aspect of judging, the focus of most of the few previous efforts to model the judicial utility function."[84] Posner's argument is largely positive, not normative, but he recognizes that it has implications for practical issues of judicial administration, such as the appropriate structure and level of judicial compensation.[85]

We believe that Posner seriously overstates the similarity between circuit judges and Supreme Court Justices, and that his model applies much better to the former than the latter. But this feature of his argument actually gives it an unexpected value, for it suggests why it may make sense to adopt some institutional arrangements calculated to induce the Justices to behave more like their counterparts on the inferior appellate courts.

Posner appears to have overlooked or understated some important differences between judges and Justices.[86] Like Easterbrook, he concludes (though for somewhat different reasons) that "the conditions of judicial employment enable and induce judges to vote their personal convictions and policy preferences—or in a word their val-

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82 *Id.* at 24.

83 *Id.* at 28–29.

84 *Id.* at 3. Posner continues:

> In fact, I assume that trying to change the world plays no role in [the judicial utility] function. Not that judges are indifferent to power; they enjoy, I shall argue, the power that goes with deciding cases. But only a small minority, whom I shall largely ignore, have a visionary or crusading bent.

Id. (citation omitted).

85 *Id.* at 2.

86 At various points in the article, Posner does note some of the relevant differences between the two groups of jurists. He predicts, for example, that there will be more campaigning for Supreme Court seats and that Justices will work harder than circuit judges, *id.* at 38, but we think the significance of other differences that he does not discuss are greater than he recognizes.

ues."[87] Circuit judges, unlike Supreme Court Justices, are somewhat constrained in exercising this power by fear of reversal, but Posner rightly points out that this is probably a weak constraint.[88] A much more important constraint, in his view, is that judges simply do not have much power because they rarely decide cases with wide importance.[89] Although he acknowledges in a passing parenthetical that Supreme Court Justices have more power,[90] we believe that the almost-unlimited discretion of the Justices to choose their cases contributes to making their job fundamentally different from that of a circuit judge.

To illustrate this point, consider Posner's discussion of "going-along" voting and "live and let live" opinion joining. In the first case, a judge who is not very interested in a particular case will have an incentive to vote with a fellow judge who does have a strong view of the case, even if he does not agree, in order to avoid various costs associated with dissenting (such as going to the trouble of writing a dissenting opinion).[91] Similarly, judges have incentives to join opinions containing obiter dicta with which they disagree. Explaining one's disagreements costs time and effort, and may create interpersonal friction, whereas the nonbinding nature of dicta means that one's discretion in future cases will not be reduced by the fact of having joined an opinion with objectionable comments in it.[92]

In both respects, Supreme Court Justices are situated quite differently. One should expect "going-along" voting to be much rarer, perhaps almost nonexistent, in the Supreme Court. That Court decides many fewer cases, and it decides a much smaller proportion of cases in which any given member of the tribunal is likely to be so uninterested as to find the cost of dissenting unacceptably high. Similarly, so-called dicta from the Supreme Court frequently have greater significance than theory might predict because inferior courts generally treat even casual remarks in Supreme Court opinions as "the law." Partly because circuit court opinions deal on average with less significant issues, and partly because subsequent circuit court panels may be less deferential to dicta from their peers, "live and let live" opinion joining is almost certainly much more common on the circuit courts than on the Supreme Court.

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87 *Id.* at 40.

88 *Id.* at 14.

89 *See id.* at 17.

90 *Id.*

91 *Id.* at 20.

92 *Id.* at 20–21.

More generally, what Posner calls the "power trip" aspect of judging[93] is far more significant on the Supreme Court than he suggests, for the simple reason that a far higher proportion of that tribunal's docket consists of cases likely to have powerful effects on the world. Posner comments at one point:

> We know that the framers of the Constitution attempted to design a government that could be operated by moral and intellectual mediocrities, a characterization of officialdom from which not even federal judges are exempt . . . . [And it is unrealistic to treat] the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest.[94]

The most common and dangerous flaws in government officials—large ambition, modest moral and intellectual talents, or both—are usually addressed by making the officials *dependent* on others through the familiar set of structural checks and balances. With the judiciary, however, the framers deliberately went a very long way toward making the officials *independent*. Whatever restraints exist are largely self-imposed, and we suspect that Posner may have identified a salutary phenomenon with his observation that "[e]xceptionally able judges arouse suspicion of having an 'agenda,' that is, of wanting to be something more than just corks bobbing on the waves of litigation or umpires calling balls and strikes."[95]

The problem today is that the conditions under which Supreme Court Justices operate make it almost impossible for them to experience their jobs as calling for the kind of modesty and restraint that Hamilton predicted, that Posner finds in most judges, and that all Supreme Court nominees now promise that they will exhibit.

For that reason, we believe that it would be a healthy change if the lives of the Justices were to become more like the day-to-day lives of circuit judges. This need not require an actual reduction of the Supreme Court's power, as in the case of such reforms as jurisdiction-stripping statutes. Nor need it require a reduction of the Court's insulation from political influence. Nor would it require the extraordinary and practically impossible step of amending the Constitution, as in the case of various proposals for term limits. Rather, we simply propose that the Justices be given somewhat more ordinary judicial work to do

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93 *Id.* at 3.

94 *Id.* at 3–4.

95 *Id.* at 4; *cf. Roberts's Confirmation Hearing*, *supra* note 72, at 55 (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them . . . . Nobody ever went to a ball game to see the umpire.").

and that the temptation to resort to judicial individualism be somewhat curtailed. With these changes, perhaps the nation might actually obtain some of what recent nominees have thought it wise to promise during their confirmation hearings.

II. Anonymous Opinions

One of the most surprisingly fateful developments in Supreme Court practice was the emergence of a culture of signed majority opinions. Today, one Justice writes an "opinion for the Court" (or tries to do so—sometimes there is no majority opinion at all), and other Justices trumpet their disagreements, from the trivial to the profound, in multiple concurring and dissenting opinions. This practice can create tensions with the traditional ideal of the rule of law, and it does not consistently produce much in the way of compensating benefits. After first sketching the historical development of the current practice, this Part argues that the adoption of a judicial anonymity rule would reduce the number of splintered opinions, increase consistency with precedent, and improve the legal quality of the Court's work.

A. Historical Development

Through the nineteenth century, English judges delivered opinions orally. In multi-judge panels, the judges announced their opinions seriatim, and a reporter might collect accounts of those orally delivered opinions together with transcribed accounts of the oral arguments of the advocates.[96] In American colonial practice, judicial opinions were not memorialized at all.[97] The first Supreme Court reporter, Alexander James Dallas, enjoyed no official position and received no official salary, and there seem to have been no formal procedures by which Justices transmitted their opinions to Dallas.[98] Rather, he cobbled together the reported opinions partly from notes the Justices may have used when they delivered their opinions orally, partly from his own notes if he was present at the reading, and partly from discussions with the attorneys in the case.[99] It is also worth mentioning that many of the early reported decisions included accounts of the oral arguments of the lawyers, some of whom were more prominent than the

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96 *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 187–91 (1959).

97 *See* Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1296 (1985).

98 *Id.* at 1298–99.

99 *See id.* at 1295–96, 1304.

Justices themselves. Such a practice obviously reduced the significance of the Justices' descriptions of the issues and arguments.

The forms of the reported opinions in the pre-Marshall Court were dramatically different than they are today. There were 63 reported cases between 1790 and 1800, of which 45, or 71%, were resolved by a short opinion, which was not attributed to a particular Justice.[100] Fifteen of the 63 cases, or 24%, were explained in seriatim opinions.[101] Three of the 63 cases, or a mere 5%, were decided in a manner with virtually no precedent in the English courts or in American colonial practice: the senior Justice who was present delivered an opinion for the Court. It was this practice that Marshall would promote and expand when he took the center chair.[102]

Historians widely credit John Marshall with raising the status of the Supreme Court from the "least dangerous branch" to a coequal player in our constitutional balance of powers. One of his decisive innovations was to discard both the short and anonymous opinions for the Court and the fragmented seriatim opinions.[103] Although roughly a quarter of the early opinions had been delivered in the latter form, Marshall pressured his colleagues to end this practice and join together to deliver a unified opinion. Thomas Jefferson strenuously urged resistance to Marshall's agenda, on the ground that it encouraged laziness and irresponsibility,[104] but Marshall prevailed upon his colleagues, all of whom lived with him in the same boarding house on Capitol Hill. Very quickly, seriatim opinions disappeared almost completely.[105]

Even more striking was the demise of the brief opinions with no attributed authorship. In the pre-Marshall Court, 71% were reported in this form; by the 1808–1809 Term only 19% took this form; and by 1814, the percentage had dropped to 4%.[106] Having all but eliminated the two dominant reporting practices of the Court's first decade, Marshall minted his own preferred practice: a unanimous opinion delivered by the most senior member of the Court by name. This almost always meant Marshall himself, even if he had not written the opin-

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100 *See* John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999).

101 *Id.*

102 *See id.* at 141.

103 *See id.* at 143–44.

104 *See id.* at 145–46.

105 From 1801 to 1806, there were only five cases with seriatim opinions. *Id.* at 144.

106 *Id.* at 145.

ion.[107] To a remarkable extent, Marshall succeeded in persuading his colleagues on the Court to subordinate personal differences and speak with a single voice—usually his own—to the outside world. Throughout the Marshall Court period, the overwhelming majority of cases were decided by unanimous opinions.[108] The ratio of separate opinions to majority opinions was a mere 0.07.[109]

In the final years of his tenure, Marshall's ability to rein his colleagues in declined, and there was a minor uptick in separate opinions.[110] Justices began more often to state reasons for dissenting, typically noting that the case involved a constitutional question or raised some other issue of significant public interest.[111] But Justice Bushrod Washington portended future developments when he wrote: "*A regard for my own consistency*, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded."[112] Today, Justices write separately in opinion after opinion, striving to preserve consistency with their own stock of personal precedents.[113]

In the Taney Court, Justices became somewhat more willing to write separately. Nonunanimity rates increased from eleven percent (in the Marshall Court) to twenty percent,[114] but were still not near modern levels. Justices writing separately sometimes remarked on their duty to remain consistent—consistent, that is, with their own previous positions rather than with the Court's precedents.[115] And lest the public misinterpret their agreement with the result as agreement with the reasoning of their colleagues, Justices occasionally wrote separately simply to set out their own views.[116]

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107 *See* White, *supra* note 26, at 36–37.

108 *Id.* at 34.

109 Kelsh, *supra* note 100, at 177.

110 *See id.* at 151.

111 *Id.* at 151–52.

112 Mason v. Haile, 25 U.S. (12 Wheat.) 370, 379 (1827) (Washington, J., dissenting) (emphasis added).

113 Some Justices do occasionally change their views, and sometimes acknowledge it. But this often just serves to accentuate how individualistic their jurisprudence is. *See, e.g.*, United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment) (repudiating the Court's Dormant Commerce Clause jurisprudence as well as a precedent in which he had joined); Tennessee v. Lane, 541 U.S. 509, 556–58 (2004) (Scalia, J., dissenting) (rejecting a "congruence and proportionality" test he had previously endorsed, but which he then wished the Court would abandon).

114 Kelsh, *supra* note 100, at 154.

115 *Id.* at 157–58.

116 *Id.* at 157.

From 1864 to 1941, separate opinion writing remained relatively infrequent, at least when measured by modern standards. Justice Brandeis, for example, often circulated drafts of dissenting opinions to his colleagues; but if he failed to persuade them, he sometimes withdrew the opinion and joined the majority.[117] John Kelsh has argued, however, that percolating beneath this relatively calm surface was a change in attitude.[118] No longer was there a strong norm against separate opinions. He offers both indirect and direct confirmation of this hypothesis: the increasingly common references to whether a cited opinion was unanimous (the implication being that a unanimous opinion has more precedential weight, which gives an incentive to Justices who disagree with a majority opinion to dissent); increased citation to separate opinions (concurring and dissenting); and the growing infrequency of comments bothering to explain why a Justice had decided to dissent.[119] Finally, the "most compelling sign that separate opinions were now viewed as playing an important role was that during this period, several separate opinions were written into law, either by statute or by subsequent overruling of the opinion for the Court."[120]

The decisive break in nonunanimity rates occurred when Harlan Fiske Stone became Chief Justice.[121] The ratio of separate opinions to majority opinions nearly doubled in the 1941 Term to 0.34, increasing to over 1.0 by 1948, where it has hovered ever since.[122] One reason, apparently, is that Stone was the first Chief Justice in the nation's history to believe that "imposed unanimity was no virtue in developing the law."[123]

In the short run, Marshall may have strengthened the Court by getting rid both of seriatim opinions and of anonymous opinions for the Court that lacked much analytical elaboration. But in the long run, his substitute—detailed, signed opinions for the Court—gave us some of the worst effects of seriatim opinions without the benefits of anonymous opinions.

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117 *See* Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142–43 (1990) (citing A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957)).

118 *See* Kelsh, *supra* note 100, at 160.

119 *Id.* at 171–73.

120 *Id.* at 173.

121 *Id.* at 175.

122 *Id.* at 177.

123 Thomas Walker et al., *On the Mysterious Demise of Consensual Norms in the United States Supreme Court*, 50 J. POL. 361, 384 (1988).

B. Opinions Both Reasoned and Anonymous

Some years ago, then-Judge Ruth Bader Ginsburg proposed that "when [circuit court] panels are unanimous, the standard practice should be to issue the decision per curiam, without disclosing the opinion writer."[124] She apparently did not mean this proposal to apply to the Supreme Court, which is more prone to hear "grand constitutional questions."[125] Because the overwhelming majority of cases in the circuit courts are relatively mundane, she said, "it is best that the matter be definitively settled, preferably with one opinion."[126]

Ginsburg was on to something, but we think she drew exactly the wrong conclusion. It is precisely because most of the cases heard before the courts of appeals are not of great significance that it is useful to preserve the practice of signed opinions. As discussed earlier, the typical circuit court judge does not derive great fulfillment from the arduous task of writing judicial opinions, which explains, in Posner's view, the ready willingness of most judges to delegate this task to their law clerks.[127] This would also explain the growing number of cases decided by unpublished opinions, which are usually drafted by career staff lawyers. In insignificant cases, attaching one's name to an opinion must surely lead judges to invest more energy in composing the document, or at least in carefully supervising the law clerk who drafts it. This is probably, on net, a benefit. If one assumes a positive correlation between input by the judge, in time and effort, and the quality of the output, signed court of appeals opinions will be better than anonymous ones. (By "better," we simply mean opinions that are clearer, more carefully reasoned, and less likely to include potentially embarrassing mistakes.)

As then-Judge Ginsburg observed, the docket of the circuit courts is overwhelmingly mundane,[128] and there is seldom an opportunity for the appellate judge to advance his prestige or reputation among the general public. A circle of interested lawyers and federal judges, however, can be expected to read even these judicial opinions, and the author will likely care to have this audience within his profession think that he is competent. Signed opinions therefore usefully encourage diligence.

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124 Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. Rev. 1185, 1192 (1992).

125 *Id.*

126 *Id.* at 1193.

127 *See* Posner, *supra* note 79, at 19.

128 *See* Ginsburg, *supra* note 124, at 1192–93.

The utility calculus works quite differently with Supreme Court Justices. Thanks in large part to the Court's discretionary docket, many of the cases decided by the Court involve matters of wide general interest—issues that engage the minds of politically attentive citizens, of the elite journalists who speak to and for these citizens, and certainly of the Justices themselves. For Supreme Court Justices, then, the subject matter of the cases itself provides a spur to work. Even when the subject matter is legally mundane, the stakes involved often create a significance that is absent from the more piddling, though legally similar, cases resolved daily by the courts of appeals. Thus, there is less need to give Supreme Court Justices special incentives designed to discourage shirking.

We believe the opinion-writing practice of the modern Court needs to change so as to reorient the esteem-seeking element in the utility function of the Justices. The solution we propose is a simple one: by statute, Justices should no longer be permitted to affix their names to the opinions—majority, concurring, or dissenting—that they file.[129]

We envision a number of healthy consequences that would result from this change. First, unable to claim credit for any of the various opinions, the Justices would come to regard their reputations as inextricably linked with the work of the Court, rather than with their own personal stock of precedents. This should mean a reduction in the number of unintelligibly splintered decisions that so frustrate the bar, the lower courts, and even members of the Court itself. Furthermore, unable to claim credit for opinions, the Justices would have less incentive to write sophomoric philosophy or ill-disguised political commentary in a transparent effort to have their names emblazoned in casebooks and popular journals. As the Court's opinions became less frilly and more legal, the press would find it harder to extract a snappy sound bite to explain the decision, and this might actually enhance the Court's reputation as something distinguishable from a body of life-tenured politicians.[130]

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129 We first made this proposal in Nelson Lund & Craig S. Lerner, *Precedent Bound?*, NAT'L REV. ONLINE, Mar. 6, 2006, http://www.nationalreview.com/comment/lund_lerner200603060828.asp. Subsequently, a thoughtful student note suggested that the Justices should voluntarily stop issuing signed opinions. James Markham, Note, *Against Individually Signed Opinions*, 56 DUKE L.J. 923, 944–51 (2006).

130 *Cf.* Frederick Schauer, *Abandoning the Guidance Function:* Morse v. Frederick, 2007 SUP. CT. REV. 205 (suggesting that the modern Justices' manifest interest in their individual reputations may help explain their frequent failure to perform the judicial role of providing clear guidance for the lower courts).

We do not propose to prohibit Justices from filing concurring and dissenting opinions. At least in our legal system, such opinions arguably provide some public benefits. They help show that the decision of the court was reached through a deliberative process. They can discipline the majority by exposing weaknesses in its reasoning. And they can usefully inform the bar about issues that are not well settled within the Court. At some point, however, fractiousness ceases to provide any public benefit and simply reflects the self-assertiveness of individual members of the Court.[131] We think that this point has been reached, and that the problem can be ameliorated by an intermediate rule under which concurring and dissenting opinions are allowed but must be issued anonymously.

We see no reason to doubt that Congress has authority to impose such a rule.[132] But how would it be enforced? In current practice, it is a widely observed norm that no judge can claim credit for an opinion issued per curiam. Likewise, under our proposed regime, the majority opinion would simply be labeled "Opinion of the Court." Concurring and dissenting opinions would have similarly nameless attributions: "Concurring Opinion (for two Justices)," "Dissenting Opinion 1 (for three Justices)," "Dissenting Opinion 2 (for one Justice)," etc. We think that the Justices would probably comply with both the letter and the spirit of such a statute.

It is no doubt true that the curious would try to guess who wrote which opinions.[133] And it would, of course, be easy for Justices who

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For a different view, which approves of the Court acting as a "republican schoolmaster" that uses "memorable phrases" to lead the people to a deeper understanding of constitutional commitments, see Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215, 215, 223 (1994). We suspect that this may help explain Professor Tushnet's "strong intuition" that adoption of our proposals would "diminish[ ] the average quality of the pool" from which Supreme Court Justices are drawn. Tushnet, *supra* note 9, at 1302. We may not share Professor Tushnet's assumptions about what makes for a high-quality Justice, but we agree that our proposals would probably result in a Court populated with fewer "republican schoolmasters."

131 *Cf.* Allison Orr Larsen, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 469 (2008) (arguing that when "a Justice rejects a controlling precedent merely because he dissented from the original decision . . . he is elevating his individual jurisprudence (and perhaps individual legacy?) and denigrating the need for consistency or at least coherence in the Court's doctrine").

132 Constitutional objections to the proposals made in this Article would presumably arise, if at all, under a separation-of-powers rubric. Given the many well-accepted ways in which Congress constrains the judicial power, such as dictating rules of judicial procedure and evidence, we think it would be very difficult to construct a persuasive argument that any of our proposals are unconstitutional. We are aware, of course, that some kind of constitutional argument can be made against just about anything.

133 Lots of people, for example, think they know who was primarily responsible for the per curiam opinion in *Bush v. Gore*. *See, e.g.*, DAVID A. KAPLAN, THE ACCIDENTAL PRESIDENT 274

disliked the rule of anonymity to leave clues in their opinions for the curious, or even to make extrajudicial statements identifying the author of specific opinions. For two reasons, we doubt that the purpose of the rule would be significantly frustrated.[134]

First, if majority opinions were anonymous, Justices in agreement with the result would have an incentive to demand that the author avoid the kind of self-identifying extravagances that we often see now. Under current practice, there's little incentive for a Justice to object to self-indulgent excesses before joining an opinion: most observers will attribute any excrescence to the named author. But under our proposal, more judicious colleagues would have new incentives to say, "Please take this out of the draft because it doesn't reflect the views of the Court." And the author would have less incentive to resist taking it out. Furthermore, once this kind of material started getting left out of majority opinions, there would be less incentive for putting it into concurrences and dissents, especially since those, too, would be at least nominally anonymous.

Second, we have no doubt that Congress has ample means to cause compliance with the spirit of the statute if the Justices got cute and began evading it. Congress controls the budget of the Court, and provides the Justices with many perquisites that it is perfectly free to withhold. A few pointed remarks at budget hearings would surely cause a majority of the Justices to discipline any recalcitrant self-promoters, for example, by ensuring that such mavericks stopped getting to write majority opinions.

III. Expanding the Court's Jurisdiction: More Cases, Less Glamour

Over the years, critics of the Supreme Court, especially political conservatives, have argued that Congress should strip it of jurisdiction over hot-button issues like abortion, busing, and school prayer.[135] This Part advances the novel suggestion that judicial restraint can be encouraged by giving the Supreme Court *more* to do, not less.

(2001); Jeffrey Rosen, *In Lieu of Manners*, N.Y. TIMES MAG., Feb. 4, 2001, at 46. The author, however, has not claimed credit for it and is not widely assigned responsibility for it in public. Perhaps it is no coincidence that the *Bush v. Gore* per curiam is not as grandiloquent as one might have expected a signed opinion in such a case to be.

134 In light of the analysis we have provided, we do not think that Professor Tushnet's comments demonstrate that the problem is "more difficult than Professors Lerner and Lund imagine." Tushnet, *supra* note 9, at 1306.

135 *See* Neal Devins, *Should the Supreme Court Fear Congress?*, 90 MINN. L. REV. 1337, 1346 (2006).

Unlike the Court envisioned by Hamilton, the modern incarnation is energetically adventurous, for the most part deciding only those legal or political issues that it deems interesting and important. Yet the Court is often wont to opine so enigmatically that little guidance is given to the lower courts, which are left to decipher the Court's sphinx-like utterances.[136] Furthermore, lower courts reach conflicting conclusions on many legal questions, and the Supreme Court often prefers to let the confusion percolate for an indefinite time. This Part begins by showing how the modern Court, now exercising almost complete discretion over its workload, could best be described as Olympian. It then proposes that Congress direct the Justices to pay more attention to what happens down in the valleys after they have loosed their thunderbolts. They should be required to hear more of the cases vexing the rest of the courts in the American judicial system.

A. Our Olympian Judges

Having ceased to be a court in the Hamiltonian sense—humble, exercising judgment rather than will—the Court has seemingly slipped the surly bonds of earth. Adjectives more appropriate to Roman emperors have been invoked to convey the power wielded by Supreme Court Justices. For several decades, critics were apt to apply the epithet "imperial" to describe the activist and detail-oriented Warren and Burger Courts.[137] Possessing an almost unfettered power to

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136 For a spectacular recent example, see Boumediene v. Bush, 128 S. Ct. 2229, 2275–77 (2008) (holding that Congress had provided an inadequate habeas corpus substitute to aliens detained at Guantanamo Bay, and remanding without saying what an adequate substitute would be or what rights a habeas court should enforce). A district judge responsible for coordinating more than 200 detainee habeas cases subsequently complained: "It is unfortunate, in my view, that the Legislative Branch of our government, and the Executive Branch have not moved more strongly to provide uniform, clear rules and laws for handling these cases." Transcript of Hearing at 6, Anam v. Obama, No. CA 04-1194 (D.D.C. Dec. 14, 2009), *available at* http://www.scotusblog.com/wp/wp-content/uploads/2009/12/Hogan-transcript-12-14-09.pdf. The irony, of course, is that Congress and the President had enacted an exceedingly clear law governing the judicial treatment of such cases. That was the very law struck down in *Boumediene*. *See Boumediene*, 128 S. Ct. at 2240–41. It may be unfortunate, but it should be no surprise that Congress has not chosen to make another guess about what rules the Supreme Court will find acceptable.

This is not to say that the lower courts are always at a loss when the Supreme Court issues puzzling opinions. For a conscientious and carefully reasoned effort to apply the Court's rather less well-reasoned pronouncements about the Second Amendment, see Judge Diane Sykes's opinion in *United States v. Skoien*, 587 F.3d 803 (7th Cir. 2009), *vacated and reh'g en banc granted* 2010 WL 1267262. For a discussion of the shortcomings in the Supreme Court jurisprudence Judge Sykes was required to interpret, see Nelson Lund, *The Second Amendment,* Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343 (2009).

137 *See, e.g.*, Nathan Glazer, *Towards an Imperial Judiciary?*, 41 Pub. Int. 104 (1975).

choose their cases, they reached into the dockets of the lower courts—state and federal—and chose hundreds of cases in fields that interested them. For example, and perhaps most famously, the Court took dozens of state and federal cases that they used to write a comprehensive and ever-changing National Code of Criminal Procedure.[138] Although the ideology of the Court shifted somewhat after Warren Burger became Chief Justice, the energy level hardly flagged. In part, this reflected Burger's desire to reverse some of the Warren Court's precedents.[139] The Supreme Court's docket from the 1950s through the 1980s was, at least by today's standards, staggeringly heavy.[140]

Legal academics warned at the time that the Supreme Court was stretched to the breaking point,[141] and that nothing short of radical overhaul could preserve it from collapse. Paul Freund and Erwin Griswold, to name just two illuminati, lent their lustrous names to the idea of a "national court of appeals."[142] The idea was championed by several Senators in what became known as the Hruska Report,[143] but the Justices continued to groan under the weight piled atop their aging bodies. Justice Brennan, who was seventy-six years old at the time, pronounced that the Court's docket was "tax[ing] [human] endurance to its limits."[144] Much academic commentary at the time suggested that the Supreme Court caseload was simultaneously too large to be handled well and too small to monitor and harmonize the swelling caseload in the lower courts.[145] Hence the claimed need, identified by many observers in the 1970s and 1980s, for a national court of appeals, or at least a cadre of super courts of appeals, to help the Supreme Court do its job.[146]

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138 *See* Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1327–30 (1977).

139 Hellman, *supra* note 54, at 429; Israel, *supra* note 138, at 1323.

140 *See* Hellman, *supra* note 46, at 1731 tbl.3; Hellman, *supra* note 54, at 403.

141 Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 247 (1973).

142 *Id.* at 250; Erwin N. Griswold, *Rationing Justice—The Supreme Court's Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 349–53 (1975).

143 COMM'N ON REVISION OF THE FED. COURT APPELLATE SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE, *reprinted in* 67 F.R.D. 195, 199–247 (1975).

144 William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1983) (address given to the Third Circuit Judicial Conference, Sept. 9, 1982).

145 The dual nature of the criticism common at that time is noted in Margaret Meriwether Cordray & Richard Cordray, *The Supreme Court's Plenary Docket*, 58 WASH. & LEE L. REV. 737, 737 (2001).

146 *See, e.g.*, Peter L. Strauss, *One Hundred Fifty Cases per Year: Some Implications of the*

Apparently, the Court did not need such help, for its overwork problem soon evaporated. The once-overburdened Supreme Court is now said to be underworked. In the late nineteenth century and early twentieth century, the Court usually heard around 200 to 300 cases per year.[147] The Court's caseload, which in the 1980s hovered around 150,[148] plummeted in the early 1990s,[149] and has remained durably between 70 and 90 for over a decade.[150] This shrinking docket was noted in the popular press as early as 1994,[151] and soon thereafter became the subject of academic commentary. Now that the Court's docket has been cut in half, academics have fallen strangely silent about the Court's ability to supervise and guide the lower courts through such a small number of decisions.[152]

After considering and rejecting other explanations for this new development, Arthur Hellman offers what he considers the most persuasive: a "new philosophy" has come to dominate the Supreme Court.[153] Over the course of the 1970s and 1980s, Justices who had been easily provoked to grant certiorari were replaced by Justices less disposed to hear cases. Hellman notes that Chief Justice Burger "zealously supported Supreme Court review of activist decisions by the lower courts," and with his retirement, "counteractivist petitioners lost what was probably their most reliable vote for certiorari."[154] For different reasons, Justice White thought it important to provide doctri-

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Supreme Court's Limited Resources for Judicial Review of Agency Action, 87 COLUM. L. REV. 1093, 1136 (1987) (arguing in favor of "[f]ive panels of seven judges each in a new judicial tier").

147 *See* Sternberg, *supra* note 61, at 5.

148 From 1971 through 1988, the Court averaged 147 cases per Term. Hellman, *supra* note 54, at 403.

149 In 1989, the Court heard 132 cases; in 1990, it heard 116 cases; by 1996, it heard 77 cases. *Id.*

150 *See* Cordray & Cordray, *supra* note 145, at 743; Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1368 (2006) (noting that in the last year of the Rehnquist Court, 74 signed opinions were filed); 2006 Term Opinions of the Court, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=06 (last visited July 8, 2010) (75 opinions from the 2006 Term); 2007 Term Opinions of the Court, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=07 (last visited July 8, 2010) (73 opinions from the 2007 Term); 2008 Term Opinions of the Court, http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=08 (last visited July 8, 2010) (83 reported opinions from the 2008 Term); 2009 Term Opinions of the Court, http://www.supremecourt.gov/opinions/slipopinions.aspx (last visited July 8, 2010) (92 opinions from the 2009 Term). These statistics include some cases that were dismissed or remanded without having been considered on the merits.

151 *See, e.g.*, Joan Biskupic, *A Different Sort of Court Awaits Blackmun Successor: Recent Terms Marked by Aversion to Change*, WASH. POST, Apr. 17, 1994, at A1.

152 Cordray & Cordray, *supra* note 145, at 738.

153 Hellman, *supra* note 54, at 429–32.

154 *Id.* at 429.

nal guidance to the lower courts; his replacement, Justice Ginsburg, has "expressed little sympathy" for this view.[155]

Justice Scalia has offered a theory to justify the change, in a short intellectual autobiography.[156] As a law student, he was attracted to the common law approach to judging: narrow decisions based on the facts of each particular case.[157] But with time the appeal of incremental judging dissipated. He confessed a mounting revulsion to fact-bound opinions that rely upon the "totality of the circumstances," for they give citizens little notice of what the law will be in future cases and do little to bind judges.[158] Scalia argued that the Supreme Court should not be obsessively patrolling the lower courts' opinions; its goal should be to state general principles of law, and then allow the lower courts to apply those principles as best they can.[159]

Justice Scalia's vision of the Supreme Court's proper role is hardly idiosyncratic. As Professor Hellman notes, "[f]rom Taft and Hughes onward, the Justices of the Supreme Court have emphasized that the Court's function is not to correct errors in the lower courts."[160] Perhaps the current dwindling of the Supreme Court's docket is simply the triumph of this school of thought. Some may regard the Court's relinquishment of its role as an "imperial" court as a welcome development. But, as Hellman notes, there is a less benign view:

> The Court, if not imperial, has now become Olympian. The Justices seldom engage in the process of developing the law through a succession of cases in the common-law tradition. Rather, Court decisions tend to be singular events, largely unconnected to other cases on the docket and even more detached from the work of lower courts.[161]

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155 *Id.*; *see also* David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. (forthcoming 2010), *available at* http://ssrn.com/abstract=1476537 (finding that every Justice appointed between 1986 and 1993 was less likely to grant plenary review than his predecessor).

156 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

157 *Id.* at 1177–78.

158 *Id.* at 1178–79.

159 *Id.* at 1186.

160 Hellman, *supra* note 54, at 432.

161 *Id.* at 433; *see also* Schauer, *supra* note 130, at 206–07 ("Although the Court's guidance obligations have been increasing, its willingness to take on these obligations has been heading in the opposite direction . . . . [T]here is a growing tendency on the part of the Court to avoid issuing a clear, general, and subsequently usable statement of the Court's reasoning or the Court's view of the implications of its decision.").

B. Coming Down from the Mountain

A move to anonymous opinions, discussed in the previous Part of this Article, should foster a more coherent body of doctrine, with Justices less inclined to pursue individual glory and more concerned with the Court's overall reputation. This Part proposes an additional means to bridge the gap between the Supreme Court and the rest of the American judicial system. It is time to reconsider the unfettered discretion the Court enjoys over its own docket.

At present, there are four statutory mechanisms for Supreme Court review, two of which are rarely triggered.[162] This leaves only discretionary review under 28 U.S.C. § 1257 (from state supreme courts) and 28 U.S.C. § 1254 (from federal courts of appeals). The first paragraph of § 1254, which covers writs of certiorari, is familiar.[163] The second paragraph provides another mechanism for review:

> By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.[164]

The Court's hostility toward this provision has rendered it "virtually a dead letter."[165] This is unfortunate. There are many cases in which the decision of one court of appeals conflicts with another, whether because of an ambiguity in a federal statute or in the Supreme Court's caselaw.[166] There are undoubtedly additional cases in

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162 28 U.S.C. § 1251 (2006) concerns the Court's original jurisdiction, which is now generally limited to cases between two states. 28 U.S.C. § 1253 involves direct appeals from three-judge district courts.

163 Cases in the courts of appeals may be reviewed by the Supreme Court "[b]y writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. § 1254(1).

164 *Id.* § 1254(2).

165 *See* Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1706 (2003).

166 Professor Hellman has devoted several informative articles to the question of circuit splits. *See, e.g.*, Arthur D. Hellman, *By Precedent Unbound: The Nature and Extent of Unresolved Intercircuit Conflicts*, 56 U. PITT. L. REV. 693 (1995); Arthur D. Hellman, *Light on a Darkling Plain: Intercircuit Conflicts in the Perspective of Time and Experience*, 1998 SUP. CT. REV. 247. He has concluded that many circuit splits are not disruptive of the legal system, a view seconded in Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008). We take no position in this debate. Our point is that forcing the Supreme Court to hear more of the cases, however mundane, that are truly vexing the legal system will narrow the chasm separating it from the so-called inferior courts. If it promotes other values as well, such as predictability and consistency in the law across circuits, that would simply be a bonus.

which circuit courts are internally divided because of similar ambiguities. And there are also cases that are systematically excluded from Supreme Court review because they involve narrow fact-bound questions.[167]

This Article proposes adding a provision to 28 U.S.C. § 1254 providing that each Term, the number of cases taken by the Supreme Court pursuant to the first paragraph (discretionary certiorari petitions) may not exceed the number of cases taken pursuant to the second paragraph (court of appeals certifications).[168] In effect, then, the Supreme Court's docket would be driven in part by the perceived needs of the judicial system, as determined by the lower court judges themselves.

The Supreme Court presumably would encourage the courts of appeals to certify certain kinds of cases, and some questions on which certiorari would have been granted will arrive by certification instead. But perhaps the Court would also be forced to review some cases in which it would not have granted a petition for certiorari. It is likely (or at least so we hope) that the courts of appeals would mostly certify cases dealing with frequently litigated issues on which Supreme Court precedent is especially unclear. The upshot would be to diminish the Supreme Court's ability to engage in the hit-and-run strategy of issuing a muddled opinion and then leaving it to others to clean up the mess. The Court would be forced, to some extent, to internalize the cost of its own lack of clarity, which would reinforce the healthy effects that we expect from a practice of issuing anonymous opinions.

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167 *See, e.g.*, Matthew L.M. Fletcher, *Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes*, 51 ARIZ. L. REV. 933, 980 (2009) (arguing that tribal petitions "often involving the interpretation of Indian treaties or complicated and narrow common law questions of federal Indian law, are readily deemed 'factbound' and 'splitless'").

168 We would remove the constraint on granting certiorari petitions in any year in which the Court accepted all the cases certified from the courts of appeals.

Our proposal is more modest than the one advanced in Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORNELL L. REV. 587 (2009). Carrington and Cramton propose the formation of a "Certiorari Division," consisting of thirteen Article III judges, which would be empowered to identify as many as 120 cases that the Supreme Court would be obliged to hear. *Id.* at 632–33. This step would be fairly radical, and it would require the creation of a new institution out of whole cloth. Our proposal simply breathes life into an already existing process (the codified court of appeals certification provision) that has fallen into desuetude, and it would not significantly diminish the Supreme Court's power to supervise the inferior courts.

IV. Real Judges Do Not Need Courtiers

"The role of law clerks is a hearty perennial of an issue."[169] This Part first traces the origins and growing influence of Supreme Court clerks. It then considers some of the criticisms leveled at the use of clerks, perhaps the most common being that they play too significant a role in screening and resolving cases.[170] Our point is slightly different: we argue that clerks have undermined the judicial character of the Court and fueled the celebrity status of individual Justices. The Court now resembles nine discrete law firms, each with a managing partner whose ego is stroked, and whose most arduous labors are often performed, by a cadre of bright and eager twentysomethings. Our proposal follows naturally: strip the Justices of their courtiers.

A. How One Court Becomes Nine Law Firms

For the first ninety years of its existence, Supreme Court Justices labored without law clerks of any kind even though their workload vastly exceeded that of twenty-first century Justices. In 1880, the Supreme Court had a docket of 1212 cases.[171] Legal briefs were not limited in length, and many exceeded the current limit of forty-five pages. Without the benefit of Westlaw or LexisNexis, the Justices conducted legal research. Oral arguments stretched on for hours. Justices drafted all the opinions themselves.

The first Justice to employ a clerk was Horace Gray, who took his seat in 1882.[172] At least until 1919, however, most clerks were assigned work that would today be regarded as secretarial.[173] Justices Brandeis, Holmes, and Gray departed from this rule to some extent, attracting top law students, particularly from Harvard, and tasking them with a variety of legal assignments.[174] In his memoirs, Secretary of State Dean Acheson, a Brandeis clerk in 1919 and 1920, noted that Brandeis and Holmes sought clerks "fresh from the intellectual stimulation of the law school, [which] brought them constant refreshment and challenge, perhaps more useful in their work than the usual office

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169 Starr, *supra* note 150, at 1376. A pair of recent academic books has comprehensively analyzed the subject. TODD C. PEPPERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERKS (2006); WARD & WEIDEN, *supra* note 62.

170 For some evidence that clerks influence the decisions of Justices on the merits of cases, see Todd C. Peppers & Christopher Zorn, *Law Clerk Influence on Supreme Court Decision Making: An Empirical Assessment*, 58 DEPAUL L. REV. 51 (2008).

171 PEPPERS, *supra* note 169, at 41.

172 *Id.* at 43–44; WARD & WEIDEN, *supra* note 62, at 24.

173 *See* PEPPERS, *supra* note 169, at 55; WARD & WEIDEN, *supra* note 62, at 30–31.

174 *See* PEPPERS, *supra* note 169, at 61–62; WARD & WEIDEN, *supra* note 62, at 33, 35.

aides."[175] One can only assume that clerks had begun to replace fellow Justices, at least to some extent, as a sounding board of ideas.

Clerks during the tenures of Chief Justices Taft (1920–1931), Hughes (1931–1940), and Stone (1941–1946) played a growing, but still relatively limited, role.[176] Stone was the first Justice to hire two law clerks, but the practice was not immediately followed.[177] Few Justices permitted their clerks to take the lead in opinion writing, but all of them eventually tasked their clerks with drafting certiorari memoranda, most expected clerks to edit opinions, and some required bench memoranda.[178] Over the course of the period, some Justices seem to have forged closer bonds with their clerks than with their colleagues on the Court. A comment by Justice Frankfurter is noteworthy in this regard: "They are, as it were, my junior partners—junior only in years. In the realm of the mind there is no hierarchy. I take them fully into my confidence so that the relation is free and easy."[179] Law clerks made perfect colleagues, it seems, or at least better colleagues than the other Justices.

It is perhaps with Chief Justice Vinson's tenure (1946–1953) that the clerk's rise in prominence began its steep ascent.[180] With Chief Justice Warren (1953–1969), the clerk's prominence became an accepted feature at the Supreme Court. In addition to drafting certiorari memoranda and judicial opinions, Warren's clerks were charged with preparing bench memoranda before oral arguments—a clerkship model embraced in essentials by the other Justices who were added to the Court during Warren's tenure.[181] Through the 1960s, Associate

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175 DEAN ACHESON, MORNING AND NOON 58 (1965).

176 *See generally* PEPPERS, *supra* note 169, at 83–144.

177 *See* WARD & WEIDEN, *supra* note 62, at 36–37.

178 *See generally* PEPPERS, *supra* note 169, at 84–144; WARD & WEIDEN, *supra* note 62, at 36–44.

179 PEPPERS, *supra* note 169, at 104. Justice Frankfurter would lobby Reed clerks directly. Writes one Reed clerk: "[Justice Frankfurter was] quite fond of using Justice Reed's law clerks as an avenue to the justice's opinions . . . Frankfurter was quite likely to walk into our chambers . . . and discuss issues with us *that he never talked to the justice about*." *Id.* at 101 (emphasis added) (internal quotation marks and citation omitted).

180 *See id.* at 134 (concluding that with Chief Justice Vinson, who was the first to add a third law clerk, "delegation of all major aspects of a justice's job duties—the review of cert. petitions and drafting of cert. memoranda, the preparation for oral argument via bench memoranda, and the drafting of opinions—became routine").

181 *Id.* at 151–52. Professor Tushnet reports that Justice Marshall did not ask for bench memoranda. *See* Tushnet, *supra* at 9, at 1301 n.2. As he clerked for Justice Marshall, he may possess inside knowledge, at least for that one Term. Todd Peppers, who interviewed dozens of clerks over many Terms, concluded that the seven Justices appointed after Warren, "save Harlan and perhaps Stewart," requested bench memoranda. *See* PEPPERS, *supra* note 169, at 152. In

Justices had only two clerks each,[182] but the rising flood of petitions (from 1055 petitions in 1950 to 3376 in 1968)[183] soon led most Justices to hire a third. Even so, it does not seem that Justices in this period were as dependent on their clerks as they eventually became. Justice Whittaker, for example, though overwhelmed by the burdens of his work and on the brink of a nervous breakdown, refused to delegate opinion-writing responsibilities to his clerks.[184]

The move to afford each Justice a fourth clerk seems to have been instigated by Justice Lewis Powell. In a 1972 letter to Chief Justice Burger, Powell wrote:

> What would you think of including in the budget a request for funds for a *fourth* law clerk for me and for any other Justice who may desire one? I do not have the background in constitutional and criminal law which enables me to function without a great deal of reading and research.[185]

Apparently, Burger was initially skeptical of the need for a fourth clerk, but the Associate Justices were soon authorized to hire two secretaries and four law clerks.[186] The importance of the clerks over the past few decades is highlighted by a comment of J. Harvie Wilkinson III, a former Powell clerk: "Justice Powell often said that the selection of his clerks was among the most important decisions he made during a term."[187] It is nowadays taken for granted that clerks play a large role in the opinion-writing process. One Justice reportedly told a clerk who asked for elaborate guidance in drafting an opinion, "If I had wanted someone to write down my thoughts, I would have hired a scrivener."[188]

B. Clerks of the Court, Not of the Justices

With their growing prominence, it should not be surprising that the clerks have attracted a measure of criticism. It has long been alleged that clerks exert too much influence on how Justices cast their

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any event, Peppers's (and our) broader point, which is uncontested, is that these seven Justices assigned considerably more substantive tasks to their clerks than most of their predecessors. *See id*. (all seven Justices appointed after Warren "routinely assigned their clerks responsibility for drafting opinions").

182 *See* WARD & WEIDEN, *supra* note 62, at 136 tbl.3.2.

183 *Id.* at 138 tbl.3.3.

184 PEPPERS, *supra* note 169, at 159–61; WARD & WEIDEN, *supra* note 62, at 202.

185 PEPPERS, *supra* note 169, at 185 (quotation and citation omitted).

186 *Id.*

187 *Id.* at 186 (internal quotation marks and citation omitted).

188 *Id.* at 164 (internal quotation marks and citation omitted).

votes. A less disputable claim is that clerks play an influential role in determining which cases the Justices choose to decide. By their own admission, many Justices seldom review certiorari petitions, relying instead upon the summaries and recommendations of the clerks.[189] The effect of the clerk filter is likely to increase the selection of cases in areas most familiar and interesting to recent graduates of prestigious law schools—especially constitutional law.[190] Such clerks, notwithstanding their intelligence and diligence, have little awareness of the issues genuinely vexing the legal community, which are not always the kinds of cases that roil the legal academy. That fact, plus a prevailing norm that sternly punishes clerks who "improvidently" recommend certiorari grants, while imposing no tax on errors in the opposite direction, inevitably biases the selection process away from cases whose significance may not be apparent to recent law school graduates.[191]

As employed today, clerks have contributed to the erosion of the Supreme Court as a cohesive judicial institution.[192] Justices rarely communicate directly with one another about the cases before them; exchanges are typically mediated through clerks.[193] Clerks, moreover, do not see themselves as employees of the Court, but of individual Justices.[194] Clerks fuel the cult of celebrity that infuses the Court, and not just through loyalty and gratitude to the Justice who was wise enough to select them from a very impressive pool of candidates. Incredible as it may seem, some clerks cravenly or strategically flatter their Justices in a manner wildly inconsistent with the clerk's private

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189 *See* Starr, *supra* note 150, at 1377.

190 *See* Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 986 (2005).

191 *See* Starr, *supra* note 150, at 1376–77. This effect is somewhat diminished by the role of the Solicitor General of the United States, whose recommendations are always taken very seriously and are frequently actively solicited. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 GEO. MASON L. REV. 237 (2009). But reliance on the President's lawyer for guidance in case selection may have its own distorting effects, for obvious reasons.

192 The institution of the judicial clerkship may also have developed in a manner that promotes politically based approaches to the law. *See* William E. Nelson, Harvey Rishikof, I. Scott Messinger & Michael Jo, *The Liberal Tradition of the Supreme Court Clerkship: Its Rise, Fall, and Reincarnation?*, 62 VAND. L. REV. 1749 (2009).

193 Citing "chatter among Supreme Court watchers" and brief passages from a journalistic book, Professor Tushnet speculates that inter-Justice deliberations have increased recently. *See* Tushnet, *supra* note 9, at 1300 n.2. The extent of the change, if any, is unknown, and the durability of any change that may have occurred is unknowable. *See supra* note 76.

194 *See* PEPPERS, *supra* note 169, at 189 (quoting J. Harvie Wilkinson III as saying, "I never felt that I was just a Supreme Court clerk—I always saw myself as a Powell clerk").

views. Frankfurter may have taken his clerks fully into his confidence, but one may doubt that the clerks always reciprocated.

The simplest solution would be to strip the Justices of all their clerks. We think such a step is unnecessarily radical. Instead, Congress should reassign the clerks (perhaps in reduced numbers) to the staff of the Court's Librarian. The Librarian would choose and supervise the clerks, who would not be permitted to draft judicial opinions. Individual Justices would submit research requests to the Librarian, who would be expected to allocate assignments more or less at random (in order to inhibit the development of bonds between Justices and clerks), and the results of the research would be shared with all the Justices.[195] Law clerks would thus serve more as servants of the Court than of individual potentates within the Court.[196]

As with our other proposals, the intent is not to punish the Court or its members, but to encourage the Court to operate more like a judicial body and less like an academic faculty cum superlegislature.[197] The job would no doubt become more challenging, not only compared with current practice, but also compared with the job of a circuit judge. We think it should. It might cause Presidents to select their nominees on the grounds of legal ability more often than they do now. It might even encourage some mediocre lower court judges to refrain from campaigning for a seat on the high court.[198] And it would almost

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195 Currently, most Justices participate in a "cert pool" arrangement, in which every petition for certiorari is randomly assigned to one law clerk, who writes a memorandum and makes a recommendation for disposition. The memorandum is shared with all the Justices who are in the pool. (Contrary to Professor Tushnet's suggestion, Tushnet, *supra* note 9, at 1301 n.2, we are well aware of this practice, and we do not believe there is anything "inaccurate" about our discussion of it.) Under our proposal, a cert pool could still be operated under the auspices of the Librarian, and it might have most of the same advantages and disadvantages of the current cert pool. It would probably not be any worse, and it might evolve into something better if the Librarian's staff were chosen for their professional expertise and experience as legal researchers rather than for their promise as craftsmen of bench memoranda and judicial opinions for particular Justices. Such clerks, moreover, would not need to be replaced each year.

196 Under our proposal, the Librarian's power would, of course, be augmented rather considerably. We are inclined to think that authority over the appointment and removal of the Librarian should be left with the Court, perhaps under an arrangement by which the Chief Justice appoints and removes, subject to a veto by a majority of the Justices.

197 It might be objected that adoption of our proposal would cut off the fresh thinking and familiarity with contemporary life that young people can provide. We disagree. The notion that Supreme Court clerks—chosen from a very narrow pool of lawyers and cocooned with their Justices in a world of extraordinary privilege—are putting the Court in touch with contemporary American life is pretty far-fetched. In any event, there are ample opportunities for advocates and amici to bring new thinking and information to the Court through their briefs.

198 In light of what we say in this paragraph, we do not understand why Professor Tushnet thinks we are asking "how the people now serving on the Court would behave if [our] proposed

certainly deter some Justices from remaining on the Court after they have lost the capacity to do much more than hire talented law clerks. The Justices might even return to the old practice of having the kind of equal and open discussions with each other that Frankfurter (and no doubt many others since) have *believed* they were having with hired help who, whatever their qualities of mind may be, are neither equal nor independent.

V. Circuit Riding Revisited

In the Judiciary Act of 1789,[199] Congress included service on lower federal courts among the original duties of members of the Supreme Court.[200] This was known as "circuit riding" because the Justices had to ride around the country on horses or in carriages to sit as circuit judges. With the exception of a short hiatus in 1801–1802, the Justices carried this burden until 1891 with the passage of the Evarts Act.[201] Legislation putting a complete end to circuit riding was not enacted until 1911.[202] Notwithstanding the great burden it placed on the Justices, Congress repeatedly voted to continue the practice so as to ensure that Justices would remain connected with the rest of the legal system, other members of the bar, and the nation as a whole. We propose to reintroduce circuit riding into the life of the Supreme Court.

A. The "Most Onerous and Laborious" Job in America

Supreme Court Justices nearly escaped the burden of circuit riding as soon as it was placed on their shoulders. The Judiciary Act of 1801, pushed through by the outgoing Federalist Congress, eliminated the practice.[203] Within a year, the Republicans repealed the 1801 Act,[204] in part as an act of partisanship, but also in part for a reason that would echo throughout the century: without circuit riding, it was said, Supreme Court Justices would be cut off from the political, cultural, and (most importantly) legal life of the rest of the nation.[205]

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changes were made." Tushnet, *supra* note 9, at 1301. He is right, however, that we have not purported to provide a "systematic" analysis predicting how the adoption of our proposals would alter the pool from which Justices are selected.

199 Judiciary Act of 1789, ch. 20, 1 Stat. 73.

200 *Id.* § 4, 1 Stat. at 74–75.

201 *See* Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826.

202 *See* Act of March 3, 1911, ch. 1, 36 Stat. 1087.

203 Glick, *supra* note 33, at 1782.

204 Repeal Act, ch. 8, 2 Stat. 132 (1802).

205 Glick, *supra* note 33, at 1783–85.

As the nation grew, and the federal judiciary's docket swelled, the position of Supreme Court Justice became, in the words of Justice McKinley, "the most onerous and laborious of any in the United States."[206] Many Justices had to travel over one thousand miles each year—even before the advent of railroads—in addition to their responsibilities on the Supreme Court.[207] Bills to curtail circuit riding were proposed practically every decade in the nineteenth century, only to be defeated again and again.[208] In congressional debates in 1869, for example, Senator George Williams argued that the abolition of circuit riding would transform the Supreme Court into a "fossilized institution" with its members cut off from the practices, laws, and customs of the local bar.[209] Proposals to end circuit riding stirred popular opposition, as reflected in an 1866 article:

> [W]e firmly believe the direct and indirect benefits derived from [circuit riding] infinitely outweigh any objections . . . . It must keep each judge's knowledge of practice and evidence much more fresh and serviceable than it could be, were he never to preside at a jury trial. The discipline, even if each judge try but a half dozen criminal and patent cases a year, more than repays him for the trouble and inconvenience; and the consequent mingling and association with the bar all over the circuit keeps up an acquaintance and understanding between it and the bench which we would be sorry to see at all lessened.[210]

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206 Frank Otto Gatell, *John McKinley*, *in* 1 JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969, at 773 (L. Friedman & F. Israel eds., 1969). Exhaustion brought on by the demands of circuit riding led, in part, to Justice William Cushing's decision to decline the commission to be Chief Justice. *See* Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 UNIV. TOL. L. REV. 597, 621–22 (2006). One nominee to the Supreme Court declined the honor altogether, noting that circuit riding was "extremely difficult [and] burthensome [sic]" and could result in the "loss of [his] health." *See* David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1718 (2007) (alteration in original) (internal quotation marks and citation omitted).

207 *See* Glick, *supra* note 33, at 1806; White, *supra* note 26, at 8 & n.24. Circuit riding could be downright dangerous. While circuit riding in California, Justice Field was assaulted by a defendant in a case he had decided. A deputy travelling with Justice Field shot and killed the assailant. Field and the deputy were then charged with murder. Charges against Field were dropped, but only the intervention of a federal court prevented the deputy from being tried in state court. *In re* Neagle, 39 F. 833 (C.C.N.D. Cal. 1889). The remarkable story is told in Glick, *supra* note 33, at 1823.

208 *See* Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 182, 185–88 (2003) (recounting the circuit-riding debate during Reconstruction); Glick, *supra* note 33, at 1799–1801, 1808–10, 1820–21.

209 CONG. GLOBE, 41st Cong., 1st Sess. 209 (1869) (statement of Sen. Williams).

210 *Summary of Events*, 1 AM. L. REV. 206, 207 (1866).

By the late nineteenth century, however, there were 1800 cases on the Supreme Court's docket and matters were languishing for years without resolution.[211] After decades of complaints from impatient litigants and the Justices themselves, the Evarts Act of 1891 created the modern courts of appeals (with new judgeships) and effectively eliminated circuit riding as a duty of Supreme Court Justices.[212]

From a twenty-first century perspective, the significance of circuit riding during the first half of this country's existence is difficult to appreciate. Circuit riding made up a large part of the work of the Supreme Court well into the nineteenth century, and it remained a socially and politically salient feature of the Justices' role in the federal government even in the post–Civil War years when circuit-riding responsibilities waned. Supreme Court Justices charged grand juries in Maryland,[213] heard criminal cases and property disputes in Arkansas,[214] heard breach of contract claims in Alabama,[215] and considered extradition orders in Pennsylvania.[216] By so doing, they remained connected to the lives of ordinary Americans, and saw firsthand how the law operated in practice at the lowest levels of the judicial system.

B. Vivifying a Fossilized Institution

The nineteenth-century practice of circuit riding was both a curse and a blessing for the Supreme Court and the American public it served. Justices lost a lot of valuable time roaming the countryside dispensing federal justice on a local, retail basis. Yet as the Court has retreated from this function, it has become ever more isolated from the operations of the lower federal courts. The bottom line is that too much circuit riding can hamper the work of the Court and too little (or none) has created a chasm between the mere mortals of the ordinary federal judiciary on one hand and Supreme Court Justices on the other.

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211 *See* Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects Its Decisionmaking*, 36 ARIZ. ST. L.J. 183, 192 (2004).

212 Act of Mar. 3, 1891 (Evarts Act), ch. 517, 26 Stat. 826.

213 Charge to Grand Jury, 30 F. Cas. 998 (C.C.D. Md. 1836) (No. 18,257) (Taney, C.J.).

214 *See* Glick, *supra* note 33, at 1811 (cataloging the circuit-riding travails of Justice Daniels).

215 *See Alabama's Forgotten Justices: John McKinley and John A. Campbell*, 63 ALA. LAWYER 236, 237–38 (2002) (discussing a string of cases decided by Justice McKinley while riding circuit, all of which were subsequently reversed by the United States Supreme Court in *Bank of Augusta v. Earle*, 38 U.S. 519 (1839)).

216 *Ex parte* Simmons, 22 F. Cas. 151 (C.C.E.D. Pa. 1823) (No. 12,863) (Associate Justice Bushrod Washington, presiding in the Pennsylvania Circuit Court).

Mindful of these competing concerns, our proposal is a modest attempt to reintroduce circuit riding.[217] Every year, the Justices of the Supreme Court would select by lot one of the 108 Article III jurisdictions (94 district courts, 13 courts of appeals, and the Court of International Trade). Once a jurisdiction has been selected, it would be removed from the pool until after all other jurisdictions had been selected. Over the course of the Term, each Justice would coordinate with the chief judge of the relevant court to ensure that he performed no less than five percent of the average annual workload of a judge in that jurisdiction. Thus, a Justice assigned to a circuit court would usually be expected to sit on one to three panels, collaboratively issuing opinions like an ordinary circuit judge; a Justice assigned to a district court would be given a dozen or so cases, and would be expected to oversee discovery, hear pretrial motions, and conduct a trial, if necessary, just like an ordinary district judge.

Some cases would carry over beyond a calendar year, and the Justice's responsibility would continue until the case's completion. In all likelihood, then, the total circuit-riding responsibilities of each Justice would exceed five percent of the workload of a typical district court or circuit judge. Even assuming it is double that, we should recall that Justices are now free to tour the world for three months of the year. Assigning them to work for half of that time would hardly constitute an intolerable burden.

Given technological developments, circuit riding would be far easier today than it was in centuries past.[218] In fact, the Court of Federal Claims already exercises a national jurisdiction, and judges of that court hold trials and settlement negotiations throughout the country. Adding circuit riding to the responsibilities of Supreme Court Justices may make it difficult for them to conduct summertime seminars abroad, but it would give them new opportunities to hold trials in Tuscaloosa and to sit on panels in Topeka.

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217 We made this suggestion in Lund & Lerner, *supra* note 129. Others have recently offered variants of the proposal as well. *See* Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1388–89 (2006); Stras, *supra* note 206, at 1712. Both articles, like this one, draw upon the impressive research compiled in a student note. Glick, *supra* note 33.

218 Professor Tushnet is right that modern communications would enable circuit-riding Justices to carry out some of their duties without leaving their plush Washington, D.C., offices. *See* Tushnet, *supra* note 9, at 1302 n.8. Given the relative modesty of the tasks expected of the Justices under our proposal, it would be all the more remarkable if the Court were to overturn *Stuart v. Laird* and hold circuit riding unconstitutional. *See* Stuart v. Laird, 5 U.S. (1 Cranch) 299, 305 (1803).

The Justices would thus be forced to cope with many of the bread-and-butter issues that other federal judges confront daily. They would have the experience of being reversed on appeal and of being outvoted on appellate panels by the same inferior judges who must usually obey their every command. Surely this would be a salutary check on the hubris that naturally develops in people who are otherwise Supreme.

In addition, the Justices would be forced to internalize, at least to some small extent, the cost of ambiguous and airy Supreme Court decisions. No longer would Justices be completely free to announce a ruling and leave others to worry about how it works. It would be their problem, too, because they would once again spend some of their time applying the law to the case without being able to choose the case or invent the law.

Conclusion

Our Anglo-American legal system has a long tradition according to which judges are supposed to be mere oracles of the law, not politicians in robes, let alone philosopher-kings or media celebrities. That is what the nation was promised when the Constitution established an independent judiciary. It is also what judicial nominees promise to be, and what their senatorial inquisitors say they should be. But hardly any informed observer could believe that our Supreme Court Justices in fact are any such thing.

Perhaps they never can be. We have argued, however, that the Justices could become at least a little bit more like the traditional model, if not through their own efforts then prodded by institutional incentives that Congress has the authority to establish. We doubt that Congress will enact such reforms, but the nation may someday wish it had.