

JUDICIAL INDEPENDENCE, JUDICIAL VIRTUE, AND THE POLITICAL ECONOMY OF THE CONSTITUTION

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Economic theory applies to many things besides the commercial marketplace. Whether, or to what extent, the Framers constitutionalized an economic theory of private property and free enterprise, they certainly did employ an economic theory of government. James Madison famously summarized that theory in *The Federalist*:

[W]hat is government itself, but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.¹

And how can the government be obliged to control itself? Again, Madison offered a succinct theoretical answer: "Ambition must be made to counteract ambition."²

The practical scheme based on this theory is familiar to us all. For the most part, the key is to make each official and each institution dependent on other officials and other institutions. Enacting a law, for example, requires the agreement of majorities in both the House and the Senate and usually of the President as well. The President takes many actions by himself or through his subordinates, but almost all of them require statu-

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1. THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

2. *Id.*

tory appropriations or authorization by one or both houses of Congress.³ All of these officials, moreover, depend on popular elections to stay in office.

But there is one institution in which the Framers took almost the opposite approach: the judiciary. In *The Federalist*, Alexander Hamilton argued that this department of government should be largely independent from the President and the Congress and even from the people themselves.⁴

Some Anti-Federalists objected that the power of judicial review, together with life tenure, could lead to profound judicial usurpations of power.⁵ Hamilton described one particularly serious objection as follows: “The power of construing the laws according to the *spirit* of the Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body.”⁶

As subsequent events have shown, this Anti-Federalist objection was not exactly a paranoid fantasy. But Hamilton had a logical response: Somebody must have the final word on what the Constitution means, and the judiciary is the least dangerous place to put that power.⁷

One reason Hamilton regarded the judiciary as the least dangerous branch was structural: The judges would control neither the sword nor the purse,⁸ and if they did get out of control, there would always be the remedy of impeachment.⁹ Unfortunately, as

3. See, e.g., U.S. CONST. art. I, art II.

4. See THE FEDERALIST NOS. 78–81 (Alexander Hamilton).

5. See, e.g., *XV Essay of Brutus* (Mar. 20, 1788), reprinted in THE ANTIFEDERALIST PAPERS, 304–09 (Ralph Ketcham ed., Signet Classics 2003); *XI Essay of Brutus* (Jan. 31, 1788), reprinted in THE ANTIFEDERALIST PAPERS, 293–98 (Ralph Ketcham ed., Signet Classics 2003).

6. THE FEDERALIST NO. 81, *supra* note 1, at 482 (Alexander Hamilton).

7. *Id.* at 481–83.

8. THE FEDERALIST NO. 78, *supra* note 1, at 465 (Alexander Hamilton) (“[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.”).

9. See THE FEDERALIST NO. 81, *supra* note 1, at 485 (Alexander Hamilton) (“There never can be danger that the judges, by a series of deliberate usurpations on the

history has shown, that structure leaves a great deal of room for judges to invent whatever Constitution and laws they like, so long as they do not push things so far as to get themselves impeached. As it has turned out, judges are never removed from office because of usurpatious decisions.¹⁰ And, of course, the remedy of impeachment was never likely to be used against judges who ignore the law by permitting Congress itself to exercise unconstitutional powers.

Hamilton also suggested another, less well-known answer to concerns about the dangers of judicial independence: He assumed that judges would have more civic virtue than other politicians.¹¹ As a substitute for the principle of relying on ambition to counteract ambition, he emphasized that special qualifications would be required of those chosen to fill judicial offices. Most obviously, judges would be scholarly individuals who had engaged in “long and laborious study” of legal precedents.¹² Hamilton paints a portrait of judges whose integrity and devotion to law would render them deeply self-effacing and indifferent to popular acclaim.¹³ And they would be mature individuals, without the youthful fire of ambition, and without the hope or expectation of using their life-tenured offices as a springboard to higher things.¹⁴

Hamilton did not spell all of this out in detail because he did not need to do so. English common law judges had spent hundreds of years developing a culture in which these qualities could flourish by extolling and exercising the judicial virtues of modesty, self-restraint, studiousness, and caution. Being human, these judges had embodied judicial virtue imperfectly. But their professional culture was sufficiently well established to allow the founding generation to believe both that people with the requisite integ-

authority of the legislature, would hazard the united resentment of the body intrusted with it, while this body was possessed of the means of punishing their presumption, by degrading them from their stations.”).

10. See Melissa H. Maxman, Note, *In Defense of the Constitution's Judicial Impeachment Standard*, 86 MICH. L. REV. 420, 420–22 (1987) (noting that “judicial impeachment proceedings are seldom invoked” and, when invoked, normally involve criminal matters).

11. See THE FEDERALIST NO. 78, *supra* note 1, at 471 (Alexander Hamilton).

12. *Id.*

13. THE FEDERALIST NO. 81 (Alexander Hamilton).

14. See THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

rity and experience could be found and that they could be trusted to conform to the traditional professional ideals.¹⁵

These ideals of judicial rectitude have not been lost. They now seem to appear most prominently in confirmation hearings, where all nominees—Republicans and Democrats alike—describe themselves as exactly the kind of person that Hamilton called to mind. They all just want to be humble servants of the law. Nothing thrills them like the study of mind-numbing precedents. They have no personal or political agendas of any kind, and they aspire only to fulfill the simple duty of deciding each case correctly according to the Constitution or the applicable statute.¹⁶

Once Supreme Court nominees are confirmed, of course, we often start to see a different picture. They instantly become big shots, treated almost as gods within the legal profession and as A-list celebrities by everyone else. In recent decades, many Justices have been prominent members of the Washington social scene. They now promote their books on television.¹⁷ They entertain audiences with cameo appearances in operas¹⁸ and by conducting mock trials of literary characters.¹⁹ They throw out first pitches at major league baseball games,²⁰

15. For a detailed discussion of the history, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008). Whether Hamilton privately believed that this tradition could be sustained is a somewhat different question. See Nelson Lund, *Judicial Review and Judicial Duty: The Original Understanding*, 26 *CONST. COMMENT.* 169, 180–81 (2009) (reviewing PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* (2008)). For a discussion of the fragility of the culture of judicial virtue upon which Hamilton's argument in *The Federalist* depended, see Nelson Lund, *Montesquieu, Judicial Degeneracy, and the United States Supreme Court*, in *NATURAL MORAL LAW IN CONTEMPORARY SOCIETY* 285 (Holger Zaborowski ed., 2010).

16. For representative (and virtually indistinguishable) statements by each of the last four nominees to the Supreme Court, see Nelson Lund, *Two Faces of Judicial Restraint (Or Are There More?) in McDonald v. City of Chicago*, 63 *FLA. L. REV.* 487, 488–89 (2011).

17. Mark Sherman, *With New Book Coming Out, Scalia Getting Less Camera-Shy*, *THE RECORD*, Apr. 10, 2008, at A19.

18. Jesse J. Holland, *Sotomayor Adds Celebrity to Supreme Court*, *MSNBC.COM*, Nov. 17, 2009, http://www.msnbc.msn.com/id/33975806/ns/politics/more_politics/t/sotomayor-adds-celebrity-supreme-court/.

19. Tim Treanor, *High Court Rules for French at Agincourt*, *DC THEATER SCENE*, Mar. 18, 2010, <http://dctheaterscene.com/2010/03/18/high-court-rules-for-french-at-agincourt/>.

20. Holland, *supra* note 18.

lead parades,²¹ and receive awards from ethnic groups with which they identify.²²

By itself, all of this flattery and self-promotion might be harmless. Unfortunately, the cult of personality shows up in rather unflattering ways in the Court's judicial work. In recent times, nearly all of the current Justices have manifestly been consumed with improving the law by moving it in the direction that they personally favor. The Justices, moreover, frequently act as though it is more important to remain consistent with their own prior statements than to follow the actual precedents of the Court.²³ At oral argument, the Justices hammer the advocates with disingenuous questions to which they already know the answers.²⁴ Indeed, the Justices are often just debating amongst themselves, with the hapless lawyers serving as props or surrogates, or as victims of judicial bullying.

When the Court's opinions are eventually announced, the opinions tend to read more like exercises in advocacy than candid explanations of the reasons for the decision, and dissenting opinions frequently outperform the majority in this respect. Perhaps most strikingly, judicial opinions frequently contain extravagant rhetoric that is manifestly designed to catch the attention of the media and the editors of case books.²⁵ Journalists and law professors are the gatekeepers of judicial reputation because they determine whether individual Justices are perceived as in-

21. *Scalia Comes Home to Lead Columbus Day Parade*, USA TODAY, Oct. 10, 2005, http://www.usatoday.com/news/nation/2005-10-10-columbus-celebrations_x.htm.

22. Henri Sault, *A Medal for Justice Ginsburg*, PHILA. INQUIRER, Apr. 24, 1994, http://articles.philly.com/1994-04-24/news/25865384_1_justice-ginsburg-silver-coins-silver-dollar (reporting on Ginsburg's induction into the Jewish-American Hall of Fame); see, e.g., Press Release, National Italian American Federation, Supreme Court Justice Samuel Alito to be Honored at Italian-American Gala in Washington, D.C. (Oct. 11, 2006), available at www.niaf.org/news/index.asp?id=482.

23. This can be seen in the frequency with which Justices cite their own concurring and dissenting opinions, as well as in the frequency with which Justices flatter or tweak their colleagues by citing their past concurrences and dissents.

24. Anyone who pays attention to the Court's oral arguments is familiar with this phenomenon, and Justice Thomas has publicly criticized his colleagues for their behavior. See Jay Reeves, *Clarence Thomas to Fellow Justices: Hush!*, PRESS REGISTER (Mobile, Ala.), Oct. 24, 2009, at B5, available at 2009 WLNR 21853769.

25. See, e.g., Ella Govshstein, *Justice Scalia and His Meta-Canon of Absurdity*, 35 HOFSTRA L. REV. 1583, 1595 (2007) ("Unable to persuade his colleagues, Scalia has confessed that he writes with 'verve and panache' to ensure that his opinions are quoted by the editors of legal textbooks, so they can influence future generations of lawyers and scholars." (citations omitted)).

fluent. The importance of this can hardly be overstated because being influential has become almost synonymous with being successful as a Justice.²⁶

How did we get to the point that so many of our judges no longer even look like the modest servants of the law that Hamilton described and that Supreme Court nominees always say they want to be? There are many causes, and the most important are probably beyond anyone's control. At the margins, however, there are incentives operating to encourage the wrong kind of ambition in the Justices: namely, the ambition to be—and to be seen as—influential.

Congress could change some of those incentives. Craig Lerner and I have suggested four possible reforms, which I will briefly summarize.²⁷

First, Congress could require that all Supreme Court opinions be issued anonymously, just like the *per curiams* that were once quite common and are still occasionally issued today.²⁸ Unable to claim credit for the opinions they write, the Justices likely would come to regard their reputations as inextricably linked with the work of the Court, rather than with their own personal precedents.²⁹ This should reduce the number of unintelligibly splintered decisions that frustrate the bar, the lower courts, and even members of the Court itself.

Anonymous opinions would also lessen the Justices' incentives to write sophomoric philosophy or ill-disguised political commentary in a transparent effort to have their names emblazoned in casebooks and the popular press.³⁰ As the Court's opinions became less colorful and more legal, it would be more difficult for the media to extract a snappy (and often legally irrelevant) sound bite to explain the decision. This change might enhance the Court's reputation as an institution distinguishable from a body of life-tenured politicians.

26. *Cf. id.*

27. For a more detailed explanation of the proposals, see Craig S. Lerner & Nelson Lund, *Judicial Duty and the Supreme Court's Cult of Celebrity*, 78 GEO. WASH. L. REV. 1255 (2010).

28. *See id.* at 1276–83.

29. *Id.* at 1281.

30. *Cf.* Richard A. Posner, *The Supreme Court, 2004 Term: Forward: A Political Court*, 119 HARV. L. REV. 31, 81 (2005) (noting that the lack of signed opinions in constitutional courts of some foreign jurisdictions reduces opportunity for judges to “play to the gallery, as our Justices do”).

Lerner and I do not propose to prohibit the Justices from filing concurring and dissenting opinions. At least in our legal system, such opinions arguably provide some public benefits. They help show that the decision of the Court was reached through a deliberative process. They can discipline the majority by exposing weaknesses in its reasoning. And they can usefully inform the bar about issues that are not well-settled within the Court. At some point, however, fractiousness simply reflects the self-assertion of the individual members of the Court. Our proposed rule could ameliorate the problems stemming from opinions driven by the ambition and vanity of individual judges.

Under our proposed regime, the majority opinion would simply be labeled "Opinion of the Court."³¹ Concurring and dissenting opinions would have similarly nameless attributions: "Concurring Opinion (for two Justices)," "Dissenting Opinion 1 (for three Justices)," "Dissenting Opinion 2 (for one Justice)," and so on.³² Lerner and I think that the Justices would probably comply with both the letter and the spirit of such a statute.³³ Certainly the curious would try to guess who wrote which opinions.³⁴ It would also be easy for Justices who dislike the rule of anonymity to leave unmistakable clues to authorship in their opinions and even to make extrajudicial statements identifying the authors of specific opinions. But for two reasons, we are confident that a norm of anonymity is enforceable.

First, if majority opinions were anonymous, those who joined the opinion would have an incentive to demand that the author avoid the kind of self-identifying extravagances so often found in current opinions. Today, there is little reason for a Justice to object to self-indulgent excesses before joining an opinion because most observers will attribute the gratuitous superfluities to the named author, especially when they are egregiously grandiose or inane. But, under our proposal, more judicious colleagues could easily say, "Please take this out of the draft because it does not reflect the views of the Court," and the author would have less incentive to resist its deletion.

31. See Lerner & Lund, *supra* note 27, at 1282.

32. See *id.*

33. See *id.*

34. Even today, commentators guess at the authors of *per curiam* opinions issued by the Court. See, e.g., Jeffrey Rosen, *In Lieu of Manners*, N.Y. TIMES MAG., Feb. 4, 2001, at 50–51 (suggesting that Justice Anthony Kennedy authored *Bush v. Gore*).

Furthermore, once the Justices began omitting the superfluities from majority opinions, there would be less temptation to place them into concurrences and dissents, especially because those, too, would be at least nominally anonymous.

In any event, Congress could induce compliance with the spirit of the statute if the Justices were to evade it. Congress controls the budget of the Court and indulges the Justices with many perquisites that the legislature is perfectly free to withhold.³⁵ A few pointed remarks at budget hearings should suffice to incentivize a majority of the Justices to discipline any recalcitrant self-promoters, perhaps by ensuring that such mavericks no longer write majority opinions.

Our second proposal is that Congress limit the discretionary nature of the Court's docket.³⁶ This is not without precedent. In fact, for well over a century the Supreme Court had little choice about which cases to hear. In 1925, the Justices persuaded Congress to give the Court much more discretion over its own docket, and almost all of the remnants of the Court's mandatory jurisdiction were removed in 1988.³⁷ At present, nearly all cases are heard when the Court exercises its discretion to grant a writ of certiorari from a state supreme court or from a federal court of appeals.³⁸ There is, however, a less well-known statutory mechanism for review:

By certification at any time by a [federal] court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.³⁹

Unfortunately, the Court's hostility to this provision has rendered it almost a nullity.⁴⁰ There are many cases in which the decision of one court of appeals conflicts with another because of an ambiguity in a federal statute or in the Supreme Court's case

35. See U.S. CONST. art I, § 8.

36. See Lerner & Lund, *supra* note 27, at 1283–89.

37. See *id.* at 1266–67.

38. See *id.* at 1267.

39. 28 U.S.C. § 1254(2) (2006).

40. See Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1706 & n.133 (2003).

law. And there are undoubtedly many more cases in which circuit courts are internally divided because of similar ambiguities.

We propose amending the statute to provide that the number of cases the Supreme Court takes each term under its authority to grant writs of certiorari may not exceed the number of cases taken under the provision authorizing certifications from the federal courts of appeals.⁴¹ The Supreme Court's docket would then be driven partly by the perceived needs of the judicial system, as determined by the judges of the lower courts.

The Supreme Court presumably would encourage the courts of appeals to certify certain types of cases, allowing some questions that would have been reviewed on certiorari to arrive by certification instead. But perhaps the statute would induce the Court to review some cases it would otherwise decline to hear. Circuit court certifications would likely focus on frequently litigated issues where Supreme Court precedent is especially unclear. The upshot would be to diminish the Supreme Court's ability to use the hit-and-run strategy of announcing a muddled opinion and then leaving others to clean up the mess.⁴² Requiring the Court to take some of these cases would force the Justices to internalize, at least to some extent, the cost of its own lack of clarity. This would complement and reinforce the healthy effects that we expect from a practice of issuing anonymous opinions.

Third, Congress could strip the Justices of their personal law clerks.⁴³ It has long been alleged that clerks exert too much influence on how Justices cast their votes and craft their opinions.⁴⁴ A less disputable claim is that clerks play an influential role in determining which cases the Justices elect to decide.⁴⁵ By their own admission, many Justices seldom review certiorari

41. See Lerner & Lund, *supra* note 27, at 1289.

42. See, e.g., *Esmail v. Obama*, 639 F.3d 1075, 1078 (D.C. Cir. 2011) (Silberman, J., concurring) (suggesting that the Supreme Court is unlikely to review certain decisions of the inferior courts because "taking a case might obligate [the Court] to assume direct responsibility for the consequences of *Boumediene v. Bush*").

43. See Lerner & Lund, *supra* note 27, at 1290–95.

44. See, e.g., TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 1–16 (2006).

45. See Kenneth W. Starr, *The Supreme Court and Its Shrinking Docket: The Ghost of William Howard Taft*, 90 MINN. L. REV. 1363, 1376 (2006) ("Those clerks serve as mighty 'barriers to entry' to the merits docket.").

petitions, relying instead on the summaries and recommendations of the clerks.⁴⁶

The effect of the clerk filter is likely to increase the selection of cases in areas most familiar and interesting to recent graduates of prestigious law schools—especially constitutional law.⁴⁷ Such clerks, notwithstanding their intelligence and diligence, have little awareness of the issues genuinely vexing the legal community, which are not always the kind of cases that roil the legal academy. That fact, combined with a prevailing norm that sternly punishes clerks who recommend “improvident” certiorari grants but imposes no tax on errors in the opposite direction, inevitably biases the selection process toward cases whose significance is apparent to recent law school graduates.⁴⁸

Clerks have also contributed to the fragmentation of the Supreme Court. Justices rarely communicate directly with one another about the cases before them. Instead, exchanges are typically mediated through clerks.⁴⁹ Clerks, moreover, do not see themselves as employees of the Court, but rather as personal retainers of individual Justices.⁵⁰ The clerks fuel the cult of celebrity that infuses the Court through loyalty and gratitude to the Justice who was wise enough to select them from a very impressive pool of candidates.

To address this problem, Lerner and I propose that Congress reassign the clerks (perhaps in reduced numbers) to the staff of the Court’s Librarian.⁵¹ The Librarian would select and supervise the clerks, and the clerks would not be permitted to draft legal opinions. Individual Justices would submit research requests to the Librarian, and the results of the research would be shared with all of the Justices. Law clerks would thus serve

46. *See id.* at 1377 (“For example, Justice Stevens admits to relying entirely on his clerks’ memoranda and ‘not even look[ing] at the papers in over 80 percent of the cases that are filed.’ Justice Scalia relies on the cert. pool to an even greater extent—he only reads cert. pool memos in cases where three Justices had voted for a grant.” (citations omitted)).

47. *See* Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 986 (2005) (“[E]ight out of the nine Justices are now in a ‘cert. pool,’ so that law clerks—fresh out of a prestigious law school and usually most interested in hot constitutional topics—have greater influence on the choice of cases heard by the Court.”).

48. *See* Starr, *supra* note 45, at 1376–77.

49. *See* Lerner & Lund, *supra* note 27, at 1293.

50. *See id.*

51. *See id.* at 1294.

more as servants of the Court than of individual potentates within the Court.

The purpose of this proposal is not to punish the Court or its members but to encourage the Court to operate more like a judicial body and less like an academic faculty cum super-legislature. The work of the Justices would no doubt become more challenging, not only compared with current practice but also compared with the job of a circuit judge. We think it should. The difference might cause Presidents to select their nominees on the grounds of legal ability more often than they do now. Some mediocre lower court judges might even be discouraged from campaigning for a seat on the high court. The Justices would be forced to have open discussions with each other, rather than with their hand-picked votaries. And if serving as a Supreme Court Justice were to become a full-time, non-delegable job, fewer Justices would insist on staying in the saddle when they can no longer even mount the horse.

Finally, Congress could bring back circuit riding and give the Justices a little taste of what it means to be a real judge, by which I mean someone who is actually expected to follow the law and who can be reversed on appeal.⁵² Circuit riding made up a large part of the Supreme Court's work well into the nineteenth century, and it remained a salient feature of the Justices' role even when circuit-riding responsibilities waned in the post-Civil War years.⁵³ Supreme Court Justices charged grand juries in Maryland, heard criminal cases in Arkansas, heard breach of contract claims in Alabama, and considered extradition orders in Pennsylvania.⁵⁴ By so doing, they remained connected to the lives of ordinary Americans and saw firsthand how the law operated in practice at the lowest levels of the federal system.

The nineteenth century practice of circuit riding was both a blessing and a curse for the Supreme Court and the American public it serves.⁵⁵ Justices lost valuable time roaming the coun-

52. For more detail on this proposal, see *id.* at 1295–99.

53. Circuit riding was part of the Justices' original duties under the Judiciary Act of 1789, ch. 20, 1 Stat. 74–75, and it continued to play an important role until the passage of the Evarts Act of 1891, ch. 517, 26 Stat. 826.

54. See Lerner & Lund, *supra* note 27, at 1297.

55. The practice of circuit riding led to a comment by Justice John McKinley that the post of Supreme Court Justice was "the most onerous and laborious of any in the United States." Frank Otto Gatell, *John McKinley*, in 1 JUSTICES OF THE UNITED STATES SUPREME COURT 1789–1969: THEIR LIVES AND MAJOR OPINIONS, 773 (Leon

tryside dispensing federal justice on a local, retail basis. Having been spared this obligation, however, the Court has become ever more isolated from the operations of the lower federal courts. The bottom line is that too much circuit riding can hamper the work of the Court, but too little (or none) can help to create an undesirable chasm between the mere mortals of the ordinary federal judiciary and the Justices of the Supreme Court.⁵⁶

Mindful of these competing concerns, Lerner and I propose a modest restoration of circuit riding.⁵⁷ Each year, the Justices of the Supreme Court would select by lot one of the 108 Article III jurisdictions (94 district courts, 13 courts of appeals, and the Court of International Trade). Once a jurisdiction has been selected, it would be removed from the pool until all other jurisdictions have been selected. Over the course of the year, each Justice would coordinate with the chief judge of the relevant court to ensure that he performs no less than five percent of the average annual workload of a judge in that jurisdiction.

Some cases would carry over beyond a calendar year, and Justices would continue to fulfill their responsibilities until the case's completion. In all likelihood, then, the total circuit riding responsibilities of each Justice would exceed five percent of the workload of a typical district court or circuit judge. Even if the workload doubled to ten percent, it would hardly require half of the three-month period during which the Justices are now free to frolic around the world. Hardly an intolerable burden. Given technological developments, moreover, circuit riding would be far easier today than it was in centuries past. In fact, the Court of Federal Claims already exercises a national jurisdiction, and judges of that court frequently hold trials and settlement negotiations throughout the country without substantial hardship.⁵⁸

Friedman & Fred L. Israel eds., 1969). The burdens associated with circuit riding also contributed to at least one nominee's decision to decline a nomination to the Supreme Court. See David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710, 1718 (2007).

56. See Lerner & Lund, *supra* note 27, at 1299.

57. We originally made the suggestion in Nelson Lund & Craig S. Lerner, *Precedent Bound?*, NAT'L REV. ONLINE (Mar. 6, 2006, 8:28 AM), http://www.nationalreview.com/comment/lund_lerner200603060828.asp. Others have offered variants of the proposal. See, e.g., Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006); Stras, *supra* note 55.

58. See Lerner & Lund, *supra* note 27, at 1298–99.

Adding circuit riding to the responsibilities of the Supreme Court Justices might give them fewer chances to conduct seminars amidst the grandeur of the Alps, but it would give them new opportunities to hold trials in Tuscaloosa and sit on panels in Topeka. They would thus be forced to cope with many of the bread-and-butter issues that other federal judges confront daily. The Justices would have opportunities to be reversed on appeal and to be outvoted on appellate panels by the same inferior judges who must usually obey their every command. Such experiences surely would be a salutary check on the hubris that naturally develops in people who are otherwise Supreme.

In addition, the Justices would be forced to internalize, at least to some small extent, the cost of ambiguous and airy Supreme Court decisions. The Justices no longer would be completely free to announce a ruling and leave others to worry about how it works; they would themselves be forced at times to act as judges obligated to apply the law in cases they are assigned to hear.

None of these proposals would solve every problem, and there is no reason to expect that Congress will adopt any of them. But such reforms could actually have some salutary practical effects, unlike the kabuki dramas that senators orchestrate during confirmation hearings. And the reforms would at least help the Justices look a bit more like the sober and modest magistrates that the founding generation expected to see on the bench.