

Article

Why Supreme Court Justices Should Ride Circuit Again

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“[W]e shall have these gentlemen as judges of the Supreme Court . . . not mingling with the ordinary transactions of business—not accustomed to the ‘forensic strepitus’ in the courts below—not seeing the rules of evidence practically applied to the cases before them—not enlightened upon the laws of the several States, which they have finally to administer here, by the discussion of able and learned counsel in the courts below—not seen by the people of the United States—not known and recognized by them—not touching them as it were in the administration of their high office—not felt, and understood, and realized as part and parcel of this great popular Government; but sitting here alone—becoming philosophical and speculative in their inquiries as to law—becoming necessarily more and more dim as to the nature of the law of the various States, from want of familiar and daily connection with them—unseen, final arbiters of justice, issuing their decrees as it were from a secret chamber—moving invisibly amongst us, as far as the whole community is concerned; and, in my judgment, losing in fact the ability to discharge their duties as well as that responsive confidence of

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*the people, which adds so essentially to the sanction of all acts of the officers of Government.”*¹

Supreme Court Justices have not “ridden circuit”² for approximately one hundred years,³ but the admonition of Senator George Badger rings as true today as it did when Congress considered eliminating circuit riding in 1848. Today’s Justices spend roughly nine months a year cloistered in the Supreme Court building in Washington, D.C., making decisions and issuing opinions on some of the most important issues of the day.⁴ Many people are unfamiliar with how the Court makes decisions, its relationship to the other branches of government, or even what types of cases it hears. Indeed, the vast majority of Americans cannot even name a single Supreme Court Justice.⁵ As several commentators have noted, the Supreme Court is arguably the most remote and secretive branch of government, at least insofar as its internal deliberations are concerned.⁶ Yet that was not always the case.

To the contrary, the earliest Justices spent most of their time outside of Washington, D.C., serving as judges of the circuit courts and conversing with lawyers and citizens.⁷ Although

1. CONG. GLOBE, 30th Cong., 1st Sess. 596 (1848) (statement of Senator George Badger regarding a bill that would have ended the practice of circuit riding).

2. In this Article, I use the words “ride circuit,” “circuit riding,” “circuit duties,” and other similar terms interchangeably to refer to the circuit duties of Justices.

3. See Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1829 (2003). Glick’s Comment, which is a wonderful and thorough discussion of the history of circuit riding, provided me with a valuable starting point and bibliography for my research.

4. See *The Supreme Court, Not Ducking*, ECONOMIST, Mar. 27, 2004, at 30, 30.

5. See James Bovard, *Ignorance Puts Our Freedom at Risk: Uninformed and Uninterested, Americans Make It Easy for Leaders to Grab More Power*, STAR-LEDGER (Newark, N.J.), Feb. 24, 2006, at 25; Greg Pierce, *Insider Politics: Court Polls*, WASH. TIMES, July 7, 2005, at A6 (citing a Findlaw poll that found that “nearly two-thirds of Americans couldn’t name a single current U.S. Supreme Court justice”).

6. See Matthew D. Bunker, *Supreme Court Justices Recoil at Being Stars of Reality TV*, BIRMINGHAM NEWS, April 6, 2003, at C4; *Inside the Court*, N.J. REC., Mar. 8, 2004, at L6.

7. William H. Rehnquist, Chief Justice, U.S. Supreme Court, Remarks (Oct. 6, 2000), in 43 WM. & MARY L. REV. 1549, 1550 (2002). In fact, during the first two Terms, there were no cases on the Supreme Court’s docket and the duties of the Justices consisted only of riding circuit. See Glick, *supra* note 3,

circuit riding was burdensome and even dangerous in light of the difficult travel conditions during the formative years of the nation,⁸ it led to a “relationship of camaraderie and respect” between the Justices and local citizens, judges, and members of the bar.⁹ The accessibility of the Justices to the general public was one of the chief reasons why circuit riding was not formally abolished until 1911,¹⁰ despite repeated attempts by some members of Congress and the Court to eliminate it.¹¹

This Article demonstrates that many of the arguments favoring circuit riding during this nation’s early years are equally apt today. Circuit riding was important because it exposed Justices to life outside of Washington and brought them closer to the general citizenry. A modern form of circuit riding would ensure that Justices gain exposure to a wider array of legal issues, the laws of various states, and the difficulties faced by lower courts in implementing the Court’s sweeping (and sometimes confounding) rulings. A renewal of circuit riding would confer additional, new benefits as well: empirical evidence tends to show that increasing the workload of the Justices would encourage them to retire in a timely manner, prior to the onset of mental or physical infirmity.¹²

On the other hand, many of the arguments against circuit riding, including the crushing caseload faced by the Court following the Civil War,¹³ are no longer barriers for the modern

at 1764.

8. Many of the early Justices traveled from Washington, D.C. to the circuit courts by means of a stick gig, which was “a wooden chair supported on two wheels and two shafts and pulled by one horse.” See Leonard Baker, *The Circuit Riding Justices*, 1977 Y.B. SUP. CT. HIST. SOC. 63, 63.

9. *Id.* at 67.

10. See Glick, *supra* note 3, at 1799, 1800, 1809, 1829. The Judiciary Act of 1801, popularly known as the “Midnight Judges Act,” briefly eliminated circuit riding. See Judiciary Act of Feb. 13, 1801, ch. 4, 2 Stat. 89 (repealed by Act of Mar. 8, 1802, ch. 8, 2 Stat. 132). Less than one year later, however, the Jeffersonian Republicans, who by then controlled both houses of Congress, repealed the Midnight Judges Act and reestablished circuit riding. See Act of Mar. 8, 1802, ch. 8, 2 Stat. 132.

11. See Glick, *supra* note 3, at 1799, 1804–05, 1807–09.

12. See David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. 1417, 1435–37 (2006); see also David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1455–59 (2005) (proposing a “Golden Parachute” for Supreme Court Justices in order to encourage them to retire before becoming mentally or physically infirm).

13. The number of signed opinions issued by the Supreme Court rapidly expanded from 128 in 1866 to 298 by 1887. LEE EPSTEIN ET AL., *THE SUPREME*

Court. The elimination of the Supreme Court's mandatory appellate jurisdiction in 1988 has granted the Court broad—indeed nearly unlimited—discretion in deciding what cases deserve plenary review.¹⁴ Following the passage of that law, the plenary docket has decreased from 141 signed opinions in 1988 to just seventy-four signed opinions during October Term 2003, which is the lowest output for the Court since 1865.¹⁵ Besides the Court's shrinking docket, the country's modern transportation system means that Justices no longer face the danger and delay accompanying transcontinental travel.

Part I describes the storied history of circuit riding, with particular emphasis on its advantages and disadvantages. It tracks circuit riding from its creation in the Judiciary Act of 1789 through its abolition in the Judicial Code of 1911.¹⁶ An examination of its history, and specifically its advantages and drawbacks, is essential to determining whether circuit riding should be revived today.

Part II begins by arguing that none of the policy objections that led to the abandonment of circuit riding are germane today. Focusing on the historical advantages of circuit riding, Part II further explains that a modern form of circuit riding would incorporate many of the advantages envisioned and discussed by the framers of the Judiciary Act of 1789. Part II then proposes the first modern circuit riding statute, The Circuit Riding Act of 2007, which would require Justices to spend approximately five days per year hearing oral arguments with a panel of one or more of the U.S. courts of appeals. After setting forth the proposed statute, Part II evaluates and compares it with the circuit riding plan recently proposed by Professor Steven Calabresi and David Presser, which would require Justices to spend four weeks per year performing the work of federal district court judges.¹⁷ While interesting, Calabresi and Presser's plan is neither practical nor tailored to the strengths and competencies of the Justices. Instead, a plan such as the Circuit Riding Act of 2007, which requires the Justices to serve as appellate judges, encompasses neither of those drawbacks

COURT COMPENDIUM: DATA, DECISIONS & DEVELOPMENTS 232–36 tbl.3-3 (4th ed. 2007).

14. Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662.

15. See EPSTEIN ET AL., *supra* note 13, at 232–35 tbl.3-3.

16. See Judicial Code of 1911, ch. 231, 36 Stat. 1087.

17. See Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1388–89 (2006).

and shares many, if not all, of the advantages of Calabresi and Presser's proposal. Finally, Part II addresses the policy and constitutional objections to the Circuit Riding Act of 2007.

I. THE STORIED HISTORY OF CIRCUIT RIDING

A. THE BIRTH OF CIRCUIT RIDING

The formidable task of creating a national judiciary was left to the nation's First Congress, which in 1789 enacted the first Judiciary Act.¹⁸ That Act established a Supreme Court composed of six Justices,¹⁹ three circuit courts,²⁰ and thirteen district courts.²¹ In contrast to the district courts, which were solely courts of first instance,²² the circuit courts exercised the functions of both a trial²³ and an appellate²⁴ court. The Judiciary Act of 1789, moreover, created three judicial circuits: the eastern, middle, and southern circuits.²⁵ While Congress cre-

18. WILFRED J. RITZ, *REWRITING THE JUDICIARY ACT OF 1789*, at 3 (1990).

19. *See* Judiciary Act of 1789, ch. 20, § 1, 1 Stat. 73.

20. *See id.* § 4, 1 Stat. at 74–75.

21. *See id.* §§ 2–3, 1 Stat. at 73.

22. *See, e.g., id.* § 9, 1 Stat. at 76–77 (assigning district courts jurisdiction over federal criminal prosecutions where the punishment did not exceed thirty lashes, one hundred dollars, or six months imprisonment); *id.* § 9, 1 Stat. at 77 (giving district courts jurisdiction over all suits “against consuls or vice consuls”); *id.* (granting jurisdiction to the district courts over “all suits at the common law where the United States sue[s]” and the matter in dispute exceeds one hundred dollars).

23. *See, e.g., id.* § 11, 1 Stat. at 78–79 (assigning the circuit courts concurrent jurisdiction over criminal matters within the district court's jurisdiction and exclusive jurisdiction over all other federal crimes); *id.* at 78 (granting circuit courts jurisdiction over “all suits of a civil nature, at common law or in equity,” where “an alien is a party, or the suit is between the citizen of the State where the suit is brought, and a citizen of another state”).

24. *See, e.g., id.* § 21, 1 Stat. at 83 (giving appellate jurisdiction to circuit courts in “causes of admiralty or maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars”); *id.* § 22, 1 Stat. at 84 (permitting a “writ of error” from the district courts in civil actions exceeding “the sum or value of fifty dollars”).

25. *See id.* § 4, 1 Stat. at 74–75. The states of Maine and Kentucky were not included in the original circuit court system, and instead the district courts in each of those states exercised the jurisdiction, “except of appeals and writs of error,” of both the district and circuit courts. *See id.* § 10, 1 Stat. at 77–78. Decisions of the Kentucky district court could be appealed to the Supreme Court in cases where the amount in controversy exceeded two thousand dollars, *see id.* §§ 10, 22, 1 Stat. at 77–78, 84–85, and decisions of the Maine district court could be appealed to the circuit court for Massachusetts, *see id.* § 10, 1 Stat. at 78.

ated one district judgeship for the district court in each state,²⁶ it did not establish separate circuit judgeships to staff the circuit courts. Instead, each three-judge circuit court included one local district judge and two Supreme Court Justices.²⁷ The Judiciary Act of 1789, therefore, required Justices to ride circuit, which involved traveling from state to state in order to hold circuit court in each district within a circuit twice annually.²⁸

Perhaps the primary reason for the creation of the circuit court system was its low cost, as compared to establishing a separate tier of appellate judges to staff an intermediate appellate court.²⁹ By using Supreme Court Justices and district judges to hold circuit court, the First Congress avoided the expense associated with adding another set of circuit court judges to the nation's payroll, which many perceived as too inflated already.³⁰ In addition, the circuit courts reduced the substantial costs involved for litigants who otherwise would have been required to appeal a district court's judgment to a geographically distant Supreme Court.³¹ Accordingly, the circuit courts conserved substantial resources for both the newly formed government and litigants appearing before the federal courts, an advantage that appealed to both the Federalists and the Anti-Federalists.³²

26. *See id.* § 3, 1 Stat. at 73.

27. *See id.* § 4, 1 Stat. at 74–75. A quorum of two judges of the circuit court was sufficient to conduct business. *Id.* However, in any case in which the circuit court was sitting in appellate review of a decision of the district court, the district judge could not vote on the appeal but could “assign the reasons” for his decision. *Id.*

28. *See id.* § 4, 1 Stat. at 74–75.

29. *See* Wythe Holt, “*The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects*”: *The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 306 (1987).

30. *See* Ralph Lerner, *The Supreme Court as Republican Schoolmaster*, 1967 SUP. CT. REV. 127, 130 (“It is plausible, even likely, that nothing more lies behind this feature of the judicial system than a close-fisted Connecticut concern to get value for money.”).

31. *See* Holt, *supra* note 29, at 306; William Paterson's Notes on the Judiciary Bill Debate and Notes for Remarks on Judiciary Bill (June 22–23, 1789), reprinted in 4 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: ORGANIZING THE FEDERAL JUDICIARY 410, 410–13 (Maeva Marcus ed., 1992) (noting that circuit court judges would meet “every citizen in his own State” and “carry Law to [citizen's] [h]omes, to their very [d]oors”).

32. *See* Holt, *supra* note 29, at 306 n.18 (discussing Federalist and Anti-Federalist sentiments on the expenses associated with a national judiciary).

As the country grew larger and wealthier, the costs of staffing an additional layer of courts became less of a concern. In contrast, one factor that was repeatedly mentioned during initial debates about circuit riding, and then throughout discussions about its possible abolition in the nineteenth century, was the value of exposing Justices to viewpoints, customs, and laws outside of Washington, D.C.³³ Circuit riding fostered Justices' familiarity with the local issues facing citizens and members of the bar throughout the country.³⁴ It also ensured that the Justices remained connected to the laws of a number of states, which was essential for both conducting the circuit courts and for Supreme Court review of claims involving state law.³⁵ In addition to enhancing familiarity with local laws, circuit court responsibilities kept the Justices aware of significant state court rulings that the Court could be called upon to review under the Judiciary Act of 1789.³⁶

Circuit riding also provided a unique opportunity for the education and persuasion of local citizens about the benefits and responsibilities of the new constitutional system.³⁷ It put Justices directly in contact with local citizens, judges, and members of the bar, and the camaraderie that developed permitted the Justices to serve as distinguished representatives of the new federal government.³⁸ In fact, while on circuit, the Justices delivered grand jury charges, which were widely reprinted

33. See Glick, *supra* note 3, at 1785, 1799–1800, 1804 n.374, 1809 & n.404, 1816 & n.456 (recounting various debates about circuit riding). During its inaugural Term, the Supreme Court met in the Royal Exchange Building in New York City. See ROBERT J. WAGMAN, *THE SUPREME COURT: A CITIZEN'S GUIDE* 41 (1993).

34. See *supra* notes 7–11 and accompanying text.

35. See William H. Rehnquist, *The Changing Role of the Supreme Court*, 14 FLA. ST. U. L. REV. 1, 3 (1986) (discussing *Blunt's Lessee v. Smith*, 20 U.S. (7 Wheat.) 248 (1822), in which the Supreme Court decided whether the lower court had properly instructed the jury under North Carolina and Tennessee law).

36. In the Judiciary Act of 1789, Congress authorized a writ of error to the Supreme Court from a decision of the highest court of a state in which a decision could be had in three circumstances: (1) where a federal statute, treaty, or authority was found invalid; (2) where a state statute or authority was upheld against a challenge based on the Constitution, federal statute, or treaty; and (3) where a federal title, right, privilege, or exemption was specifically claimed or set up and then denied. Judiciary Act of 1789, § 25, 1 Stat. 73, 85–87.

37. See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 19 (1928); Holt, *supra* note 29, at 307–08.

38. See Glick, *supra* note 3, at 1759–60.

in newspapers, to lecture citizens “on the nature of centralized government, the responsibility of the citizenry, and the ways in which the new government served their needs.”³⁹ Local citizens enjoyed watching the Justices perform their circuit duties, providing a positive impression of the newly created federal courts.⁴⁰

Another advantage of circuit riding was its important contribution to the administration of justice in the new federal court system. As opposed to the district courts, the jurisdiction of the circuit courts was wide ranging⁴¹ and involved some of the most important cases and divisive legal questions facing the new Republic.⁴² By ensuring that one or more Justices participated in the resolution of each case before the circuit courts, circuit riding improved public confidence in the outcome of individual cases and in the legitimacy of the circuit courts more generally.⁴³

Finally, circuit riding enhanced the uniformity of federal law,⁴⁴ which was an important consideration in light of the nation’s less than satisfactory experience under the Articles of Confederation. Such uniformity was especially imperative in the maritime field, where the “need for a body of law applicable throughout the nation was recognized” as essential to effective commerce.⁴⁵ By involving Justices in the decisions made by the circuit courts, local pressures rarely carried the day,⁴⁶ and uniform outcomes among the district courts were more common because of the Justices’ recurring contact with local district judges.⁴⁷

39. *Id.* at 1760.

40. *See, e.g.,* Baker, *supra* note 8, at 67 (discussing the positive impression left by Chief Justice Marshall’s appearance in the circuit court of Richmond, Virginia).

41. *See* Holt, *supra* note 29, at 305–06.

42. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 29 (2003); Holt, *supra* note 29, at 307.

43. *See* Holt, *supra* note 29, at 307.

44. *Id.* at 308.

45. FRANKFURTER & LANDIS, *supra* note 37, at 7.

46. It is not the case that local pressures *never* unduly influenced the decisions of the circuit courts. Leonard Baker recounts one instance in which a circuit court decision involving Justice Story ruled against a ban on imports from Great Britain based on “New England antiwar sentiment.” Baker, *supra* note 8, at 67 (quoting GERALD T. DUNNE, JUSTICE JOSEPH STORY & THE RISE OF THE SUPREME COURT 97 (1970)).

47. *See* Glick, *supra* note 3, at 1761.

B. THE BURDENS OF CIRCUIT RIDING AND ITS TEMPORARY ABOLITION

Despite the high hopes and good intentions of the First Congress, circuit riding was difficult in light of the means of transportation available in the late 1700s. For the Justices, it meant “bouncing thousands of miles over rutted, dirt roads in stagecoach, on horseback, and in stick gigs to bring the federal judiciary system to the American communities strewn along the Eastern seaboard.”⁴⁸ The task was even more burdensome, and even dangerous, for Justices riding through the southern circuit, which “required long trips through rough, unpopulated, and even unknown terrain at times in unpredictably nasty weather with lodging uncertain and often unpleasant.”⁴⁹ The Justices assigned to the southern circuit had to travel nearly two thousand miles a year under these conditions,⁵⁰ and it often took six months or more for them to complete their circuit duties.⁵¹ To make matters worse, the Justices were forced to pay for their own travel and lodging while on the road.⁵²

To say that most Justices disliked circuit riding would be an understatement. Between 1789 and 1799, two Supreme Court Justices (Justice Johnson and Justice Blair) resigned their positions due to the difficulties associated with circuit riding, while two others (Chief Justice Jay and Justice Rutledge) left to pursue positions in state government.⁵³ Robert Harrison, meanwhile, declined an appointment to the Supreme Court because he found the duties of a Justice “extremely difficult [and] burthensome [sic]” as it could result in the “loss of [his] health, and sacrifice [of] a very large portion of [his] private and domestic happiness.”⁵⁴ Other Justices, such as James Iredell,

48. Baker, *supra* note 8, at 63.

49. Glick, *supra* note 3, at 1765 (internal quotation marks and footnotes omitted). Indeed, it was not unusual for the Justices to share a room with complete strangers; Justice Cushing once slept with twelve fellow lodgers, and Justice Iredell unexpectedly discovered “a bed fellow of the wrong sort” on another trip. *See id.* at 1765 n.79 (quoting 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES 1789–1800: THE JUSTICES ON CIRCUIT 1790–1794, at 3 (Maeva Marcus ed., 1988)).

50. *See Holt, supra* note 29, at 309.

51. Glick, *supra* note 3, at 1766.

52. *See* 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 559 n.29 (1971).

53. Glick, *supra* note 3, at 1780 n.207.

54. Letter from Robert H. Harrison, Chief Justice of the Gen. Court of Md., to George Washington, U.S. President (Oct. 27, 1789), *reprinted in* 1 THE

were pushed into ill health and even death due in part to the rigors of circuit riding.⁵⁵ By all accounts, circuit riding was a truly miserable part of the job.

Those who remained on the Court complained vigorously about their circuit duties. Besides writing each other,⁵⁶ the Justices began corresponding with various political leaders to garner support for the elimination of circuit riding.⁵⁷ Writing President Washington, the Justices stated that they found “the burdens laid upon [them] so excessive that” they could not keep from “representing them in strong and explicit terms.”⁵⁸ Attorney General Edmund Randolph agreed with the Justices and proposed the abolition of circuit riding, but a congressional committee ignored his recommendation.⁵⁹ As the Justices became increasingly desperate to rid themselves of the burdens of circuit riding, they offered to forfeit part of their salary in exchange for the elimination of their circuit duties.⁶⁰ Congress eventually granted the Justices partial relief in 1793 when it passed a law requiring only one Justice to attend each circuit court,⁶¹ but it rejected other efforts by the Justices to make circuit riding less burdensome.⁶²

After the Justices had been riding circuit for more than a decade, the outgoing Federalist Congress temporarily abolished the practice in 1801. Shortly after losing the presidential and congressional elections to the Republicans, but prior to the transfer of power, the Federalists passed the Judiciary Act of 1801,⁶³ otherwise known as the “Midnight Judges Act.” The Act abolished circuit riding, reduced the number of Justices on the

DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800: APPOINTMENTS AND PROCEEDINGS 36, 36–37 (Maeva Marcus & James R. Perry eds., 1985).

55. See Calabresi & Presser, *supra* note 17, at 1391.

56. See, e.g., Holt, *supra* note 29, at 309 n.28 (quoting Letter from James Iredell, Assoc. Justice, U.S. Supreme Court, to Thomas Johnson, Assoc. Justice, U.S. Supreme Court (Mar. 15, 1792)).

57. See STEWART JAY, MOST HUMBLE SERVANTS: THE ADVISORY ROLE OF EARLY JUDGES 103 (1997).

58. FRANKFURTER & LANDIS, *supra* note 37, at 22.

59. Glick, *supra* note 3, at 1768–69.

60. *Id.* at 1769–70.

61. Judiciary Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333.

62. See Glick, *supra* note 3, at 1778. The Justices attempted to alter the sequence and timing of riding circuit in order to make it less burdensome. *Id.* Although Congress partially acquiesced to the Justices’ recommended actions, it refused to reform the middle circuit.

63. Judiciary Act of Feb. 13, 1801, ch. 4, 2 Stat. 89.

Supreme Court from six to five, and created six new circuit courts staffed with sixteen new circuit judges.⁶⁴ The Act gained its popular name because President Adams nominated Federalist politicians to fill the new positions on the circuit courts, and many of them received their commissions on Adams's last day in office.⁶⁵ The passage of the Act and the confirmation of the new judges caused dissension around the country; Republican newspapers savagely criticized the Federalists' actions.⁶⁶ Despite a vigorous debate about the benefits of eliminating circuit riding,⁶⁷ the Republicans repealed the entirety of the Judiciary Act of 1801 less than one year after it was enacted.⁶⁸

The repeal of the Midnight Judges Act eventually led to a constitutional showdown before the Supreme Court when a litigant challenged Chief Justice Marshall's power to serve as a circuit judge in *Stuart v. Laird*.⁶⁹ After Marshall upheld the Repeal Act while sitting as a circuit judge, the case reached the Supreme Court. Former Attorney General Charles Lee, who argued the case before the Supreme Court, offered four chief arguments against the Repeal Act. First, he argued that circuit riding was unconstitutional because it required Justices to hear the trial of cases that were outside of the original jurisdiction of the Supreme Court.⁷⁰ Second, he contended that circuit riding violated the Appointments Clause because it "impose[d] new duties" on the Justices, and the addition of these new duties was inconsistent with their appointment as Supreme Court Justices.⁷¹ Third, he maintained that circuit riding violated a litigant's right to have six unbiased Justices decide a case before the Supreme Court.⁷² Finally, he asserted that the Repeal Act was unconstitutional because it deprived the newly appointed circuit judges of life tenure, in contravention of Article

64. *Id.* §§ 6–7, 2 Stat. at 90–91 (repealed 1802).

65. 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 188 (1926).

66. *Id.* One common criticism was that "Adams [wa]s laying the foundation of future faction and his own shame." *Id.*

67. See Michael Coblenz, *The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy*, *FED. LAW.*, Aug. 2006, at 49, 50 (book review).

68. See Act of Mar. 8, 1802, ch. 8, § 1, 2 Stat. 132.

69. 5 U.S. (1 Cranch) 299 (1803).

70. See *id.* at 305.

71. *Id.*

72. *Id.*

III, Section 1 of the Constitution.⁷³

The Court disposed of the first three arguments (ignoring the fourth) in all of 119 words, noting that any constitutional objection to circuit riding was “of recent date” and that “practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”⁷⁴ The decision in the case was no doubt influenced by the political environment at the time, as the Republicans had control of both the executive and legislative branches.⁷⁵ In upholding the Repeal Act, the Court was able to avoid a bitter showdown with Jefferson.⁷⁶

C. THE INCREASING BURDENS OF CIRCUIT RIDING AND ITS ABOLITION

The westward expansion of the United States meant longer and even more difficult circuit riding trips for the Justices over rough terrain.⁷⁷ In 1807, Congress established the Seventh Circuit and added a seventh Supreme Court Justice to staff it.⁷⁸ In 1837, eight more states were added to the circuit system and two additional Justices were appointed to sit in the newly created Eighth and Ninth Circuits.⁷⁹ When Justice Stephen Field was appointed to the Court in 1863, he was assigned circuit duties for the new Tenth circuit, a trip that took him approximately six weeks to complete.⁸⁰ Many of the Justices were re-

73. *Id.* at 303–04.

74. *Id.* at 309. I have previously stated that, though *Stuart* was “abysmally reasoned,” the Court was correct in upholding circuit riding against constitutional challenge. See Stras & Scott, *supra* note 12, at 1408.

75. BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 195–98* (2005) (suggesting that the outcome of *Stuart* was based more on a fear of the Republicans than on a consensus that circuit riding was constitutional).

76. See Coblenz, *supra* note 67, at 51.

77. Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 *IND. L.J.* 153, 172 (2003).

78. Act of Feb. 24, 1807, ch. 16, 2 Stat. 420; Geyh, *supra* note 77, at 172.

79. See Act of Mar. 3, 1837, ch. 34, 5 Stat. 176.

80. See Glick, *supra* note 3, at 1813 & n.437. Justice Stephen Field was nearly assassinated while riding circuit. David Terry, his former colleague on the California Supreme Court and a losing litigant before Field’s circuit court, attempted to kill Justice Field while he was dining on a train. See *In re Neagle*, 135 U.S. 1, 52–53 (1890); William H. Rehnquist, Chief Justice, U.S. Supreme Court, Remarks at the Dual Enforcement of Constitutional Norms

quired to travel more than two thousand miles annually,⁸¹ and their journeys remained hazardous. The roads were often inadequate for their carriages,⁸² sickness and disease were constant worries,⁸³ and the accommodations were still uncomfortable in many areas.⁸⁴

In addition to the growing burdens presented by the travel, the Justices faced a burgeoning docket. The country's expansion meant an increase in the amount of judicial business, before both the circuit courts and the Supreme Court.⁸⁵ The number of cases before the Supreme Court nearly doubled from 1803 to 1810,⁸⁶ and by 1826 the Court was able to dispose of only thirty-eight out of the 164 docketed cases.⁸⁷ By 1870, the Court's docket had reached 636 cases.⁸⁸ The mounting workload required the Justices "either to slight their Supreme Court work with an undue delay in the disposition of appeals or to slight their circuit work by insufficient attendance on circuit, or both."⁸⁹ As a result, it became increasingly common for circuit court proceedings to be held by only a single district judge, who often reviewed his own prior rulings in a case.⁹⁰

Even though the Justices continued to request relief from their circuit duties, Congress was slow to respond. Congress

Symposium, *in* 46 WM. & MARY L. REV. 1219, 1225 (2005). Terry was shot by Deputy U.S. Marshall David Neagle before he could kill Field. *See In re Neagle*, 135 U.S. at 53. Neagle was eventually indicted for murder, but the Supreme Court later held that he had a federal immunity defense to the prosecution. *See* Rehnquist, *supra*, at 1225; Seth P. Waxman & Trevor W. Morrison, *What Kind of Immunity? Federal Officers, State Criminal Law, and the Supremacy Clause*, 112 YALE L.J. 2195, 2235–36 (2003).

81. *See* FRANKFURTER & LANDIS, *supra* note 37, at 49. Justice McKinley claimed that his circuit duties for the Ninth Circuit, which included Alabama, Arkansas, Louisiana, and Mississippi, required him to travel approximately ten thousand miles per year. *Id.*

82. Glick, *supra* note 3, at 1806.

83. *See id.* at 1810 (recounting Justice Daniel's experience of riding circuit "through yellow fever at Vicksburg and congestive and autumnal fevers" in Jackson).

84. *See, e.g., id.* at 1811 (describing Justice Daniel's accommodations in "a beached and converted steamboat where he was housed in a room six feet by four feet and tormented by Buffalo gnats").

85. FRANKFURTER & LANDIS, *supra* note 37, at 34.

86. *See id.* at 34–35.

87. WARREN, *supra* note 65, at 676.

88. FRANKFURTER & LANDIS, *supra* note 37, at 60.

89. *Id.* at 34.

90. *See id.* at 87 ("Such an appeal is not from Philip drunk to Philip sober, but from Philip sober to Philip intoxicated with the vanity of a matured opinion and doubtless also a published decision.").

partially eased the burden when it passed the Act of June 17, 1844, which required only a single Justice to visit each district annually to hold circuit court.⁹¹ Besides that one piece of legislation, the only assistance from Congress was an occasional extension of the Court's Term for an additional month, permitting the Justices to hear a few of the cases that were accumulating on its increasingly overcrowded docket.⁹² When the docket became further congested, the Court resorted to self-help, promulgating a rule limiting oral argument to two hours per side.⁹³ According to Felix Frankfurter and James Landis, the new rule "did something, but not much."⁹⁴

Three chief factors contributed to congressional inaction on circuit riding. First, policymakers had fundamental disagreements about the proper role of the federal judiciary, and these disagreements led to congressional impotence on a variety of issues, not just circuit riding.⁹⁵ Indeed, political delay hampered the resolution of such simple matters as reforming the circuit system to accommodate newly admitted states.⁹⁶ The Civil War made matters worse as many Southerners adamantly opposed any expansion of the federal judiciary,⁹⁷ and states' rights advocates feared that the elimination of circuit riding would lead to less respect for the states and a greater number of Supreme Court decisions supporting the assertion of federal power.⁹⁸

91. See Act of June 17, 1844, ch. 96, 5 Stat. 676. The Justices previously had their circuit riding duties reduced in much the same way under the Act of 1793, which required the Justices to ride circuit within each district only once per year. See FRANKFURTER & LANDIS, *supra* note 37, at 22. However, when the country was later divided into six circuits and only a single Justice was assigned to each circuit, the Justices were once again required to ride circuit within each district twice annually. *Id.* at 31–32. *But see id.* at 32 (explaining that a provision in the Act of 1793 allowed a single district judge to preside over the circuit courts, a "provision . . . constantly invoked if circuit courts were to be held at all").

92. See, e.g., Act of Sept. 6, 1916, ch. 448, 39 Stat. 726; Act of June 17, 1844, ch. 96, 5 Stat. 676; Act of May 4, 1826, ch. 37, 4 Stat. 160.

93. See FRANKFURTER & LANDIS, *supra* note 37, at 52.

94. *Id.* at 52.

95. See *id.* at 80–85 (describing the political discussion about reorganizing the federal judiciary); Geyh, *supra* note 77, at 178 ("[D]eveloping and sometimes conflicting notions of judicial independence and accountability had put Congress in a box that was difficult to escape.")

96. See Geyh, *supra* note 77, at 177–78.

97. See FRANKFURTER & LANDIS, *supra* note 37, at 84.

98. See Glick, *supra* note 3, at 1800.

Second, there was a general unwillingness to change the structure of the federal judiciary. Congress was reluctant to reform many aspects of the federal judicial system because it viewed the Judiciary Act of 1789 as the implementation of the Framers' vision of an independent and robust judiciary.⁹⁹ While some argued that changes to the judiciary should be treated no differently than legislation in other areas, "[t]he prevailing view was that legislation regulating the courts was different, because it altered the structure of an independent branch of government, the longstanding stability of which legislators admired and were desirous of preserving."¹⁰⁰ Specifically, the Midnight Judges Act was a particularly infamous historical precedent that, in the minds of many legislators, was not to be repeated.¹⁰¹

Third, many in Congress continued to believe in the genuine advantages of circuit riding. Although some still criticized circuit riding as outmoded, difficult, and wasteful,¹⁰² many others repeatedly voiced their support. In fact, as Washington, D.C. became less centrally located through westward expansion, policymakers feared that the elimination of circuit riding would separate the Court from the rest of the nation and that Justices would become "completely cloistered within the city of Washington."¹⁰³ Many legislators worried that the Court would become a "fossilized institution,"¹⁰⁴ unaware of the business of the circuits, and that the decisions of the Court would "assume a severe and local character."¹⁰⁵ Other legislators viewed circuit riding as critical in keeping Justices knowledgeable about the practical realities of litigation to ensure that their decisions did not become too philosophical and unconnected from the communities in which the decisions would be implemented.¹⁰⁶ Senator William Allen spoke particularly passionately and eloquently on behalf of the proponents of circuit riding in 1848:

I would admonish those gentlemen, who do not think as I do on these points, but wish to maintain this Judiciary in its present features,

99. See Geyh, *supra* note 77, at 171.

100. *Id.* at 173.

101. See *id.* at 174–75.

102. See 33 ANNALS OF CONG. 123–26 (1819) (describing and rejecting the arguments against circuit riding); WARREN, *supra* note 65, at 185–86; Calabresi & Presser, *supra* note 17, at 1404–05.

103. 33 ANNALS OF CONG. 126 (1819) (statement of Sen. Smith).

104. Geyh, *supra* note 77, at 186 (quoting Senator Williams).

105. 33 ANNALS OF CONG. 126 (1819) (statement of Sen. Smith).

106. See Glick, *supra* note 3, at 1809.

that if they do not wish to sound the tocsin, they had better not separate the judges for an hour from circuit duties, and direct intercourse with the people of the State. That is the only feature in the system which connects them with the nation; and if that be struck out, the striking out of the court will follow as naturally as the snuffing of a candle issues in darkness.¹⁰⁷

As the docket continued to expand, however, the pressures on the Court became so overwhelming that the Justices could not always attend to their circuit duties. By the 1860s, the Supreme Court's plenary docket had become a "record of arrears," and the lengthy delay before obtaining a hearing and a decision from the Supreme Court had become unacceptable.¹⁰⁸ Congress was forced to act and passed the Judiciary Act of 1869,¹⁰⁹ which preserved the spirit of circuit riding but eased the burdens imposed on the Justices. The Act created one full-time circuit judge for each of the nine circuits and reduced the circuit responsibilities of the Justices to just one visit to each district within a circuit every other year.¹¹⁰ Nonetheless, throughout the 1880's many Justices neglected their circuit duties altogether,¹¹¹ and it became increasingly clear that reform was necessary. Justice William Strong advocated the creation of an intermediate court of appeals, writing that each Justice was spending approximately eight to twelve hours a day hearing and deciding cases from the opening of the Term in October until its conclusion in May.¹¹² Chief Justice Morrison Waite too spoke out on the onerous workload resulting from the Court's bloated docket.¹¹³

Finally, in 1891, Congress passed a bill sponsored by Senator William Evarts that established an intermediate court of appeals for the federal judiciary.¹¹⁴ In addition to a new tier of appellate review, the Evarts Act introduced the concept of dis-

107. CONG. GLOBE, 30th Cong., 1st Sess. 595–96 (1848).

108. See FRANKFURTER & LANDIS, *supra* note 37, at 69–70. By 1888, the Court was nearly three years behind in adjudicating the cases on its plenary docket. See Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1650 (2000).

109. See FRANKFURTER & LANDIS, *supra* note 37, at 45–46.

110. See Act of April 10, 1869, ch. 22, 16 Stat. 44.

111. See WARD, *supra* note 42, at 89.

112. See William Strong, *The Needs of the Supreme Court*, 132 N. AM. REV. 437, 439 (1881).

113. See *Notes*, 22 AM. L. REV. 269, 292 (1888) (quoting Chief Justice Morrison R. Waite).

114. See Evarts Act of 1891, ch. 517, 26 Stat. 826; FRANKFURTER & LANDIS, *supra* note 37, at 100–01.

cretionary review for the Supreme Court through the writ of certiorari, and simultaneously granted litigants an appeal as of right to one of the regional circuit courts of appeals.¹¹⁵ The Act transformed the Court's plenary docket; only 275 new cases were docketed in 1892.¹¹⁶

While neither the old circuit courts nor circuit riding were formally abolished under the Evarts Act, Justices were no longer statutorily required to sit as judges of either the old circuit courts or the newly created circuit courts of appeals.¹¹⁷ While some Justices continued to ride circuit, most did not, and any confusion about the issue was finally dispelled when the old circuit courts were abolished in 1911,¹¹⁸ formally ending the storied 120-year history of circuit riding.¹¹⁹

II. A RENEWED CALL FOR CIRCUIT RIDING

A. THE BURDENS AND ADVANTAGES OF A MODERN FORM OF CIRCUIT RIDING

Although few scholars have focused on the practice of circuit riding,¹²⁰ it was an important and original component of the Framers' vision for an independent judiciary.¹²¹ For approximately half of this country's history, it was a large, perhaps even dominant, component of the job description of Supreme Court Justices.¹²² Congress ultimately abolished circuit

115. See Evarts Act of 1891, ch. 517, § 6, 26 Stat. 826.

116. See 1893 ATT'Y GEN. ANNUAL REP., at iv; Glick, *supra* note 3, at 1827.

117. See Glick, *supra* note 3, at 1828. Under the Act, however, the Justices were "competent to sit as judges of the circuit court of appeals within their respective circuits." Evarts Act of 1891, ch. 517, § 3, 26 Stat. 826; Glick, *supra* note 3, at 1828.

118. See Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

119. See Glick, *supra* note 3, at 1829.

120. See *id.* at 1753 & n.2 (noting the paucity of research on the issue of circuit riding). Steven Calabresi and David Presser can be added to that short list of scholars. See *generally* Calabresi & Presser, *supra* note 17 (arguing for the reintroduction of circuit riding).

121. Many of the legislators who passed the Judiciary Act of 1789 also signed the U.S. Constitution. See *Cohens v. Virginia*, 19 U.S. 264, 420 (1821) ("A contemporaneous exposition of the constitution, certainly of not less authority than that which has been just cited, is the [Judiciary Act of 1789]. We know that in the Congress which passed that act were many eminent members of the Convention which formed the constitution."); Tor Ekeland, Note, *Suspending Habeas Corpus: Article I, Section 9, Clause 2 of the United States Constitution and the War on Terror*, 74 *FORDHAM L. REV.* 1475, 1516 (2005).

122. See *supra* Part I.

riding, not because it no longer served any purpose, but because of the difficulties and dangers associated with transcontinental travel and because of the crushing caseload faced by the Supreme Court during the 1880s.¹²³

Neither of those issues is an impediment to a renewal of circuit riding today. First, today's transportation system consists of planes, trains, and automobiles, and Justices can travel across the country by jet plane in just a few hours. The accommodations in even the most remote parts of the country greatly exceed the standards of lodging available during the 1800s, when Justices were sometimes forced to share a room with strangers or even sleep in their stagecoaches.¹²⁴ The availability of the Internet and telephones in every part of the country ensures that Justices would be able to vote in time-sensitive death penalty cases and keep in touch with their chambers during the week in which they are circuit riding. Indeed, some of the current Justices spend most of their summers away from Washington, and they are able to keep up with their work from virtually anywhere in the world without much difficulty.¹²⁵

Second, the plenary docket is no longer anywhere near the plateau reached during the mid-1880s. When Congress effectively abolished circuit riding in 1891, the number of signed opinions released by the Supreme Court over the prior decade ranged from a low of 232 in 1881 to a high of 298 in 1886.¹²⁶ Even so, the Court was more than three years behind on its work.¹²⁷ Since 1986, by contrast, the Court has been hearing fewer cases; it issued just seventy-four signed opinions during both the 2002 and 2003 Terms, a lower output than in any year since 1865.¹²⁸ With the elimination of the Supreme Court's mandatory appellate jurisdiction in 1988, the Court has had

123. See Calabresi & Presser, *supra* note 17, at 1404–05. For a discussion of the other reasons why circuit riding was abolished, see *id.* at 1406–08.

124. See *id.* at 1404; Glick, *supra* note 3, at 1765 & n.79.

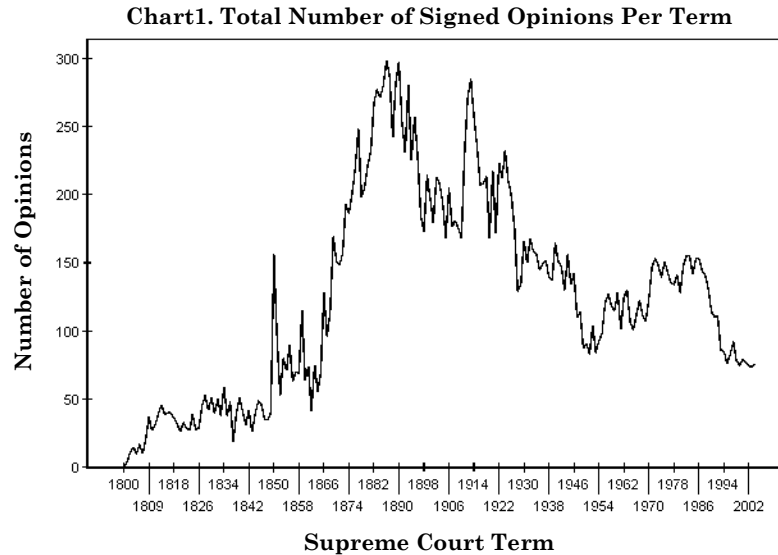
125. See, e.g., Dahlia Lithwick, *High Court, Low Profile*, BALT. SUN, Aug. 31, 2004, at 15A, available at 2004 WLNR 1472804 (describing Justice Souter's summers in New Hampshire); *Some Justices Make Summer Busman's Holiday*, NEWSDAY, Aug. 26, 2002, at A13, available at 2002 WLNR 511032 (discussing Justice Thomas's trips in his motor home during the summer months).

126. See EPSTEIN ET AL., *supra* note 13, at 232–36 tbl.3-3. In contrast, over the first sixty years of circuit riding, the Supreme Court never even reached triple digits in the number of signed opinions released annually. See *id.*

127. See Hartnett, *supra* note 108, at 1650.

128. See EPSTEIN ET AL., *supra* note 13, at 232–36 tbl.3-3.

nearly unlimited discretion in setting the size of its plenary docket, subject to only a few, nonmaterial exceptions.¹²⁹ The following chart graphically displays the reduction in the Court's plenary docket since 1986, as compared to when circuit riding was effectively abolished in the late 1800s:¹³⁰



As the above chart demonstrates, the Court was deciding more than three times as many cases in the mid-1880s as it does today. Moreover, as Calabresi and Presser point out, the primary failing of the old circuit riding system was that it placed too much “reliance on Supreme Court Justice manpower to do appreciable quantities of lower court work.”¹³¹ Today, with 651 district judges and 179 circuit judges authorized by Congress (not including senior judges),¹³² there are plenty of judges to handle the caseload, even though dockets have been steadily rising in the lower federal courts.¹³³ Circuit-riding Jus-

129. See Act of June 27, 1988, Pub. L. No. 100-352, 102 Stat. 662. The categories of cases over which the Court currently exercises mandatory review add “very little to the Court’s workload.” See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 97 (1989).

130. All data for the chart are derived from EPSTEIN ET AL., *supra* note 13, at 232–36 tbl.3-3.

131. Calabresi & Presser, *supra* note 17, at 1410.

132. See 28 U.S.C. §§ 44(a), 133(a) (2000).

133. See David R. Stras, *The Supreme Court’s Gatekeepers: The Role of Law Clerks in the Certiorari Process*, 86 TEX. L. REV. 947, 964–67 (2007).

tics would assist the lower courts in keeping up with the demands of their dockets, to be sure, but they would not be required to shoulder the majority, or even an appreciable amount, of the workload, as was required under the old circuit court system. Instead, a renewal of circuit riding would be premised on the considerable advantages it would confer on the Court, the Justices, and the general public.

The historic support for circuit riding was based largely on the odious effects of having the Justices confined to Washington, D.C. to perform their work. Representative James Buchanan stated in 1826 that “[i]f the Supreme Court should ever become a political tribunal, it will not be until the Judges shall be settled in Washington, far removed from the People, and within the immediate influence of the power and patronage of the Executive.”¹³⁴ Although the judiciary was not intended to be as political as the legislative or executive branches, the Framers surely did not intend to isolate it from the general citizenry either, as even the earliest statements about circuit riding make clear.¹³⁵ Citizens may not flock to the circuit courts to see the Justices in action, as they did during the early years of circuit riding. But modern circuit riding appearances would surely provide greater exposure for the Justices and the Court, similar to the extensive media coverage accompanying the recent visits by Sandra Day O’Connor to the Second, Eighth, and Ninth Circuits.¹³⁶

Circuit riding would also expose the Justices to judges and communities with which they are unfamiliar. Many Justices over the course of history have led cloistered lives, with the most notable recent example being Justice Souter, who returns to New Hampshire every summer after the Term ends and rarely makes public appearances.¹³⁷ At a minimum, circuit riding for one week per year would require the Justices to interact with local judges and members of the bar. At most, their visits

134. 2 REG. DEB. 932 (1826).

135. See *supra* notes 37–40 and accompanying text.

136. See, e.g., *A Supreme Surprise for N.Y. Lawyers*, NEWSDAY, Oct. 12, 2006, at A20, available at 2006 WLNR 17665008; Howard Mintz, *Retired Justice O’Connor Helps in S.F. Court*, SAN JOSE MERCURY NEWS, Oct. 19, 2006, at B1, available at 2006 WLNR 18149282; Donna Walter, *Eighth Circuit Appeals Panel Examines Voting Rights*, DAILY REC. (Kan. City, Mo.), Feb. 13, 2007, available at 2007 WLNR 2917024.

137. See Lithwick, *supra* note 125; Mark Walsh, *Reclusive Justice Souter Attends N.H. Ceremony*, 25 EDUC. WK., Apr. 19, 2006, at 26, available at 2006 WLNR 7497386.

could turn into noteworthy annual events for some communities, resulting in coverage by local newspapers and social engagements open to local lawyers, judges, or even the general public.

Other advantages of circuit riding accrue directly to the Justices and the Court. Professors Arthur Hellman and Carolyn Shapiro have argued that the Court has become increasingly “Olympian” over the past two decades, issuing fewer opinions but granting certiorari in a relatively increasing number of important cases that permit it to make sweeping legal rulings.¹³⁸ Professor Shapiro further criticizes the Court for announcing “rules and standards [in plenary cases] often without applying them to the factual situations from which they arise.”¹³⁹ In a dissent, then-Justice Rehnquist offered a similar critique:

The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a treatise about cooking by someone who has never cooked before and has no intention of starting now.¹⁴⁰

In addition, the Justices do not have an opportunity to watch closely the development of various areas of federal law, primarily because the Court grants certiorari in so few cases each year.¹⁴¹ Instead, the Court takes a piecemeal approach to its supervisory function, commonly reviewing and deciding legal questions only after the lower courts have become squarely divided. Consequently, there is rarely a unifying theme in the

138. See Arthur D. Hellman, *The Shrunken Docket of the Rehnquist Court*, 1996 SUP. CT. REV. 403, 433–38; Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, 63 WASH. & LEE L. REV. 271, 288 (2006).

139. See Shapiro, *supra* note 138, at 313–14.

140. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 269 (1986) (Rehnquist, J., dissenting); cf. *Crawford v. Washington*, 541 U.S. 36, 75 (2004) (“The Court grandly declares that [w]e leave for another day any effort to spell out a comprehensive definition of testimonial. But the thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of testimony the Court lists is covered by the new rule. They need them now, not months or years from now.”) (Rehnquist, C.J., concurring in judgment) (citations omitted).

141. Arguably, reading petitions for certiorari could keep the Justices abreast of important developments in federal law. However, at least two Justices (Stevens and Rehnquist) have admitted in the past that they do not read most petitions for certiorari, and the Court largely leaves the initial screening of petitions to law clerks. See Stras, *supra* note 133, at 46, 53, 54.

cases the Court reviews each Term,¹⁴² and it often takes years for an issue to resurface on the Court's plenary docket.¹⁴³ Thus, the Justices are not regularly forced to grapple with the gaps or inconsistencies in the Court's contemporary opinions or the challenges faced by lower courts in implementing them.¹⁴⁴

A renewal of circuit riding may alleviate the problems posed by "the Court's current distance from the daily work of the lower courts"¹⁴⁵ and encourage the Justices to "become more sensitive to administrative and jurisprudential headaches they create for the lower courts."¹⁴⁶ By sitting on the lower courts, even for a short period, the Justices would be required to engage in the type of fact-intensive analysis of cases that is commonplace in the lower federal courts, and to even apply the Court's precedents, a practice which could foster some humility when the Justices return each October to decide an additional batch of Supreme Court cases.¹⁴⁷

142. Sometimes the Court does take a group of cases to clarify an area of federal law. For instance, in 1999 the Court decided a trio of cases under the Americans with Disabilities Act (ADA) that addressed various aspects of that law, including whether corrective or mitigating measures can be considered in determining coverage under the ADA. *See* *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555, 558 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 521 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 475 (1999).

143. Although there are numerous examples of this phenomenon, one prominent example is the lengthy, nearly twenty-year period between the Court's opinion in *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804 (1986), and its subsequent decision in *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308 (2005), clarifying the standard for federal question jurisdiction under 28 U.S.C. § 1331 for state law claims that present questions of federal law. In the employment discrimination area, the Court took approximately fourteen years to finally resolve the important question of whether direct evidence of discrimination is required in mixed-motive cases under Title VII of the Civil Rights Act of 1964. *Compare* *Price Waterhouse v. Hopkins*, 490 U.S. 228, 270–71 (1989) (O'Connor, J., concurring) (holding that the plaintiff must present direct evidence of discrimination to trigger the mixed-motive analysis), *with* *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92 (2003) (holding that the plaintiff did not need to prove discrimination by direct evidence in mixed-motive cases).

144. *See* Hellman, *supra* note 138, at 435 ("When the Court addresses a particular statute or doctrine only in isolated cases at long intervals, the Justices may not fully appreciate how the particular issue fits into its larger setting.").

145. Shapiro, *supra* note 138, at 329.

146. *Id.*

147. *See id.* The U.S. courts of appeals, for instance, are often asked to review a district court's grant of summary judgment or a jury verdict for sufficiency of the evidence. Those types of cases, as well as many others, require circuit judges to apply and evaluate facts in making their decisions.

Aside from humility and perspective, circuit riding would also require the Justices to decide cases in areas of the law in which the Court is not traditionally interested. It is no secret that the Court rarely hears cases involving state law, yet many cases on the Court's plenary docket involve the type of general common law questions for which background knowledge of state law would prove useful. Many areas of federal law require familiarity with the common law: ERISA cases involve common law trust principles,¹⁴⁸ FELA cases incorporate common law tort doctrines,¹⁴⁹ and cases involving sentencing enhancements under the Armed Career Criminal Act require comparison between a state's definition of an offense and the generic definition of an offense adopted by a majority of states.¹⁵⁰ Although there are numerous other examples, requiring the Justices to decide diversity cases while sitting on the circuit courts would improve their effectiveness when cases requiring knowledge of general common law principles, such as ERISA and FELA cases, appear on the Court's plenary docket.

Riding circuit would also expose Justices to areas of federal law over which the Court generally does not exercise plenary review. For example, the Court has expressed doubt about whether it should ever grant plenary review over cases involving the interpretation of the Sentencing Guidelines, primarily because Congress placed in the Sentencing Commission the authority to "periodically review the work of the courts, and . . . make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," including retroactive

148. See, e.g., *Aetna Health Inc. v. Davila*, 542 U.S. 200, 209 (2004). ERISA is the Employee Retirement Income Security Act, which sets uniform standards for employee benefit plans. 29 U.S.C. §§ 1001–1461 (2000); see Margaret E. McLean, *Employee Stock Ownership Plans and Corporate Takeovers: Restraints on the Use of ESOPs by Corporate Officers and Directors to Avert Hostile Takeovers*, 10 PEPP. L. REV. 731, 735–36 (1983).

149. See, e.g., *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 541–42 (1994). FELA is the Federal Employers' Liability Act, 45 U.S.C. §§ 51–60 (2000), which makes "railroads liable for injuries or deaths suffered by their employees in interstate commerce as a result of the negligence of the railroad's other employees, agents, or officers." Caleb Nelson, *The Persistence of General Law*, 106 COLUM. L. REV. 503, 520 (2006).

150. See *Taylor v. United States*, 495 U.S. 575, 599–602 (1990). The Supreme Court recently decided a case raising a similar issue, *United States v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007), in which the question presented was whether a violation of California's vehicle-theft statute qualified as a "theft" offense, which is a subcategory of "aggravated felon[ies]" under the Immigration and Nationality Act. See 8 U.S.C. § 1101(a)(43)(G) (2000).

changes.¹⁵¹ In other areas as well, such as cases involving the interpretation of the Federal Rules of Evidence, the Court has been relatively quiet in recent years.¹⁵² Yet these are important areas of federal law as, for instance, the Supreme Court possesses statutory responsibility for the issuance and amendment of the various federal rules of evidence and procedure,¹⁵³ and as sentencing issues have been garnering increased attention from academics and policymakers in recent years.¹⁵⁴ By sitting on the circuit courts, which regularly hear cases on the Sentencing Guidelines and the federal rules, the Justices would both augment the breadth of their knowledge of federal law and strengthen their ability to carry out their statutory responsibilities.¹⁵⁵

Finally, circuit riding would encourage Justices to retire in a timely manner, before the onset of mental or physical infirmity. For Justices who are mentally or physically infirm, increasing the workload can make the job more difficult, varied, and exhausting, even though the new duties may not be very challenging for Justices in good health. Mental and physical infirmity has been and inevitably will continue to be a serious problem on the Supreme Court, and in a prior co-authored article, I even proposed a package of retirement incentives—a “golden parachute” for Supreme Court Justices—to alleviate the problem.¹⁵⁶ Congress possesses other tools to encourage timely retirement, including the power to increase the Justices’ workload by expanding the appellate jurisdiction of the Supreme Court or by adding supplementary duties to their job de-

151. *Braxton v. United States*, 500 U.S. 344, 348 (1991).

152. The last time the Supreme Court reviewed a case involving interpretation of the Federal Rules of Evidence was approximately seven years ago. *See Ohler v. United States*, 529 U.S. 753 (2000).

153. *See* 28 U.S.C. § 2072 (2000).

154. *See, e.g.*, Symposium, *Sentencing: Learning From, and Worrying About, the States?*, 105 COLUM. L. REV. 933, 933–36 (2005); Symposium, *Sentencing Lessons*, 58 STAN. L. REV. 1, 1–4 (2005); *see also Mandatory Sentencing Is Criticized by Justice*, N.Y. TIMES, March 10, 1994, at A22 (“I simply do not see how Congress can be satisfied with the results of mandatory minimums for possession of crack cocaine.” (quoting Justice Kennedy)).

155. Because the Sentencing Guidelines did not go into effect until November 1, 1987, Justices Stevens and Scalia did not hear any cases involving interpretation of the Sentencing Guidelines prior to their elevation to the Supreme Court in 1975 and 1986, respectively. *See* U.S. SENTENCING COMM’N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2, available at http://www.ussc.gov/general/USSCoverview_2005.pdf (last visited Apr. 22, 2007).

156. Stras & Scott, *supra* note 12, at 1455–59.

scriptions.¹⁵⁷ As Calabresi and Presser argue, circuit riding is a “reasonable way of accomplishing that goal.”¹⁵⁸

Indeed, Professors David Nixon and J. David Haskin conducted a study in which they concluded that adding to judicial workload increases the probability of retirement.¹⁵⁹ Using each month on the appellate court as a separate observation in their regression analysis, Nixon and Haskin found that “personal factors such as workload . . . are the most substantively and statistically significant factors affecting aggregate retirements.”¹⁶⁰ Two other empirical studies of lower court judges confirm the relationship between workload and retirement.¹⁶¹ As I have written previously, “[t]hese studies suggest that increasing the workload of Justices, which in turn increases the amount of time spent on judging rather than leisure, will make retirement more attractive for the average Justice.”¹⁶² Accordingly, in addition to the institutional and personal benefits of circuit riding, its renewal will also encourage mentally and physically infirm Justices to retire in a timely manner.

B. THE CIRCUIT RIDING ACT OF 2007

Even though the practice of circuit riding began with the Judiciary Act of 1789, Congress has never provided much specificity with respect to the circuit duties of the Justices. For instance, the Judiciary Act of 1789 simply stated that “there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two Justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum.”¹⁶³ In contrast, that Act exhaustively discussed the jurisdiction of

157. See *id.* at 1436.

158. See Calabresi & Presser, *supra* note 17, at 1415.

159. See David C. Nixon & J. David Haskin, *Judicial Retirement Strategies: The Judge's Role in Influencing Party Control of the Appellate Courts*, 28 AM. POL. Q. 458, 471–72 (2000).

160. See *id.* at 480. The authors measured judicial workload by calculating the “the number of case filings per judge.” *Id.* at 466.

161. See Deborah J. Barrow & Gary Zuk, *An Institutional Analysis of Turnover in the Lower Federal Courts, 1900–1987*, 52 J. POL. 457, 469 (1990); James F. Spriggs, II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893–1991*, 48 POL. RES. Q. 573, 590 (1995).

162. Stras, *supra* note 12, at 1437.

163. Judiciary Act of 1789, § 4, 1 Stat. 74–75.

the Supreme Court, the old circuit courts, and the district courts.¹⁶⁴

To avoid the lack of guidance accompanying past legislation, I recommend that Congress enact my proposed circuit riding legislation, the Circuit Riding Act of 2007. The Act carefully delineates the additional requirements that would be placed on the Justices. First, rather than requiring them to conduct trials at the district court level, as Calabresi and Presser have recently proposed, the Circuit Riding Act of 2007 calls for the Justices to spend five days (or about one work week) per year sitting on panels of the U.S. courts of appeals. Second, the proposed Act ensures that Justices sit with as many different panels and judges as possible during their brief circuit riding visits, while accommodating the prevailing practice of some circuits to have one panel sit together for an entire week of hearings. Third, the Act makes clear that the Justices' additional circuit duties will not interfere with their Court obligations because the requirements of the Act may only be satisfied during the summer months when the Court is in recess.¹⁶⁵ Fourth, the Act expressly provides for the payment of reasonable expenses incurred by the Justices while riding circuit, including lodging and transportation, and augments their existing salaries to compensate them for the additional work required by the Act.¹⁶⁶

The Circuit Riding Act of 2007 (to be codified as 28 U.S.C. § 42)

- (a) 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

164. See *supra* notes 19–28 and accompanying text.

165. If there are circuits that do not regularly schedule oral argument sessions during the summer months, then the Circuit Riding Act of 2007 would require them to annually schedule at least a single panel of the court of appeals during the months of July, August, or September, which is at most a minor imposition.

166. The payment of additional compensation to the Justices avoids any serious argument that Congress has unconstitutionally diminished the Justices' salaries, even though any such argument would likely be doomed to failure anyway. The Constitution, by its terms, does not require that federal judges receive supplementary compensation for additional duties or work, only that their salaries not be *diminished* during their continuance in office. See U.S. CONST. art. III, § 1 (providing that federal judges “shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”); Stras & Scott, *supra* note 12, at 1419–21.

order of the Supreme Court. The Chief Justice may make such allotments in vacation. A Justice may be assigned to more than one circuit, and two or more Justices may be assigned to the same circuit.¹⁶⁷

(b) The Chief Justice of the United States and the associate Justices of the Supreme Court shall participate in the work of the United States Courts of Appeals in the following manner:

(1) The Chief Justice and the associate Justices shall each participate in one or more panels of the United States Courts of Appeals for a minimum of five days each year;

(2) Justices assigned to two circuits pursuant to this section shall spend a minimum of five days sitting on each circuit to which they are assigned over every two-year period;

(3) Justices assigned to a single circuit pursuant to this section shall spend a minimum of five days sitting on the circuit to which they are assigned and a minimum of five days on another circuit over every two-year period;

(4) These duties may be performed at any time between July 1 and October 1 of each year, as agreed to by each Justice and respective circuit;

(5) In no circumstance shall a Justice sit with the same judge for more than five days in any two-year period;

(6) No more than one Justice may sit on a panel in order to fulfill the requirements of this section;

(7) The Justices are ineligible to vote on or participate in an en banc rehearing of any case decided by the Courts of Appeals, but are eligible to vote for

167. Subsection (a) mirrors the language of the current 28 U.S.C. § 42. The remainder of the Circuit Riding Act of 2007 is new and thus would require legislative action. Supreme Court Rules 21 and 22 govern the in-chambers practices of the Supreme Court with respect to motions and stay applications, including the duties of Circuit Justices. SUP. CT. R. 21, 22.

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panel rehearing if they were a member of the original panel that heard the case;

(8) Participation by the Justices through video arguments or teleconferencing shall not fulfill the requirements of this section.

(c) The chief judge of each circuit shall be responsible for scheduling cases and panels so that the Justices may fulfill the requirements of this section.

(d) Provision shall be made for payment of reasonable travel, lodging, and other expenses incurred by the Justices in fulfilling the requirements of this section.

(e) The annual salaries of the Justices shall be adjusted to provide \$3000 in additional compensation for each day a Justice sits on a panel of the United States Court of Appeals.

C. THE UNIQUE ADVANTAGES OF THE CIRCUIT RIDING ACT OF 2007

A modern circuit riding proposal must consider both the individual competencies of members of the Court and the strengths and limitations of the courts that would host the Justices. Calabresi and Presser would require Justices to spend four weeks per year conducting trials and performing the work of a district judge.¹⁶⁸ While the Justices would no doubt benefit from the experience of serving as trial judges, the modern realities and demands of litigation render that proposal impractical. By contrast, the Circuit Riding Act of 2007 is closely tailored to the strengths of the Justices and the competencies of the circuit courts by focusing the Justices' efforts on the familiar demands of appellate adjudication rather than the vagaries of trial litigation.

The role of a federal district judge today differs dramatically from the days when Justices rode circuit. During the eighteenth and nineteenth centuries in particular, litigation in federal courts centered around a "trial-based procedure" in which the district judge or circuit judge (of the old circuit courts) served as an impartial adjudicator of disputes.¹⁶⁹ In

168. See Calabresi & Presser, *supra* note 17, at 1388–89.

169. Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WISC. L. REV. 631, 639; see also Paul D. Carrington, *A New Con-*

criminal cases, for example, jurors might sit “for not one but a whole series of trials” and most trials were “over within a day,” with many ending even “within an hour.”¹⁷⁰ Today, by contrast, the median time from filing to final judgment in a criminal case is fourteen months when a defendant receives a jury trial.¹⁷¹

The nature of federal litigation on the civil side has also changed dramatically in recent years, particularly since the promulgation of the Federal Rules of Civil Procedure in 1938. The Rules “interposed a number of new steps between the commencement of litigation and trial, each of which could yield a judicial ruling and thus require judicial time.”¹⁷² Federal district judges are now required to assume a “managerial” role in the conduct of civil litigation,¹⁷³ in which the pretrial process rather than the trial itself is the “main event.”¹⁷⁴ These pretrial tasks, comprising a significant part of the civil work of district judges, include “ruling on discovery disputes, deciding joinder issues, conducting pretrial and settlement conferences, and . . . punishing lawyers for misbehavior.”¹⁷⁵ After the plaintiff files a complaint, the defendant may file a motion to dismiss or for a change of venue, and then the parties may conduct discovery that can last for months or even years.¹⁷⁶ At the conclusion of the discovery phase, one or both parties may file a motion for summary judgment, and then it may be months before a trial commences. In the twelve-month period ending September 30,

federacy? Disunionism in the Federal Courts, 45 DUKE L.J. 929, 932–44 (1996) (examining the changing role of federal district courts from the nineteenth to the twentieth century).

170. Lawrence M. Friedman, *The Day Before Trials Vanished*, 1 J. EMPIRICAL LEGAL STUD. 689, 692 (2004). Friedman’s study contained many generalizations about litigation prior to the twentieth century and did not distinguish between federal and state trials.

171. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 255 tbl.D6 (2005), <http://www.uscourts.gov/judbus2005/appendices/d6.pdf>. For cases ending in dismissal the median is 6.2 months, while the median duration of a bench trial is approximately 7.3 months. *See id.*

172. Yeazell, *supra* note 169, at 639.

173. *See* Judith Resnick, *Managerial Judges*, 96 HARV. L. REV. 376, 378–79 (1982) (arguing that the Federal Rules of Civil Procedure have shifted the role of judges from adjudicators to managers of litigation).

174. Judith Resnick, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937 (2000).

175. Yeazell, *supra* note 169, at 639.

176. *See, e.g.*, Judith Resnick, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 511 (1986) (noting that, although not typical, some cases take months to complete discovery).

2005, civil cases concluding before trial usually took around thirteen months from the time of filing.¹⁷⁷ Civil cases that reached trial took even longer—approximately twenty-two months from the date of filing until final judgment.¹⁷⁸

For both criminal and civil cases, the district courts would have difficulty accommodating Justices for a finite period of only four weeks each year.¹⁷⁹ Even if it is unnecessary for the Justices to manage a case from beginning to end, there are few activities (other than a trial) that would provide meaningful experience for the Justices over such a brief period. Moreover, because of the increased emphasis on managing a case from the beginning, Justices would be at a significant disadvantage if they were asked to conduct a trial without being involved in the pretrial process.¹⁸⁰ And even the comparatively simple task of sentencing criminal defendants requires some familiarity with the factual context of each case, which is often gained through a judge's participation in the guilt phase of a trial. The lag between the guilt and sentencing phases of many criminal trials would make even this routine assignment difficult for circuit-

177. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, *supra* note 171, at 188 tbl.C5.

178. *See id.* In 1963, by contrast, the median interval between filing and final judgment in a civil trial was just sixteen months. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 480–81 fig.13 (2004).

179. As a result, it is far too simplistic to argue that Justices today can conduct trials because “famous Justices from John Marshall to Stephen Field rode circuit and tried cases.” Calabresi & Presser, *supra* note 17, at 1408.

180. Indeed, the Court has made a similar point regarding its role in the trial of cases under the Court's original jurisdiction: “This Court is . . . structured to perform as an appellate tribunal, ill-equipped for the task of fact-finding and so forced, in original cases, awkwardly to play the role of fact finder without actually presiding over the introduction of evidence.” *Ohio v. Wyandotte Chem. Corp.*, 401 U.S. 493, 498 (1971).

To be sure, then-Justice William Rehnquist presided over a federal trial in Richmond, Virginia, in 1984, and the district court appeared to have no problem accommodating his presence. *See* Aaron Epstein, *Cameras to Capture the Elusive Rehnquist*, N.J. RECORD, Jan. 7, 1999, at A8. In an interesting turn of events, however, the Fourth Circuit later reversed Justice Rehnquist's decision to permit the case to go forward to trial. *See Chief Justice's Other Trial Was Overturned*, TULSA WORLD, Jan. 2, 1999, at A14. It is unclear the extent to which Rehnquist's unfamiliarity with the background of the case made the task more difficult for him, and whether such unfamiliarity contributed to the case's reversal in the Fourth Circuit. It bears mentioning, however, that few modern Justices have presided over trials. *See* Calabresi & Presser, *supra* note 17, at 1406.

riding Justices.¹⁸¹ Put simply, it would be extremely difficult, perhaps even an outright waste of judicial resources, for district courts to isolate and assign discrete aspects of civil and criminal cases to the Justices, and such an approach is unlikely to result in much meaningful experience for the Justices.¹⁸²

In contrast to the district courts, the federal circuit courts can readily accommodate the participation of Supreme Court Justices. In most cases before the courts of appeals, the factual record has been fully developed and the legal issues have been considerably narrowed. Moreover, appeals are ordinarily more predictable than trials, as oral arguments are often scheduled weeks or months in advance, the parties are usually not able to alter the hearing date through strategic maneuvering, and the record and briefs are available to members of the panel prior to the hearing. In addition, Justices would be able to prepare in advance by reviewing the briefs, record, and any applicable federal and state cases. Prior to oral argument, the Justices can even discuss the issues in a particular case, if necessary, with other members of the panel through electronic mail, letters, or telephone calls. Moreover, by conversing with other members of appellate panels, the Justices would encounter a greater variety of viewpoints and personalities than they would by performing their work alone in the district courts as Calabresi and Presser propose.¹⁸³

181. See Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 1004–05 n.188 (2003) (noting that in the federal courts the preparation of pre-sentence investigation reports results in the sentencing hearing “tak[ing] place several weeks or even months after the verdict or guilty plea”). Of course, a criminal case that ends in a plea agreement would likely allow the Justices sufficient time to participate in the sentencing of a defendant. However, such a truncated process is unlikely to result in the type of meaningful trial experience advocated by Calabresi and Presser.

182. A circuit riding plan requiring the Justices to handle just a few cases each year, but not setting a finite time limit for their participation in the work of the district courts, would avoid many of the problems associated with Calabresi and Presser’s plan. An open-ended proposal lacking firm time limits, however, would likely have the unfortunate consequence of interfering with the Justices’ work obligations on the Supreme Court as their circuit riding duties would linger into the Court’s Term.

183. Indeed, the jurisdiction of the old circuit courts included appeals from the decisions of district courts in certain types of cases. See *supra* notes 23–24 and accompanying text. Moreover, one of the benefits of the early circuit riding system was that the Justices were exposed to district court judges while sitting on three-judge panels. See *supra* notes 26–28 and accompanying text. The Circuit Riding Act of 2007 would further emphasize that advantage by having the Justices sit with *two* lower court judges on each panel, rather than just one district judge as required under the Judiciary Act of 1789.

The work that often lingers after a hearing before the courts of appeals—such as the drafting of opinions and substantive discussions among members of a panel—would be unlikely to interfere with the Justices' obligations to the Supreme Court. Most of the interaction among members of an appellate panel occurs immediately after oral argument when the judges decide the outcome of the cases during conference, and any subsequent communications are often in the form of electronic mail, including circulated draft opinions. Unlike trial work, performing the functions of a circuit judge would not require the Justices to maintain a physical presence, other than during the hearings. Accordingly, there is no reason to believe that the Justices would not be able to participate fully in the work of the courts of appeals while simultaneously discharging their duties to the Supreme Court.¹⁸⁴

In addition to the aforementioned issues of institutional competency, the Justices are also not particularly well-suited for trial court work either. Of the present members of the Supreme Court, only Justice Souter has any experience as a trial judge,¹⁸⁵ and none has experience as a federal district judge. In addition, only Justice Alito has spent any appreciable time as a federal prosecutor, and it not clear whether any of the other Justices tried cases during their pre-judicial careers. Moreover, senior Justices such as Sandra Day O'Connor have overwhelmingly elected to participate in panels of the U.S. courts of appeals rather than sit as district judges.¹⁸⁶ In sum, the Justices'

184. Although it is a minor point, the courts of appeals are also better equipped than the district courts to accommodate the Justices' physical presence. Most appellate courtrooms have at least three seats on the bench, with some having more to accommodate an en banc argument. Indeed, senior Justices have regularly sat by designation on the courts of appeals without much difficulty. In contrast, trial work would require either the temporary use of an empty courtroom or for one of the existing district court judges to temporarily abandon or share his courtroom. It is also possible that the Justices' participation in the work of the district courts would require the hiring of additional (or at least the sharing of) court personnel, such as marshals, court reporters, and courtroom deputies.

185. Justice Souter spent five years as a New Hampshire Superior Court judge prior to becoming a Justice of the New Hampshire Supreme Court. See 5 THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS 1809 (Leon Friedman & Fred L. Israel eds., 1997).

186. For example, Lexis searches of the judicial activities of three senior Justices revealed that they sat exclusively on the courts of appeals. The search dates were taken from the date of each Justice's retirement until their death (and until April 17, 2007 in the case of Justice O'Connor). The search terms were JUDGES (full name of the judge including middle initial). The results

pre-judicial careers and post-retirement activities do not suggest that they would be comfortable or competent to perform the work of district judges.

Calabresi and Presser argue, however, that one of the primary advantages of their proposal is that the Justices would acquire new skills by learning “more about how trial courts actually work and about what is happening on the front lines of our court system.”¹⁸⁷ While I share Calabresi and Presser’s view that the Justices should become more knowledgeable about the trial process, I remain unconvinced that spending four weeks a year as a district judge is the only means of achieving that objective. Unlike the certiorari process before the Supreme Court, the courts of appeals exercise mandatory appellate jurisdiction over a wide range of cases and issues, many of which would expose the Justices to the nuances of trial practice. For instance, deciding cases involving whether a district court’s grant of summary judgment is appropriate, whether a sentence for a criminal defendant is reasonable, or whether a district court abuses its discretion in the admission of evidence, all of which are issues that the Supreme Court generally ignores,¹⁸⁸ would educate the Justices about the issues facing the district courts without placing them in the awkward position of performing tasks for which they are arguably unqualified.¹⁸⁹ Indeed, as Judge Posner has observed, “[t]he position of a court of appeals judge provides a good vantage point for evaluating the work of district judges.”¹⁹⁰ Accord-

were as follows: Justice O’Connor has sat on a total of fifteen cases in the Second, Eighth, and Ninth Circuits since her retirement on January 31, 2006; Justice Byron White sat on a total of seventy-four cases in the Fifth, Eighth, Ninth, and Tenth circuits between June 28, 1993, and April 15, 2002; Justice Tom Clark sat on 338 cases in several circuits between June 12, 1967, and June 13, 1977. The searches turned up no instances of a Justice sitting as a district judge.

187. Calabresi & Presser, *supra* note 17, at 1408.

188. These types of cases, unless the lower court misstates or incorrectly decides an issue of law, tend to be denied because they involve “erroneous factual findings or the misapplication of a properly stated rule of law.” *See* SUP. CT. R. 10.

189. I also question whether four weeks per year is sufficient time for the Justices to become fully acquainted with the trial process. Because most cases before the district courts last for months or even years, circuit-riding Justices would manage only discrete aspects of a case, and then only for a month each year. *See supra* notes 169–82 and accompanying text. Mastering the myriad of tasks that the district courts face, however, can take months or even years of experience. *See* Resnick, *supra* note 173, at 391–413.

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ingly, considerations of institutional and individual competency favor a proposal, such as the Circuit Riding Act of 2007, requiring the Justices to spend one week per year participating in the work of the U.S. courts of appeals rather than performing the unfamiliar duties of a district judge.

D. POTENTIAL OBJECTIONS TO THE CIRCUIT RIDING ACT OF 2007

Despite the numerous advantages from a renewal of circuit riding, skeptics of the Circuit Riding Act of 2007 could raise a number of potential objections. First, although the constitutionality of circuit riding has been settled for over two hundred years, the paucity of analysis from the Court in *Stuart v. Laird*¹⁹¹ could encourage litigants to renew some of the original questions about the constitutionality of the practice. Second, as with earlier attacks on the circuit riding, some may argue that its renewal would take the Justices away from their substantial Court obligations and render it more difficult for them to keep up with the demands of their offices. Third, skeptics may argue that the advantages discussed in Parts II.A and II.C are largely illusory, or point to insurmountable political barriers in reinstating a modern form of circuit riding.

As discussed above, circuit riding raises a number of interesting constitutional questions that the Court considered and ultimately rejected in *Stuart*. Although none of the arguments were specifically addressed in any detail, the Court concluded that “acquiescence” and “practice” under the circuit riding system for a number of years had fixed its constitutionality.¹⁹² The Circuit Riding Act of 2007 arguably implicates two of the constitutional objections raised by the parties in *Stuart*.

Litigants may first argue that having the Justices sit on the courts of appeals for even one week per year violates the Appointments Clause because the new duties would be inconsistent with their appointment as Justices of the Supreme Court. Under the Supreme Court’s prevailing case law, Congress may add duties to an office, but those new duties must be germane.¹⁹³ As I have explained previously, even the onerous form of circuit riding practiced at the end of the eighteenth cen-

336 (1996).

191. 5 U.S. (1 Cranch) 299 (1803).

192. See *id.* at 305.

193. See *Weiss v. United States*, 510 U.S. 163, 174–75 (1994) (applying a germaneness standard to an Appointments Clause challenge to military officers sitting as military judges).

ture was constitutional because it added only germane judicial duties to the office of a Supreme Court Justice.¹⁹⁴ The Circuit Riding Act of 2007 would require the Justices to spend only one week per year sitting on panels of the courts of appeals, which is far less burdensome than the months of circuit riding that were required by the Judiciary Act of 1789. Moreover, requiring Justices to sit on the lower federal courts is a classic example of downward designation, which is the least constitutionally problematic form of judicial designation.¹⁹⁵ Thus, to find the Circuit Riding Act of 2007 unconstitutional arguably would draw into doubt the ability of a federal judge at any level of the judicial hierarchy to sit by designation (upward, lateral, or downward) on any other lower federal court, a longstanding practice that has become an integral tool in coping with the mounting workloads in the lower federal courts.¹⁹⁶ Finally, the *character* of the added duties—judicial work in the lower federal courts¹⁹⁷—is surely germane for many of the reasons discussed in this Article, most notably the exposure that the Justices would receive to areas of federal law that are largely neglected on the Supreme Court’s plenary docket.¹⁹⁸

194. See Stras & Scott, *supra* note 12, at 1408, 1416–17.

195. See *id.* at 1417–18.

196. See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Continuing Experiment in Specialization*, 54 CASE W. RES. L. REV. 769, 795 (2004) (listing the thousands of cases decided by each circuit from 1982 to 2004 that involved a judge sitting by designation); Richard B. Saphire & Michael E. Solimine, *Diluting Justice on Appeal?: An Examination of the Use of District Court Judges Sitting by Designation on the United States Courts of Appeals*, 28 U. MICH. J.L. REFORM 351, 359–63 (1995) (examining the widespread use of district court judges sitting by designation on the courts of appeals as a result of increased caseloads).

If hearing cases on the lower federal courts is nongermane to the office of a Supreme Court Justice, then arguably any federal judge who sits on a court to which she was not appointed would be participating in a violation of the Appointments Clause. See U.S. CONST. art. II, § 2. The counterargument, of course, is that the “supreme Court” is specifically referred to in the Constitution, while all other federal courts are mentioned only under the “one-size fits all” category of the “inferior Courts.” See U.S. CONST. art. I, § 9; *id.* art. III, § 1. A corollary of that argument is that Justices of the Supreme Court occupy distinct offices from judges of the inferior courts. See Stras & Scott, *supra* note 12, at 1409–10. Consequently, striking down the power of Supreme Court Justices to sit on the lower courts would have only indirect bearing on the interchangeability of federal judges at other levels of the judicial hierarchy. Resolution of this difficult question, however, is beyond the scope of this Article and merits a separate discussion of its own.

197. Stras & Scott, *supra* note 12, at 1416 n.98.

198. See *supra* notes 151–54 and accompanying text for a discussion of sentencing, procedural, and evidentiary issues.

A second, more troublesome argument is that litigants who appear before a panel with a Supreme Court Justice may later be deprived of nine unbiased Justices in a hearing before the Supreme Court.¹⁹⁹ During the early years of circuit riding, Attorney General Edmund Randolph raised this issue as an important cost of circuit riding.²⁰⁰ Two outcomes are possible if such a case is placed on the plenary docket of the Supreme Court: (1) an arguably biased Justice hears the case if she refuses to recuse herself; or (2) the affected Justice recuses herself, but leaves the Court with only eight qualified members to hear the case. While the latter option removes any specter of bias,²⁰¹ it does raise the possibility that a greater number of cases could be affirmed by an equally divided Court, in which the Court affirms the lower court decision in a one- or two-line per curiam opinion.²⁰² Cases affirmed by an equally divided court tend to waste the Court's time and resources and leave the lower courts in continued disarray with respect to the issues over which the Court granted certiorari.²⁰³

The probability is remote, however, that a renewal of circuit riding would cause the Court to suddenly face a large num-

199. A closely related issue is whether the members of an appellate panel would be more deferential to the views of a sitting Supreme Court Justice, giving the circuit riding Justice too much influence over the decisions reached by the panel. *See, e.g.*, Sara C. Benesh, *The Contribution of "Extra" Judges*, 48 ARIZ. L. REV. 301, 306 (2006) (discussing small group theory, in which "status in the group matters to decisionmaking and that 'the individual who feels inferior and needs approval will, in the group context, behave in a conforming manner'" (quoting S. SIDNEY ULMER, COURTS AS SMALL AND NOT SO SMALL GROUPS 13 (1971))). It is unclear, however, how the presence of a Supreme Court Justice would affect the behavioral dynamics of an appellate panel because, in the usual circumstance, a judge sitting by designation on a court of appeals is either from an equivalent or lower level of the federal judicial hierarchy. *See id.* at 306–07.

200. *See* Edmund Randolph, Report of the Attorney General to the House of Representatives (Dec. 27, 1790), in 1 AMERICAN STATE PAPERS: MISCELLANEOUS 23 (Walter Lowrie & Walter S. Franklin eds., 1834).

201. Although the decisions of the Justices on recusal issues were far from uniform under the old circuit riding system, many did eventually recuse themselves from consideration of cases that they heard before the circuit courts. *See* Stras & Scott, *supra* note 12, at 1416 n.97. Indeed, Chief Justice Marshall recused himself from the Court's consideration of *Stuart v. Laird* for that very reason. *Id.*; *see also* *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 308 (1803).

202. *See, e.g.*, *Borden Ranch P'ship v. U.S. Army Corps of Eng'rs*, 537 U.S. 99 (2002); *Free v. Abbott Labs.*, 529 U.S. 333 (2000); *Cal. Pub. Employees' Ret. Sys. v. Felzen*, 525 U.S. 315 (1999).

203. *See* Ryan Black & Lee Epstein, *Recusals and the "Problem" of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 82–83 (2005).

ber of cases in which the outcome would be decided by an equally divided Court. As an initial matter, the courts of appeals have terminated on the merits between 27,000 and 30,000 cases during each year between 2000 and 2005.²⁰⁴ Many of those cases were undoubtedly decided by screening panels or some other similar mechanism. However, over the past six years, the number of cases receiving an oral argument before the courts of appeals (excluding the Federal Circuit) has ranged from a low of 8645 cases in 2004 to 9752 cases in 2000.²⁰⁵ Of those cases, the Supreme Court grants plenary consideration to about seventy-six to eighty cases per year, or roughly 0.9% of the cases receiving a full hearing before the courts of appeals.²⁰⁶ If the Justices ride circuit for one week each year, they will in total have participated in approximately 225 lower court decisions, assuming that each panel hears about five cases per day.²⁰⁷ That figure is so small that it is unlikely that more than a handful of cases raising recusal questions will appear on the Court's plenary docket each Term.²⁰⁸ Of that handful of cases, an even smaller percentage would result in an equally divided Court.²⁰⁹ As Ryan Black and Lee Epstein have observed, "equally divided cases are relatively rare occurrences."²¹⁰ Of the 1,319 cases in which an equally divided court was a possibility during the 1946 to 2003 Terms, the Court was deadlocked in

204. See U.S. COURT OF APPEALS, JUDICIAL CASELOAD PROFILE, <http://www.uscourts.gov/cgi-bin/cmsa2005.pl> (last visited Apr. 22, 2007).

205. See *id.*

206. The Supreme Court issued an average of eighty "opinions of the court" between 2001 and 2005. These statistics were obtained from the Harvard Law Review's annual "The Statistics" section. See *The Statistics*, 120 HARV. L. REV. 372, 380 (2006).

207. Most, if not all, of the circuits assign the cases heard by panels in a random fashion. See, e.g., Emily Bazelon, *Agree to Disagree*, WASH. MONTHLY, Sept. 2003, at 56, 57; Dov B. Fischer, *Short-Circuiting Justice*, WKLY. STANDARD, May 27, 2002, at 15, 16. Accordingly, the cases heard by the Justices are unlikely to be either more difficult or have greater saliency (except by random chance) than those heard by other panels of a circuit.

208. In fact, assuming a 0.9% rate of plenary review by the Supreme Court for cases receiving a full hearing before the courts of appeals, approximately two additional Supreme Court cases per Term (or 0.9% multiplied by 225 cases) would involve a recusal issue.

209. Based on the historical numbers calculated by Black and Epstein, the Circuit Riding Act of 2007 can be expected to produce an additional case involving an equally divided Court about once every seven years. See Black & Epstein, *supra* note 203, at 86–94.

210. *Id.* at 85. Black and Epstein also found that the data "run contrary to [the] common belief" that discretionary recusals "lead to an appreciable increase in . . . plurality opinions." *Id.* at 94.

only seventy-four cases, or in about six percent of the cases in which a tie was possible.²¹¹ Based on these statistics, it appears unlikely that the Circuit Riding Act of 2007 would result in a materially greater number of cases in which the outcome of a case would be decided by an equally divided Court.

Skeptics may further argue that the advantages of the Circuit Riding Act of 2007 are largely illusory because all of the current Justices previously served on a U.S. court of appeals.²¹² Indeed, in light of the failed nomination of Harriet Miers in 2005, it appears that prior circuit court experience is an increasingly important, perhaps even essential, credential for Supreme Court nominees.²¹³ But prior judicial experience by no means eliminates the need for circuit riding. To the contrary, each of the Justices would benefit from regular exposure to different courts and judges, as well as to the types of cases commonly heard by the courts of appeals—call it continuing legal education (CLE) for Supreme Court Justices.²¹⁴ As stated above, the Supreme Court's plenary docket is highly limited, in terms of both the number and types of cases, and does not include cases involving highly factbound issues, pure questions of state law, or interpretation of the Sentencing Guidelines, all of

211. *Id.* at 85–86. As the authors point out, the percentages were slightly higher for the Rehnquist Court, in which the Court deadlocked in about 8.11% of the cases in which a tie was possible. *Id.* at 86.

Although they do not answer the question, Epstein and Black float a number of possible reasons for the surprisingly low number of cases decided by an equally divided Court. One possibility is that one or more Justices may change their votes for institutional reasons so as to avoid the negative consequences flowing from a decision made by an equally divided Court. *See id.* at 96. Another possibility is purely strategic: a Justice might “cast a ‘sophisticated’ vote (in an apparent four-to-four case) to avoid a future decision that may be even more distant from her policy preferences,” as questions left undecided by an evenly divided Court increase the temptation in the next case to renew the battle all over again. *Id.* It is also possible that the Justices refuse to recuse themselves in cases in which they think a split Court might result. *See id.*

212. *See, e.g.*, U.S. SUPREME COURT, THE JUSTICES OF THE SUPREME COURT, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Apr. 22, 2007).

213. *See* INVESTOR'S BUS. DAILY, Jan. 5, 2007, at A2; *Politics This Week*, ECONOMIST, Oct. 29, 2005, at 85.

214. Unlike for other active federal judges, there appears to be no statutory authorization for the Chief Justice to designate *active* Supreme Court Justices to sit by designation on the lower federal courts. *See* 28 U.S.C. § 291 (2000) (circuit judges); 28 U.S.C. § 292 (2000) (district judges); 28 U.S.C. § 294 (2000) (retired Supreme Court Justices, circuit judges, and district judges).

which are staples on the dockets of the lower federal courts.²¹⁵ And, of course, the current Justices, nearly all of whom have not sat by designation on a lower federal court, have not grappled with the application of binding Supreme Court opinions in cases that they themselves had a hand in crafting. Furthermore, three of the Justices, Chief Justice Roberts, Justice Souter, and Justice Thomas, enjoyed tenures on the courts of appeals of less than three years, while two others, Justice Stevens and Justice Scalia, have not sat on a lower federal court in more than twenty years.²¹⁶ Those five, because of their abbreviated or dated service to the circuit courts, would likely gain the most from circuit riding.

Still others may argue that increasing the Supreme Court's plenary docket is a more pressing workload concern. As I have noted previously, the Supreme Court's plenary docket has declined sharply over the past two decades, from a high of 153 signed opinions in 1986 to just seventy-four signed opinions in both the 2002 and 2003 Terms.²¹⁷ I agree that the Supreme Court should hear additional cases, and I propose elsewhere a certification procedure that is aimed at accomplishing that objective.²¹⁸ But many of the benefits of circuit riding are exclusive. For example, it is unlikely that increasing the size of the Supreme Court's plenary docket would result in the Justices hearing a greater number of cases involving state law or the Sentencing Guidelines, and it certainly would not provide them with greater exposure to other judges, courts, and communities.²¹⁹ Moreover, with at least four law clerks allotted to every Justice and the presence of numerous support staff at the Supreme Court, there is no reason to believe that Justices cannot handle both a larger plenary docket and the limited, additional circuit duties proposed in the Circuit Riding Act of 2007.²²⁰

215. See *supra* notes 148–54 and accompanying text.

216. See, e.g., U.S. SUPREME COURT, *supra* note 212.

217. See Stras, *supra* note 133, at 21–22.

218. See David R. Stras, *Opening the Doors to the Supreme Court: A Solution to the Declining Plenary Docket* (unpublished manuscript, on file with author).

219. See *supra* Part II.A.

220. It can be argued that the workload of today's Supreme Court is much lighter than during the middle to end of the nineteenth century. During the 1850s, the Court issued an average of 86.1 signed opinions per Term, slightly larger than the output of the current Court, and that number nearly quadrupled to an average of 265.7 signed opinions per Term in the 1880s. See EPSTEIN ET AL., *supra* note 13, at 232–36 tbl.3-3. Moreover, until the 1880s, none of the Justices had law clerks, and the Justices regularly rode circuit for sev-

A closely related objection is that a renewal of circuit riding could exact non-trivial opportunity costs on the Justices, including interfering with their ability to complete their obligations to the Supreme Court. Perhaps circuit riding would also limit the other public appearances of the Justices, such as visits to law schools to give speeches or to judge moot court competitions. If the Justices were currently spending their summers laboring over the Court's business or visiting law schools, then this objection would hold substantial weight. However, as Calabresi and Presser point out, some Justices like Anthony Kennedy "spend their summers abroad in Europe,"²²¹ while others such as John Paul Stevens have "plenty of time to engage in leisurely activities" during the summer months.²²² Even then-attorney and now-Chief Justice John Roberts has weighed in on the matter, stating in a memorandum that "it is true that only Supreme Court Justices and schoolchildren are expected to and do take the entire summer off."²²³

While the Circuit Riding Act of 2007 would require Justices to spend only a single week in residence with the courts of appeals, it is true that their responsibilities under the Act could span a longer period. The Justices would presumably wish to review the briefs prior to oral argument (although the level of preparation would vary by Justice), and the completion of opinion assignments from each sitting would require substantial additional work. But the burdens for the Justices in carrying out the duties required by the Act are related—even necessary—to reaping the advantages from circuit riding discussed in Part II.A, such as having the Justices grapple with unfamiliar legal issues and interact with new sets of judges with differing viewpoints and experiences.²²⁴ Even so, it is difficult to imagine that the duties required by the Circuit Riding Act of

eral months each year under difficult conditions. *See* Stras, *supra* note 133, at 950–51. Even with the massive increase in the number of petitions for certiorari in recent years, it would be difficult to say that today's Justices work harder than the Justices who served during the last half of the nineteenth century.

221. Calabresi & Presser, *supra* note 17, at 1387.

222. *See id.* at 1414.

223. Jesse J. Holland, *Roberts: Use Care with Religion*, CHARLOTTE OBSERVER, Aug. 20, 2005, at A17, available at 2005 WLNR 13109076.

224. *See supra* notes 138–55 and accompanying text. Moreover, the amount of work for each of the Justices would depend in large part on the amount of work each delegates to her clerks, which varies widely by chambers. *See* Stras, *supra* note 133, at 6, 17–18.

2007 would eliminate more than half of the Justices' lengthy summer vacations, and often much less, leaving them ample time for their other leisurely pursuits.

Finally, although not technically a policy objection, skeptics may argue that passage of the Circuit Riding Act of 2007 is unrealistic because there is no movement afoot to reform the Supreme Court. An excellent example of this difficulty is the history of circuit riding itself, because it took nearly 120 years, numerous proposals from Congress, and constant complaints from the Justices to abolish it. Although the legal academy has become increasingly interested in exploring institutional reform of the Supreme Court, as reflected by two prominent academic conferences over the past two years,²²⁵ I am presently unaware of any proposals in Congress advocating major institutional change. It is unlikely that any members of Congress were elected solely on promises to reform the Supreme Court, or that such reform is high on their list of legislative goals. Nonetheless, a renewal of circuit riding is a far less objectionable reform measure than other recent proposals that have received extensive media coverage, such as a constitutional amendment proposing term limits for Supreme Court Justices²²⁶ and wide-reaching jurisdiction-stripping legislation.²²⁷

225. Professors Paul Carrington and Roger Cramton sponsored a conference at Duke University Law School in 2005 that resulted in a collection of essays published by Carolina Academic Press. *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* (Paul D. Carrington & Roger C. Cramton eds., 2005). In addition, the Minnesota Law Review sponsored a symposium in October 2005 entitled, "The Future of the Supreme Court: Institutional Reform and Beyond," in which ten leading scholars discussed the prospects for institutional reform of the Supreme Court. See David R. Stras & Karla Vehrs, *Foreword: The Future of the Supreme Court: Institutional Reform and Beyond*, 90 MINN. L. REV. 1147, 1148–53 (2006).

226. See, e.g., Steve Forbes, *Fact and Comment*, FORBES, Feb. 13, 2006, at 29; Fred Graham, *In Need of Review: Life Tenure on the U.S. Supreme Court*, USA TODAY, Jan. 16, 2006, at 11A; Linda Greenhouse, *How Long is Too Long for the Court's Justices?*, N.Y. TIMES, Jan. 16, 2005, at 45.

227. See Calabresi & Presser, *supra* note 17, at 1416 ("Reinstituting circuit riding is far less controversial than passing jurisdiction-stripping bills . . ."); Butch Mabin, *Ginsburg: Federal Judiciary's Historic Role Under Siege*, LINCOLN J. STAR, Apr. 8, 2006, at B1, available at 2006 WLNR 6166709 (quoting Justice Ginsburg as saying that jurisdiction-stripping bills have failed because "[i]t is easier to block enactment of a bill than to get a bill enacted"); *Rule of Law in U.S. Requires an Independent Judiciary*, TELEGRAPH (Macon, Ga.), Oct. 1, 2006, available at 2006 WLNR 170002395 ("Bills have been filed in Congress involving 'jurisdiction stripping' on other subjects—for instance, eliminating the court's ability to rule on such issues as the wording of the Pledge of Allegiance or the public display of the Ten Commandments.").

With the academy's recent interest in the Supreme Court as an institution, it is my hope that a greater number of proposals for institutional change will be generated, and that pressure will mount to have a real debate in Congress about the future of the Supreme Court and the federal judiciary.

CONCLUSION

Circuit riding for Supreme Court Justices is as old as the federal judiciary itself and has a storied history that spans this country's first 120 years. Yet little academic commentary exists on it, and only one other scholarly piece has explored its renewal. With the size of the Supreme Court's plenary docket falling in recent years to levels not seen since the mid-1800s, it is time to consider the reintroduction of circuit riding. As this Article suggests, there are numerous benefits to the general public, the Court, and particularly the Justices that would result from a renewal of circuit riding. Moreover, these benefits can be attained in a reasonable and workable manner. Many of the policy objections that prompted circuit riding's abolition are no longer concerns for today's Court, and a proposal that requires Justices to perform work on the U.S. courts of appeals matches the competencies of both the Justices and the courts on which they would sit. In a time when the Court as an institution has become increasingly cloistered in Washington, D.C., a renewal of circuit riding would reverse that trend by exposing the Justices to a number of other judges, communities, and areas of the law.