The Originalist Case for Court Packing

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Abstract

The idea of expanding the Supreme Court seems inescapably mired in partisanship, hailed by some as an ideological corrective and denounced by others as a destabilizing affront to the constitutional order. This Article, however, seeks to reframe this debate and to demonstrate that Court expansion would represent not an unprincipled departure from constitutional tradition, but rather a long-overdue return to the Supreme Court's foundational design. Indeed, the oft-neglected history that this Article uncovers leads to an unexpected but unavoidable conclusion—that fidelity to the intent of the Founders and to longstanding constitutional practice calls for increasing the number of Justices to thirteen or twenty-six. While this conclusion may seem startling, restoring the Justices' historic connection to the judicial circuits—both in their number and in their functions—would in fact return the Court to its constitutional roots while addressing challenges of the modern day.

From the Republic's earliest days until the Civil War's aftermath, Supreme Court Justices maintained a deep and integral connection to both the federal judiciary and the nation as a whole through their ties to the circuit courts. Once a defining feature of the judiciary, this structural connection—now faded from public memory—rested on three core principles: parity between the number of Justices and the number of circuits; the practice of circuit riding, in which each Justice was assigned to hear cases in a specific circuit; and the "circuit residency" requirement, which mandated that each Justice be a resident of his assigned circuit. These interwoven elements fostered a Court grounded in regional experiences and democratic legitimacy, and they stood as constitutional bedrock for America's first 140 years. Indeed, so deeply entrenched was this framework that even at the height of the Civil War, President Lincoln adhered to it despite political expediency urging otherwise. It was not until the late nineteenth century that this link began to fray, culminating in 1929 when Congress abruptly dismantled the Founders' judicial architecture by creating a tenth circuit without appointing a corresponding tenth Justice.

This neglected history is crucial in several respects. First, it reveals that increasing the number of Justices is not merely consistent with longstanding historical practice but is, in fact, demanded by the Founders' intentions for the judiciary. While Court expansion may intuitively feel radical, those committed to historically informed constitutional interpretation should embrace rather than resist such expansion. Second, this historical perspective challenges our modern assumptions about the Court and the judiciary, exposing how dramatically today's system diverges from its original design. Neither the Founders nor Lincoln could have envisioned a Supreme Court severed from the circuits in number or function, yet precisely such a Court now sits at our judiciary's apex. Finally, this history offers a path forward for addressing modern criticisms of the Court. To this end, this Article advocates for reestablishing the Court's connection with the circuits—a reform which, despite appearing unconventional, is in fact more constitutionally grounded and politically feasible than many other proposed reforms. At minimum, this would involve increasing the number of Justices to match the number of circuits; at best, it would also entail reviving those longstanding norms and practices that served the Court for so long.

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Introduction

It was an unprecedented and ideologically driven move to reshape the judiciary, one that sought to alter the number of Supreme Court Justices in order to ensure the administration's desired partisan balance. Billed as a reform effort to improve the Court, the initiative quickly became a lightning rod for heated political debate, hailed by supporters as a much-needed overhaul and condemned by critics as an illegal power grab.

No, this is not a reference to any of the various calls in recent years to expand the Supreme Court,[1] nor even an allusion to Franklin D. Roosevelt's famous Court packing scheme of 1937.[2] Rather, the year was 1801, when the

[1] *E.g.*, Hayes Brown, *The Supreme Court Is a Political Arena. It's Time to Add More Players*, MSNBC (Jul. 21, 2024), https://www.msnbc.com/opinion/msnbc-opinion/supreme-court-reforms-more-seats-rcna162326 [https://perma.cc/2EM8-HYSX]; Holly Brewer, *The Case for Expanding the Supreme Court Has Never Been Stronger*, New Republic (Jul. 9, 2024), https://newrepublic.com/article/183404/case-expanding-supreme-court-never-stronger-biden-immunity [https://perma.cc/P9PS-53JJ]; Peter Roff, *With Calls To Expand Supreme Court, Liberals Hope To Skirt the Rules*, Newsweek (Jul. 8, 2024, 2:30 PM EDT), https://www.newsweek.com/calls-expand-supreme-court-liberals-hope-skirt-rules-opinion-1922236 [https://perma.cc/6QHS-FSE5].

[2] President Franklin D. Roosevelt's attempt to expand the Court and Justice Owen Robert's "switch in time that saved nine" virtually constitutes an academic subfield in itself. *See generally, e.g.,* Noah Feldman, Scorpions: The Battles and Triumphs of FDR's Great Supreme Court Justices 103–21 (2010); William E. Leuchtenburg, The Supreme Court Reborn: The Constitutional Revolution in the Age of Roosevelt 82–162 (1996); James

lame-duck John Adams and his Federalist allies, having been trounced in the previous year's election, hastily enacted a controversial judiciary act that radically reshaped the federal court.[3] Though seemingly just a partisan maneuver to pack the judiciary with politically reliable judges and block the incoming president Thomas Jefferson from making two Supreme Court appointments, the act did much more than merely tilt the judiciary's ideological balance. Rather, it disrupted a core constitutional principle that had been established from the first days of the Founding—that the number of Justices was tied to the number of judicial circuits. However, this constitutional upheaval proved very short-lived. In 1802, the new Democratic-Republican Congress repealed the act,[4] restoring the judiciary's original structure and reaffirming the connection between the Court and the circuits that would persist for the next 127 years.

After decades on the margins, the idea of comprehensive reform to the Supreme Court has become a focal point in legal and political discourse, with Court expansion (frequently labeled "Court packing")[5] often regarded as one

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Macgregor Burns, Packing the Court: The Rise of Judicial Power and the Coming Crisis of the Supreme Court 139–56 (2009); Jeff Shesol, Supreme Power: Franklin Roosevelt vs. the Supreme Court 429–43 (2011).

[3] Judiciary Act of 1801, ch. 4, § 11, 2 Stat. 89, 92. The act bore the disarmingly bland title, "An Act to provide for the more convenient organization of the Courts of the United States." *Id.*

[4] Judiciary Act of 1802, ch. 31, 2 Stat. 156.

[5] A brief note on terminology: the language surrounding Court enlargement is somewhat fluid, and increasing the number of Justices can be referred to in various ways—"Court expansion," "Court packing," or "Court re-balancing." Tom Daly, *'Good' Court-Packing? The Paradoxes of Democratic Restoration in Contexts of Democratic Decay*, 23 German L.J. 1071, 1077 (2022). Often, the choice of term depends more on the personal predilections of the commentator rather than the content of the reform, with supporters of increasing the number of Justices using positive-sounding terms and opponents employing more negative language. Some seek to distinguish between "Court packing" (defined as a purely partisan move aimed at changing the Court's ideological tilt) and "Court expansion" (defined as a value-neutral move pursuing nonpartisan aims, such as efficiency). The former is often deemed impermissible and potentially unconstitutional, while the latter is considered licit. Neil S. Siegel, *The Trouble with Court-Packing*, 72 Duke L.J. 71, 74 (2022); M. Todd Henderson, *Court-Packing Is Unconstitutional*, Newsweek (Oct. 30 2020), https://www.newsweek.com/court-packing-unconstitutional-opinion-1543290 [https://perma.cc/43WH-A9TF]; *see also* Stephen M. Feldman, *Court-Packing Time? Supreme Court Legitimacy and Positivity Theory*, 68 Buff. L. Rev. 1519, 1535 (2020); David Kosař & Katarína Šipulová, *Comparative Court-Packing*, 21 Int'l J. Con. L. 80, 84–87 (2023).

However, any neat distinction between "Court packing" and "Court expansion" is less clear-cut in practice. Motives are almost always mixed, and any proposal to expand the Court can be argued to have either apolitical or political effects—supporters of the most crassly ideological plan could present the proposal in entirely neutral terms, while opponents of the most neutral proposal could label it "packing." Michelle Adams et al., *Presidential Commission on the Supreme Court of the United States Final Report*, 73 (2021), https://scholarship.law.columbia.edu/faculty_scholarship/3779 [https://perma.cc/E8TA-Y9XC].

Apart from the title (which intentionally employs the more recognizable and provocative term), this Article favors the term "Court expansion" over "Court packing." This preference is partly personal (we hope for Court expansion based on sound judgment rather than blinkered ideological thinking), and partly pragmatic ("Court packing" is often simply a term of abuse). However, we deny that there is any constitutionally relevant distinction between "Court expansion" and "Court packing." As will be discussed, the Constitution's text offers essentially no guidance on how Congress should organize the Court, and absolutely no conditions for how and why it should expand the Court. *See* Akhil Reed Amar, America's Unwritten Constitution: The Precedents and Principles We Live By 355 (2012).

of the most radical proposals.[6] Enlarging the Court is above all framed as a partisan issue, another battlefield in the ongoing political war between the two parties.[7] To its proponents, Court expansion is a necessary corrective, a strategy to shift the ideological pendulum, a way to "get even."[8] To its critics, it is a reckless and hyper-partisan gambit, one that sets a dangerous precedent and threatens to unravel long-standing constitutional norms.[9] History itself would appear to vindicate this partisan interpretation, since any mention of Court expansion inevitably recalls Roosevelt's Court packing attempt and the unmistakably political motivations that drove it.[10]

Yet, although it is invariably framed in partisan terms today, Court expansion has deep historical roots that transcend the current political moment.

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[6] *E.g.*, Thomas M. Keck, *Erosion, Backsliding, or Abuse: Three Metaphors for Democratic Decline*, 48 L. & Soc. Inq. 314, 322 (2023); Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 Yale L.J. 148, 164 (2019).

[7] Matthew A Seligman, *Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform*, 54 Ariz. L.J. 585 (2022); Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 Calif. L. Rev. 1703, 1721 (2021); Pema Levy, *How the Left Lost Faith in SCOTUS and Learned to Love Packing the Court*, Mother Jones (Oct. 14, 2022), https://www.motherjones.com/politics/2022/10/how-the-left-lost-faith-in-scotus-and-learned-to-love-packing-the-court [https://perma.cc/N75C-CUZ8]; Brian L. Frye, *Court Packing Is a Chimera*, 42 Cardozo L. Rev. 2697, 2698 (2020). The Republican Party's 2024 platform explicitly opposed any change in the number of Justices and vowed that the party would "not allow the Democrat Party to increase this number, as they would like to do, by 4, 6, 8, 10, and even 12 Justices." 2024 Republican Party Platform, Am. Presidency Project (2024), https://www.presidency.ucsb.edu/documents/2024-republican-party-platform [https://perma.cc/3VFD-U28S]. Meanwhile, in reintroducing a bill to expand the Supreme Court to thirteen Justices, Senator Edward Markey framed it as a response to "Republicans hav[ing] hijacked the confirmation process and stolen the Supreme Court majority." *Sen. Markey, Rep. Johnson Announce Legislation to Expand Supreme Court, Restore its Legitimacy, Alongside Sen. Smith, Reps. Bush and Schiff*, Ed Markey, U.S. Senator for Mass. (May 16, 2023), https://www.markey.senate.gov/news/press-releases/05/16/2023/sen-markey-rep-johnson-announce-legislation-to-expand-supreme-court-restore-its-legitimacy-alongside-sen-smith-reps-bush-and-schiff [https://perma.cc/U4Q2-N3TC].

[8] *E.g.*, Brown, *supra* note 1; Perry Bacon, Jr., *Expand the Supreme Court. And Weaken It*, Wash. Post (Jul. 10, 2024), https://www.washingtonpost.com/opinions/2024/07/10/scotus-reforms-expand-justices-supermajority [https://perma.cc/52KL-5TEY]; David Scharfenberg, *Republicans Have Been Playing Hardball for Decades, Will Democrats Push Back?*, Bost. Globe (Jan. 3, 2020), https://www.bostonglobe.com/2020/01/03/opinion/will-democrats-break-democracy-bid-fix-it [https://perma.cc/B3DK-ZT5W]; Moira Donegan, *Enough Playing Nice. It's Time to Pack the Courts*, Guardian (Apr. 19, 2019), https://www.theguardian.com/commentisfree/2019/apr/19/pack-the-courts-democrats-2020 [https://perma.cc/C4GC-S59C]; Jamelle Bouie, *Mad About Kavanaugh and Gorsuch? The Best Way to Get Even Is to Pack the Court*, N.Y. Times (Sept. 17, 2019), https://www.nytimes.com/2019/09/17/opinion/kavanaugh-trump-packing-court.html [https://perma.cc/R3FN-XKAX]; David Faris, It's Time To Fight Dirty: How Democrats Can Build a Lasting Majority in American Politics 94 (2018).

[9] The Editors, *Biden's Assault on the Legal System*, Nat'l Rev. (Jul. 18, 2024), https://www.nationalreview.com/2024/07/bidens-assault-on-the-legal-system [https://perma.cc/LNY9-C5UP]; Siegel, *supra* note 5, at 74, 77, 97–99; Thomas B. Griffith & David F. Levi, *The Supreme Court Isn't Broken. Even If It Were, Adding Justices Would Be a Bad Idea*, Wash. Post, Dec. 13, 2021, https://www.washingtonpost.com/opinions/2021/12/12/term-limits-court-packing-for-supreme-court-bad-ideas [https://perma.cc/Z53R-C6W4]; Keith E. Whittington, *Court Packing Is Discreditable as Ever*, Wall St. J., Dec. 9, 2021, https://www.wsj.com/articles/court-packing-is-discreditable-as-ever-supreme-court-expansion-biden-progressives-constitution-11639083365 [https://perma.cc/6FCS-DWHE]; Bruce Ledewitz, *A Call for America's Law Professors to Oppose Court-Packing*, 2019 Pepp. L. Rev. 1, 6–15 (2019).

[10] Siegel, *supra* note 5, at 73–74; Feldman, *supra* note 5, at 1542–43; Jill M. Fraley, *Against Court Packing, or A Plea to Formally Amend the Constitution*, 42 Cardozo L. Rev. 2777, 2786, 2795 (2021); Epps & Sitaraman, *supra* note 6, at 164; Ledewitz, *supra* note 9, at 7–8.

Frequently overlooked by both sides of the debate is that such an expansion would align precisely with the Founders' intentions. Far from being a radical, partisan idea invented in the twentieth century, Court expansion instead represents a return to a principle with significant constitutional weight.

To see this, we must journey back in time, well before the New Deal era of 1937, and uncover a crucial but largely forgotten facet of American constitutional history. Today, many regard the Court's size as sacrosanct,[11] that it "was always meant to be" a body of nine.[12] Even those who make it their stock and trade to study history, although recognizing that the number of Justices on the Court has fluctuated between six and ten, have missed the underlying reason for these changes.[13] For the changing number of Justices over American history has not been driven simply by unprincipled partisan politics; rather, it has followed a clear, predictable pattern laid down at the Founding—the number of Justices had to be directly tied to the number of circuits.

For almost 140 years, the number of Justices followed a straightforward formula, most often at a direct one-Justice-to-one-circuit ratio, but at the beginning of American history in a two-to-one ratio. This connection between the number of Justices and the number of circuits was regarded as an obvious, fundamental principle of the judiciary's structure, and was broken only in modern times. History and tradition show us, then, that having a nine-Justice Court in a thirteen-circuit judiciary is highly anomalous and that, regardless of one's politics, the modern Court should have thirteen or twenty-six Justices to comport with this longstanding constitutional precedent.

Rediscovering this constitutional rule requires us to uncover a history that has been long neglected and to appreciate how deeply the modern judiciary has diverged from the form that the Founders envisioned. Although we continue to use terms like "Justices" and "circuits," their meaning and connotations differ greatly from what they have been throughout American history. Recapturing the original understanding of the Supreme Court requires us to have a different understanding of the entire judicial structure and to abandon our preconceived notions about its workings.

The modern federal judiciary operates as a rigid hierarchy: District courts serve as the courts of first resort, circuit courts handle appeals, and the Supreme Court stands at the apex, rarely conducting first instance reviews.[14] This strict

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[11] Amar, *supra* note 5, at 352.

[12] 2024 Republican Party Platform, *supra* note 7 ("We will maintain the Supreme Court as it was always meant to be, at 9 Justices.").

[13] Rivka Weill, *Court Packing as an Antidote*, 42 Cardozo L. Rev. 2705 (2021); Epps & Sitaraman, *supra* note 6, at 164; Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 Vand. L. Rev. 465 (2018). Scholars who have advocated for the reviving of circuit riding have overlooked the historical connection between the number of Justices and the number of circuits and have failed to address the mismatch between the two in the present. Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 Minn. L. Rev. 1386 (2006); David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 Minn. L. Rev. 1710 (2007). Even where scholars have noted the Supreme Court's historical tie to the Circuits, they have neglected to note the current mismatch in terms of number and how this is relevant to Court packing in the modern day. Siegel, *supra* note 5, at 74.

[14] Zachary D. Clopton, *Power and Politics in Original Jurisdiction*, 91 U. Chi. L. Rev. 83, 86, 92–94 (2024); *see also*, Vincent L. McKusick, *Discretionary Gatekeeping: The US Supreme Court's Management of Its Original Jurisdiction Docket Since 1961*, 45 Me. L. Rev. 1993, 187–188 (noting

separation between levels means that, while the Justices are assigned to certain circuits[15] (most Justices to one, but some to two or even three[16]), the Justices' institutional connections to them are rather minimal.[17] Certainly, Justices do not regularly serve as or alongside circuit judges, let alone district judges. But this hierarchical system, which seems so natural to us, starkly contrasts with the judiciary implemented by the Founders and maintained throughout much of American history.

To fully grasp this original system, we must imagine a judiciary that was understood and acted as an integrated whole, characterized not by rigid separation but rather by constant interaction. In this world, the number of Justices was directly and inextricably tied to the number of federal judicial circuits because circuit courts literally could not exist independent of the Justices. For, although circuit courts existed, there was no such thing as circuit judges. Rather, circuit courts were composed of one district judge and two Justices[18]—that is, Justices served simultaneously as Supreme Court Justices and circuit court judges for a particular circuit.[19] Moreover, these circuit courts, unlike their modern incarnations, served as the primary courts of first resort in the federal system. Thus, Justices routinely heard ordinary cases from everyday litigants and deliberated with district judges as equals.[20]

This setup meant that for there to be three circuits, as there were in 1789, there had to be six Justices. When the number of circuits increased over the course of the nineteenth century, the number of Justices increased in lockstep.[21] It was inconceivable that the two should not be connected—to the

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the divergence between the Founder's assumption that original jurisdiction cases would comprise a significant portion of the Supreme Court's work and the reality of the modern docket).

[15] Federal law still requires that each circuit have at least one Justice assigned to it. 28 U.S.C. § 42.

[16] Given the current circuit-Justice imbalance, only the First, Second, Seventh, Ninth, Tenth, and Eleventh Circuits are allotted to a single Justice. The Third and Fifth Circuits are currently overseen by the same Justice, as are the Sixth and the Eighth. Meanwhile, the Fourth, Federal, and District of Columbia Circuits are all under the purview of the Chief Justice. *Circuit Assignments*, Sup. Ct. of the U.S., https://www.supremecourt.gov/about/circuitassignments.aspx [https://perma.cc/4RS4-PYZN].

[17] In their residual capacity as "Circuit Justices" (the title they go by when supervising their assigned circuits), the Justices receive applications for relief directed to them individually and may unilaterally grant certain forms of interim or administrative relief for cases originating from their assigned circuit—such as extensions of filing deadlines or other procedural variances, temporary injunctions, or stays of judgment or execution. Sup. Ct. R. 22; Clare Cushman, Courtwatchers: Eyewitness Accounts in Supreme Court History 43 (2011); Daniel Gonen, *Judging in Chambers: The Powers of a Single Justice of the Supreme Court*, 76 U. Cinn. L. Rev. 1159, 1163 (2008); Sandra Day O'Connor, *Foreword: The Changing Role of the Circuit Justice*, 17 U. Toledo L. Rev. 521 (1986). While the Justices remain, in theory, empowered to grant bail or issue writs of habeas corpus for such cases, these powers have fallen into disuse in the modern day. U.S.C. § 2101(c); Gonen, *supra* note 17, at 1164; O'Connor, *supra* note 17, at 524.

[18] Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75; Bernard Schwartz, A History of the Supreme Court 14 (1993).

[19] Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 Harv. J.L. & Pub. Pol'y 769, 856 (2006); John O. McGinnis, *Justice Without Justices*, 16 Const. Comment. 541, 545 (1999)

[20] David Lynch, The Role of Circuit Courts in the Formation of United States Law in the Early Republic 99–100 (2018); Erwin C. Surrency, *The Judiciary Act of 1801*, 2 Am. J.L. Hist. 53, 56 (1958).

[21] *See* Justin Crowe, Building the Judiciary: Law, Courts, and the Politics of Institutional Development 18–19 (2012).

extent that even as the Civil War raged, and even as President Lincoln pushed the envelope on various long-standing constitutional understandings, he did not choose the politically advantageous path of severing the link between the Court and the circuits.[22]

Yet the Justices' ties to the circuits ran even deeper. Because each Justice served concurrently as a judge in a particular circuit, nominations to the Supreme Court were also nominations to specific circuits. Unlike today, where the Chief Justice personally assigns Justices to circuits according to his discretion,[23] early Justices were assigned based on what we have termed the "circuit residency" requirement. This rule mandated that Justices be residents of the specific circuit that they served, and so guaranteed that each circuit was overseen by someone with meaningful ties to the region.[24] This residency requirement not only ensured that every circuit was represented on the Court, but also complemented the Justices' central duty as circuit judges—circuit riding. In this practice, Justices traveled extensively within their circuits, convened circuit courts with the district's judges, and heard cases from local litigants.[25] Though at times taxing and often criticized by the Justices themselves, circuit riding was vital in an era before modern transportation and communication, ensuring that justice was accessible to all while fostering a sense of national equality and unity.[26] All of these interlocking norms and practices connecting the Justices and the circuits—whether in number, geographical origin, or local familiarity gained through circuit riding—were crucial to how the judiciary worked, bridging the distances and hierarchies separating Justices, lower judges, and ordinary citizens.

The deep bond between the Supreme Court and the circuits, forged by the Framers and preserved throughout the early Republic, held firm through the end of the Civil War, and it was only political maneuvering in the 1860s that marked the first serious disruption of the Justice-circuit connection.[27] Thereafter, though, the link gradually eroded. The Judiciary Act of 1891 dealt the first serious blow, creating the modern Courts of Appeals, exempting the Justices from participating in these new bodies, and transferring most of the

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[22] *See infra* Section II.D.

[23] 28 U.S.C. § 42. The circuits were most recently assigned in 2022. *Circuit Assignments*, *supra* note 16. Though the Chief Justice could assign Justices to circuits by throwing darts at a map, the current allocation points to an underlying logic of representativeness, based either on personal ties or ideological affinity to the circuit. For a further discussion of the representativeness of these circuit assignments, see *infra* notes 288–290 and accompanying text.

[24] Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 Cardozo L. Rev. 1753, 1763 (2003); Gerard N. Magliocca, Andrew Jackson and the Constitution: The Rise and Fall of Generational Regimes 66 (2007); *see also* Paul A. Freund, *The New England Seat on the Supreme Court*, 87 Proceedings of the Massachusetts Historical Society 32 (1975) (charting the succession of Justices on the "New England seat" on the Court).

[25] *See* Glick, *supra* note 24, at 1756–1763.

[26] Crowe, *supra* note 21, at 87, 99; David Gardner Chardavoyne, The United States District Court for the Eastern District of Michigan: People, Law, and Politics 12–13 (2012); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding Comment*, 24 Cardozo L. Rev. 1753, 1759–61 (2002); R. Kent Newmyer, *Justice Joseph Story on Circuit and a Neglected Phase of American Legal History*, 14 Am. J. L. Hist. 112, 114, 133–34 (1970); 1 Charles Warren, The Supreme Court 58 (rev. ed., 1922).

[27] Judiciary Act of 1866, ch. 210, § 1, 14 Stat. 209, 209.

old circuit courts' appellate jurisdiction to them.[28] Instantly, then, the act created new institutions devoid of any institutional memory of the judiciary's original functioning and stripped the old circuit courts, which did have that memory, of their force and purpose. In 1911, the new Judicial Code abolished both the old circuit courts as well as the practice of circuit riding, ending the foundational practice established at the Founding along with the institutions that had underpinned it.[29] Finally, in 1929, Congress dismantled the last vestige of the judiciary's traditional structure when it increased the number of circuits to ten but left the number of Justices at only nine.[30] This abrupt and unceremonious revolution, which dispensed with nearly a century and a half of tradition and practice, was accomplished without comment.

Sundered from the circuits, the Supreme Court metamorphosed into an institution far different from what the Founding generation had envisioned. For 140 years, the Justices were shaped by the important, celebrated practices of republican statesmen—returning to their home regions, engaging with ordinary citizens, and apprising themselves of local conditions. Once confined to Washington, though, they became cloistered and remote, estranged from the realities of the common people and the practicalities of everyday legal issues. The prevailing historical narrative regards this transformation as a triumph, dismissing the old system as primitive while lauding its dissolution as a mark of progress.[31] This consensus, however, has failed to see the development for what it truly was—an abandonment of the structure of the judiciary as understood by the Framers.

This Article aims to reshape contemporary debates about the Supreme Court by uncovering the deep historical roots of Court expansion. However, this exploration is not merely an academic exercise—more fundamentally, it reveals a conception of the judiciary quite different from today's understanding and invites us to envision new ways the Court could and should function.[32] That is, remembering the Supreme Court's past helps us make sense of its present and chart a course for its future.

At its core, this Article operates from a straightforward premise: that the Founders' design of the Supreme Court in both its form and function deserves respect. Deference to history and tradition is hardly a novel proposition; it is a cornerstone of modern constitutional interpretation. The choices of the first Congress and its successors continue to shape our understanding of the federal government's structure in profound ways.[33] When it comes to

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[28] Circuit Courts of Appeals Act, ch. 517, § 2, 26 Stat. 826, 826–27 (1891).

[29] Judicial Code of 1911, ch. 231, 36 Stat. 1087.

[30] Tenth Circuit Act, ch. 363, 45 Stat. 1346 (1929).

[31] *See, e.g.*, Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 27, 29 (2015); Sandra Day O'Connor, Out of Order: Stories from the History of the Supreme Court 72 (2013); Crowe, *supra* note 22, at 70; Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Will. & Mary Q. 4, 5 (1965).

[32] Various scholars have written on the Supreme Court from the perspective of institutional design. *See, e.g.*, Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 Duke L.J. 1439 (2009); Tracey E. George & Chris Guthrie, "*The Threes": Re-Imagining Supreme Court Decisionmaking*, 61 Vand. L. Rev 1825 (2008).

[33] Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 Calif. L. Rev. 1745, 1746 n.13 (2006). *See infra* note 85.

the judiciary, deferring to history means embracing the original conception of the Supreme Court—namely, as a court that was inextricably connected to the circuits. And to honor this understanding requires increasing the number of Justices on the current Court.

However, while our methodology is originalist, this Article takes no position on originalism as an interpretive method. The landscape of constitutional interpretation is richly populated and has long hosted vigorous debates about originalism's merits.[34] Our focus lies elsewhere. Instead, we seek to recover a history that has been lost and to demonstrate how originalist readings of the Constitution not only support but compel Court expansion. Those who believe that history should inform the American constitutional order should find our analysis valuable, particularly if they view text, history, original understanding, and early practice as binding. Yet our proposed reforms rest on more than historical foundations; we advocate them not from blind reverence for the past, but because they offer practical remedies to contemporary political challenges.[35] In this way, our Article should resonate with both originalists and non-originalists alike.

We recognize that we are stepping into the crowded and contentious field of Court reform proposals, where Court expansion not only carries a particularly political charge, but also currently seems all but impossible. But ours is not a partisan gambit dictated by the vagaries of the present. Rather, it is a project of constitutional reclamation, one that seeks to recover a norm whose meaning has been blurred by the distortions of hyperpartisanship. This Article seeks to move beyond narrow, results-oriented skirmishes and toward a deeper, structural understanding of the judiciary's role within our constitutional order. Our proposals are thus not motivated by a desire to stock the bench with ideologues, nor by a romantic longing for the eighteenth century, but by a firm commitment to restoring constitutional structures that served a valuable purpose historically and would continue to do so today. Yes, today's political climate renders Court expansion a distant prospect; but history show us that ideas have a way of biding their time. We therefore undertake this work now—not in the expectation of immediate change, but to ensure that when the debate inevitably returns, it is guided by reason, not reaction.

We are also aware that expanding the Court to thirteen Justices—let alone twenty-six—may seem extreme, and that our broader project to revive circuit residency and circuit riding may appear downright fanciful. However, our plan stands on firmer constitutional ground and has a better chance of

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[34] *E.g.*, Erwin Chemerinsky, Worse Than Nothing: The Dangerous Fallacy of Originalism (2022); Robert W. Bennett & Lawrence B. Solum, Constitutional Originalism: A Debate (2011); Originalism: A Quarter-Century of Debate, (Steven G. Calabresi ed., 2007); Frank Cross, The Failed Promise of Originalism (2013); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204 (1980).

[35] We are mindful of Oliver Wendell Holmes's famous warning against conflating antiquity with authority. Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.").

being enacted than many alternate reforms.[36] Not only can it be achieved through simple legislation, rather than constitutional amendment, but it is rooted in historical practice, which is significant in an era when the Supreme Court—the body that would hear constitutional challenges to any Court reforms—frequently grounds its analysis in history.

Any effort to reform the Supreme Court, including our own, faces a three-prong test—can, should, and how. That is, what must be considered is *can* the Court be reformed in the way proposed, *should* it be reformed in this manner, and *how* should the proposed reform be implemented.

The first prong, concerning the reform's viability, is a constitutional test and rests heavily on precedents from history and tradition. Many Court reform proposals, such as term limits, falter at this step and would very likely be struck down by the Supreme Court as unconstitutional. The vast majority of legal commentators agree with us that Court expansion *can* be done, and this Article's historical analysis should robustly counter any arguments sounding in originalism that contend that enlarging the Court is unconstitutional. Indeed, if this Article achieves nothing else, it should shut the door on any such originalist claims that increasing the number of Justices inherently violates constitutional norms or original understanding. Briefly, America's historical constitutional order is offended not by Court expansion, but by the failure to expand the Court.

The second prong for assessing a reform—its justification—similarly draws on history and tradition while also introducing pragmatic considerations. This Article contends that expanding the Supreme Court and reintegrating it with circuit courts would address concerns about the Court's current state by enhancing its accountability, visibility, and legitimacy. Legal commentators, who often praise the Founding era's attention to constitutional structures, have largely overlooked how the original judicial system wove the judiciary into the fabric of local life and addressed many of the worries modern critics have about Court. This Article asserts that the proposed changes to the Supreme Court's structure are both constitutionally sound and pragmatically advantageous, serving not just as a nod to tradition, but as a path to a more effective judicial system.

The third prong, implementation, is purely pragmatic. In this Article, we present two possible levels of reform: one minimal and the other more ambitious. The minimal proposal, though less preferred, suggests reviving the Court-circuit connection at least in part by increasing the number of Justices to match the number of circuits. The more ambitious proposal aims to fully reinstate the original constitutional structure of the Supreme Court by reintroducing circuit riding and the circuit residency requirement, though we recognize that this may be seen as unrealistic by some. Our specific reform proposals are tentative, and we welcome debate and discussion on other ways to best restore the relationship between the Justices, the circuits, and the nation as a whole.

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[36] For a survey of other Court reform proposals, see *infra* Section III.B.3.

The Article proceeds in three parts. In Part I, we set the stage for our central argument on the historical significance of the bond between the Supreme Court and the circuit courts and why that relationship deserves to be revived today. We start by examining contemporary criticisms of the Supreme Court, both to highlight specific areas that deserve attention and to lay out the motivations and concerns animating our proposal. We then confront the challenge of conducting originalist analysis on unwritten principles, addressing the argument that the Court-circuit relationship cannot be binding due to its textual absence from the Constitution. Unwritten constitutional principles, we demonstrate, are widely accepted by scholars and courts, and have significantly shaped judicial practices. The historical integration of the Supreme Court and circuit courts is thus not mere tradition but a constitutional principle worthy of contemporary consideration.

Part II delves into the historical core of our argument, uncovering the overlooked link between the number of Supreme Court Justices and the number of circuits. After a brief discussion of British antecedents, we explore the establishment of the federal judiciary under the Constitution and the Judiciary Act of 1789, tracing the development of the constitutional practices of Court-circuit parity, circuit residency, and circuit riding. We then show how this bundle of norms was widely regarded as binding throughout the early Republic and through the Civil War. It is this long-standing practice, we argue, and not the innovations of the twentieth century, that should guide our understanding of the Supreme Court's structure. Finally, we trace the steady decline of the connection starting in the later 1860s, showing how the constitutional framework established by the Founders was disassembled by degrees until it was definitively and unceremoniously abolished in 1929.

But what Congress unthinkingly abandoned in the 1920s Congress could revive in the present day and, in Part III, we advocate for just that. While we support fully reinstating the original constitutional structure of the Supreme Court, we acknowledge that this would mark a significant departure from recent practices, and thus we offer two possible tiers of reform. The first, more minimal approach recommends realigning the number of Justices with the number of circuits. This could involve adding four new Justices, matching the one-to-one ratio that governed throughout the nineteenth century, or adding seventeen new Justices, corresponding to the two-to-one ratio that held from 1789 to 1802. Our second, bolder proposal calls for not only increasing the number of Justices but fully reconnecting the Court with the circuits by reviving circuit riding and reinstating the circuit residency requirement.[37]

[37] We should address the two somewhat atypical circuits—the District of Columbia Circuit and the Federal Circuit—and how they fit into our broader vision of reviving circuit riding and the circuit residency requirement.

The D.C. Circuit is the simpler case. The circuit is, of course, much smaller than the other numbered circuits, but it is nonetheless a geographically defined entity. Under our proposal, this would mean that the Justice assigned to it would have to (a) be a resident of D.C., and (b) hear appeals-level cases in D.C. The fact that the circuit is so much more compact than the other circuits does not significantly complicate our proposal—the circuits already exhibit significant variation in terms of size, as evidenced by the vast expanse of the Ninth Circuit. Thus, while circuit

Though ambitious, this plan would restore practices that ensured a close connection between the Supreme Court, the judiciary, and the nation, reanchoring the Court within its original constitutional framework while also providing practical benefits. Lastly, we address potential remaining objections, such as the constitutionality of dual appointments and practical concerns about enlarging the Court, as well as comparing our project to alternative reform proposals. While our originalist arguments for Court expansion might seem outlandish to critics, they hold the distinct advantage of being not only historically grounded but directly achievable through legislation alone.

While the debate on Court expansion will no doubt continue, this Article demonstrates that its historical pedigree is beyond dispute. Although currently a politically contentious issue, enlarging the Court is not a radical departure from but rather a return to one of the Constitution's foundational structures. In a time when the Court is beset by controversies and criticisms, this early model offers more than nostalgic appeal; it provides a grounded, workable alternative. Not every challenge calls for revolution—sometimes the way forward lies not in charting new territory, but in retracing our steps.

I. Preliminaries: Court and Constitution

We begin, quite naturally, at the beginning, establishing in this Part the groundwork for our Article's central descriptive and normative claims about the deep-rooted connection between the Supreme Court and the circuits, and why that relationship deserves to be revitalized. This preliminary discussion is essential. Before delving into the overlooked history that this Article uncovers, we must understand why this history is worth excavating: that is, how this history might be brought to bear in modern America and why it merits our attention at all.

To start, we briefly survey the criticisms directed at the Supreme Court today and how our proposal seeks to address them. Concerns about politicization, lack of accountability, and a perceived disconnect from the broader judicial system and society are widespread, highlighting a growing frustration with how the nation's highest court both appears and operates. By examining these issues in detail, we can not only understand the motivations behind calls for reform but also the specific aspects of the Supreme Court

riding in the D.C. Circuit would be rather easy and might even be regarded as the plum circuit riding assignment, the circuit itself can be treated just like any of the other geographical circuits.

A bit more vexing is the younger stepchild of the circuits, the Federal Circuit. Unlike all the other circuits, its jurisdiction is defined by subject matter rather than geography. Still, the court does have a clearly-defined circuit where its cases originate—only, that circuit encompasses the entirety of the United States. For our purposes, then, circuit riding the Federal Circuit would involve hearing federal cases nationwide, and the residency requirement would simply require the Justice be a resident of the United States. Given that our proposed reintegration of the Justices with their circuits is meant to foster local knowledge and representativeness, one could argue for a possible third qualification, namely that the Justice assigned to the Federal Circuit ought to additionally possess expertise in the areas of law in which the Federal Circuit specializes.

that warrant addressing. This analysis is essential, as it allows us to pinpoint the precise areas where historical practices might offer valuable insights or potential remedies.

Next, we discuss the concept of unwritten constitutional rules—how certain principles, though unwritten, have been and should be regarded as equally authoritative as the constitutional text itself. These unwritten rules have often dramatically shaped the judicial landscape of the United States, most famously in the case of the power of judicial review. This idea forms the basis for understanding how the historical integration of the Supreme Court with the circuit courts should be seen not merely as a tradition but as a constitutional principle with significant implications for today.

A. The State of the Modern Court

It is at this point almost clichéd to remark that the modern Supreme Court is in crisis.[38] The confirmation process is widely considered broken,[39] and the Court's partisan divide is the deepest in recent history.[40] Yet, the more perilous issue is undoubtedly the Court's eroding legitimacy in the public eye.[41] Faith in the Supreme Court has plummeted to historic lows,[42] and it

[38] *E.g.*, Akhil Reed Amar, *Something Has Gone Deeply Wrong at the Supreme Court*, Atlantic (July 2, 2024), https://www.theatlantic.com/politics/archive/2024/07/trump-v-united-states-opinion-chief-roberts/678877 [https://perma.cc/TAZ2-295B]; Clay S. Jenkinson, *Anatomy of the Supreme Court as an Institution in Crisis*, Governing (May 13, 2023), https://www.governing.com/context/anatomy-of-the-supreme-court-as-an-institution-in-crisis [https://perma.cc/R7WT-ZRTL].

[39] *E.g.*, Tyler Cooper, *The Supreme Court Confirmation Process Needs Switching Up*, Bloomberg L. (Apr. 21, 2022, 4:00 AM EDT), https://news.bloomberglaw.com/us-law-week/the-supreme-court-confirmation-process-needs-switching-up [https://perma.cc/8AQH-HFAJ]; Am. Const. Soc'y, *Judicial Nominations: A Broken Process* (2018), https://www.acslaw.org/wp-content/uploads/2018/10/Judicial-Nominations-A-Broken-Process-1.pdf [https://perma.cc/5749-7CHQ].

[40] *E.g.*, Linda Greenhouse, *Who Cares If Supreme Court Justices Get Along?*, N.Y. Times (Apr. 13, 2024), https://www.nytimes.com/2024/04/13/opinion/supreme-court-friends.html [https://perma.cc/8RUT-9URF]; Amelia Thomson-DeVeaux & Laura Bronner, *The Supreme Court's Partisan Divide Hasn't Been This Sharp in Generations*, FiveThirtyEight (Jul. 5, 2022, 1:08 PM), https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations [https://perma.cc/MBS4-CQCS].

[41] *E.g.*, Matthew Hall & Joseph Daniel Ura, *Loss of Supreme Court Legitimacy Can Lead to Political Violence*, Conversation (Jul. 1, 2024, 8:17 AM EDT), https://theconversation.com/loss-of-supreme-court-legitimacy-can-lead-to-political-violence-233316 [https://perma.cc/CR2W-KA2C]; Matt Ford, *The Supreme Court's Public Legitimacy Crisis Has Arrived*, New Republic (Sep. 26, 2022), https://newrepublic.com/article/167846/supreme-court-legitimacy-crisis-dobbs [https://perma.cc/7JG4-28ED]; Zack Beauchamp, *What Happens When the Public Loses Faith in the Supreme Court?*, Vox (Jun. 26, 2022, 11:01 AM EDT), https://www.vox.com/23055620/supreme-court-legitimacy-crisis-abortion-roe [https://perma.cc/SQF7-AHWC]; *America's Supreme Court Faces a Crisis of Legitimacy*, Economist (May 7, 2022), https://www.economist.com/briefing/2022/05/07/americas-supreme-court-faces-a-crisis-of-legitimacy [https://perma.cc/3MBY-X3JS].

[42] *E.g.*, Victoria Balara, *Supreme Court Approval Rating Drops to Record Low*, Fox News (Jul. 16, 2024, 6:00 PM EDT), https://www.foxnews.com/official-polls/fox-news-poll-supreme-court-approval-rating-drops-record-low [https://perma.cc/AG5Q-PC6X].

is increasingly regarded as hyperpoliticized,[43] corrupt,[44] out of touch with the nation,[45] and even a threat to the American democratic project.[46]

Our proposal seeks to address at least some of these concerns. We believe this is a vital project, essential for the health and integrity of the constitutional system that has governed the nation since its Founding. Certainly, we fully acknowledge that the challenges facing the Supreme Court are complex and deeply rooted, and we do not pretend that ours is a panacea that will instantly resolve every problem. But what we do offer is a clear, actionable plan that, if pursued in earnest, could begin to restore trust and function where both have eroded. At the very least, it is worth the effort to try.[47]

First, then, one of our central aims is to reduce the politicization that now engulfs both the confirmation process and the Court itself—twin developments that have eroded public trust and deepened national polarization. Expanding the Court would reduce the significance of any one appointment, meaning that each vacancy would no longer spark a high-stakes political showdown. An expanded bench could also host a wider spectrum of judicial philosophies and temperaments, diminishing the sway of fixed blocs and promoting a culture of cooperation and compromise.

Additionally, our reform seeks to reconnect the Court with the nation it serves. In a functioning republic, judicial legitimacy depends not only on legal brilliance but also on the sense that the Court understands—and belongs to—the public. A Supreme Court perceived as isolated in its marble chambers risks

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[43] *E.g.*, Adam Serwer, *The Supreme Court Fools Itself*, Atlantic (July 24, 2024), https://www.theatlantic.com/politics/archive/2024/07/roberts-supreme-court-2024-term/678983 [https://perma.cc/R5QW-3RN3; *New Poll Shows Majority of Americans Believe Supreme Court Justices Put Ideology Over Impartiality*, PBS (Jun. 27, 2024), https://www.pbs.org/newshour/nation/new-poll-shows-majority-of-americans-believe-supreme-court-justices-put-ideology-over-impartiality [https://perma.cc/6SUL-6DQX].

[44] *E.g.*, Eli Mystal, *The Supreme Court's New Ethics Code Won't Stop the Corruption*, Nation (Nov. 14, 2023), https://www.thenation.com/article/society/the-supreme-courts-new-ethics-code-wont-stop-the-luxury-vacations [https://perma.cc/9X2M-S3TC]; Jennifer Rubin, *Sheldon Whitehouse Was Right All Along: The Supreme Court Is Corrupt*, Wash. Post (June 25, 2023, 7:45 AM), https://www.washingtonpost.com/opinions/2023/06/25/whitehouse-alito-ethics [https://perma.cc/3UZG-G9U7].

[45] *E.g.*, John Nicols, *We Rejected Monarchy in 1776. The Supreme Court Just Brought It Back*, Nation (Jul. 4, 2024), https://www.thenation.com/article/politics/supreme-court-monarchy-july-4 [https://perma.cc/8KDW-7CRJ]; Laura Vella, *Majority of Americans Say Supreme Court Is "Out of Touch,"* Hill (Sep. 30, 2022, 1:04 PM ET), https://thehill.com/regulation/court-battles/3668935-majority-of-americans-say-supreme-court-is-out-of-touch-poll [https://perma.cc/HE6X-722L]; Jesse Wegman, *This Supreme Court Is Out of Step With Most Americans*, N.Y. Times (May 3, 2022), https://www.nytimes.com/2022/05/03/opinion/supreme-court-roe-wade.html [https://perma.cc/6Q4E-PBRY].

[46] *E.g.*, *The Supreme Court Has Undermined US Democracy*, Fin. Times (Jul. 2, 2024), https://www.ft.com/content/df8efa5f-4a7d-4432-b002-6be7f243d7f7 [https://perma.cc/G3KG-KQXG]; Patrick Marley, *Supreme Court's Trump Immunity Ruling Poses Risk for Democracy, Experts Say*, Wash. Post (Jul. 1, 2024), https://www.washingtonpost.com/politics/2024/07/01/supreme-court-immunity-trump-democracy [https://perma.cc/BSS9-EAAR]; Elie Mystal, *The Supreme Court Must Be Stopped*, Nation (Mar. 1, 2024), https://www.thenation.com/article/archive/the-supreme-court-must-be-stopped [https://perma.cc/4DVC-PE6L].

[47] For a similar project but with a somewhat different outlook, see Epps & Sitaraman, *supra* note 6, at 169–72. *But see* Doerfler & Moyn, *supra* note 7, at 1708. ("Asking 'how to save the Supreme Court' is asking the wrong question. Saving the Supreme Court is not a desirable goal; getting it out of the way of progressive reform is.").

having its rulings dismissed as unmoored from reality, or worse, as illegitimate. Our proposal to reembed the Justices in the circuits aims to arrest that drift. By hearing cases across diverse regions and in their local contexts, the Justices would gain an understanding of American life beyond the Beltway, while citizens would see the Court as an institution that moves among them.

Our proposal is also crafted with stability in mind. We seek reforms that are acceptable to most political stakeholders, ones that steer clear of partisan gamesmanship and instead create a stable foundation that outlasts the current political moment. Moreover, our plan for expanding the Court has a clear endpoint, as must any reform seeking to avoid endless partisan tit-for-tat. Only within a principled and durable framework can the judiciary remain focused on its core mission: interpreting the law and protecting the foundational values of our republic.

Finally, our proposal seeks to proceed by statute rather than a constitutional amendment.[48] The American Constitution may be revered for any number of reasons, but not for its amendability.[49] Its high threshold for amendment, while perhaps promoting the stability and longevity of the American republic, invariably renders amendment proposals "dead on arrival."[50] By offering a legislative solution, we can effectively bypass this near-impossible obstacle and address contemporary concerns now—rather than in, say, 202 years,[51] or, much more likely, never.[52]

B. Originalism and Original Constitutional Practice

Concerns about the Supreme Court are almost as varied as the reform proposals they have inspired and, in this Article, we argue that reviving the traditional constitutional rule of linking Justices to circuits—both in number and duties—not only would realign the modern constitutional order with its original intent but also could offer a practical solution to contemporary challenges. Critics, however, might immediately argue that no such rule exists, given its absence from the Constitution's text.

In this Section, we tackle this contention, exploring the legitimacy of applying originalist analysis to matters not explicitly mentioned in the Constitution. Skeptics may assert that without clear textual support, the Court-circuit link cannot constitute a binding constitutional rule; indeed, some scholars

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[48] This is a frequent consideration in Court reform proposals. *E.g.*, Doerfler & Moyn, *supra* note 7, at 1753; Epps & Sitaraman, *supra* note 6, at 152; Adam H. Morse & Julian E. Yap, *A Panel-Based Supreme Court*, 37 Ohio N.U. L. Rev. 23, 26 (2011).

[49] Richard Albert, *The World's Most Difficult Constitution to Amend?*, 110 Calif. L. Rev. 2005, 2006–2007 (2022).

[50] *Id.*

[51] The Twenty-Seventh Amendment was famously proposed during the First Congress in 1789 but not ratified until 1992. Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 Fordham L. Rev. 497, 498 (1992).

[52] As of 2019, the ratification rate for amendment proposals was approximately 0.23%. *See Measures Proposed to Amend the Constitution*, U.S. Senate, https://www.senate.gov/legislative/MeasuresProposedToAmendTheConstitution.html [https://perma.cc/VNL6-GJV7].

view the idea of Court expansion with deep suspicion.[53] Yet this view rests on an overly narrow reading of constitutional authority. The force of a constitutional principle has never depended solely on its explicit inclusion in the Constitution's text, and the concept of unwritten constitutional rules is both well-established and widely accepted. The historical integration of the Supreme Court with the circuit courts should thus be recognized not merely as tradition but as a constitutional principle that remains binding.

As a matter of text, Congress undoubtedly holds the power to change the number of Supreme Court Justices and to set requirements for the Court.[54] Compared to its treatment of the other branches of government, the Constitution is strikingly sparse in Article III and offers only minimal guidance on how the Supreme Court should be structured or operate.[55] It establishes that "[t]he judicial power of the United States, shall be vested in one Supreme Court,"[56] and sets the terms of employment for the Justices (namely, serving during good behavior and receiving compensation that cannot be reduced while in office).[57] Article III additionally provides for the Court's original and appellate jurisdiction.[58] But that's it; there is no mention of how many Justices there should be, how the Court should function, or anything else. A few additional clues can be gleaned from other articles of the Constitution, namely that there is a position of "Chief Justice"[59] and that the Justices are appointed by the President and confirmed by the Senate.[60]

But beyond these provisions, the Constitution necessarily leaves the detailed organization, internal operations, and procedural rules to the determination of Congress. This discretion is underscored by the Constitution's grant to Congress of the power to determine the Court's appellate jurisdiction,[61] as well as by Congress's practice from the very earliest days of altering the Court in various ways—from changing its size to setting quorum requirements to mandating practices such as circuit riding.[62] Congress is, of course, empowered by the Necessary and Proper Clause[63] to enact laws to effectively implement

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[53] *E.g.*, Siegel, *supra* note 5, at 74; Ledewitz, *supra* note 9, at 6–15.

[54] Doerfler & Moyn, *supra* note 7, at 1753; Epps & Sitaraman, *supra* note 6, at 185; Grove, *supra* note 13, at 506–07; Michael Stokes Paulsen, *Checking the Court*, 10 N.Y.U. J.L. & Liberty 18, 64 (2016); Jonathan Turley, *Unpacking the Court: The Case for the Expansion of the United States Supreme Court in the Twenty-First Century*, 33 Perspectives on Political Science 155, 158 (2004).

[55] Doerfler & Moyn, *supra* note 7, at 1753; George & Guthrie, *Remaking*, *supra* note 32, at 1443; George & Guthrie, *The Threes*, *supra* note 32, at 1825–26; Michael C. Blumm, Kate Flanagan & Annamarie White, *Right-Sizing the Supreme Court: A History of Congressional Changes*, 72 Case W. Res. L. Rev. 9, 16–17 (2021); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 Geo. L.J. 255, 270 (2017).

[56] U.S. Const. art. III, § 1.

[57] *Id.*

[58] *Id.* art. III, § 2, cl. 1–2.

[59] *Id.* art I, § 3, cl. 6.

[60] *Id.* art. II, § 2, cl. 2.

[61] *Id.* art. III, § 2, cl. 2.

[62] Doerfler & Moyn, *supra* note 7, at 1753; George & Guthrie, *Remaking*, *supra* note 32, at 1443–44; George & Guthrie, *The Threes*, *supra* note 32, at 1826; Epps & Sitaraman, *supra* note 6, at 190–91.

[63] U.S. Const. art. I, § 8, cl. 18.

the powers vested in the federal government, which, especially given the Constitution's silence, includes shaping the judiciary's structure and functioning.

The most obvious objection to our argument that longstanding constitutional norms call for the number of Justices to match the number of circuits is, of course, these very silences. Since this linkage is not explicitly stated in the constitutional text, critics could argue, it cannot be considered a binding constitutional rule.[64] Indeed, some originalist scholars have labeled Court expansion as "plainly unconstitutional"[65] and as potentially "violat[ing] the Necessary and Proper Clause."[66] Even those who personally believe Court expansion is constitutional have suggested that the Court could, in theory, deem it unconstitutional, based in part on the longstanding practice of having a nine-Justice bench.[67]

However, these arguments, despite being grounded in originalist understandings and advanced by prominent legal scholars, are flawed because they fail to take proper account of the historical structure of the Supreme Court and how the relation between circuits and the Supreme Court has dictated the size of the Court. In part this is because the history has been forgotten, but just as much it is because the vast majority of the historical material about the structure of the Supreme Court comes out of developments after the Constitution's ratification.

An originalist approach that confines itself to the four corners of the Constitution quickly runs dry when it comes to the judiciary, since the Framers deliberately entrusted the First Congress with the task of organizing that branch. However, originalism has come a long ways since mere textualism.[68] Our argument for expanding the Supreme Court and restoring the circuit system to its original form aligns with this modern, more developed version of

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[64] Some scholars have gone further, describing Court expansion as a "violation of constitutional convention," Siegel, *supra* note 5, at 102, and a "danger[]" to "American constitutional democracy." Ledewitz, *supra* note 9, at 18.

[65] M. Todd Henderson, *Court-Packing Is Unconstitutional*, Newsweek (Oct. 30, 2020), https://www.newsweek.com/court-packing-unconstitutional-opinion-1543290 [https://perma.cc/ZJ5S-QGY9]. M. Todd Henderson describes modern proposals to expand the Supreme Court as "plainly unconstitutional," since, unlike previous expansions designed to improve the function of the judiciary, these are "intend[ed] . . . to pack the Court for political reasons, plain and simple." *Id.*

[66] Michael Rappaport, *Is Court Packing Constitutional?*, L. & Liberty (Nov. 6, 2020), https://lawliberty.org/is-court-packing-constitutional [https://perma.cc/WT45-TBGA]. Michael Rappaport contends that expanding the Court could "violate the spirit of the Constitution" and thus run afoul the "constraints" of the Necessary and Proper Clause, which he suggests limits Congress from passing "improper" laws that destabilize the constitutional order. *Id.*

[67] William Baude, *Why Isn't Court-Packing Unconstitutional?*, Reason.com (Oct. 31, 2020), https://reason.com/volokh/2020/10/31/why-isnt-court-packing-unconstitutional [https://perma.cc/72SW-9TMA].

[68] For a survey of the intellectual history of originalism, see Eric Segall, Originalism as Faith (2018); Lawrence B. Solum, *What Is Originalism?: The Evolution of Contemporary Originalist Theory*, *in* The Challenge of Originalism: Theories of Constitutional Interpretation 12 (Grant Huscroft & Bradley W. Miller eds., 2011); Jamal Greene, *Selling Originalism*, 97 Geo. L.J. 657 (2009); Lawrence B. Solum, *We Are All Originalists Now*, Constitutional originalism: A Debate 1 (Robert W. Bennett & Lawrence B. Solum eds., 2011).

originalism.[69] The early functioning of the three branches during the nation's Founding era is crucial in this project, as these initial practices established what it was that the Constitution meant[70]—including, in particular, how the very skeletal provisions of Article III would be fleshed out and how the judiciary would function in practice.

Briefly, then, the Constitution's silence on certain matters does not imply their nonexistence or unimportance.[71] Understanding the constitutional order transcends the mere act of reading the few thousand words of the Constitution[72]; it demands immersion in the historical understandings and practices that gave those words their meaning. While the Constitution itself outlines the republic's form and foundational principles, it is the dynamic interplay between this text and historical sources that forms the fullness of the American constitutional order, and that enables us, over two centuries later, to keep striving toward a fuller understanding of the Constitution.[73] Early legislative decisions, executive actions, and judicial practices all illuminate how the Constitution was understood and applied, revealing the unwritten rules that the Founders considered integral.[74]

Judicial review is a prime example. Though not mentioned anywhere in the Constitution's text, it is universally acknowledged as a core function of the judiciary. Indeed, without the power to interpret the Constitution, originalism would be an impossible endeavor. That judicial review was intended as a constitutional feature can be inferred from the confluence of pieces of evidence: It was commonly practiced in the states before ratification,[75] accepted by the

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[69] Our vision here draws inspiration from the principles of framework originalism, as conceptualized by Jack M. Balkan. *See generally* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 Nw. U. L. Rev. 549, 550–51 (2009).

[70] Justice Antonin Scalia in particular was a pioneer in this approach, taking an uncommon interest among originalists of his era in using post-Ratification practice to determine constitutional meaning. *See, e.g.*, McCreary Cnty. v. ACLU, 545 U.S. 844, 896–97 (2005) (Scalia, J., dissenting) ("What is more probative of the meaning of the Establishment Clause than the actions of the very Congress that proposed it, and of the first President charged with observing it?"); Michael D. Ramsey, *Beyond the Text: Justice Scalia's Originalism in Practice*, 92 Notre Dame L. Rev. 1945, 1957–62 (2017).

[71] Ronald J. Krotoszynski, Jr., *The Unitary Executive and the Plural Judiciary: On the Potential Virtues of Decentralized Judicial Power*, 89 Notre Dame L. Rev. 1021, 1062 (2014) ("Although Americans like to claim that we have a written constitution, the truth is considerably more complicated; the text, in many respects, is merely a starting point for our constitutional law, rather than an end point."); Franchise Tax Bd. of California v. Hyatt, 587 U.S. 230, 247 (2019) ("There are many other constitutional doctrines that are not spelled out in the Constitution but are nevertheless implicit in its structure and supported by historical practice."). For more on unwritten constitutional rules and conventions, see Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 Mich. L. Rev. 1361 (2022); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Madisonian Liquidation, and the Originalism Debate*, 106 Va. L. Rev. 1, 17-31 (2020); Mark Tushnet, *The Pirate's Code: Constitutional Conventions in U.S. Constitutional Law*, 45 Pepp. L. Rev. 481 (2018); Amar, *supra* note 5; Laurence H. Tribe, The Invisible Constitution (2008).

[72] Amar, *supra* note 5, at ix ("The eight thousand words of America's written Constitution only begin to map out the basic ground rules that actually govern our land.").

[73] *Id.* at 13; Tribe, *supra* note 71, at 11–12, 26–29.

[74] Amar, *supra* note 5, at 19–20.

[75] William Michael Treanor, *Judicial Review Before Marbury*, 58 Stan. L. Rev. 455, 457–58 (2005).

Framers,[76] and embraced early in American history.[77] This constitutional norm, first articulated in *Marbury v. Madison,* "has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."[78] Historical practice—before, during, and after the Constitution's ratification—has long served as persuasive proof to courts and scholars alike that judicial review lies at the Constitution's core.[79]

As this Article demonstrates, the tie between circuits and high courts goes back into English history long before the Founding, was common practices in the states, was put into practice immediately following Ratification, was endorsed by the Founders,[80] and was reaffirmed in the same moment as *Marbury*.[81] So linked were the Justices to the circuits that Founders referred to the members of the highest court as "circuit judges."[82] Critics of using extratextual evidence in the case of the circuit-Court connection would have to explain how that position is consistent with accepting the legitimacy of judicial review, itself a historically derived principle absent from the Constitution's text. Indeed, the circuit-Court connection was implemented well before judicial review, so it is in some sense better attested to.

These sorts of early understandings and practices carry heavy weight, and, as has been recognized "the constitutional understandings that crystallized during the Washington administration have enjoyed special authority on a wide range of issues."[83] One key area where a firm understanding took root was in the structure and operation of the judiciary—and, in particular, in the tight relationship between Justices and the circuits. As early as 1803, the Supreme Court was using the evidence of Founding-era practice to clarify the proper organization of the judiciary, notably in affirming the connection between the Justices and the circuit courts as established by the Judiciary Act of 1789.[84]

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[76] *See e.g.*, The Federalist No. 78 (Alexander Hamilton) (discussing the power of judicial review).

[77] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[78] Cooper v. Aaron, 358 U.S. 1, 18 (1958).

[79] Franchise Tax Bd. of California v. Hyatt, 587 U.S. 230, 247 (2019); Akhil Reed Amar, America's Constitution: A Biography 211–12 (2005); Anthony V. Baker, "*So Extraordinary, So Unprecedented an Authority": A Conceptual Reconsideration of the Singular Doctrine of Judicial Review*, 39 Duq. L. Rev. 729, 734 (2001).

[80] Letter from George Washington to the Supreme Court (Apr. 3, 1790), *in* 5 The Papers of George Washington, Presidential Series 313, 313–14 (Dorothy Twohig, Mark A. Mastromarino & Jack D. Warren eds., 1996).

[81] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).

[82] In a letter listing the recent appointments by the Washington administration, Alexander Hamilton referred to Justice James Wilson as being named "one of the 5 circuit Judges." Hamilton used the number five rather than six because he was counting only the Associate Justices, having already noted John Jay's appointment as Chief Justice. Letter from Alexander Hamilton to John B. Church (Sept. 28, 1789), *in* 26 The Papers of Alexander Hamilton 483, 483 (Harold C. Syrett ed., 1979). Similarly, Justice Jay referred to the Justices as "Judges on the Circuits." Letter from John Jay to Richard Law (Mar. 10, 1790), *in* 5 The Selected Papers of John Jay 212, 213 (Elizabeth M. Nuxoll ed., 2017). Senator William McClay likewise described the Justices during their time away from the Court as "Circuit Judge[s]." Wythe Holt, "*To Establish Justice": Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 Duke L.J. 1421, 1505 (1989) (quoting Senator William McClay).

[83] Amar, *supra* note 5, at 309.

[84] *Stuart*, 5 U.S. (1 Cranch) at 299.

Ever since, the practices of early constitutional actors—especially those of the First Congress—have been treated as key indicators of how the constitutional order was originally conceived and understood.[85] This mode of

[85] Numerous scholars have emphasized the importance of the actions of the first Congress for the Court. *See* Michael Bhargava, *The First Congress Canon and the Supreme Court's Use of History*, 94 Calif. L. Rev. 1745, 1755–57 (2006); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288, 1298 (2020); William Baude, *Constitutional Liquidation*, 71 Stan. L. Rev. 1, 59–63 (2019). The Supreme Court, for its part, has repeatedly acknowledged the authority of both the Framers and the first Congresses. Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 432 (2024) ("The practice of the First Congress . . . . 'provides contemporaneous and weighty evidence of the Consitution's meaning.'" (quoting Bowsher v. Synar, 478 U.S. 714, 723 (1986))); Haaland v. Bracken, 599 U.S. 255, 290 (2023) ("[E]arly congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning.'" (quoting Bowsher, 478 U.S. at 723)); Am. Legion v. Am. Humanist Ass'n, 588 U.S. 29, 63 (2019) (asserting that the First Congress offers a "very direct connection . . . to the thinking of those who were responsible for framing the First Amendment"); Town of Greece v. Galloway, 572 U.S. 565, 566 (2014) (asserting that the Court "must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010) (asserting that congressional action in 1789 because it "provides contemporaneous and weighty evidence of the Constitution's meaning since many of the Members of the First Congress had taken part in framing that instrument." (quoting Bowsher, 478 U.S. at 723))); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 373 (2006) (deferring to 1789 and 1800 acts because they were "considered and enacted in the immediate wake of the Constitution's ratification"); Utah v. Evans, 536 U.S. 452, 503 (2002) ("[T]he early Census Acts [of 1790 and 1810] . . . provide significant additional evidence . . . [of what] the Framers meant.") (Thomas, J., dissenting); Printz v. United States, 521 U.S. 898, 905 (1997) ("[E]arly congressional enactments 'provid[e] "contemporaneous and weighty evidence" of the Constitution's meaning.'" (quoting Bowsher, 478 U.S. at 723)); Harmelin v. Michigan, 501 U.S. 957, 980 (1991) ("The actions of the First Congress . . . are of course persuasive evidence of what the Constitution means."); Bowsher, 478 U.S. at 723 (asserting that congressional action in 1789 "provides 'contemporaneous and weighty evidence' of the Constitution's meaning since many of the Members of the First Congress 'had taken part in framing that instrument.'" (quoting Marsh v. Chambers, 463 U.S. 783, 790 (1983)); Marsh, 463 U.S. at 790 ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888)) (alteration in original); *Ex parte* Quirin, 317 U.S. 1, 41–42 (1942) (deferring to an 1806 act because it was "a contemporary construction" of the Constitution "entitled to the greatest respect"); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394 (1928) ("This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs long acquiesced in fixes the construction to be given its provisions." (citing Myers v. United States, 272 U.S. 52, 175 (1923))); McGrain v. Daugherty, 273 U.S. 135, 174 (1927) (according "special significance" to the actions of Congressmen who were previously members of the Constitutional Convention); Knowlton v. Moore, 178 U.S. 41, 56 (1900) (deferring to a 1797 act because it was "adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish"); Sparf v. United States, 156 U.S. 51, 169 (1895) ("But, upon the question of the true meaning and effect of the constitution of the United States in this respect, opinions expressed more than a generation after the adoption of the constitution have far less weight than the almost unanimous voice of earlier and nearly contemporaneous judicial declarations and practical usage.") (Gray, J., dissenting); Pelican Ins. Co., 127 U.S. at 297, *overruled in part on other grounds by* Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935) (deferring to the Judiciary Act of 1789 because it "was passed by the first congress assembled under the constitution, many of whose members had taken part in framing that instrument, and is contemporaneous and weighty evidence of its true meaning" (citing Ames v. Kansas, 111 U.S. 449, 463 (1884)); *The Laura*, 114 U.S. 411, 416 (1885) (asserting that 1797 and 1800 acts as "afford[] an irresistible answer, and ha[ve], indeed fixed the construction'" (quoting Stuart, 5 U.S. (1 Cranch) at 309)); *Ames*, 111 U.S. at 469 (deferring to the "practical construction put on this provision of the constitution by congress at the very moment of the

constitutional interpretation, sometimes referred to as the "First Congress canon,"[86] draws not only from the actions of the Congress that sat from 1789 to 1791 but from the collective constitutional practice of the Founding generation through the first decades of the republic.[87] The Supreme Court has long looked to history and tradition as guiding stars in legal interpretation, a practice that recent history makes especially clear.[88] While the Court's historical method can be questioned,[89] its historical impulse cannot.

To be sure, the Justices of the eighteenth and nineteenth centuries voiced pointed criticisms of certain aspects of the Court-circuit connection—above all against the practice of circuit riding—and our critics might seize on these objections to argue that none of this arrangement could have amounted to a constitutional norm.[90] Complaints about circuit riding are indeed an omnipresent feature in the scholarship, which often characterizes the practice as both a personal and institutional burden.[91] However, two key points should be highlighted.

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organization of the government"); *id.* at 464 (deferring to the Judiciary Act of 1789 because it was the product of "the first congress, in which were many who had been leading and influential members of the convention"); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884) ("The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were contemporary with its formation, many of whom were members of the convention which framed it, is of itself entitled to very great weight."); Cooley v. Bd. of Wardens, 53 U.S. 299, 315 (1851) (describing a 1789 act as a "contemporaneous construction of the Constitution" that "is entitled to great weight"); Prigg v. Pennsylvania, 41 U.S. 539, 621 (1842) (describing a 1791 act as "a contemporaneous exposition of [a] constitutional provision . . . , which has been always regarded by this court as of very high authority"); McCulloch v. Maryland, 17 U.S. 316, 379 (1819) ("The members of the convention who framed the constitution, passed into the first congress, by which the new government was organized; they must have understood their own work."); Martin v. Hunter's Lessee, 14 U.S. 304, 351 (1816) (deferring to Judiciary Act of 1789 because it was the product of "the first congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution"); Stuart, 5 U.S. (1 Cranch) at 309 (asserting that a "practice . . . commencing with the organization of the judicial system" and "acquiescence under it for a period of several years . . . affords an irresistible answer, and has indeed fixed the construction.").

[86] Bhargava, *supra* note 85, at 1747; Baude, *supra* note 85, at 59–63.

[87] *E.g.*, Bhargava, *supra* note 85, at 1768–69; Parrillo, *supra* note 85, at 1298 n.41; Cent. Va. Cmty. Coll. 546 U.S. at 945 (characterizing acts between 1789 and 1800 as "considered and enacted in the immediate wake of the Constitution's ratification"); Printz, 521 U.S. at 907 (characterizing acts enacted between 1789 and 1802 as establishing how "the Constitution was originally understood"); *Ex parte* Quirin, 317 U.S. at 41–42 (characterizing an 1806 act as "a contemporary construction" of the Constitution "entitled to the greatest respect"); Knowlton, 178 U.S. at 56 (1900) (characterizing 1797 acts as "adopted at a time when the founders of our government and framers of our Constitution were actively participating in public affairs, thus giving a practical construction to the Constitution which they had helped to establish"); *The Laura*, 114 U.S. at 416 (characterizing acts between 1797 and 1800 as enunciating "a contemporary [constitutional] interpretation of the most forcible nature"); Burrow-Giles Lithographic Co., 111 U.S. at 56 (characterizing acts between 1790 and 1802 as framed "by the men who were contemporary with [the Constitution's] formation, many of whom were members of the convention which framed it," and so "entitled to very great weight"); *see also*, Am. Legion, 588 U.S. at 63 (accepting a practice "follow[ed] in [a] tradition" even where it "lacked the very direct connection, via the First Congress").

[88] *See, e.g.*, N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1 (2022); Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[89] *E.g.*, Reva B. Siegel, *Memory Games*: Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 Texas L. Rev. 1127 (2023).

[90] *See infra* notes 146–156 and accompanying text.

[91] *E.g.*, Crowe, *supra* note 21, at 70 (asserting that circuit riding involved "not only the questionable legal practice of justices hearing appeals of their own decisions but also the

First, what troubled the Justices was not the structural principle linking the Supreme Court to the circuits, but rather the exhausting, demeaning, and at times dangerous realities of circuit riding, as well as the complications raised by their dual service on both the high court and the circuit courts.[92]—not at the fundamental connection between the Court and the circuits. No Justice or commentator questioned the legitimacy of linking the number of Justices to the number of circuits.

Second, the modern Court has noted that when a legal norm endures in the face of sustained objection, it is the practice—not the protest—that holds sway; that is, persistent criticisms can paradoxically strengthen a practice's legitimacy by demonstrating its resilience and institutional acceptance. [93] The Justices' obligations to the circuits, though disparaged for decades by members of the Court and Congress,[94] remained in place well into the twentieth century. Far from discrediting the Court-circuit link, though, the steady drumbeat of protest reveals just how entrenched the connection was within the country's legal order.

Certainly, we recognize that the American constitutional system is not immutable, and that the nation has the power to reshape the judiciary or any of the structures of government. But such fundamental changes should result from intentional, democratic deliberation—not from a collective lapse of memory. Take, for instance, the direct election of senators. This ended the long historical practice of state legislatures chosing senators and was the result of more than forty years of public debate, media scrutiny, and reform efforts across the states.[95] It was this sustained national conversation, culminating in the formal ratification of the Seventeenth Amendment, legitimized what was indisputably a dramatic departure from the Founders' original vision.

In stark contrast, the link between the number of Justices and the number of circuits, considered a cornerstone of the constitutional structure throughout the early Republic, was dismantled without anything even approaching this level of deliberation. This constitutional revolution was not the result of a

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inconvenience foisted upon justices forced to travel to distant outposts for extended periods"); Dale Yurs, *The Early Supreme Court and the Challenges of Riding Circuit*, 36 J. Sup. Ct. Hist. 181 (2011) (characterizing the Justices' opposition to circuit riding as a fight "not only to ease the burdens of travel, but also to ensure the integrity of the judiciary"); Glick, *supra* note 26, at 1781–82 (asserting that Congress "showed a complete disregard for the needs of the judicial branch by failing to relieve the justices of their circuit duties"); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Wm. & Mary Q. 4, 5 (1965) (characterizing circuit riding as a "deficienc[y] of the Judiciary Act"); Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 27, 29 (2015) (asserting that circuit riding "put[] strains on the [judicial] system"). There exist a few exceptions to this critical consensus, including Stras, *supra* note 13; Calabresi & Presser, *supra* note 13.

[92] *See infra* notes 146–171 and accompanying text.

[93] Marsh v. Chambers, 463 U.S. 783, 791 (1983) ("We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems [it] posed.").

[94] Circuit riding did, of course, have its supporters in Congress, many of whom praised it as a vital tether between the Supreme Court and the people. Glick, *supra* note 24 at 1754, 1759–1761; Newmyer, *supra* note 26, at 114 n.8; Stras, *supra* note 13, at 1727.

[95] Zachary D. Clopton, *The Meaning of the Seventeenth Amendment and a Century of State Defiance*, 107 Nw. U. L. Rev. 1181, 1189–1193 (2013).

formal amendment; nor the outcome of express legislative action at the state or national level; nor the culmination of a national discussion; nor even the subject of media coverage. Indeed, it seems to have been scarcely noticed at all.[96]

The Founders' vision of the Supreme Court deserves the same deference we routinely give to other early constitutional practices and understandings. This is not to suggest that every custom from the Court's infancy remains binding—for instance, the first Supreme Court issued orders in the name of the President, a habit taken from British courts that acted in the name of the king.[97] Practices can and do change. However, what should give us pause is the wholesale abandonment of the framework created by the Framers and followed for 140 years for how the Supreme Court and the circuits should operate—and that this transformation occurred not by virtue of any formal amendment, but as the result of historical amnesia.

II. "[T]he Judges on the Circuits"[98]: The Court's First 140 Years

For nearly 140 years, the connection between the Justices and the circuits they served was a cornerstone of not just the Supreme Court but of the entire federal judiciary. This structure, woven into the fabric of the American judiciary from its inception, ensured that the Justices engaged not only with legal texts but also with the practical realities of the regions they oversaw and the citizens they judged. Yet today, this critical aspect of the judiciary's history is scarcely remembered, obscured by a modern Court whose structure feels natural and inevitable.

This Part tells the story of how a constitutional norm that held strong even as the Civil War raged faded into obscurity and was ultimately forgotten. We will trace this history from the itinerant courts in England that inspired the Founders, through the creation of the federal judiciary by the Constitution and the Judiciary Act of 1789, and through the continuous practice up to the Civil War. Throughout these periods, the judiciary of the United States operated as a cohesive entity, with Justices not perched above the system but actively engaging with it. The parity between Justices and circuits, the circuit residency requirement, and the tradition of circuit riding were seen as indispensable norms—integral constitutional principles regarded as unquestionable. Finally, we will examine the system's decline in the late nineteenth century, as successive incremental changes steadily eroded and eventually destroyed

[96] Critics may contend that our premise falters against the Constitution's explicit grant of power to Congress to structure the judiciary—that is, while the circuit-Court connection may have once been a binding constitutional norm, Congress both had the authority to undo it through legislation and did so in the early twentieth century. But this argument overreads the scope of Congress's power. While the Constitution empowers the legislature to establish inferior courts, U.S. Const. art. I, § 8, cl. 9; *id.* art. III, § 1, and to shape the Supreme Court's appellate jurisdiction, *id.* art. III, § 2, cl. 2, nowhere does it confer license to fundamentally transform the judiciary's constitutional identity through ordinary legislation. To hold a seat on the Supreme Court at the Founding was to be enmeshed in the circuit system, and this arrangement defined the Justices' roles and responsibilities for America's first 140 years.

[97] Schwartz, *supra* note 19, at 18.

[98] Letter from John Jay to Richard Law, *supra* note 82, at 213.

this longstanding structure, leading to a modern era where the Court is severed from the circuits and the old link is all but forgotten.

Understanding this history illuminates the original vision of the Founders and reveals how the judiciary we have today is not the judiciary that we have always had. Reflecting on these lost norms invites us to consider how reconnecting with these foundational principles might inform contemporary discussions about judicial reform and the place of the Supreme Court in American society.

A. Circuit Courts Before the Constitution

To understand why the number of Supreme Court Justices was tied to the number of circuits, it is critical to understand what the Framers sought to achieve by making the Justices an essential part of the operations of the circuits. Unlike some scholars, we argue that the circuit system itself must be understood in terms of English precedent.[99] In England, the royal circuit courts served as more than instruments of justice—they functioned as engines of national unity. They projected legal authority outward, extending the central government's control and standardizing legal practices across diverse regions. Simultaneously, these courts channeled regional information back to the crown, ensuring that the center remained informed of local customs and conditions.

The origins of American circuit courts lie in the English system of assizes, an institution with roots stretching far back into English history. In 1166, King Henry II appointed Richard de Lucy and Geoffrey de Mandeville as itinerant judges, which marked the start of a routine practice of royal officials traversing England.[100] Over time, this system evolved into a structure of six circuits with thirty justices, known as *justiciae errantes* (wandering justices) or *justiciarii in itinere* (justices in circuit), who ventured throughout the realm resolving legal disputes. Beyond serving to deploy trained jurists around the kingdom, the circuits also extended royal power to distant regions of the realm. When these justices convened courts, which were open to the public, they did so in the name of the king and bearing his insignia, symbolizing the extension of royal authority across the kingdom. The proceedings were characterized by a level of pomp and ceremony that would have been unfamiliar to many of the counties, further serving to highlight the king's sovereignty and power.[101] The presence of the circuit judges conveyed to residents of the countryside an important message: that the Crown was attentive to local needs, but also was

[99] Surrency, *supra* note 20, at 55. *But see* 1 G. Edward White, Law in American History: From the Colonial Years Through the Civil War 197 (2012) (asserting that the federal circuits in the United States were a "unique institution, whose composition and jurisdiction did not resemble any prior court in England or America").

[100] John Baker, An Introduction to English Legal History 19 (5th ed. 2019).

[101] *Id.*

capable of enforcing its authority. The justices, meanwhile, gained valuable insights into local life and could engage directly with local populations.[102]

Yet just as significant was the circuit system's role in fostering the emergence of a *common* law that extended across the realm. Rather than a patchwork terrain marked by isolated pockets of local law and custom, England's legal landscape instead steadily evolved into a more cohesive and coherent system.[103] The itinerancy of the justices made them vehicles of legal uniformity, carrying with them not only royal authority but a shared legal consciousness that transcended dialect and distance.[104] In time, the Magna Carta itself enshrined the importance of the assizes, mandating that the king—or his chief justiciar—dispatch judges annually to each county to hold court.[105] In the event that the justices could not complete these visits, the charter provided several other means for the assizes to be held.[106]

The British colonies of North America, inheriting both the ideals and the institutions of English law, established circuit systems—termed *nisi prius* systems—modeled on the royal assizes. When New York established its court system, it made heavy use of judicial circuits, requiring the justices of the colony's highest court to "goe the circuit" through the counties to "hold the Supream Court, being then assisted by two or more Justices of the peace."[107] Over time, this evolved into a bifurcated arrangement: trials and fact-finding unfolded under the watch of circuit-riding justices and local justices of the peace, while final judgment was reserved for the Supreme Court sitting en banc in New York City.[108] Other colonies followed a similar path. In Massachusetts, judges from the Court of the Assistants—the colony's highest tribunal—were required to ride circuit twice a year.[109] North Carolina implemented its own circuit system in 1737–38.[110] In Pennsylvania, at least two of the judges of the provincial court rode circuit, and the 1710 legislation establishing the Supreme Court of Pennsylvania required the justices to hold court twice a year in every county in the colony.[111]

The Founding generation thus had no shortage of examples—both in England and the colonies—of justices whose duties required them to ride circuit. This was no ancillary task, but rather integral to the judicial function itself, a defining characteristic of what it meant to serve on a high court.

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[102] *Id.* at 7.
[103] *Id.* at 20.
[104] *Id.* at 1.
[105] Magna Carta, Ch. 18 (1215); Henry C. Clark, *Circuit Riding a Former National Asset*, 8 A.B.A. J. 772, 772 (1922).
[106] Magna Carta, *supra* note 105.
[107] Martin L *Budd, Law in Colonial New York: The Legal System of 1691*, 80 Harv. L. Rev. 1757, 1766 (1967) (quoting the Continuation Act of 1692); William Edward Nelson, The Common Law in Colonial America: The Middle Colonies and the Carolinas, 1660-1730, at 51 (2013).
[108] Budd, *supra* note 107, at 1766.
[109] Peter Charles Hoffer, Law and People in Colonial America 30 (rev. ed. 1998).
[110] Nelson, *supra* note 107, at 83–84.
[111] Benjamin Grant, Reports of Cases Argued and Adjudged in the Supreme Court of Pennsylvania 101 (1864).

Indeed, legal commentators in the United States observed that the practice of circuit riding did more than simply dispense justice—it brought the profession into intimate contact with ordinary citizen and fostered a sense of camaraderie among practioners. One mid-nineteenth century biographer, describing circuit riding in post-Revolutionary Virginia, offered an enthusiastic tribute to the system: "[T]he riding of the Circuit, which always brought several into company, and the adventures of the wayside, gave to the Bar a sportive and light-hearted love of association which greatly fostered the opportunity and the inclination for convivial pleasure."[112] Oliver Wendell Holmes, writing in *The Common Law*, echoed this appreciation. He extolled the wisdom born of regular exposure to everyday disputes, arguing that "[a] judge who has long sat at *nisi prius* ought gradually to acquire a fund of experience which enables him to represent the common sense of the community."[113] For Holmes, it was this practical intimacy with local custom and sensibility that equipped such judges to lead juries—not merely to instruct them, but to guide them toward just outcomes.[114]

Beyond firsthand examples, knowledge about the mechanics and specifics of the English circuit system reached readers on both sides of the Atlantic in the eighteenth century via William Blackstone, whose accounts deeply influenced the future structure of the American justice system. Blackstone's *Commentaries on the Laws of England* stand as a seminal work in American legal history, serving a key source and referent for a wide range of legal questions.[115] Within the *Commentaries*, Blackstone expresses profound admiration for the "excellent and venerable institutions" of the English court system, declaring that "we cannot but admire the wise economy and admirable provision of our ancestors" in crafting such a sound and robust judicial system.[116] In Blackstone's description of the assizes, judges were appointed by the "great council of the realm," possessing the "delegated power from the king's great court or *aula regia* [and] being looked upon as members thereof." [117] These judges would embark on circuit journeys to hear cases, referring the most challenging ones to the Court of Common Pleas.[118] Blackstone further notes that the Magna Carta expanded the assizes to cover every county annually.[119]

Blackstone's depiction of the assizes would have a long legacy in the United States, foreshadowing how the Framers envisioned the relationship between America's Supreme Court and the circuits. For one thing, Blackstone's observations on the Magna Carta's extension of the assizes system

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[112] Charles Warren, A History of the American Bar 201 (1911) (quoting Joseph P. Kennedy, Memoirs of the Life of William Wirt (1849)); *see also* Clark, *supra* note 105, at 773–74 (collecting accounts attesting to the value of circuit riding in bringing together judges, members of the bar, and the general public, including some that described circuit riding as "the largest and best part of legal education").

[113] Oliver Wendell Holmes, The Common Law 124 (1881).

[114] *Id.*

[115] Lawrence M. Friedman, A History of American Law 71, 83 (4th. ed. 2019).

[116] 3 William Blackstone, Commentaries *59.

[117] *Id.* at *57–58.

[118] *Id.* at *59.

[119] *Id.* at *58.

are significant for American perspectives of the institution. Americans of the Founding generation already held a positive vision of the Magna Carta as a foundational document for liberty; by linking the circuit courts to this revered symbol of English liberty, the positive aura surrounding the Magna Carta would have naturally extended to the circuit court institution. More fundamentally, though, American readers of Blackstone, such as the Framers, would have seen in the English circuit system not an institution of stationary Justices handling appeals, but rather one in which judges from a nationally prestigious court interacted with citizens and local legal cultures. Indeed, Blackstone's presentation of the assizes—comprising judges affiliated with a higher court, traveling across the whole of the country to dispense local justice, and directing the most difficult cases to a superior body—essentially mirrors the arrangement established by the Judiciary Act of 1789, as will be discussed in the next section.

B. The Creation of the Supreme Court

The connection between the circuits and the Justices, both in their number and in their procedures, was enshrined in law from the very origins of the federal judiciary. Article III of the Constitution is conspicuously vague, merely providing for the establishment of a Supreme Court and a federal judiciary, but offering virtually nothing on how these entities were to be organized or how they would actually function.[120] Rather, it was with the passage of the Judiciary Act in 1789 that the first Congress gave form and structure to this branch of government.[121]

In this act, the Supreme Court was established with one Chief Justice and five associate Justices. Simultaneously, three circuits were created: an Eastern Circuit of New Hampshire, Massachusetts, Connecticut, and New York; a Middle Circuit of New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; and a Southern Circuit, of South Carolina and Georgia (the districts of Maine and Kentucky were not attached to any circuit). From the outset, these two features of the judicial system were yoked together, with each circuit assigned two Justices who, together with one district court, comprised the circuit court. As the act explained:

> [T]here shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum: Provided, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.[122]

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[120] *See* Glick, *supra* note 24, at 1756.

[121] Pauline Maier, Ratification: The People Debate the Constitution, 1787–1788, at 464 (2010).

[122] Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.

The judiciary's tiers thus functioned not as isolated rungs but as interlocking parts of a unified structure, with Supreme Court Justices embedded directly in a circuit court system that quite literally could not function without them—for, with a quorum requirement of two, at least one Justice had to be present for a circuit court to convene at all. These early circuit courts, moreover, bore little resemblance to today's Courts of Appeals. They were not appellate bodies but rather were the primary trial courts of the federal system, possessing far broader jurisdiction than the district courts.[123] As a result, members of the Supreme Court in the eighteenth century regularly presided over ordinary trials.

Contemporary sources from the first Congress provide further indication of the relationship these legislators believed would exist between the Supreme Court and the circuit courts. A newspaper piece entitled "Letter from a Gentleman in New York," which offered a firsthand account of the passage of the Judiciary Act, described the structure of the new judiciary in this way:

> Inferior Courts shall be held twice a year in each district, which Courts shall consist of two of the Supreme Judges and the Admiralty Judge . . . . This Court shall act as a *nisi prius* Judge, in cases originating in the Supreme Court, and as a Court of Appeals from the Admiralty Court; and from this Court, no appeal shall lie, except the matter in dispute be of the value of 2000 dollars, and in common law cases on points of law only.[124]

The author likely referred to district judges as "admiralty judges" because admiralty law was one of the few areas firmly within their remit—recall that district courts had only very limited jurisdiction, and that circuit courts were the main courts of first instance. Notably, the observer identified the emerging system as a kind of *nisi prius* arrangement, one that mirrored contemporary judicial practices in New York and Philadelphia and traced its lineage back to the English assizes.

Requiring Justices to ride circuit served to allay some of the worries among antifederalists and other skeptics about the new Constitution. Patrick Henry had notably raised concerns about the ability of Virginians to seek redress in national courts, highlighting the significant barrier that distance could play in accessing the judiciary: "If [speculators] perpetrate the most unwarrantable outrage on your persons or property, you cannot get redress on this side of Philadelphia or New-York: And how can you get it there?"[125] This problem of distance was addressed through circuit riding, which delivered justice directly to litigants, eliminating the need for them to travel to the national capital except for in the rare case of a Supreme Court appeal.[126] Similarly, the norm that developed requiring Justices be residents of the circuits they

[123] Newmyer, *supra* note 26, at 114; Surrency, *supra* note 20, at 56.

[124] Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 61 n.29 (1923).

[125] Patrick Henry, *Speech to the Virginia Convention*, 9 The Documentary History of the Ratification of the Constitution 425, 440 (John P. Kaminski & Gaspare J. Saladino eds., 1986).

[126] Maier, *supra* note 119, at 464.

oversaw worked to reassure skeptics by ensuring that the Justices were not foreign emissaries of federal power but instead were representatives attuned to regional interests

Alongside the Judiciary Act, another foundational statute in the creation of the federal judiciary was the Process Act—passed just five days later and, in many respects, its procedural counterpart. This law introduced a bifurcated system of judicial process, one track for the district courts and another for the Supreme Court and its circuit incarnations. From its opening lines, the act makes Congress's intentions clear:

> [A]ll writs and processes issuing from a supreme or circuit court shall bear the test of the chief justice of the supreme court, and if from a district court, shall bear test of the judge of such a court, and shall be under seal of the court from whence they issue; and signed by the clerk thereof. The seals of the supreme and circuit courts to be provided by the supreme court, and of the district courts, by the respective judges of the same.[127]

In this single paragraph, the original architecture of the judiciary is laid bare. The circuit courts were regarded as inextricably entwined with the Supreme Court, to the extent that even the symbolic trappings of legal authority flowed from the high court. As one legal historian put it, this provision offers striking proof "that the circuit courts were not viewed as a separate court, but as part of one supreme court."[128]

In addition to creating an internally cohesive judiciary, the connection between Justices and circuits served a representative function, as can be seen by the composition of the first Supreme Court. Circuits, as discussed, followed the sectional contours of the nation—north, middle, and south—and George Washington selected Justices based on the geographical boundaries of the circuits. As has been noted by other scholars, this sort of geographical representation was viewed during the Founding era as essential for legitimizing both the Court and the government at a whole.[129] Thus, when writing the Senate to seek confirmation for these Justices, Washington underscored the significance of their geographical ties, introducing each of them with their state of origin such as "John Jay of New York" or "John Rutledge of South Carolina."[130] Washington, moreover, carefully ensured that each circuit was represented on the Supreme Court, nominating Justices that hailed from each of the three

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[127] Process Act, ch. 21, § 1, 1 Stat. 93, 93 (1789).

[128] Wilfred J. Ritz, Rewriting the History of the Judiciary Act of 1789: Exposing Myths, Challenging Premises, and Using New Evidence 63 (Wythe Holt & L.H. LaRue eds., 1990).

[129] Glick, *supra* note 24, at 1756–63; Newmyer, *supra* note 26, at 133–34; David M. O'Brien, *Packing the Supreme Court*, 62 Va. Q.L. Rev. 189, 191 (1986); *see also*, Maeva Marcus, *Federal Judicial Selection: The First Decade*, 39 U. Rich. L. Rev. 797, 800 (2005) ("[G]eographical distribution was of the utmost importance, not only because of the necessity of circuit-riding, but also because [George Washington] wished to avoid arousing jealousy among the states.").

[130] Letter from George Washington to the Senate (Sep. 24, 1789), *in* 4 The Papers of George Washington, Presidential Series 313, 313 (Dorothy Twohig ed., 1996) (internal punctuation omitted).

circuits: two from the Eastern Circuit,[131] three from the Middle Circuit,[132] and one from the Southern Circuit.[133] Notably, he even ensured that each of the Justices came from different states within each circuits, meaning that no state was represented twice. The slight imbalance in circuit representation (of two, three, and one Justice, respectively) was rectified when one of the nominees from the Middle Circuit, Robert H. Harrison, declined the nomination (and subsequently died), leading Washington to chose as his replacement James Iredell of North Carolina, which was part of the Southern Circuit. When the first Supreme Court was confirmed, then, two interrelated precedents took root: that every circuit would receive equal representation on the bench, and that each Justice would hail from the circuit to which he was assigned.

With this understanding of the Supreme Court and the circuits they oversaw, the Justices played a dual representative role, serving as liaisons between the government and the people.[134] In one direction, they embodied the national government and its laws, establishing a vital connection between the far-flung states and the capital.[135] In the other direction, they functioned as agents of the populace, learning about the customs and attitudes of ordinary citizens while riding circuit and then bringing these insights back to the center. In carrying out these functions, the circuit courts closely resembled the assizes, which had been employed as a mechanism of bringing central governance to distant localities in England.

As the Justices began to leave the nation's capital to start riding circuit, President Washington emphasized to them the importance of what they were about to embark on. Although, he wrote, it was, "important that the Judiciary System should . . . be independent in its operations," he also noted the opportunity that circuit riding offered:

> As you are about to commence your first Circuit, and many things may occur in such an unexplored field, which it would be useful should be known; I think it proper to acquaint you, that it will be agreeable to me to receive such Information and Remarks on this Subject, as you shall from time to time judge expedient to communicate.[136]

In this way, circuit riding accomplished more than merely administering justice; it served as a vital means through which the federal government could connect with the people and gather essential information necessary for effective republican governance.

The Justices' presence on the circuit courts that crisscrossed the young republic imbued the judiciary with a dynamic character. As they rode circuit,

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[131] John Jay of New York and William Cushin of Massachusetts. *Id.*

[132] Robert H. Harrison of Maryland, James Wilson of Pennsylvania, and John Blair of Virginia. *Id.*

[133] John Rutledge of South Carolina. *Id.*

[134] Newmyer, *supra* note 26, at 114; Marin K. Levy, *Visiting Judges*, 107 Calif. L. Rev. 67, 93 (2019).

[135] Newmyer, *supra* note 26, at 114.

[136] Letter from George Washington to the Supreme Court, *supra* note 80.

members of the Court carried the authority of federal law into the far reaches of the nation, lending both stature and substance to the courts they joined. When serving on the circuit courts, they remained, of course, Justices of the Supreme Court; as Senator Daniel Webster observed, they were "Judges of the Supreme Court . . . not Judges of a circuit."[137] This was of course literally true: in the early republic, there were only two kinds of Article III judges—Supreme Court Justices and district judges. More broadly, though, the Justices' service on the circuits imbued decisions with added weight, and additionally offered litigants a window onto the views of the Justices, without having to travel all the way to the capital.

At the same time, the Justices' collaboration with district judges in distant courtrooms helped nurture a certain democratic ethos within the judiciary.[138] As was previously noted, the Justices deliberated with district judges as equals while on circuit. That Webster felt compelled to specify their rank speaks to a fluidity of roles and perceptions, and there are instances in which knowledgeable commentators did indeed refer to Justices as "circuit Judges."[139] The act of sitting side by side with district judges diluted a sense of rigid judicial hierarchy; the Justices, for all their stature, held votes no more decisive than those of their colleagues.[140] This contributed to a fluid and collegial legal culture, one that respected the distinct functions of each judge and rejected the notion that hierarchy rendered collaboration inappropriate or impossible.

One revealing glimpse into the intended flexibility of the early federal judiciary and the role the Justices were meant to play within it can be teased out from the Judiciary Act's differential treatment of "rehearing." Although district judges were barred from voting in the circuit courts on cases they had previously decided on at the district level, the same prohibition did not apply to Justices; that is, a Justice who had already ruled on a case while riding circuit was free to vote on it again at the Supreme Court.[141] This inconsistency was not simply the result of legislative oversight, for such a restriction on Justices was considered when the Judiciary Act was being drafted; Senator William McClay wrote in his journal that lawmakers had proposed "prevent[ing] the Circuit Judge from sitting in the Supreme Court on an appeal [w]hen he had given original Judg[men]t."[142] But motions to that effect twice failed to pass.[143] The Senate's reasons for keeping the varied approach are nowhere spelled out. However, the ability of Supreme Court Justices to vote twice on the same case—once at the circuit level, and again at the Supreme Court—may

[137] Newmyer *supra* note 26, at 113 (quoting Senator Daniel Webster).
[138] Levy, *supra* note 134, at 97.
[139] *See supra* note 82 and accompanying text.
[140] Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U.L. Rev. 205, 262 (1985) ("[T]he very structure of the circuit courts created by the [Judiciary] Act dramatized the structural equality of all federal judges. These courts were staffed not by appointing separate Article III judges, but rather by forming circuit panels in which Supreme Court justices and federal district judges sat together, with each judge—regardless of status—given an equal vote.").
[141] Glick, *supra* note 24, at 1834–35.
[142] Holt, *supra* note 82, at 1505 (internal punctuation omitted) (quoting Senator William McClay).
[143] *Id.*

be regarded as a feature, not a bug. Indeed, in difficult or contentious cases, nineteenth-century Justices would at times deliberately exercise their ability to rehear a case. Starting in 1802, the Supreme Court had appellate jurisdiction in cases where the circuit panel was divided, meaning that a Justice could guarantee rehearing simply by voting against their district judge colleague. In essence, the ability of Justices to rehear a case can be seen as a mechanism to permit a thorough examination of a case, reflecting a deliberate choice in the architecture of the legal system.[144]

The system that the Judiciary Act established that linked the Supreme Court with the circuits, with mandated circuit riding and collaboration with district judges, presented several advantages. It fostered connections between the Supreme Court and the district courts; it brought the Justices into contact with ordinary citizens; it even saved money by eliminating the need for a separate group of circuit judges.[145]

The only problem was that the Justices hated riding circuit—a grueling ordeal in an age when travel was slow, hazardous, and wholly unreliable.[146] Vast distances and primitive infrastructure severed the Justices from their families; letters arrived weeks late, if at all.[147] Chief Justice John Jay, writing to his wife while on circuit, fretted over their children's illnesses and yearned for the peace of retirement.[148] Justice James Iredell, wearied by the demands of the road, likened himself to a "travelling postboy" and confided to Jay that the grueling two-thousand-mile journey around the Southern Circuit left him unable to discharge his other duties.[149] The Justices, writing collectively in 1792, explained that "some of the present Judges do not enjoy health and strength of body sufficient to enable them to undergo the toilsome Journies through different climates, and seasons, which they are called upon to undertake."[150] No one, they argued, could withstand such punishing demands for long. In fact, the Justices detested circuit riding so much that they offered to take a $500 pay cut (from their $3,500 salary) if Congress would free them from their circuit duties.[151]

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[144] Austin Allen, Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837–1857, at 28 (2006). The Judiciary Act of 1802 reduced circuit courts to just two judges—a Supreme Court Justice and a district judge—so any disagreement between them would result in a split vote. Judiciary Act of 1802, ch. 31, § 4, 2 Stat. 156, 157–58; Surrency, *supra* note 20, at 64.

Though it may seem anomalous by modern standards, the practice of allowing a judge to review his own decision was firmly rooted in Anglo-American legal tradition and was a feature of the English court system. Glick, *supra* note 24, at 1835. Some Justices, however, opposed this arrangement on constitutional grounds, arguing that it was improper for a Justice to review his own decisions. See *infra* note 161 and accompanying text.

[145] Crowe, *supra* note 21, at 38–39.

[146] Glick, *supra* note 24, at 1765–67; Landa M. Freeman, *Mr. Jay Rides Circuit*, 31 J.S.C. Hist. 18, 19–20 (2006); Stras, *supra* note 13, at 1718–19; Yurs, *supra* note 91, at 183–85.

[147] Freeman, *supra* note 146, at 19; Yurs, *supra* note 91, at 184–85.

[148] Freeman, *supra* note 146, at 20, 26.

[149] Warren, *supra* note 26, at 86 (quoting Justice Iredell); Crowe, *supra* note 21, at 53.

[150] Letter from the Supreme Court Justices to Congress (Aug. 9, 1792), *in* 10 The Papers of George Washington, Presidential Series 643, 644 n.1 (Robert F. Haggard & Mark A. Mastromarino eds., 2002).

[151] Glick, *supra* note 24, at 1769–70; James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 Mich. L. Rev. 1, 20, 32 (2008). Admittedly, given

Certainly, the then-established circuit riding system was not perfect, and many of the logistical complaints about it were valid.[152] As the Justices noted, the arrangement posed particular difficulties for those who lacked the physical stamina to endure the demands of circuit riding.[153] Indeed, Justices were at times driven to the brink by the punishing demands of riding circuit, forcing many to spend extended periods away from the Court recuperating from illness or exhaustion—and driving some to an early grave.[154] So formidable were the demands of the road that they even dulled the dazzle of serving on the highest court. Distinguished lawyers declined appointment to the bench outright; others accepted only to resign not long after—Justice John Rutledge, for instance, resigned in 1791 to lead South Carolina's supreme court, while Chief Justice John Jay left after six years to become Governor of New York.[155] When Robert H. Harrison declined George Washington's offer to join the Court, he did so with a pointed candor: serving as a Justice, he wrote, would be "extremely difficult & burthensome, even to a Man of the most active comprehensive mind; and vigorous frame."[156]

Many of these grievances ring true and suggest that Congress should have perhaps taken more care when delineating the circuits or alternatively created more circuits and a larger Supreme Court. However, the early republic was not characterized as a period of widespread good health—illness and disease were pervasive and could strike Justices even when they stayed put. Justice Thomas Johnson, for instance, missed the entire first term of the Court in Philadelphia due to illness, and did not even make it to the nation's capital in New York.[157] In 1793, a yellow fever outbreak tore across Philadelphia, striking directly where the Court sat and prompting many residents to flee the city.[158] While circuit riding may have presented certain risks, the eighteenth century was not devoid of other hazards, and maladies could strike Justices irrespective of whether they were on circuit duty.

Beyond the pains and perils associated with travel, the Justices raised other, more legalistic concerns. Chief Justice Jay, in a letter addressed to President Washington and written in the name of the entire Supreme Court, contended that the practice of having Justices serve on circuit courts posed serious constitutional challenges. This letter—which Washington may never

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that the Justices covered their own expenses while riding circuit, such a pay cut may have in fact ended up saving them money. Pfander *supra* note 151, at 21–23.

[152] *See* Glick, *supra* note 24, at 1765–66; Yurs, *supra* note 91 at 184–86; Freeman *supra* note 146, at 1718–19; Stras, *supra* note 13, at 1727.

[153] Glick, *supra* note 24, at 1766. One Senator quipped that Justices required "less the learning of a judge than the agility of a post-boy." *Id.* at 1780 (quoting Senator Gouverneur Morris).

[154] *Id.* at 1766, 1798.

[155] *Id.* at 1780–81; Isaac Unah, The Supreme Court in American Politics 3 (2009); Artemis Ward, Deciding to Leave: The Politics of Retirement from the United States Supreme Court 25 (2003).

[156] Dale Yurs, *The Early Supreme Court and the Challenges of Riding Circuit*, 36 J.S.C. Hist. 181, 183 (2011) (quoting Robert H. Harrison).

[157] *Id.* at 27.

[158] John Fabian Witt, American Contagions: Epidemics and the Law from Smallpox to COVID-19 35 (2020); The Documentary History of the Supreme Court of the United States, 1789–1800: Suits against states, 284 (Maeva Marcus et al. eds., 1985).

have received[159]—raised a number of issues with the Justices' dual roles as both circuit judges and Supreme Court Justices. First, according to Jay, permitting Justices to sit on courts with broad original jurisdiction violated the Constitution's very narrow grant of original jurisdiction to the Supreme Court—"it would appear very singular, if the Constitution was capable of being so construed, as to exclude the Court, but yet admit the Judges of the Court."[160] Furthermore, Jay emphasized the potential problems of Justices serving as appellate judges for their own decisions, highlighting the inherent conflict of being "at the same Time both the *Controllers* and the *controled*."[161] Such an arrangement would corrode the public's trust in the judicial system and diminish its effectiveness since the Justices, having made an erroneous decision at the circuit level, might be reluctant to reverse themselves in public proceedings. Finally, Jay contended that appointing Justices as circuit judges violated the Appointments Clause, as the circuit judgeships represented a separate office that required the president's nomination and the Senate's consent.[162]

Yet the fact that Congress and the Court never acted upon any of these concerns, and that the Court ultimately upheld the constitutionality of circuit riding ten years later in *Stuart v. Laird*,[163] suggests that Jay's speculations here were incorrect. As the letter itself acknowledged, there is a clear "Distinction between a Court and it's Judges,"[164] dispelling the claims of apparent conflict concerning original jurisdiction—the limitations on original jurisdiction applied to the Supreme Court as a body, when all the Justices sat together in review of a case, and not to individual members sitting in a different court. Meanwhile, the potential issues arising from a Justice reviewing his own decisions would be at least partially mitigated by the collaborative nature of the Supreme Court. The Justice would be but one of six Justice who would be reviewing the decision, and participating in such a joint reconsideration could very well foster a change of view. Even accepting the issue at face value, the straightforward solution to a Justice acting as an appellate judge in a case he already decided would be quite simply for that Justice to recuse himself, not for the entire system of circuit riding to dismantled. Finally, the claim regarding the Appointments Clause is seriously undermined by the fact that Justices and circuit judges were one and the same—when the President appointed and the Senate confirmed a Justice, both branches understood that this individual would serve as both a Justice and as a circuit judge.

Notably, it was not just the Justices who took issue with the circuit system; Attorney General Edmund Randolph, too, was deeply critical of the structure set up by the Judiciary Act. Yet, much like the Justices' objections, Randolph's criticisms in fact hint at the system's underlying strengths. As a scion of Virginia's elite, he viewed the circuit system's intimacy with the public not as a

[159] Letter from the Supreme Court Justices to George Washington, *supra* note 144, at 431 n.5.
[160] *Id.* at 429.
[161] *Id.*
[162] *Id.*
[163] Stuart v. Laird, 5 U.S. (1 Cranch) 299 (1803).
[164] Letter from the Supreme Court Justices to George Washington, *supra* note 144, at 429.

virtue but as a vulgarity—its populist texture too coarse for the refined dignity he believed the judiciary ought to project. When the House of Representatives called on him to report on the state of the judiciary, Randolph recommended a specific reform: that the Justices be excused of their circuit duties, and that the work be left solely to district judges. His rationale was threefold.[165] First, requiring Justices to ride circuit courts diminished the Court's stature, blurring the lines between its members and lower judges. "The supreme judges themselves who ride the circuits," he warned, "will . . . be soon graduated in the public mind, in relation to the circuits; will soon be considered as circuit judges, and will not be often appreciated as supreme judges."[166] Second, beyond optics, circuit riding exacted an intellectual toll—it scattered the Justices' focus and cut them off from their libraries and law books.[167] Finally, he argued that having the Court to review decisions made by its own members while on circuit risked pitting Justice against Justice and sowing internal strife.[168] What Randolph proposed instead was a more insulated Court, stationary and elevated, with the hope that such distance would produce more refined opinions and a more consistent body of national law.[169] It was a rather different vision of the Court: not mobile and engaged, but removed and rarefied, its authority emanating from stillness rather than presence.

Randolph conceded that there were arguments in favor of tying the Justices to the circuit courts and attempted to rebut them. To the claim that the circuit system could extend the influence of the federal government by allowing "the most distinguished judges [to] visit every state,"[170] Randolph dismissed this as "too vague" an objection. As to the assertion that the circuit system replicated the best parts of the generally popular English system of assizes, Randolph claimed that there were major differences between the two systems, namely that the judges of the assizes were "not authoritative" because they were "so small in number, as to be compelled to rely on the strength and solidity of their judgment only, instead of their influence."[171] What is notable is that Randolph's rebuttals were entirely based on pragmatic policy grounds, rather than constitutional or structural ones.

Randolph sought a Supreme Court that resembled a judicial ivory tower, an esteemed institution disconnected from popular sentiments. Rather than hard-working judges drawing wisdom from their travels and a law rooted in popular sentiment, his vision championed a trajectory for American law that privileged a professional cadre of scholarly lawyers. However, much like Alexander Hamilton's advocacy for a stronger executive with a lifetime appointment and the reduction of states to mere administrative units,[172]

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[165] Crowe, *supra* note 21, at 44–46.

[166] Edmund Randolph, Report of the Attorney-General Read in the House of Representatives, December 31, 1790, at 8 (1790).

[167] *Id.*

[168] *Id.*

[169] *Id.* at 9.

[170] *Id.*

[171] *Id.* at 9.

[172] Ron Chernow, Alexander Hamilton 310 (2004); Forrest McDonald, Alexander Hamilton: A Biography 101 (1979).

Randolph's anti-populist vision for the American judiciary failed to gain popular support or political traction.

Yet, in writing about the Supreme Court's relationship to the circuits, most scholars and legal commentators have taken the criticism of the Justices and the attorney-general as determinative, accepting without question that the circuit-linked judicial system did not work. The unacknowledged assumption underlying this is that the Justices possessed the deepest understanding of the institution, and thus their discontent signaled a fundamental problem in need of correction. Naturally, those who supported the circuit system as it existed were less inclined to write at length than the Justices and their allies, who found reason to protest. Indeed, the very aspects of circuit duty the Justices found disagreeable could just as well be seen as virtues. They tethered the Court to the rough realities of a young republic, discouraging the emergence of a cloistered elite and keeping the American legal tradition from becoming a mere echo of Europe's aristocratic inheritance.

C. The Circuit Breaker: The Judiciary Act of 1801

Despite criticism, the system that the Founders had instituted endured as America's judiciary developed. The connection between the highest court and the circuits that spanned the nation embraced a set of interconnected principles—that of geographical representation of each circuit, of the engagement of the Justices with ordinary people through circuit riding, and of numerical parity between the two. This link represented a broad, shared consensus concerning the role and purpose of the Supreme Court, and it persisted even as the judicial system changed.

Some of these changes were more drastic than others. Early in the period, there was an attempt by the outgoing Adams administration to drastically refashion the federal judiciary. After losing the election of 1800 to Thomas Jefferson, the Federalists under President Adams refused to accept their loss passively and took advantage of the lengthy, pre-Twentieth Amendment lame duck period to pass legislation to cement Federalist influence in the courts.[173] With this Judiciary Act of 1801, the so-called Midnight Judges Act, the link between the Supreme Court and the circuits was severed. The number of seats on the Supreme Court was decoupled from the number of circuits, with the former being reduced from six to five, while the latter was doubled from three to six; simultaneously, circuit riding was abolished and a new intermediate level of circuit courts was instituted, staffed by sixteen new judges who would take on the former circuit-riding role of the Justices.[174] This drastic judicial restructuring, motivated above all by partisan considerations, stood as an almost complete repudiation of the organizational scheme that had been set up

[173] Bruce Ackerman, The Failure of the Founding Fathers: Jefferson, Marshall, and the Rise of Presidential Democracy 130 (2007); Kathryn Turner, *Federalist Policy and the Judiciary Act of 1801*, 22 Wm. & Mary Q. 3, 10, 14 (1965).

[174] Judiciary Act of 1801, ch. 4, §§ 3, 7, 21, 27, 2 Stat. 89, 90–91, 96–97, 98; Surrency, *supra* note 20, at 62.

at the Founding and which had persisted since that time. Had this Federalist-spearheaded remaking of the judiciary stood the test of time, the way that we understand the judicial branch in the present day would doubtless have been very different.

As it happened, though, this butchering of the circuit system proved to be extremely short-lived and was swiftly rejected by contemporaries. As soon as he assumed the presidency, Thomas Jefferson and his allies set about dismantling the judicial overhaul engineered by his predecessor. The Federalists, unsurprisingly, rallied to defend the Midnight Judges Act. The most famous result of the struggle over the repeal was *Marbury v. Madison*, spurred by Jefferson's refusal to deliver the commission of one of the "midnight judges" appointed by Adams—though William Marbury's undelivered commission actually appointed him as a Justice of the Peace for the District of Columbia, rather than to an Article III judgeship.[175] While less remembered than *Marbury*, Jefferson's prompt restoration of the original structure and functioning of the Supreme Court played a crucial role in maintaining the precedent set at the Founding and in guiding judicial practice right through the Civil War. The Judiciary Act of 1802 restored the six-member Supreme Court and reestablished the connection of the Justices to the circuits, both in terms of number and through the reinstitution of circuit riding.[176] The one notable innovation from 1801 that endured was the increase in the number of circuits to six.[177] With the Supreme Court returned to six members, this meant that each circuit would now be served by a single Justice instead of two, a pattern that would persist for much of the nineteenth century.[178] These circuit courts would thus consist of two judges, one Justice and one district judge, who would meet twice annually in each of the seventeen districts.[179]

The 1802 Judiciary Act further introduced a significant element related to the Justices' circuit riding—it granted the Supreme Court the authority to conduct appellate review in any case where the two members of the circuit held divergent views on the law.[180] Because one of the sitting circuit court judges was always a Justice, members of the Supreme Court thus gained a mechanism to refer any case to the full Court.[181] Very quickly Justices began availing themselves of this tool, and it soon emerged as a custom that they would intentionally split the circuit vote with their district court colleagues whenever questions arose in the circuits that, in their judgment, warranted deliberation by the Supreme Court as a whole.[182] Chief Justice Roger B. Taney would eventually try to clamp down on this practice by mandating that, in order for a case to merit review at the Supreme Court, the circuit court needed

[175] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[176] Judiciary Act of 1802, ch. 31, § 5, 2 Stat. 156, 158.
[177] *Id.* at § 4, 2 Stat. at 157.
[178] Surrency, *supra* note 20, at 64.
[179] Crowe, *supra* note 21.
[180] Judiciary Act of 1802, ch. 31, § 6, 2 Stat. 156, 159–61.
[181] Allen, *supra* note 144, at 28.
[182] *Id.*

to actually consider the case and not simply split the vote. Still, though, this long-standing mechanism for granting certiorari was maintained.[183]

Alongside the legislative rollback of the 1801 reforms came the equally significant ruling in *Stuart v. Laird*, which upheld the practices and understandings that had prevailed before the Federalists' attempted reorganization. The case originated in an unassuming dispute: John Laird had sued Hugh Stuart over an unpaid debt and had won in one of the circuit courts created under the Judiciary Act of 1801. By the time Laird returned to court to enforce the judgment, however, the 1801 Act had been swept away, and with it, the circuit court that had ruled in his favor. Laird thus turned to one of the newly revived circuit courts reestablished by the Judiciary Act of 1802, which was structured according to the old model and presided over by none other than Chief Justice John Marshall. Once again, Laird won.[184]

Stuart, however, refused to accept defeat, and the judicial restoration of 1802 furnished him with a potent challenge: that the circuit court which had affirmed the judgment against him was illegitimate, and that the 1802 act that had revived it was itself unconstitutional. In his argument before the Supreme Court, Stuart attacked both the original circuit court framework established in 1789 and its 1802 restoration on two fundamental grounds. First, Stuart argued that the legislative assignment of Justices to circuit court positions violated the Appointments Clause, as these were judicial appointments properly belonged to the president, not the legislature.[185] Second, Lee contended that, in most cases, the Supreme Court could only have Article III appellate jurisdiction, not original jurisdiction, which at the time was the province of the circuit courts. Thus, "no judge of that court, as such, is authorized to hold a court of original jurisdiction," hence excluding the Justices from sitting on circuit.[186] Indeed, Chief Justice Marshall's opinion in *Marbury* a week before had been grounded on the premise that the Supreme Court's original jurisdiction could not be expanded beyond those enumerated in the Constitution—so if the role of Justices acting on circuit courts was seen as expanding the Supreme Court's original jurisdiction, it would be unconstitutional.

In a unanimous opinion written by Justice William Patterson, the Supreme Court dismissed this argument, holding that it was constitutionally permissible for Justices to serve on circuit courts. Responding to Lee's contentions, they emphasized:

> To this objection [to Justices sitting as circuit judges], 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

[183] *Id.*

[184] Mark V. Tushnet, Arguing Marbury v. Madison 5–6 (2005). Having heard the case while riding circuit, Chief Justice John Marshall ultimately opted to recuse himself when the matter reached the Supreme Court. Stuart v. Laird, 5 U.S. (1 Cranch) 299, 308 (1803).

[185] *Id.* at 305.

[186] *Id.*

> 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.[187]

The vision of the Framers and over a decade of sustained practice had hallowed the institution of circuit riding and the Justice's dual roles as both Supreme Court Justices and circuit court judges. Indeed, the Court's emphatic assertion that the issue was totally settled, that the construction of the Constitution on this matter had become "fixed" and immutable, raises the possibility that the 1801 evisceration of the circuit arrangement had itself been unconstitutional.

Stuart's vigorous defense of circuit riding is significant, representing a settling of judicial practices reminiscent of *Marbury*—indeed, the two cases were decided within one week of each other. The practice of judicial review endorsed by *Marbury* has obviously become a cornerstone of what the Supreme Court does and how it is understood. Circuit riding, defended vigorously by the very Justices who established judicial review, deserves equal consideration. Although modern commentators have regarded circuit riding as an oddity of the early judicial system that was rightly eliminated, it is difficult to simultaneously dismiss the Marshall Court's ruling in *Stuart* while affording heavy weight to *Marbury*—to selectively scorn the one and embrace the other lacks any clear principle. Indeed, one cannot claim that *Stuart*'s affirmation of circuit riding is somehow insufficiently indicative of the fundamental character of the judiciary without also calling into serious question the principle of judicial review itself. To fully appreciate the constitutional landscape established in the early Republic, we argue, both *Marbury* and *Stuart* must be embraced jointly.

The foundational period of 1789 to 1802, when the judiciary's constitutional workings were being established,[188] was thus marked in no small part by the intimate link between the Supreme Court and the circuits, a connection that endured through the judiciary's uneven maturation in the early nineteenth century. The trans-Appalachian, post-Revolution states, which had been briefly added to the circuits by the Act of 1801[189] but then promptly removed by the Act of 1802,[190] remained for a period of time outside the circuit system.[191] This exclusion rankled many westerners,[192] and by 1807 a new Judiciary Act created a new, seventh circuit for Kentucky, Tennessee, and Ohio, with the number of Justices on the Court correspondingly increased to seven.[193] The legislation explicitly mandated that this new Justice "reside in

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[187] *Id.* at 309.

[188] Saul Cornell & Gerald Leonard, The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution, 1780s–1830s, at 93 (2019).

[189] Judiciary Act of 1801, ch. 4, § 4, 2 Stat. 89, 90.

[190] Judiciary Act of 1802, ch 31, § 3, 2 Stat. 156, 157.

[191] Blumm, Flanagan & White, *supra* note 55, at 25; Curtis Nettels, *The Mississippi Valley and the Federal Judiciary, 1807–1837*, 12 Miss. Valley Hist. Rev. 202, 202–203 (1925).

[192] Justin Crowe, *Westward Expansion, Preappointment Politics, and the Making of the Southern Slaveholding Supreme Court*, 24 Stud. Am. Pol. Dev. 90, 93–94 (2010).

[193] Judiciary Act of 1807, ch. 16, §§ 2, 5, 2 Stat. 420, 420, 421.

the seventh circuit,"[194] resulting in the appointment of Thomas Todd, a Kentucky resident since the 1780s who had helped draft the state's constitution.[195]

The early Republic's flurry of judicial reforms ground to a halt as the century progressed, and for a period of thirty years, the number and borders of the circuits remained frozen—even as nine new states were admitted to the Union.[196] This legislative inaction was not due to Congressional ignorance or apathy—Western citizens vociferously protested their status as mere "judicial provinces" excluded from the faster, cheaper justice offered by circuit courts,[197] and after 1815 nearly every congressional session saw efforts to address the issue.[198] Rather, the explanation lies in the circuits' intrinsic connection to the Supreme Court: creating new circuits meant appointing new Justices, which was a nonstarter in an era of rising factionalism.[199] This Congressional deadlock thus underscores the strength of the Court-circuit link—the two institutions were so intertwined that expanding one without expanding the other was simply unthinkable.[200]

D. Lincoln and the Non-Suspension of the Court-Circuit Bond

The force of the precedents surrounding the structure of the Supreme Court and the circuits—that the number of Justices align to the number of circuits, and that each Justice hail from and represent a state within their assigned circuit—finds its most striking affirmation during that period when the American judicial system was so gravely tested, the Civil War. Throughout his presidency, Lincoln showed a clear willingness to push the constitutional envelope, most famously in his suspension of the writ of habeas corpus. Yet in this turbulent era, he preserved the deeply rooted belief that Supreme Court appointments must correspond to judicial circuits. That Lincoln, facing the pressures of war, did *not* suspend the Court-circuit connection speaks volumes about the weight and reverence this constitutional tradition commanded.

At the war's outbreak, the North held four circuits and the South held five, an arrangement that explains in part the Southern-leaning character of the Court in the antebellum period.[201] For Lincoln, this division posed an immediate and thorny dilemma.[202] Almost a year before Lincoln took office,

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[194] *Id.* at § 5, 2 Stat. at 421.

[195] Blumm, Flanagan & White, *supra* note 55, at 27.

[196] Crowe, *supra* note 191, at 96; Blumm, Flanagan & White, *supra* note 55, at 26; The only exception to this legislative standstill was the incorporation of Maine into the First Circuit following its admission as a state. Act of Mar. 30, 1820, ch. 27, § 1, 3 Stat. 554, 554; Blumm, Flanagan & White, *supra* note 55, at 26.

[197] Nettels, *supra* note 190, 207–209 (quoting Representative Polk).

[198] Blumm, Flanagan & White, *supra* note 55, at 27–30; Nettels, *supra* note 190, at 210–26.

[199] Blumm, Flanagan & White, *supra* note 55, at 28.

[200] Crowe, *supra* note 191, at 95–96, 98–101.

[201] *Id.* at 91–92, 115.

[202] David M. Silver, Lincoln's Supreme Court 27 (1957). The First Circuit encompassed Maine, New Hampshire, Massachusetts, and Rhode Island, Act of Mar. 30, 1820, ch. 27, § 1, 3 Stat. 554, 554; the Second Circuit encompassed Vermont, New York, and Connecticut, Eighth and Ninth Circuits Act, ch. 34, § 1, 5 Stat. 176, 176 (1837); the Third Circuit encompassed New Jersey and Pennsylvania, *id*; the Fourth Circuit encompassed Delaware, Maryland,

Justice Peter V. Daniel, a Virginian who presided over the Ninth Circuit, had died.[203] Republicans in Congress had blocked President James Buchanan from confirming a replacement for the seat, leaving Lincoln to inherit the opening when he took office in March 1861. As tradition since the Founding dictated, the new Justice would have to come from the Ninth Circuit; but the Ninth Circuit encompassed just two states, Arkansas and Mississippi. Lincoln was thus left with no choice but to appoint someone from a slave state, either one that had already joined the Confederacy or one teetering on the brink of rebellion (and which would secede just two months later).

Lincoln acutely needed a functioning and sympathetic Court due to swirling questions over the legality of his wartime measures, most notably the naval blockade of the South initiated in April 1861. But the crisis deepened that very month with the death of Justice John McLean and the resignation of Justice John Archibald Campbell, who returned home to Alabama to join the Confederate cause, eventually serving as its Assistant Secretary of War.[204] Replacing McLean posed little challenge, as his Seventh Circuit included reliably Northern states like Ohio, Michigan, Indiana, and Illinois. The real challenge lay with Justice Campbell's Fifth Circuit, which included only Alabama and Louisiana—both of which had been in full rebellion since January. By early May, then Lincoln faced the daunting task of appointing not one but two Justices from regions entirely under Confederate control.[205]

The simplest solution, of course, would have been to appoint replacements from any loyal state, time-honored constitutional practices be damned. No provision in the Constitution explicitly required that a Justice hail from their assigned circuit, and two Northerners could have easily been installed to oversee the Fifth and Ninth Circuits. It would have been an expedient solution, perfectly suited to the exigencies of war. But to do so would have been to break with the circuit residency requirement, and that was something Lincoln would not do.

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and Virginia, Act of Aug. 16, 1842, ch. 180, § 1, 5 Stat. 507, 507; the Fifth Circuit encompassed Alabama and Louisiana, *id.*; the Sixth Circuit encompassed North Carolina, South Carolina, Georgia, *id.*; the Seventh Circuit encompassed Michigan, Ohio, Indiana, and Illinois, Eighth and Ninth Circuits Act, ch. 34, § 1, 5 Stat. 176, 176 (1837); the Eighth Circuit encompassed Kentucky, Tennessee, and Missouri, *id.*; and the Ninth Circuit encompassed Arkansas and Mississippi, *id.*, 5 Stat. at 177. California stood alone in its own separate California Circuit. California Circuit Act, ch. 142, § 1, 10 Stat. 631, 631 (1855).

[203] Brian McGinty, Lincoln and the Court 92 (2008). As a Virginian assigned to a circuit that did not include Virginia, Justice Peter V. Daniel's assignment marked the sole breach of the circuit residency requirement that occurred before the Civil War. Crowe, *supra* note 21, at 127. Shortly after Daniel's confirmation to the bench, Congress redrew the circuit boundaries to address concerns that the Ninth Circuit was too large for a single Justice to preside over. Lawmakers thus reduced the circuit to just Arkansas and Mississippi, but in solving one problem created a new one: no sitting Justice hailed from either state. Rather than leave these states without a presiding Justice or attempt to remove Daniel unconstitutionally, the Supreme Court pragmatically overlooked the residency requirement this one time and assigned the Virginian to the new, shrunken Ninth Circuit. Act of Aug. 16, 1842, ch. 188, § 1, 5 Stat. 507, 507; Crowe, *supra* note 21, at 87, 99.

[204] Ward, *supra* note 155, at 64–65; Jonathan Lurie, *Ex-Justice Campbell: The Case of the Creative Advocate*, 30 J.S.C. His. 17, 17–19 (2005).

[205] McGinty, *supra* note 202, at 98.

Lincoln candidly outlined his judicial dilemma in his first annual message to Congress. As he noted, even if suitable candidates from the South could be found, many would likely refuse the role, unwilling to risk the personal dangers of openly aligning with the Union.[206] Confronting this impasse, Lincoln proposed three potential solutions: redrawing the circuit boundaries while preserving the system as it stood; eliminating the Supreme Court's circuit duties and relying on circuit judges; or abolishing the circuits and their courts altogether, leaving only district courts and the Supreme Court.[207] Rather than adopt either of the latter options, which would have shattered the longstanding Court-circuit connection, Lincoln chose the first, holding fast to the precedent that had guided judicial appointments since the nation's Founding, favoring adaptation over upheaval. The decision is telling. Lincoln was demonstrably willing to forego established constitutional understandings when circumstances demanded. And in adhering to this custom, Lincoln not only recognized a tradition, but deliberately affirmed its enduring power.

Rather than discarding longstanding constitutional practice, Congressional Republicans opted to reshape the circuits themselves. If the South wanted to divide the Union, Lincoln would respond by uniting the South. Southern and border states were consolidated into fewer, larger circuits, while northern states were incorporated into as many circuits as possible. In essence, this was judicial gerrymandering, redrawing circuit boundaries exactly as if they were legislative districts, motivated by the belief that it was the only practical path to ensure the appointment of pro-Union Justices.

Amid this reorganization, Senator John W. Grimes of Iowa waged a determined campaign to prevent his state from being grouped with Illinois in the same circuit. These efforts were driven partly by the ambition to see a particular Iowan, Samuel F. Miller, appointed to the Supreme Court, but they also reflected broader anxieties about Iowa's prospects being overshadowed by the political influence of the president's own state.[208] Grimes's maneuvering thus shows more than routine political jockeying; it illuminates the practical implications of the Court-circuit connection. While Congress could not select Justices outright, its power to define circuit boundaries shaped the president's pool of candidates. Furthermore, because circuit legislation required approval from both the Senate and the House, the latter—ordinarily excluded from confirmations—gained a limited but meaningful role in judicial appointments. This arrangement ensured a degree of Congressional buy-in, balancing the president's authority with regional representation on the bench. Grimes's efforts thus exemplify how regional and political dynamics intertwined to shape the judiciary, balancing national unity with local interests.[209]

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[206] Abraham Lincoln, Annual Message to Congress 1861, *in* 2 Abraham Lincoln: Speeches and Writing, 1859–1865, at 279, 284–85 (1989).

[207] *Id.*

[208] David M. Silver, *Lincoln's Appointment of United States Justice Samuel F. Miller*, 33 Ann. Iowa 510, 513 (1957).

[209] Richard J. Ellis, The Development of the American Presidency 372, 372–73 (2012).

In the end, the Judiciary Act of 1862 dramatically redrew the circuit map for much of the country. Florida and the entire Deep South (save Louisiana) were bundled together into a single circuit, the Fifth;[210] the Sixth Circuit now snaked from Kentucky to Texas; the Old Northwest, once unified under a single circuit, was divided into two[211]; and, finally, the Ninth Circuit, a formerly southern circuit, now went only as south as Missouri and spanned all the way up to Minnesota.[212] As a result, the number of circuits composed solely of southern or border states was slashed from five to three, while those including northern states increased from four to six—and thus opening the door to a considerable reorientation of the Court.[213]

Equally significant was the act's resolution of Lincoln's Supreme Court vacancy dilemma. Recall that the challenge had stemmed from the vacancies for the Fifth and Ninth Circuits, two regions deep in the Confederate heartland from which Lincoln had to find two loyal Justices. But now, Lincoln's options had been dramatically expanded. The redesigned Fifth Circuit, now that it included Georgia, no longer even needed a new Justice; the Georgian Justice James M. Wayne could simply be reassigned to oversee it, sparing Lincoln from the delicate task of appointing a new Justice from the Deep South at all. Instead, through a process of legislative alchemy, the vacancy on the Fifth Circuit had been transmuted into a vacancy on the Eighth, a circuit that bore no resemblance to its predecessor and was instead now centered on Illinois.[214] The Ninth Circuit, in turn, shed its southern roots and reemerged as an entirely Midwestern circuit that (thanks to Senator Grimes's efforts) included Iowa. As a result of this restructuring, instead of having to find two candidates

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[210] Judiciary Act of 1862, ch. 177, § 1, 12 Stat. 576, 576. Keen readers will recognize that consolidating the Deep South into the Fifth Circuit would not fully address Lincoln's challenge, as one of his issues was finding a nominee for the Fifth Circuit; for a full discussion of the solution, which included targeted boundary changes and Justice reassignments, see *infra* note 214 and accompanying text.

[211] Before the 1862 Act, Michigan, Ohio, Indiana, and Illinois formed the Seventh Circuit, Eighth and Ninth Circuits Act, ch. 34, § 1, 5 Stat. 176, 176 (1837); afterwards, Ohio and Indiana were all that remained in the Seventh Circuit, while Michigan and Illinois were reassigned to a redefined Eighth Circuit, now joined by Wisconsin (a state that had never been in any circuit). Act of Aug. 9, 1846, ch. 89, § 4, 9 Stat. 56, 57; Judiciary Act of 1862, ch. 177, § 1, 12 Stat. 576, 576.

[212] The bulk of the new Ninth Circuit was made up of states that had never been included in any circuit, including Minnesota, Iowa, and the newly admitted Kansas. Act of May 11, 1858, ch. 31, § 3, 11 Stat. 285, 285; Act of Mar. 3, 1845, ch. 76, § 2, 5 Stat. 789, 789; Act of Jan. 29, 1861, ch. 25, § 4, 12 Stat. 126, 128. The Judiciary Act's other changes involved bringing Florida and Texas into the circuit system, as well as enlarging the Fourth Circuit to include North Carolina. Judiciary Act of 1862, ch. 177, §§ 2, 1, 12 Stat. 576, 577, 576. The First, Second, Third, and California Circuits were left unchanged.

[213] Michael A. Kahn, *Abraham Lincoln's Appointments to the Supreme Court: A Master Politician at His Craft*, 22 J. Sup. Ct. Hist. 65, 71 (1997).

[214] The vacancy on the Fifth Circuit was shifted over to the Eighth Circuit though a cascade of strategic geographic adjustments and Justice reassignments. First, the circuit boundaries were redrawn, with the Fifth taking in Georgia and the Sixth Circuit taking in Tennessee. Judiciary Act of 1862, ch. 177, § 1, 12 Stat. 576, 576. The Fifth Circuit vacancy was then filled by Justice James M. Wayne, who was reassigned from the Sixth Circuit; Wayne's vacated post on the Sixth Circuit was simultaneously assumed by Justice John Catron of Tennessee, who relinquished his old oversight of the Eighth. Crowe, *supra* note 191, at 115; Abraham Lincoln, Allotment of Supreme Court Judges to Circuits, *in* 5 Collected Works of Abraham Lincoln 480, 481 (Roy P. Basler ed., 1953).

from Alabama, Mississippi, Arkansas, and Louisiana, Lincoln could instead nominate a Justice from Illinois and another from Iowa—which he promptly did, selecting David Davis for the Eight Circuit and Samuel F. Miller for the Ninth.[215]

The following year, in 1863, the federal judiciary was revised again as Republicans elevated the California Circuit to a proper Tenth Circuit that now included Oregon.[216] This, of course, required the creation of a tenth seat on the Supreme Court, which Lincoln entrusted to Stephen J. Field, Chief Justice of the California Supreme Court.[217] As before, this move undeniably rebalanced the Supreme Court, further anchoring it to pro-Union states.

Yet beyond the act's immediate political advantages, it reinforced the enduring value of the Court-circuit connection, which ensured the judiciary remained both cohesive on a national level and responsive to regional realities, even amid the upheaval of war. As a sitting Chief Justice, Field was not only familiar with the unique legal landscape of the West but also could serve as a direct representative of its judicial culture, bringing this distinct perspective to the distant East. His appointment to the newly established Tenth Circuit integrated the rapidly expanding Pacific states into the nation's judicial framework, symbolizing a deliberate effort to weave these burgeoning territories into both the Supreme Court and the broader fabric of the Union. Even as Lincoln and Congress reshaped the circuits to meet the demands of war and shifting political realities, the enduring principle of tying each Justice to a specific circuit prevailed. This tradition stood as a testament to its profound influence on the American judiciary, safeguarding regional representation while maintaining institutional unity, even during the nation's most turbulent times.

E. The End of the Court-Circuit Connection

The enduring bond between Justices and circuits, unshaken even by the tremors of the Civil War, soon faced challenges that ultimately led to its dissolution. After Lincoln's assassination, political maneuvering began to erode this vital connection, a process that only accelerated as the century progressed. The foundational structures tying Justices to circuits were steadily dismantled, not through any grand plan to create a new system, but through a series of accidents and small decisions. Ultimately, though, this led to the unraveling of the judiciary's original design, transforming it into a system markedly different from what the Founders had conceived.

It started with just a hiccup. By 1866, Congressional Republicans had reached their breaking point with President Andrew Johnson. His relentless

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[215] Lincoln, *supra* note 213, at 481; Crowe, *supra* note 21, at 146, 146 n.72. Meanwhile, Lincoln nominated Noah H. Swayne for the Seventh Circuit, a circuit that had never posed any problems even before the 1862 Act and which was now reduced to just Ohio and Indiana. Judiciary Act of 1862, ch. 177, § 1, 12 Stat. 576, 576; Lincoln, *supra* note 213, at 481; Crowe, *supra* note 21, at 146, 146 n.72.

[216] Tenth Circuit Act (1863), ch. 100, § 1, 12 Stat. 794, 794.

[217] McGinty, *supra* note 202, at 179.

pardons for former Confederate leaders, repeated vetoes of civil rights legislation, and general leniency toward the South had pushed them to the brink. The final straw came in April when Johnson nominated Henry Stanbery to the Supreme Court. The vacancy had existed since shortly after Lincoln's assassination, and though Stanbery was a distinguished lawyer and had served as Ohio's first attorney general, there was a glaring issue with the nomination: He not only shared Johnson's sympathies with the South but had in fact drafted Johnson's veto message for the Civil Rights Act of 1866.[218]

In retaliation, Congress passed the Judicial Circuits Act of 1866.[219] The crucial provision of the act stipulated that the number of Justices would be reduced from ten to seven, not immediately, but by barring the filling of any Supreme Court vacancies.[220] The entire objective in this case was to prevent Johnson from being able to select any new Justices.[221] Simultaneously, the act reduced the number of circuits to nine, thereby appearing at first glance to disrupt the parity between Justices and circuits that had existed since the Founding.

Yet, although they wanted to thwart Johnson, the Republicans did not intend to destroy America's longstanding judicial order. For, while the Supreme Court nominally had ten seats, only nine of those were filled; the proposed reduction in the number of circuits to nine thus precisely corresponded to the number of Justices. When the bill was considered by the Senate, Lyman Trumbull, a Republican from Illinois, made it clear that its purpose was not to disrupt the traditional connections between the circuits and the Justices. He explained, "[t]he bill as it came from the House provided that the judges of the Supreme Court should be eight associate justices and one chief justice, and arranged the nine circuits for the nine judges,"[222] and, crucially, that "whenever the number on the bench shall be reduced hereafter it will involve the necessity of changing the circuits at a future time."[223] There was thus not only a conscious effort to align the number of circuits and the number of Justices, but also a clearly articulated understanding that Congress would reduce the number of circuits in lockstep with the shrinking of the Supreme Court. The *Congressional Globe* records no debates on this point from either Republicans or Democrats; over three-quarters of a century of constitutional practice had firmly established the connection between circuits and Justices as a tacitly accepted, fundamental aspect of the American judicial system.

In the end, only two seats were ultimately eliminated from the ten-seat court. In 1869, with lame-duck President Johnson set to be replaced by the much more popular Ulysses S. Grant, Congressional Republicans again altered the size of the Supreme Court with the Judiciary Act of 1869, this time

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[218] Eric Foner, Reconstruction: America's Unfinished Revolution, 1863–1877, at 230–65 (1988).

[219] Judiciary Act of 1866, ch. 210, 14 Stat. 209.

[220] *Id.* at § 1, 14 Stat. at 209.

[221] Peter Charles Hoffer, William James Hull Hoffer, & N.E.H. Hull, The Federal Courts: An Essential History 169 (2016).

[222] Cong. Globe, 39th Cong., 1st Sess. 3697 (1866); Stanley I. Kutler, *Reconstruction and the Supreme Court: The Numbers Game Reconsidered*, 32 J.S. Hist. 42, 44–45 (1966).

[223] Cong. Globe, 39th Cong., 1st Sess. 3697 (1866).

raising the number to nine Justices.[224] The immediate effect was to give the new President Grant a nomination opportunity, since Justice Moore Wayne had died two years earlier. The more lasting one, of course, was that it set the Court's size at nine—the number it has remained at ever since. It seems inconceivable that the Congress of 1869 imagined they were setting the Court's size in stone; nothing in the congressional debates suggests that the legislators intended to permanently fix the number of Justices at nine or to abandon the historical practice that had governed since the nation's Founding.

Yet whatever Congress's intentions, the Judiciary Act of 1869 marked the beginning of a quiet but consequential erosion of the judicial architecture laid by the Founders, ushered in through the creation of circuit judges. In response to swelling caseloads, the act created a new cadre of circuit judges to alleviate pressure on both the district courts and the Supreme Court.[225] Notably, though, these new circuit judges did not form a new tier of courts, but merely staffed the existing circuit courts, exercising the same authority as Justices riding circuit.[226] These new positions, on their face, did not portend a revolution; indeed, although the Justices' circuit riding duties were reduced, the statute still required them to attend one term of circuit court in each district of their circuit every two years. But what may have seemed a modest change in fact marked the first step in the Supreme Court's withdrawal from the circuits, setting in motion an eventual complete separation.[227]

Some foresaw the potential negative repercussions of changing the circuit system, criticizing the act's innovations for weakening the direct connection between the Supreme Court and the public. Republican Senator George F. Edmunds of Vermont told the Senate that the people valued seeing the highest judges come to their localities to preside over trials, that this fostered a "respect and confidence" in the judicial process, and that these sentiments would be compromised by the proposed changes.[228] He lamented the abandonment of "a system that has been in use so long and that has worked so well."[229] Edmunds notably referred to the Court meeting in Washington as sitting "in banc," implying the Justices' ordinary work was riding circuit, not convening in the capital.[230]

Senator George Williams of Oregon similarly decried how the bill might turn the Supreme Court into a remote and elite body, warning:

> If you pass a law that in effect isolates the Supreme Court of the United States from the districts and the circuits, if you make it a tribunal where judges are to remain and stay, and not make acquaintance with the lawyers and litigants in different circuits, it will become a fossilized institution, and the judges will know

[224] Judiciary Act of 1869, ch. 22, § 1, 16 Stat. 44, 44.
[225] Judiciary Act of 1869, ch. 22, § 2, 16 Stat. 44, 44–45; Crowe, *supra* note 21, at 153, 156–58; Cushman, *supra* note 17, at 40, 205.
[226] Judiciary Act of 1869, ch. 22, § 2, 16 Stat. at 44–45; Crowe, *supra* note 21, at 160.
[227] *See* Crowe, *supra* note 21, at 160–61.
[228] Cong. Globe, 40th Cong., 3rd Sess. 1483 (1869).
[229] *Id.*
[230] *Id.*

> nothing about the business of the circuits except what is derived from the records which are brought before them.[231]

For Williams, the Court's connection to the circuits fostered decisions that, although grounded in the Constitution and federal law, were also informed in part by local conditions and customs.[232] As Williams explained:

> I think it extremely desirable that an intimate relation between the Supreme Court and the circuits should be maintained, and that every supreme judge should have more or less experience upon a circuit which will enable him when he proceeds upon the Supreme bench to adjust cases in accordance with the practices, the usages, and the laws which prevail in the different circuits of the United States.[233]

Indeed, Williams sought to vindicate this vision by proposing that the Supreme Court be doubled, with two Justices assigned to every circuit, as had been the case at the nation's Founding. Going even further, the Senator suggested that the expanded Court bifurcate its responsibilities, with one part handling circuit duties and the remainder convening to address national issues; the Justices would rotate between these two roles.[234] This innovative proposal underscores the enthusiasm of those who sought to preserve the Founders' circuit-riding system in a more populous and bustling modern age.

Yet, like its predecessor, the Judiciary Act of 1869 continued to envision the number of circuits and the number of Justices as directly linked. Raising the number of Justices was seen as a way of establishing parity with the number of circuits. Senator Trumbull explained the situation to the Senate: "The United States is now divided into nine circuits. Since the decease of Mr. Justice Wayne one of the circuits has been without any of the justices of the Supreme Court allocated to that circuit."[235] Due to the Judiciary Act of 1866's provision that Supreme Court vacancies would not be filled until the Court reached seven Justices, the incoming President Grant would be unable to fill Wayne's seat.[236] Congress, then, could either reduce the number of circuits to eight or expand the number of Justices to nine; they opted for the latter.

The Supreme Court's connection to the circuits, already weakened in the 1860s, suffered a further blow with the Judiciary Act of 1891, also known as the Evarts Act.[237] Since the Founding, many Justices had openly expressed their disdain for circuit responsibilities, and plans for creating intermediate appellate courts that would lighten the Justices' load had been bandied about for years. Finally, after a report from Justice Horace Gray recommending the

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[231] Cong. Globe, 41st Cong., 1st Sess. 209 (1869).
[232] *Id.*
[233] *Id.*
[234] Adams et al., *supra* note 5, at 87.
[235] Cong. Globe, 40th Cong., 3rd Sess. 1366 (1869).
[236] *Id.*
[237] Circuit Courts of Appeals Act, ch. 517, 26 Stat. 826 (1891); Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 Colum. L. Rev. 793, 824 (2022).

establishment of a new middle level of courts, Congress acted, passing the Evarts Act and profoundly altering the structure of the judiciary.[238]

While it did not officially abolish circuit riding, the Evarts Act nonetheless represented a definitive rupture in the traditional connection between the Justices and the circuits in several respects.[239] To begin, the Evarts Act reconfigured the Supreme Court's approach to appellate review, granting the Court a largely discretionary docket.[240] This was a significant departure from the original purpose of the circuits, by which the Justices traveled, engaged with the public, and brought contentious cases requiring the full Supreme Court's expertise back to the main body.

The act furthermore established the new circuit courts, one for each of the nine circuits and staffed by two circuit judges and one district judge.[241] What the act did *not* do, however, was to abolish the old circuit courts, leading to the oddity that, for nearly twenty years, the United States had two entirely distinct court systems that both went by the name "circuit court"—one in continuous existence since the Founding and the other newly established in 1891.[242] Yet, although they bore the same name, these two institutions differed starkly. The new circuit courts of appeal, unlike their predecessors, did not serve as courts of first instance, but rather were exclusively appellate courts. Equally crucially, the act exempted the Justices from participating in these new appellate courts, although they could choose to do so if they wished.[243] But if the new circuit courts would not be graced by the presence of the Justices, what they were graced with was almost all the appellate jurisdiction that the old circuit courts had had.[244] Consequently, the old circuit courts, though still in existence, quickly became marginal, and the number of cases they heard steadily declined.[245]

In one stroke, then, the act established new circuit courts that had no connection to or experience of the judiciary's historical structure, sent the old circuit courts that did have that institutional memory into terminal decline, and detached the Justices from the cases they had traditionally overseen. The Evarts Act thus entirely remade the judiciary, prioritizing efficiency and specialization over tradition and continuity, and creating a more centralized and compartmentalized system than had ever existed before.

Changes continued apace. The old circuit courts and the tradition of circuit riding lingered on, as one legal scholar has put it, as "little more than vestiges of a bygone era"[246] until both were eliminated by the Judicial Code

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[238] Schwartz, *supra* note 18, at 177.

[239] *Id.*

[240] Ryan J. Owens & David A. Simon, *Explaining the Supreme Court's Shrinking Docket*, 53 Wm. & Mary L. Rev. 1219, 1243–44 (2012).

[241] Circuit Courts of Appeals Act, ch. 517, §§ 1–2, 26 Stat. 826, 826–27 (1891).

[242] Hoffer, Hoffer & Hull, *supra* note 221, at 206.

[243] Schwartz, *supra* note 18, at 177.

[244] Hoffer, Hoffer & Hull, *supra* note 221, at 206.

[245] *Id.*

[246] Justin Crowe, *The Constitutional Politics of the Judiciary*, *in* The Oxford Handbook of the U.S. Constitution 203 (Mark V. Tushnet, Mark A. Graber, & Sanford Levinson eds., 2015).

of 1911.[247] In the space of just a few decades, Congress had taken the judicial system set up by the Founding generation and turned it into a rigid hierarchy, with the Supreme Court Justices now occupying an elevated and distant position at its top. Those who had advocated for the Justices to stay in Washington, who had wanted them to be treated as a privileged caste, had won.

The move toward a more stratified judiciary, which abandoned the system where Justices served as residents and representatives of the circuits, reached its culmination under Chief Justice William Howard Taft. Taft, who dreamed of creating an "executive head of the judiciary," led a large-scale campaign culminating in Congress establishing the Conference of Senior Circuit Judges under the Chief Justice's leadership. This body, comprising appellate judges from the circuit courts of appeals, laid the groundwork for what would become the Judicial Conference of the United States.[248] While this may have regularized and bureaucratized the judiciary,[249] it deviated from the original constitutional order, where Justices enjoyed equality among themselves and in their interactions within circuit courts alongside district judges. Chief Justice Taft further petitioned Congress to pass the Judiciary Act of 1925, known as the Judges' Bill, which removed almost all the Court's mandatory appellate jurisdiction and gave the Justices control over their own docket.[250] As a result, Supreme Court Justices would now seldom hear ordinary cases, having used complaints about the Court's heavy workload to transform themselves into solely appellate judges—a role the Framers never envisioned.[251]

Finally, when the second iteration of the Tenth Circuit was created in 1929, there was no corresponding addition of a new Justice to the nine-member Supreme Court. There was no debate in the House on the motion at all, and the Senate's sole concern pertained to the number of judges each circuit would be assigned. [252] The idea that the number of circuits and the number of Justices should be connected, so strong throughout the nation's early history, had apparently died an unremarked death, having faded from collective memory over the course of thirty-eight years of judicial innovations.

III. Reconnecting the Justices to the Circuits

Congress abandoned the system established at the Founding, which linked the Court and circuits in terms of number, residency, and judicial service, without engaging in any sort of debate or reasoned reflection. That these practices endured for generations as binding constitutional norms is

[247] Judicial Code of 1911, ch. 231, § 289, 36 Stat. 1087, 1167.

[248] Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 Ind. L.J. 223, 275 (2003).

[249] Kevin J. Burns, William Howard Taft's Constitutional Progressivism 162 (2021).

[250] The Judges' Bill, ch. 229, 43 Stat. 936, 937 (1925); Owens & Simon, *supra* note 240; Meg Penrose, *Overwriting and Under-Deciding: Addressing the Roberts Court's Shrinking Docket*, 72 SMU L. Rev. For. 8, 12 (2019).

[251] Kenneth Starr, *The Supreme Court and its Shrinking Docket: The Ghost of William Howard Taft*, 90 Minn. L. Rev. 1363, 1369 (2006).

[252] 70 Cong. Rec. 3697–98, 3918, 4123 (1929).

itself a powerful argument for reviving them. Yet, beyond their historical significance, these practices had practical virtues as well. They made the Supreme Court more responsive to the nation, less elite and cloistered, and enhanced the Court's legitimacy by quite literally bringing Justice to the people. A return to tradition thus offers a viable solution to many of the Court's current issues.

In this Part, we outline how we imagine the modern Court could be reformed to honor the history discussed in Part II. We believe that the judiciary designed in 1789 constituted a cohesive whole with significant merits often overlooked by modern commentators. Ideally, then, we would like to see a broad-based readoption of the Founders' vision—including the requirement of circuit residency and the practice of circuit riding. While we firmly maintain that it would be best to fully embrace the form and function of the Supreme Court as it was at the Founding, we acknowledge that such a proposal is ambitious and may face strong resistance. As such, we begin by offering a much more moderate reform that would at least move the Court closer to that ideal and align with longstanding historical practice. Finally, we address possible lingering questions to our proposal, including constitutional concerns about dual appointments, practical worries about an expanded Court's efficiency or the partisan bent of Court expansion, and the broader question of how Court expansion compares to other potential reforms. This organization adheres to the framework set out in the Introduction: beginning with a detailed outline of the proposal (*how*), then addressing constitutional objections (*can*), and finally examining practical concerns (*should*).[253]

A. Our Proposal

Not every reawakening leads straight to a happy ending. Rip Van Winkle, after emerging from his twenty-year slumber, found himself hounded by dogs, teased by children, and nearly strung up as a British spy.[254] We recognize that the Court-circuit link, having been dormant for much longer, might face a similarly chilly reception from some. Reviving such a long-neglected norm would no doubt face hurdles, and many may resist a comprehensive reform of the judiciary. Therefore, we begin with a less preferred but more moderate proposal to revive Founding practices by reconnecting the Supreme Court and the circuits at least in part, before moving on to discussing our fuller, more ambitious proposal.

[253] Though we adhere to the three-part framework outlined in the Introduction, we begin with the more concrete "how"—laying out the particulars of our suggested reforms—before tackling the normative and constitutional questions of "can" and "should." We proceed in this way for the sake of clarity; after all, a meaningful evaluation of whether reform is possible or prudent must first establish what, precisely, is being proposed.

[254] Washington Irving, *Rip Van Winkle, reprinted in* The Complete Tales of Washington Irving 1, 6, 11 (Charles Neider ed., 1998).

1. The Minimal Proposal

Our minimal proposal is to increase the number of Supreme Court Justices to match the number of circuits, aligning with the historical practice that governed the structure of the judiciary for the first 140 years of American history. This could involve adding four new Justices to achieve the one-to-one ratio that prevailed for most of that period; alternatively, it could involve adding seventeen new Justices to achieve the two-to-one ratio that governed from 1789 to 1802. Either approach would realign the judiciary with its historical precedent, restoring a key aspect of its original design.

Given the significant benefits of circuit riding and circuit residency that we have outlined, it may seem puzzling for us to put forward a pared-down proposal at all. After all, merely increasing the number of Justices stops short of fully restoring the vision embraced by the Founders and the advantages that they recognized, and, to be clear, our preference is unequivocally for the bolder path.

But this minimal proposal is not a concession to mere pragmatism. As this Article has emphasized, the argument for increasing the number of Justices to align with the number of circuits is not simply about practical benefits—it is about fidelity to original constitutional understandings. This linkage is not a historical artifact to be discarded according to shifting policy preferences, but a constitutional cornerstone embedded within the judiciary's structure from its foundation.

Certainly, we believe that the weight of historical practice strongly supports the reinstitution of circuit residency and riding, making our comprehensive proposal the proper one for those committed to history and tradition. That said, we recognize that there are reasons not to insist on their full restoration. History itself shows that Congress has adjusted the frequency with which Justices rode circuit[255] (meaning that it could, at least in theory, be reduced to zero), and that the circuit residency requirement has, on occasion, been ignored (as in the case of Justice Daniel[256]). Moreover, if a rigid insistence on reviving these practices would perpetuate the current disconnect between the Court and the circuits, we acknowledge that there may be some wisdom in not letting the perfect be the enemy of the good.

But such pragmatism ends where constitutional principle begins, and the essential link between the number of circuits and Justices is, we maintain, just such a principle. For 140 years, it formed the structural backbone of the Court—only rarely set aside, and always swiftly restored. It stands as the constitutional floor, the irreducible minimum for a judiciary built upon the framework laid down at the Founding.

And it is not as though such a change would have no practical benefits. A larger Court would lessen the impact of each individual appointment,

[255] *E.g.*, Act of Mar. 2, 1793, ch. 22, § 1, 1 Stat. 333, 333–34; Judiciary Act of 1801, ch. 4, 2 Stat. 89; Act of June 17, 1844, ch. 96, 5 Stat. 676; Judiciary Act of 1869, ch. 22, 16 Stat. 44; Levy, *supra* note 134, at 96.

[256] *See supra* note 203.

potentially reducing the contentiousness and political intensity of the confirmation process. More Justices would also mean more frequent turnover, leading to a more balanced and less politically charged appointment process, since players would know that there would be more opportunities for appointments in the future.[257] Additionally, an expanded bench might bring with it a broader spectrum of perspectives and legal temperaments. This would not only deepen the Court's reasoning but could also soften its divides. Where a smaller, more homogenous body risks calcifying into rival blocs, a broader composition makes it far more difficult for any single viewpoint to dominate and creates room for unexpected coalition. In such a setting, compromise would cease to be a reluctant concession and become a structural necessity—nudging the Court toward a more fluid, collaborative ethos, and away from the rigidity of partisanship.

The remaining, important question is whether one should adopt a two-to-one or a one-to-one ratio of Justices to circuits. The norm established by the Founders was that there were two Justices assigned to each circuit. This practice, which persisted from 1789 to 1801, would translate into a modern Supreme Court of twenty-six Justices, given the current number of federal circuits. Certainly, we recognize that twenty-six may sound like a very large number of Justices. But it is nowhere near the highest figure proposed—certain proposals call for expanding the Supreme Court to 179 Justices by adding every single appellate judge to the bench.[258]

Alternatively, a one-to-one ratio in aligning the number of Justices with the current number of circuits offers a more moderate approach. This model reflects the practice from 1802 to 1929, when each circuit was overseen and represented by one Justice. Although this arrangement lacks the original endorsement of the Founders, it is supported by a sustained tradition that was effective for over a century.

Ultimately, the choice between increasing the Court by four or seventeen members depends on the goals prioritized. A larger Court of twenty-six Justices would be more faithful to the Framers' vision, though it may be seen by some as unwieldy. On the other hand, a Court of thirteen Justices, while not specifically endorsed by the Founders, aligns with a well-established historical precedent and may offer a more manageable reform. This Article does not aim to definitively settle this debate; we leave the resolution of this important issue to further deliberation.

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[257] Some scholars propose that this could additionally lead to greater diversity on the bench as Presidents might be willing to take greater risks in the appointment process. George & Guthrie, *Remaking*, *supra* note 32, at 1470.

[258] Epps & Sitaraman, *supra* note 6, at 185; John O. McGinnis, *Justice Without Justices*, 16 Const. Comm. 541, 541 (1999); Aaron Dozeman & Andrew Moshirnia, *Shuffling the Deck for a Fairer Game: A Modest Proposal to Fix the Supreme Court by Adding Four Randomly Assigned Circuit Court Judges per Term*, N.Y.U. L. Rev. F. (Mar. 28, 2022), https://www.nyulawreview.org/forum/2022/03/shuffling-the-deck-for-a-fairer-game-a-modest-proposal-to-fix-the-supreme-court-by-adding-four-randomly-assigned-circuit-court-judges-per-term [https://perma.cc/AM8V-NCD3].

2. The Full Proposal

But to fully remake the form of the judiciary intended by the Constitution and to address the concerns of the present, we propose the more ambitious project of thoroughly reconnecting the Court and the circuits. This would involve increasing the Justices' presence and role in the circuits, reviving the practice of circuit riding and reimplementing the circuit residency requirement. That is, Justices would no longer simply be assigned to a circuit—they would travel throughout it to hear a set number of cases and would be required to be legal residents of the circuit they served. This would revive long-followed practices that historically ensured a close connection between the Court, the judiciary generally, and the country as a whole.

To the limited extent they have considered the matter, jurists and scholars have tended to take the Justices' criticisms of the circuit riding system as a wholly convincing reason to abandon the practice and have thus implicitly supported the changes that severed the relationship between the Justices and the circuits. This prevailing view is exemplified by the acclaimed *Hart and Weshler's The Federal Courts and the Federal System*, regarded as the definitive casebook in the field. This tome tells law students that, after 1802, "the circuit courts grew more and more rickety," and describes circuit riding as "putting strains on the system"; the Evart's Act, meanwhile, is extolled as having "finally absolved the justices of the Supreme Court of their obligation to 'ride circuit.'"[259] Justice Sandra Day O'Connor has similarly noted that "the era of riding circuit is now long past, and that is a good thing."[260] The prevailing narrative portrays the development of the current system of federal courts as a victory of rationality, as the steady reworking of an archaic and unwieldy legal framework into one marked by clarity and efficiency. What this vision misses are the virtues such a system had, why the Founders chose it, and why it was seen as essential to the Republic.

From the Founding era, the practice of assigning Justices to circuits and making them hear cases in remote areas was detested by the Justices. However, this practice was not a flaw in the system, as it is so often portrayed, but rather should be understood as a feature. In a nation that had abolished noble titles, that had eschewed the concept of gentleman, and where the President was not "His Majesty," leveling the most eminent judges with the common populace required that the judicial job itself be a form of service. This meant it had to entail some level of hardship and sacrifice. Justice Iredell once complained of being reduced to the status of a mere "postboy."[261] But perhaps that was precisely the point. By being forced into the saddle, exposed to the elements and the everyday struggles of ordinary Americans, the Justices were kept grounded—less like their aloof European counterparts and more like

[259] Richard H. Fallon et al., Hart and Wechsler's The Federal Courts and the Federal System 27, 29 (2015). For similar criticisms of circuit riding, see *supra* note 91.
[260] O'Connor, *supra* note 31, at 72.
[261] Warren, *supra* note 26, at 86 (quoting Justice Iredell).

stewards of a democratic experiment still in its infancy.[262] However much they hated it, circuit riding brought the nation's highest legal minds face-to-face with the people whose rights they were sworn to protect.

Serving as a Justice in the early republic was, and was understood as, a form of patriotic sacrifice made for the good of the nation—as discussed, the hardship of service sometimes deterred or exhausted even the most capable legal minds.[263] The work of circuit riding was grueling, and the hardship did not lighten simply because a Justice resided within the circuit—and so Justices tended to retire when the demands of the bench outpaced their ability to bear it.[264] In essence, if one wanted comfort, to live well and easily, there were better places to be a lawyer in the young United States; being a Supreme Court Justice was not intended to be the cushiest position in the legal profession.

Meanwhile, having Justices who resided in the circuits ensured a meaningful connection between the Supreme Court and the nation, and discouraged a charmed, detached existence in the nation's capital. Much like the major figures of the other branches, whether legislators or the President, the Justices worked only temporarily in the seat of government and maintained strong connections to their home states.[265] While residency requirements persist in the judiciary at both the district and appellate levels, the longstanding expectations that Justices, like other federal judges, would reside within their circuit has quietly faded.[266] This norm, once so deeply ingrained that it held sway even during the tumult of the Civil War, seems to have been completely forgotten.

Indeed, the American ideal that judges should not merely preside over communities but live within them marked a sharp departure from British legal tradition. In England, Blackstone had famously warned against such intimacy between judge and locale, writing that "the prudent jealousy of our ancestors ordained that no man of law should be judge of assise in his own country."[267] American legal commentators, including Justice Iredell, were well aware of this tradition and recognized that the United States had fundamentally inversted it.[268] Judges, like elected representatives, were expected to be deeply rooted in the daily rhythms, concerns, and character of the communities they served. Familiarity, not detachment, was seen as the foundation of judicial legitimacy.[269] And by ensuring that each circuit was represented on the Supreme Court, the system preserved a measure of geographic balance and diversity—a safeguard against the dominance of any single region in shaping the nation's highest law.

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[262] *See* Newmyer, *supra* note 26 at 115; Stras, *supra* note 13, at 1711–12, 1729–31.

[263] *See supra* notes 146–156 and accompanying text.

[264] Ward, *supra* note 155, at 8. Indeed, encouraging the retirement of older or infirm Justices is sometimes cited as a key benefit by proponents of reviving circuit riding. Calabresi & Presser, *supra* note 13, at 1413–14; Stras, *supra* note 13, at 1733.

[265] *See* Newmyer, *supra* note 26, at 132; Levy, *supra* note 134, at 93.

[266] 28 USC § 44; 28 USC §134.

[267] 3 William Blackstone, Commentaries *38.

[268] Letter from James Iredell to the Supreme Court Justices (Feb. 1, 1791), *in* 5 The Selected Papers of John Jay 313, 313–16 (Elizabeth M. Nuxoll ed., 2017).

[269] Newmyer, *supra* note 26, at 115.

Indeed, for the Founding era, such norms concerning equality and representativeness were seen as working in concert to make the judiciary a branch of government that would be closer to the citizens.[270] Until the late nineteenth century, there was a pervasive skepticism among Americans about law and the role of lawyers, as well as "a persistent dream of doing without lawyers, . . . [of] simple, clear natural justice, stripped clean of obfuscation and jargon, a book of law that everyone might read for himself."[271] Although this vision of the law as being accessible to the common people was never fully carried into practice, and although lawyers and judges remained a separate body, the structural design of the court system worked toward minimizing this separation.

The Founding generation sought to create a judiciary that mirrored the republican ideals of the fledgling nation. Among the debates the Framers had, one minor though deeply symbolic one was what attire was appropriate for the Justices. The more hierarchically-oriented Alexander Hamilton argued firmly for following the English tradition of wigs and robes, while Thomas Jefferson, reflecting his affection for (and affectation of) yeoman simplicity, was highly critical of both—though especially disliked wigs, reportedly exclaiming "For Heaven's sake, discard the monstrous wigs which make the English judges look like rats peeping through benches of oakum."[272] The answer, as was so often the case in early American history, was a compromise: The judges discarded the wigs but retained the robes, thus allowing judges to convey their status through attire while consciously differentiating themselves form the English elite. The judiciary itself represented a similar kind of compromise, functioning as an educated branch of government trained in special skills, but one which was not entirely divorced from the population. In *Federalist* No. 78, Alexander Hamilton explained that "the courts were designed to be an intermediate body between the people and the legislature," and this conception dictated how federal courts were structured, in which a delicate balance was sought between elite expertise and connection with the broader population.[273]

The structure of the Court, as it stands today, often places Justices in an elevated position that can encourage a sense of detachment and an expectation of deference. Chief Justice John Roberts declared in his confirmation hearings that judges should be "servants of the law, not the other way around";[274] yet in practice, the Justices are seldom treated as if they are servants, civil or otherwise. Admittedly, some Justices have acknowledged the importance of remaining connected to the public and have taken steps to engage with local communities. Justice Thomas, in particular, has expressed a desire to stay grounded, citing his fondness for motorhome travel as a means of immersing himself in everyday American life and fostering spontaneous, unfiltered interactions

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[270] *See* Nettels, *supra* note 190, at 210–26.
[271] Friedman, *supra* note 115, at 14.
[272] Schwartz, *supra* note 18, at 15 (quoting Thomas Jefferson).
[273] The Federalist No. 78 (Alexander Hamilton).
[274] John Roberts, *Chief Justice Roberts Statement - Nomination Process*, United States Courts (2005), https://www.uscourts.gov/educational-resources/educational-activities/chief-justice-roberts-statement-nomination-process [https://perma.cc/42P5-W86P].

with ordinary citizens.[275] While elements of his public profile may at times seem at odds with this ideal, [276] such tensions do not negate Thomas's stated values; rather, they illuminate the inherent difficulty of sustaining meaningful connections from within the rarified world of the nation's highest court. Justice Thomas's vision of remaining connected to ordinary Americans points to a deeply rooted understanding of what the judiciary should aspire to be—and that even a Justice in robes may yet aspire to be a citizen among citizens.

Some of the recent controversies surrounding the Supreme Court suggests that the Justices have not fully succeeded in maintaining a genuine connection with the American people, and the Court is routinely perceived as elite and disconnected from the rest of American society.[277] One possible solution to this perception would be a return to the Founders' original practices, where Justices were tied to specific circuits and actively engaged with local affairs. Advocates of modern circuit riding argue that resuming the practice would allow Justices to reconnect with public sentiment outside of Washington, much as lawmakers do when they visit their constituencies.[278] We support these proposals, but also the broader vision of reinstating the connection between Justices and circuits through residency requirements and by matching the number of Justices to the number of circuit. What was designed to ensure a judiciary for a republican government at the time of Ratification and during the early Republic can still work in the present day.

Advocating for the revival of circuit riding is likely to raise at least some eyebrows. For starters, it might seem absurdly antiquated, conjuring images of Justices traveling on horseback.[279] However, its modern descendant, "sitting by designation," is a well-accepted practice. But its modern descendant, "sitting by designation," is a routine and accepted part of judicial life. Active circuit and district court judges are regularly assigned to courts outside their home jurisdictions,[280] and both active and retired Supreme Court Justices may be designated to hear cases in lower courts.[281] Circuit riding would simply institutionalize practices that have been historically employed and are closely related to those already in use.

Skeptics might also contend that dispatching the Justices to the circuits would grind the Supreme Court's business to a halt. Yet history tells a different story. The Court today hears far fewer cases than it once did, even during

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[275] Justin Elliott, Joshua Kaplan, & Alex Mierjeski, *Clarence Thomas and the Billionaire*, ProPublica (Apr. 6, 2023), https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow [https://perma.cc/46NB-NMY8] (quoting Justice Thomas).

[276] *Id.*

[277] *See supra* notes 38–46 and accompanying text.

[278] Michaela Conley, *An Unconstitutional Band-Aid: The Practice of Sitting by Designation in the Federal Judiciary*, 29 Roger Williams U. L. Rev., 352 (2024); Calabresi & Presser, *supra* note 13, at 1389; Levy, *supra* note 134, at 72.

[279] *E.g.*, Nicholas Wallace, *It's Time to Bring Circuit Riding Back to the Supreme Court*, Balls & Strikes (Jan. 21, 2022), https://ballsandstrikes.org/very-serious-ideas/bring-back-circuit-riding-yeehaw [https://perma.cc/F2KS-APBS] (quipping that modern circuit riding would involve the Justices "[g]alloping across the countryside like revolutionary minutemen").

[280] 28 U.S.C. §§ 291(b), 292(a).

[281] 28 U.S.C. § 294(a), (c).

the era when circuit riding was mandatory.[282] In 1850, for instance, the Justices managed to decide 168 cases[283]—nearly three times the number taken up in the 2023–24 term—and over the following three decades it maintained an average yearly output of between 89 and 213 cases.[284]

Indeed, there is in some sense no better time to reimplement circuit riding. Modern technology and transportation advancements make this practice feasible without imposing significant hardships on the Justices. Cars, trains, and planes would enable Justices to traverse the entire distance of a judicial circuit in mere hours, when it would have taken Justices in the Founding era weeks or months on bad or nonexistent roads.[285] In the eighteenth and nineteenth centuries, Justices traveled without access to law books and cases, as a law library could not fit in a saddlebag.[286] Today, online research services like Westlaw and Lexis, along with the ubiquity of physical law libraries throughout the country, would allow Justices to access legal materials wherever they might be.[287] Ironically, then, the judicial system envisioned by the Founders is far easier to implement today than it was in the late eighteenth century.

Meanwhile, we concede that the notion of Justices serving as regional representatives may initially feel alien to their constitutional role—this is, after all, a task typically reserved for legislators, and one that appears at odds with the principle of judicial impartiality. Yet this sort of representativeness not only has deep roots in American constitutional history—as this Article has shown—but continues to inform circuit assignments to this day. For although the Chief Justice could allocate circuits at random, the current distribution seems designed to give almost every circuit a "representative" Justice.[288] Six circuits (the Second, Third, Seventh, Tenth, Eleventh, and the District of Columbia) are currently overseen by Justices who were either born there, worked there, or served as judges there.[289] In other circuits, meanwhile, the

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[282] *E.g.*, George & Guthrie, *Remaking*, *supra* note 32, at 1441, 1445; Morse & Yap, *supra* note 48, at 31; Owens & Simon, *supra* note 240. In the 2023 term, the Court issued just 61 opinions. Adam Liptak, *Supreme Court's Leisurely Pace Will Produce Pileup of Late June Rulings*, N.Y. Times, Jun. 14, 2024, https://www.nytimes.com/2024/06/14/us/politics/supreme-court-rulings-june.html [https://perma.cc/AJ9J-NYH2]. This is less than half the average number it issued between 1980 and 2000. Harold J. Spaeth et al., *Modern Database: 2023 Release 01*, Sup. Ct. Database, http://scdb.wustl.edu/data.php?s=1 [https://perma.cc/66JJ-X8V6]. Indeed, it is the lowest since 1864. Harold J. Spaeth et al., *Legacy Database: SCDB Legacy 07*, Sup. Ct. Database, http://scdb.wustl.edu/data.php?s=6 [https://perma.cc/2YH9-UKQ8].

[283] Spaeth et al., *Legacy Database: SCDB Legacy 07*, *supra* note 282.

[284] The average number of opinions issued per year was 89 in the 1850s, 97 in the 1860s, and 213.5 in the 1870s. *Id.*

[285] Calabresi & Presser, *supra* note 13, at 1405; Stras, *supra* note 13, at 1727.

[286] *See* Crowe, *supra* note 21, at 39 (observing that one of the reasons the Judiciary Act of 1789 assigned admiralty cases to district courts rather than circuit courts was that these cases tended to rely on precedent and that district courts had easier access to the necessary lawbooks than judges on the circuit).

[287] Calabresi & Presser, *supra* note 13, at 1408.

[288] Many thanks to Maggie Shirley for this insight.

[289] The Second Circuit is assigned to Justice Sonia Sotomayor, a New York native who sat on the Second Circuit itself; the Third Circuit is assigned to Justice Samuel Alito, a New Jersey native who sat on the Third Circuit; the Seventh Circuit is assigned to Justice Amy Coney Barrett, who studied and taught in Indiana and sat on the Seventh Circuit; the Tenth Circuit is assigned to Justice Neil Gorsuch, a Colorado native who sat on the Tenth Circuit; the Eleventh Circuit is assigned to Justice Clarence Thomas, a Georgia native; the D.C. Circuit is assigned to Chief

representation is not geographic but ideological. The conservative Fifth Circuit falls under Justice Samuel Alito's purview, as are the similarly aligned Sixth and Eighth Circuits under Justice Brett Kavanaugh, while the more liberal First and Ninth Circuits are overseen by Justices Ketanji Brown Jackson and Elana Kagan, respectively.[290] Given that some form of representativeness clearly continues to shape circuit assignments, the idea of reviving a formal circuit residency requirement and ensuring that each circuit is represented on the Court should not seem entirely outlandish or inconceivable.

Thus, in addition to the benefits outlined above of expanding the number of Justices, reinstituting circuit riding and requiring Justices to be legal residents of their circuits could prove a significant boon to the Court. These early constitutional norms, far from antiquated, hold the promise of reconnecting the Justices with the geographic and cultural breadth of the nation. Such a shift would help dispel the image of the Court as an aloof, cloistered body, and reframe its members not only as national arbiters but as regional stewards, grounded in the issues and realities of the communities they serve. Indeed, such local rootedness might temper anxieties around lifetime tenure by forging a subtle but enduring bond of accountability between Justices and the communities they hail from and serve.

Adopting our broader proposal would undoubtedly require an in-depth national conversation, one far deeper than the space of this Article allows. We do not believe there are any legal barriers stopping Congress from simply passing a bill restoring the Court-circuit connection today. From a practical standpoint, a phased and deliberate reform—unfolding over several years—may offer the surest path forward. With regards to expanding the Court and reinstituting the circuit residency requirement, such an approach would give ample time to identify qualified candidates from each circuit and would help ease fears of a sudden, jarring transformation of the Court's composition; and with regards to reviving circuit riding, it would provide breathing room to work out the particulars. Of course, the Constitution imposes no such timetable, and we suggest this only as a practical route to a restoring a long-neglected constitutional norm. In the end, however it is achieved, reestablishing the Court's ties to the circuits would revive the Founders' vision

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Justice John Roberts, who worked in Washington, D.C., and sat on the D.C. Circuit. *Circuit Assignments*, *supra* note 23; *Current Members*, Sup. Ct. of the United States (2025), https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/YQE7-L3ZT].

[290] The Judicial Common Space Lee Epstein, Andrew D. Martin, Jeffrey A. Segal, and Chad Westerland, *The Judicial Common Space*, Lee Epstein, Wash. Univ. Sch. L. (Apr. 19, 2024), https://epstein.wustl.edu/jcs [https://perma.cc/4PEE-W3EE]; Adam Feldman, *Supreme Court Eyeing Fifth Circuit, But Too Early to Decipher Why*, Bloomberg L. (Dec. 11, 2023), https://news.bloomberglaw.com/us-law-week/supreme-court-eyeing-fifth-circuit-but-too-early-to-decipher-why [https://perma.cc/62EJ-UG9Y]. It should be noted, though, that Justice Ketanji Brown Jackson has some prior ties to the First Circuit, having attended law school and clerked in Massachusetts. *Current Members*, *supra* note 289.

The remaining two circuits—the Fourth and the Federal—are traditionally assigned to the Chief Justice: the Fourth for its geographic proximity to the capital, and the Federal for being functionally centered on D.C. Lee Epstein, Jeffrey A. Segal, Harold J. Spaeth, & Thomas G. Walker, The Supreme Court Compendium: Data, Decisions, and Developments (6th ed. 2015) 451 & nn.h–i; Cushman, *supra* note 225, at 42.

of a judiciary rooted in regional diversity—while simultaneously addressing modern concerns about the Court's legitimacy and institutional vitality.

B. Possible Objections

While we believe the constitutional argument for Court expansion is rock-solid, there are perhaps lingering constitutional questions and practical quibbles that merit consideration—the *can* and the *should* in our three-prong test. In this Section, we will address a few possible objections, including the permissibility of Justices serving simultaneously as Supreme Court Justices and circuit judges, concerns that a larger Court would be inefficient and unworkable, and claims that Court expansion is improperly partisan.

1. Constitutional Objections

Some have argued that having Justices serve simultaneously on the Supreme Court and on appellate courts constitutes an impermissible mixing of offices, dismissing circuit riding as "constitutionally dubious."[291] On the surface, such dual appointment might smack of unconstitutionality, flouting the norm of separation of powers and violating Article III's apparent delineation between the Supreme Court and inferior courts.[292]

This seems, however, a rather peculiar argument to make. The Founders plainly accepted the custom of circuit riding, and *Stuart*, which represents the Supreme Court's last word on the subject of Justices serving as circuit judges, unequivocally upheld the practice.[293] From the inception of the United States judiciary, circuit riding was understood as a fundamental duty of Justices, continuing all the way until the establishment of Courts of Appeals in 1891.[294] Indeed, over the years, Justices have held a wide variety of dual appointments, serving as diplomats,[295] investigators,[296] commissioners,[297] prosecutors,[298] and

[291] Calabresi & Lindgren, *supra* note 19, at 862–63.
[292] Epps & Sitaraman, *supra* note 6, at 186.
[293] *See supra* Section II.A.
[294] *See supra* Sections II.B–D.
[295] Chief Justice Jay served as an envoy to Britain in 1794; Chief Justice Oliver Ellsworth served as an envoy to France in 1799; Justice Samuel Nelson and Justice Campbell served as envoys in 1861 to attempt to forestall the Civil War. Epps & Sitaraman, *supra* note 6, at 187; Jonathan Lippman, *The Judge and Extrajudicial Conduct: Challenges, Lessons Learned, and a Proposed Framework for Assessing the Propriety of Pursuing Activities beyond the Bench*, 33 Cardozo L. Rev. 1341, 1343 (2011).
[296] Justice Owen Roberts chaired the investigation into the attack on Pearl Harbor in 1942 and a commission on protecting art and monuments in 1943; Chief Justice Earl Warren chaired the investigation into the Kennedy assassination from 1963 to 1964. Epps & Sitaraman, *supra* note 6, at 188; Lippman, *supra* note 295, at 1343.
[297] Five Justices served on the Electoral Commission to settle the disputed election of 1876; Justice Nelson served on the Alabama Claims Commission in 1871; Justice Charles Evans Hughes chaired the Postal Commission of 1911. Lippman, *supra* note 295, at 1343.
[298] Justice Robert Jackson served as the chief American prosecutor at the Nuremberg trials from 1945 to 1946. Epps & Sitaraman, *supra* note 6, at 188; Lippman, *supra* note 295, at 1343.

even Cabinet members[299] while remaining members of the Court. And this is to say nothing of the countless lower court judges who routinely hold concurrent positions—serving on the Foreign Intelligence Surveillance Court or Sentencing Commission, holding simultaneous district judgeships, and sitting by designation on courts other than the one to which they were commissioned.[300] These examples highlight the longstanding acceptance of flexibility in the judiciary when it comes to dual appointments.

There is a strong argument that the text of the Constitution vindicates these longstanding practices.[301] The Constitution is able to be very explicit in barring certain members of government from holding multiple office, doing so in three different clauses.[302] Significantly, though, it establishes no such prohibition on judges from holding multiple judicial positions at the same time.[303] The Virginia Ratifying Convention in fact recognized this omission and suggested an amendment to prevent federal judges from holding other offices, but this was never adopted.[304]

2. Pragmatic Objections

One practical, rather than constitutional, objection to increasing the number of Justices is the concern that a larger Court would become unwieldy and inefficient—that a Court with twenty-six or even just thirteen Justices would simply get nothing done. Abraham Lincoln once told Congress that "adding of judges to the Supreme Court, enough for the accommodation of all parts of the country with circuit courts, would create a court altogether too numerous for a judicial body of any sort."[305] Lincoln's words were calculated to advance his own project of Court reform, but it still worth considering the substance of this objection.

It is not clear that a large Court that met en banc would simply cease to function. Petit juries regularly reach verdicts over contentious and complex legal issues with twelve members, and federal grand juries can have up to twenty-three members.[306] There is no reason to assume that having fewer people involved ensures better legal outcomes (and if fewer people *did* ensure better outcomes, it is not clear why nine Justices would be preferable to six or even three). Numerous other national supreme courts or constitutional courts

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[299] Chief Justice Marshall continued serving as Secretary of State after being appointed to the Court in 1801. Epps & Sitaraman, *supra* note 6, at 187.

[300] *Id.* at 188.

[301] *Id.* at 186–87; Steven Calabresi & Joan Larsen, *One Person One Office: Separation of Powers or Separation of Personnel*, 79 Cornell L. Rev. 1045, 1124 (1994); *See also* Mistretta v. United States, 488 U.S. 361, 397 (1988).

[302] U.S. Const. art. I, § 6, cl. 2 (barring members of Congress from holding other federal offices); *id.* art. I, § 9, cl. 8 (restricting federal officers from receiving foreign offices); *id.* art. II, § 1, cl. 2 (barring members of Congress and federal officers from being presidential electors); Epps & Sitaraman, *supra* note 6, at 186–87; Calabresi & Larsen, *supra* note 301, at 1124.

[303] Epps & Sitaraman, *supra* note 6, at 186–87; Calabresi & Larsen, *supra* note 301, at 1124.

[304] Calabresi & Larsen, *supra* note 301.

[305] Lincoln, *supra* note 205.

[306] Fed . R. Crim. P. 6(a)(1).

have more than nine justices—the United Kingdom has twelve, South Korea has fifteen, Germany has sixteen, and India has thirty-four.[307]

Even if this concern over the number of Justices were valid, it could be addressed by adopting a panel system similar to that used by the Courts of Appeal, as has been proposed by other scholars.[308] To be clear, this possible reform is ancillary to our main argument and does not constitute a central aspect of our proposal. It is merely offered as a potential solution to this counterargument.

In this system, not all Justices would sit for every case. Instead, panels of a subset of Justices could hear cases, and the Court would conduct en banc reviews for the rare instances where a unified full-Court opinion was warranted, such as particularly contentious or important matters.[309] This model is, of course, already well-established for the modern appellate courts as a proven means in managing caseloads and ensuring thorough deliberation, and it could quite straightforwardly be instituted at the highest court.[310]

Opponents to this argue that the Constitution's "one supreme Court" mandate prohibits a panel system, since having Justices sit in different panels would disrupt the unity contemplated by the requirement.[311] However, those who support the constitutionality of panels seem to have the better of the argument. Just as the Seventh Circuit is considered a single court despite frequently operating in panels, a Supreme Court that used panels but retained the ability to sit en banc should clearly be regarded as a single court.[312] If the "one supreme Court" clause required entirely static membership and full participation of every Justice, then every recusal would run afoul of Article III's indivisibility requirement,[313] as would nearly a quarter of the Court's decisions

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[307] *Apex ("Supreme") Courts | Judiciaries Worldwide*, Judiciaries Worldwide: A Resource of the Federal Judicial Center, https://judiciariesworldwide.fjc.gov/apex-supreme-courts [https://perma.cc/2XF5-XQ73].

[308] *See, e.g.*, Epps & Sitaraman, *supra* note 6, at 181–85; George & Guthrie, *Remaking*, *supra* note 32, at 1458–68; George & Guthrie, *The Threes*, *supra* note 32. *See also* Amar, *supra* note 140, at 268 n.213 ("Although it may seem anomalous to suggest [a panel] structure for the Supreme Court, the anomaly exists only if we confuse the historically familiar with the constitutionally necessary.").

[309] This aligns with the proposal laid out in George & Guthrie, *Remaking*, *supra* note 32, at 1466. They propose the Court should convene en banc primarily for resolving major constitutional challenges, overturning precedent, and confronting matters of equal importance.

[310] *Id.*

[311] *E.g.*, Stephen M. Shapiro, Supreme Court Practice § 1.1 (10th ed. 2013); Eugene Gressman, *The Constitution v. The Freund Report*, 41 Geo. Wash. L. Rev. 951, 961 (1973); Tom C. Clark, *The Supreme Court Conference*, 19 F.R.D. 303, 308 (1957); Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential to Reinforce the Supreme Court*, 90 Minn. L. Rev. 678, 679–80 (2006).

[312] Joanna R. Lampe, *Congressional Control over the Supreme Court*, 26 (2023); Adams et al., *supra* note 5, at 85; Amanda Frost, *Judicial Ethics and Supreme Court Exceptionalism*, 26 Geo. J. L. Eth., 474 (2013); Morse & Yap, *supra* note 48, at 41; Lisa T McElroy & Michael C Dorf, *Coming off the Bench: Legal and Policy Implications of Proposals To Allow Retired Justices To Sit By Designation on the Supreme Court*, 61 Duke L.J. 81, 110 (2011); Davies, *supra* note 311, at 685.

[313] Epps & Sitaraman, *supra* note 6, at 190; McElroy & Dorf, *supra* note 312, at 110. Equally questionable would be additional statutes that contemplate the possibility of the Court having less than the full complement of members, including 28 U.S.C. § 3 (allowing a Justice to take on the duties of Chief Justice in case of incapacity) and 28 U.S.C. § 3 (allowing the Chief Justice to send a case to a body of appellate judges if there is are not enough Justices to achieve quorum). Davies, *supra* note 311, at 707–08.

between 1954 and 2006.[314] Does anyone suggest that cases such as *Students for Fair Admissions v. Harvard*,[315] *United States v. Virginia*,[316] *Chevron U.S.A., Inc. v. NRDC*,[317] *United States v. Nixon*,[318] *Eisenstadt v. Baird*,[319] *Katz v. United States*,[320] *International Shoe Co. v. Washington*,[321] *United States v. Carolene Products*,[322] *Erie Railroad Co. v. Tompkins*,[323] *International News Service v. Associated Press*,[324] *Gibbons v. Ogden*,[325] or *Marbury v. Madison*[326] were invalid because they were decided without the full Court? And, in fact, from 1802 to 1839, the Court effectively operated with a panel system during the summer, with a single Justice sitting for the August session and acting on behalf of the entire Court.[327] This August Term was consistently regarded as a legitimate session of the Supreme Court, and no constitutional objections were raised against this arrangement.[328]

The panel system, if implemented well, could have much to speak for it, beyond merely addressing concerns about the number of Justices—increasing Court efficiency,[329] fostering a more collaborative and collegial atmosphere,[330] and deterring partisan litigation by creating uncertainty about which Justices will hear particular cases.[331] Again, though, such a panel system is by no means central to our proposal. We bring it up merely as a pragmatic, constitutionally sound possibility, not as an essential condition for Court expansion.

Finally, beyond practical concerns, some have argued that Court expansion is impermissibly partisan and, even if technically constitutional, is fundamentally unwise. Again and again the concern is voiced that increasing the number of Justices is blatant political gamesmanship, a "nuclear" option that is inherently destabilizing and that will lead to an ever-worsening spiral of partisanship.[332] There is the natural worry about the absence of a limiting principle, that one party expanding the Court will simply invite the other to do the same when they return to power.

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[314] George & Guthrie, *Remaking*, *supra* note 32, at 1455; George & Guthrie, *The Threes*, *supra* note 32, at 1853.
[315] 600 U.S. 181 (2023).
[316] 518 U.S. 515 (1996).
[317] 467 U.S. 837 (1984).
[318] 418 U.S. 683 (1974).
[319] 405 U.S. 438 (1972).
[320] 389 U.S. 347 (1967).
[321] 326 U.S. 310 (1945).
[322] 304 U.S. 144 (1938).
[323] 304 U.S. 64 (1938).
[324] 248 U.S. 215 (1918).
[325] 22 U.S. (9 Wheat.) 1 (1824).
[326] 5 U.S. (1 Cranch) 137 (1803).
[327] Davies, *supra* note 311.
[328] *Id.* at 688, 693–94, 695–96.
[329] George & Guthrie, *Remaking*, *supra* note 32, at 1458–59; George & Guthrie, *The Threes*, *supra* note 32, at 1830–31.
[330] George & Guthrie, *Remaking*, *supra* note 32, at 1470; George & Guthrie, *The Threes*, *supra* note 32, at 1837.
[331] Epps & Sitaraman, *supra* note 6, at 184. For more on the use of such a "veil of ignorance" in the law, see Adrian Vermeule, *Veil of Ignorance Rules in Constitutional Law*, 111 Yale L.J. 399 (2001).
[332] *See supra* notes 7–9 and accompanying text; Epps & Sitaraman, *supra* note 6, at 152–53.

We do not deny that, given the makeup of the present Court, "Court packing" is coded as liberal. However, it is crucial to recognize that this is true simply in the current moment. Any number of political changes could alter that understanding, and Court expansion does not carry any inherent political tilt. Nor do we deny that many other proposals for Court expansion often appear to advocate for increasing the number of Justices by a seemingly arbitrary number, offering little in the way of grounding or rules and thus seem to leave the door open to perpetual expansion.[333]

Our proposal is different. Court expansion motivated by longstanding constitutional practice has an inherent limiting principle—the example of history itself. There are only two options that we see—either one Justice per circuit, if one goes by the practice that held from 1802 to 1929, or two Justices per circuit, if one prefers the example of the Founding. That is to say, Court expansion based on history and Founding practices leads us to a maximum of twenty-six Justices—there is no infinite spiral from there, because there is no further to go.[334]

Restoring the relationship between the Justices and the number of circuits may carry with it risks—as with any change, there will almost inevitably be winners and losers. An expansion of the Court, particularly if it happened all at once, could potentially disrupt its smooth operation and coherence, and might require changes to manage a larger, more complex body. Requiring the Justices to ride circuit may be just as unpopular in the present Court as it was for past Courts,[335] and the adjustments required could be unwelcome to those accustomed to the current system. And, of course, it is possible that current members of the Court may become politically entrenched or radicalized if they are faced with a sudden influx of ideologically different colleagues.[336]

Despite these potential hurdles, we believe such reform is worthwhile. The proposed changes aim to restore the Court to its original constitutional structure, a move we see as essential for preserving its integrity and effectiveness. While the transition may be challenging, the long-term benefits of aligning the Court with its intended framework outweigh the risks.

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[333] *E.g.*, *id.* at 193–200 (proposing a fifteen-Justice Court but providing no justification for the number fifteen); George & Guthrie, *Remaking*, *supra* note 32, at 1457–58 (proposing a fifteen-Justice Court, but providing no clear basis for this number apart from the fact that it is odd and allows for panels of three); *see also* Michael Stokes Paulsen, *Testimony of Professor Michael Stokes Paulsen to the Presidential Commission on the Supreme Court of the United States* 7 (Aug. 2, 2021), https://www.regulations.gov/comment/PCSCOTUS-2021-0001-2159 [https://perma.cc/V47K-EZSU] ("Court-packing invites an 'arms race' of progressive escalation . . . . Fifteen [Justices] becomes twenty-one becomes thirty-seven becomes fifty-three and we're off to the races.").

[334] To be clear, we do not claim that twenty-six Justices is an inherent constitutional ceiling, for just as the Constitution imposes no requirement that the Court be limited to nine Justices, it likewise sets no cap on the number of circuits (as evidenced by the relatively recent creation of the Eleventh and Federal Circuits). Our point is not that Court expansion is intrinsically self-limiting in any absolute sense—human institutions are always vulnerable to excess—but that, contrary to caricature, such expansion need not be untethered from principle. History offers structure; it does not guarantee restraint, but neither does it preclude it.

[335] Though advancements in infrastructure, transportation, and communication would hopefully mitigate some of these complaints. Stras, *supra* note 13, at 1727; *see supra* notes 285–287 and accompanying text.

[336] Siegel, *supra* note 5, at 93.

3. Addressing Alternate Court Reforms

Finally, one might pose a final *should* challenge and question why we even consider expanding the Court at all. With numerous alternative proposals available, why should our approach stand out, particularly for those who may not subscribe to originalism? This Section reviews these other proposals to demonstrate that, at the very least, ours is not inferior to the rest—and, in many cases, it is more constitutionally sound and politically feasible. However outlandish our originalist arguments for Court expansion may strike critics, they have the distinct advantage of being not only historically sound but also directly achievable through legislation.

The idea of term limits for Justices has proven a popular idea,[337] appealing perhaps because of how safe and reasonable it seems. Term limits are common in most state supreme courts and numerous other countries' highest courts,[338] and they promise to increase the Court's legitimacy and accountability while reducing polarization and the role of random chance. However, Congress's power to enact term limits legislatively is dubious, running headlong into Article III's guarantee of tenure during "good Behaviour,"[339] which the Supreme Court has consistently interpreted as enshrining lifetime tenure.[340] Consequently, most legal scholars and commentators agree that implementing term limits would require a constitutional amendment.[341]

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[337] *E.g.*, Joe Biden, *My Plan to Reform the Supreme Court and Ensure No President Is Above the Law*, Wash. Post, July 29, 2024, https://www.washingtonpost.com/opinions/2024/07/29/joe-biden-reform-supreme-court-presidential-immunity-plan-announcement [https://perma.cc/K8QG-YRKX]; Alicia Bannon & Michael Milov-Cordoba, *Supreme Court Term Limits*, Brennan Ctr. for Just., 4–9 (2023), https://www.brennancenter.org/our-work/policy-solutions/supreme-court-term-limits [https://perma.cc/PR2P-C9W3]; Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Congress (2021); Adam Chilton, Daniel Epps, Kyle Rozema & Maya Sen, *Designing Supreme Court Term Limits*, 95 S. Calif. L. Rev. 1 (2021); Tyler Cooper & Amanda Dworkin, Dylan Hosmer-Quint, Amanda Pescovitz, *Retiring Life Tenure: On Term Limits and Regular Appointments at the Supreme Court*, 42 Cardozo L. Rev. 2763, 2765 (2021); Kermit Roosevelt & Ruth-Helen Vassilas, *Supreme Court Justices Should Have Term Limits*, CNN (Sept. 30, 2019), https://www.cnn.com/2019/09/30/opinions/supreme-court-term-limits-law-roosevelt-vassilas/index.html [https://perma.cc/5F55-QU95]; Ben Feuer, *Why the Supreme Court Needs 18-Year Term Limits*, L.A. Times (July 18, 2017), https://www.latimes.com/opinion/op-ed/la-oe-feuer-supreme-court-term-limits-anthony-kennedy-20170718-story.html [https://perma.cc/4DWW-47R3].

[338] Michael Milov-Cordoba, *Life Tenure Is a Rarity on State Supreme Courts*, Brennan Ctr. for Just. (Oct. 2, 2024), https://www.brennancenter.org/our-work/analysis-opinion/life-tenure-rarity-state-supreme-courts [https://perma.cc/2U3F-ZLJV]; Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges*, 35 Oxford J.L. Stud. 627, 640 (2015). Only Rhode Island appoints state supreme court justices for life. Massachusetts, New Hampshire, and New Jersey do not have fixed term limits but require justices to retire at age 70. Milov-Cordoba, *supra* note 338.

[339] U.S. Const. art. III, § 1.

[340] *E.g.*, Nguyen v. United States, 539 U.S. 69, 72 (2003); United States v. Hatter, 532 U.S. 557, 567 (2001); Freytag v. Comm'r, 501 U.S. 868, 907 (1991) (Scalia, J., concurring); United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955); United States *ex rel.* Goodrich v. Guthrie, 58 U.S. 284, 286 (1854). *But see* Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 Yale L.J. 72 (2006) (arguing against the conventional interpretation of "good Behaviour" as granting life tenure).

[341] *E.g.*, Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 U. Chi. L. Rev. 665, 668–669 (1969); Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 Geo. L.J. 965, 987 (2007); Chilton, Epps,

Instituting a supermajority requirement for judicial review is another idea that is frequently mooted.[342] While not explicitly prohibited by the Constitution or the Judiciary Act of 1789, the idea, though considered as early as 1823, has always been rejected.[343] While either the Necessary and Proper Clause in Article I[344] or the Exceptions and Regulations Clause of Article III[345] might grant Congress the power to create a supermajority requirement, this is a unresolved constitutional question.[346] The proposal additionally raises implementation challenges, such as how to handle precedents set by a simple majority of Justices—a question raised when a supermajority proposal was considered in the 1930s and rejected.[347] The idea of Congress overriding Supreme Court decisions[348] seems like even more of a nonstarter, given that the Court has previously invalidated just such an attempt in *City of Boerne v. Flores*.[349] And, of course, any attempt to legislatively change Supreme Court outcomes would require a congressional majority capable of passing such legislation, making it no easier to achieve than the legislatively-enacted Court expansion that we propose.

Jurisdiction stripping is another popular proposal.[350] This has the benefit of being unquestionably constitutional, since Article III explicitly allows for Congress to make exceptions to the Court's appellate jurisdiction.[351]

Rozema & Sen, *supra* note 336, at 9; Doerfler & Moyn, *supra* note 7, at 1754; Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 Mich. L. Rev. 765, 766–768 (1989); Calabresi & Lindgren, *supra* note 19, at 771 (2006); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a "Golden Parachute*, 83 Wash. U. L. Rev. 1397, 1405 (2005); Epps & Sitaraman, *supra* note 6, at 173–74; James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 Va. L. Rev. 1093, 1097 (2004).

[342] *E.g.*, Epps & Sitaraman, *supra* note 6, at 181–82; Jenny Hunter, Protecting Workers' Rights and Democracy from the Courts—A Practical Guide to Court Reform (2024), https://peoplesparity.org/court-reform [https://perma.cc/F9DR-4H3Z]; Molly Coleman & Jenny Hunter, *The Supreme Court Is Out of Control. This Is Our Best Hope.*, Slate (Jul. 3, 2024), https://slate.com/news-and-politics/2024/07/supreme-court-reform-congress-democracy-solution.html [https://perma.cc/YE4Z-WE77]; Adams et al., *supra* note 5 at 67–110; Dylan Matthews, *The Supreme Court Is Too Powerful and Anti-Democratic. Here's How We Can Scale Back Its Influence*, Vox (Sep. 29, 2020, 8:10 AM CDT), https://www.vox.com/policy-and-politics/21451471/supreme-court-justice-constitution-ryan-doerfler [https://perma.cc/74V4-U4UC].

[343] Adams et al., *supra* note 5, at 170.

[344] U.S. Const. art. I, § 8, cl. 18.

[345] U.S. Const. art. III, § 2, cl. 2.

[346] Adams et al., *supra* note 5, at 179–80; Epps & Sitaraman, *supra* note 6, at 190–91; Evan H. Caminker, *Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past*, 78 Ind. L.J. 73, 117 n.12 (2003).

[347] Barry Cushman, *Court-Packing in Context*, 48 Sup. Ct. Hist. 174, 186 (2023).

[348] *E.g.*, Coleman & Hunter, *supra* note 342; Hunter, *supra* note 342, at 2–3.

[349] 521 U.S. 507 (1997). *See also*, Bank Markazi v. Peterson, 578 U.S. 212, 226, (2016) ("Congress, we have also held, may not 'retroactively comman[d] the federal courts to reopen final judgments." (quoting Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 219 (1995))).

[350] *See, e.g.* Joseph Fishkin & William E. Forbath, The Anti-Oligarchy Constitution: Reconstructing the Economic Foundations of American Democracy 431 (2022); Doerfler & Moyn, *supra* note 7, at 1744 (2021).

[351] U.S. Const. art. III, § 2; Christopher Jon Sprigman, *Congress's Article III Power and the Process of Constitutional Change*, 95 N.Y.U. L. Rev. 1778 (2020); Richard H. Fallon, Jr., *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1043, 1065-68 (2010). Indeed, the scope of the Supreme Court's appellate jurisdiction has been entirely shaped by Congress and has varied throughout history. Herbert Wechsler, *The Appellate Jurisdiction of the Supreme Court: Reflections*

Like Court expansion, jurisdiction stripping requires nothing more than a legislative majority, and Congress has a history of altering the Court's jurisdiction through ordinary legislation.[352] However, there are reasons to believe that jurisdiction stripping may perhaps be a less optimal reform than the one we propose. It would bring about more sweeping changes to the judicial system—beyond simply adjusting the number of Justices or reconnecting them to the circuits—by potentially reshaping how the entire federal court system handles cases.[353] Additionally, there may be limitations on Congress's ability to engage in jurisdiction stripping, especially if it eliminates avenues for federal judicial power to protect public rights.[354] Finally, some scholars have suggested that it simply would not work as intended.[355]

Lastly, the proposal for a binding ethical code for the Justices has garnered attention.[356] The Justices themselves already created a voluntary code of conduct in November 2023,[357] though some have questioned its adequacy. The concept of a Supreme Court ethics code with "teeth," however, quickly encounters practical obstacles. While Congress has some constitutional authority to regulate the Supreme Court and could pass an ethics code, it has no constitutional mechanism to directly enforce consequences on the Justices, whose lifetime tenure protects them from everything save for impeachment[358] As a result, any congressionally imposed code of ethics risks either being merely advisory or simply redundant, since Congress can already impeach without such a code. Indeed, the Code of Judicial Conduct, which has been bandied about as a useful model,[359] has itself been deemed "aspirational" and

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on the Law and the Logistics of Direct Review, 34 Wash. & Lee L. Rev. 1043, 1047–1049 (1977); Stephen Vladeck, The Shadow Docket: How the Supreme Court Uses Stealth Rulings to Amass Power and Undermine the Republic 38–39, 45 (2023).

[352] For examples, see Daniel Epps & Alan M. Trammell, *The False Promise of Jurisdiction Stripping*, 123 Colum. L. Rev. 2077, 2097–102 (2023); Travis Christopher Barham, *Congress Gave and Congress Hath Taken Away: Jurisdiction Withdrawal and the Constitution*, 62 Wash. & Lee L. Rev. 1139, 1174–83 (2005).

[353] For this reason, jurisdiction-stripping has been characterized as a radical or "nuclear" option. Paul Stancil, *Congressional Silence and the Statutory Interpretation Game*, 54 Wm. & Mary L. Rev. 1251, 1271 (2013); Janet Cooper Alexander, *Jurisdiction-Stripping in a Time of Terror*, 95 Calif. L. Rev. 1193, 1198 (2007).

[354] Richard Fallon, *Jurisdiction-Stripping Reconsidered*, 96 Va. L. Rev. 1093, 1133–35. In *Boumediene v. Bush*, the Supreme Court struck down a statute that barred federal courts from hearing habeas corpus petitions. The decision, however, rested on the Suspension Clause and the historical significance of habeas corpus—suggesting that this may be a uniquely protected area where Congress's power to jurisdiction strip is constrained. 553 U.S. 723, 739–45 (2008).

[355] Epps & Trammell, *supra* note 352.

[356] Biden, *supra* note 336; *ABA Promotes Binding Supreme Court Ethics Code*, Am. Bar Ass'n. (2024), https://www.americanbar.org/news/abanews/aba-news-archives/2024/08/aba-promotes-binding-scotus-ethics [https://perma.cc/9QQ7-JRF7].

[357] *Code of Conduct for Justices of the Supreme Court of the United States*, (2023), https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf [https://perma.cc/TVR5-FFVT].

[358] Some have sought to devise clever workarounds to this separation-of-powers difficulty. *See* Stephen I. Vladeck, *The Supreme Court Code of Conduct Is Missing This Big Thing*, CNN (November 14, 2023), https://www.cnn.com/2023/11/14/opinions/supreme-court-code-of-conduct-clarence-thomas-vladeck/index.html [https://perma.cc/EJ7P-CM67] (proposing that Congress create an Article III inspector general as a form of "sideways leverage" against the Court).

[359] Biden, *supra* note 336.

lacks an enforcement mechanism.[360] Though we do not oppose the formulation of an ethics code, without a means of enforcement, it seems unlikely to significantly change the Court's conduct or image.

The principal issue with these proposed reforms is not their practical wisdom; there are plausible arguments that any of them might improve the functioning of the Court. Rather, the issue is that all of them raise serious constitutional questions. To use a traffic light metaphor to illustrate this continuum: Term limits would be a clear red light, as they violate the plain text of the Constitution; supermajority requirements and jurisdiction stripping would be a yellow light, due to unresolved constitutional questions that would ultimately be decided by the Justices themselves; and a voluntary code of ethics without an enforcement mechanism would receive a green light, but if it attempted to discipline or remove Justices, it would turn red.

Our proposal has the advantage of having been done before in American history, and as such we know that it would receive a green light. Unlike other suggestions that might push the boundaries of constitutional interpretation, ours remains firmly anchored within established constitutional understandings. The size of the Supreme Court has fluctuated throughout history, expanding and contracting without a single constitutional amendment. This historical fluidity highlights the existing flexibility within the constitutional framework, demonstrating that changing the number of Justices is not only possible but constitutionally sound. And while reform proposals abound, any serious path to Court reform must begin with ideas that are not only beneficial, but are both politically achievable and resistant to judicial reversal.

Conclusion

In this Article, we have presented the case for expanding the Supreme Court and restoring the traditional link between the circuits and the Justices. We argue that this conclusion should be intuitive to originalists, who should seek to understand and emulate the models promulgated by the Founders. We have demonstrated that, from the pre-Founding era until the Civil War, there was a longstanding history of high court judges riding circuit and an established norm of Justices being closely connected with the circuits. For almost 140 years, the number of Justices was directly tied to the number of circuits, and political actors consistently operated on the assumption that Justices had to serve as circuit judges and that every circuit had to be represented by at least one Justice. Additionally, we have made the pragmatic argument that returning to the republican and egalitarian vision that the Framers had for the judiciary can counter contemporary perceptions of the Supreme Court as elite, corrupt, and isolated from the public. Finally, we addressed the feasibility of our proposal compared to other Court reform efforts. Although we advocate

[360] Joanna R. Lampe, Cong. Rsch. Serv., *The Supreme Court Adopts a Code of Conduct* 1 (2023), https://crsreports.congress.gov/product/pdf/LSB/LSB11078 [https://perma.cc/LDW9-SUCU].

for increasing the number of Justices, our aim goes beyond mere court packing for political reasons. Instead, we strive to restore the judiciary to something akin to its original structure under the early Judiciary Acts.

Of course, many details would have to be carefully worked out to fully embark on this constitutional correction. How should the Federal Circuit be treated, given its national scope and specialized focus? Should new Supreme Court appointments be staggered over time, perhaps limiting how many a single president could make in one term? Policymakers and legal experts will have to flesh out how to legislatively implement these reforms.

What we can counsel, though, is that those thinking about the structure of the judiciary would do well to look backward and glean insights from the wisdom of history. Certainly, the judiciary established during the Founding era was not without its flaws. Some geographic areas that should have been included in the circuit system were not, and some circuits were too large for a Justice to manage. Like any human institution, it featured its share of lapses and inefficiencies. Yet, the defects of this original judiciary system were not as vast as scholars and lawyers have often imagined, nor did they justify its wholesale abandonment. The requirements for Justices to ride circuit and maintain circuit residency persisted until the Civil War and beyond not as antiquated relics of a bygone era, but as sound, integral components of the constitutional order.

It is not too late to learn from the Judiciary Act of 1789 and the practices of the Founding generation, and to restore some of what has been thoughtlessly lost. Contemporary concerns about a judiciary grown distant from the governed have spawned numerous reform proposals—well-intentioned, perhaps, but often legally precarious. A more promising path lies in embracing the Court's original design: expanding its ranks while reestablishing structures that render Justices more accountable to, and representative of, the people they serve. The wisdom of the Founders remains available to us—the only question is whether we will prove wise enough to return to it.