

Article

A Certain Mongrel Court: Congress's Past Power and Present Potential To Reinforce the Supreme Court

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“Although a Supreme Court is provided for by the Constitution, the organization of the existing Court rests on an act of Congress.”¹

What can be done to keep the doors of the Supreme Court open if the death or incapacitation of several Justices (as a result of, say, a terrorist attack) deprives it of a quorum?² There is a tendency to assume—somewhat mistakenly, as this Article will show—that Congress has little or no power to address this problem head-on. This assumption is rooted in the constitutional mandate that “[t]he judicial Power of the United States,

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1. EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 209 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978).

2. See generally Continuity of Gov't Comm'n, The Continuity of Government Commission Meeting (Sept. 23, 2002), <http://www.continuityofgovernment.org/pdfs/020923transcript.pdf>. Reducing the quorum (currently six, 28 U.S.C. § 1 (2000)) would not answer the question. It would merely narrow the problem to the death or incapacitation of most or all of the Justices. Moreover, for purposes of this Article, a quorum reduction probably does not amount to much of a narrowing, because if terrorists or some other villains target the Supreme Court they will almost certainly attack when the Justices are in one place, and thus not, for example, during the Court's recess from early July to late September, when they tend to scatter.

shall be vested in *one* supreme Court,” and a reading of those terms and their history that precludes legislation creating some sort of back-up Court.³

First, the text: The word “one” in “one supreme Court” is read to mean “one [indivisible].” As Chief Justice Morrison R. Waite expressed it,

I beg you to note this language: “ONE SUPREME COURT and such inferior courts as Congress MAY, FROM TIME TO TIME, ordain and establish.” Not a Supreme Court or Supreme Courts, but “ONE,” and ONLY ONE. This *one* Supreme Court Congress cannot abolish, neither can it create another. Upon this the Constitution has no doubtful meaning. There must be one, and but one. Certainly such a provision, in such pointed language, carries with it the strongest implication that when this court acts, it must act as an entirety, and that its judgments shall be the judgments of the court sitting judicially as one court and not as several courts.⁴

And second, the history: It is simply understood that Congress’s implementation of the “one supreme Court” language has never involved a reorganization of the Court under which some Justice or Justices conducted the Court’s business while others qualified to serve were compelled to watch from the sidelines.⁵

3. U.S. CONST. art. III, § 1 (emphasis added); *see, e.g.*, Randolph Moss & Edward N. Siskel, *The Least Vulnerable Branch*, 53 CATH. U. L. REV. 1015, 1044–47 (2004); Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff).

4. Morrison R. Waite, Chief Justice, U.S. Supreme Court, Speech of Chief-Justice Waite (Sept. 15, 1887), in BREAKFAST TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES 18, 19 (Philadelphia, J.B. Lippincott Co. 1888); *see also, e.g.*, DEBATES IN THE CONGRESS OF THE UNITED STATES, ON THE BILL FOR REPEALING THE LAW “FOR THE MORE CONVENIENT ORGANIZATION OF THE COURT OF THE UNITED STATES;” DURING THE FIRST SESSION OF THE SEVENTH CONGRESS, AND A LIST OF THE YEAS AND NAYS ON THAT INTERESTING SUBJECT 104 (Albany, Whiting, Leavenworth, & Whiting 1802) (statement of Sen. Gouverneur Morris) (“The constitution says, the judicial power shall be vested in *one* supreme court, and in inferior courts. The legislature can therefore only organize *one* supreme court, but they may establish as many inferior courts as they shall think proper.”).

5. *See, e.g.*, Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 44 n.222 (1990) (debating the merits of a multipaneled Court, while noting the more than two hundred-year history of the Supreme Court in its current form); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569, 1614–19 (1990) (discussing the Founders’ apparent expectation that the Supreme Court would exercise appellate jurisdiction over inferior courts); *see also, e.g.*, Stephen J. Field, Associate Justice, U.S. Supreme Court, The Centenary of the Supreme Court (Feb. 4, 1890), in HAMPTON L. CARSON, *THE SUPREME COURT OF THE UNITED STATES: ITS HISTORY AND ITS CENTENNIAL CELEBRATION* 698, 713 (Philadelphia, John Y. Huber Co. 1891) (“No case in

Part I of this Article shows that the “one [indivisible]” reading of the text is correct. A review of the development of the Constitution’s “one supreme Court” language reveals that the Framers did indeed read “one supreme Court” to mean “one [indivisible] supreme Court”—a single body consisting of all of its available and qualified members to conduct its business. That reading has persisted in the overwhelming majority of expert commentary from all three branches of the federal government and academia down to the present day.

But Part II reveals a conflict between the verbal expression and the actual implementation of the Constitution’s “one supreme Court” language: the historical belief in perfect congressional perpetuation of the “one [indivisible] supreme Court” is mistaken. Early Congresses did not treat the constitutional commitment to “one supreme Court” as an absolute bar to all subdivision of the structure and business of the Court. And the Supreme Court itself went along with the legislature. Part II.A chronicles an instructive instance of this behavior in the early Republic: the creation in 1802 of a one-Justice rump Supreme Court that sat on the first Monday of August until 1839.⁶ Part II.B describes the operation of the August Term rump Court, its relationship to the conventional February Term en banc Court,⁷ and its eventual demise on nonconstitutional grounds.⁸

Part III attempts to reconcile the constitutional provision of “one [indivisible] supreme Court” with the congressional organization of the Court into a one-Justice rump and the more familiar en banc body, and to divine from the rump-Court experience some sense of the scope of Congress’s past power and present potential to fiddle with the structure of the Supreme Court. The result is a set of three requirements that any statute must satisfy:

- (1) Preserve involvement of active Justices in deciding cases;
- (2) Preserve the functionally indivisible Court; and
- (3) Eschew compulsory participation by any Justice in anything other than the conventional en banc Court.

the Supreme Court is ever referred to any one Justice, or to several of the Justices, to decide and report to the others.”).

6. Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

7. *Id.* § 1, 2 Stat. at 156. In 1826 Congress changed the February Term to a January Term. Act of May 4, 1826, ch. 37, 4 Stat. 160.

8. Act of Feb. 28, 1839 § 7.

Drawing on that experience and applying these three requirements, Parts III.A and B offer two novel examples of the forms congressional action might take, with an eye to improving continuity of Supreme Court operations in the face of calamity. None of this should be taken to mean that Congress *should* exercise whatever power it may have to change the structure of the Supreme Court in the service of continuity of government. (Careful congressional study may reveal that the best course of legislative action is no action at all.)⁹ But it does mean that a decision to abandon consideration of legislative approaches *should not* be based on a presumption of complete, uninterrupted, and constitutionally-compelled congressional impotence in this area.

Before moving on to the history of “one supreme Court,” be clear about what this Article is and what it is not. It is not a contribution to the ancient and polyphonous jurisdiction-stripping debate, meaning the assertion and denial of capacities in the states and in the other branches of the federal government to restrict or avoid the reach of the Court.¹⁰ It is, instead, a small addition to the relatively sparse study of Justice-stripping, meaning the assertion and denial of capacities within the federal government to restrict participation by Justices in work that is within the Court’s jurisdiction.¹¹

In addition, this Article is predicated on the idea that the United States is better-off with a Supreme Court than without one, even for a short time. On the one hand, it is certainly true that lower courts would continue to resolve most cases within federal jurisdiction without any need for Supreme Court involvement, even during a national crisis involving the decapita-

9. See Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff).

10. See, e.g., *Demore v. Hyung Joon Kim*, 538 U.S. 510 (2003); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868); Lloyd C. Anderson, *Congressional Control over the Jurisdiction of the Federal Courts: A New Threat to James Madison’s Compromise*, 39 BRANDEIS L.J. 417 (2000); William W. Van Alstyne, *A Critical Guide to Ex parte McCardle*, 15 ARIZ. L. REV. 229 (1973); see also T.R. Goldman, *Full-Court Pressure: Congress Pushed Federal Judges to Save Terri Schiavo, but They Wouldn’t Go Along*, LEGAL TIMES, Mar. 28, 2005, at 1.

11. The related question of when restrictions on the Justices become unconstitutional encroachments on their right to “hold their Offices during good Behaviour,” U.S. CONST. art. III, § 1, is beyond the scope of this Article. Laws already on the books beg the question. See, e.g., 28 U.S.C. §§ 3, 42–43 (2000) (addressing the contingency of a vacancy in the office of the Chief Justice due to disability, the allotment of Supreme Court Justices to circuits, and the composition of the circuits, respectively).

tion of the U.S. government.¹² On the other hand, however, there are good reasons to have a Supreme Court in place, some of which would be especially important during just such a crisis, including: (1) settling intra- and inter-branch disputes triggered by whatever disaster affects the Court itself;¹³ (2) promoting a sense of national stability domestically;¹⁴ and (3)

12. See, e.g., Charles Lane, *After Sept. 11, Judiciary Rethinks the Unthinkable: Judges Confident of Continuity, but Not Security*, WASH. POST, Apr. 12, 2002, at A29 (“All . . . district and circuit judges . . . can issue writs under the All Writs Act. So we are already dispersed nationwide.” (quoting Justice Anthony Kennedy)); Continuity of Gov’t Comm’n, *supra* note 2 (statement of J. Robert A. Katzmann) (“The Federal Judiciary, unlike the other branches of government, is dispersed across the nation and so it does not confront the same kinds of issues . . .”).

13. See, e.g., CONTINUITY OF GOV’T COMM’N, PRESERVING OUR INSTITUTIONS: THE CONTINUITY OF CONGRESS 2 (2003), available at <http://www.continuityofgovernment.org/pdfs/FirstReport.pdf> [hereinafter CONTINUITY OF GOV’T COMM’N, REPORT]. The report states:

The confusion might very well lead to a conflict over who would be president, Speaker of the House, or commander in chief, and a cloud of illegitimacy would likely hang over all government action. The institution that might resolve such disputes is the Supreme Court. However, it is likely that the entire Court would be killed in such an attack, leaving no final tribunal to appeal to for answers to questions about succession and legislative and executive action.

Id. The report continues: “If such a case arose during a national crisis involving, for example, separation of powers issues or presidential succession issues, the Supreme Court might be needed to make a prompt ruling. Thus, the continuity of the Supreme Court during a period of crisis also deserves attention.” *Id.* at 5; see also Norman J. Ornstein, *Unprepared: Why Inauguration Day Is Dangerous*, NEW REPUBLIC, Jan. 17, 2005, at 15, 15–16; Continuity of Gov’t Comm’n, Hearing on Potential Reforms to the Presidential Succession System (Oct. 27, 2002), <http://www.continuityofgovernment.org/pdfs/1027AEItranscript.pdf> [hereinafter Continuity of Gov’t Comm’n, Hearing] (statements of Rep. Brian Baird & Norman J. Ornstein, American Enterprise Institute). Justices and the Court have served in similar capacities in the past. See, e.g., *Bush v. Gore*, 531 U.S. 98, 110 (2000) (per curiam) (presidential election dispute); *Dames & Moore v. Regan*, 453 U.S. 654, 669–74 (1981) (presidential power to nullify private claims against foreign governments); *United States v. Nixon*, 418 U.S. 683, 707 (1974) (judicial process versus executive privilege); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (freedom of press versus national security); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–89 (1952) (presidential encroachment on private sector absent statutory authorization); *Ray v. Blair*, 343 U.S. 154, 155 (1952) (per curiam) (political parties’ conformity pledge of electors); *Marks v. Davis*, 4 Rapp 1413, 1413–14 (1912) (Van Devanter & Pitney, JJ., in chambers) (state electoral dispute); 7 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 *passim* (Supp. 1988) (presidential election dispute); *infra* note 133 (describing the *Holtzman v. Schlesinger* litigation).

14. See, e.g., CONTINUITY OF GOV’T COMM’N, REPORT, *supra* note 13, at 5; Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff).

presenting an image of national durability and strength internationally.¹⁵ “So having a Supreme Court in place in this age of terrorism, or a final court of judgment, as quickly as possible is, in fact, something meaningful”¹⁶ Moreover, having a “final court of judgment” other than the Supreme Court would in all likelihood be an ineffective less-than-half measure. Even if Congress purported to create by statute some sort of temporary emergency “final court of judgment,”¹⁷ such a court, being something other than the Supreme Court, “might not carry the weight of authority that might be needed for such an urgent constitutional crisis or an issue that requires such resolution.”¹⁸ Furthermore, any “final court of judgment” that was not the Supreme Court would be an “inferior court” whose decisions would “provide no more finality of decisions than would a currently existing Court of Appeals.”¹⁹ Finally, we should expect extraordinary cooperation among our nation’s political leaders in a time of crisis (including speedy replacement of needed Supreme Court justices), and a failure of collaborative spirit at such a time would signal governmental problems more urgent than a temporary loss of the Supreme Court. But in any case, conscientious preparation with an eye to reducing the strain on political leadership at such a time could improve the chances for successful collaboration in areas where preparation is impossible or unsuccessful. Thus, it would be best to have a Supreme-Court-in-a-can, ready to go if disaster strikes. The question, then, is whether Congress can create one.²⁰

15. See, e.g., Continuity of Gov’t Comm’n, Hearing, *supra* note 13 (statement of Rep. Brian Baird).

16. *Id.* (statement of Norman Ornstein).

17. An impossible task for some kinds of disputes. See, e.g., U.S. CONST. art. III, § 2, cl. 2 (granting the Supreme Court original jurisdiction in certain cases).

18. Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff).

19. *Id.*

20. It has been reported that the Supreme Court has its own “closely guarded” secret continuity plan, see Lane, *supra* note 12, but whatever provisions such a plan may make for protecting members of the Court who survive a catastrophe or for preserving the administrative systems of the Court, it cannot lawfully provide for filling seats on the Court. That power belongs to the President and Congress. U.S. CONST. art. II, § 2. At most, the Justices may have collectively ratified, in advance, an extraordinary exertion of judicial power by any of their number on an emergency basis—perhaps some variant of the “rule of necessity” that would permit less than a quorum of the Court to deal with cases requiring decision during a crisis. *Cf.* United States v. Will, 449 U.S. 200, 213–16 (1980) (explaining that under the “rule of necessity,” a

I. THE “ONE SUPREME COURT”

National commitment to a single court of last resort dates from the first days of the framing of the Constitution. The ninth “Resolve” in the “Virginia Plan” presented at the opening of the Philadelphia convention in late May 1787 provided that “a National Judiciary be established to consist of *one or more supreme tribunals*, and of inferior tribunals to be chosen by the National Legislature.”²¹ The convention, working through the Virginia Plan from front to back, arrived at the ninth Resolve on Monday, June 4:

It was then moved and seconded to proceed to the consideration of the 9th resolution submitted by Mr[.] Randolph[.] When on motion to agree to the first clause[.] namely “resolved that a national judiciary be established[.]” it passed in the affirmative[.]

It was then moved and seconded to add these words to the first clause of the ninth resolution[.] namely “to consist of *One supreme tribunal*, and of one or more inferior tribunals.[.] [A]nd on the question to agree to the same. [I]t passed in the affirmative.²²

With the convention’s acceptance of the “One supreme tribunal” amendment, discussion of Virginia’s proposal for “one or more supreme tribunals” disappeared from the convention’s deliberations.²³ Thereafter, the national court of last resort was

judge may hear a case in which he or she has a personal interest, despite impartiality concerns, if no other judge has jurisdiction, such as when a statute affects the Compensation Clause of Article III). But even that questionable approach could not reach the situation in which all nine members of the Court are killed or incapacitated. *See supra* note 2.

21. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 21 (Max Farrand ed., 1911) [hereinafter RECORDS] (emphasis added).

22. *Id.* at 95 (emphasis added); *see also id.* at 104–05 (noting that the motion to add the words “to consist of one supreme tribunal, and of one or more inferior tribunals” to the resolution passed in the affirmative).

23. Whether the objective of fixing the maximum number of supreme courts at one was to reduce or enhance the power of the judiciary is not clear from the record. It might have been part of a campaign to minimize the power of the federal courts. *See, e.g.,* David E. Engdahl, *What’s in a Name? The Constitutionality of Multiple “Supreme” Courts*, 66 IND. L.J. 457, 465 (1991) (“It seems . . . that this wording change . . . is better viewed as the first of several parliamentary steps by the delegates who maintained that all litigation should begin (and ordinarily end) in *state* courts, with only a single national tribunal to review certain classes of cases.”); James S. Liebman & William F. Ryan, “Some Effectual Power”: *The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 715 (1998). Or it could have been a step toward maximizing the supervisory power of the national court of last resort. *See, e.g.,* Steven G. Calabresi & Gary Lawson, *Equity and Hierarchy*, 102 YALE L.J. 255, 274 (1992); James E. Pfander, *Jurisdiction-Stripping and the Supreme Court’s Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1452–53 (2000).

invariably referred to in the singular and almost always as the “one supreme” court or tribunal.²⁴

But the words “one supreme” do not by themselves preclude the division of such a court into individual justices or panels of justices to conduct portions of the court’s business. The existence of one and only one United States Court of Appeals for the District of Columbia Circuit, for example, does not preclude the creation of multiple divisions of that court to sit in panels and decide cases independently of each other.²⁵ It might be reasonable to infer—from the early, undisputed, and apparently unanimous replacement of “one or more supreme tribunals” with “One supreme tribunal”—some sort of understanding that the Supreme Court was to sit only as one body in its entirety, but it would be better if there were something more concrete to rely on. There is, as follows.

The question of compensation for federal judges came up for debate at the constitutional convention on July 18, 1787. At that point the proposed language provided that the judges were “to receive punctually, at stated times, a fixed compensation for their services; in which no encrease or diminution shall be made.”²⁶ Gouverneur Morris—a delegate representing Pennsylvania who was soon to be the leader of the convention’s Committee of Style and one of the most influential figures in the ultimate formulation of the language of the Constitution—moved to strike the prohibition on increasing judicial salaries on the ground that “the Legislature ought to be at liberty to increase salaries as circumstances might require.”²⁷ Benjamin Franklin, in support of the motion, offered an example: “the business of the [judicial] department may increase as the Country becomes more populous.”²⁸

James Madison opposed Morris’s motion on the ground that the power to grant or withhold raises would give Congress an inappropriate capacity to influence judicial behavior.²⁹ And he rebutted Franklin’s comment with the sensible suggestion

24. See, e.g., 1 RECORDS, *supra* note 21 *passim*; 2 *id. passim*. The competing “New Jersey Plan,” presented on June 15, 1787, featured “a supreme” court. 1 *id.* at 244 (emphasis added).

25. 28 U.S.C. §§ 44, 46 (2000) (dividing the circuit courts into panels).

26. 1 RECORDS, *supra* note 21, at 226.

27. 2 *id.* at 38, 44; see also Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI-KENT L. REV. 31, 42–43 (1998).

28. 2 RECORDS, *supra* note 21, at 44–45.

29. *Id.* at 45.

that “[t]he increase of business will be provided for by an increase of the number who are to do it.”³⁰ Morris and Franklin had no answer to Madison’s solution to the problem of increasing caseloads,³¹ except with respect to the Supreme Court. “The increase of business can not be provided for in the supreme tribunal in the way that has been mentioned [by Madison],” Morris explained, because “[a]ll the business of a certain description whether more or less must be done in that single tribunal—Additional labor alone in the Judges can provide for additional business. Additional compensation therefore ought not to be prohibited.”³² In other words, because the work of the Supreme Court could not be divided up among the members of the Court, adding Justices would only add to the number of people involved in each decision and every other piece of Court business. No one, including Madison, disagreed with Morris’s telling riposte. There being apparently no interest in establishing separate compensation systems for the Supreme Court and for the rest of the federal judiciary, Morris’s motion passed.³³ Later in the convention Madison and others tried to re-insert the bar on increases in judicial salaries—a campaign that Morris successfully “opposed . . . for reasons urged by him on a former occasion.”³⁴ The Constitution in its final form permitted raises for sitting federal judges.³⁵

The “one supreme Court” question was never again an issue in the framing or ratification of the Constitution,³⁶ or in its implementation in the Congresses of the 1790s. Thus, in a contentious period of constitutional formation and thoroughgoing interpretation of many provisions of the new national charter,³⁷

30. *Id.*

31. Madison’s solution is, in fact, a method commonly used to deal with rising workloads at the trial and intermediate levels of the federal judiciary. See *Atkins v. United States*, 556 F.2d 1028, 1046 & n.10 (Ct. Cl. 1977) (per curiam) (noting that Madison’s prophecy “has generally been borne out though unevenly”).

32. 2 RECORDS, *supra* note 21, at 45.

33. *Id.*

34. *Id.* at 429–30.

35. U.S. CONST. art. III, § 1.

36. See, e.g., Luther Martin, Md. Att’y Gen., *Genuine Information*, Address Before the Legislature of the State of Maryland (Nov. 29, 1787), reprinted in 3 RECORDS, *supra* note 21, app. A, CLVIII, at 172, 220.

37. See generally DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997); STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM* (1993).

there seems to have been little doubt among the key players that the Constitution should, and then did, specify one and not more than one indivisible Supreme Court—meaning one body collectively deciding all of the cases that came before it and over which it had jurisdiction.³⁸ The sentiments of the Framers—seemingly echoed in the comments of Chief Justice Waite on the centennial of the Constitution³⁹—have been consistently shared by almost all judges, bureaucrats, and scholars ever since.⁴⁰

38. This understanding did not deter early Congresses from piling additional duties, judicial and otherwise, onto members of the Court. Nor, for that matter, has it deterred modern Congresses from doing the same. Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 U. TOL. L. REV. (forthcoming 2006) (manuscript at 55–57, on file with author).

39. See *supra* note 4 and accompanying text.

40. See, e.g., Letter from Chief Justice Charles E. Hughes to Senator Burton K. Wheeler (Mar. 21, 1937), in SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711 app. C, at 40 (1937) (“I may also call attention to the provisions of article III, section 1, of the Constitution that the judicial power of the United States shall be vested ‘in one Supreme Court’ The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a supreme court functioning in effect as separate courts.”); see also, e.g., Caleb Cushing, *Analysis of the Existing Constitution of the Judicial System of the United States, and Suggestion of Desirable Modifications Thereof*, 6 Op. Att’y Gen. 271, 277 (1854); Paul A. Freund, *Why We Need the National Court of Appeals*, 59 A.B.A. J. 247, 249–50 (1973); *Report of the Study Group on the Caseload of the Supreme Court*, 57 F.R.D. 573, 583 (1973); *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group’s Composition and Proposal*, 59 A.B.A. J. 721, 729–30 (1973). But see CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864–88, PART TWO 770 (1987) (discussing Justice Stephen J. Field’s support for an enlarged and panelized Supreme Court); Tony Mauro, *Profs Pitch Plan for Limits on Supreme Court Service*, LEGAL TIMES, Jan. 3, 2005, at 1 (describing a proposal by Professors Paul Carrington and Roger Cramton to establish mandatory senior status for Justices who have served for a long time—a construct that would surely fail at least the third prong of the test proposed in this Article for constitutionality of restrictions on the “one supreme Court”). Byron R. White and Akhil Amar have suggested that the Court could hear cases in panels, but both leave the door open to review by the en banc Court, thus retaining an ultimate presumption of “one [indivisible] supreme Court” of last resort. Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B.U. L. REV. 205, 268 n.213 (1985); Byron R. White, *Challenges for the U.S. Supreme Court and the Bar*, 51 ANTITRUST L.J. 275 *passim* (1982); cf. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 287–89 (1928) (discussing proposals for dividing responsibility for evaluating petitions for certiorari); Eugene Gressman, *The National Court of Appeals: A Dissent*, 59 A.B.A. J. 253, 255 (1973) (discussing a 1927 proposal by Felix Frankfurter for panel screening of petitions for certiorari).

II. THE TWO SUPREME COURTS

In 1802, however, President Thomas Jefferson and the Republican Congress created a second Supreme Court, of a sort: a one-justice rump Court to sit at an August Term.⁴¹ The Republicans did not empower this Court to perform all of the functions of the full Court, but even the limited authority they did grant to it—combined with the active compliance of Chief Justices John Marshall and Roger Taney and their colleagues, and its unchallenged survival for more than thirty years—suggests that the constitutional indivisibility of the “one supreme Court” was understood to permit at least some limited legislative manipulation of the internal structure of that one Court.

A. FROM “MIDNIGHT JUDGES” TO “MONGREL COURT”

In what Jefferson called “the Revolution of 1800,” he and his Republican partisans defeated the Federalists in that year’s presidential and congressional elections.⁴² President John Adams and the outgoing Federalist Congress took advantage of the subsequent lame-duck legislative session to create several new judgeships and fill them with Federalists.⁴³ The new denizens of this enlarged judiciary were the “Midnight Judges”⁴⁴ whose commissions Adams was diligently signing, and his Secretary of State John Marshall was somewhat ineptly distributing,⁴⁵ in the hours before the last Federalist President’s term ended. Jefferson and the Republicans were unhappy with this maneuver, and set about undoing it shortly after they took office.⁴⁶ The result was the Repeal Act of March 8, 1802.⁴⁷ It was

41. Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

42. Letter from Thomas Jefferson to Judge Spencer Roane (Sept. 6, 1819), in 10 THE WRITINGS OF THOMAS JEFFERSON 140 (Paul Leicester Ford ed., New York, The Knickerbocker Press 1899). For a thorough examination of the “Revolution,” see generally DANIEL SISSON, THE AMERICAN REVOLUTION OF 1800 (1974).

43. Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed 1802) (“Midnight Judges Act”).

44. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 188 (rev. ed. 1926).

45. See, e.g., *Marbury v. Madison*, 5 U.S. 87, 1 Cranch 137 (1803); WILLIAM E. NELSON, *MARBURY V. MADISON: THE ORIGINS AND LEGACY OF JUDICIAL REVIEW* 57 (2000).

46. 11 ANNALS OF CONG. 15–16 (1801) (President’s Message); *id.* at 23 (repeal bill introduced by Sen. Breckenridge); WILLIAM S. CARPENTER, *JUDICIAL TENURE IN THE UNITED STATES* 55–63 (1918); FRANKFURTER & LANDIS, *supra* note 40, at 26–28.

followed a few weeks later by the “Act to amend the Judicial System of the United States” (April Act), which—in the course of insulating the Repeal Act from effective judicial review by the Supreme Court—created the one-Justice Court with which this Article is concerned.⁴⁸

Debates on the floors of the House and Senate, and private correspondence among the Justices, highlighted constitutional objections to key provisions in the Repeal Act and the April Act, but the section of the Repeal Act creating the one-Justice rump Court was not one of them. While there were a few objections on policy grounds, it was constitutionally unobjectionable in Congress and the Court. Based on the course of legislation—from the Midnight Judges Act to the Repeal Act to the April Act—the rump Court was, to all appearances, accepted as either a pragmatic (if one was a Republican) or a cosmetic (if one was a Federalist) compromise between abolition and preservation of one of the Court’s two annual terms.

The Midnight Judges Act of 1801 “combined thoughtful concern for the federal judiciary with selfish concern for the Federalist party.”⁴⁹ It was designed to serve two functions: (1) to repair several defects in the Judiciary Acts of 1789⁵⁰ and 1793,⁵¹ most importantly by relieving members of the Supreme Court of the circuit-riding duties they had borne since 1789;⁵² and (2) to embed as many Federalists as possible in the judicial branch as a bulwark against the incoming Republican Congress and President, by creating sixteen new circuit court judgeships for the lame duck Federalists to fill before they left office.⁵³

The Repeal Act of 1802 was the Republicans’ straightforward response: it declared that the Midnight Judges Act “is

47. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

48. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156 (partially repealed 1839).

49. DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS 1801–1829*, at 11–12 (2001); FRANKFURTER & LANDIS, *supra* note 40, at 24–25.

50. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

51. Act of Mar. 2, 1793, ch. 22, 1 Stat. 333.

52. Act of Feb. 13, 1801, ch. 4, § 27, 2 Stat. 89, 98 (repealed 1802).

53. *Id.* §§ 6–7, 2 Stat. at 90–91. As Jefferson not entirely unfairly characterized the intentions of the Federalists, “[T]hey have retired into the Judiciary as a stronghold. There the remains of federalism are to be preserved and fed from the treasury, and from that battery all the works of republicanism are to be beaten down and erased.” Letter from Thomas Jefferson to John Dickinson (Dec. 19, 1801), in 10 *WRITINGS OF THOMAS JEFFERSON* 301, 302 (Andrew A. Lipscomb ed., 1904).

hereby repealed.”⁵⁴ Alas, repeal raised troubling constitutional problems, the most significant being the abolition of the sixteen new judgeships, all of which were already occupied.⁵⁵ The Constitution provides that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour,”⁵⁶ and no one of consequence was claiming that any of the new judges had engaged in impeachably bad behavior. Nor was there any doubt that the Federalists had complied with the constitutional requirements of presidential nomination, senatorial advice and consent, presidential appointment and commissioning, and judicial oath-taking.⁵⁷ So there was no way for the Republicans to remove or ignore the new judges on constitutional grounds. Nor was there any sentiment for the delayed gratification of a statute under which the new judgeships would expire with the incumbents.⁵⁸ The Republican revolution required a prompt return to the status quo ante the Midnight Judges Act. And thus the only acceptable solution was to torpedo the new judgeships with the Midnight Judges still on board, notwithstanding the apparent Article III prohibition on the removal of well-behaved judges. The Republicans justified the judicial abolitions on the ground that the Constitution merely protected a judge’s office-holding so long as the office existed, but that nothing prevented Congress and the President from abolishing the office itself, and once the office was gone, the judge no longer had any constitutionally-protected right to

54. Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132, 132. The full story of the elaborate politicking and rhetoric surrounding the judiciary acts of 1801–02 is beyond the scope of this Article. For thorough treatments, see generally RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS* 36–68 (1971); GEORGE LEE HASKINS & HERBERT A. JOHNSON, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FOUNDATIONS OF POWER* 163–68 (1981).

55. FRANKFURTER & LANDIS, *supra* note 40, at 21 n.56.

56. U.S. CONST. art. III, § 1.

57. See U.S. CONST. art. II, § 2, cl. 2, art. II, § 3, art. VI, cl. 3; see also Act of Sept. 24, 1789, ch. 20, § 8, 1 Stat. 73, 76 (requiring Justices and judges to take an oath of office).

58. The Midnight Judges Act itself included such a provision reducing the size of the Supreme Court from six to five on the next departure of an Associate Justice, expected to be the aged and ailing William Cushing. SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 12 (1937); see also Act of July 23, 1866, ch. 210, § 1, 14 Stat. 209, 209 (depriving President Andrew Johnson of the power to fill vacancies on the Supreme Court by providing that “no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six”).

hold it.⁵⁹ The Federalist minority sensibly pointed out that this would make a nullity of judicial independence under Article III.⁶⁰ Both sides invoked the Constitution's "one supreme Court" mandate. The Republicans cited it to contrast Congress's constitutional inability to destroy the Supreme Court with its constitutional authority to destroy inferior courts,⁶¹ while the Federalists used the same language to justify the Midnight Judges Act,⁶² suggesting that circuit-riding improperly hampered the capacity of the Justices to sit as a Court.⁶³ Although the Federalists probably had the better constitutional argument,⁶⁴ the Republicans had the votes in Congress, and a President who approved.⁶⁵

It was not at all clear, however, that the Republicans had the votes on the Supreme Court to uphold the constitutionality of the Repeal Act. The Court was populated entirely by Federalists, and by judges who hated to ride circuit. In fact, private correspondence among the Justices reveals that Chief Justice John Marshall and Justice Samuel Chase were decidedly for

59. See, e.g., 11 ANNALS OF CONG. 27–30 (1802) (statement of Sen. Breckenridge); *id.* at 59–62 (statement of Sen. Mason). This proposition may seem outrageous today, but it had at least some legal support at the time. See, e.g., 5 JOHN COMYNS, A DIGEST OF THE LAWS OF ENGLAND 155 (Samuel Rose ed., London, A. Strahan 4th ed. 1800); 3 WILLIAM CRUISE, A DIGEST OF THE LAWS OF ENGLAND RESPECTING REAL PROPERTY 165 (London, A. Strahan 1804).

60. See, e.g., 11 ANNALS OF CONG. 33–34 (1802) (statement of Sen. Mason); *id.* at 56–57 (statement of Sen. Tracy); *id.* at 126–32 (statement of Sen. Chipman).

61. See, e.g., *id.* at 48 (statement of Sen. Jackson) ("The word *shall*, applied to the Supreme Court, is imperative and commanding, while the word *may*, applied to the inferior courts, is discretionary, and leaves to the Legislature a volition to act, or not to act, as it sees fit."); *id.* at 27–28 (statement of Sen. Breckenridge).

62. See, e.g., *id.* at 86 (statement of Sen. Morris) ("The Constitution says, the judicial power shall be vested in one Supreme Court, and in inferior courts. The Legislature can therefore only organize one Supreme Court, but they may establish as many inferior courts as they shall think proper.").

63. See, e.g., *id.* at 125 (statement of Sen. Chipman); see also *id.* at 53 (statement of Sen. Tracy) ("A court which is to act together, should not be numerous . . .").

64. See DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST ONE HUNDRED YEARS 75 (1985); see also *Glidden v. Zdanok*, 370 U.S. 530, 544–47 (1962) (plurality opinion) (discussing Congress's control over territorial courts as opposed to Article III courts); *O'Donoghue v. United States*, 289 U.S. 516, 529–38 (1933) (comparing the independence of Article III judges with that of legislative judges).

65. See CHARLES GROVE HAINES, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789–1835, at 227–35 (1960).

overturning the Repeal Act, while Justices William Cushing, William Paterson, and Bushrod Washington were unwilling to take that step.⁶⁶

Anticipating trouble at the Supreme Court, the Republican Congress passed the April Act—a transparent and ultimately successful attempt to insulate the Repeal Act from review by the Supreme Court until after the Justices had ridden circuit in the upcoming summer and fall of 1802. By then, the operation of the Repeal Act would be well-established, and the Justices' circuit riding would displace the Midnight Judges, thus implicitly conceding the force of the Repeal Act. The April Act achieved this end by extending the Republican repeal movement to include a provision of the original Judiciary Act of 1789: "so much of the [1789 Act] as provides for the holding a session of the supreme court of the United States on the first Monday of August, annually, is hereby repealed."⁶⁷ As a result, the Supreme Court could not sit to hear a challenge to the Repeal Act until its next sitting, in February 1803.⁶⁸ Eventually, after caving in and riding circuit (political reality and the arguments of Cushing, Paterson, and Washington having prevailed over the pique of Marshall and Chase), the Court upheld the constitutionality of some of the Repeal Act's provisions and dodged review of the rest,⁶⁹ to the disappointment of Federalist pols.⁷⁰

66. See generally 6 THE PAPERS OF JOHN MARSHALL 104–21 (Charles F. Hobson ed., 1990) (reprinting Justices' correspondence discussing the Repeal Act).

67. Act of April 29, 1802, ch. 31, §1, 2 Stat. 156, 156.

68. See HAINES, *supra* note 65, at 243 ("As the Judiciary debate progressed in the spring of 1802, the Congressional leaders decided to abolish the August session, except for the receipt of motions and other routine matters. The result of these enactments was that the Supreme Court sat in December, 1801, and did not meet again to hear cases until February, 1803.").

69. *Stuart v. Laird*, 5 U.S. 185, 190–91, 1 Cranch 298, 308–09 (1803); see also BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 163–98 (2005); CARPENTER, *supra* note 46, at 76–78 (discussing the effect and constitutionality of limiting judicial review of the Repeal Act).

70. See, e.g., WILLIAM PLUMER'S MEMORANDUM OF PROCEEDINGS IN THE UNITED STATES SENATE 1803–1807, at 103 (Everett S. Brown ed., 1923) ("When the Judges of the Circuit Court were removed by the repeal of the law in 1802, then was the time for the Judges of the Supreme Court, to have taken their stand against the encroachments of Congress & of the Executive. That Court ought to have declared the repealing law unconstitutional—they ought to have refused to have held Circuit Courts But unfortunately there was then a diversity of opinion in the Supreme Court upon this subject[.]").

But the Republicans' hostility toward federal judges in general and the Supreme Court Justices in particular (at least so long as they were Federalists) did not manifest itself in an unrealistic plan to do away with the national judiciary entirely.⁷¹ The Republicans abolished the August en banc sitting of the Court, but they preserved the February sitting.⁷² And, in an effort to keep the wheels of justice turning at the Court—and perhaps take the edge off Federalist claims that the abolition of the August Term created by the Judiciary Act of 1789 was a scurrilous ploy to avoid judicial review of the Repeal Act—they created in the second section of the April Act a new kind of Supreme Court session, limited to procedural issues and conducted by one Justice:

And be it further enacted, That it shall be the duty of the associate justice resident in the fourth circuit formed by this act, to attend at the city of Washington on the first Monday of August next, and on the first Monday of August each and every year thereafter, who shall have power to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein, preparatory to the hearing, trial or decision of such action, suit, appeal, writ of error, process, pleadings or proceedings: and that all writs and process may be returnable to the said court on the said first Monday in August, in the same manner as to the session of the said court, herein before directed to be holden on the first Monday in February, and may also bear teste on the said first Monday in August, as though a session of the said court was holden on that day, and it shall be the duty of the clerk of the supreme court to attend the said justice on the said first Monday of August, in each and every year, who shall make due entry of all such matters and things as shall or may be ordered as aforesaid by the said justice, and at each and every such August session, all actions, pleas, and other proceedings relative to any cause, civil or criminal, shall be continued over to the ensuing February session.⁷³

Federalists in Congress were as outraged in April by the April Act as they had been in March by the Repeal Act, but almost none of their anger—and absolutely none of their constitutional objections—was directed at the new rump Court. They taunted the Republicans about the true purpose of the April Act: “Are the justices of the Supreme Court objects of terror to [Republican] gentlemen? . . . Are they afraid that they will pro-

71. See HAINES, *supra* note 65, at 224. There were a couple of hotheaded exceptions, but lacking Jefferson's support, their calls for abolition of the Federalist judiciary went nowhere. DUMAS MALONE, *JEFFERSON THE PRESIDENT: FIRST TERM, 1801–1805*, at 110–35 (1970).

72. Act of Apr. 29, 1802, ch. 31, § 1, 2 Stat. 156, 156.

73. *Id.* § 2, 2 Stat. at 156.

nounce the repealing law void?”⁷⁴ The Republicans replied with the obvious reciprocal: “But we have as good a right to suppose [Federalist] gentlemen on the other side are as anxious for a session in June [or August], that this power may be exercised, as they have to suppose we wish to avoid it, to prevent the exercise.”⁷⁵ Supplementing such barbs with plausible constitutional objections to the April Act was harder. James Bayard, who led the Federalist opposition to the Repeal Act and the April Act in the House of Representatives,⁷⁶ was reduced to spluttering, “The effect of the present bill will be, to have no court for fourteen months. Is this Constitutional?”⁷⁷ He had no answer for his own question, and the Republicans felt no need to provide one.⁷⁸ Debate on policy grounds continued for a short while, with the Federalists complaining mightily that the abolition of the August sitting by the full Court would prolong litigation and encourage abusive delay tactics by defendants.⁷⁹ Federalists derided the August-Term rump Court, as “a certain mongrel court . . . to consist of one justice, vested with power to take preliminary steps without authority to take final ones.”⁸⁰ But that was as far as it went. The April Act passed without a single objection that the rump Court suffered from any constitutional defect involving the “one supreme Court” requirement, or, for that matter, any other provision of the Constitution.⁸¹

The rump Court passed muster even more easily at the Supreme Court itself, where it was never questioned by Justices or litigants. The Justices, who were fulminating and debating in their internal correspondence about the constitutionality of the abolition of the circuit courts and the reinstatement of circuit-riding for themselves,⁸² were apparently perfectly un-

74. 11 ANNALS OF CONG. 1229 (1802) (statement of Rep. Bayard).

75. *Id.* (statement of Rep. Nicholson).

76. Bayard also delivered the Presidency for Thomas Jefferson a year earlier. *See* ELKINS & MCKITTRICK, *supra* note 37, at 748–50.

77. 11 ANNALS OF CONG. 1229 (1802) (statement of Rep. Bayard). Bayard was correct about the fourteen-month gap, which ran from the last sitting of the full Court under the Midnight Judges Act (December 1801) to the first sitting of the full Court under the April Act (February 1803).

78. *Id.*

79. *See, e.g., id.* at 1205, 1210 (statement of Rep. Bayard); *id.* at 1207 (statement of Rep. Griswold); *id.* at 1207–08 (statement of Rep. Dennis).

80. *Id.* at 1205 (statement of Rep. Bayard).

81. *See id.* at 1205–11.

82. *See supra* notes 66, 69 and accompanying text.

concerned about the new rump August Term. Even Justice Chase, who wrote to Chief Justice Marshall on April 24, 1802, that he was prepared to lose his seat on the Court in the fight against the unconstitutional terms of the Repeal Act, placidly expressed in that same letter his hope for an early conference of the Court to discuss strategy, suggesting “that the Judges could meet me, at Washington, on the first Monday of August next, when I must be there to prepare the Cases for trial.”⁸³ Chase was the “associate justice resident in the fourth circuit formed by [the April] act” who was assigned the “duty of . . . attend[ing] at the city of Washington on the first Monday of August next . . . to make all necessary orders touching any suit, action, appeal, writ of error, process, pleadings or proceedings, returned to the said court or depending therein.”⁸⁴ Marshall forwarded Chase’s invitation to Justice Paterson with similar complaisance: “he has requested . . . that we should meet in Washington . . . in August next when he is directed to hold a sort of a demi session at that place.”⁸⁵

Less than fifteen years after the ratification of the Constitution, with its “one supreme Court” mandate, nobody said “boo” about the constitutionality of the rumping of that Court. There were arguments between the contending political factions about the utility of transforming the Court’s August Term from a full-blown, en banc, case-or-controversy-deciding session

83. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 66, at 109, 110.

84. Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322. Chase was the Federalist judge most despised by the Republicans, having been, among other things, the most vigorous in adjudicating cases brought against Republican publishers under the Alien and Sedition Acts. See JAMES HAW ET AL., *STORMY PATRIOT: THE LIFE OF SAMUEL CHASE* 216–25 (1980). I suspect there may have been some bear baiting sentiment behind the selection of Chase to serve on the rump Court—Republicans may have hoped that he would refuse to serve in that capacity, thus providing additional fodder for the soon-to-be-commenced impeachment proceedings against him. See *id.* After all, it would have been just as easy and geographically convenient to assign the rump-Court duties to the slightly less controversial and substantially more widely respected resident of the Fifth Circuit—Chief Justice John Marshall—instead of the resident of the Fourth Circuit, as provided by the April Act, as the Fifth Circuit included Virginia at the time. Additionally, this setup might have been less constitutionally questionable, given that the Chief Justice is the only member of the Court specified by the Constitution. U.S. CONST. art. I, § 3, cl. 6.

85. Letter from John Marshall to William Paterson (May 3, 1802), in 6 THE PAPERS OF JOHN MARSHALL, *supra* note 66, at 117, 118.

into a purely procedural session, but that was as far as it went. The lack of any constitutional objection to the existence of the rump Court speaks even more loudly in light of the repeated invocation of the Constitution in the course of the debates over other provisions of the Repeal Act and the April Act.⁸⁶ If there was ever a time when the constitutionality of legislative interference in Court operations was top of mind, it was in the winter and spring of 1802. And yet the rump Court passed through unchallenged.

Thus, at the beginning of the nineteenth century, all three branches of the federal government joined or acquiesced in the creation of the one-Justice rump Supreme Court of 1802, a long-lasting illustration of the flexibility of Article III's "one [indivisible] supreme Court" requirement.

B. THE "DEMI SESSIONS" OF 1802 TO 1838

The Supreme Court—either in the form of Justice Chase sitting at the August Term or in the form of the en banc Court sitting at the February Term—might have resisted the perpetuation of the August Term as a division of the "one [indivisible] supreme Court," but it did not. Instead the Court chose to treat both of its forms—en banc and rump—as versions of the same body, albeit with different ranges of authority depending on whether it was sitting by the authority of the first section of the April Act (en banc, with broad authority to decide cases and controversies), or the second (rump, with only limited procedural powers).⁸⁷

The opportunity to stymie the August Term rump Court, at least as an edition of the Supreme Court, arose from the muddled language of the April Act. Its first section repealed the portion of the Judiciary Act of 1789 that "provides for the holding of a session of the supreme court . . . on the first Monday of August," and its second section merely ordered that one Justice "attend at the city of Washington on the first Monday of Au-

86. See *supra* notes 59–65, 77 and accompanying text (noting the constitutional objections to the abolition of the circuit judgeships, the reinstatement of Supreme Court circuit-riding, and the abolition of the traditional August Term).

87. Perhaps the Justices did not think about it or did not care, so long as it served their political ends. This Article assumes that constitutional officers care about, and consider themselves constrained by, constitutional limits on their acts and their offices.

gust . . . to make all necessary orders . . . *as though* a session of the said court was holden on that day.”⁸⁸ But other language in the April Act made this less than an easy answer, because the Act was textually of two minds about the status of the August rump Court. The second section of the Act also referred to the rump session as “*such* August session,” and made provisions for the attendance of the Clerk of the Court and the treatment of August Term filings and orders that leave little doubt that the proceedings of the rump Court were to be treated as identical to proceedings of any other session of the Court.⁸⁹ In addition, it used exactly the same language to describe the scope of the powers of the Justice from the Fourth Circuit sitting at the August Term, and the scope of the powers of less than a quorum of Justices sitting at the February Term.⁹⁰ Moreover, if the rump Court was not a Supreme Court, what could it be? The Constitution grants Congress wide latitude to vest the “judicial Power . . . in such inferior Courts as [it] may from time to time ordain and establish.”⁹¹ Perhaps the rump Court was some sort of one-off inferior court, but if it was, it was an inferior court that performed only functions of the Supreme Court, and the decisions of which were not subject to any sort of review. In other words, it was an inferior national court of last resort conducting only unreviewable business of the Supreme Court and staffed only by a Justice and the Clerk of that Court. This would have been at most a distinction without a difference, and maybe not even that.

In any event, neither the Supreme Court nor anyone else ever treated the August Term as anything other than a session of the Supreme Court. The behavior of the Justices, the Clerk of the Court, and counsel appearing at rump sessions all testify to the recognized legitimacy of the rump Term. None of which is to say that the August Term was of great substantive consequence,⁹² at least until near the end of its existence.

88. Act of Apr. 29, 1802 § 2 (emphasis added).

89. *Id.* (emphasis added).

90. *Compare id.* § 1, *with id.* § 2.

91. U.S. CONST. art. III, § 1.

92. *See, e.g.,* ST. GEORGE TUCKER, 4 BLACKSTONE’S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND OF THE COMMONWEALTH OF VIRGINIA 30 (1803), *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 181, 187 (Philip B. Kurland & Ralph Lerner eds., 1987) (“[T]here is now but one session of the supreme court in every year, for hearing and deciding causes therein depending, the session in August being merely preparatory.”).

At the outset, Samuel Chase, the Justice assigned to serve as the sole member of the rump Court,⁹³ dutifully came to Washington on the first Monday of August 1802. He met the Clerk of the Court, Elias B. Caldwell,⁹⁴ and, according to the minutes of the Supreme Court, opened Court as follows:

At a Session of the Supreme Court of the United States, begun and held at the City of Washington on Monday the 2d day of August in the year of our Lord 1802 agreeably to the Statute in such Case made and provided Samuel Chase one of the Associate Justices of the said Supreme Court and resident of the fourth Circuit was present and the Clerk of the said Supreme Court attending it is ordered by the said Judge that the following entries be made in the following actions to wit⁹⁵

The first rump Term, like all but one or two of its successors, was short and dull. Chase ordered, and Caldwell recorded, a few routine joinder orders and the continuation (that is, preservation for hearing at the next Term) of all of the cases on the Court's docket.⁹⁶ The very routineness with which the records of the first rump August Term are treated support its status as just another Term of the Supreme Court. The minutes for the Term are just like the minutes for any other Term of the Court. The opening paragraph quoted above follows the well-settled formula used by the Court for all sessions during the preceding years (other than the references to Chase and his residence), and the subsequent running head reads "August Term 1802."⁹⁷ The whole business appears in the Court's minute book between the minutes for December Term 1801 and the minutes for February Term 1803. In other words, the only major differences between August Term 1802 and the Terms that occurred immediately before and after it were the date, the attendees, and the scope of the work. Justice Chase and Clerk Caldwell treated it as a Term, and when the Court met en banc in 1803, it treated the orders of the August Term as valid exercises of the Court's authority, taking up cases in which Chase had issued orders in August without remark.⁹⁸

93. Act of Apr. 29, 1802 § 2.

94. 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: PART ONE 163–64 (Maeva Marcus & James R. Perry eds., 1985) [hereinafter DOCUMENTARY HISTORY: PART ONE].

95. [1790–1805 A] Minutes of the Supreme Court of the United States 127, *microformed on* Microcopy No. 215, Roll 1 (1790–1828) (Nat'l Archives Microfilm) [hereinafter Minutes Roll 1].

96. *See id.* at 127–28.

97. *Id.* at 128.

98. *See id.* at 128–36.

The Court's minutes record equally uneventful August Term sittings by Chase from 1803 through 1807.⁹⁹ The purely routine nature of the August Term's docket is reflected in the 1807 minutes, which begin with a formulaic session-opening paragraph similar to the one quoted above, and then, without even bothering with the usual list of cases continued, report that "[i]t is ordered by the said Judge (no counsel attending) that the causes on the Docket be continued."¹⁰⁰

The full Court and counsel appearing before it also occasionally dealt with issues relating to or arising from the August Term Court. In 1806 the full Court issued a new rule governing assignment of errors on appeal, specifying that "[i]n cases not put to issue at the August Term, it shall be the duty of the Plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court at the commencement of the Term."¹⁰¹ In *Blackwell v. Patten*, the full Court refused to quash a writ of error that was challenged on the ground that it had not been properly filed during the preceding August Term.¹⁰² In other cases the Court heard arguments addressing the August Term or issued orders contemplating service or other performance in conjunction with the August Term.¹⁰³ Again, no one ever intimated that there was anything

99. See *id.* at 136–37, 152, 167–68 (recording the 1803–1805 August Terms); [1806–1817 B] *id.* at 29, 61 (recording the 1806–1807 August Terms).

100. *Id.* at 61. Dockets for the early August Terms are hard to come by. Only one—the rough docket for the 1806 Term—appears to have survived, although there are references to August Terms scattered through February and January Term dockets covering the period treated here. See generally Rough Dockets of the United States Supreme Court (on file with National Archives and Records Administration, Washington, D.C., Record Group 267, Entry 5, Records of the Supreme Court of the United States, Rough Dockets, 1791 – Volume 1, 1803, 1806–8, 1810–27, Box 1); Rough Dockets of the United States Supreme Court (on file with National Archives and Records Administration, Washington, D.C., Record Group 267, Entry 8, Records of the Supreme Court of the United States, Rough Dockets, 1803, 1806–8, 1810–1904, 1914–23, Aug. Term 1806, Feb. Terms 1812, 1818, 1819, 1821, 1822, 1826, Jan. Term 1828, Box 1).

101. [1806–1817 B] Minutes of the Supreme Court of the United States 28, *microformed on* Minutes Roll 1, *supra* note 95 (recording the 1806 February Term).

102. 11 U.S. (7 Cranch) 277, 277–78 (1812).

103. See, e.g., *Ex parte Hennen*, 38 U.S. (13 Pet.) 225 (1839); *Rhode Island v. Massachusetts*, 38 U.S. (13 Pet.) 23, 23–24 (1839); *New Jersey v. New York*, 30 U.S. (5 Pet.) 284, 291 (1831) (Baldwin, J., concurring in part); see also *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 676 (1838) (argument of counsel).

improper or constitutionally questionable about the existence or operation of the rump Court.

Following the August 1807 Term, there is an unexplained gap in entries of minutes for the August Terms, after which the routine picks up with Gabriel Duvall (Chase's successor as Justice resident in the fourth circuit) presiding in 1812.¹⁰⁴ Duvall, perhaps impatient with the mundane routine of the August Term, appears to have neglected his duties.¹⁰⁵ For the 1820 rump sitting, the opening paragraph of the minutes has a blank space before the words "one of the associate Justices of the said Supreme Court and resident of the fourth Circuit in the state of Maryland was present."¹⁰⁶ The same gap appears in the minutes for the 1821 through 1835 August Terms.¹⁰⁷ After Duvall's retirement in 1835, newly-commissioned Chief Justice Roger Taney (another resident of the Fourth Circuit) assumed responsibility for the August Term.¹⁰⁸ By the time Taney took over, the August Term proceedings had become nothing more than clerical rubber-stamp sessions for continuing cases from one en banc term to the next.¹⁰⁹ At the same time, however, the

104. Throughout the existence of the rump August Term, the Fourth Circuit consisted of Maryland and Delaware. Chase was the circuit Justice from 1802 to 1811, Gabriel Duvall from 1811 to 1835, and Roger Taney from 1836 until long after the abolition of the August Term. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 335–36 tbl.4-12 (3d ed. 2003).

105. See CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–1864*, at 276 (1974).

106. [1817–1824 C] Minutes of the Supreme Court of the United States 132, *microformed on* Minutes Roll 1, *supra* note 95.

107. *Id.* at 223, 319, 421 (recording the 1821–1823 August Terms); [1824–1828 D] *id.* at 531, 627, 735, 889, 1041 (recording the 1824–1828 August Terms); [1829–1831 E] Minutes of the Supreme Court of the United States 1192, 1396, 1578, *microformed on* Microcopy No. 215, Roll 2 (1829–1837) (Nat'l Archives Microfilm) [hereinafter Minutes Roll 2] (recording the 1829–1831 August Terms); [1832–1834 F] *id.* at 1788, 1956 (recording the 1832–1833 August Terms); [1834–1837 G] *id.* 3103, 3255 (recording the 1834–1835 August Terms). On the other hand, William T. Carroll, the Clerk of the Court from 1827 to 1863, appears to have taken the August Term quite seriously during this period. For example, see the Rough Dockets for the 1828–1830 August Terms on file with National Archives and Records Administration, Washington D.C., Records Group 267, Entry 8, Box 1, *supra* note 100.

108. See EPSTEIN ET AL., *supra* note 104, at 336 tbl.4-12.

109. For example, see the report of *Niles' National Register* for August 4, 1838:

It is probably not known to most of our readers—for until yesterday it was not known to us—that there is a rule term of the supreme court held, according to law, at the court room in the capitol annually on the first Monday in August. At this court it is made the business of

August Terms—and the rules governing them—were widely recognized by scholars and practitioners as genuine elements of the Court's operations.¹¹⁰

Taney was to serve as rump Justice for only three August Terms, from 1836 to 1838.¹¹¹ But it was during his relatively brief tenure that the August Term proceedings—two in particular—most clearly demonstrated that the rump Court was a division of the Supreme Court. First, there was Taney's presentation of his own letters patent and evidence of oath-taking at the August 1836 Term. Second, there was his treatment of the case of *Ex parte Hennen* at the August 1838 Term, combined with his second opinion in that case, delivered at the sitting of the full Court in January 1839.

When Taney ordered that the minutes of the August 1836 Term include his presentation to the Court of his letters patent (his commission) and evidence that he had taken the constitutional and statutory oaths of office,¹¹² he was following a tradition that had begun on February 2, 1790, with the first member of the Court, Chief Justice John Jay.¹¹³ Before taking a seat on the Court, every Justice was expected to present his paper

the circuit judge for the fourth judicial district to attend. For many years past, the business of this court has been entirely *pro forma*, requiring neither argument by counsel, nor decision by the court; and the attendance of the judge has not always been deemed necessary.

The Suprmme [sic] Court, 54 NILES' NAT'L REG. 354 (1838); see also CARL BRENT SWISHER, ROGER B. TANEY 354 (1935) (reporting that Taney, who lived in Baltimore, traveled on the Fourth Circuit twice each year, and "[i]n addition he had to go to Washington each January for the regular term of the Supreme Court, and in August for a vestigial term at which he alone was required to be present").

110. See, e.g., ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 342–43 (Albany, Wm. & A. Gould & Co. 1831); THOMAS F. GORDON, A DIGEST OF THE LAWS OF THE UNITED STATES 150, 152 (Philadelphia, Thomas F. Gordon 1827); THOMAS SERGEANT, CONSTITUTIONAL LAW: BEING A VIEW OF THE PRACTICE AND JURISDICTION OF THE COURTS OF THE UNITED STATES AND OF CONSTITUTIONAL POINTS DECIDED 78, 83–84 (Philadelphia, P.H. Nicklin & T. Johnson 1830).

111. [1834–1837 G] Minutes of the Supreme Court of the United States 3421, 3539, *microformed on* Minutes Roll 2, *supra* note 107 (recording the 1836–1837 August Terms); [1838–1839 H] Minutes of the Supreme Court of the United States 3829, *microformed on* Microcopy No. 215, Roll 3 (1838–1848) (Nat'l Archives Microfilm) [hereinafter Minutes Roll 3] (recording the 1838 August Term).

112. [1834–1837 G] Minutes of the Supreme Court of the United States 3421–35, *microformed on* Minutes Roll 2, *supra* note 107.

113. See 1 DOCUMENTARY HISTORY: PART ONE, *supra* note 94, at 1–7.

qualifications to the Court. Every member of the Court had done so (or, in a few cases, was presumed to have done so),¹¹⁴ for more than forty years. It is difficult to believe that Taney, or the Clerk, could have viewed his presentation of his papers at the August Term as anything other than the traditional presentation of papers to the Court before taking a seat on it, an assumption that is only reinforced by Taney's failure to present his papers at the next sitting of the full Court in January 1837.¹¹⁵

Second, and even more telling, was Taney's treatment of Duncan Hennen's request for a mandamus to the federal district judge for the Eastern District of Louisiana, or an order to show cause.¹¹⁶ Hennen was seeking an order "requiring the said Judge to restore Duncan N. Hennen to the office of Clerk of said District Court."¹¹⁷ Taney doubted that the April Act empowered the August rump Court to issue either the mandamus or an order to show cause.¹¹⁸ Nevertheless, Taney took the extraordinary steps of hearing argument in the case at the August Term,¹¹⁹ and then issuing the requested order to show cause.¹²⁰ As he explained in an opinion for the full Court in the

114. See Davies, *supra* note 38 (manuscript at 17–22).

115. *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 228 (1839); [1834–1837 G] Minutes of the Supreme Court of the United States 3435–39, *microformed on* Minutes Roll 2, *supra* note 107.

116. *Ex parte Hennen* (Aug. 6, 1838) (Taney, C.J., unpublished August Term opinion), *reprinted infra* App.; [1838–1839 H] Minutes of the Supreme Court of the United States 3829–50, *microformed on* Minutes Roll 3, *supra* note 111 (recording the 1838 August Term).

117. *Ex parte Hennen*, *infra* App.

118. *Id.*

119. As reported by *Niles' National Register*:

We understand . . . that chief justice Taney, now judge of the fourth circuit will be on the bench on Monday [August 6] next, the term day; and that the highly interesting case of the removal from office, avowedly without cause, of the clerk of the circuit court for the District of Louisiana, will come before him, upon a motion to show cause why a writ of mandamus should not issue to that court to restore the old clerk to the discharge of the duties of his office.

The Suprmme [sic] Court, *supra* note 109, at 354; see also *Supreme Court of the U. States*, 54 NILES' NAT'L REG. 373 (1838) (reporting at length on the August 6 proceedings before Taney, which included extensive reading from the pleadings by Richard S. Coxe, counsel for Hennen).

120. *Ex parte Hennen*, *infra* App.; *Supreme Court of the U. States*, *supra* note 119, at 373 (reporting that "the court granted rules in both cases, returnable to the ensuing term of the supreme court, to be held in January next" and "transact[ed] some other [unspecified] business" before "the court adjourned to the next term").

same case at the next January Term, Taney had engaged in this maneuver because “the question was an important one, and might again occur; [and] I thought it proper that it should be settled by the judgment of the Court at its regular session, and not by a single judge.”¹²¹ He then went on to explain that, “I therefore laid the rule [to show cause], because it was the only mode in which I could bring the subject before the Court for decision.”¹²² There is only one reason why Taney would have seen issuing the order to show cause as the *only* way to bring the issue to the full Supreme Court: if he understood that the rump Court was also the Supreme Court. If the rump Court was an inferior court, Taney could have denied Hennen’s petition at the August Term and the en banc Court could have heard Hennen’s appeal from the denial at its following January Term.¹²³ But if the rump Court was a Supreme Court, then there could be no appeal from the denial, the Supreme Court being the court of last resort. Therefore, the only way to keep the case alive from the August Term to the January Term for consideration by the full Court was to deny the petition for a mandamus, issue the order to show cause, and make it returnable during the January Term, at which time the full Court would have the opportunity to consider it. Taney explained:

1. Whether the Supreme Court have the power to issue a writ of mandamus in such a case as that described in the petition. —
2. If the Supreme Court have the power is it also given to the Judge of

121. *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 229 (1839). Taney’s use of the word “judge” rather than “Justice” when describing the rump Court is of no moment. During his tenure the two terms were routinely bandied about as equivalents in arguments before the Court and in published opinions. Thus, for example, in his opinion for the Court in *United States v. Ferreira*, Taney refers both to the “Justices of the Supreme Court” and to the “judges of the Supreme Court.” 54 U.S. 43, 54–55, 13 How. 40, 50–51 (1852); *see also, e.g.*, *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 565–67 (1842) (argument of counsel); *id.* at 631 (Taney, C.J., concurring in part and dissenting in part); *Kendall v. United States*, 37 U.S. (12 Pet.) 524, 653 (1838) (Taney, C.J., dissenting). More telling is the contrast in *Ex parte Hennen* between the Court at “regular session”—that is, the collective body—and the Court sitting as a “single” judge—that is, the individual, rump body. *Ex parte Hennen*, 38 U.S. (13 Pet.) at 229. Taney clearly disapproved of this statutory construct, but just as clearly believed he was bound to operate within it, at least for the time being.

122. *Ex parte Hennen*, 38 U.S. (13 Pet.) at 229.

123. *See, e.g.*, *Decatur v. Paulding*, 39 U.S. (14 Pet.) 497, 513 (1840) (Taney, C.J.) (“This case is brought here by a writ of error, from the judgment of the Circuit Court of the United States for the District of Columbia, refusing to award a peremptory mandamus.”). The Court has continued to hear such appeals in modern times. *See, e.g.*, *Mallard v. U.S. Dist. Court*, 490 U.S. 296, 308–09 (1989).

the 4th Circuit, by the act of Congress of 1802. ch. 291. s.2. establishing the August term. —

....

... If the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term.¹²⁴

That is precisely what Taney did—issue an order when he was “strongly inclined to the opinion that [he] had no power to [issue], in any case, at the August Term”¹²⁵—because there was no appeal from the August Term, as it was the Supreme Court. Taney would only have approached *Ex parte Hennen* in this manner if he had been “strongly inclined to the opinion” that the August Term was a Term of the Supreme Court.¹²⁶

124. *Ex parte Hennen*, *infra* App.

125. *Ex parte Hennen*, 38 U.S. (13 Pet.) at 229.

126. A small but significant difference—the word “or” versus the word “as”—between the reported and original manuscript versions of Taney’s January 1839 opinion for the full Court in *Ex parte Hennen* suggests an additional and even more extraordinary possibility. His reported opinion begins as follows: “At the August term of the Supreme Court, held by the Chief Justice or Judge for the fourth circuit, according to the act of Congress of 1802 . . .” 38 U.S. (13 Pet.) at 228 (emphasis added). His manuscript opinion begins: “At the August Term of the Supreme Court, held by the Chief Justice as Judge for the 4th circuit, according to the act of Congress of 1802 . . .” *Ex parte Hennen*, (Jan. 26, 1839) (Taney, C.J., unpublished draft opinion) (on file with National Archives and Records Administration, Washington, D.C., Record Group 267, Entry 27, Opinions in Original Jurisdiction Cases, 1835, 1837–1839, Box 1) (emphasis added). The “or” in the reported opinion could be read in any number of ways, all consistent with Taney’s service as a Justice on the rump Court. But the “as” in the manuscript opinion lends itself to another interpretation as well—that Taney thought he was sitting as a circuit judge, an inferior Article III judge, on the Supreme Court, doing the Court’s business. Given the sloppiness of which Reporter of Decisions Richard Peters Jr. was accused by some Justices and other interested observers, this supposition may not be implausible. See SWISHER, *supra* note 105, at 298–306; G. EDWARD WHITE, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE MARSHALL COURT & CULTURAL CHANGE, 1815–35, at 407–12 (abr. ed. 1991); Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendance*, 83 MICH. L. REV. 1291, 1361–62 (1985). However, if this interpretation was accurate, it would support a range of options for Congress dramatically wider than proposed in this Article. Such options might include the designation of judges of inferior federal courts to serve on the Supreme Court, see Moss & Siskel, *supra* note 3, at 1042–47; Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff), or the creation of a non–Article III court capable of handling the business of the Supreme Court. I have, however, found no other evidence to support such possibilities, and it is also quite possible that either Taney or Peters, with whom Taney was on friendly terms, SWISHER, *supra* note 105, at 300–04, caught the implications of the manuscript’s use of “as” and intentionally changed it for the reported version.

The dust-up over *Ex parte Hennen* did generate at least a little bit of media coverage for the August Term, apparently the only public attention it ever enjoyed.¹²⁷ It is possible that Taney, a sophisticated politician as well as a sophisticated lawyer, deliberately made a mountain out of Hennen's molehill in order to raise congressional awareness of the useless relic (and waste of Taney's time for a few days every year) that the August Term had become.¹²⁸ If so, it worked. The August Term provision of the April Act was repealed without fanfare in February 1839, on unelaborated grounds of "efficiency" as part of an omnibus act dealing with a variety of judicial business.¹²⁹

Thus, the division of the Supreme Court into en banc and rump versions that was begun at the beginning of the nineteenth century persisted for most of the first half of that century, without objection on constitutional grounds.

III. THE CONTINUOUS COURT

It would seem that the conventional assumption that Congress cannot engage in any reorganization of the Supreme Court without authorization in the form of a constitutional amendment is, at least to a limited and hard-to-define extent, wrong. The extent to which this insight is relevant to modern questions about legislative authority to develop a more durable Supreme Court for the age of terror is another matter. Congress could pass on the opportunity (and avoid the responsibil-

127. See *The Suprme* [sic] *Court*, *supra* note 109, at 354; *Supreme Court of the U. States*, *supra* note 119, at 373. An 1829 Senate report on "the propriety and necessity of so amending the Judicial System of the United States, as to place all the States in a similar situation, and furnish to the citizens of each an equal opportunity of having due administration of justice" made no mention of the rump Court. S. REP. NO. 20-50, at 1-7 (1829).

128. See *supra* note 109 and accompanying text.

129. Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322 (repealing the Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, and thereby abolishing the August Term); JOHN FORSYTH, REPORT FROM THE SECRETARY OF STATE, IN COMPLIANCE WITH A RESOLUTION OF THE SENATE, SHOWING THE NUMBER OF SUITS ON THE TRIAL DOCKET OF EACH OF THE CIRCUIT COURTS OF THE UNITED STATES, AND THE NUMBER OF MILES TRAVEL OF EACH JUDGE OF THE SUPREME COURT OF THE UNITED STATES, S. DOC. NO. 25-50, at 32-33 (1839) (recording that Chief Justice Taney included mileage to Washington for the August Term); J. SEN. 25th Cong., 2d Sess. (Mar. 13, 1838), at 288 (noting the resolution submitted by Senator Clay seeking a report from the Secretary of State regarding the distances traveled by judges); see also ALFRED CONKLING, A TREATISE ON THE ORGANIZATION, JURISDICTION AND PRACTICE OF THE COURTS OF THE UNITED STATES 693 n.a (Albany, W.C. Little and Co. 3d ed. 1856) (noting that "[t]he August term has been abolished").

ity) to consider a more active role in assuring Supreme Court continuity, or it could explore potentially useful modern analogs to the antique rump Court.

Avoidance could take any one of several forms. There are plenty of rationales for ignoring or belittling this history now. First, it is possible that the whole business was unconstitutional, or at least it would be today. The Constitution evolves in the hands of our judges,¹³⁰ and if nothing else, it could be a denial of due process.¹³¹ Second, and relatedly, the rump Court came and went before constitutional substance and procedure began to merge in the Supreme Court.¹³² It may not be possible to have a purely procedural Supreme Court any more, or perhaps anything other than a full-fledged Court on the Morrison Waite model.¹³³ Third, the passage of more than 150 years

130. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1190–91 (2005) (discussing “evolving standards of decency”); *id.* at 1222 (Scalia, J., dissenting).

131. See U.S. CONST. amend. V, XIV.

132. See Cass R. Sunstein, *The Dred Scott Case, with Notes on Affirmative Action, the Right to Die & Same-Sex Marriage*, 1 GREEN BAG 2D 39, 40–41 (1997).

133. See *supra* note 4 and accompanying text. On the other hand, there are contexts in which members of the Court have continued to sit as something more than a single Justice on circuit and less than the full Court (or a quorum thereof). For example, when dealing with especially volatile political cases, Justices have occasionally compromised the independence of their supposedly atomistic decision making as circuit Justices. The most prominent example is the *Holtzman v. Schlesinger* litigation over the constitutionality of the bombing of Cambodia by the United States in the summer of 1973. After Justices William O. Douglas and Thurgood Marshall issued conflicting in-chambers decisions, Marshall enlisted the support of all seven other members of the Court in support of his position. *Holtzman v. Schlesinger*, 414 U.S. 1321, 1322 (1973) (Marshall, J., in chambers). That decided the matter and elicited from Douglas the only published dissent ever from an in-chambers opinion. See *id.* at 1322–26 (Douglas, J., dissenting). And when Justice Mahlon Pitney was confronted by a particularly difficult election dispute in the summer of 1912, he invited Justice Willis Van Devanter to join him, and the two heard oral argument and issued a joint in-chambers opinion denying relief. *Marks v. Davis*, 4 Rapp 1413, 1413–14 (1912) (Van Devanter & Pitney, JJ., in chambers); Ross E. Davies, *Faithless Electors of 1912*, 4 GREEN BAG 2D 179, 180–81, 186–87 figs.1, 2 & 3 (2001). Nevertheless, these quasi-Courts are at least technically not competitors with the “one supreme Court” because in-chambers opinions are generally subject to review by the full Court. See Stephen M. Shapiro & Miriam R. Nemetz, *An Introduction to In-Chambers Opinions*, 2 Rapp ix, xvii–xviii (2004). However, the practical (as opposed to precedential) difference between a decision by the full Court and an in-chambers opinion issued under the authority of a single circuit Justice with the support of the other Justices may be quite limited. See, e.g., *Holtzman*, 414 U.S. at 1322 (Marshall, J., in chambers) (“I have been in communication with the other Members of the Court and [all seven of them] agree with this action.”).

without a statutory sequel to the April Act's creation of the rump Court may be grounds for constitutional desuetude of the Guarantee Clause variety.¹³⁴ However, this view could also support an argument that a statute passed by a Congress bold enough to act at this late date would raise only political questions secure from judicial review.¹³⁵ Fourth, Congress could simply punt this one to the Supreme Court, which, in the absence of a self-discovered power of self-perpetuation, would amount to nothing. Where there is a will there is probably a way.

But assuming instead that Congress will not punt and the Supreme Court would not invalidate the rump Court,¹³⁶ exploration could take at least as many forms as avoidance. There are reasons for some optimism on this front, because a rump Court law would not stand alone: over the centuries Congress has created and the Supreme Court has accepted other compromises of "one supreme Court" literalism.¹³⁷ For example, the quorum requirement in Title 28 is really nothing more than a statutory license to the Justices to carry on their business with a rump, so long as it is of a certain size.¹³⁸ Much the same can be said of the statutory provision for a substitute drawn from the Court's membership when the Chief Justice is unable to serve.¹³⁹ And there is 28 U.S.C. § 2109,¹⁴⁰ which permits a Chief Justice confronted by a Court without a quorum to remand a case to a body that looks a bit like a semi-inferior rump court—a specially-formed, "final and conclusive" panel of appel-

134. U.S. CONST. art. IV, § 4; *see also, e.g.*, *United States v. Plunk*, 153 F.3d 1011, 1021 (9th Cir. 1998); Amar, *supra* note 40, at 237 n.110.

135. *Cf.* Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560–69 (1962) (arguing for limited judicial review of legislation enacted under on the Guarantee Clause power).

136. A rejection of the rump Court by a modern Court might satisfy certain Article III don't-tread-on-me sensibilities, but it could also devastate some of the Court's nineteenth century precedents. *See* Davies, *supra* note 38 (manuscript at 62–63).

137. It is possible that all departures from the operation of "one supreme Court" consisting of all of its members discussed below are unconstitutional, but if that is the case then there may well turn out to be sufficient support to generate and ratify a constitutional amendment dealing with quorums and recusals, and that would provide an opportunity to deal with continuity of the Court at the same time without statutory creativity of the sort proposed in this Article.

138. *See* 28 U.S.C. § 1 (2000).

139. *See id.* § 3.

140. *See id.* § 2109.

late court judges.¹⁴¹ Thus, the pedigree provided by the original rump Court statute is not the only source of validation for a modern version. Such a law would be surrounded by other statutes reflecting contemporary notions of the flexibility of the Constitution's "one supreme Court" language,¹⁴² and it would serve the policies outlined in the introduction to this Article.

And so the possibilities on the table for perpetuation of a decimated Supreme Court should be revisited and perhaps expanded with an eye to some key attributes of the April Act's rump Court, all of which point to the constitutionally charming nature of the relationship between the rump Court and the full Court. Most importantly, the two versions of the Supreme Court did not interfere with each other or meddle with the capacity or credibility of the Court as a whole to decide cases and controversies as the national court of last resort. Consider the following manifestations of that relationship:

(1) *Preserving involvement of active Justices in deciding cases.* The August rump Court conducted important, if boring and largely ministerial, Supreme Court functions, but the Justice sitting at that term had no power to decide a single case or controversy.¹⁴³ And with the exception of Roger Taney's preservation of *Ex parte Hennen* for review by the full Court,¹⁴⁴ the rump Court never posed as deciding any case or controversy. In other words, no Justice was ever stripped from the decision of a case. Existing statutory qualifications of the "one supreme Court" requirement also reflect the importance of this principle. Thus, the quorum requirement at 28 U.S.C. § 1 is, again, best read as a limited license—not a mandate—to the Court to operate as a rump. Similarly, the provisions of Title 28 governing judicial discipline (including the constitutionally questionable grant of power to panels of judges to limit or eliminate the abil-

141. See, e.g., *United States v. Aluminum Co. of Am.*, 322 U.S. 716 (1944), transferred to 148 F.2d 416, 421 (2d Cir. 1945); see also *United States v. Will*, 449 U.S. 200, 212 (1980) (describing 28 U.S.C. § 2109).

142. See *Burnham v. Superior Court of Cal.*, 495 U.S. 604, 621–23 (1990); Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 *FORDHAM L. REV.* 87, 95–124 (1997); Suzanna Sherry, *The Ghost of Liberalism Past*, 105 *HARV. L. REV.* 918, 923–28 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE* (1991)).

143. See Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, repealed by Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

144. See *Ex parte Hennen*, 38 U.S. (13 Pet.) 225, 228–29 (1839); *Ex parte Hennen* (Aug. 6, 1838) (Taney, C.J., unpublished August Term opinion), reprinted *infra* App.

ity of fellow judges to hear and decide cases) do not apply to members of the Supreme Court.¹⁴⁵ And while the recusal requirements detailed in 28 U.S.C. § 455 speak in compulsory terms,¹⁴⁶ each individual Justice has traditionally exercised perfectly unbridled and unreviewed discretion when it comes to the decision whether to recuse herself or himself in any case.¹⁴⁷

(2) *Preserving the functionally indivisible Court.* The rump Court never sat in competition with the conventional en banc Court. In other words, while there was more than one division of the Court, there was never more than one supreme tribunal in operation at any time. Similarly, the historical power of reviewability of in-chambers decisions reflects the subordination of Justices sitting as individuals and small groups to the collective sitting as the “one supreme Court.”¹⁴⁸

(3) *No Justice was compelled to participate in anything other than the conventional en banc Court.* Although the Congress that passed the April Act may (or may not) have targeted Justice Chase for rump Court duty, the statute itself was phrased in neutral terms. It specified that “the associate justice resident in the fourth circuit formed by this act” would sit at the August Term,¹⁴⁹ which meant that Chase could have moved out of Maryland, thereby relinquishing the rump Court, and any other member of the Court could have moved into Maryland or Delaware (the two states that made up the Fourth Circuit at the time), thereby taking up the rump mantle.¹⁵⁰

The bottom line: Congress fiddled with the Court’s structure to serve its own ends, but it did not interfere with the capacity of any Justice seated on the Court to participate in the

145. 28 U.S.C. § 372; see also David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1065–66 (2000) (discussing the political complexities behind judicial discipline and the problem of applying statutory discipline measures, other than impeachment, to the Supreme Court).

146. See *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 913–17 (2004) (Scalia, J., in chambers).

147. See Letter from Chief Justice William H. Rehnquist to Senator Patrick Leahy (Jan. 26, 2004), in 7 GREEN BAG 2D 280, 280 (2004); see also *Laird v. Tatum*, 409 U.S. 824, 836–39 (1972) (Rehnquist, J., in chambers); *Jewel Ridge Coal Corp. v. Local No. 6167, United Mine Workers of Am.*, 325 U.S. 897, 898 (1945) (Frankfurter, J., concurring in denial of rehearing).

148. See *supra* note 133 (discussing the status and function of Justices sitting in chambers).

149. See Act of Apr. 29, 1802, ch. 31, § 2, 2 Stat. 156, 156, *repealed by* Act of Feb. 28, 1839, ch. 36, § 7, 5 Stat. 321, 322.

150. An admittedly laughable image.

decision of any case or controversy. Separation of powers and the independence of the “one supreme Court” were preserved. Perhaps this was enough—consciously or otherwise—to ensure a certain level of comfort in all three branches of the federal government with a divided “one supreme Court” for more than thirty-five years.

Exploring the possibilities for congressional action in light of the rump Court experience could suggest new approaches. Bearing in mind that any proposal for Supreme Court continuity in the event of decimation or destruction of the normal body will appear odd, even Rube Goldbergesque, consider the following examples, and the likelihood that they are constitutional.

A. RECUSED JUSTICES IN RESERVE

Consider a Conditional Permanent Recusal and Recall of Justices Act (CPR Act). Under the CPR Act, members of the Supreme Court would be entitled to permanently recuse themselves from all Court business (with the condition described below), thereby: (a) taking on all the attributes and benefits of a retired Justice, while keeping all of the perks of being an active Justice, except for the opportunity to participate in the regular decision making processes of the Court; and (b) opening a seat for the President and Congress to fill with a new active Justice; while (c) remaining a member of the Court and therefore constitutionally available to serve on the Court. The one condition under which this permanent recusal could be temporarily suspended would be a failure of the Court to reach a quorum. In that event, a recused Justice would enjoy the power to temporarily void his or her permanent recusal and return to active duty on the Court, but only: (a) for so long as the Court is unable to reach a quorum via either the recovery of incapacitated Justices or the filling of vacant seats through the standard nomination, advise-and-consent, and appointment process; and (b) if he or she can satisfy the judicial council for the circuit in which he or she resides of her physical and mental ability to do the job.¹⁵¹

The CPR Act would not guarantee continuity of the Supreme Court in the event of disaster, but it would probably reduce the odds of total disruption, and at relatively little cost. The certainty of the Act’s effectiveness would depend entirely on the willingness of sitting members of the Court to perma-

151. See 28 U.S.C. §§ 332, 372, 377(d) (2000).

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nently recuse themselves while still competent to serve, and would increase with the number of willing Justices. The Act would require very little in the way of revision of the United States Code. The proposed amendments to Title 28 of the Code are underlined:

§ 1. Number of justices; quorum – The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum, plus so many conditionally permanently recused justices as are competent to serve on the Court and who may serve only for the duration of a failure of the Chief Justice and the associate justices to achieve a quorum.

§ 4. Precedence of associate justices and of conditionally permanently recused justices – Associate justices shall have precedence according to the seniority of their commissions. Justices whose commissions bear the same date shall have precedence according to seniority in age. Conditionally permanently recused justices (as defined in section 455(g) of this title) shall have precedence according to the seniority of their commissions. Conditionally permanently recused justices whose commissions bear the same date shall have precedence according to seniority in age.

§ 5. Salaries of justices – The Chief Justice and each associate justice and conditionally permanently recused justice shall each receive a salary at annual rates determined under section 225 of the Federal Salary Act of 1967 (2 U.S.C. 351–361), as adjusted by section 461 of this title.

§ 42. Allotment of Supreme Court justices to circuits – The Chief Justice of the United States and the associate justices of the Supreme Court shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court. The Chief Justice may make such allotments in vacation. When on active service, a conditionally permanently recused justice shall be allotted as circuit justice to the circuit or circuits to which the previous occupant of his or her seat was allotted. A justice may be assigned to more than one circuit, and two or more justices may be assigned to the same circuit.

§ 455. Disqualification of justice, judge, or magistrate . . . (g) Any Chief Justice or associate justice of the Supreme Court may at any time elect to conditionally permanently recuse himself or herself from all current and future business of the Supreme Court, except that any such “conditionally permanently recused justice” may temporarily void his or her conditional permanent recusal and return to active duty on the Court, but only: (1) for so long as the Court is unable to muster a quorum through either the recovery of incapacitated active members of the Court or the filling of vacant seats by the President with the advice and consent of the Senate; and (2) after a certificate signed by a majority of the members of the Judicial Council for the circuit in which he or she resides attesting that he or she suffers from no mental or physical disability rendering him or her unable to discharge efficiently all the duties of the office is presented to the President and the President finds that he or she is able to serve.

The CPR Act would conform to the three characteristics of the rump Court listed above:

(1) *Preserving involvement of active Justices in deciding cases.* Retirement and recusal would remain in the control of each individual Justice. They would be free to stay or go on the established terms, and they would have the new recall-and-return option.

(2) *Preserving the functionally indivisible Court.* Only one Court, the current one, would sit. The rump would truly be a retiring body—doing nothing except in times of crisis, and then as part of the regular Court. And the CPR Act would achieve this end without the problems of vote dilution and appearances of political manipulation that accompanied President Franklin Roosevelt's proposal to enlarge the Court.¹⁵²

(3) *No Justice was compelled to participate in anything other than the conventional en banc Court.* Again, retirement, recusal, and recall are all within the control of the Justice, subject only to their certifiable ability to serve.

There is at least one reason to be pessimistic about this idea. Justices have been known to develop an *apres moi, le deluge* view of the Court. They find it difficult to imagine justice prevailing in their absence, thereby making it their duty to remain on the Court as long as physically possible. Justices Harry Blackmun and William O. Douglas come to mind.¹⁵³ How pervasive this supreme solipsism may be is impossible to determine, no other Justice having been anywhere near as forthright on the subject (at least in public) as Blackmun was in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.¹⁵⁴ There may be some unknown proportion of Justices who, when considering whether to retire sooner or later, will give no weight to the prospect of preserving the Court in the event of

152. See generally SENATE COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711 (1937).

153. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 922–23, 943 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); see also, e.g., BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 481–95 (2003); JAMES F. SIMON, *INDEPENDENT JOURNEY: THE LIFE OF WILLIAM O. DOUGLAS* 447–54 (1980); Garry Wills, Editorial, *And Another Douglas, William O., Ought Now to Resign*, ST. PAUL PIONEER PRESS, Apr. 9, 1975, at 6.

154. See *Casey*, 505 U.S. at 922–23, 94 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part); Garrow, *supra* note 145. In fairness to Justice Blackmun, it should be noted that he retired before he lost his edge, despite the concerns he expressed in *Casey*. See LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 237–51 (2005).

terrorist attack or other calamity. On the other hand, there are plenty of Justices who have retired while still quite sharp. The impending retirement of an evidently capable and energetic Sandra Day O'Connor at the relatively early age of 75 is only the most recent example. Others include Justices Byron White, Tom Clark, and Arthur Goldberg, as well as Charles Evans Hughes, both as Justice and as Chief Justice.¹⁵⁵ And it may be that the opportunity to frustrate a terrorist attack on the Supreme Court would foster a greater willingness among sitting Justices to consider retiring sooner rather than later.

Securing a more reliably available and sufficiently deep bench of conditionally permanently recused Justices along the lines of the CPR Act is probably beyond Congress's power without a constitutional amendment, but there are additional steps Congress could take. It could seek an agreement with the President to nominate, confirm, and appoint individuals who promise to conditionally permanently recuse themselves as soon as they take office as Justices.¹⁵⁶ Under such an agreement and the CPR Act, the President and Senate could take advantage of the next opening on the Court to install at least six conditionally permanently recused Justices (enough to make a quorum if needed) before filling the open seat with a Justice who would remain active. Such a precommitment strategy might land some of the participants in jail for bribery,¹⁵⁷ although a Congress interested in entering deals of this sort could simply amend § 210 of the federal criminal code to permit them. Even so, I, like Professor Saul Levmore, "have little doubt but that other federal courts would find such promises unenforceable," on grounds of judicial independence or political nonjusticiability.¹⁵⁸ Therefore, any freshly appointed Justice who decided to renege on his or her part of such a deal would probably be beyond the reach of a frustrated President and Senate, unless the House of Representatives was willing to impeach a Justice under § 210 of the criminal code in order to enforce a criminal deal with the President and Senate.

155. EPSTEIN ET AL., *supra* note 104, at 394–400 tbl.5-17.

156. These Justices would not have to sit on their hands for decades. They could work in the federal appellate courts. 28 U.S.C. §§ 42, 43. Congress could also amend 28 U.S.C. § 294 to apply to recused as well as retired Justices.

157. See 18 U.S.C. § 210 (criminalizing "[o]ffer[s] . . . to procure appointive public office").

158. Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 584 (1996).

B. QUALIFIEDLY QUALIFIED BACK-UP JUSTICES

Or consider a Qualifications for Justices Act (Qualifications Act). Under the Qualifications Act, the President would have the authority to nominate and, by and with the advice and consent of the Senate, appoint back-up Justices to the Supreme Court. Those back-ups would be subject to an extra qualification: that some or all of them would take office only in the event that a catastrophic event killed enough Justices to deprive the Court of a quorum. Once that qualification was satisfied for a back-up Justice, he or she would enjoy the same right to hold the office during good behavior.¹⁵⁹

The President has the authority to nominate and the Senate to confirm Justices to the Supreme Court in anticipation of a vacancy. Historically, this has occurred when a Justice notifies the President that he or she intends to retire on a date certain, or upon the confirmation of a successor.¹⁶⁰ Under the Qualifications Act, the President's authority in this area would be statutorily acknowledged to extend to anticipation of a perhaps remote, but certainly grave and not impossible eventuality—the killing of enough Justices to deprive the Court of a quorum. Congress has the power to add to the qualifications for offices specified in the Constitution, including Article III judges.¹⁶¹ Historically Congress has not been extravagant in its use of this power, normally limiting it to oath and bond requirements,¹⁶² but it has used it on occasion to specify more narrowly *ex ante* qualifications for office on the basis of, for example, age and political party affiliation.¹⁶³ Similarly, Congress

159. Keeping back-up Justices usefully occupied would in all likelihood be a nonissue. Most or all of them would probably be federal appellate judges. With the confirmation of Chief Justice John Roberts, eight of the current Justices came to the Court directly from the federal courts of appeals, and it has been almost a quarter-century since the last appointment of a Justice (Sandra Day O'Connor) with a different pedigree. EPSTEIN ET AL., *supra* note 104, at 341–42 tbl.4-12; Oyez.com, U.S. Supreme Court Justices, <http://www.oyez.org/oyez/portlet/justices/> (last visited Nov. 30, 2005).

160. *See, e.g.*, Nominations for Prospective Vacancies on the Supreme Court, 10 Op. Off. Legal Counsel 108, 108–11 (1986).

161. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415–17 (1819).

162. *See, e.g., id.* (mentioning approvingly the statutory oath required by the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, § 8, 1 Stat. 73, 76 (codified at 28 U.S.C. § 453)); *United States v. Le Baron*, 60 U.S. (19 How.) 73, 78 (1856) (discussing bond requirements).

163. 28 U.S.C. § 251(a)–(b). The current version of § 251 contains qualifications only with respect to political party affiliations; the age requirements of § 251 were removed in 1996. Federal Courts Improvement Act of 1996, Pub. L.

has legislated *ex post* qualifications (or, rather, disqualifications) of Article III judges, based on, for example, disability or conflict of interest.¹⁶⁴ Thus, while the combination of anticipatory nominations and preliminary qualifications proposed in the Qualifications Act is unorthodox, it is not unprecedented.

The Qualifications Act would require even less than the CPR Act in the way of revision of the United States Code. The Qualifications Act could be inserted in a single new section:

§ 7. Back-up justices; quorum – The President shall nominate and appoint, by and with the advice and consent of the Senate, a panel of no more and no less than nine Justices in excess of the number specified in section 1 of this title. Such back-up Justices shall take office only upon fulfilling the qualifications for office specified in Article VI of the Constitution, plus the additional qualification that their presence on the Court be necessary to overcome a failure of the quorum specified in section 1 of this title due to the death of sitting Justices, and with the condition that the oaths of office specified in the Constitution and in section 453 of this title shall not be taken until that additional qualification has arisen. Back-up Justices shall join the Court only in numbers necessary to restore the Court's quorum, and they shall join the Court in seniority order on the basis of birth.

Like the CPR Act, the Qualifications Act comports nicely with the rump Court's limited intrusions on the constitutional "one supreme Court":

(1) *Preserving involvement of active Justices in deciding cases.* Nothing about the normal operation of the Court would change, and no one qualified to sit would be prevented from sitting. And in the event that a back-up Justice qualified for office-holding on the Court, he or she would be a full member of the court with the privilege of serving during good behavior just like any other member of the Court.

(2) *Preserving the functionally indivisible Court.* Only one Court, the current one, would sit. The rump would be a rump Court only in the sense that there would be individuals with all the qualifications to serve save one: a seat to be filled under a certain condition, but when filled, filled on the same terms as those applicable to any other Justice.

(3) *No Justice was compelled to participate in anything other than the conventional en banc Court.* Again, membership would be the same; only the qualification would be different.

As with the CPR Act, so with the Qualifications Act, there are grounds for pessimism about this idea. There is, of course,

No. 104-317, § 501(b)(1), 110 Stat. 3847, 3856.

164. 28 U.S.C. §§ 3, 455.

the very strong likelihood that the back-up panel of Justices would become just one more game piece to be manipulated by presidents and the senators. But if that is a valid objection to judicial reform, then the Founders should have thrown in their cards back in 1787, or 1789, or 1802 at the latest. The prospect of politicking is no excuse for inaction, at least when the playing field is government in a democracy.¹⁶⁵ Then there is the possibility that presidents will feel some pressure to nominate back-up Justices for seats on the Court that open up in the regular course of affairs as a means of underlining the fitness for office of the back-up Justices in general should they ever be called into service.¹⁶⁶ Something of this sort of nominating pattern (albeit surely for different reasons) already exists to some extent with respect to the United States Court of Appeals for the District of Columbia Circuit, four alumni of which are currently serving on the Supreme Court.¹⁶⁷ But the fact that not all D.C. Circuit judges make it to the Supreme Court does not appear to have tarnished the lower court. Conversely, the judges of the United States Court of Appeals for the Fourth Circuit do not seem to be suffering any loss of standing due to the failure of any of their number to join the Court in recent decades. No doubt this is due in part to the fact that there are more good judges than there are seats on the Supreme Court, and to the many reminders that a failure to reach that high office is not necessarily a mark of inferior judicial merit. Witness Henry Friendly, Learned Hand, James Kent, Lemuel Shaw, George Wythe, and their ilk. Besides, a back-up panel of people who would make good Supreme Court Justices is the whole idea, so occasionally drawing from that source would make sense.

More troubling is the problem of perceived court-packing that could accompany a sudden and dramatic change in the make-up of the Court occurring all at once and under one President.¹⁶⁸ Compelling the President to select and the Senate

165. See *supra* Part II.A.

166. See Moss & Siskel, *supra* note 3, at 1044. A fresh round of nomination, advice (or should advice come before nomination?), consent, appointment, and commissioning would be necessary, there being no other way to remove the impediment of the additional qualification in § 7.

167. Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Ruth Bader Ginsburg were all judges on the D.C. Circuit before their appointments to the Supreme Court. EPSTEIN ET AL., *supra* note 104, at 326–30 tbl.4-9.

168. See Moss & Siskel, *supra* note 3, at 1037–38; Continuity of Gov't

to review the nine choices up front and in a single panel before the onset of a crisis should reduce the risk that perceptions of court-packing could undermine the authority of a wholly or largely new Supreme Court. Further, it is possible that the give-and-take of establishing the panel would result in a body that reasonable people will be able to view as balanced, especially if the panel's confirmation proceedings demonstrate that to be the case. If this is too much to hope for, the Qualifications Act could include a political diversity requirement—in the same terms as those already in place for the Article III Court of International Trade¹⁶⁹—as shown in the underlined addition below, with the novel but necessary corollary supplement further highlighted in italics:

§ 7. Back-up justices; quorum – The President shall nominate and appoint, by and with the advice and consent of the Senate, a panel of no more and no less than nine Justices in excess of the number specified in section 1 of this title, not more than five of whom shall be from the same political party. Such back-up Justices shall take office only upon fulfilling the qualifications for office specified in Article VI of the Constitution, plus the additional qualification that their presence on the Court be necessary to overcome a failure of the quorum specified in section 1 of this title due to the death of sitting Justices, and with the condition that the oaths of office specified in the Constitution and in section 453 of this title shall not be taken until that additional qualification has arisen. Back-up Justices shall join the Court only in numbers necessary to restore the Court's quorum, and they shall join the Court in seniority order on the basis of birth, subject to the overriding requirement that no back-up Justice may follow immediately after a member of his or her political party.

The dubious constitutionality of the political diversity requirement has never been tested, making it an uncertain, if not weak, reed on which to hang the composition of the back-up Justice panel.¹⁷⁰ Congress could address this concern by adopting a less concrete but perhaps equally effective standard—

Comm'n, *supra* note 2 (statement of James C. Duff).

169. 28 U.S.C. § 251(a) (“The President shall appoint, by and with the advice and consent of the Senate, nine judges Not more than five of such judges shall be from the same political party.”); *see also Star-Belly Judges*, 5 GREEN BAG 2D 240, 240 (2002).

170. *See* Adam J. Rappaport, *The Court of International Trade's Political Party Diversity Requirement: Unconstitutional Under Any Separation of Powers Theory*, 68 U. CHI. L. REV. 1429, 1429 n.3 (2001) (citing Jamin B. Raskin, “A Complicated and Indirect Encroachment”: *Is the Federal Election Commission Unconstitutionally Composed?*, 52 ADMIN. L. REV. 609, 623–29 (2000)). Indeed, the Court of International Trade's political party diversity requirements may violate the Appointments Clause of Article III. For a discussion on this topic, *see generally id.*

couched in terms of “critical mass” or “balance” or the like—that might well have a better chance of passing constitutional muster.¹⁷¹

A formal diversity requirement might be thought to “over politicize[] the Court appointment process, even more so than it currently is,” thereby “diminish[ing] the respect for the Court.”¹⁷² Granted, a specific political diversity requirement is more heavy-handed than the conventional mechanisms for achieving political diversity, and this approach may not be appropriate for broad application to judicial selection. In this context, however, it is a matter of unusual form following extraordinary function in the pursuit of a constructive and credible response to a potential political crisis.¹⁷³ More importantly, it is the political impartiality and adjudicative quality of Justices’ service while on the Court—not an absence of politicking preceding that service—that commands respect and preserves the “noble notion that there is no party affiliation of the Justices of the Court.”¹⁷⁴ Supreme Court appointments have been so publicly and vigorously political since the early years of the Union that a causal relationship between a politicized appointments process and ruination of the Court’s reputation would have precluded the development of a respectable Court in the first place. Indeed, President George Washington, our greatest national unifier and the only person elected to the office by a unanimous Electoral College, made thirteen nominations to the Supreme Court—all Federalist partisans¹⁷⁵—and his successor John Adams added four more Federalist nominations.¹⁷⁶ The next four

171. Compare, e.g., *Gratz v. Bollinger*, 539 U.S. 244, 271–72, 275 (2003) (upholding a race-based admissions policy that sought to enroll a “critical mass” of underrepresented minorities through an individualized assessment of diversity), with *Grutter v. Bollinger*, 539 U.S. 306, 315–16, 335–36 (2003) (holding unconstitutional a race-based admissions policy that automatically assigned points based on race, thus making race a decisive factor and resembling a quota system).

172. Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff).

173. See CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 186–89 (2003); G. Edward White, *Justices & “Electoral College” Elections*, 7 GREEN BAG 2D 387, 391–92 (2004) (reviewing WILLIAM H. REHNQUIST, CENTENNIAL CRISIS: THE DISPUTED ELECTION OF 1876 (2004)).

174. Continuity of Gov’t Comm’n, *supra* note 2 (statement of James C. Duff); see also White, *supra* note 173, at 391–96.

175. See 1 DOCUMENTARY HISTORY: PART ONE, *supra* note 94, at 1–123; 1 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: PART TWO 601–854 (Maeva Marcus & James R. Perry eds., 1985).

176. See 1 DOCUMENTARY HISTORY: PART ONE, *supra* note 94, at 124–55.

Presidents (Thomas Jefferson, James Madison, James Monroe, and John Quincy Adams) placed seven men on the Court, all fellow Republicans. More recently, the 41st President nominated only Republicans, and his successor nominated only Democrats. And every intervening President behaved pretty much the same way.¹⁷⁷ The Justices' transition-game involvement in appointments reflects the same sensibility. As the late Chief Justice Rehnquist quite reasonably acknowledged on national television, "traditionally Republican appointees have tended to retire during Republican administrations. . . . And Democratic appointees during [Democratic administrations]."¹⁷⁸ In other words, sitting Justices tend to select Presidents to receive retirement letters on the basis of political affiliation,¹⁷⁹ a rational and respectable reciprocal to Presidents who tend to select Justices to receive commissions on the basis of political affiliation. In fact, insistence on an apolitical appointments process for back-up Justices would be implausibly inconsistent with the noble tradition of elected officials seeking to represent the interests of their constituents in the selection of powerful federal officials.¹⁸⁰ Finally, even if the modern Supreme Court appointments process has reached an apogee of politicization that makes historical comparisons inapt—an environment in which the major political parties engage in no-holds-barred campaigns

177. See EPSTEIN ET AL., *supra* note 104, at 343–51 tbl.4-13 (listing all Supreme Court Justices and their respective political parties at time of appointment).

178. Tony Mauro, *Rumor Mill Starts Anew in Wake of Rehnquist's Hints About Retirement*, N.J.L.J., Apr. 9, 2001, at 9, 9 (alteration in original) (quoting Chief Justice William H. Rehnquist on *The Charlie Rose Show* (PBS television broadcast Feb. 16, 2001)).

179. Sometimes a Justice's desire to serve as long as possible trumps the inclination to return a seat to a politically compatible President, *see supra* notes 153–54 and accompanying text, but that has not distracted either the Justice or knowledgeable observers from the traditional importance of politics in making appointments. *See, e.g.*, MURPHY, *supra* note 153, at 493; Emerson H. Tiller & Frank B. Cross, *A Modest Proposal for Improving American Justice*, 99 COLUM. L. REV. 215, 220–21 (1999) (commenting that the same traditions exist at all levels of the federal judiciary). This should not cause any lost sleep. Retirement is a personal and political act, not a judicial one, as illustrated most famously in the case of Justice Charles Evans Hughes, who retired from the Court in order to run for President against Woodrow Wilson. Hughes lost the campaign and later returned to the Court when President Herbert Hoover appointed him Chief Justice, all without damaging his reputation as a great member of the Court. EPSTEIN ET AL., *supra* note 104, at 340 tbl.4-12, 364 tbl.4-17.

180. *See* Akhil Reed Amar, *Games over Center Court*, WASH. POST, July 5, 2005, at A13.

to place their respective favored ideologues on the Court and politically assassinate those of the opposing party—that is hardly grounds for hand-wringing about the politicizing effect of a formal diversity requirement. If the politics of appointments really have reached an unprecedentedly violent and rancorous extreme, then a constraint such as the diversity requirement seems likely to make things better rather than worse.

The questionable durability of a back-up Justice's appointment is troubling as well. Like the Court of International Trade's political diversity requirement, the understanding that "the President's constitutional power to nominate Justices for anticipated vacancies is limited only by his term of office,"¹⁸¹ is untested. It is, however, a sensible inference, given that a contrary interpretation would permit a sitting President to "encroach upon the appointment power of his successor."¹⁸² Unfortunately, the federal government is most vulnerable to a head-shot during a transition between administrations, whether that transition is part of our regularly scheduled democratic programming or not.¹⁸³ This is the very time when the commissions of not-completely-qualified back-up Justices would be destroyed, or at least cast into serious constitutional doubt, by the departure of their appointing President. Assuming the validity of this view, the Qualifications Act could also be expanded to include a presidential transition sunset clause and ratification option, as underlined below:

§ 7. Back-up justices; quorum – The President shall nominate and appoint, by and with the advice and consent of the Senate, a panel of no more and no less than nine Justices in excess of the number specified in section 1 of this title, not more than five of whom shall be from the same political party. Such back-up Justices shall take office only upon fulfilling the qualifications for office specified in Article VI of the Constitution, plus the additional qualification that their presence on the Court be necessary to overcome a failure of the quorum specified in section 1 of this title due to the death of sitting Justices, and with the condition that the oaths of office specified in the Constitution and in section 453 of this title shall not be taken until that additional qualification has arisen. Back-up Justices shall join the Court only in numbers necessary to restore the Court's quorum, and they shall join

181. Nominations for Prospective Vacancies on the Supreme Court, 10 Op. Off. Legal Counsel 108, 111 (1986).

182. *Id.*

183. See John Fortier, *President Michael Armacost? The Continuity of Government After September 11*, BROOKINGS REV., Fall 2003, at 33, 34; Ornstein, *supra* note 13, at 15.

the Court in seniority order on the basis of birth, subject to the overriding requirement that no back-up Justice may follow immediately after a member of his or her political party. The commissions of Justices who fail to qualify for a seat on the Court before the President who appointed them leaves office shall terminate thirty days after that date, unless that President's successor ratifies their commissions within that period of time.

Finally, the mechanical, age-based pre-sequencing of the ascension of back-up Justices to the Court under the Qualifications Act could result in something other than the pareto-optimal replacement of particular dead Justices, at least from the perspective of the relevant authorities—the President and the Senate. Whether one views the Supreme Court as a “team”¹⁸⁴ (the internal dynamics of which must be carefully anticipated and accounted for in the filling of every seat) or as a market of “nine little law firms”¹⁸⁵ (the competition among which must be dealt with just as carefully)¹⁸⁶ the anticipatory selection and fixed sequencing under the Qualifications Act of nine Justices to fill whatever seats might open up amounts to a partial loss of the power to manipulate the Supreme Court team-or-market that Presidents and Senates have traditionally exercised. A Congress seeking to balance its interest in preserving this feature of the Supreme Court appointments process with considerations of speed and certainty in the restoration of a quorum of the Court in a time of crisis could look to a process frequently used in the selection of arbitrators: the “alternate strike” method.¹⁸⁷ This straightforward and easy-to-administer process is recommended by the Federal Mediation and Conciliation Service for arbitrator selection,¹⁸⁸ and has a long and

184. See, e.g., Akhil Reed Amar, *Hugo Black and the Hall of Fame*, 53 ALA. L. REV. 1221, 1241 (2002); Thomas E. Baker, *Why We Call the Supreme Court “Supreme”: A Case Study on the Importance of Settling National Law*, 4 GREEN BAG 2D 129, 131 (2001); Richard A. Posner, *A Tribute to Justice William A. Brennan, Jr.*, 104 HARV. L. REV. 13, 14 (1990).

185. BERNARD SCHWARTZ, *DECISION: HOW THE SUPREME COURT DECIDES CASES* 6 (1996); see also Felix Frankfurter, *Chief Justices I Have Known*, 39 VA. L. REV. 883, 901 (1953); Sally J. Kenney, *Puppeteers or Agents?*, 25 LAW & SOC. INQUIRY 185, 220 (2000).

186. See Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353 *passim* (2005) (discussing the difficulty of selecting federal judges).

187. See, e.g., *Murray v. United Food & Commercial Workers Int'l, Local 400*, 289 F.3d 297, 302–04 (4th Cir. 2002).

188. 29 C.F.R. § 1404.12 (2005); ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 171–75 (Alan Miles Ruben ed., 6th ed. 2003) (discussing arbitrator selection and, *inter alia*, the use of the alternate strike method by the Federal Mediation and Conciliation Service and the American Arbitration Association); see also *Pirelli Cable Corp.*, Case No. 20-CA-30624-1, at 7 (FLRB Apr.

distinguished history in jury selection as well.¹⁸⁹ The parties simply take turns eliminating one individual at a time from a panel of arbitrators, going back and forth until there is one left. That last person standing becomes the arbitrator who will decide their case¹⁹⁰—an individual who may not be either party's first choice but is certainly far from being either party's worst choice. The President and the Senate could use the alternate strike method to select from the available back-up Justices a mutually least objectionable replacement for any particular departed member of the Court. The Qualifications Act could be expanded to incorporate this approach, as underlined below:

§ 7. Back-up justices; quorum – The President shall nominate and appoint, by and with the advice and consent of the Senate, a panel of no more and no less than nine Justices in excess of the number specified in section 1 of this title, not more than five of whom shall be from the same political party. Such back-up Justices shall take office only upon fulfilling the qualifications for office specified in Article VI of the Constitution, plus the additional qualification that their presence on the Court be necessary to overcome a failure of the quorum specified in section 1 of this title due to the death of sitting Justices, and with the condition that the oaths of office specified in the Constitution and in section 453 of this title shall not be taken until that additional qualification has arisen. Back-up Justices shall join the Court only in numbers necessary to restore the Court's quorum, and they shall join the Court one-by-one, based on the use of the alternate strike method by the President and Senate as many times as necessary to restore a quorum of the Court (on the first selection, the first strike shall be made by the President, and that privilege will alternate between the President and the Senate for all future selections), but if the President and Senate for any reason fail to restore a quorum using this method within one week from the date on which the quorum failure occurs, then back-up Justices will automatically join the Court in seniority order on the basis of birth, subject to the overriding requirement that no back-up Justice may follow immediately after a member of his or her political party. The commissions of Justices who fail to qualify for a seat on the Court before the President who appointed them leaves office shall terminate thirty days after that date, unless

21, 2003), [http://www.nlr.gov/nlr/shared_files/decisions/ALJ/JD\(SF\)-26-03.pdf](http://www.nlr.gov/nlr/shared_files/decisions/ALJ/JD(SF)-26-03.pdf); Ann C. Hodges, *Mediation and the Americans with Disabilities Act*, 30 GA. L. REV. 431, 492 (1996) (discussing mediator selection).

189. Some commentators have suggested using a method similar to the "stuck jury" for selecting trial judges. See Geoffrey P. Miller, *Bad Judges*, 83 TEX. L. REV. 431, 482–87 (2004) (advocating use of a "panel-exclusion" method to select trial judges). For more information about "struck" juries see generally James Oldham, *The History of the Special (Struck) Jury in the United States and Its Relation to Voir Dire Practices, the Reasonable Cross-Section Requirement, and Peremptory Challenges*, 6 WM. & MARY BILL RTS. J. 623 (1998).

190. 29 C.F.R. § 1404.12.

that President's successor ratifies their commissions within that period of time.

Other proposals addressing the issue of Supreme Court continuity abound, from the creation of an intermediate court of appeals to operate only in times of national crisis,¹⁹¹ to a modified appointment process,¹⁹² to a judicial line of succession comparable to the one already in place for the President.¹⁹³ It may be that Congress is not acting on any of these ideas, or considering any others, because it has more important, or at least more interesting or pressing, business to attend to. But the current state of discourse among scholars and policy experts suggests that Congress believes that it is excused by the Constitution from bearing any responsibility for addressing this issue. That is wrong, because Congress does have the power to take at least some small if untested and difficult-to-define steps, as the history of the rump Court of 1802 shows.¹⁹⁴

CONCLUSION

The Supreme Court is a monolithic entity, normally consisting of nine members filling nine seats—"nine over nine." Congress has the power to change the denominator of that fraction by legislating a smaller or larger number of seats, so long as that legislation does not purport to dislodge a sitting member of the Court. Congress has the power to reduce the numerator of that fraction by impeaching a member of the Court in the House of Representatives and then convicting him or her in the

191. See, e.g., Moss & Siskel, *supra* note 3, at 1042–47; Ornstein, *supra* note 13, at 16.

192. See, e.g., Moss & Siskel, *supra* note 3, at 1037–38; Continuity of Gov't Comm'n, *supra* note 2 (statement of James C. Duff).

193. See U.S. CONST. amend. XX, §§ 3, 4; 3 U.S.C. § 19 (2000); see also, e.g., James C. Ho, *Ensuring the Continuity of Government in Times of Crisis: An Analysis of the Ongoing Debate in Congress*, 53 CATH. U. L. REV. 1049, 1070–71 (2004).

194. Congress probably would not, and certainly should not, seek to hold some Justices in reserve by imposing extra duties so burdensome that they would leave no time to participate in the Court's work except in emergencies. Cf. 11 ANNALS OF CONG. 1216–17 (1802) (statement of Rep. Henderson) (arguing that requiring the Supreme Court to review all cases in which the circuit court judges are divided would be too burdensome); CURRIE, *supra* note 64, at 226 n.201, 280 n.29 (discussing Justice McKinley's refusal to sit due to heavy circuit-riding duties). In any event, modern Justices could frustrate such a maneuver using resources not available to their predecessors—law clerks, computers, telephones, etc. See David J. Garrow, *The Brains Behind Blackmun*, LEGAL AFF., May/June 2005, at 27; Linda Greenhouse, *Chief Justice Won't Return to the Court This Year*, N.Y. TIMES, Nov. 27, 2004, at A11.

Senate. Congress and the President together have the power to preserve a reduction in the numerator caused by the departure of a member of the Court by neglecting to nominate, confirm, and commission a replacement. When it comes to the membership of the Supreme Court, that is all the Constitution provides. But the April Act's one-Justice Court that sat from 1802 to 1838 suggests that the constitutional mandate vesting the judicial power of the United States in "one supreme Court" does not mean that all Justices must always be permitted to participate in all permutations of that Court. The history of the Court tells us that there may be room for useful and constitutional maneuvering. Congress should keep that lesson in mind when deciding whether, and what, to do about preserving a functional Supreme Court in times of crisis and over the long haul. It may well be that the wisest course is to do nothing, but if so, Congress should reach that conclusion for the right reasons, not via a constitutional cop-out.

ber next. — If the Supreme Court shall be of opinion that I have not the power at this term to lay this rule, it will of course be discharged by the court at the January Term. It is nothing more than notice to the parties against whom it issues. It decides nothing and leaves all the questions open for the decision of that tribunal to which they more properly belong. —