1999

Justice Without Justices

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My proposal for constitutional erasure is simply to eliminate the position of Supreme Court Justice. This notion is not as radical as it initially sounds. It would not stamp out judicial review, the supremacy of federal law, or even the Supreme Court itself. If the separate office of Supreme Court Justice had not been established, federal judges sitting on the inferior courts of the United States could have been randomly assigned to the Supreme Court for short periods, such as six months or a year. In the early republic, Supreme Court Justices themselves sat on designated lower courts when they "rode circuit." Call my counterfactual universe "Supreme Court riding."

For now, assume that this universe would require an alteration of the Constitution, rather than a mere revision of jurisdictional statutes, though I will return briefly to that interesting issue below. Whatever means would be necessary to carry it out, my proposal would efface a key provision of our received constitutional order. Why do it? I believe that judges should treat all written law, including the Constitution, as a formal system of rules to be objectively interpreted according to their original meaning. Supreme Court Justices have too often proved incapable of engaging in this enterprise. The most disastrous decisions in the constitutional history of the United States—such as *Dred Scott*,[1] *Plessy*,[2] and *Roe v. Wade*[3]—have this in common: the Justices employed a style of decision making that had more in common with formulating a political platform or policy position paper than with interpreting a legal text understood as a system of rules.

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* Professor, Benjamin N. Cardozo Law School. Thanks to Akhil Amar, John Duffy, Michael Herz, Nelson Lund, Michael McConnell, Mark Movsesian, Michael Rappaport, and Paul Shudack for helpful comments.

1. *Dred Scott v. Sandford*, 60 U.S. 393 (1856).
2. *Plessy v. Ferguson*, 163 U.S. 537 (1896).
3. 410 U.S. 113 (1973).

The nature of the office itself has made such lapses almost inevitable. Vested for life with the awesome power to make final decisions with wide-ranging consequences for the nation, Supreme Court Justices generally cannot help but come to see themselves as statesmen rather than as humble arbitrators of legal disputes. Indeed, many of the mortals who have inhabited the marble temple across from the Capitol have come to believe that they have an even higher calling: to serve as priests of our collective conscience and to preserve the nation's "very ability to see itself though its constitutional ideals."[4]

In contrast, judges who "rode" to the Supreme Court only for a short time would have been more likely to treat constitutional issues and other momentous decisions more like the other quotidian matters that they were accustomed to resolving in their courts. Supreme Court riding would have lessened Justices' vested interest in the development of constitutional law according to some personal vision because they would have returned to their home courts to dine on a diet of mundane commercial and criminal matters, as well as constitutional issues for which they were not the final arbiters. The prospect of soon returning to a professional life occupied with discovery disputes and trials of accused drug dealers functions like the whisper of the slave in the back of the triumphal chariot, who reminded the Roman general of his mortal fallibility. Today's newspapers, like the throngs of cheering Romans, perform the opposite role by encouraging judges to overstep the law. The short term of Supreme Court riders would make it easier to resist the urgings of the *Washington Post* and *New York Times* to "grow in office." Thus, the structure of the office of Supreme Court riders would have been more likely to instill the habits of constrained judgment contemplated by Federalist 78.[5]

Supreme Court riding would also have had other good effects. It would have made the Court a less imperial (and imperious) presence in national life. Long ago, our own American Brutus correctly predicted that the Supreme Court would consolidate power in the central government because the Justices would have an interest in using interpretation to expand their own powers and those of the government to which they be-

4. *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992).

5. Federalist 78 (Hamilton) in Clinton Rossiter, ed., *The Federalist Papers* 464, 465 (Mentor, 1961) (Courts should have "neither *force* nor *will* but merely judgment").

longed.[6] Supreme Court riders, however, would not have been long time residents of the nation's federal district and would thus be more likely to retain a respect for the nation's constituent states. The structure of the office would thus have militated against the unjustifiable nationalizing tendencies that have often marred the Court's jurisprudence.

A related benefit is that Supreme Court riders would have not spent their lives in one of the world's most artificial cities—a locale where the principal business is minding other people's business. Simply by living in cities with a greater multiplicity of enterprises and concerns, Supreme Court riders would at the margin have been more sympathetic to market processes and civil society.[7] Thus, the elimination of the position of Supreme Court Justice would have tempered one great tension inherent in our original constitutional order: a Constitution dedicated to preserving private and decentralized ordering has unfortunately depended for its preservation on the decisions of governmental actors employed by a centralized authority.

My counterfactual universe would have combined the advantages of term limits with those of life tenure. Federal judges would have continued to enjoy the independence afforded by life tenure because they would have returned to their home courts, whatever decisions they made while on loan to the Supreme Court. But the sharp limits on their terms of supreme decision making would have improved some pathologies associated with life tenure on the Supreme Court. It would have encouraged a circulation of jurists with fresh perspectives on legal issues and prevented the law from becoming the personal domain of a few. It would also have curtailed the effects of senility and the excessive delegation of power to young and energetic law clerks by reducing the temptation to cling to the bench into very old age.

The most important risk from term limits, in general, is that an office holder will perform less responsibly to make a name for himself in the short time available. While some jurists might have used their short-time on the high court to seek fifteen min-

6. *Brutus XI*, reprinted in John P. Kaminskin and Gaspare J. Saladino, eds., 15 *The Documentary History of the Ratification of the Constitution* 516-17 (State Historical Society of Wisconsin, 1984).

7. For similar reasons Professor Steven Calabresi has suggested that the Supreme Court be moved to a location outside Washington. See *Relimiting Congressional Power: Should Congress Play a Role?*, 12 L. & Pol. Rev. 627, 636 (1997) (remarks of Steven Calabresi).

utes of fame, I believe the risk from this would have been small. New Justices have typically behaved for their first few years much as they did as lower court judges.[8] It seems to take a while to make the transition from a servant of the law to its master.

Some may argue that Supreme Court riding would have destabilized the Court, weakening the force of precedent and consequently the public's respect for its judgments. This critique might have some force if we were to compare a court composed of Supreme Court riders with one composed of judicial paragons. But the notion has little force if we compare my imagined court with what has actually existed. That Supreme Court has frequently overruled important decisions, often within a short period, both with and without decisive changes in personnel.[9] The Court has even included Justices who stubbornly refused to uphold the death penalty despite scores of contrary decisions by their brethren.[10] Some Justices have candidly admitted that stare decisis is simply a doctrine of convenience.[11] Others praise stare decisis, but in important cases give it no effect.[12]

When was the last time any Justice was publicly praised for a career marked by fidelity to precedent, or criticized as a judicial innovator? Supreme Court Justices by virtue of their long tenure can often move the law dramatically to their way of thinking, and serious concern for precedent interferes with the exercise of that power. In contrast, Supreme Court riders would have been less able to instantiate their political vision and would therefore be more likely to follow precedent. Moreover, because the riders would have come from inferior courts, which operate under the threat of reversal, they would have had more practice in following precedent. Lower court judges are frequently praised in testimonials and memorials for being infrequently reversed. The raw power that was briefly theirs while riding to the Supreme Court would seldom have had much affect

8. Of course, some individual lower court judges have always rendered outlandish judgments, but they would have had less ability to affect the decisions of nine-member court than their own trial court or a panel of three.

9. The most notorious example is *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985), which overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), which itself overruled *Maryland v. Wirtz*, 392 U. S. 183 (1968).

10. See Clifton S. Elgarten, *A Tribute to Justice William J. Brennan, Jr.*, 19 Cardozo L. Rev. 817, 817-19 (1997) (praising the refusal of Justices Brennan and Marshall to accede to stare decisis in the death penalty).

11. See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 Cornell L. Rev. 401, 403 (1988).

12. See William O. Douglas, *Stare Decisis*, 49 Colum. L. Rev. 735 (1949).

on their overall reputation, except perhaps negatively if they seemed to get carried away with themselves while on the Supreme Court.

Another possible objection is that Supreme Court riders would have been less capable jurists than Supreme Court Justices. This objection seems to have force only if we assume what I deny: that the Supreme Court should be an arena for statesmen or demi-gods. The variation in legal ability that now exists within the federal judiciary is relatively small, perhaps smaller than what exists within the Supreme Court itself. What distinguishes the Justices as a group from other federal judges is not so much their talent as the luck and the political skills that got them onto the high court, along with the grandiose aura that accompanies their greatly enhanced power. Requiring the Supreme Court's work to be done by ordinary judges would make it more likely that they would only do the Court's proper work.

Some might argue that the system would have been defective in that judges would not have remained to decide the merits of most cases for which they had granted certiorari. I count that as yet another virtue of Supreme Court riding. Judges would have generally granted certiorari without knowing the identity of the case's ultimate decision makers. This veil of ignorance would discourage strategic behavior, thus strengthening the rule of law.

It is possible that some forms of Supreme Court riding could be implemented within the constitutional universe we already inhabit. The Constitution provides: "The Judges, both of the supreme and inferior Courts, shall hold their Offices, during good Behavior. . . ."[13] The most natural reading may require (and the Framers certainly expected) judges to be appointed to a distinct Supreme Court, but the language is ambiguous. Moreover, the early Supreme Court Justices who rode circuit sat as members of inferior courts and thus our early traditions suggest that the inferior courts and the Supreme Court did not have to possess completely separate personnel. Even today, retired Justices sometimes sit by designation on courts to which they were never appointed, as do many district and circuit judges. The Constitution does, however, contemplate the office of Chief Justice,[14] and

13. U.S. Const., Art. III, § 1.

14. See U.S. Const., Art. I, § 3, cl. 6 ("When the President of the United States is tried, the Chief Justice shall preside").

it is more likely that a judge must hold this specific appointment during "good behavior."

However far one might go by statute in the direction of my proposal, it would have been better for the Constitution to provide expressly for Supreme Court riding. If statutory Supreme Court riding had been adopted and had proved superior to our current system in curbing the Supreme Court's nationalizing tendencies, interest groups that generally benefit from eviscerating the restraints of federalism would have tried to amend the statute.[15] Moreover, the President and a Congress of one party might have been tempted to create the position of Supreme Court Justice instead of Supreme Court rider to give more power to their prospective appointees. Foreclosing the creation of Supreme Court Justices through constitutional language would therefore have been the wisest course.

A constitutional provision to carry out circuit riding might have read something like this: "The Supreme Court shall be constituted in such a manner as Congress may by law require from among the judges of the inferior courts: provided, however, that assignments for terms of equal length not exceeding two years shall be made randomly from among appellate courts or courts of first instance, or both."[16] That would have allowed Congress to decide important issues whose optimal treatment might change over the course of the nation's history, such as whether to use only appellate judges as opposed to trial judges, whether to have staggered terms, and exactly how long those terms should be. On the other hand the requirement of randomness would have prevented Congress from manipulating the system to obtain the selection of its preferred judges.

In creating an alternate universe by eliminating an office rather than by eliminating a particular event or person, I am guided by the spirit of the Framers. The Framers recognized that while we can never know the particular problems of the future, we can grasp man's enduring nature and invent political

15. For a discussion of the manner in which interest groups eviscerate sound constitutional restraints, see John O. McGinnis and Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 Wm. & Mary L. Rev. 365, 394-96 (1999).

16. The optimal constitutional provision might well also have permitted Congress to choose state supreme court judges on a random basis to ride to the Supreme Court. Their service would create yet another force for preserving federalism. The option of employing state supreme court judges would also have preserved Congress' option of declining to create interior federal courts. See U.S. Const., Art. III, § 1 ("The judicial power of the United States shall be vested . . . in such interior courts as Congress may from time to time ordain and establish.").

machinery that turns the inputs of that nature and our particular environment into the output of good government. In my view, Supreme Court riding should have been made part of our constitutional machine because it would have better channeled the ambition of our judges into enforcing the rule of law appropriate for the limited and decentralized government that the rest of the Constitution contemplated.