



# JUDICIAL DUTY AND THE SUPREME COURT'S CULT OF CELEBRITY

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## **Judicial Duty and the Supreme Court's Cult of Celebrity**

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### **I. Introduction**

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

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nominee is *sincerely* pledging allegiance to the accepted ideal.

Nowhere was the new consensus more vividly on display than in the most recent Supreme Court confirmation hearings. Sonia Sotomayor came before the Senate with a long and fairly bland record as a circuit judge, but also with a history of extra-judicial statements suggesting both that she thinks impartiality is unachievable and that she is untroubled by that reality. When pressed at her hearings, Sotomayor repeatedly and resolutely maintained that she would never do anything except impartially apply the law to the facts, that she had no agenda of any sort, and that she would certainly not allow her policy preferences or her own values to have the slightest effect on her decisions. All of her controversial extrajudicial statements, she claimed, had been misunderstood, or were meant to convey the opposite of what she had said. In what may have been a first, she also repudiated the approach to judging that President Obama had said he was looking for in someone who deserved to be appointed.

Predictably, Republican Senators on the Judiciary Committee suspected a feigned confirmation conversion, and Democrats defended the nominee. But none of them opposed her on the ground that she was pledging allegiance to the wrong ideal. Whatever one may think about the sincerity of Sotomayor or the Senators, this performance suggests the existence of deep popular expectations about the distinction between law and politics. The law is supposed to be made by elected officials, including those who ratified the Constitution, and judges are supposed to apply the law in the cases that come before them. Where the law is unclear, judges

should do their best to determine what the lawgiver meant, and should be cautious and restrained in departing from interpretations already adopted by prior courts. What judges should never do is use the power of their office to change the law to suit their own personal notions of what the law should be.

In the legal academy, this traditional ideal is considered laughable at best and pernicious at worst. Michael Louis Seidman probably summed up the professional consensus when he said, in the midst of the Sotomayor hearings: “If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court.”<sup>1</sup> The theory underlying his view rests on two principal propositions. First, the law, and especially the Constitution, is so vague and ambiguous that it is simply not possible for judges—and especially Supreme Court Justices—to avoid relying on their own moral and political views in a wide range of cases. Second, *Marbury v. Madison*, America’s foundational judicial precedent, established a truly independent and politically powerful judiciary that is now an integral part of our nation’s policymaking apparatus.

Philip Hamburger’s *Law and Judicial Duty*, to which a panel of this symposium is devoted, argues that the traditional ideal of judging was well established for hundreds of years among very sophisticated common law judges, who were fully aware of the inherent ambiguity of

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<sup>1</sup> The Federalist Society Online Debate Series, July 19, 2009, <http://www.fed-soc.org/debates/dbtid.30/default.asp>.

law and the need for an independent judiciary.<sup>2</sup> What's more, the traditional ideal sounds a lot like what Alexander Hamilton promised in *Federalist No. 78*, where he predicted that Supreme Court Justices would be just what today's politicians say they want: scholarly types, cautious and profoundly boring, immersed in the tedium of mind-numbing precedents, and deeply self-effacing. Hamilton's predictions have proven generally accurate with respect to most judges in the lower federal courts, as Sotomayor's own record as a circuit judge suggests. But few observers would characterize today's Supreme Court Justices as heirs to the virtually unbroken tradition of judicial duty that Hamilton presupposes. Unlike their judicial subordinates—mere district and circuit judges—they are Supreme Court Justices, a semantic distinction that points to a yawning chasm, both in status and in behavior.

The recent bipartisan paeans to precedent and judicial modesty could reflect an inchoate political consensus that our Justices should behave more like traditional judges. But hectoring nominees at confirmation hearings, or lauding them for their presumed intent to follow the traditional ideal, is certain to have negligible consequences. Can anything more efficacious be done?

Recently, we have seen a flurry of proposals to eliminate life tenure for Supreme Court Justices,<sup>3</sup> a

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<sup>2</sup> For a more detailed discussion of Hamburger's argument, see Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 CONST. COMM. 169 (2009).

<sup>3</sup> For a sample of various proposals, see Roger C. Cramton and Paul C. Carrington, REFORMING THE SUPREME COURT: TERM

reform that was advocated long ago by a young John Roberts.<sup>4</sup> These proposals are motivated by the view that the Court is no longer functioning, according to its original design, as a genuinely judicial institution. Without disputing the diagnosis, we are skeptical about the proposed cure. For one thing, it would require a constitutional amendment. More significantly, however, it does not address the root of the problem, and if adopted might well merely serve as an incentive for Justices to cram a maximum amount of political activism into a shorter period of time.

Statutes are much easier to enact than constitutional amendments, and Congress could take steps to make our Court less adventurous and more respectful of both law and precedent. This Article sketches some modest measures<sup>5</sup> that would lead in that direction, if Congress were serious about curtailing the

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LIMITS FOR SUPREME COURT JUSTICES (2006); *Panel Discussion: Term Limits for Judges?*, 13 J.L. & POL. 669 (1997); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT 541 (1999); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 568-84 (1999).

<sup>4</sup> See David R. Stras and Ryan W. Scot, *Retaining Life Tenure: The Case for the Golden Parachute*, 83 WASH. U. L. REV. 1367, 1400 (2005).

<sup>5</sup> Our proposals are not modest in the Swiftian sense. For a suggestion that is somewhat more radical than ours, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999) (proposing that courts be forbidden to enforce the Constitution, and urging that it be effectively replaced with a different constitution consisting approximately of part of one paragraph from the Declaration of Independence along with selected parts of the current Constitution's Preamble).

behavior that so many Senators are pleased to condemn during confirmation proceedings. But before proposing remedies, we offer a partial account of the origin of the disease. In Part II, we explore the reasons for the rise of what we call the celebrity Justice. One engine in this development, we suggest, was Chief Justice Marshall's innovative practice of elaborately reasoned opinions for the Court signed by individual Justices. This practice has allowed and encouraged Justices to pursue personal glory through opinions that are apt to read less like the work of judges than like political manifestos or pop philosophy. In the twentieth century, moreover, a number of other developments allowed Supreme Court Justices to shed various onerous judicial responsibilities, making possible an ever more exclusive focus on the politically architectonic issues of greatest interest to themselves and to the political, journalistic, and academic elites from which they seek approval.

We then suggest some correctives aimed at creating incentives for the Supreme Court to behave more like a court, and for Supreme Court Justices to behave more like judges than like peers of the realm. In Part III, we propose that Congress enact a statute forbidding the Supreme Court to issue signed opinions. Standard practice now is for judicial opinions to be signed by the Justice who wrote the opinion, or hired the clerk who wrote it. Occasionally, the Justices revert to an older practice of issuing anonymous *per curiam* opinions. Truly unpretentious judicial servants should have no need to put their personal stamp on the law, and the practice of doing so has contributed to unnecessary and unhealthy flamboyance in the Court's work. We propose that Congress require that all Supreme Court opinions, including concurrences and dissents, be issued

anonymously. This should lead to fewer self-indulgent separate opinions, more judicious majority opinions, and more reason for future Justices to treat the resulting precedents respectfully.

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

Part V recommends that Congress take their law clerks away from the Justices. These intelligent, energetic, and intensely ambitious young people are itching to do the hard work of studying precedents and writing opinions. It should be no surprise that modern Justices have frequently assumed the more pleasant role of dictating big thoughts and deep feelings to the clerks, and editing the drafts they write. Truly old-fashioned judges would study the precedents themselves, discuss the law with their colleagues rather than with their

handpicked votaries, and write their own opinions. The Supreme Court once heard hundreds of cases each year, without law clerks to help. Today's Justices should be able to manage the few dozen with which they now seem comfortable.

In Part VI, we propose to bring back circuit riding. Through the late nineteenth century, Congress required Supreme Court Justices to serve part of their time on lower federal courts, "riding circuit" around the country. Restoring this practice would expose the Justices to the problems created by muddled Supreme Court decisions. It would also give them some on-going experience in the role of a judge whose decisions are subject to appellate review.

Without pretending to guarantee anything, and certainly without predicting that Congress will enact our proposals, we think such reforms could have a significant impact on the behavior of the Justices, making them more like the modest scholars that the *Federalist Papers* assumed we would have. Our proposed reforms might also approximate the benign effects of judicial term limits. If serving as a Supreme Court Justice were to become a full-time, non-delegable job, fewer people would insist on staying in the saddle past the time when they can even mount the horse.

## **II. From Obscure Scholar to Global Celebrity**

United States Supreme Court Justices enjoy far more power and prestige than their eighteenth century counterparts. A significant portion of this increase is due to the enormously increased power of the federal

government itself, both in absolute terms and in relation to the state governments. It would be surprising if this change were not accompanied by institutional changes in the Court, and one might therefore suppose that the most significant changes in judicial power and prestige have been inevitable concomitants of our increasingly nationalized form of governance. We doubt that things are quite so simple.

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

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

We begin by sketching the humble status of the early Supreme Court Justices, and certain institutional changes that significantly increased their power and status. We then offer a brief account of the modern Supreme Court Justices, celebrities trailed by paparazzi.

Finally, we use analytical frameworks developed by Frank Easterbrook and Richard Posner to provide a theoretical basis for the proposals sketched in the following sections of this Article.

### A. The Judges Break Their Chains

In his famous analysis in the *Federalist Papers*, Hamilton invoked Montesquieu for the proposition that the judiciary can threaten the liberties of the people only if judges are controlled by the legislature or the executive. From this it seemed to follow that judicial independence guarantees judicial harmlessness. Mocking fears of an imperial judiciary,<sup>6</sup> Hamilton assured his audience that the judiciary “may truly be said to have neither FORCE nor WILL, but merely JUDGMENT.”<sup>7</sup> The executive, Hamilton noted, controls the government’s coercive force, while the legislature commands society’s material resources and prescribes the rules to which the community is subjected. By contrast, the judiciary “has no influence over either the sword or the purse, no direction either over the strength or of the wealth of the society, and can take no active resolution whatever.”<sup>8</sup>

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

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<sup>6</sup> THE FEDERALIST No. 81, at 545-546 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

<sup>7</sup> THE FEDERALIST No. 78, at 523.

<sup>8</sup> *Id.* (emphasis added).

necessary, according to Hamilton, to induce qualified lawyers to serve.<sup>9</sup> In *Federalist No. 78* and again in *No. 81*, Hamilton used the phrase “long and laborious study” in describing the background required for a seat on the Court. The image conjured is of men (and now, of course, women as well), gray-haired and wrinkled, purged by age and arduous study of the fire that drives ambitious politicians.

From today’s perspective, it is hard to resist smiling at Hamilton’s further suggestion that the President might find it difficult to prevail upon competent lawyers to serve on this new Court. One does not imagine that a president would need to engage in much arm-twisting to persuade any law firm partner to forego a seven-figure salary in private practice to become a Supreme Court Justice. But the considerations to which Hamilton referred may not have been specious at the time. When Justice James Wilson died in 1798, President John Adams offered the position to John Marshall, who declined the position because he was unwilling to leave his successful practice in Richmond.<sup>10</sup> Even some who consented to serve soon quit the job. John Jay, for example, famously left to become an ambassador, a decision that one would expect in the twentieth century, according to Felix Frankfurter, only from “a certified madman.”<sup>11</sup>

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<sup>9</sup> *Id.* at 529-30.

<sup>10</sup> See Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. RICH. L. REV. 797, 805 n.41 (2004).

<sup>11</sup> Quoted in Theodore Ruger, *The Judicial Appointment Power of the Chief Justice*, 154 U. PA. L. REV. 1323, 1324 (2006). A few

Service on the Supreme Court over the first four decades of the republic was both physically and mentally demanding, and it enmeshed the Justices in the multi-varied intricacies of the legal system. The early Justices enjoyed neither regal accommodations nor a retinue of flunkies. The courtrooms where they worked varied from drab to uninhabitable.<sup>12</sup> Justices who served on the Marshall Court roomed together in the same boarding house on Capitol Hill over the course of their two-month term in Washington. At least from some accounts, it appears that the Justices lived, ate and breathed the law, sitting through interminable oral arguments (there were no time limits) and then debating the issues among themselves.<sup>13</sup> The Justices had no clerks, no secretaries, no librarians; and yet they were expected to issue opinions within days, or at most weeks, after oral argument.<sup>14</sup>

The work of the early Supreme Court was very different from that of its modern counterpart. Between 1789 and 1801, the Court took 87 appeals from state and

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years after Frankfurter's statement, President Johnson prevailed upon Arthur Goldberg to leave the Supreme Court and become our Ambassador to the United Nations, a decision widely regarded as among the most baffling in human history.

<sup>12</sup> See G. Edward White, *The Working Life of the Marshall Court, 1815-1835*, 70 VA. L. REV. 1, 3 (1984).

<sup>13</sup> *Id.* at 35.

<sup>14</sup> *Id.* at 30.

federal courts.<sup>15</sup> Of those, 36 arose via diversity jurisdiction (including state citizenship and alienage), 35 were admiralty cases, 9 were civil actions brought by the United States; only 7 were federal question cases brought under Section 25 of the Judiciary Act.<sup>16</sup> Most of the cases coming before the Court during these years were mundane matters, often involving issues of state law.<sup>17</sup> Although the early Court did hear some cases of wide significance, it typically found itself resolving narrow, commercial matters. This continued for some time, leading one commentator to observe that even under Chief Justice Marshall, the Court’s “docket consisted largely of private disputes, and many—at times most—of the cases it decided were ‘a mass of humdrum litigation’ with little impact beyond the individual litigants.”<sup>18</sup>

Also importantly contributing to the Justices’ exposure to a variety of legal issues was the practice of circuit riding, which consumed about two months each year.<sup>19</sup> Circuit riding was an integral part of a Justice’s job description, for courts of appeals consisted of two

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<sup>15</sup> See Julius Goebel, Jr., *Antecedents and Beginnings to 1801*, in I THE OLIVER WENDELL HOLMES DEVISE HISTORY OF THE SUPREME COURT OF THE UNITED STATES 663, 665 (Paul A. Freund ed., 1971).

<sup>16</sup> *Id.* at 803 (Appendix, Table II).

<sup>17</sup> *Id.* at 804 (Table III).

<sup>18</sup> Laura Krugman Ray, *Lives of the Justices: Supreme Court Autobiographies*, 37 CONN. L. REV. 233, 234 (2004).

<sup>19</sup> See Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1797-98 (2003).

Supreme Court Justices and one district judge.<sup>20</sup> In addition to appellate responsibilities, Justices riding circuit also held trials and instructed grand juries.<sup>21</sup> Members of the first Congress argued that one of the benefits of circuit riding was to expose the Justices to the day-to-day legal issues confronted by ordinary Americans. Roger Sherman, for example, wrote that Justices “can acquire a knowledge of the rights of the people of these States much better by riding the circuit, than by Staying at home and reading British and other foreign Laws.”<sup>22</sup>

Supreme Court Justices complained almost immediately about circuit riding, although they did uphold the practice against a constitutional challenge.<sup>23</sup> Despite repeated entreaties from the Justices, Congress insisted that they perform these duties. During debates in the nineteenth century, one Senator remarked that if relieved from circuit riding responsibilities, Supreme Court Justices would be “completely cloistered within the city of Washington, and their decisions, instead of emanating from enlarged and liberal minds, will assume a severe and local character.”<sup>24</sup> Another worried that the Justices, insulated in the capital, would be subjected to

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<sup>20</sup> *Id.* at 1757.

<sup>21</sup> *Id.* at 1802-03.

<sup>22</sup> Letter from Roger Sherman to Simeon Baldwin (Jan. 21, 1789), quoted in Henry J. Bourguignon, *The Federal Key to the Judiciary Act*, 46 S.C. L. Rev. 647 (1995) (punctuation altered).

<sup>23</sup> *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

<sup>24</sup> 33 Annals of Cong. 126 (1819) (Statement of Sen. Smith), quoted in Glick, *supra* note 19, at 1799.

“dangerous influences and strong temptations that might bias their minds and pollute the streams of national justice.”<sup>25</sup> Both Senators—William Smith and Abner Lacock—deserve a place alongside Cassandra in the pantheon of vindicated prophets.

As a practical matter, circuit riding ended when Congress enacted the Evarts Act of 1891, but the Justices were still left with another disagreeable burden: judging lots of dull cases. One might regard this as part and parcel of being a judge, and indeed during its first century the Supreme Court had almost no discretionary power over its docket.<sup>26</sup> The Evarts Act created the modern courts of appeals, with judges to staff them, and provided that, with respect to some cases, their decisions would be final. But the courts of appeals could certify a question for decision by the Supreme Court,<sup>27</sup> and the Court’s docket remained not only enormous in the first decades of the twentieth century, but cluttered with tedious cases.

The Judges’ Bill of 1925 represents a watershed in the history of the Supreme Court. The brainchild of Chief Justice Taft, who ushered it though a Congress that was largely unaware of the stakes, the Judges’ Bill expanded

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<sup>25</sup> *Id.* at 130 (Statement of Sen. Lacock), quoted in Glick, *supra* note 19, at 1799.

<sup>26</sup> See Edward A. Hartnett, *Questioning Certiorari: Some Reflections 75 Years After the Judges’ Bill*, 100 COLUM. L. REV. 1643, 1649 (2000).

<sup>27</sup> In addition, parties could request a writ of certiorari, which was understood “as a sort of fallback provision should the circuit courts of appeals prove, on occasion, to be surprisingly careless in deciding cases or issuing certificates.” *Id.* at 1656.

the realm of discretionary appeals, while contracting the realm of mandatory review.<sup>28</sup> Testifying before Congress, several Justices downplayed the bill's significance, suggesting that it would merely allow the Court to avoid frivolous cases. As Edward Hartnett notes, "they never adequately explained why the power of summary affirmance was not sufficient for this purpose."<sup>29</sup> This power is still routinely exercised by modern courts of appeals as a means of coping with large dockets, and it is at least not obvious why it is inferior to a discretionary docket. In retrospect, moreover, it is striking that members of Congress never pressed the Justices to elaborate on the criteria they would use in distinguishing the worthy appeals from the frivolous.

Soon after enactment of the Judges' Bill, the Court seized the new mode of discretionary review—through the writ of certiorari—to limit not only the number of cases it hears, but the nature of its review. Rather than considering an entire case, the Court soon began reviewing only narrow legal questions, leaving aside legal and factual issues in which the Justices were uninterested. This reflected a departure from pre-Evarts Act practice, and it obviously increases the Court's discretion to shape its own agenda. The Supreme Court also used a jurisdictional procedural rule it adopted in

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<sup>28</sup> "In 1924, 40% of the cases filed in the Supreme Court were within the Court's obligatory jurisdiction, with 60% of the filings left to the Court's discretion to decide whether to decide. In 1930, the percentage of obligatory filings fell to 15%, with 85% left to the Court's discretion." *Id.* at 1704 n.365 (citing GERHARD CASPER & RICHARD POSNER, THE WORKLOAD OF THE SUPREME COURT 20 (1976)).

<sup>29</sup> Hartnett, *supra* note 26, at 1705.

1928 to avoid appeals that seemed to be squarely within its remaining mandatory docket.<sup>30</sup> Over ensuing decades, the Justices effectively eliminated the practice, preserved in the Judges' Bill, of having courts of appeals certify questions for Supreme Court review.<sup>31</sup>

Congress eliminated almost all of the remnants of mandatory Supreme Court review in 1988. As Hartnett has noted, “[T]here is (virtually) no law governing the Supreme Court’s exercise of power to set its own agenda, and the Court has steadfastly refused to establish any.”<sup>32</sup> Thanks to a cooperative Congress, the Justices are now in a position where they could hardly confine themselves to exercising, in Hamilton’s formulation, “neither FORCE nor WILL, but merely JUDGMENT,” even if they wanted to.

## B. Celebrities in Robes

Supreme Court Justices are treated like royalty within the legal world. But their celebrity stretches

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<sup>30</sup> *Id.* at 1704 (discussing Supreme Court Rule 12).

<sup>31</sup> Unstinting hostility to such certifications depressed the numbers of such appeals from 72 the first decade after the implementation of the Judges' Bill, to 20 the following decade. Such certifications soon became extremely rare. In 1992, the Court rebuked a lower court for bothering the Supreme Court with a legal issue that had merely generated an intracircuit conflict. *See id.* at 1712. Recently, Justices Stevens and Scalia rather forlornly objected to the Court's decision to dismiss a certification. *United States v. Seale*, No. 09-166 (Nov. 2, 2009).

<sup>32</sup> *Id.* at 1648.

beyond that world.<sup>33</sup> They are feted by the ethnic groups that identify with them.<sup>34</sup> They deliver speeches, not only to legal audiences, but also to various other groups of admirers. Recently, they have taken to delivering lectures abroad, and some even promote their autobiographies on television.

Today's Justices have a lot of time for extrajudicial matters. From an historical perspective, their workload is extremely light. Some may choose to work relatively hard, but only if they choose to do so, and in many cases only a fraction of their time will be consumed by their work *as judges*. They get more than three months of vacation, during which they are free to escape the sweltering Washington summers. And escape they enthusiastically do—not just around the country, but around the world.

Between 1874 and 1924, the Court was burdened with a workload that would be regarded as staggering today, usually hearing more than 200 or even 250 cases per year.<sup>35</sup> Some Justices had a single clerk to assist, but most had none. Today's Supreme Court occupies a brave new world: a docket of 70-odd cases, with four law clerks and two secretaries assigned to each Justice. Nothing

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<sup>33</sup> Cf. Ray, *supra* note 18, at 238; Jesse J. Holland, *Capital Culture: Sotomayor Adds Celebrity to Court*, WASHINGTON POST, Nov. 17, 2009.

<sup>34</sup> Justice Ginsburg, for example, was named to the Jewish American Hall of Fame in 2004; Justice Scalia was the Grand Marshall of Manhattan's Columbus Day Parade.

<sup>35</sup> Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 5 (2009).

prevents a Justice from delegating virtually all the work of analyzing cases and preparing opinions to the law clerks, and it has long been routine for members of the Court to delegate the most demanding tasks—especially writing first drafts of opinions—to the clerks.

We must emphasize that we do not think a light workload for Supreme Court Justices is inherently a bad thing.<sup>36</sup> Rather, our concern is that jettisoning at least some of the onerous tasks that Justices once performed has had undesirable effects on the way these public employees perform the functions that they have chosen to retain for themselves. Apart from voting in cases, the only judicial task deemed non-delegable is questioning the lawyers at oral argument. This task is optional (as Justice Thomas has demonstrated), and those who choose to perform it sometimes look more like self-appointed advocates, or even bullies, than like judges seeking to be educated about the issues at stake in the case.

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

The increased public prominence of Supreme Court Justices appears to be associated with three other widely-lamented trends: the Court's ever-more intrusive role in American political life, the Court's chronic proclivity toward splintered decisions, and a certain easy-going attitude toward the precedents that provide our case law with what stability it enjoys. Is there a causal relation

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<sup>36</sup> A desire to see the Justices burdened with more work for its own sake would be especially graceless coming from fellow public servants like us, whose workload could not be called unduly oppressive.

among these phenomena? Without purporting to prove a complete causal theory, we suggest that Congress could and should provide the Justices with incentives to behave more like traditional judges and less like publicity-hungry politicians.

Many years ago, Frank Easterbrook used Arrow's Theorem to argue that structural features of the Supreme Court virtually guarantee that the Court will sometimes issue logically inconsistent decisions, and that the growing stock of such inconsistencies will present the Justices with a choice between (a) disregarding the precedents and revisiting the underlying constitutional and statutory provisions or (b) deciding cases based on the Justices' personal views of what the law should be.<sup>37</sup> Easterbrook believed it was unlikely that the Justices would return to the underlying laws themselves, and likely that they would increasingly substitute their own view of good policy for those of the other branches.<sup>38</sup> Justice Thomas' frequently solitary expressions of a willingness to revisit precedents that appear inconsistent with the Constitution have tended to confirm Easterbrook's prediction, as has the increasing frequency with which the Court declares decisions of the other branches unconstitutional.

Easterbrook rightly considered it naïve to expect that the Supreme Court could become perfectly consistent, or to hope that the Court could altogether cease the practice of issuing splintered opinions that

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<sup>37</sup> Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

<sup>38</sup> *Id.* at 831.

expose the complexity of disagreements among its members. The impossibility of perfect consistency and reliably unified majorities on the Court, however, should not be taken to mean that nothing can or should be done to discourage excessive and unnecessary fragmentation. On the contrary, it might be no less naïve to think that the Court can continue indefinitely to expand its power over the lives of the citizenry, misleadingly exercised in the name of the Constitution and statutes, while ever more visibly manipulating “inconsistent precedents [that allow] the Justices to ‘prove’ anything they like.”<sup>39</sup> Nowadays, indeed, even when there is only *one* precedent on point, the Court can argue without visible embarrassment that it means the opposite of what it says.<sup>40</sup> There may be some kind of tipping point that will be recognized only when the political branches launch a counteroffensive, which could itself be so excessive as to create a constitutional imbalance far worse than the one it means to correct.

It would be rational for members of the Court to worry about such dangers. Chief Justices, who are disproportionately given the credit and blame for the Court’s collective failures and successes, would have especially strong reasons to be concerned about the effects of excessive disunity and institutional overreaching. This may partly explain the great emphasis that John Roberts placed on judicial modesty during his confirmation hearings. Unfortunately, however, the Justices face

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<sup>39</sup> *Id.*

<sup>40</sup> For discussion of a recent example, see Nelson Lund, Heller and Second Amendment Precedent, 13 LEWIS AND CLARK LAW REVIEW 335 (2009).

serious collective action obstacles that may make it impossible for them to place meaningful restraints on themselves.

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

It should therefore come as no surprise that, in form and substance both, the Court has become almost totally bereft of the kind of collective identity that Chief Justice Marshall worked so hard to create. The current Court operates, as Justice Lewis Powell remarked decades ago, "as nine small, independent law firms."<sup>41</sup> The only time the Court meets as a body to discuss cases is in conference after oral argument. According to accounts of the Rehnquist Court, there is apparently no give and take in these conferences, simply a short statement by each Justice explaining how he will vote and why.<sup>42</sup> The Justices then retire to their individual offices,

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<sup>41</sup> Quoted in John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 170 n.201 (1999).

<sup>42</sup> See Margaret Raymond, *The Importance of Being Important*, 84 IOWA L. REV 147, 150 (1998). The times being what they are, perhaps we must note that we sometimes use "he" as an

and communications between them, if any, are typically mediated through their clerks.<sup>43</sup> There is virtually no deliberation by the Justices *as a court*; whatever deliberation does take place occurs within each Justice's chambers.<sup>44</sup> This is strikingly different from early Supreme Court practice, in which the members of the Court, without clerks and living together through the term, deliberated together and together forged the Court's jurisprudence.

The modern Court is best understood as an aggregation of individuals, each with his own jurisprudence. Consistent with the isolated working conditions they have chosen to adopt for themselves, the Justices have become noticeably concerned with remaining *personally* consistent over time. It would be an exaggeration to say that traditional principles of stare

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indefinite pronoun, referring to people of both sexes, without disrespect to either.

<sup>43</sup> See Sally J. Kenney, *Puppeteers or Agents? What Lazarus's Closed Chambers Adds to Our Understanding of Law Clerks at the U.S. Supreme Court*, 25 LAW & SOC. INQUIRY 185, 198 (2000).

<sup>44</sup> This practice may be changing somewhat under the new Chief Justice, who has spoken openly of his desire to persuade his colleagues to subordinate their individual agendas and behave more like a collegial and institutionally oriented body. See Jeffrey Rosen, *Robert's Rules*, THE ATLANTIC, January/ February 2007. Roberts has gone so far as to say (publicly!) that his model is none other than Chief Justice Marshall himself. Admirable as this ambition may be, we are skeptical about his, or any other Chief Justice's, chances of producing major and lasting changes in this direction through his own efforts.

decisis have been abandoned in the Supreme Court,<sup>45</sup> but it is striking how frequently one sees members of the Court adhering to their own personal “precedents” rather than deferring to the Court’s actual precedents. And it is even more striking how often one sees majority opinions laden with citations to the concurrences and even dissents of “swing” Justices like O’Connor and Kennedy.

For the reasons given above, this kind of “judicial individualism” has to some extent become irresistible. And it is important to note that one reason is that most or all of the Justices strongly believe that their own jurisprudential views are worth fighting for. We would not advocate an effort to prevent the Justices from adhering to principles they regard as important. What we do suggest, however, is that the Court and the law might be improved if the Justices had fewer incentives to engage in unnecessary and unproductive disputes, let alone inappropriate aggrandizement of themselves.

An attempt to think systematically about changing the incentives that operate on the Justices requires some sense of how existing incentives shape their behavior. We begin with Richard Posner’s provocative economic model

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<sup>45</sup> The accusation that another Justice has improperly overturned precedent still seems to demand a response. Compare *Montejo v. Louisiana*, 556 U.S. \_\_ (2009) (Alito, J. concurring,) (criticizing opinion of Justice Stevens in *Arizona v. Gant* for overturning precedent) with *Montejo v. Louisiana*, 556 U.S. \_\_ n.5 (2009) (Stevens, J., dissenting) (responding that his opinion in *Gant* did not in fact overturn earlier precedent and counterclaiming that Alito’s claimed fealty to precedent is specious in light of his willingness to overturn precedent in *Montejo*).

of the judicial utility function.<sup>46</sup> As Posner observes, the great project of assuring the independence of federal appellate judges has entailed efforts to strip them of the most usual incentives that operate on workplace behavior, such as more pay for more or better work and the threat of losing one's job for poor performance.<sup>47</sup> But that must mean that other incentives take the place of the usual ones.

Posner's most intriguing suggestion is that appellate judges, including most Supreme Court Justices, are motivated to work at their jobs largely because they take pleasure in what they regard as the essential functions of the job. One such function is the very act of voting, i.e. expressing an opinion about which party should win the case, much as ordinary voters seem to take pleasure in expressing their opinion about which candidate should be elected, even when there is almost no chance that one vote will affect the outcome. Another important element, according to Posner, is the pleasure judges take in forming the opinion on which their votes are based, much as spectators of dramatic performances take a disinterested pleasure in making judgments about which characters are right and wrong, in "judging" so to speak between Antigone and Creon, or between Falstaff and Prince Hal. Finally, Posner suggests that judges, who

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<sup>46</sup> Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993). Posner's views have evolved since this article was published, see, e.g., RICHARD A. POSNER, HOW JUDGES THINK (2008), but for our purposes here we think it is more useful to focus on his earlier analysis.

<sup>47</sup> *Id.* at 2.

enjoy an extraordinary amount of latitude to define their own jobs as they please, take pleasure in following the conventional rules of judicial behavior, much as chess players take pleasure in following the rules of their game (even when they have an opportunity to cheat), or as poets take pleasure in conforming to the discipline of the sonnet form.

Posner's model also includes more obvious elements of utility, such as leisure, popularity, and prestige, but he argues that these have much less importance than one might suppose, and he consciously "downplays the 'power trip' aspect of judging, the focus of most of the few previous efforts to model the judicial utility function."<sup>48</sup> Posner's argument is largely positive, not normative, but he recognizes that it has implications for practical issues of judicial administration, such as the appropriate structure and level of judicial compensation.

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

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<sup>48</sup> *Id.* at 3. Posner continues: "In fact, I assume that trying to change the world plays no role in [the judicial utility] function. Not that judges are indifferent to power; they enjoy, I shall argue, the power that goes with deciding cases. But only a small minority, whom I shall largely ignore, have a visionary or crusading bent." *Id.* (footnote omitted).

Let's begin with some differences that Posner appears to have overlooked or understated.<sup>49</sup> Like Easterbrook, Posner concludes (though for somewhat different reasons) that "the conditions of judicial employment enable and induce judges to vote their personal convictions and policy preferences—or in a word their values."<sup>50</sup> Circuit judges, unlike Supreme Court Justices, are somewhat constrained in exercising this power by fear of reversal, but Posner rightly points out that this is probably a weak constraint.<sup>51</sup> A much more important constraint, in his view, is that judges simply do not have much power because they rarely decide cases with wide importance. Although he acknowledges in a passing parenthetical that Supreme Court Justices have more power,<sup>52</sup> we believe that the almost unlimited discretion of the Justices to choose their cases contributes to making their job fundamentally different from that of a circuit judge.

To illustrate this point, consider Posner's discussion of "going-along" voting and "live and let live" opinion joining. In the first case, a judge who is not very interested in a particular case will have an incentive to

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<sup>49</sup> At various points in the article, Posner does note some of the relevant differences between the two groups of jurists. He predicts, for example, that there will be more campaigning for Supreme Court seats and that Justices will work harder than circuit judges, but we think the significance of other differences that he does not discuss are greater than he recognizes.

<sup>50</sup> *Id.* at 40.

<sup>51</sup> *Id.* at 14.

<sup>52</sup> *Id.* at 17.

vote with a fellow judge who does have a strong view of the case, even if he doesn't agree, in order to avoid various costs associated with dissenting (such as going to the trouble of writing a dissenting opinion). Similarly, judges have incentives to join opinions containing obiter dicta with which they disagree because it is costly in various ways to explain one's disagreements, whereas the non-binding nature of dicta means that one's discretion in future cases will not be reduced by the fact of having joined an opinion with objectionable comments in it.

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

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

framers of the Constitution attempted to design a government that could be operated by moral and intellectual mediocrities, a characterization of officialdom from which not even federal judges are exempt . . . [and it is unrealistic to treat] the judiciary as a collection of genius-saints miraculously immune to the tug of self-interest.”<sup>53</sup> With respect to most government officials, including judges, the most common dangers—large ambition, modest moral and intellectual talents, or both—are addressed by making the officials *dependent* on others, through the familiar set of structural checks and balances. With the judiciary, however, the framers deliberately went a very long way toward making the officials *independent*. For that reason, we suspect that Posner may have identified a salutary phenomenon with his observation that “[e]xceptionally able judges arouse suspicion of having an ‘agenda,’ that is, of wanting to be something more than just corks bobbing on the waves of litigation or umpires calling balls and strikes.”<sup>54</sup>

The present danger, we think, is that the conditions under which Supreme Court Justices operate make it almost impossible for them to experience their jobs as calling for the kind of modesty and restraint that Hamilton predicted, that Posner finds in most judges, and

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<sup>53</sup> *Id.* at 3-4.

<sup>54</sup> *Id.* at 4. Cf. Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 55 (2005) (statement of the Hon. John G. Roberts, Jr.) (“Judges are like umpires. Umpires don’t make the rules, they apply them. . . . Nobody ever went to a ball game to see the umpire.”).

that all Supreme Court nominees now promise that they will exhibit.

For that reason, we believe that it would be a healthy change if the lives of the Justices were to become more like the day-to-day lives of circuit judges. This need not require an actual reduction of the Supreme Court's power, as in the case of such reforms as jurisdiction-stripping statutes. Nor need it require a reduction of the Court's insulation from political influence. Nor does it require the extraordinary and practically impossible step of amending the Constitution, as in the case of various proposals for term limits. Rather, we simply propose that the Justices be given somewhat more ordinary judicial work to do, and that a little of the temptation to judicial individualism be curtailed. With these changes, perhaps we might actually obtain some of what recent nominees have thought it wise to promise during their confirmation hearings.

### **III. Anonymous Opinions**

One of the most surprisingly fateful developments in Supreme Court practice was the emergence of a culture of signed majority opinions. Currently, one Justice writes an “opinion for the Court” (or tries to do so: sometimes there is no majority opinion at all) and other Justices trumpet their disagreements, from the trivial to the profound, in multiple concurring and dissenting opinions. This practice can at least create tensions with the traditional ideal of the rule of law, and does not consistently produce much in the way of compensating benefits. After first sketching the historical development

of the current practice, we argue that the adoption of a judicial anonymity rule would reduce the number of splintered opinions, increase consistency with precedent, and improve the legal quality of the Court's work.

### A. Historical Development

Through the nineteenth century, English judges delivered opinions orally. In multi-judge panels, each judge announced his opinion *seriatim*, and a reporter might collect accounts of those orally delivered opinions, together with transcribed accounts of the oral arguments of the advocates. In American colonial practice, judicial opinions were not memorialized at all.<sup>55</sup> The first Supreme Court reporter, Alexander James Dallas, enjoyed no official position and received no official salary, and there seem to have been no formal procedures by which Justices transmitted their opinions to Dallas. Rather, he cobbled together the reported opinions partly from notes the Justices may have used when they delivered their opinions orally, partly from his own notes if he was present at the reading and partly from discussions with the attorneys in the case.<sup>56</sup> It is also worth mentioning that the reported decisions included accounts of the oral arguments of the lawyers. Such a practice obviously reduced the significance of the Justices' descriptions of the issues and arguments. The spotlight was shared with the appellate advocates, some of whom were more prominent than the Justices themselves.

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<sup>55</sup> See Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1291, 1296 (1985).

<sup>56</sup> *Id.* at 1295-96.

The forms of the reported opinions in the pre-Marshall Court were dramatically different than they are today. There were 63 reported cases between 1790 and 1800, of which 45, or 71%, were resolved by a short opinion, which was not attributed to a particular Justice.<sup>57</sup> Fifteen of the 63 cases, or 24%, were explained in *seriatim* opinions.<sup>58</sup> Three of the 63 cases, or a mere 5%, were decided in a manner with virtually no precedent in the English courts or in American colonial practice: the senior Justice who was present delivered an opinion for the Court. It was this practice that Marshall would promote and expand when he took the center chair.

Historians widely credit John Marshall with raising the status of the Supreme Court from the “least dangerous branch” to a co-equal player in our constitutional balance of powers. And one of his decisive innovations in this regard was to discard both the short and anonymous opinions for the Court and the fragmented *seriatim* opinions. Although roughly a quarter of the early opinions had been delivered in the latter form, Marshall pressured his colleagues to end this practice and join together to deliver a unified opinion. Thomas Jefferson strenuously urged resistance to Marshall’s agenda, on the ground that it encouraged laziness and irresponsibility,<sup>59</sup> but Marshall prevailed upon his colleagues, all of whom lived with Marshall in the same

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<sup>57</sup> See Kelsh, *supra* note 41 at 140 (1999)

<sup>58</sup> *Id.*

<sup>59</sup> See *id.* at 145-46.

boarding house on Capitol Hill. Very quickly, *seriatim* opinions disappeared almost completely.<sup>60</sup>

Even more striking was the demise of the brief opinions with no attributed authorship. In the pre-Marshall court, 71% were reported in this form; by the 1808-1809 term only 19% took that form; and by 1814, the percentage had dropped to 4%.<sup>61</sup> Having all but eliminated the two dominant reporting practices of the Court's first decade, Marshall minted his own preferred practice: a unanimous opinion of the Court delivered by the most senior member of the Court by name. This almost always meant Marshall himself, even if he had not written the opinion.<sup>62</sup> To a remarkable extent, Marshall succeeded in persuading his colleagues on the Court to subordinate personal differences and present a single face—usually his own—to the outside world. Throughout the Marshall Court period, the overwhelming majority of cases were decided by unanimous opinions. The ratio of separate opinions to majority opinions was a mere .07.<sup>63</sup>

In the final years of his tenure, Marshall's ability to rein his colleagues in declined, and there was a minor uptick in separate opinions.<sup>64</sup> Justices began more often to state reasons for dissenting, typically noting that the

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<sup>60</sup> From 1801 to 1806, there were only 5 cases with *seriatim* opinions. *Id.* at 144.

<sup>61</sup> *Id.* at 145.

<sup>62</sup> See White, *supra* note 12, at 36-37.

<sup>63</sup> Kelsh, *supra* note 41, at 177.

<sup>64</sup> *Id.* at 151.

case involved a constitutional question or raised some other issue of significant public interest.<sup>65</sup> But Justice Bushrod Washington portended future developments when he wrote: “*A regard for my own consistency*, and that, too, upon a great constitutional question, compels me to record the reasons upon which my dissent is founded.<sup>66</sup> Today, Justices write separately in opinion after opinion, striving to preserve consistency with their own stock of personal precedents.<sup>67</sup>

In the Taney Court, Justices became somewhat more willing to write separately. Nonunanimity rates increased 150%, but were still not near modern levels. Justices writing separately sometimes remarked on their duty to remain “consistent”—not that is, with the Court’s precedents, but with their own previous positions.<sup>68</sup> And lest the public misinterpret their agreement with the result as agreement with the reasoning of their colleagues, Justices occasionally wrote separately simply to set out their own views.

From 1864 to 1941, separate opinion writing remained relatively infrequent, at least when measured

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<sup>65</sup> *Id.* at 151-52.

<sup>66</sup> *Id.* at 151.

<sup>67</sup> Some Justices do occasionally change their views, and acknowledge it. But this often just serves to accentuate how individualistic their jurisprudence is. See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 556-58 (2004) (Scalia, J., dissenting); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Management Auth.*, 550 U.S. 330, 349 (2007) (Thomas, J., concurring in the judgment).

<sup>68</sup> Kelsh, *supra* note 41, at 157-58.

by modern standards. Justice Brandeis, for example, often circulated drafts of dissenting opinions to his colleagues; but if he failed to persuade his colleagues, he sometimes withdrew the opinion and joined the majority.<sup>69</sup> John Kelsh has argued, however, that percolating beneath this relatively calm surface was a change in attitude. No longer was there a strong norm against separate opinions. He offers both indirect and direct confirmation of this hypothesis: the increasingly common references to whether a cited opinion was unanimous (the implication being that a unanimous opinion has more precedential weight, which gives an incentive to Justices who disagree with a majority opinion to dissent); increased citation to separate opinions (concurring and dissenting); and the growing infrequency of comments bothering to explain why a Justice had decided to dissent. Finally, the “most compelling sign that separate opinions were now viewed as playing an important role was that during this period, several separate opinions were written into law, either by statute or by subsequent overruling of the opinion for the Court.”<sup>70</sup>

The decisive break in nonunanimity rates occurred when Harlan Fiske Stone assumed the position of Chief Justice.<sup>71</sup> The ratio of separate opinions to majority opinions doubled in the 1941 Term to .34, increasing to over 1.0 by 1948, where it has hovered ever since. One reason, apparently, is that Stone was the first Chief

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<sup>69</sup> See Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 142-43 (1990).

<sup>70</sup> Kelsh, *supra* note 41, at 173.

<sup>71</sup> *Id.* at 162.

Justice in the nation’s history to believe that “imposed unanimity was no virtue in the law.”<sup>72</sup>

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

### **B. Opinions both reasoned and anonymous**

Some years ago, then-Judge Ruth Bader Ginsburg proposed that “when [circuit court] panels are unanimous, the standard practice should be to issue the decision per curiam, without disclosing the opinion writer.”<sup>73</sup> She apparently did not mean this proposal to apply to the Supreme Court, which is more prone to hear “grand constitutional questions.”<sup>74</sup> Because the overwhelming majority of cases in the circuit courts are relatively mundane, she said, “it is best that the matter be definitively settled, preferably with one opinion.”<sup>75</sup>

Ginsburg was onto something, but we think she drew exactly the wrong conclusion. It is precisely because most of the cases heard on the courts of appeals are not of

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<sup>72</sup> *Id.* at 179.

<sup>73</sup> Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1192 (1992).

<sup>74</sup> *Id.* at 1192-93.

<sup>75</sup> *Id.* at 1192-93.

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

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

The utility calculus works quite differently with Supreme Court Justices. Thanks in large part to the Court's discretionary docket, many of the cases decided by the Court involve matters of wide general interest—issues that engage the minds of politically attentive citizens, of

the elite journalists who speak to and for these citizens, and certainly of the Justices themselves. For Supreme Court Justices, then, the subject matter of the cases itself provides a spur to work carefully that is absent from most of the cases heard by the courts of appeals. Even when the subject matter is legally mundane, the stakes involved often create a significance that is absent from the more piddling, though legally similar cases resolved daily by the courts of appeals. Thus, there is less need to incentivize Supreme Court Justices to refrain from shirking.

We believe the opinion-writing practice of the modern Court needs to change so as to reorient the esteem-seeking element in the utility function of the Justices. The solution we propose is a simple one: by statute, Justices should no longer be permitted to affix their names to the opinions—majority, concurring or dissenting—that they file.<sup>76</sup>

We envision a number of healthy consequences that would result from this change. First, unable to claim credit for any of the various opinions, the Justices would come to regard their reputations as inextricably linked with the work of the Court, rather than with their own personal stock of precedents. This should mean a reduction in the number of unintelligibly splintered decisions that so frustrate the bar, the lower courts, and

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<sup>76</sup> We first made this proposal in Nelson Lund & Craig Lerner, *Precedent Bound*, National Review Online, March 6, 2006, at [http://www.nationalreview.com/comment/lund\\_lerner200603060828.asp](http://www.nationalreview.com/comment/lund_lerner200603060828.asp). Subsequently, a thoughtful student note suggested that the Justices voluntarily stop issuing signed opinions. James Markham, *Against Individually Signed Opinions*, 56 DUKE L.J. 923 (2006).

even members of the Supreme Court itself. Furthermore, unable to claim credit for opinions, we think the Justices would have less incentive to write sophomoric philosophy or ill-disguised political commentary in a transparent effort to have their names emblazoned in popular journals. As the Court's opinions became less frilly and more legal, the press would find it harder to extract a snappy sound bite to explain the decision, and this might actually enhance the Court's reputation as something distinguishable from a body of life-tenured politicians.<sup>77</sup>

We do not propose to prohibit Justices from filing concurring and dissenting opinions. Such opinions arguably provide, at least in our legal system, some public benefits. They help show that the decision of the court was reached through a deliberative process. They can discipline the majority by exposing weaknesses in its reasoning. And they can usefully inform the bar about issues that are not well-settled within the Court. At some point, however, fractiousness ceases to provide any public benefit and simply reflects the self-assertion of the individual members of the Court.<sup>78</sup> We think that this

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<sup>77</sup> Cf. Frederick Schauer, *Abandoning the Guidance Function*: Morse v. Frederick, 2007 Sup. Ct. Rev. 205 (suggesting that the modern Justices' apparent interest in their individual reputations may explain their frequent failure to perform the judicial role of providing clear guidance for the lower courts). For an approving view of the Court as a "republican schoolmaster" that uses "memorable phrases" to lead the people to a deeper understanding of constitutional commitments, see Mark Tushnet, *Style and the Supreme Court's Educational Role in Government*, 11 CONST. COMMENT. 215 (1994).

<sup>78</sup> Cf. Allison Orr Larson, *Perpetual Dissents*, 15 GEO. MASON L. REV. 447, 468-70 (2008).

point has been reached, and that the problem can be ameliorated by an intermediate rule under which concurring and dissenting opinions are allowed, but all opinions must be issued anonymously.

We see no reason to doubt that Congress has authority to impose such a rule. But how would it be enforced? In current practice, it is a widely observed norm that no judge can claim credit for an opinion issued “per curiam.” Likewise, under our proposed regime, the majority opinion would simply be labeled “Opinion of the Court.” Concurring and dissenting opinions would have similarly nameless attributions: “Concurring Opinion (for two Justices),” “Dissenting Opinion 1 (for three Justices),” “Dissenting Opinion 2 (for one Justice),” etc. We think that the Justices would probably comply with such a statute, and we have no doubt that Congress has ample means to cause compliance if some of them get cute and begin evading it.<sup>79</sup>

#### **IV. Expanding the Court’s Jurisdiction: More Cases, Less Glamour**

Over the years, critics of the Supreme Court, especially political conservatives, have argued that

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<sup>79</sup> This does not mean that the curious will never be able to figure out who wrote what. Lots of people think they know who wrote the per curiam in *Bush v. Gore*, for example. The important point is that the author has not claimed credit for it, and is rarely if ever assigned responsibility in public. Perhaps it is no coincidence that the per curiam is not as grandiloquent as one might have expected a signed opinion in such a case to be.

Congress should strip it of jurisdiction over hot-button issues like abortion, busing, and school prayer.<sup>80</sup> Here we advance the novel suggestion that judicial restraint can be encouraged by giving the Supreme Court *more* to do, not less. Unlike the Court envisioned by Alexander Hamilton, the modern incarnation is energetically adventurous, for the most part deciding only those legal or political issues that it deems interesting and important. Yet the Court is often wont to opine so enigmatically that little guidance is given to the lower courts, which are left to decipher the Court's sphinx-like utterances.<sup>81</sup> Furthermore, lower courts reach conflicting conclusions on many legal questions, and the Supreme Court often prefers to let the confusion "percolate" for an indefinite time. We begin by showing how the modern Court, now exercising almost complete discretion over its workload, could best be described as either imperial or Olympian. We then propose that Congress order the Justices to pay a little more attention to what happens down in the valleys after they've loosed their thunderbolts. They should be required to hear more of the cases vexing the rest of the courts in the American judicial system.

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<sup>80</sup> See, e.g., *Panel Discussion: Relimiting Federal Judicial Power: Should Congress Play a Role?*, 13 J.L. & POL. 627 (1997).

<sup>81</sup> For a spectacular recent example, see Boumediene v. Bush, 128 S. Ct. 2229 (2008) (holding that Congress had provided an inadequate habeas substitute to aliens detained at Guantanamo Bay, and remanding without saying what an adequate substitute would be or what rights a habeas court should enforce). For a conscientious and carefully reasoned effort to apply the Court's rather less well-reasoned pronouncements about the Second Amendment, see Judge Dianne Sykes' opinion in United States v. Skoien, No. 08-3770 (7th Cir. Nov. 18, 2009).

### A. Our Olympian Judges

Having ceased to be a court in a Hamiltonian sense—humble, exercising judgment rather than will—the Court has seemingly slipped the surly bonds of earth. Adjectives more appropriate to Roman emperors have been invoked to convey the power wielded by Supreme Court Justices. For several decades, critics were apt to apply the epithet “imperial” to describe the activist and detail-oriented Warren and Burger Courts. Possessing an almost unfettered power to choose their cases, they reached into the dockets of the lower courts—state and federal—and chose hundreds of cases in fields that interested them. For example, and perhaps most famously, the Court took dozens of state and federal cases that they used to write a comprehensive and ever changing National Code of Criminal Procedure. Although the ideology of the Court shifted after Warren Burger became Chief Justice, the energy level hardly flagged. In part, this reflected Burger’s desire to reverse some of the Warren Court’s precedents. The Supreme Court’s docket from the 1950s through the 1980s was, at least by today’s standards, staggeringly heavy.

Legal academics warned at the time that the Supreme Court was stretched to the breaking point, and nothing short of radical overhaul could preserve it from collapse. Paul Freund and Erwin Griswold, to name just two illuminati, lent their lustrous names to the idea of a “national court of appeals.”<sup>82</sup> The idea was championed by

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<sup>82</sup> Paul Freund, *Why We Need a National Court of Appeals*, 59 A.B.A. J. 247 (1973); Erwin N. Griswold, *Rationing Justice - The Supreme Court’s Caseload and What the Court Does Not Do*, 60 CORNELL L. REV. 335, 349-53 (1975).

several Senators in what became known as the Hruska Report,<sup>83</sup> but nothing came of it in the end. The Justices groaned—noisily—under the weight piled atop their frail and aging bodies. Justice Brennan, who was 77 years old at the time, pronounced that the Court’s docket was “tax[ing] [human] endurance to the limits.”<sup>84</sup> Much academic commentary at the time suggested that the Supreme Court caseload was simultaneously too large to be handled well and too small to monitor and harmonize the swelling caseload in the lower courts.<sup>85</sup> Hence the claimed need, identified by many observers in the 1970s and 1980s, for a national court of appeals, or at least a cadre of super courts of appeals, to help the Supreme Court do its job.<sup>86</sup>

Apparently, the Court did not need such help, for its overwork problem soon evaporated. The once-

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<sup>83</sup> Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change, reprinted in 67 F.R.D. 195, 199-247 (1975).

<sup>84</sup> William J. Brennan, *Some Thoughts on the Supreme Court’s Workload*, 66 JUDICATURE 230 (1983), quoted in Carolyn Shapiro, *The Limits of the Olympian Court: Common Law Judging Versus Error Correction in the Supreme Court*, WASH. & LEE L. REV. 271, 277 (2006).

<sup>85</sup> The dual nature of the criticism common at that time is noted in Margaret Meriwether Cordray and Richard Cordray, *The Supreme Court’s Plenary Docket*, 58 WASH. & LEE L. REV. 737 (2001).

<sup>86</sup> Peter Strauss, for example, argued in favor of “[f]ive panels of seven judges each in a new judicial tier.” Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court’s Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1136 (1987).

overburdened Supreme Court is now said to be underworked. In the late nineteenth century and early twentieth century, we should recall, the Court usually heard around 200 to 300 cases per year. The Court's caseload, which in the early 1980s hovered around 150,<sup>87</sup> plummeted in the early 1990s,<sup>88</sup> and has remained durably between 70 and 80 for over a decade. This shrinking docket was noted in the popular press as early as 1994,<sup>89</sup> and soon thereafter became the subject of academic commentary. Oddly, however, while the Court's docket has halved, academics have fallen silent about the Court's ability to supervise and guide the lower courts through such a small number of decisions.<sup>90</sup>

After considering and rejecting other explanations for this new development, Arthur Hellman offers what he considers the most persuasive: a "new philosophy" has come to dominate the Supreme Court. Over the course of the 1970s and 1980, Justices who had been easily provoked to grant certiorari were replaced by Justices less disposed to hear cases. Hellman notes that Chief Justice Burger "zealously supported Supreme Court review of activist decisions by the lower courts," and with his

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<sup>87</sup> From 1971 through 1988, the Court averaged 147 cases per term. Arthur Hellman, *The Shrunken Docket of the Supreme Court*, 1996 SUP. CT. REV. 403, 403 (1996).

<sup>88</sup> In 1989, the Court heard 132 cases; in 1990, it heard 116 cases; by 1996, it heard 77 cases. *Id.*

<sup>89</sup> See, e.g., Joan Biskupic, "A Different Sort of Court Awaits Blackmun Successor: Recent Terms Marked by Aversion to Change," *Wash. Post*, Apr. 17, 1994, at A1.

<sup>90</sup> Cordrays, *supra* note 85, at 738.

retirement, “counteractivist petitioners lost what was probably their most reliable vote for certiorari.”<sup>91</sup> For different reasons, Justice White thought it important to provide doctrinal guidance to the lower courts; his replacement, Justice Ginsburg, has “expressed little sympathy” for this view.<sup>92</sup>

Justice Scalia, characteristically, has offered a theory to justify the change, in a short intellectual autobiography.<sup>93</sup> As a law student, he was attracted to the common-law approach to judging: narrow decisions based on the facts of each particular case.<sup>94</sup> But with time the appeal of incremental judging dissipated. He confessed a mounting revulsion to fact-bound opinions that rely upon the “totality of the circumstances,” for they give citizens little notice of what the law will be in future cases and do little to bind judges.<sup>95</sup> Scalia argued that the Supreme Court should not be obsessively patrolling the lower courts’ opinions: its goal should be to state general

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<sup>91</sup> Hellman, *supra* note 87, at 429.

<sup>92</sup> *Id.* See also David R. Stras, *The Supreme Court’s Declining Plenary Docket*, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1476537](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476537) (finding that every Justice appointed between 1986 and 1993 was less likely to grant plenary review than his predecessor).

<sup>93</sup> Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

<sup>94</sup> *Id.* at 1177.

<sup>95</sup> *Id.* at 1178.

principles of law, and then allow the lower courts to apply those principles as best they can.<sup>96</sup>

Scalia's vision of the Supreme Court's proper role is hardly idiosyncratic. As Hellman notes, “[f]rom Taft and Hughes onward, the Justices of the Supreme Court have emphasized that the Court's function is not to correct errors in the lower courts.”<sup>97</sup> Perhaps the current dwindling of the Supreme Court's docket is simply the triumph of this school of thought. Some may regard the Court's relinquishment of its role as an “imperial” court as a welcome development. But, as Hellman notes, there is a less benign view: “The Court, if not imperial, has now become Olympian. The Justices seldom engage in the process of developing the law through a succession of cases in the common-law tradition. Rather, Court decisions tend to be singular events, largely unconnected to other cases on the docket and even more detached from the work of lower courts.”<sup>98</sup>

## B. Coming Down from the Mountain

A move to anonymous opinions, discussed in the previous section, should foster a more coherent body of doctrine, with Justices less inclined to pursue individual glory and more concerned with the Court's overall reputation. In this section, we propose an additional means to bridge the gap between the Supreme Court and the rest of the American judicial system. It is time to

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<sup>96</sup> *Id.* at 1186.

<sup>97</sup> Hellman, *supra* note 87, at 432.

<sup>98</sup> *Id.* at 433; see also Schauer, *supra* note 77.

reconsider the unfettered discretion the Court enjoys over its own docket.

At present, there are four statutory mechanisms for Supreme Court review, two of which are rarely triggered.<sup>99</sup> This leaves only discretionary review under 28 U.S.C. 1257 (from state supreme courts) and 28 U.S.C. 1254 (from federal courts of appeals). The first paragraph of Section 1254, which covers writs of certiorari, is familiar;<sup>100</sup> the second paragraph provides another mechanism for review:

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

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<sup>99</sup> 28 U.S.C. 1251 concerns the Court's original jurisdiction, which is now generally limited to cases between two States. 28 U.S.C. 1253 involves direct appeals from three-judge courts.

<sup>100</sup> Cases in the courts of appeals may be reviewed by the Supreme Court:

- (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

The Court’s hostility to this provision has rendered it “virtually a dead letter.”<sup>101</sup> This is unfortunate. There are many cases in which the decision of one court of appeals conflicts with another, whether because of an ambiguity in a federal statute or in the Supreme Court’s case law. And there are undoubtedly many more in which circuit courts are internally divided because of the same sorts of ambiguity.

We propose adding a provision to 28 U.S.C. 1254 providing that each term, the number of cases taken by the Supreme Court pursuant to the first paragraph (discretionary certiorari petitions) may not exceed the number of cases taken pursuant to the second paragraph (court of appeals certifications).<sup>102</sup> In effect, then, the Supreme Court’s docket would be driven in part by the perceived needs of the judicial system, as determined by the lower court judges themselves.

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<sup>101</sup> See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORN. L. REV. 1672, 1706 (2003).

<sup>102</sup> Cf. Paul D. Carrington & Roger C. Cramton, *Judicial Independence in Excess: Reviving the Judicial Duty of the Supreme Court*, 94 CORN. L. REV. 587 (2009). The authors propose the formation of a “Certiorari Division,” consisting of thirteen Article III judges, which would be empowered to identify as many as 120 cases that the Supreme Court would be obliged to hear. *Id.* at 632-34. This step would be fairly radical, and it would require the creation of a new institution out of whole cloth. Our proposal simply breathes life into a process (authorized by the existing court of appeals certification provision) that has fallen into desuetude, and it would leave the Supreme Court with more power to supervise the inferior courts.

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

Further steps could be taken to pull the Justices down from their Olympian heights. A nontrivial portion of the workload in the federal courts consists of diversity cases, which regularly concern mundane state-law issues of contracts, torts and property. Congress could provide an incentive for the Supreme Court to hear some of these cases. Our proposal could be modified, for example, to provide that the number of certiorari petitions raising federal questions taken through the writ of certiorari cannot exceed the number of cases taken through certification *and* the number of diversity cases raising purely state-law issues. It's frequently said that constitutional law is a form of common law, and it might do the Justices good to get some practice with the real McCoy.

## **V. Real Judges Don't Need Courtiers**

“The role of the clerks is a hearty perennial of an issue.”<sup>103</sup> In this section, we first trace the origins and growing influence of Supreme Court clerks. We then consider some of the criticisms leveled at the use of clerks, perhaps the most common being that they play too significant a role in screening and resolving cases. Our point is slightly different: we argue that clerks have undermined the judicial character of the Court and fueled the celebrity status of individual Justices. The Court now resembles nine discrete law firms, each with a managing partner whose ego is stroked, and whose most arduous labors are often performed, by a cadre of bright and eager twentysomethings. Our proposal follows naturally: strip the Justices of their courtiers.

### **A. How One Court Becomes Nine Law Firms**

For the first 90 years of its existence, Supreme Court Justices labored without law clerks of any kind, although their workload vastly exceeded that of twenty-first century Justices. In 1880, the Supreme Court had a docket of 1,212 cases.<sup>104</sup> Legal briefs were not limited in length, and many exceeded the current limit of 45 pages.

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<sup>103</sup> Kenneth W. Starr, 90 MINN. L. REV. 1363, 1376 (2006). A pair of recent academic books comprehensively analyzed the subject. TODD C. PETERS, COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT CLERKS (2006); ARTEMUS WARD & DAVID WEIDEN, SORCERERS’ APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT (2006).

<sup>104</sup> Peppers, *supra* note 103, at 41.

Without the benefit of Westlaw or Lexis, the Justices conducted legal research. Oral arguments stretched on for hours. Justices drafted all the opinions themselves.

The first Justice to employ a clerk was Horace Gray, who took his seat in 1882.<sup>105</sup> At least until 1919, however, most clerks were assigned work that would today be regarded as secretarial. Indeed, some clerks in this period were neither law students nor practicing lawyers. Justices Brandeis, Holmes and Gray departed from this rule to some extent, attracting top law students, particularly from Harvard, and tasking them with a variety of legal assignments. In his memoirs, future Secretary of State Dean Acheson, a Brandeis clerk in 1919 and 1920, noted that Brandeis and Holmes sought the “intellectual stimulation” of the law school, which brought with them constant refreshment and challenge, perhaps more useful in their work than the usual office aides.<sup>106</sup> One can only assume that clerks had begun to replace fellow Justices, at least to some extent, as a sounding board of ideas.

Clerks during the tenure of Chief Justices Taft (1920-1931), Hughes (1931-1940), and Stone (1941-1946) played a growing, but still relatively limited role. Stone was the first Justice to hire two law clerks, but the practice was not immediately followed. Few Justices permitted their clerks to take the lead in opinion writing, but all of them eventually tasked their clerks with

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<sup>105</sup> Ward & Weiden, *supra* note 103, at 24; Peppers, *supra* note 103, at 43-44.

<sup>106</sup> Dean Acheson, *Morning and Moon*, 57-58, quoted in Peppers, *supra* note 103, at 62-63.

drafting certiorari memoranda, most expected clerks to edit opinions, and some required bench memoranda.<sup>107</sup> Over the course of the period, some Justices seem to have forged closer bonds with their clerks than with their colleagues on the court. A Frankfurter comment is noteworthy in this regard: “They are, as it were, my junior partners—junior only in years. In the realm of the mind there is no hierarchy. I take them fully into my confidence so that the relation is free and easy.”<sup>108</sup> Law clerks made perfect colleagues, it seems, or at least better colleagues than the other Justices.

It is perhaps with Chief Justice Vinson’s tenure (1946-1953) that the clerk’s rise in prominence began its steep ascent. With Chief Justice Warren (1953-1969), the clerk’s prominence became an accepted feature at the Supreme Court. In addition to drafting certiorari memoranda and judicial opinions, Warren’s clerks were charged with preparing bench memoranda before oral arguments—a clerkship model embraced by the seven Justices who were added to the Court during Warren’s tenure.<sup>109</sup> Through the 1960s, Associate Justices had only two clerks each,<sup>110</sup> but the rising flood of petitions and

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<sup>107</sup> See generally Peppers, *supra* note 103, at 84-145; Ward & Weiden, *supra* note 103, at 36-53.

<sup>108</sup> Peppers, *supra* note 103, at 104. Frankfurter would lobby Reed clerks directly. Writes one Reed clerk: “[Frankfurter was] quite fond of using Justice Reed’s clerk as an avenue to the justices’ opinions . . . . Frankfurter was quite likely to walk into our chambers . . . and discuss issues with us *that he never talked to the justice about.*” *Id.* at 101 (emphasis added).

<sup>109</sup> *Id.* at 152.

<sup>110</sup> *Id.* at 154.

appeals (from 1,234 cases in 1951 to 3,643 in 1971) led most Justices to hire a third. Even so, it does not seem that Justices in this period were as dependent on their clerks as they eventually became. Justice Whittaker, for example, though overwhelmed by the burdens of his work and on the brink of a nervous breakdown, refused to delegate opinion-writing responsibilities to his clerks.<sup>111</sup>

The move to afford each Justice a fourth clerk seems to have been instigated by Justice Lewis Powell. In a 1972 letter to Chief Justice Burger, Powell wrote, “What would you think of including in the budget a request for funds for a fourth law clerk for me and for any other Justice who may desire one? I do not have the background in constitutional and criminal law which enables me to function without a great deal of reading and research.”<sup>112</sup> Apparently, Burger was initially skeptical of the need for a fourth clerk, but the associate justices were soon authorized to hire two secretaries and four law clerks.<sup>113</sup> The importance of the clerks over the past few decades is highlighted by J. Harvie Wilkinson’s comment that “Justice Powell often said that the selection of his clerks was among the most important decisions he made during a term.”<sup>114</sup> It is nowadays taken for granted that clerks play a large role in the opinion-writing process. One Justice reportedly told a clerk who asked for elaborate guidance in drafting an opinion, “If I had wanted someone

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<sup>111</sup> *Id.* at 159-61; Ward & Weiden, *supra* note 103, at 202.

<sup>112</sup> Peppers, *supra* note 103, at 185.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 186.

to write down my thoughts, I would have hired a scrivener.”<sup>115</sup>

### B. Clerks of the Court, not of the Justices

With their growing prominence, it should not be surprising that the clerks have attracted a measure of criticism. It has long been alleged that clerks exert too much influence on how Justices cast their votes. A less disputable claim is that clerks play an influential role in determining which cases the Justices choose to decide. By their own admission, many Justices seldom review certiorari petitions, relying instead upon the summaries and recommendations of the clerks.<sup>116</sup> The effect of the clerk filter is likely to increase the selection of cases in areas most familiar and interesting to recent graduates of prestigious law schools—especially constitutional law.<sup>117</sup> Such clerks, notwithstanding their intelligence and diligence, have little awareness of the issues genuinely vexing the legal community, which are not always the kind of cases that roil the legal academy. That fact, plus a prevailing norm that sternly punishes clerks who “imprudently” recommend certiorari grants, while imposing no tax on errors in the opposite direction, inevitably biases the selection process toward cases whose

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<sup>115</sup> *Id.* at 164.

<sup>116</sup> Starr, *supra* note 103, at 1377.

<sup>117</sup> See Suzanna Sherry, *Politics and Judgment*, 70 Mo. L. REV. 973, 986 (2005).

significance is apparent even to recent law school graduates.<sup>118</sup>

As employed today, clerks have contributed to the erosion of the Supreme Court as a cohesive judicial institution. Justices rarely communicate directly with one another about the cases before them; exchanges are typically mediated through clerks. Clerks, moreover, do not see themselves as employees of the Court, but of individual Justices.<sup>119</sup> Clerks fuel the cult of celebrity that infuses the Court, and not just through loyalty and gratitude to the Justice who was wise enough to select them from a very impressive pool of candidates. Incredible as it may seem, some clerks cravenly or strategically flatter their Justices in a manner wildly inconsistent with the clerk's private views. Frankfurter may have taken his clerks fully into his confidence, but one may doubt that the clerks always reciprocated.

The simplest solution would be to strip the Justices of all their clerks. We think such a step is unnecessarily radical. Instead, we propose that Congress reassign the clerks (perhaps in reduced numbers) to the staff of the Court's Librarian. The Librarian would choose and supervise the clerks, who would not be permitted to draft

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<sup>118</sup> Starr, *supra* note 103, at 1376-77. This effect is somewhat diminished by the role of the Solicitor General of the United States, whose recommendations are always taken very seriously, and frequently actively solicited. But reliance on the President's lawyer for guidance in case selection may have its own distorting effects, for obvious reasons.

<sup>119</sup> Peppers, *supra* note 103, at 189 (quoting J. Harvie Wilkinson III as saying "I never saw myself as a Supreme Court clerk—I saw myself as a Powell clerk.").

legal opinions. Individual Justices would submit research requests to the Librarian, who would be expected to allocate assignments more or less at random (in order to inhibit the development of bonds between Justices and clerks), and the results of the research would be shared with all the Justices. Law clerks would thus serve more as servants of the Court than of individual potentates within the Court.

As with our other proposals, our intent is not to punish the Court or its members, but to encourage the Court to operate more like a judicial body and less like an academic faculty cum super-legislature. The job would no doubt become more challenging, not only compared with current practice, but also compared with the job of a circuit judge. We think it should. It might cause Presidents to select their nominees on the grounds of legal ability more often than they do now. It might even encourage some mediocre lower court judges to refrain from campaigning for a seat on the high court. And it would almost certainly deter some Justices from remaining on the Court after they have lost the capacity to do much more than hire talented law clerks. The Justices might even return to the old practice of having the kind of equal and open discussions with each other that Frankfurter (and no doubt many others since) have *believed* they were having with hired help who are neither equal nor independent.

## **VI. Circuit Riding Revisited**

In the Judiciary Act of 1789, Congress included service on lower federal courts among the original duties

of members of the Supreme Court.<sup>120</sup> This was known as “circuit riding” because the Justices had to ride around the country on horses or in carriages to sit as circuit judges. With the exception of a short hiatus in 1801-1802, the Justices carried this burden until 1891 with the passage of the Evarts Act.<sup>121</sup> Legislation putting a complete end to circuit riding was not enacted until 1911.<sup>122</sup> Notwithstanding the great burden it placed on Justices, Congress repeatedly voted to continue the practice so as to ensure that Justices would remain connected with the rest of the legal system, other members of the bar, and the nation as a whole. We propose to reintroduce circuit riding into the life of the Supreme Court.

#### **A. The “Most Onerous and Laborious” Job in America**

Supreme Court Justices nearly escaped the burden of circuit riding as soon as it was placed on their shoulders. The Judiciary Act of 1801, pushed through by the outgoing Federalist Congress, eliminated the practice.<sup>123</sup> Within a year, the Republicans repealed the 1801 act, in part as an act of partisanship, but also in part for a reason that would echo throughout the century: without circuit riding, it was said, Supreme Court

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<sup>120</sup> 1 Stat. 73, 74-75 (1789).

<sup>121</sup> 26 Stat. 826 (1891).

<sup>122</sup> 36 Stat. 1087 (1911).

<sup>123</sup> 2 Stat. 89, 132 (1801).

Justices would be cut off from the political, cultural and, most importantly, legal life of the rest of the nation.

As the nation grew, and the federal judiciary's docket swelled, the position of Supreme Court Justice soon became, in the words of Justice McKinley, "the most onerous and laborious of any in the United States."<sup>124</sup> Many Justices had to travel over one thousand miles each year—even before the advent of railroads—in addition to his responsibilities on the Supreme Court. Bills to curtail circuit riding arose practically every decade in the nineteenth century, only to be defeated again and again. In congressional debates in 1869, for example, Senator George Williams argued that the abolition of circuit riding would transform the Supreme Court into a "fossilized" institution, with its members cut off from the practices, laws and customs of the local bar.<sup>125</sup> Proposals to end circuit riding stirred popular opposition, as reflected in an 1866 article:

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<sup>124</sup> Quoted in G. EDWARD WHITE, THE MARSHALL COURT AND CULTURAL CHANGE 162 (1988). Exhaustion brought on by the demands of circuit riding led, in part, to Justice William Cushing's decision to decline the commission to be Chief Justice. See Ross Davies, *William Cushing, Chief Justice of the United States*, 37 UNIV. OF TOL. L. REV. 597, 621 (2006). One nominee to the Supreme Court declined the honor altogether, noting that circuit riding was "extremely difficult [and] burthensome [sic]" and could result in the "loss of [his] health." See David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1718 (2007).

<sup>125</sup> Speech by Senator Williams, Cong. Globe., 41st Cong., 1st Sess. 209 (1869), quoted in Charles G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, 78 IND. L.J. 153, 186 (2003).

[W]e firmly believe the direct and indirect benefits derived from [circuit riding] infinitely outweigh any objections . . . . It must keep each judge's knowledge of practice and evidence much more fresh and serviceable than it could be, were he never to preside at a jury trial. The discipline, even if each judge try but a half dozen criminal and patent cases a year, more than repays him for the trouble and inconvenience; and the consequent mingling and association with the bar all over the circuit keeps up an acquaintance and understanding between it and the bench which we would be sorry to see lessened.<sup>126</sup>

By the late nineteenth century, however, there were 1,800 cases on the Supreme Court's docket and matters were languishing for years without resolution.<sup>127</sup> After decades of complaints from impatient litigants and the Justices themselves, the Evarts Act of 1891 created the modern courts of appeals (with new judgeships) and effectively eliminated circuit riding as a duty of Supreme Court Justices.

From a twenty-first century perspective, the significance of circuit riding during the first half of this

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<sup>126</sup> Summary of Events: United States-Congress, 1 Am. L. Rev. 206, 207 (1866-1867), quoted in Glick, *supra* note 19, at 1816 n.456.

<sup>127</sup> See Margaret Meriwether Cordray & Richard Cordray, *The Calendar of the Justices: How the Supreme Court's Timing Affects its Decisionmaking*, 36 ARIZ. L. ST. L. J. 183, 192 (2004).

country's existence is difficult to appreciate. Circuit riding made up a large part of the work of the Supreme Court well into the nineteenth century, and it remained a socially and politically salient feature of the Justices' role in the federal government even in the post-Civil War years when circuit riding responsibilities waned. Supreme Court Justices charged grand juries in New Hampshire, sentenced murderers in Louisiana, determined land claims in Kentucky, and enforced extradition orders in New York. By so doing, they remained connected to the lives of ordinary Americans, and saw first hand how the law operated in practice at the lowest levels of the judicial system.

## B. Vivifying a Fossilized Institution

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

Mindful of these competing concerns, our proposal is a modest attempt to reintroduce circuit riding.<sup>128</sup> Every

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<sup>128</sup> We made this suggestion in Lund & Lerner, *Precedent Bound*, *supra* note 76. Others have recently offered variants of the proposal as well. See Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV.

year, the Justices of the Supreme Court would select by lot one of the 105 Article III jurisdictions (93 district courts plus 12 courts of appeals). Once a jurisdiction has been selected, it would be removed from the pool until all other jurisdictions have been selected. Over the course of the term, each Justice would coordinate with the Chief Judge of the chosen court to ensure that he performs no less than 5% of the average annual workload of a judge in that jurisdiction.

Some cases would carry over beyond a calendar year, and Justices would continue responsibility until the case's completion. In all likelihood, then, the total circuit riding responsibilities of each Justice would exceed 5% of the workload of a typical district court or circuit judge. Even assuming it is double that, we should recall that Justices are now free to frolic around the world for three months of the year. Assigning them to work for half of that time would hardly constitute an intolerable burden.

Given technological developments, circuit riding would be far easier today than it was in centuries past. In fact, one federal court—the Federal Court of Claims—already exercises a national jurisdiction, and judges of that court frequently, and without substantial hardship, hold trials and settlement negotiations throughout the

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1386, 1388-89 (2006); Stras, *supra* note, at 1712. Both of these articles, like this one, draw upon the impressive research compiled in a student note. Glick, *supra* note 19.

country. Adding circuit riding to the responsibilities of a Supreme Court Justice may make it difficult for them to conduct seminars abroad, but it would give them new opportunities to hold trials in Tuscaloosa and sit on panels in Topeka. They would thus be forced to cope with many of the bread-and-butter issues that other federal judges confront daily—the rules of evidence, diversity cases, sentencing issues, etc. They would have the experience of being reversed on appeal, and of being outvoted on appellate panels by the same inferior judges who must usually obey their every command. Surely a salutary check on the hubris that naturally develops in people who are otherwise Supreme. In addition, the Justices would be forced to internalize, at least to some small extent, the cost of ambiguous and airy Supreme Court decisions. No longer would Justices be completely free to announce a ruling and leave others to worry about how it works. It would be their problem, too, because they would be more like what they were long ago: judges.

## Conclusion

Our Anglo-American legal system has a long tradition according to which judges are supposed to be mere oracles of the law, not politicians in robes, let alone philosopher-kings or media celebrities. That is what the nation was promised when the Constitution established an independent judiciary. It is also what judicial nominees promise to be, and what their senatorial inquisitors say they should be. And it is how the judges typically present themselves in their opinions after they are confirmed and appointed. But hardly any informed

observer could believe that our Supreme Court Justices in fact are any such thing.

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