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## Essay

# Reintroducing Circuit Riding: A Timely Proposal

Steven G. Calabresi<sup>†</sup> and David C. Presser<sup>\*</sup>

*“Sir, in a country like this, it is of some importance that your judges should ride the circuits, not only to become practically acquainted with the different rules that govern the decisions in the different States of the Union, but that they may not forget the genius and temper of their government. Adopt the system now before you, and your supreme judges will be completely cloistered within the City of Washington, and their decisions, instead of emanating from enlarged and liberalized minds, will assume a severe and local character.”<sup>1</sup>*

*“If the Supreme Court should ever become a political tribunal, it will not be until the Judges shall be settled in Washington, far*

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<sup>\*</sup> J.D. Candidate 2007, Northwestern University School of Law. I would like to thank my beloved wife for her limitless patience, thoughtfulness, and support (both financial and emotional) over the last several months. I also thank for their penetrating comments and questions Javitt Adili, Farnaz Alemi, Brian Hagedorn, Daniel Lev, Benjamin Thelen, and Matthew Vanek. Thanks also to Stephen B. Presser for his faith and advice, and for being such a great dad.

1. 33 ANNALS OF CONG. 125–26 (1819) (statement of Sen. Smith). The authors are indebted to Joshua Glick’s informative Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003), for leading them to this and the following quote from the congressional debates over circuit riding and for triggering Professor Calabresi’s memory of Professor Akhil Amar’s comments at the 1996 Federalist Society Symposium, which are contained in Federalist Society Symposium, *Panel Four: Relimiting Federal Judicial Power: Should Congress Play a Role?*, 13 J.L. & POL. 627, 638–44 (1997) [hereinafter *Panel Four*].

removed from the People, and within the immediate influence of the power and patronage of the Executive.”<sup>2</sup>

The Justices of the Supreme Court have a lot of free time on their hands during the summer months,<sup>3</sup> and most of them also have their best years behind them.<sup>4</sup> Some, like Justice Anthony Kennedy,<sup>5</sup> spend their summers abroad in Europe<sup>6</sup> and

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2. 2 REG. DEB. 932 (1826) (statement of Rep. Buchanan).

3. See 28 U.S.C. § 2 (2000) (“The Supreme Court shall hold at the seat of government a term of court commencing on the first Monday in October of each year and may hold such adjourned or special terms as may be necessary.”). Much like a college on the quarter system, the Court is usually in recess from late June or early July until October. See *The Court and Its Procedures*, <http://www.supremecourtus.gov/about/procedures.pdf> (last visited Apr. 10, 2006).

4. At the time of Chief Justice William Rehnquist’s death in 2005, the average age of the Justices was seventy-one (including two octogenarians and two septuagenarians). See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 877 tbl. 2 (2006); see also Legal Info. Inst., Cornell Law Sch., Supreme Court Collection: Current Supreme Court Justices, <http://supct.law.cornell.edu/supct/justices/fullcourt.html> (last visited Apr. 10, 2006) (providing links to biographies of the Justices on the Court at the time of Rehnquist’s death).

5. “Every summer for the past fifteen years, Kennedy and his wife, Mary, have rented an apartment in Salzburg,” where he teaches a class called “Fundamental Rights in Europe and the United States” to ninety American students and twenty students “from schools around the world.” See Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, NEW YORKER, Sept. 12, 2005, at 42, 44 (internal quotation marks omitted).

6. The vacation patterns of the other Justices are quite similar to those of Kennedy. See, e.g., *Justices Let Others Pick Up Tab in Summer Travels*, L.A. TIMES, June 28, 2000, at A19A. Taking advantage of the fact that foreign and domestic universities often pay for the travel expenses of Justices and their spouses during the summer, see *id.*, six out of nine Justices included continental cavorting in their summer itineraries in 1999:

Justice Ruth Bader Ginsburg was a guest lecturer at Tulane University Law School’s summer program in Greece (she traveled to the Netherlands as a guest lecturer the previous February).

Justice Stephen G. Breyer took on lecturing duties in Austria and Chile.

Justice Sandra Day O’Connor made it to Japan for a speech and discussions with faculty and students at Doshisha University in Kyoto. She also participated in conferences and meetings in Scotland and the Czech Republic.

Auckland, New Zealand, was Justice Antonin Scalia’s destination for a weeklong seminar sponsored by the University of Auckland. He also taught for two weeks at Hofstra University’s summer law school program in Nice, France.

bring European notions of constitutional “interpretation” back to bear on the constitutional questions before them on the U.S. Supreme Court.<sup>7</sup>

This Essay considers whether there is a way, short of a constitutional amendment, to rein in the Justices’ transatlantic legal dalliances, while also encouraging aged, life-tenured Justices to retire. We contend that there is. The solution to both problems is to reintroduce the practice of circuit riding by Supreme Court Justices, which was abolished almost 100 years ago but which existed for the first 122 years of the Court’s history. We propose that the Justices be required to ride circuit for a four-week session in July following the recess of the Supreme Court’s annual Term, during what is now the Justices’ three-month summer vacation. We note, as Chief Justice John Roberts did early in his career, that “only Supreme Court justices and schoolchildren are expected to and do take the entire summer off,”<sup>8</sup> and we suggest a partial correction of that situa-

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Justice Anthony M. Kennedy made it to Salzburg, Austria, as a teacher for University of the Pacific’s McGeorge School of Law, and to Moscow, London and Edinburgh, Scotland, for others.

Chief Justice William H. Rehnquist got his expenses paid for teaching at the University of London but turned over a \$2,000 honorarium to his church.

*Id.*

7. For examples of the Court’s reliance on foreign sources of law, see the majority opinions authored by Kennedy in *Roper v. Simmons*, 543 U.S. 551, 576 (2005) (citing, among other sources, Convention on the Rights of the Child, art. 37, Nov. 20, 1989, 1577 U.N.T.S. 3, “which every country in the world has ratified save for the United States and Somalia”), and *Lawrence v. Texas*, 539 U.S. 558, 572–73 (2003) (noting that COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION (authorized Am. ed., Stein & Day 1963) (1957), a British report, advised the British Parliament to repeal anti-homosexuality laws). Justice Breyer has also relied on foreign sources of law, such as in his dissent from the denial of certiorari in *Knight v. Florida*, 528 U.S. 990, 995–99 (1999) (citing cases from the Privy Council of Jamaica, the Supreme Court of India, the Supreme Court of Canada, the United Nations Human Rights Committee, and a number of U.S. cases citing foreign decisions and policies). See also Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743 (2005).

8. Donna Cassata, *Roberts Rises to Chief Justice Nominee*, BOSTON.COM, Sept. 5, 2005, [http://www.boston.com/news/education/higher/articles/2005/09/05/roberts\\_rises\\_to\\_chief\\_justice\\_nominee?mode=PF](http://www.boston.com/news/education/higher/articles/2005/09/05/roberts_rises_to_chief_justice_nominee?mode=PF) (quoting an April 19, 1983 memorandum written by Roberts). At the time of this statement, Roberts was serving as Associate Counsel to President Reagan in the White House Counsel’s Office. See The Justices of the Supreme Court, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Apr. 10, 2006).

tion. During their one month of riding circuit, the Justices would preside over trials on the district courts of their respective circuits<sup>9</sup> rather than hobnobbing in Salzburg with foreign luminaries. We propose to pay the Justices an additional \$100,000 a year to compensate them for this added work, giving them a much-deserved salary increase and making clear that our goal is to reform and improve the functioning of the Court. We think circuit riding would get the Justices in touch with popular opinion outside of the Beltway, much as trips to their home districts and states do for representatives and senators. We also think the Justices would benefit from knowing more about the real-world impact their law of criminal procedure is having in the district courts and from seeing the practical effects of the rules of procedure they promulgate.<sup>10</sup>

We begin in Part I by discussing the constitutionality of circuit riding as it originally existed from 1789 to 1911. We show that although there was a vigorous debate on the Marshall Court as to whether the original and very onerous circuit-riding system was constitutional, that debate was decisively and finally resolved in favor of the constitutionality of the practice. In Part II, we consider the constitutionality of our very modest circuit-riding proposal under modern Rehnquist Court Appointments Clause case law. We conclude that a modest cir-

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9. Professor Calabresi would like to acknowledge as a source of inspiration for this idea the proposal of his fellow panelist, Professor Amar, at the 1996 Federalist Society Symposium. Professor Amar touched on the historical practice of circuit riding, noting that “[o]ne of the things circuit-riding did do is it took justices outside of Washington, D.C. It put them in touch with trials and with state law and with lots of other judges, and it perhaps created a different perspective on law in America.” *Panel Four, supra* note 1, at 639. At this panel, Professor Calabresi betrayed his own transatlantic leanings when he suggested that in order to put a limiting perspective on the Supreme Court’s power,

Congress might want to consider by statute doing two things that Germany does with its constitutional court, and that is to move the Supreme Court to another part of the country to get it outside the Beltway. Perhaps, the Supreme Court should be moved to a city in the Sunbelt. The current Court is dominated by Northeasterners and Californians. Its decisionmaking reflects that perspective. It might be appropriate for a major institution of the national government to be based in some Sunbelt state given that a majority of Americans now live in that part of the country.

*Id.* at 636.

10. *Cf. id.* at 643–44 (comments of Professor Amar) (“Because I actually think [the Justices have] been over-exuberant in criminal procedure, I would like them to actually see crime up close, in trials, and not just federal trials for white-collar crimes but murder, rape, and robbery cases as well.”).

cuit-riding plan of the type we propose would be constitutional, although onerous circuit-riding duties might well be unconstitutional. In Part III, we look at the reasons why circuit riding was abolished, and we show that none of those reasons still holds true today. We thus conclude that none of the reasons that led to the abolition of circuit riding should preclude its being reestablished. Finally, in Part IV, we consider the normative case for reestablishing circuit riding. We think reintroducing circuit riding is a good idea for three reasons. First, it would get the Justices reacquainted with American values outside the Beltway, much as extensive domestic travel does for Presidents and members of Congress. Second, it might encourage the Justices to retire after about fifteen years on the bench, as they did on average between 1789 and 1970, rather than staying on average for twenty-six years, as they have done since 1970. Finally, it would help get the Justices out of the business of importing foreign sources of law into American constitutional law. We think the reestablishment of circuit riding is an idea whose time has come.

#### I. THE CONSTITUTIONALITY OF THE ORIGINAL FORM OF CIRCUIT RIDING

We begin with the question of the constitutionality of circuit riding as it existed from 1789 until its abolition in 1911, and we consider what the founding giants of our court system said and thought about that issue. Strikingly, John Jay, the very first Chief Justice of the Supreme Court, expressed the belief that the system of circuit riding set up by the Judiciary Act of 1789<sup>11</sup> was unconstitutional;<sup>12</sup> but when push came to shove, he and the other Justices flinched rather than insist upon such a bold claim.<sup>13</sup>

The original system of circuit riding to which Jay objected provided for three circuit courts in the northern, middle, and southern parts of the original United States.<sup>14</sup> Beginning in

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

12. See Letter from the Justices of the Supreme Court to George Washington (ca. Sept. 13, 1790), in 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800, at 89 (Maeva Marcus ed., 1988) [hereinafter 2 DOCUMENTARY HISTORY]; see also discussion *infra* notes 22–29 and accompanying text.

13. See JULIUS GOEBEL, JR., 1 HISTORY OF THE SUPREME COURT OF THE UNITED STATES 556 (1971); see also *infra* notes 30–31 and accompanying text.

14. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

1789, each circuit court was staffed with two Supreme Court Justices and one local district judge.<sup>15</sup> In 1793, the system was reformed so that only one Justice, rather than two, was required.<sup>16</sup> The cases these circuit courts heard included not only appeals from the district courts, but also trials of actions that were brought originally in the circuit courts.<sup>17</sup> During the early years of the Republic, circuit riding took up nearly half of the Justices' year, was undertaken at the Justices' own expense, and was physically very onerous and at times even dangerous.<sup>18</sup> Justice James Iredell, for example, died at the youthful age of forty-eight,<sup>19</sup> in part because of the rigors of circuit riding in the southern circuit, where roads and accommodations were still quite scarce.<sup>20</sup>

Jay's complaints about circuit riding surfaced in 1790, right after the Justices' very first season of riding circuit.<sup>21</sup> Jay

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15. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 11 (1928).

16. Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34 (“[T]he attendance of only one of the justices of the supreme court, at the several circuit courts of the United States, to be hereafter held, shall be sufficient, any law requiring the attendance of two of the said justices notwithstanding . . .”).

17. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79. Roughly, the jurisdiction of the district courts included certain criminal cases, as well as civil cases involving admiralty and maritime questions, *id.* § 9, 1 Stat. at 76–77, while the circuit courts handled trials of cases involving diversity of citizenship and appeals from the district courts, *id.* § 11, 1 Stat. at 78–79.

18. See Maeva Marcus, *Introduction* to 2 DOCUMENTARY HISTORY, *supra* note 12, at 1, 3.

19. See Robert M. Ireland, *Iredell, James*, in *THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES* 509, 509 (Kermit L. Hall ed., 2d ed. 2005) [hereinafter OXFORD COMPANION].

20. See *id.* (“The physically taxing duties of riding his federal judicial circuit contributed to his death . . .”); Kermit L. Hall, *Circuit Riding*, in OXFORD COMPANION, *supra* note 19, at 169, 169 (“The southern circuit . . . required travel of nearly 1,800 miles, twice a year, in a country that had poor roads or, in some places, none at all.”); Glick, *supra* note 1, at 1765 (describing the experience of circuit riding on the southern circuit); see also *id.* at 1771 n.130 (discussing the assignment of the Justices to specific circuits).

21. Jay's diary entries from Massachusetts in late April 1790 reveal his struggle with a late and harsh winter storm, in which his “[h]orses [were] much incommoded by the Snow & wet.” Diary Entry of John Jay (Apr. 29, 1790), in 2 DOCUMENTARY HISTORY, *supra* note 12, at 54, 54. Compared to some of the other Justices, Jay had it easy on the eastern circuit, through which travel was “fatiguing,” but not nearly as arduous as travel through the southern circuit. See Glick, *supra* note 1, at 1765 (“[T]he Southern Circuit required long trips through rough, unpopulated, and even unknown terrain’ at times in ‘unpredictably bad nasty weather’ with lodgings ‘uncertain and often unpleasant.” (footnotes omitted) (quoting Wythe Holt, “*The Federal Courts*

drafted a letter to President Washington on behalf of his fellow Justices objecting to circuit riding on two constitutional grounds.<sup>22</sup> First, he argued, allowing the Justices to hear cases in courts of original jurisdiction violated Article III, Section 2<sup>23</sup> because of the “legal Incompatibility of ultimate appellate Jurisdiction, with original Jurisdiction.”<sup>24</sup> In Jay’s view, it was undesirable for the Justices to hear appeals on cases they had tried originally in the circuit courts. Second, Jay argued, Congress had violated Article II, Section 2 (the Appointments Clause)<sup>25</sup> by essentially appointing the Justices to ride the circuit courts when this is “an Exercise of Powers, which, constitutionally and exclusively belong to the President and Senate.”<sup>26</sup> In other words, the Justices were nominated, confirmed, and commissioned to sit on the Supreme Court and not on the circuit courts. By appending onerous and nongermane inferior court duties onto the duties of a Supreme Court Justice, Jay believed that Congress had violated the Appointments Clause.

Jay acknowledged that there was a distinction between the Supreme Court as an institution and its Justices. He thus did not think that circuit riding added impermissibly to the original jurisdiction of the Court. Rather, he believed that the Supreme Court should not sit in judgment of its own members’ decisions on the inferior courts:

We are aware of the Distinction between a Court and it’s [sic] Judges; and are far from thinking it illegal or unconstitutional, however it may be inexpedient to employ them for other Purposes, provided the latter Purposes be consistent and compatible with the former\_ [sic] But from this Distinction it cannot, in our Opinions, be inferred, that the Judges of the Supreme Court may also be Judges of inferior and subordinate Courts, and be at the same Time both the Controllers and the controled [sic].<sup>27</sup>

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*Have Enemies in All Who Fear Their Influence on State Objects?: The Failure to Abolish Supreme Court Circuit-Riding in the Judiciary Acts of 1792 and 1793*, 36 BUFF. L. REV. 301, 308 (1987)); see also *id.* at 1771 n.130 (discussing the assignment of the Justices to specific circuits).

22. See Letter from the Justices of the Supreme Court to George Washington, *supra* note 12, at 89–91.

23. U.S. CONST. art. III, § 2.

24. See Letter from the Justices of the Supreme Court to George Washington, *supra* note 12, at 89–90.

25. U.S. CONST. art. II, § 2.

26. Letter from the Justices of the Supreme Court to George Washington, *supra* note 12, at 91.

27. *Id.* at 90.



Jay feared that the public's faith in the new Federal Supreme Court would be undermined every time the Justices affirmed the opinion of one of their own.<sup>28</sup> He cited Matthew Bacon's *A New Abridgement of the Law* to show that once appointed to the greater office of the Supreme Court, the Justices believed of their "inferior" duties on the lower courts that there was "a Presumption they cannot be executed with Impartiality and Honesty."<sup>29</sup>

Jay's letter to Washington appears never to have been sent,<sup>30</sup> and perhaps believing that they had overstated their case, the Justices did not push the issue further at that time.<sup>31</sup> Two years later, however, the Justices did ask the President and Congress for relief from "a kind of life, on which we cannot reflect, without experiencing sensations and emotions, more easy to conceive than proper for us to express."<sup>32</sup> Their request contained no explicit references to the constitutionality of circuit riding, but it did represent to Congress, framed as an issue of policy, the two main points from Jay's aborted letter of 1790:

[T]he distinction made between the Supreme Court and its Judges, and appointing the same men finally to correct in one capacity, the errors which they themselves may have committed in another, is a distinction unfriendly to impartial justice, and to that confidence in the supreme Court, which it is so essential to the public Interest should be reposed in it.<sup>33</sup>

Many of the representations contained in the letter referred to the "too burthensome" task of riding circuit in between the two sessions of the Supreme Court and during "the two most severe seasons of the year."<sup>34</sup> For example, the Justices objected "[t]hat to require of the Judges to pass the greater part of their days on the road, and at Inns, and at a distance from their families, is a requisition which in their opinion should not be made unless in cases of necessity."<sup>35</sup> This complaint about the onerous quality of circuit riding suggests that

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28. *Id.*

29. *See id.* (quoting 3 MATTHEW BACON, A NEW ABRIDGEMENT OF THE LAW 736–37 (London, E. Richardson & C. Lintot 2d ed. 1762)).

30. GOEBEL, *supra* note 13, at 556.

31. *Cf. id.* (noting that Jay was prepared to challenge the Judiciary Act, but did not do so "for reasons of political decorum").

32. Letter from the Justices of the Supreme Court to George Washington (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra* note 12, at 288, 288.

33. Letter from the Justices of the Supreme Court to Congress (Aug. 9, 1792), in 2 DOCUMENTARY HISTORY, *supra* note 12, at 289, 290.

34. *Id.* at 289–90.

35. *Id.* at 290 (editor's footnotes omitted).

had the going not been so arduous (especially during a time when the docket of the Supreme Court was quite slim<sup>36</sup>), no objections to circuit riding, constitutional or otherwise, might have been raised. Further evidence of this point is the fact that the Justices did not initially object to the constitutionality of circuit riding when it was first imposed on them in 1789, before they had learned from experience how hard it was.

But the really interesting founding-era debate about the constitutionality of circuit riding did not arise until the period between 1801 and 1803, when John Adams's Federalists squared off against the Jeffersonians over the issue. In the winter of 1801, months after he had lost his bid for reelection, Adams persuaded Congress to abolish circuit riding and to create sixteen new circuit court judges, whom he got to pick, to staff the circuit courts.<sup>37</sup> The Jeffersonians were outraged by the appointments of the so-called midnight judges.<sup>38</sup> As a result, Congress passed a Repeal Act in 1802, abolishing the new circuit court judgeships and reintroducing circuit riding by the Justices.<sup>39</sup> This Repeal Act raised two constitutional questions: First, could Congress by ordinary legislation abolish life-tenured federal judgeships? Second, was the re-creation by Congress of circuit riding constitutional?<sup>40</sup> This second question touched off a heated debate on the Marshall Court, which revealed that a number of the Justices in 1802, including Chief Justice John Marshall, thought that circuit riding was unconstitutional as an original matter.<sup>41</sup> Professor Bruce Ackerman

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36. See Glick, *supra* note 1, at 1764 (citing, among other sources, BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 18 (1993)) ("During [the first session of the Supreme Court] and the following two terms, there were no cases on the docket and the justices had little to do." (footnote omitted)).

37. See Act of Feb. 13, 1801, ch. 4, § 7, 2 Stat. 89, 90–91 (repealed 1802) (establishing the new circuit court judgeships); see also 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 185–88 (rev. ed. 1937) (detailing the passage of the Judiciary Act of 1801).

38. WARREN, *supra* note 37, at 188–209. Charles Warren quotes a famous letter drafted by Thomas Jefferson in March 1801 that helped spawn the term "midnight judges," in which Jefferson rails against the "new appointments which Mr. A[dams] crowded in with whip and spur from the 12th of Dec. when the event of the election was known . . . until 8 o'clock of the night at 12 o'clock of which he was to go out of office." *Id.* at 201 (omission in original).

39. Act of Mar. 8, 1802, ch. 8, 2 Stat. 132 (repealed 1911).

40. See BRUCE ACKERMAN, THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 176 (2005).

41. *Id.* at 163–72.

demonstrates why the reestablishment of circuit riding was upheld by the Marshall Court: key Justices, such as William Paterson and Bushrod Washington, thought the issue had been settled by practice.<sup>42</sup> Professor Ackerman claims the Justices who took that position did so mainly out of fear of the political power of the Jeffersonians, who were then riding high.<sup>43</sup>

Several notable exchanges occurred on the Marshall Court during this time as to the constitutionality of circuit riding. Professor Ackerman describes Marshall's opinion on the issue:

Only four of Marshall's letters remain in the archives, but all take the same position. If the justices consulted first principles, the Constitution gives them no choice—they must defy the new statutory command and refuse to go circuit riding. For Marshall, a simple point was decisive: when he and his colleagues obtained their appointments, they received commissions to serve as justices of the Supreme Court, and not as all-purpose providers of judicial services. The jurisdiction of Supreme Court justices is defined in Article III of the Constitution, and it does not include a grant to ride around the country holding trials with district judges. Before Marshall and the others could be required to engage in extensive trial work, the president and Senate would have to appoint them to a second, distinct office. In the words of his letter to Justice Cushing on April 19[, 1802]: “For myself I more than doubt the constitutionality of this measure & of performing circuit duty without a commission as a circuit Judge.”<sup>44</sup>

Professor Ackerman also quotes a letter from Marshall to Paterson, in which Marshall again expressed doubt as to the constitutionality of circuit riding:

I cannot conquer [the opinion] that the constitution requires distinct appointments & commissions for the Judges of the inferior courts from those of the supreme court. It is however my duty & my inclination in this as in all other cases to be bound by the opinion of the majority of the Judges.<sup>45</sup>

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42. *Id.* at 165–66 (noting that Paterson's opinion on the constitutionality of circuit riding “not only is important in itself but will affect the decisions of the others”); *id.* at 169–70 (describing the opinions of Paterson and Washington).

43. *Id.* at 170–72.

44. *Id.* at 163–64 (quoting Letter from John Marshall to William Cushing (Apr. 19, 1802), in 6 THE PAPERS OF JOHN MARSHALL 108, 108 (Charles F. Hobson ed., 1990) [hereinafter 6 MARSHALL PAPERS]).

45. Letter from John Marshall to William Paterson (Apr. 19, 1802), quoted in ACKERMAN, *supra* note 40, at 165. Marshall also declared his willingness to be bound by majority opinion in his letter to Cushing of April 19, 1802:

For myself I more than doubt the constitutionality of . . . performing circuit duty without a commission as a circuit Judge. But I shall hold myself bound by the opinions of my brothers. I am not of opinion that we can under our present appointments hold circuit courts, but I presume a contrary opinion is held by the court & if so I shall conform to

Nor was Marshall alone in thinking that the Repeal Act was unconstitutional in so far as it restored circuit riding. Justice Samuel Chase likewise argued against the constitutionality of circuit riding in a letter to Marshall.<sup>46</sup> Chase also raised the separate proposition in this letter that it would be unconstitutional for the Justices to return to ride circuit and displace the circuit court judges appointed by Adams in 1801.<sup>47</sup> Chase laid out at length his objections to the repeal of the Judiciary Act of 1801 and the impending bill that would reestablish the Justices' riding circuit:

If the repealing Law has not *abolished* the Circuit Courts, which it certainly has not done, but has established Circuit Courts in the repealing Act, and also in the Bill intended to be passed, *substantially the same* with the Circuit Courts in the Law repealed; and if the repealing Act has not destroyed the Office of the Judges appointed, commissioned, and qualified under the Law repealed; it follows that the Offices of these Judges are *now full*; and consequently no Judge of the Supreme Court (nor any Judge of any District Court) holding this opinion can exercise the Office of a Judge of such Courts, without violating the Constitution. Secondly—If the repealing Act be void, so far, as it intends to destroy the Office of the Judges under the Law repealed, and a Judge of the Supreme Court (or of a District Court) should hold the Circuit Court, I think he would, thereby, be *instrumental* to carry into effect an *unconstitutional* Law. If he executes the Office of Circuit Judge, I think he thereby decides that the repealing was *constitutional*.<sup>48</sup>

In addition to attacking the legitimacy of the Justices' riding circuit under the Repeal Act, Chase also stated his belief that even if they had been given specific commissions as judges of the inferior courts—which he believed they lacked—the Justices would remain constitutionally precluded from hearing cases of first instance for want of a specific grant of original jurisdiction to do so:

I am inclined to believe, that a Judge of the Supreme Court cannot act as a Judge of a Circuit Court, *without*, or *with* a commission. No one can deny that a Judge of the Circuit Court is an *Officer* of the United States; and the Constitution . . . directs the President to commission *all the Officers* of the United States. I apprehend that, no one can hold *any Office* under the United States, without a Commission to hold such office.

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it.

Letter from John Marshall to William Cushing, *supra* note 44, at 108.

46. Letter from Samuel Chase to John Marshall (Apr. 24, 1802), in 6 MARSHALL PAPERS, *supra* note 44, at 109, 113–15.

47. *See id.*

48. *Id.* at 113–14.

... The Constitution intended that the Judges of the Supreme Court should not have *original* Jurisdiction, but only in the few Cases enumerated. The inference is just, that, as the Constitution only gave the supreme Court original Jurisdiction in a few specified cases, it intended to *exclude* them from *original* Jurisdiction in all other cases; and more especially as it gives them *appellate* Jurisdiction in all Cases that should arise under the Constitution or Laws of the United states. But the Judges have held Circuit Courts ever since the formation of the Federal Government, until the late Judiciary Law [of February 13, 1801]. The fact is so. I can truly say that I never considered the question. I acted as a Circuit Judge . . . . By the Constitution . . . , all Judges are to be nominated by the President to the senate, and the President, with the advice and consent of the Senate, is to appoint them. If Congress, by Law, requires a Judge of the supreme Court to hold a Circuit Court, does not Congress, thereby, *substantially* nominate and appoint a Judge of the Circuit Court?<sup>49</sup>

Despite his strong feelings on the subject, however, Chase's colleagues persuaded him to go back to circuit riding, and he thus became "instrumental to carry into effect"<sup>50</sup> the Repeal Act.

As Professor Ackerman discusses, three of the Justices polled by Marshall—Washington, Paterson, and William Cushing—argued that the constitutionality of circuit riding had been settled by early practice.<sup>51</sup> Contemporaneous letters reveal the opinion of several of the Justices that, in the words of one recent commentator, "since the original justices had acquiesced to performing their circuit-riding duties, the question of constitutionality should be regarded as settled."<sup>52</sup>

It was this sentiment that carried the day when, in *Stuart v. Laird*,<sup>53</sup> the issue of the constitutionality of circuit riding and of the Repeal Act of 1802 finally reached the Supreme Court. Having already sat on the case as a circuit Justice, Marshall recused himself from the appeal,<sup>54</sup> as was the unofficial prac-

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49. *Id.* at 114–15.

50. *Id.* at 114 (emphasis omitted).

51. ACKERMAN, *supra* note 40, at 169–70.

52. Glick, *supra* note 1, at 1791 (citing Letter from Hannah Cushing to Abigail Adams (June 25, 1802), *quoted in* 6 MARSHALL PAPERS, *supra* note 44, at 118 n.6 (editor's footnote) (revealing Paterson's views by including a portion of a letter from Paterson to Marshall and copied to Cushing); Letter from John Marshall to William Paterson (May 3, 1802), *in* 6 MARSHALL PAPERS, *supra* note 44, at 117, 117–18 (revealing Washington's views); Letters from William Paterson to John Marshall (June 11 & 18, 1802), *cited in* 6 MARSHALL PAPERS, *supra* note 44, at 118 n.6 (editor's footnote) (reporting Cushing's views)). Paterson's views as expressed in his correspondence foreshadowed his holding in *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

53. 5 U.S. (1 Cranch) 299.

54. *Id.* at 308.

tice by the Justices when cases they had heard on circuit came before the Court.<sup>55</sup> Stuart's lawyer, Charles Lee, was the former Attorney General under Adams<sup>56</sup> and "an experienced Virginia practitioner."<sup>57</sup> Lee offered three main points against the circuit court's, and the Supreme Court's, jurisdiction to hear the case, which were reminiscent of Jay's, Marshall's, and Chase's beliefs concerning the constitutionality of circuit riding.<sup>58</sup> First, Lee argued that the Repeal Act, which created the circuit court and bestowed jurisdiction upon it, unconstitutionally deprived all the previously existing federal courts of their jurisdiction and stripped the circuit judges of their life-tenured offices granted by the Judiciary Act of 1801.<sup>59</sup> Second, Lee claimed that the Repeal Act and the Act of April 29, 1802,<sup>60</sup> were unconstitutional "because they impose new duties upon the judges of the supreme court, and thereby infringe their independence; and because they are a legislative instead of an

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55. See, e.g., *Fenmore v. United States*, 3 U.S. (3 Dall.) 357, 364 (1797) (Paterson, J.) ("As I joined in giving the judgment of the circuit court, it gives me pleasure to be relieved from the necessity of delivering any opinion on the present occasion."); *Bingham v. Cabot*, 3 U.S. (3 Dall.) 19, 42 (1795) (Cushing, J.) (recusing himself from rendering an opinion "upon the question of affirming or reversing the judgment of the court below," on which he sat). *But see*, e.g., *Penhallow v. Doane's Adm'rs*, 3 U.S. (3 Dall.) 54, 108-16 (1795) (Blair, J.) (reiterating his reasoning on the circuit court but admitting that after hearing the opinions of his brethren on the Supreme Court, he is "of a different opinion" regarding his allocation of damages); *Georgia v. Brailsford*, 2 U.S. (2 Dall.) 402, 405-06 (1792) (Iredell, J.) (indicating that though he had heard the case at circuit court, he gave "[his] opinion, on the present motion, detached from every previous consideration of the merits of the cause").

56. See U.S. DEP'T OF JUSTICE, *Charles Lee, in ATTORNEYS GENERAL OF THE UNITED STATES 1789-1985*, at 6, 6 (1985).

57. GOEBEL, *supra* note 13, at 582. Only four years earlier, Lee, acting as Attorney General, had successfully argued before the Court that the Eleventh Amendment to the Constitution "supercede[d] all suits depending as well as prevent[ed] the institution of new suits against a state by citizens of another state" in federal court, maintaining that "[f]rom the moment those who gave the power to sue a state annulled it, this power ceased to be a part of the Constitution, and if it did not exist there, it could not be exercised." *Id.* at 740-41. Lee also argued on behalf of William Marbury in the contemporaneous and hugely significant case *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), where, as a Federalist, he likely expected to encounter a sympathetic Court. Robert J. Reinstein & Mark C. Rahdert, *Reconstructing Marbury*, 57 ARK. L. REV. 729, 743-44 (2005). Lee was to be disappointed by the outcomes of both cases, whose opinions were handed down within a week of each other.

58. See *supra* notes 22-29, 44-49 and accompanying text.

59. *Stuart*, 5 U.S. (1 Cranch) at 303-05 (argument by Lee).

60. Act of Apr. 29, 1802, ch. 31, 2 Stat. 156.

executive appointment of judges to certain courts.”<sup>61</sup> Finally, Lee asserted that “[a] party in [the Supreme Court] has a right to have his cause tried by [all six unbiased Justices]” and that “[a Justice] having tried the cause in the court below, and given judgment, must be in some measure committed; he feels an anxiety that his judgment should be affirmed.”<sup>62</sup>

In four paragraphs drafted by Justice Paterson, which did not specifically address the merits of most of Lee’s argument, the Court held the Repeal Act and the practice of Justices riding circuit—already acquiesced to by the Marshall Court<sup>63</sup>—to be constitutional.<sup>64</sup> Paterson reiterated the reliance on custom in explaining the Court’s reasoning:

Another [proposed] reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. Of course, the question is at rest, and ought not now to be disturbed.<sup>65</sup>

This was the last time that the Court considered the question of the constitutionality of circuit riding.<sup>66</sup> When Congress

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61. *Stuart*, 5 U.S. (1 Cranch) at 305.

62. *Id.*

63. The Justices had resumed riding circuit in the fall of 1802, “signif[ying] their acquiescence in the repeal of the Judiciary Act of 1801 and in the restoration of the former system.” 6 MARSHALL PAPERS, *supra* note 44, at 121 n.1 (editor’s footnote).

64. *Stuart*, 5 U.S. (1 Cranch) at 308–09; *cf.* David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1408 (2006) (calling *Stuart* “abysmally reasoned,” but concurring in the result on the grounds that “Congress may *add* to a judge’s responsibilities, subject only to the requirement of reappointment for duties wholly nongermane to the office”).

65. *Stuart*, 5 U.S. (1 Cranch) at 309.

66. After the *Stuart* decision, the fate of circuit riding rested with Congress, which engaged in a century-long volley from House to House of numerous bills, only a few of which became acts, that attempted to address the needs of the judiciary as expansion and industrial revolution bequeathed upon the nation’s courts rapidly burgeoning dockets at both the nisi prius and appellate levels. *See generally* FRANKFURTER & LANDIS, *supra* note 15, at 30–145. However, the rationale on which it was upheld—that the acquiescence of the Justices and decades of tradition had rendered the question moot as a matter of constitutional construction—has since been questioned in other contexts by other cases. *See, e.g.*, *United States v. Woodley*, 726 F.2d 1328, 1337 (9th Cir.

finally did away with circuit riding in 1911, it did so not on any constitutional basis, but for pragmatic reasons: it adopted the current system of federal appellate courts and gave the Supreme Court the power of certiorari in order to gain control over the ballooning dockets of the federal courts.<sup>67</sup> *Stuart*<sup>68</sup> thus remains the final word from the Court on the constitutionality of circuit riding; and, indeed, the current practice of allowing Justices and circuit court judges to sit by designation on inferior federal courts<sup>69</sup> presupposes the constitutionality of circuit riding. The fact that many Justices, both retired and active, in recent years have sat by designation on the inferior federal courts<sup>70</sup> shows that *Stuart* is still good law to the extent it holds that Justices may sit on the inferior courts even though they are commissioned only to the Supreme Court.

## II. THE CONSTITUTIONALITY OF OUR CIRCUIT-RIDING PROPOSAL UNDER CURRENT APPOINTMENTS CLAUSE PRECEDENT

Whether or not circuit riding was constitutional as practiced in the early days of the Republic, and regardless of its constitutionality as a matter of originalism, circuit riding as we propose to re-create it today would be constitutional. Chief Justice John Jay acknowledged that other judicial duties could be assigned to Justices, provided that the purposes of their extra-Supreme Court duties were “consistent and compatible” with their role on the Court.<sup>71</sup> We believe that Justices riding circuit

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1983) (“This early line of Supreme Court authority, holding that unchallenged historical practice is sufficient evidence of constitutionality, no longer . . . represents the thinking of the Court. Recent Supreme Court discussions of the issue indicate that any practice, no matter how fully accepted or efficient, is ‘subject to the demands of the Constitution which defines powers and . . . sets out just how those powers are to be exercised.’” (second omission in original) (quoting *INS v. Chadha*, 462 U.S. 919, 945 (1983))), *withdrawn*, 732 F.2d 111 (9th Cir. 1984).

67. See discussion *infra* notes 112–23 and accompanying text.

68. 5 U.S. (1 Cranch) 299.

69. 28 U.S.C. § 43(b) (2000) (providing that Justices “designated or assigned [to a circuit court of appeals] shall be competent to sit as judges of the court”); *id.* § 291(b) (allowing circuit judges to serve on district courts); *id.* § 294(a) (permitting retired Justices to sit by designation).

70. See, e.g., *Redden v. Interstate Commerce Comm’n*, 956 F.2d 302 (D.C. Cir. 1992) (opinion by Justice Clarence Thomas, sitting by designation on a three-judge appellate panel); *Rice v. Branigar Org., Inc.*, 922 F.2d 788 (11th Cir. 1991) (opinion by retired Justice Lewis Powell, sitting by designation).

71. Letter from the Justices of the Supreme Court to George Washington,



for four weeks a year during the Court's three-month summer recess would not interfere with their duties on the Court. Nor would it significantly impinge on their quality of life as happened to the Justices in the late eighteenth and early nineteenth centuries. Relatively recently, then-Associate Justice William Rehnquist sat by designation as a trial judge in the Fourth Circuit without experiencing any of the horrors intimated by the early foes of circuit riding.<sup>72</sup> Our proposal entails a limited amount of circuit riding, encourages the Justices' recusal from hearing appeals of their own lower court decisions—which has, at any rate, not been a problem with Justices sitting by designation on circuit courts of appeals—and asks the Justices to perform duties that are entirely germane to their duties as Justices.

As one of us has discussed in another recent article, the key issue as to the constitutionality of circuit riding is whether it violates the Appointments Clause by annexing the duties of a separate and new office to the existing duties of a Supreme Court Justice.<sup>73</sup> The Rehnquist Court clearly held in *Weiss v. United States* that Congress may annex additional duties to an existing office provided that those additional duties are germane to the duties of the existing office. *Weiss* required the Court to consider whether judge advocates general could appoint commissioned officers of the armed services to serve as military judges without a separate nomination by the President and confirmation by the Senate.<sup>74</sup> The Court quite correctly concluded that history and practice had settled the issue.<sup>75</sup> Because “the role of military judge is ‘germane’ to that of military officer,” no separate nomination and confirmation process was constitutionally required.<sup>76</sup>

The issue, then, with respect to the constitutionality of our circuit-riding proposal is whether requiring Justices to spend

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*supra* note 12, at 90.

72. See John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. TIMES, Mar. 3, 1985, § 6 (Magazine), at 28 (“Last year, [Rehnquist] traveled unannounced to Richmond, Va., to preside over a two-day trial . . . . ‘To refresh myself,’ he explains.”).

73. Calabresi & Lindgren, *supra* note 4, at 859–68; see also Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 15, 82–89 (Roger C. Cramton & Paul D. Carrington eds., 2006).

74. *Weiss v. United States*, 510 U.S. 163, 170 (1994).

75. *Id.* at 174–76.

76. *Id.* at 176.

four weeks a year sitting by designation as trial judges attaches a nongermane duty to the office of Supreme Court Justice. We think it does not. First, as we have already explained in Part I, more than 200 years ago in *Stuart v. Laird*, a far more onerous form of circuit riding—involving months and months of arduous and physically dangerous labor—was held to be perfectly constitutional by the Marshall Court.<sup>77</sup> After 200 years, it is arguably far too late in the day to revisit the question of the constitutionality of circuit riding, especially when the Marshall Court thought that question was foreclosed by 12 years of early practice, and when circuit riding went on for 122 years of the nation's constitutional history.<sup>78</sup> If *Stuart* is not to be overruled, then surely our modest circuit-riding plan must be upheld. And it seems awfully late in our history for a 200-year-old foundational case like *Stuart* to be overruled.

Second, in reliance on the correctness of *Stuart*, many retired Justices have sat by designation on the inferior federal courts.<sup>79</sup> If *Stuart* were overruled, one would have to conclude that it is unconstitutional for retired Supreme Court Justices to sit by designation on the inferior federal courts. A retired Supreme Court Justice is, after all, only commissioned to sit on the Supreme Court, and so if mandatory circuit riding violates the Appointments Clause voluntary sitting by designation must violate it as well. The long-standing practice of retired Justices sitting by designation on the inferior courts, along with the 122-year practice of circuit riding, suggest that our circuit-riding plan is perfectly constitutional.

Third, under *Weiss*, the duty of sitting for four weeks as a trial judge is germane to the job of being a Supreme Court Jus-

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77. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803).

78. The era of circuit riding began with the Judiciary Act of 1789, ch. 20, 1 Stat. 73, and was not formally abolished until 1911 by the Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167 (abolishing the existing circuit courts). The Code took effect on January 1, 1912, and finally eliminated the circuit courts, FRANKFURTER & LANDIS, *supra* note 15, at 134, though a whiff of them remained in that circuit court of appeals judges could hold district court, *id.* at 135.

79. See, e.g., *Rice v. Branigar Org., Inc.*, 922 F.2d 788 (11th Cir. 1991) (opinion by retired Justice Lewis Powell, sitting by designation); see also 28 U.S.C.S. § 294 interpretive notes and decs. (LexisNexis 2001) (Generally) (“Inherent power of justices of the Supreme Court to preside over trial courts has long been taken as matter [sic] of course, and retired justice [sic] retains his office, all judicial power with respect to such duties, as he would have possessed had he not retired.”).

tice.<sup>80</sup> Justices control the content of our law of criminal procedure and promulgate the Federal Rules of Civil Procedure, Criminal Procedure, and Evidence.<sup>81</sup> It is important for them to experience first hand the problems our nation's trial courts face so the Justices can do a better job in writing the rules that govern those courts.

Moreover, the duty imposed is not an onerous one. Justices currently work only nine months a year, on a docket that is about half what it was fifteen years ago, and with twice as many law clerks as they had in 1968.<sup>82</sup> Asking them to spend four weeks of their three-month summer vacation among inferior court judges rather than in lecturing with European and American legal elites is not unreasonably burdensome. Members of Congress travel back to their home districts on a weekly basis, and the President and Vice President travel throughout the United States all the time. Asking Justices to spend a mere four weeks a year in the circuits to which they are assigned as circuit Justices is not an onerous or unreasonable demand. Learning what judges think of Supreme Court doctrine outside the world of the Beltway, the elite national law schools, and European legal elites is germane to the job of being a Justice. Under the test of *Weiss*,<sup>83</sup> therefore, our circuit-riding plan ought to be upheld.

A skeptic might ask at this point whether a more onerous form of circuit riding than the one we propose would also be constitutional. What if Congress were really to go back to the good old days and require the Justices to spend six months of the year riding circuit? What if Congress were to require that the Justices travel on horseback or by bus and not by plane? We think such a burdensome plan might well impair the independence of the Court by requiring the Justices to perform nongermane duties. Because the germaneness test is inherently one of reasonableness, we think Congress can impose reasonable lower court duties on the Justices but not unreasonable ones. Moreover, the test of what is reasonable must be in terms

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80. *Cf. Weiss*, 510 U.S. at 173–76 (discussing germaneness in the context of the military justice system and concluding that “the role of military judge is ‘germane’ to that of military officer”).

81. *See* 28 U.S.C. § 2072 (2000) (granting the Court the power to make rules of practice, procedure, and evidence).

82. *See* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1996); Calabresi & Lindgren, *supra* note 73, at 34–35.

83. *See* 510 U.S. at 173–76.

of what is reasonable in the twenty-first century, in a world with plane travel and a nation of nearly 300 million citizens. Just because onerous circuit riding was constitutional and reasonable early in our constitutional history does not necessarily mean that it would be so today. We think it extremely unlikely that Congress would impose unreasonable circuit-riding duties on the current Justices—but were Congress to do so, the Justices would be within their rights to strike down such a law. We do not think a hypothetical and far-fetched parade of horrors should preclude adoption of our modest circuit-riding plan, which, as we show in Part IV below, has several practical benefits.

### III. THE ARGUMENTS FOR ABOLISHING THE ORIGINAL CIRCUIT-RIDING SYSTEM DO NOT APPLY TO OUR PROPOSAL TO REVIVE CIRCUIT RIDING

Circuit riding as it was officially practiced from 1790 until 1911 failed to work, but for reasons that ought not to prevent its re-creation in the modest form we propose here. The biggest objection to circuit riding made early in our constitutional history stemmed from the fact that travel in the late eighteenth and early nineteenth centuries could be difficult, time consuming, and life threatening.<sup>84</sup> In his recent history of circuit riding, Joshua Glick notes many instances illustrating the extreme physical hardship it imposed on the Justices.<sup>85</sup> A brief smattering of examples reveals that the Justices had to contend with flashfloods washing out bridges and nearly killing them (James Iredell);<sup>86</sup> lodging in public houses with as many as twelve strangers in the same room (William Cushing)<sup>87</sup> and sometimes “a bed fellow of the wrong sort” (Iredell);<sup>88</sup> untried routes and modes of transportation over great distances and

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84. See, e.g., Glick, *supra* note 1, at 1765–82, 1801–17; see also *supra* notes 18–21 and accompanying text. For a concise overview of the history of circuit riding and major changes to the circuit courts throughout their existence, see Glick, *supra* note 1. For a detailed history of the challenges facing the circuit courts during the eighteenth and nineteenth centuries, along with Congress’s attempts to deal with them, see FRANKFURTER & LANDIS, *supra* note 15, at 4–145.

85. See Glick, *supra* note 1, at 1765–66.

86. *Id.* at 1765 n.78.

87. *Id.* at 1765 n.79.

88. *Id.* (quoting Marcus, *supra* note 18, at 3).

through unfamiliar territory (Samuel Chase);<sup>89</sup> and such hardships as distance and weather that “incommoded [horses] by the Snow & wet” (John Jay).<sup>90</sup> Such pitfalls rendered the circuit-riding Justices’ absences from their homes and families particularly unpleasant.<sup>91</sup>

Between 1790 and 1802, the United States was divided into three circuits: an eastern, a middle, and a southern circuit.<sup>92</sup> Travel through the southern circuit was especially difficult.<sup>93</sup> There were few roads, and those that existed were sometimes washed out. The only means of travel was on horseback or by stagecoach, and accommodations could be hard to find.<sup>94</sup> Much of the circuit was sparsely settled frontier territory. In short, circuit riding was a physically arduous task, especially for aging Supreme Court Justices.<sup>95</sup> The physical rigors of circuit riding appear to have contributed to the death of Justice Iredell, one of the most distinguished of the early Justices, at the age of forty-eight.<sup>96</sup> In addition to imposing these physical hardships, the practice demanded prolonged absences of the Justices from their families<sup>97</sup> at a time when telephone or telegraph communication was nonexistent.

None of these difficulties would be present today. Today’s Justices would be away from their families for only four weeks in July, a time of year when they might even be able to bring their families with them as they sat on circuit. Travel would be by jet plane, not on horseback, and Congress ought to provide a comfortable enough budget to pay for reasonable hotel accommodations. Thanks to telephones, cable television, and the Internet, Justices would not be isolated for months on end from

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89. See *id.* at 1766 n.80 (describing Chase’s trip from Baltimore to Savannah).

90. Diary Entry of John Jay, *supra* note 21, at 54.

91. Early on in the practice of circuit riding, the Justices objected “[t]hat to require of the Judges to pass the greater part of their days on the road . . . and at a distance from their families, is a requisition which in their opinion should not be made unless in cases of necessity.” Letter from the Justices of the Supreme Court to Congress, *supra* note 33, at 290 (editor’s footnotes omitted).

92. The three-circuit system laid out in the Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75, was not augmented to compose six circuits until after the Act of April 29, 1802, ch. 31, § 4, 2 Stat. 156, 157–58, took effect.

93. See discussion *supra* notes 19–21 and accompanying text.

94. See generally *supra* notes 89–93 and accompanying text.

95. Glick, *supra* note 1, at 1766.

96. See *supra* notes 19–20 and accompanying text.

97. Glick, *supra* note 1, at 1766.

family, friends, co-workers, or news sources. Moreover, their circuit-riding duties would take up only four weeks of the year and not several months. Fifty- and sixty-year-old Justices ought not to find four weeks a year of trial work to be too physically taxing or onerous. Perhaps such work would be hard for an eighty-five-year-old Justice like John Paul Stevens, but we believe, respectfully, that such elderly Justices ought to retire. Thus, the first historical argument against circuit riding no longer applies.

A second set of initial arguments against circuit riding was made in 1790 by Attorney General Edmund Randolph.<sup>98</sup> According to Felix Frankfurter and James Landis these arguments “have never been stated more impressively nor more pithily than in Randolph’s report.”<sup>99</sup> Randolph made several interrelated claims. He worried that if they were too busy riding circuit, the Justices would lack the time and leisure they needed to become “master[s] of the common law in all its divisions, . . . chancellor[s], . . . civilian[s], . . . federal jurist[s], and skilled in the laws of each State.”<sup>100</sup> This concern obviously is not raised by our circuit-riding proposal. Spending four weeks in July riding circuit rather than hobnobbing with European or American legal elites would not make the Justices any less learned in the law. To the contrary, riding circuit would give the Justices real experience with trial work and with questions of state law that would make them better jurists. Modern day Justices have a huge staff of law clerks and librarians to assist them and far more complete briefing than did their predecessors in the 1790s.<sup>101</sup> Four weeks of trial work a year would not deprive the Justices of the leisure time they need to serve effectively on the Supreme Court.

Randolph also objected to the problem of bias raised by the early form of circuit riding, both because initially two Justices rode circuit together<sup>102</sup> and because those two were then among

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

99. FRANKFURTER & LANDIS, *supra* note 15, at 15.

100. Randolph Report, *supra* note 98, at 23.

101. See 22 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 401.04 (3d ed. 2005) (describing the roles of the Court’s large staff, including librarians and law clerks); *id.* §§ 408.70–75 (summarizing the Court’s requirements for petitions for certiorari and briefing).

102. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

the six Justices who heard any appeal from a circuit court decision<sup>103</sup> at a time when the Court's jurisdiction was entirely mandatory.<sup>104</sup> This objection likewise does not apply to our proposal. We would have each Justice ride circuit alone on the federal trial courts within their respective circuits. Most of their decisions as trial judges would never be appealed, and, of those few decisions that would be appealed, in only a handful of cases would certiorari be sought from the Court. In only an even smaller handful of that handful, perhaps 1 percent,<sup>105</sup> would certiorari be granted and the case heard by the Court. In those very few cases, the Justice whose lower court work was being reviewed ought to recuse himself, leaving the case to be decided by eight other engaged and active colleagues. We think this would more than suffice to take care of the problems with bias that Randolph raised in 1790 against the first circuit-riding law.

Finally, and most quaintly, Randolph worried that circuit-riding Justices might be forced to decide cases without adequate guidance from experience, precedent, or books of reference:

Situated as the United States are, many of the most weighty judiciary questions will be perfectly novel. These must be hurried off on the circuits, where necessary books are not to be had; or relinquished for argument before the next set of judges, who, on their part, may want books, and a calmer season for thought. So that a cause may be suspended until every judge shall have heard it.<sup>106</sup>

This is not a concern that would apply to any Justice riding circuit in the modern era. There are few novel legal questions facing most federal district courts, and books are to be had for study at any district or circuit court of appeals courthouse.

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103. See Randolph Report, *supra* note 98, at 24.

104. It would be 100 years until the Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826, first gave the Court discretion over its docket. The Act, discussed *infra* note 122 and accompanying text, "provided for direct appeals from the district and circuit courts to the Supreme Court in defined classes of cases [with intrinsically more important issues], and routed all other cases to the courts of appeals for final disposition [subject to certiorari by the Supreme Court]." FRANKFURTER & LANDIS, *supra* note 15, at 99 & n.195.

105. During the Court's 2003 Term, 7,814 cases were filed, of which "91 . . . were argued and 89 were disposed of in 73 signed opinions." CHIEF JUSTICE WILLIAM H. REHNQUIST, 2004 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9 (2005), available at <http://www.supremecourtus.gov/publicinfo/year-end/2004year-endreport.pdf>. In other words, the Court granted certiorari to approximately 1.2 percent of the cases filed.

106. Randolph Report, *supra* note 98, at 24.

Moreover, today we have Internet access to the whole of the nation's federal and state case law, statutes, reports, and virtually every other public legal and historical document, which makes vast stores of knowledge available to any puzzled Justice. Randolph's concerns were reasonable ones in 1790, and they even remained legitimate throughout much of the nineteenth century. Modern conditions, however, render these concerns moot.

One related fear that critics of our proposal might raise is that Justices lack the competence to serve as federal trial court judges because the skills that make one a good appellate judge are so different from the skills required of a trial judge. We would respond to this point with several observations. First, for 122 years of our history, famous Justices from John Marshall to Stephen Field rode circuit and tried cases.<sup>107</sup> While law has become more specialized since circuit riding was finally and formally abolished in 1911,<sup>108</sup> most of the modern Justices were at some point litigators,<sup>109</sup> so they will mostly not be strangers to a trial courtroom. More importantly, we think Justices ought to know more about how trial courts actually work and about what is happening on the front lines of our court system, even if that requires that they learn something new. Instead of learning foreign constitutional law with European legal elites, we think they should be learning what problems are being created in the district and appellate courts of their own circuits by the Federal Rules the Justices promulgate<sup>110</sup> and their own criminal procedure case law.<sup>111</sup> Admittedly, some of the Justices may initially be reversed quite often in their trial court rulings, but that could be a good experience for them. They would eventually learn how to try cases, just as newly appointed district court judges must do. It is our impression that Supreme Court

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107. See Glick, *supra* note 1, at 1793, 1813 (discussing the travels of the two Justices).

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

109. For biographical information on the current Justices, see *The Justices of the Supreme Court*, *supra* note 8.

110. See 28 U.S.C. § 2072 (2000) (bestowing on the Court the power to establish rules of practice, procedure, and evidence).

111. Cf. *Panel Four*, *supra* note 1, at 643–44 (comments of Professor Amar) (“Because I actually think [the Justices have] been over-exuberant in criminal procedure, I would like them to actually see crime up close, in trials, and not just federal trials for white-collar crimes but murder, rape, and robbery cases as well.”).



Justices are brighter and more talented than many newly appointed district judges who may have been appointed, in part, because they were the friends of senators. We are therefore unpersuaded by the argument that Justices are too incompetent to learn how to function successfully as trial judges for four weeks a year.

A third major reason why circuit riding was abolished was that the dockets on both the circuit courts and the Supreme Court grew so out of control that the old circuit-riding system just completely broke down. Basically, circuit riding contemplated a three-tier federal court system—the Supreme Court, the circuit courts, and the district courts—staffed by only two tiers of judges—Supreme Court Justices and district judges.<sup>112</sup> The following data, reported by Frankfurter and Landis,<sup>113</sup> demonstrate why this system collapsed.

Term	Number of Cases Pending in the District and Circuit Courts
1873	29,013
1880	38,045
1890	54,194

Obviously, there was no way the old system of circuit riding could by itself be reformed to handle an increase of such magnitude in the caseload of the federal judiciary. The only possible solution was the creation of a third tier of judges—the circuit judges—who could staff the circuit courts and make circuit riding unnecessary. That system is, of course, precisely what Congress chose to create, and today we have a federal judiciary containing 91 district courts<sup>114</sup> with 663 district judges.<sup>115</sup> The districts are organized into 13 circuits,<sup>116</sup> with a circuit court of appeals for each<sup>117</sup> and to which at least 1 Justice is assigned as circuit Justice.<sup>118</sup> The Justices oversee a to-

112. See *supra* notes 14–16 and accompanying text.

113. FRANKFURTER & LANDIS, *supra* note 15, at 60.

114. See 28 U.S.C. §§ 81–131 (2000) (establishing and defining the federal district courts). This figure excludes the territorial courts for Guam, the Virgin Islands, and the Northern Mariana Islands.

115. 28 U.S.C. § 133(a) (Supp. III 2003).

116. 28 U.S.C. § 41 (2000).

117. *Id.* § 43(a).

118. See *id.* § 42; Supreme Court Order of Wednesday, September 7, 2005, available at <http://www.supremecourtus.gov/orders/courtorders/090705pzzr.pdf>.

tal of 179 judges sitting on the circuit courts of appeals.<sup>119</sup>

The key mistake of the original system of circuit riding, which caused that system eventually to fail and become outdated, was its reliance on Supreme Court Justice manpower to do appreciable quantities of lower court work. That is simply not feasible in the modern world and has not been feasible for more than a century. But while circuit-riding Justices would not have any impact on the docket congestion of the district courts, we still think circuit riding is a good idea for other reasons that we discuss in Part IV. We thus recommend that if circuit riding is re-created, it should be done not to get more work out of the Justices but instead to get them in touch with the problems of the district courts and with public opinion outside the Beltway and other elite circles. We would emphasize that our goal here would be to make the Justices better Justices. We have no desire to reintroduce circuit riding to “punish” the Justices, and we would strongly oppose any reinstatement of circuit riding that was proposed for such a purpose.

There was a second docket congestion problem that caused the original system of circuit riding to break down: docket congestion on the Supreme Court, which had at the time an entirely mandatory jurisdiction.<sup>120</sup> Again, data from Frankfurter and Landis<sup>121</sup> illustrate the extent of the problem.

119. See 28 U.S.C. § 44(a) (2000). The following table describes the distribution of judges among the circuits.

Circuits	Number of Judges
District of Columbia	12
First	6
Second	13
Third	14
Fourth	15
Fifth	17
Sixth	16
Seventh	11
Eighth	11
Ninth	28
Tenth	12
Eleventh	12
Federal	12

*Id.*

120. See *supra* note 104 and accompanying text.

121. FRANKFURTER & LANDIS, *supra* note 15, at 60.

Term	Number of Cases on the Supreme Court Docket
1870	636
1880	1212
1890	1816

The Court's docket nearly tripled in the twenty years between 1870 and 1890, a time when the Court had no discretion to refuse to hear any of these cases! It was only natural that circuit riding could not work under these circumstances. The Justices could not even keep up with their own caseload, much less staff another tier of the federal judiciary. This is why when Congress passed the Circuit Court of Appeals Act of 1891,<sup>122</sup> the effect, according to Frankfurter and Landis, was instantaneous: "The Supreme Court at once felt its benefits. A flood of litigation had indeed been shut off."<sup>123</sup>

Obviously, today's Supreme Court has an almost entirely discretionary docket,<sup>124</sup> and while the Court is routinely asked to hear thousands of cases, in recent times it has chosen only to hear about eighty to ninety cases a year.<sup>125</sup> In fact, the Justices only hear about half as many cases today as they did fifteen years ago.<sup>126</sup> Moreover, they each have four law clerks to help them with their work, whereas they each only had two prior to

122. Circuit Court of Appeals Act of 1891, ch. 517, 26 Stat. 826.

123. FRANKFURTER & LANDIS, *supra* note 15, at 101. This statement is borne out by a glance at the number of cases on the Court's appellate docket from 1887 to 1892.

October Term	Number of New Cases on the Supreme Court's Appellate Docket
1887	482
1888	550
1889	489
1890	623
1891	379
1892	275

*Id.* at 102 & n.208.

124. See, e.g., MOORE ET AL., *supra* note 101, §§ 400.05[2], 405.02; Robert L. Stern et al., *Epitaph for Mandatory Jurisdiction*, A.B.A. J., Dec. 1, 1988, at 66 (discussing the 1988 legislation relieving the Court almost entirely of its mandatory appellate jurisdiction); see also *supra* note 105 and accompanying text.

125. For example, ninety-one cases were argued before the Court in the 2003 Term, up from eighty-four in the 2002 Term. REHNQUIST, *supra* note 105, at 9.

126. Calabresi & Lindgren, *supra* note 73, at 35.

1970.<sup>127</sup> We do not mean to suggest that Supreme Court Justices and law clerks do not work hard: they mostly work very hard for nine months of the year. The other three months, however, are spent on a lengthy summer vacation that compares to that of schoolchildren.<sup>128</sup> Moreover, that vacation is often spent in the company of European elites whom we think are a bad influence on the Justices, in part because they represent a decadent, secular way of life. All we propose is that the Justices spend four of their twelve weeks off outside the Beltway on the judicial front lines of the nation. This is not an unreasonably onerous burden to impose.

In sum, the original system of circuit riding was criticized and ultimately abolished because it was physically dangerous and exhausting, it deprived Justices of the time they needed to become experts in the law, it was awkward for Justices to hear appeals from cases they had tried below, the Justices had inadequate access to legal resources, there was a need for a third tier of federal circuit judges, and the Supreme Court's caseload had grown completely unmanageable. Strikingly, none of these arguments continues to apply today. The arguments that led to the abolition of the original system of circuit riding do not counsel against the modest restoration we propose here.

#### IV. NORMATIVE ARGUMENTS IN FAVOR OF REINTRODUCING CIRCUIT RIDING

As we have been arguing throughout this Essay, we think reintroducing circuit riding is a good idea for three reasons. First, it would get the Justices back in touch with American values outside the Beltway, much as Presidents and members of Congress keep themselves acquainted with the public through their extensive domestic travels. Second, it might persuade the Justices to retire after serving fifteen years on the bench rather than continuing to serve for an additional eleven years.<sup>129</sup> Finally, it would help get the Justices out of the business of importing foreign sources of law into American constitutional jurisprudence. We will say a word further on each of

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127. See MOORE ET AL., *supra* note 101, § 401.04[5]; see also discussion *supra* note 82 and accompanying text.

128. This point was made by none other than Chief Justice John Roberts when he worked in the Reagan administration. See discussion *supra* note 8 and accompanying text.

129. See Calabresi & Lindgren, *supra* note 73, at 24.

these points better to explain ourselves.

First, we think that it is very important to get all officers of the federal government and members of Congress outside the Beltway and in contact with American grassroots opinion. There are big differences of opinion, as we know from recent elections, between Red State America and Blue State America, and it is the opinion of Blue State America which dominates Washington, D.C. Right now, Justices are far less likely to spend time in the hinterlands than are members of Congress, who return weekly to their districts, or Presidents and Vice Presidents, who travel nationwide. Admittedly, the Justices do usually attend the judicial conferences of the circuits for which they are circuit Justices, but they generally do this only once a year and for a few days at most. This is not enough contact with public opinion outside the Beltway to have any appreciable influence on the Justices. They also hear stay requests and review other papers filed with the Court that originate from their circuits.<sup>130</sup> Once again, however, this is a minimal demand that does not acquaint them with the problems faced by the district courts or with other judges' points of view.

Circuit riding for four weeks a year would be far less of a burden on Justices than that which members of Congress bear flying back and forth from Washington, D.C., to their districts or states. Four weeks would be long enough to allow circuit-riding Justices to have lots of lunches and dinners with local federal court of appeals and district court judges from whom the Justices could learn a great deal. Local lawyers might come to watch Justices read jury charges, and the local press might cover their four-week stints back on their home turfs. We think all these things would be highly beneficial and that they would make Justices more learned and more modest than their sojourns in Europe seem to do.

Second, in a recent article one of us has shown that Supreme Court Justices are retiring at a much older age now than they were earlier in our history, and they are serving on the Court more than ten years longer on average.<sup>131</sup> Between 1789 and 1970, Justices served an average of fifteen years and retired at about age sixty-eight, which allowed vacancies on the

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130. See SUP. CT. R. 22–23, available at <http://www.supremecourtus.gov/ctrules/rulesofthecourt.pdf>.

131. Calabresi & Lindgren, *supra* note 73, at 23–25.

Court to open up once every two years.<sup>132</sup> Between 1970 and the two departures from the Court in 2005, the Justices have served on average more than twenty-six years and have retired at about age seventy-nine, with vacancies on the Court opening up only once every three or more years.<sup>133</sup> Many causes account for this complex phenomenon, and we refer anyone seeking to understand it to the article Professors Calabresi and James Lindgren have written on the subject.<sup>134</sup> Some of the most important causes are that since 1968, the number of law clerks per Justice has doubled, the number of cases they hear each year has dropped by about half in the last fifteen years, and the social status of their office has greatly increased.<sup>135</sup> We thus think that there are now elderly Justices remaining on the Supreme Court because it is a prestigious and cushy job where no one has to do much heavy lifting and where there is a three-month summer vacation. For example, at least one elderly Justice, eighty-five-year-old John Paul Stevens, reputedly lives part-time in Florida and has plenty of time to engage in leisurely activities.<sup>136</sup>

We are troubled by this phenomenon because we think there is a minimal amount of physical vigor a Justice must possess to stay mentally sharp and to perform fully the job of being a Justice. It was Professor Calabresi's opinion when he clerked at the Court from 1987 to 1988 that two Justices, William Brennan and Thurgood Marshall, lacked the requisite physical strength to do their jobs, while another Justice, Harry Blackmun, was intellectually overtaxed by his job. It appears from news accounts that this problem has not ceased to exist: William Rehnquist appears pretty clearly to have been too ill last year—the last year of his life—to warrant his continued service as a Justice.<sup>137</sup> We need a way to get such elderly, frail Justices

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132. *Id.* at 24, 27.

133. *Id.* at 23–27.

134. *Id.* at 30–35.

135. *Id.* at 34–35.

136. *E.g.*, Anne Gearan, *Rehnquist's Death Puts Stevens in Charge*, SFGATE.COM, Sept. 4, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/09/04/national/w075007D89.DTL> (“[Stevens] speaks in public infrequently, and is not the constant presence at arts performances or charity functions frequented by some of his colleagues. He lives part-time in Florida, and spends his off-hours playing competitive duplicate bridge and tennis.”).

137. *See, e.g.*, Charles Lane, *Rehnquist Won't Vote in Every Case Heard This Term*, WASH. POST, Dec. 14, 2004, at A8; Luiza Ch. Savage, *Rehnquist III, Making Court Election Topic*, N.Y. SUN, Oct. 26, 2004, <http://www.nysun.com/>

to think more seriously than they currently do about retiring.

Circuit riding as we propose it is a reasonable way of accomplishing that goal. Four weeks riding circuit is a minimal demand to place on Justices. Healthy fifty-, sixty-, and even seventy-year-olds routinely try cases in the nation's district courts. The work we would ask Justices to do is not strenuous or physically dangerous. Anyone who is so frail or so ill that they cannot try cases for four additional weeks a year probably ought not to continue to sit on the Court. We do not expect that Justices would like four weeks of trial duty, at least initially, but it is far less burdensome than what senators and congressmen do in traveling back to their states and districts. We think it is a reasonable way to put a thumb on the scale and encourage, without forcing, eighty-five-year-old Justices to think more seriously about retirement.

Finally, much has been written recently about the Court's new-found practice of relying on foreign sources of law in cases like *Lawrence v. Texas*<sup>138</sup> and *Roper v. Simmons*.<sup>139</sup> One of us has written a law review article on this subject which shows that while the Court has in practice cited foreign sources of law "throughout its history," it is only since 1958 that it has relied on foreign law to strike down American statutes as unconstitutional.<sup>140</sup> We share at least some of the skepticism that Justices Antonin Scalia and Clarence Thomas have expressed about this trend, and we believe it is due in part to the extensive European travel that most of the Justices now do during their three-month summer vacations. We would make Justices spend one of those three months back here in the United States trying cases. We think this would be a useful and mild corrective to their current practice of spending excessive amounts of time overseas.

## CONCLUSION

We have shown that notwithstanding some serious dissent, a far more onerous form of circuit riding than what we propose was upheld early on in our nation's constitutional history. Under current Supreme Court case law, a circuit-riding plan of the type we propose ought to be upheld as constitutional. None of

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article/3755.

138. 539 U.S. 558, 572–73 (2003).

139. 543 U.S. 551, 575–78 (2005).

140. Calabresi & Zimdahl, *supra* note 7, at 755.

the reasons for which the original form of circuit riding was abolished ought to cause us today to reject a more modest form of circuit riding. Moreover, there are important policy benefits that might be obtained by reintroducing circuit riding. We recognize that we are asking Justices to do more work than they currently do, and so at the same time as we reintroduce circuit riding we would also give them a \$100,000 annual pay increase.

Reinstituting circuit riding is far less controversial than passing jurisdiction-stripping bills, and it is certainly less constitutionally problematic. At the same time, it is something a simple majority of the House and the Senate can do to rein in—if only a little bit—a very aggressive Supreme Court. We think circuit riding is an idea whose time has come again, and we hope the current Congress considers reintroducing it.