

# COMING OFF THE BENCH: LEGAL AND POLICY IMPLICATIONS OF PROPOSALS TO ALLOW RETIRED JUSTICES TO SIT BY DESIGNATION ON THE SUPREME COURT

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## ABSTRACT

*In the fall of 2010, Senator Patrick Leahy introduced a bill that would have overridden a New Deal-era federal statute forbidding retired Justices from serving by designation on the Supreme Court of the United States. The Leahy bill would have authorized the Court to recall willing retired Justices to substitute for recused Justices. This Article uses the Leahy bill as a springboard for considering a number of important constitutional and policy questions, including whether the possibility of 4–4 splits justifies the substitution of a retired Justice for an active one; whether permitting retired Justices to substitute for recused Justices would violate Article III’s requirement that there be “one supreme Court”; and whether the ethical limitations on extrajudicial activities should be the same for active and retired judges and Justices. In addition to relying on published material, we draw on information gleaned from our interview with retired Justice Stevens, who was the original source of the Leahy proposal.*

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## INTRODUCTION

In her first term as an Associate Justice of the Supreme Court of the United States, Elena Kagan recused herself from roughly one-third of the cases on the Court’s docket.<sup>1</sup> Although Justices do not typically divulge their grounds for recusing,<sup>2</sup> the reason for all of these recusals was obvious: Kagan believed that her participation in various aspects of these cases in her former role as solicitor general created at least the appearance of impropriety.<sup>3</sup> Kagan perhaps could have taken a narrower view and recused herself in fewer cases;

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1. During the 2010 term, Justice Kagan recused herself from twenty-eight cases. *October Term 2010*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/terms/ot2010> (last visited Sept. 5, 2011); Nina Totenberg, *The Robe Seems To Suit New Justice Kagan*, NPR (Dec. 27, 2010), <http://www.npr.org/2010/12/27/132109642/the-robe-seems-to-suit-new-justice-kagan>. The Court heard eighty-two merits cases in the October 2010 Term. *Stat Pack for October Term 2010*, SCOTUSBLOG, 1 (June 28, 2011), [http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB\\_OT10\\_stat\\_pack\\_final.pdf](http://sblog.s3.amazonaws.com/wp-content/uploads/2011/06/SB_OT10_stat_pack_final.pdf).

2. *But cf.* *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J.) (order denying motion to recuse) (discussing the grounds for the request of his own recusal but ultimately denying the motion).

3. *See, e.g.*, Robert Barnes, *Recusals Could Force Newest Justice To Miss Many Cases*, WASH. POST, Oct. 4, 2010, at A15 (“Kagan is recusing herself from cases in which she had a role in drafting a brief for the Supreme Court, or when she was actively involved in a case in the lower courts.”).

nevertheless, once the deed was done, the Court was left short-handed.

Into the breach stepped Chairman of the Senate Judiciary Committee Patrick Leahy, who introduced a bill<sup>4</sup> that would lift a New Deal-era prohibition on retired Supreme Court Justices sitting by designation on the high court.<sup>5</sup> Under the Leahy proposal, a majority of the active Justices would have been able to designate a retired Justice to substitute for a recused Justice.<sup>6</sup> The proposal seemed especially timely in autumn 2010<sup>7</sup> because there were—and as

4. Senator Patrick Leahy's September 29, 2010, bill was simple in its concept and its language: "To amend chapter 13 of title 28, United States Code, to authorize the designation and assignment of retired justices of the Supreme Court to particular cases in which an active justice is recused." S. 3871, 111th Cong. pmb. (2010). In other words, in any Supreme Court case in which a sitting Justice was recused, a retired Supreme Court Justice could be tapped to take her place in deciding the case. The September 29 bill read as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

**SECTION 1. DESIGNATION AND ASSIGNMENT OF RETIRED  
SUPREME COURT JUSTICES.**

Section 294 of title 28, United States Code, is amended—

(1) in subsection (a), by inserting "(1)" after "(a)";

(2) by adding at the end the following:

"(2) Any retired Chief Justice of the United States or any retired Associate Justice of the Supreme Court may be designated and assigned to serve as a justice on the Supreme Court of the United States in a particular case if—

"(A) any active justice is recused from that case; and

"(B) a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice."; and

(3) in subsection (d), by striking "No such designation or assignment shall be made to the Supreme Court." and inserting "Except as provided under subsection (a)(2), no designation or assignment under this section shall be made to the Supreme Court."

*Id.* sec. 1.

5. 28 U.S.C. § 294(d) (2006) ("No . . . designation or assignment [of retired judges or Justices] shall be made to the Supreme Court.").

6. S. 3871 sec. 1, § 2.

7. Senator Leahy introduced this bill on September 29, 2010. On November 8, 2010, the authors spoke for approximately twenty minutes by telephone conference call with Justice Stevens, who was in his chambers in Washington, D.C. We did not record the conversation, but each of us took detailed notes. Justice Stevens told us that he and then-Chief Justice Rehnquist had the idea several years ago to enlist retired Justices as substitutes for recused Justices, but were unable to persuade their colleagues to seek legislation authorizing the proposal. Following his decision to retire, Justice Stevens met with Senator Leahy, who asked him if he had any ideas for the improvement of the Court's operations. At that point, Justice Stevens suggested that retired Justices could be enlisted to serve as substitutes for recused Justices. Telephone Interview with John Paul Stevens, Assoc. Justice (retired), Supreme Court of the U.S. (Nov. 8, 2010) (notes on file with the *Duke Law Journal*).

this Article goes to press, continue to be—three retired Justices in good mental and physical condition.<sup>8</sup>

Adoption of the Leahy bill could avoid some 4–4 split decisions,<sup>9</sup> but it answers no pressing need. Indeed, as we explain, implementing the proposal would raise a substantial number of questions of policy, administrability, and constitutionality. Accordingly, we do not endorse the Leahy bill.

Nonetheless, we are sympathetic to the spirit of the Leahy proposal because retired Justices currently represent a valuable and underutilized human resource. The Leahy proposal thus raises the broader question of how retired Justices who wish to remain active in public life may do so consistently with judicial ethics and constitutional constraints. Furthermore, in seeking to draw on the experience and expertise of retired Justices, the Leahy proposal and the others that we discuss in this Article present an opportunity to explore questions about the nature of the office held by active Supreme Court Justices, no less than retired ones.

This Article uses the Leahy proposal to frame discussion of the foregoing issues. Part I briefly recounts the history of retirements from the Court. Part II canvasses the costs and benefits of asking retired Justices to participate in a substitution system. Part III considers constitutional objections to the Leahy bill. Part IV considers other roles that in the past have been, and in the future could be, assigned to willing retired Justices. The Article concludes by arguing for broad utilization of the services of retired Justices.

## I. RETIRED JUSTICES THROUGHOUT HISTORY AND TODAY

The end of the twentieth century and the beginning of the twenty-first century brought many changes to the American judicial system, but one largely overlooked development was the survival of retired Supreme Court Justices, most of them able-bodied and

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8. The retired Justices are Justices Stevens, O'Connor, and Souter.

9. As discussed in Part II.C, *infra*, according to longstanding tradition, 4–4 splits do not create precedent but instead simply result in the lower court decision's being affirmed. *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868); *see also* Edward A. Hartnett, *Ties in the Supreme Court of the United States*, 44 WM. & MARY L. REV. 643, 646 (2002) ("The traditional practice of the Supreme Court of the United States is that 'no affirmative action can be had in a cause where the judges are equally divided in opinion as to the judgment to be rendered or order to be made.'" (quoting *Durant*, 74 U.S. (7 Wall.) at 110)).

mentally sharp.<sup>10</sup> Over the course of American history, most Supreme Court Justices “remain[ed] on the court until they died (the exit strategy of 49 of the 103 Justices not currently serving) or became enfeebled by age (recall the explanation that Justice Thurgood Marshall gave when he retired in 1991 at the age of 83: ‘I’m old and falling apart.’).”<sup>11</sup> Indeed, before the 1990s, it was not unusual for a Justice to retire when no other retired Justice was living and competent.<sup>12</sup> And before 1937, when Congress passed the Retirement Act, retirement was not even possible; resignation was the only available option.<sup>13</sup>

In the 1990s, however, Chief Justice Burger and Justices Powell, White, and Blackmun were simultaneously alive and in reasonably

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10. A significant exception was Justice Thurgood Marshall. *See infra* text accompanying note 11.

11. Linda Greenhouse, *Justice Unbound*, N.Y. TIMES OPINIONATOR (Dec. 2, 2010, 9:44 PM), <http://opinionator.blogs.nytimes.com/2010/12/02/justice-unbound>. In large part, the reluctance to retire came about because “resigned” Justices did not receive pensions. Indeed, historically, even Justices enfeebled by age remained on the Court so that they could continue to draw a salary, even when they were no longer physically or mentally capable of performing the job. For example, Edward Bates, attorney general under Abraham Lincoln, wrote on April 11, 1864, that four Supreme Court Justices—Chief Justice Taney and Associate Justices Catron, Grier, and Wayne—wanted to retire but were unable to do so because Congress had not passed a pension bill and their salaries were their sole means of support. THE DIARY OF EDWARD BATES 1859–1866, at 358 (Howard K. Beale ed., 1933). Chief Justice Taney died that year and left his orphaned daughters a tiny estate. Ross E. Davies, *The Judiciary Fund: A Modest Proposal That the Bar Give to Judges What Congress Will Not Let Them Earn*, 11 GREEN BAG 2D 357, 359 (2008). Seven years later, his children were in such dire circumstances that the Supreme Court petitioned to set up a fund on their behalf. *Id.* Meanwhile, the Judiciary Act of 1869, ch. 22, 16 Stat. 44, provided living Justices who had reached the age of seventy and who had served for at least ten years with a lifetime pension of their yearly salary as of the date of their retirement. *Id.* § 5. A comprehensive study of Article III judges shows that pension eligibility plays a crucial role in the timing of the decision to resign, retire, or take senior status. *See* Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1869–2002*, 8 AM. L. & ECON. REV. 143, 145 (2006) (“The key empirical finding of this article identifies pensions . . . as the primary determinant of judicial turnover.”). Although the study finds that Supreme Court Justices—unlike district and circuit court judges—do not synchronize their decisions to cease active service with pension eligibility, *id.*, that finding hardly casts doubt on the proposition that the ability to receive any payment whatsoever influences the decision of a Justice to step down before death or enfeeblement.

12. *See* DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 104–54* (1999) (describing the retirements, resignations, and deaths of Justices from 1937 through 1987).

13. *See* Act of Mar. 1, 1929, Pub. L. No. 70-870, 45 Stat. 1422 (repealed 1937) (allowing Supreme Court Justices to resign but not retire). In Part III, *infra*, we discuss the differences between resignation and retirement. *See infra* text accompanying notes 94–99.

good health for at least part of their retirements.<sup>14</sup> Between 2005 and 2010, Justices O'Connor,<sup>15</sup> Souter, and Stevens retired from their positions on the Court, all before their health or mental competence required them to do so.<sup>16</sup> Even though modern Justices often serve longer than their historical counterparts,<sup>17</sup> it may not come as a surprise that they find themselves ready to retire after twenty,<sup>18</sup> twenty-five,<sup>19</sup> or even thirty-five<sup>20</sup> years in their demanding roles on the Court.

Indeed, as Professor David Atkinson notes, Justices have historically retired for one or more of eight reasons: “(1) the threat of impeachment; (2) an attractive pension; (3) ambition; (4) dissatisfaction or weariness; (5) poor health or declining physical energy; (6) mental decline or disability; (7) family pressure; and (8) a

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14. As the previous quotation indicates, *see supra* text accompanying note 11, Justice Marshall was retired and still living from 1991 to 1993, but he was in very poor health, and his physical condition predated his retirement.

15. Justice O'Connor announced her intended retirement in July 2005, but she did not actually retire until the confirmation and investiture of her successor, Justice Alito, in January 2006. President George W. Bush had originally chosen John G. Roberts, Jr., to replace O'Connor. Upon Chief Justice Rehnquist's death, the president withdrew his nomination of Roberts for Associate Justice to appoint him to be Chief Justice. David D. Kirkpatrick, *Alito Sworn In as Justice After Senate Gives Approval*, N.Y. TIMES, Feb. 1, 2006, at A21; *see also* R. SAM GARRETT & DENIS STEVEN RUTKUS, CONG. RESEARCH SERV., RL 33118, SPEED OF PRESIDENTIAL AND SENATE ACTIONS ON SUPREME COURT NOMINATIONS, 1900–2010, at 4–7 (2010) (discussing the nomination processes of Justice Alito and Chief Justice Roberts).

16. According to news and self-reports, Justice O'Connor retired primarily to care for her husband, who had Alzheimer's disease. Richard W. Stevenson, *O'Connor To Retire, Touching Off Battle over Court*, N.Y. TIMES, July 2, 2005, at A1. Justice Souter retired primarily to return to his native New Hampshire. Peter Baker & Jeff Zeleny, *Souter's Exit To Give Obama First Opening*, N.Y. TIMES, May 2, 2009, at A1. Justice Stevens apparently retired simply because, having served on the Court longer than all but two other Justices in American history, he wished to spend his remaining years engaged in other pursuits. Ross E. Davies, Craig D. Rust & Adam Aft, *Supreme Court Sluggers: John Paul Stevens Is No Stephen J. Field*, 13 GREEN BAG 2D 465, 465 (2010).

17. ATKINSON, *supra* note 12, at 188–89.

18. David Souter received his Associate Justice commission on October 3, 1990, and assumed senior status on June 30, 2009. *Biographical Directory of Federal Judges: Souter, David Hackett*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2244&cid=999&ctype=na&instate=na> (last visited Sept. 5, 2011).

19. Sandra Day O'Connor received her Associate Justice commission on September 22, 1981, and assumed senior status on January 31, 2006. *Biographical Directory of Federal Judges: O'Connor, Sandra Day*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=1796&cid=999&ctype=na&instate=na> (last visited Sept. 5, 2011).

20. John Paul Stevens received his Associate Justice commission on December 17, 1975, and assumed senior status on June 30, 2010. *Biographical Directory of Federal Judges: Stevens, John Paul*, FED. JUDICIAL CTR., <http://www.fjc.gov/servlet/nGetInfo?jid=2290&cid=999&ctype=na&instate=na> (last visited Sept. 5, 2011).

voluntary choice even though they remain capable of doing the work.”<sup>21</sup> And regardless of the reason a Justice chooses to retire, “early”<sup>22</sup> retirement is made easier by the statutory pension scheme set out for retired Justices. Justices who retire under the “rule of eighty”<sup>23</sup> may collect whatever their full salary was at the time of their retirement.<sup>24</sup> Justices who wish to continue to serve on the lower federal courts are entitled to subsequently enacted judicial pay raises, if they occur.<sup>25</sup>

But when relatively young and healthy, even vigorous, Justices retire, they do not typically sit idly by and watch as the world marches on without them. Justices who have retired since the 1960s have tended to engage in a wide range of activities: They give interviews and speeches;<sup>26</sup> they teach law students and other adults;<sup>27</sup> they chair

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21. ATKINSON, *supra* note 12, at 1. On the other hand, Atkinson posits that there have also been eight reasons why Justices decline to retire voluntarily over the years: “(1) financial considerations; (2) party or ideology; (3) a determination to stay; (4) a sense of indispensability; (5) loss of status; (6) a belief they can still do the work; (7) not knowing what else to do; (8) family pressure to stay in office.” *Id.* at 8 (noting that some of these reasons, such as financial considerations and feeling at a loss for how to occupy time, are no longer serious concerns). With respect to Atkinson’s second factor, there is certainly anecdotal evidence of Justices timing their retirement to coincide with the term of a president thought likely to name a successor who shared the retiring Justice’s jurisprudential views. Retiring Justices, however, tend to deny such motivation. *Cf.* Anthony Lewis, Op-Ed., *The Blackmun Legacy*, N.Y. TIMES, Apr. 8, 1994, at A27 (reporting a statement by Justice Blackmun urging President Clinton not to “use a litmus test . . . but just [to] pick good judges” (omission in original)). Whatever one makes of individual examples, there is little statistical evidence of judges and Justices timing their retirements based on the expected ideology of their successors. *See* Yoon, *supra* note 11, at 145 (“[T]he rates at which federal judges—at all levels—leave active status are largely unaffected by either political or institutional environment . . .”).

22. Of course, a person who retires at age ninety, as Justice Stevens did, could hardly be said to be taking early retirement in any other profession. As noted, however, over the course of Supreme Court history, Justices have rarely retired before they were forced to do so by declining health. *See supra* note 11 and accompanying text.

23. 28 U.S.C. § 371(c) (2006); *see also* *Frequently Asked Questions*, U.S. COURTS, <http://www.uscourts.gov/Common/FAQS.aspx> (last visited Sept. 5, 2011) (“Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge (65+15 = 80). A sliding scale of increasing age and decreasing service results in eligibility for retirement compensation at age 70 with a minimum of 10 years of service (70+10=80). Senior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts’ workload annually.”). By its language, this statute expressly applies to Justices, as well as judges on the lower federal courts.

24. 28 U.S.C. § 371(a).

25. To be eligible for judicial pay raises, retired Justices must annually perform at least the same amount of work that an active judge would perform in three months, or other work for the courts as specified in detail under the statutory scheme. *Id.* § 371(e).

26. For example, Justice O’Connor interviewed Justice Stevens in *Newsweek* at the end of 2010. *Sandra Day O’Connor Interviews John Paul Stevens*, NEWSWEEK, Dec. 27, 2010/Jan. 3,

or otherwise serve on commissions;<sup>28</sup> they speak out on issues related to the judiciary and beyond;<sup>29</sup> and they sit by designation on the lower federal courts. One retired Justice even acted in a Hollywood movie, portraying, as might be expected, a famous Justice from history.<sup>30</sup>

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2011, at 38. Justice Souter gave the 2010 Harvard commencement speech. Linda Greenhouse, *Justice Souter's Class*, N.Y. TIMES OPINIONATOR (June 3, 2010, 9:47 PM), <http://opinionator.blogs.nytimes.com/2010/06/03/justice-souters-class>. Justice O'Connor speaks extensively on judicial independence and sponsors an effort to spur civics education. See *The Sandra Day O'Connor Project on the State of the Judiciary Has Concluded*, GEORGETOWN LAW, <http://www.law.georgetown.edu/judiciary> (last visited Sept. 5, 2011) (detailing some of Justice O'Connor's activities); see also ICIVICS, <http://www.icivics.org> (last visited Sept. 5, 2011) (game-playing civics site envisioned by O'Connor).

27. For example, retired Justice Stewart taught a class for Paul Gewirtz, Potter Stewart Professor of Constitutional Law at Yale Law School. Professor Gewirtz recalled:

After the Justice retired from the Court, and I had started teaching at Yale, I invited him to visit his old law school and teach a class in my course on "Antidiscrimination Law." He came and taught a controversial affirmative action case in which he had recently dissented, and was a great success.

Paul Gewirtz, Essay, *On "I Know It When I See It,"* 105 YALE L.J. 1023, 1023 n.† (1996). Justice O'Connor is listed as a faculty member at the law school that carries her name at Arizona State University. *Faculty Index*, SANDRA DAY O'CONNOR COLL. OF LAW, <http://apps.law.asu.edu/Apps/Faculty/FacultyIndex.aspx> (last visited Sept. 5, 2011). During the summer of 2010, Justice O'Connor participated in a University of Virginia Semester at Sea conference, which took place on a cruise from Ft. Lauderdale, Florida, to Halifax, Nova Scotia. *Forum on Global Engagement To Feature Justice Sandra Day O'Connor and Activist/Historian Julian Bond*, SEMESTER AT SEA (June 2, 2010), <http://www.semesteratsea.org/what-s-new-at-sas-/press-releases/forum-on-global-engagement-to-feature-justice-sandra-o-connor-and-activist/historian-julian-bond.php>.

28. For example, Chief Justice Burger chaired the U.S. Constitution Bicentennial Commission, Charles N. Quigley, *Civic Education: Recent History, Current Status, and the Future*, 62 ALB. L. REV. 1425, 1447 (1999); Justice White chaired the Commission on Structural Alternatives for the Federal Courts of Appeals, Cathy Catterson, *Changes in Appellate Caseload and Its Processing*, 48 ARIZ. L. REV. 287, 288 (2006); and Justice O'Connor sat on the Iraq Study Group, David E. Sanger, *G.O.P.'s Baker Hints Iraq Plan Needs Change*, N.Y. TIMES, Oct. 9, 2006, at A1.

29. Chief Justice Warren worked with the group World Peace Through Law in his retirement. He also spoke against the creation of a National Court of Appeals. JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 508–10 (2006). Justice O'Connor has not minced words over her feelings on judicial elections. James Podgers, *O'Connor on Judicial Elections: 'They're Awful. I Hate Them,'* A.B.A. J. (May 9, 2009, 8:09 AM CDT), [http://www.abajournal.com/news/article/oconnor\\_chemerinsky\\_sound\\_warnings\\_at\\_aba\\_conference\\_about\\_the\\_dangers\\_of\\_s](http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_aba_conference_about_the_dangers_of_s). And, according to one judge who has been extremely active since taking senior status roughly a quarter-century ago, retired judges should write more than they do. See Ruggero J. Aldisert, *All Right, Retired Judges, Write!*, 8 J. APP. PRAC. & PROCESS 227, 228 (2006) ("And this is the recommendation that I make for every retired judge—trial or appellate, state or federal: Make yourselves heard on scholarly issues.").

30. Justice Blackmun appeared as Justice Story in the Steven Spielberg film AMISTAD (DreamWorks SKG 1997). TINSLEY E. YARBROUGH, HARRY A. BLACKMUN: THE OUTSIDER JUSTICE 330–33 (2008).



Retired Justices have notably been absent, however, from an obvious form of service, one that retired federal district and circuit court judges routinely perform: sitting by designation on their own Court—that is, the Supreme Court—when it is shorthanded. The reason for their absence—the lack of statutory authority for them to sit on the Court after retirement, even in special circumstances—has been the object of several reform proposals over the years, most notably the Leahy bill.<sup>31</sup>

Seen from one perspective, any proposal to lengthen the period of service of Supreme Court Justices swims against the tide. Politicians and scholars have sought to impose term or age limits on Supreme Court Justices, either through constitutional amendment<sup>32</sup> or, more controversially, by statute.<sup>33</sup> These proposals aim to remedy overpoliticization,<sup>34</sup> “mental decrepitude,”<sup>35</sup> ossification, excessive

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31. Several bills authorizing the recall of Supreme Court Justices were introduced in the 78th Congress (1943–1944) after a small handful of Supreme Court cases were dismissed for lack of a quorum. See H.E. Cunningham, Editorial Note, *The Problem of the Supreme Court Quorum*, 12 GEO. WASH. L. REV. 175, 185–89 (1944) (discussing several such proposals). The possibility was also discussed in 1954 when Congress considered several resolutions proposing constitutional amendments to change the composition and jurisdiction of the Supreme Court. See generally *Composition and Jurisdiction of the Supreme Court: Hearing on S.J. Res. 44 Before the S. Comm. on the Judiciary*, 83d Cong. 27 (1954); *Composition and Jurisdiction of the Supreme Court: Hearing on S.J. Res. 44, H.R.J. Res. 194, H.R.J. Res. 27 & H.R.J. Res. 91 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 83d Cong. 26 (1954).

32. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 824 (2006) (“We propose that . . . Congress and the states should pass a constitutional amendment imposing an eighteen-year, staggered term limit on the tenure of Supreme Court Justices.”); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1034–41 (2000) (detailing, among other proposals, Senator Butler’s push for a constitutional amendment mandating that Justices retire at age 75).

33. See, e.g., Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467, 471 (Roger C. Cramton & Paul D. Carrington eds., 2006) (“One Justice or Chief Justice, and only one, shall be appointed during the first session of Congress after each federal election . . . . If an appointment under this Subsection results in the availability of more than nine Justices, the nine who are junior in commission shall sit regularly on the Court.”). *But see* Calabresi & Lindgren, *supra* note 32, at 855–68 (arguing that such a statute would be unconstitutional).

34. See Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23 (“Currently each justice is tempted to time his or her departure with one eye on the political calendar and one finger in the political wind. . . . Perverse incentives also exist at the other end of the age spectrum: Life tenure encourages presidents to nominate young candidates with minimal paper trails and maximal potential to shape the future.”).

35. ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 240 (2003).

countermajoritarianism, and other perceived ills that purportedly result from life tenure.<sup>36</sup>

We take no position here on the wisdom of life tenure or on the constitutionality of those proposals that would restrict it without a formal constitutional amendment. Instead, we assume that life tenure will remain for the foreseeable future, and, given that fact, we ask what roles retired Justices can fruitfully play, including whether they might constitutionally and practically serve by designation on their own Court after retirement from active service.

## II. THE “PROBLEM” AND POTENTIAL SOLUTION

### A. *Background: The “Rehnquist/Stevens” Proposal*

As time passes, the case for the Leahy bill loses strength. Soon, the cases on which Justice Kagan worked as solicitor general will all have worked their way through the system, and the number of recusals will revert to its usual handful per term. Still, the issue may well arise again.

Indeed, the history of the current proposal illustrates the recurring nature of the underlying problem. When we interviewed retired Justice Stevens on the subject, he told us that many years earlier he and then-Chief Justice Rehnquist had originally conceived of what became the Leahy bill, but at the time they were unable to persuade any of their colleagues to ask Congress for authorizing legislation.<sup>37</sup> Upon retiring, Justice Stevens attempted to revive the idea by suggesting it to Senator Leahy.<sup>38</sup>

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36. *See id.* at 240–47 (noting that the “debate about life tenure” is “longstanding” and describing several past proposals to limit the tenure of the Justices).

37. Telephone Interview with John Paul Stevens, *supra* note 7; *see also* HARRY A. BLACKMUN AS INTERVIEWED BY HAROLD HONGJU KOH, THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 352 (1997), *available at* <http://lcweb2.loc.gov/diglib/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09> (“During that term—it might have been during the ‘86 term—Justice Stevens suggested that Congress should be asked to legislate to provide for a retired justice to sit in place in a vacancy that happened for a particular case. If a justice was recused or ill or the Court was reduced to eight for a period, the legislation would have enabled a retired justice to fill the vacancy so that there were always nine on a case. The Court did not support this. I’m not sure I know the reasons why. In any event, Congress did not enact it.”); Letter from John Paul Stevens to William H. Rehnquist (Oct. 28, 1998), *in* WARD, *supra* note 35, app. C at 255–57 (continuing a prior oral discussion about “the possibility of requesting Congress to enact legislation authorizing [the Court] to invite a retired justice to sit [on the Court] on cases in which [they] do not have a full Court”).

38. Telephone Interview with John Paul Stevens, *supra* note 7.

The primary motive of Justice Stevens and Chief Justice Rehnquist was to avoid 4–4 vote splits,<sup>39</sup> and the timing of the Leahy proposal strongly suggests that Senator Leahy had the same intent. We would define the “retired Justices problem” more broadly. In fact, as explained in Section C, the 4–4 split may not be a real problem. But even if the original reasons for the proposal do not themselves warrant a change, there may well be other significant benefits from permitting retired Justices to serve on the Court as substitutes for recused Justices.

Retired Justices are a valuable human resource—however small and elite the group making up that resource might be—and one that is underutilized under the existing statutory scheme.<sup>40</sup> This problem may be solved in part by the Leahy bill, but other solutions may also be appropriate. In considering the roles that retired Justices might appropriately play, this Part also discusses how to structure incentives to encourage retired Justices to continue to serve the public.

### *B. Retirement’s Costs*

In some ways, a Justice’s decision to retire resembles a retirement decision in any other profession, and, in many respects, the outcome is the same. The Court temporarily loses some ability to disperse its workload. The seat loses someone with experience and expertise that is almost invariably unmatched—at least at first—by her replacement’s.

But the retirement of a Supreme Court Justice differs from other retirements. Unlike employees in other professions, Justices retire and then remain completely disengaged from the Supreme Court decisionmaking process. For professionals from physicians to athletes to corporate executives, even for lawyers in top firms, retirement usually means continued engagement—if not directly, at least as a consultant.<sup>41</sup> Retired oncologists and Hall of Fame coaches may remain available to review difficult files, assist in tough cases, or offer

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39. *See id.* (remarking that there would be a “[c]lear advantage in having there be a 5–4 split, [which would] get the conflict resolved”).

40. *See* 28 U.S.C. § 294(d) (2006) (outlining the procedure for assigning retired judges and Justices to perform judicial duties in the lower courts and noting that no designations or assignments “shall be made to the Supreme Court”).

41. *See* Neal E. Cutler, *Working in Retirement: The Longevity Perplexities Continue*, J. FIN. SERVICE PROFESSIONALS, July 2011, at 19, 21 (analyzing survey data to show that a quarter of respondents ages sixty-five to seventy-five reported that they were both retired and working).

their expertise for a fee to whoever needs it, wherever they might be, but particularly to their former employers.

And, to be certain, the decision to continue serving as a consultant need not be motivated by financial remuneration, because by retirement most professionals are financially secure.<sup>42</sup> Rather, they assist both because they can and because they enjoy the work.<sup>43</sup>

Yet when it comes to Supreme Court Justices—some of the most accomplished, experienced, dedicated professionals in the country—this option to remain a “player” is not available. Thus, the ineligibility of retired Justices to serve on the Supreme Court carries at least one obvious cost: it contributes to the atrophy of a valuable human resource, even when retired Justices remain active in other respects.

### C. *Avoiding 4–4 Splits*

Although loss of human capital may be the broad problem occasioned by Justices’ retirements, proposals to permit them to return and “pinch hit” typically target a more specific issue: 4–4 splits due to recusals. When the Court divides evenly—in Court parlance, “affirms by an equally divided Court”—the lower court’s ruling stands, but no precedent is set.<sup>44</sup> An analysis of any proposal along

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42. Whether Supreme Court Justices are financially secure upon retirement will vary from case to case, notwithstanding the fact that Justices earn their full judicial salaries for life. *See* 28 U.S.C. § 371(a) (2006) (“Any justice or judge of the United States appointed to hold office during good behavior may retire from the office after attaining the age and meeting the service requirements . . . and shall, during the remainder of his lifetime, receive an annuity equal to the salary he was receiving at the time he retired.”). As Chief Justice Roberts has noted in his annual *Year-End Report on the Federal Judiciary*, judicial salaries are quite low as compared to those of other high-profile lawyers. *See, e.g.*, JOHN G. ROBERTS, JR., 2008 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7 (2008), available at <http://www.supremecourt.gov/publicinfo/year-end/2008year-endreport.pdf> (“I suspect many are tired of hearing it, and I know I am tired of saying it, but I must make this plea again—Congress must provide judicial compensation that keeps pace with inflation.”).

43. *See* Michael C. Dorf, *Some Possible Hidden Complications of a Senate Proposal To Permit Retired Justices To Pinch-Hit for Their Recused Colleagues*, FINDLAW (Oct. 6, 2010), <http://writ.news.findlaw.com/dorf/20101006.html> (commenting on how Justices O’Connor and Stevens have “expressed an interest in hearing cases by designation on [the] Court” and how “[e]ach of them remains mentally razor-sharp”).

44. Scholars have discussed whether letting a lower court decision stand is, in fact, a problem. *See, e.g.*, Thomas E. Baker, *Why We Call the Supreme Court “Supreme”: A Case Study on the Importance of Settling the National Law*, 4 GREEN BAG 2D 129, 130–31 (2001) (arguing that affirmation by an equally divided Court fails to settle important issues); Hartnett, *supra* note 9, at 678 (“[T]here is good reason to retain the clear and long-established practice of the Supreme Court of the United States to affirm when, in the exercise of its appellate jurisdiction, it finds itself evenly divided as to the judgment.”); William L. Reynolds & Gordon G. Young, *Equal Divisions in the Supreme Court: History, Problems, and Proposals*, 62 N.C. L. REV. 29, 56

the lines of the Leahy bill should therefore consider how serious a problem the 4–4 split really is.<sup>45</sup>

In quantitative terms, the answer appears to be “not very.” On average, more than one-third of Supreme Court cases are decided unanimously.<sup>46</sup> For example, in October Term 2009,<sup>47</sup> forty of eighty-six cases resulted in unanimous decisions.<sup>48</sup> Out of the cases that are not decided unanimously, most are decided 8–1, 7–2, or 6–3.<sup>49</sup> Therefore, although the general public may have the perception that most cases split the Court 5–4—often along ideological lines with Justice Kennedy casting the swing vote<sup>50</sup>—5–4 votes in fact constitute a small percentage of the Court’s decided cases.<sup>51</sup> And even among

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(1983) (“Th[e] practice [of affirming without opinion when the Court is split] has the virtue only of simplicity, failing to address either the Justices’ obligations to the litigants or to other branches of government.”); Jason Mazzone, *4–4 Is Fine*, BALKINIZATION (Oct. 8, 2010, 1:59 PM), <http://balkin.blogspot.com/2010/10/4-4-is-fine.html> (“The only effect of a 4–4 outcome is that the lower court decision stands. That can’t be a problem because it’s the result that occurs in the hundreds of cases the Court declines to hear each term. And it’s the result in the millions of cases that the Court is not even asked to review.”).

45. Note that Senator Leahy himself identified 4–4 splits as the chief harm that his bill sought to remedy, saying, “Given the Court’s recent rash of 5:4 rulings, the absence of one Justice could result in a 4:4 decision.” Press Release, Senator Patrick Leahy, Leahy Proposes Bill To Allow Retired Justices To Sit on Court by Designation (Sept. 29, 2010), *available at* [http://leahy.senate.gov/press/press\\_releases/release/?id=D8C57B55-3988-4E00-BDE7-13459F4AB540](http://leahy.senate.gov/press/press_releases/release/?id=D8C57B55-3988-4E00-BDE7-13459F4AB540).

46. See *Final Stats OT09*, SCOTUSBLOG, 4 (July 7, 2010), <http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf> (citing statistics for October Term 2006 (38 percent of cases decided unanimously), October Term 2007 (30 percent decided unanimously), October Term 2008 (33 percent decided unanimously), and October Term 2009 (47 percent decided unanimously)). For all four reported terms, more cases were decided unanimously than by a 5–4 vote split. *Id.*

47. As of this writing, October Term 2009 is the most recent full term for which there is data.

48. *Final Stats OT09*, *supra* note 46, at 4.

49. See *id.* (citing statistics for October Term 2006 (12 percent of cases decided 8–1, 12 percent decided 7–2, 4 percent decided 6–3), October Term 2007 (8 percent of cases decided 8–1, 28 percent decided 7–2, 14 percent decided 6–3), October Term 2008 (5 percent of cases decided 8–1, 16 percent decided 7–2, 16 percent decided 6–3), and October Term 2009 (9 percent of cases decided 8–1 or 7–1, 15 percent decided 7–2, 10 percent decided 6–3)).

50. See Robert Barnes, *Term Saw High Court Move to the Right*, WASH. POST, July 1, 2009, at A1 (“It is a familiar ideological split: Roberts, Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr. on one side; Stevens, Ginsburg, Stephen G. Breyer and Souter on the other. Justice Anthony M. Kennedy remains in the role of the decider, finding himself in the majority more than any other justice and siding twice as often in 5 to 4 votes with conservatives as he did with liberals.”); Adam Liptak, *The Roberts Court, Tipped by Kennedy*, N.Y. TIMES, July 1, 2009, at A1 (calling Kennedy “the most powerful jurist in America”).

51. In the 2009 term, the Court split 5–4 in only fourteen of the seventy-two cases in which it issued signed merits opinions. *Final Stats OT09*, *supra* note 46, at 4 (stating that there were

these cases, some are not split along ideological lines.<sup>52</sup> In recent years, the Court has, on average, decided fewer than one case per term by a 4–4 vote as a result of a recusal.<sup>53</sup>

Indeed, the problem remains quantitatively small even in an extraordinary term, such as October Term 2010. When Justice Kagan promised to recuse herself from roughly one-third of the Court's docket, the 4–4 split was still not a serious problem. Based on the voting pattern from the October Term 2009, one of us predicted that Justice Kagan's recusal in roughly one-third of the Court's cases would only result in two or three 4–4 splits.<sup>54</sup> As the term unfolded, her decision to recuse herself resulted in two such splits.<sup>55</sup> Those two cases involved the following questions: whether the first-sale doctrine applies only to copyrighted items that are made and distributed in the United States;<sup>56</sup> and whether a citizenship-transmission statute that imposes different standards for children born out of wedlock, depending on whether their mothers or fathers are citizens, is constitutional.<sup>57</sup> These are not unimportant issues, but a delay in resolving them will not do serious damage.<sup>58</sup>

Thus, there was hardly a compelling case for the Leahy bill based on a need to avoid 4–4 splits even when it was proposed, much less in

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sixteen 5–4 cases but including in that total two cases that were actually 5–3). *But see* Press Release, Senator Patrick Leahy, *supra* note 45 (remarking on “the Court’s recent rash of 5:4 rulings”).

52. Five of the fourteen 5–4 decisions were not split along ideological lines. *Final Stats OT09*, *supra* note 46, at 3.

53. See Ryan Black & Lee Epstein, *Recusals and the “Problem” of an Equally Divided Supreme Court*, 7 J. APP. PRAC. & PROCESS 75, 92 (2005) (finding an average of 0.65 4–4 splits per term from 1986 to 2003). During the 2010 term, two cases were affirmed by an equally divided Court. *Stat Pack for October Term 2010*, *supra* note 1, at 3.

54. Dorf, *supra* note 43. Moreover, the Leahy bill seems poorly suited for resolving ideologically divisive 4–4 splits. *See id.* (“Based on recent experience, in roughly half of the 5–4 cases in which Justice Stevens was in the majority, the Court split on ideological grounds. Yet in those cases, the conservative Justices might be reluctant to call on the assistance of one of their retired colleagues. And the selection of a particular Justice could itself be fraught.”); *see also infra* text accompanying notes 90–91.

55. See *Stat Pack for October Term 2010*, *supra* note 1, at 3.

56. See *Costco Wholesale Corp. v. Omega, S.A.*, 131 S. Ct. 565 (2011) (mem.), *aff'g mem. per curiam by an equally divided Court* 541 F.3d 982 (9th Cir. 2008).

57. See *Flores-Villar v. United States*, 131 S. Ct. 2312 (2011) (mem.), *aff'g mem. per curiam by an equally divided Court* 536 F.3d 990 (9th Cir. 2008).

58. Conversely, the Court may fail to produce a majority opinion even when no Justice is recused. For an example from the October 2010 Term, see *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011).

retrospect. As Justice Kagan's recusal rate settles to normal, the argument becomes weaker still.

To be sure, there have been, and will continue to be, other periods when the Court finds itself with only eight members available, but there is little evidence to suggest that the experience during Justice Kagan's first term was anomalous for such periods. Consider the last year of Chief Justice Rehnquist's service, during which the Chief Justice was battling throat cancer and thus was repeatedly unavailable for Court business. Nonetheless, based in part on the late Chief Justice's judicious marshalling of his remaining strength,<sup>59</sup> no 4–4 splits occurred.<sup>60</sup> Large numbers of recusals or absences by future Justices could, in principle, lead to a substantial number of 4–4 splits, but that prospect is, for now, only hypothetical. We would be hard pressed to disagree with Professor Jason Mazzone's characterization of the Leahy proposal as “a solution in search of a problem”<sup>61</sup>—at least so long as the proposal's goal is understood to be transforming a substantial number of 4–4 splits into 5–4 rulings.

Yet it could be argued that even one 4–4 split can be harmful. If a case presented an issue of sufficient importance to warrant a grant of certiorari in the first place, then failure to resolve the issue would be harmful, regardless of the outcome.<sup>62</sup> We agree that this argument adds some force to the case for the Leahy proposal but would caution against overstating the point for two reasons.

First, issues that are truly important to resolve are likely to recur, and a Justice who recused herself the first time a case came before the Court might often decide to participate the second time. Because the new case might involve different parties or circumstances, the Justice's view on whether or not a conflict existed might change.

Second, the Court is unlikely to be able to utilize a substitute Justice in precisely the cases that we have reason to think would

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59. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 74 (2005) (noting—and criticizing—“Chief Justice Rehnquist's decision, when he first fell seriously ill in the fall of 2004, to participate for a time only in the decision of cases in which his would be the deciding vote”).

60. We searched for the term “affirmed by an equally divided Court” in the Supreme Court Westlaw database during the acute period of Chief Justice Rehnquist's illness and returned no results. *Accord The Supreme Court, 2004 Term—The Statistics*, 119 HARV. L. REV. 415, 423 tbl.I(C) (2005) (denoting no 4–4 splits for the October 2004 Term).

61. Mazzone, *supra* note 44.

62. *Cf. Di Santo v. Pennsylvania*, 273 U.S. 34, 42 (1927) (Brandeis, J., dissenting) (“It is usually more important that a rule of law be settled, than that it be settled right.”). In explaining his support for the Leahy bill, Justice Stevens made this same claim. See *supra* note 39.

result in 4–4 splits: ideologically divisive cases. In such circumstances, the more conservative Justices would presumably hesitate to call upon the services of a retired Justice who could swing the result in a liberal direction, and vice versa. As we explain in our discussion of strategic considerations, this problem is likely to persist regardless of what mechanism is used to select the particular retired Justice to use as a substitute at times when more than one retired Justice is available.

In sum, 4–4 splits do not present a large problem when evaluated in quantitative terms and, although they could present a substantial problem qualitatively, the Leahy proposal is unlikely to do much to solve that problem.

#### D. *Quorums and Institutional Dynamics*

Historically, proposals to permit substitutes on the Supreme Court have tended to arise in response to the risk that no quorum<sup>63</sup> would be available to resolve an important case.<sup>64</sup> But for much the same reason that the Leahy bill is unnecessary to resolve 4–4 splits, it is unnecessary to create a quorum: cases in which there is no quorum very rarely arise because the reasons one Justice may have for a recusal tend to be unconnected to the reasons for recusal of the other Justices.<sup>65</sup> And in the sorts of cases in which we might expect recusals

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63. A quorum for Supreme Court purposes is six Justices. 28 U.S.C. § 1 (2006); SUP. CT. R. 4.

64. See, e.g., *To Change the Quorum of the Supreme Court of the United States: Hearing on H.R. 2808 Before Subcomm. No. 4 of the H. Comm. on the Judiciary*, 78th Cong. (1943) (detailing hearings on a bill related to the Supreme Court's quorum requirements).

65. Most Justices' conflicts due to prior professional experience disappear after a year or two on the Court, although there are exceptions. See, e.g., *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 314 (2d Cir. 2009) (noting that Justice Sotomayor was originally a member of the Second Circuit panel for this case, which was argued on June 7, 2006, and that Sotomayor was elevated to the Supreme Court on August 8, 2009, prior to the September 21, 2009, decision), *cert. granted*, 131 S. Ct. 813 (2010) (noting that Justice Sotomayor took no part in the consideration or decision of the petition). When he was confirmed in 1967, after serving as solicitor general, Justice Marshall recused himself in sixty-one cases, fifty-three of which were related to his work as solicitor general. Mark Walsh, *A Changing Landscape: In First Court with Three Women, All Eyes Are on Justice Kagan*, A.B.A. J., Oct. 2010, at 24, 25 (quoting Supreme Court practitioner Thomas C. Goldstein). Thereafter, Justice Marshall's prior service as solicitor general rapidly ceased to warrant recusal, but throughout his career on the Court, he recused himself "in all cases involving two organizations with which he had long been associated—the National Association for the Advancement of Colored People and the NAACP Legal Defense (later 'and Education') Fund." Ross E. Davies, *The Reluctant Recusants*, 10 GREEN BAG 2D 79, 80 (2006). Once on the Court, most Justices work actively to avoid situations which might create conflicts and lead to recusals. See, e.g., Adam Liptak & Duff Wilson, *Justices To Examine Rights*



to be correlated—such as disputes over judicial pay or cases that involve so many corporate parties that multiple Justices can be expected to have a financial stake or a substantial prior relationship with at least one of them<sup>66</sup>—retired Justices would probably also recuse themselves. In these circumstances, the so-called “rule of necessity” should be a sufficient safeguard for ensuring that important cases are heard.<sup>67</sup>

To be sure, one can imagine tragic circumstances in which multiple vacancies might cripple the Court. A plague, terrorist attack, or fatal accident that simultaneously killed or disabled multiple Justices, for example, could impair the Court’s ability to function. But such a tragedy would call for a much more robust and targeted response than the one contemplated by the Leahy bill.

In the ordinary course of events, the Justices have shown a considerable capacity for accommodating one another’s career timetables. For example, when two or more Justices have been considering retirement in the same period, they have usually avoided saddling the president and Senate with simultaneous vacancies. Thus, Justice Marshall retired one year after Justice Brennan did, and Justice Stevens retired one year after Justice Souter did. Even when unforeseen events have outpaced the Justices’ plans—such as when Chief Justice Rehnquist died shortly after Justice O’Connor had announced her retirement, thus creating two simultaneous vacancies—the Court and the political system have quickly adjusted. On that occasion, President Bush redesignated the nomination of John Roberts from the O’Connor seat to the Chief Justice’s chair. Roberts was confirmed in time for the start of the new term, while

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*of Corporations*, N.Y. TIMES, Sept. 29, 2010, at A20 (citing Chief Justice Roberts’s selling of Pfizer stock so that he could participate in two cases the company had before the Court). *But cf.* *Cheney v. U.S. Dist. Court*, 541 U.S. 913 (2004) (Scalia, J.) (order denying motion to recuse) (declining to recuse himself after some commentators suggested that his duck-hunting trip with Vice President Cheney, the petitioner in the case, raised a potential conflict).

66. *See* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008) (mem.) (describing a case in which Chief Justice Roberts and Justices Kennedy, Breyer, and Alito took no part in the consideration or decision of the petition).

67. The “rule of necessity” provides that even if a judge or Justice has an interest in a case, she must hear and decide the case if it otherwise cannot be heard. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 213–16 (1980) (describing the origin of the “rule of necessity”).

O'Connor retained her seat pending the confirmation of her own eventual successor.<sup>68</sup>

What about cases in which only one, two, or three Justices are recused? Although the substitution of a retired Justice for a recused Justice would not be necessary to reach a quorum, it might have secondary effects on the dynamics of the Court at oral argument and in conference.<sup>69</sup> Particularly in a small, close-knit group that works together for a number of years, having a group of eight rather than nine might well present a different kind of problem and raise a different kind of question: Do we value the conversation among nine Justices to the extent that having only eight, or only seven, or even only six diminishes the quality of the process and devalues the resulting decision, even when a majority prevails?<sup>70</sup>

Undoubtedly, deliberations among a Court of six would be somewhat different from deliberations among a Court of nine, although it is difficult to say exactly how.<sup>71</sup> In any event, a seriously shorthanded Court occurs with sufficient infrequency to suggest that this situation, too, is generally not a problem.<sup>72</sup>

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68. Thus, the Court was not shorthanded, even though it took three nominees to fill O'Connor's seat: Roberts; then, upon his move to Chief Justice, Harriet Miers; and, following the withdrawal of her nomination, Samuel Alito. GARRETT & RUTKUS, *supra* note 15, at 4–7.

69. See, e.g., Clifford May, *On Judges and Justice: Byron White Reflects on Court and Critics*, ROCKY MTN. NEWS, June 30, 1996, at 69A, reprinted in DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* app. C at 467 (1998) (“[E]very time a new justice comes to the Supreme Court, it’s a different court.” (quoting Justice White)).

70. Cf. Berkolow, *Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos*, 15 VA. J. SOC. POL’Y & L. 299, 329 n.142 (2008) (“While this is troubling in the fractured opinion settling [*sic*], we do not tend to draw distinctions between a close majority (5–4) and a stronger majority (8–1) in terms of ascribing precedential weight. Even unanimous decisions are not necessarily valued any differently as precedent.”).

71. Although we cannot observe the Court’s deliberations, we can look to research about how juries deliberate for guidance. For a summary of the large volume of research on the effect of jury size on deliberations, see Dennis J. Devine, Laura D. Clayton, Benjamin B. Dunford, Rasmey Searing & Jennifer Pryce, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL’Y & L. 622, 624–64 (2001). See also Ballew v. Georgia, 435 U.S. 223, 232–39 (1978) (plurality opinion) (citing research in an effort to determine what size jury is necessary to guarantee the Sixth Amendment right to a trial by jury in criminal cases).

72. Even between 1946 and 2003, when the overall recusal rate was substantially higher than it has been recently (excepting Justice Kagan’s first year on the Court), at least eight Justices participated in almost 97 percent of the Court’s cases. See Black & Epstein, *supra* note 53, at 90 n.59 (explaining the results and methodology of an empirical study of the use of discretionary recusals).

*E. Strategic Considerations Under the Leahy Bill*

The foregoing Sections show that the Court would only rarely benefit substantially from the services of a retired Justice substituting for a recused or otherwise absent Justice. And even in those cases in which such a substitution might be thought beneficial, problems remain.

With recusal at the discretion of each Justice,<sup>73</sup> a Justice makes a difficult decision in each case that might warrant recusal. Although Justices seek to avoid the appearance of impropriety,<sup>74</sup> whether a failure to recuse gives rise to such an appearance is often debatable. Because the Court is largely impervious to criticism in such cases,<sup>75</sup> because Justices would almost certainly recuse themselves in clear-cut conflict situations, and because impeachment is the only available remedy for clearly unethical decisions not to recuse,<sup>76</sup> Justices are largely unaccountable for their recusal decisions.

Consider, then, the following hypothetical example: A petitioner asks the Court to grant certiorari in a controversial case, one which might well divide the Court 5–4. As the petition begins to make its way through the Court’s review process, one Justice notes that she may have a conflict requiring recusal.<sup>77</sup>

As the law now stands, in making her recusal decision, that Justice must consider whether the potential conflict would affect her ability to decide the case neutrally and whether the conflict might

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73. 28 U.S.C. § 455(a) (2006); *see also* *Cheney v. U.S. Dist. Court*, 541 U.S. 913, 915–16 (2004) (Scalia, J.) (order denying motion to recuse) (arguing by implication that the decision to recuse when the rules do not clearly dictate recusal is up to each individual Justice).

74. *See, e.g.*, Caprice L. Roberts, *The Fox Guarding the Henhouse?: Recusal and the Procedural Void in the Court of Last Resort*, 57 RUTGERS L. REV. 107, 123–24 (2004) (discussing Justice Scalia’s recusal in *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), a Ninth Circuit case that he had criticized prior to the Supreme Court’s hearing the case); *cf.* MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2007) (“A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”).

75. *See Cheney*, 541 U.S. at 923 (arguing that Justices should not recuse themselves merely because “a significant portion of the press” demands it).

76. *See* U.S. CONST. art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

77. Because recusal almost always occurs before the Justices discuss the certiorari petition at conference, a Justice must make the decision about whether to recuse herself before she knows whether four of her colleagues will vote to grant certiorari. *See, e.g.*, *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 1133 (2010) (granting the petition for a writ of certiorari and noting that “Justice Breyer took no part in the consideration or decision of this petition”).

create the appearance of impropriety.<sup>78</sup> But were Congress to authorize the substitution of a retired Justice to fill the vacancy, she might well consider one additional factor: which retired Justice might take her place in deciding the case were she to recuse herself.<sup>79</sup>

Why? Because if the Justice would likely be part of a five-Justice majority, then her recusal would reduce the votes on her side of the issue to four. Were a Justice of a different ideological ilk to take her place, the majority—and the opportunity to set precedent in a controversial area of the law—would go to the other side.

So what is a Justice in this position to do? At a formal and conscious level, the answer is clear: the Justice should decide whether to recuse without regard to such collateral consequences.<sup>80</sup> But as

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78. 28 U.S.C. § 455(a)–(b). According to Senator Leahy, some Justices might choose not to recuse themselves simply because their absences from the cases might create a 4–4 split. *See* Press Release, Senator Patrick Leahy, *supra* note 45 (“Retired Justices may be designated to sit on any court in the land except the one to which they were confirmed . . . . The bill I am introducing today will ensure that the Supreme Court can continue to serve its essential function. In recent history, Justices have refused to recuse themselves and one of their justifications has been that the Supreme Court is unlike lower courts because no other judge can serve in their place when Justices recuse.”); *see also* *Cheney*, 541 U.S. at 915 (“Let me respond, at the outset, to Sierra Club’s suggestion that I should ‘resolve any doubts in favor of recusal.’ That might be sound advice if I were sitting on a Court of Appeals. There, my place would be taken by another judge, and the case would proceed normally. On the Supreme Court, however, the consequence is different: The Court proceeds with eight Justices, raising the possibility that, by reason of a tie vote, it will find itself unable to resolve the significant legal issue presented by the case.” (citations omitted)); Black & Epstein, *supra* note 53, at 75–81 (describing the commonly held sentiment among Supreme Court Justices that the possibility of a split-decision should weigh into a Justice’s determination of whether or not to recuse herself); *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1039 (2004) (“In interpreting this provision, one should distinguish the situation of a district judge or a court of appeals judge, from that of a Supreme Court Justice. A case such as the one you mentioned would be an easy call for a judge who was replaceable, for example, a court of appeals judge on a three-judge panel. If there were any doubt, that judge could step out and let one of her colleagues replace her. But on the Supreme Court, if one of us is out, that leaves eight, and the attendant risk that we will be unable to decide the case, that it will divide evenly. Some think that a recusal in the Supreme Court is equivalent to a vote against the petitioner. When cases divide evenly, we affirm the decision below automatically. Because there’s no substitute for a Supreme Court Justice, it is important that we not lightly recuse ourselves.”).

79. Note that Senator Leahy himself did not view this problem as likely to arise. Barring retired Justices from pitching in “defies common sense,” he maintained, while their availability “would encourage sitting justices to recuse themselves when there is even an appearance of a conflict of interest.” Jess Bravin, *Welcome Back, Souter (and O’Connor and Stevens)*, WALL ST. J. WASH. WIRE (Sept. 29, 2010, 1:04 PM ET), <http://blogs.wsj.com/washwire/2010/09/29/welcome-back-souter-and-oconnor-and-stevens>.

80. Justice Stevens is emphatic that Justices must recuse themselves when recusal rules so dictate, without regard for strategic considerations including the possibility of a 4–4 split. *See*

human beings, Justices are subject to all of the same cognitive biases as everyone else, so they can be expected to make close recusal decisions under the influence of their strategic perceptions of the consequences for the merits.<sup>81</sup> Even if only unconsciously, a Justice might choose not to recuse herself under a rotation system, in which she knew exactly which retired Justice was next in line to fill an empty seat, or under a random system, in which a Justice was to be chosen at random but the odds were unfavorable for an ideological ally to be the choice. Likewise, she might choose not to recuse herself in a system like the one suggested by Justice Stevens, in which a retired Justice would be slotted in based on his or her legal expertise,<sup>82</sup> if that Justice's views on the issue in the case were well known, or at least easily anticipated, and did not align with the potentially recused Justice's own.<sup>83</sup>

Strategic decisionmaking would not necessarily be limited to cases in which a sitting Justice was recused. Sitting Justices would always be aware that their retired colleagues could become unretired for the purposes of some case down the road. With that prospect in mind, a Justice might not choose to overrule a case in which a retired colleague wrote the majority because she might need that colleague's vote in a future case down the road. Although the Court's culture does not allow explicit logrolling, that fact does not mean that Justices never consider one another's presumed preferences.<sup>84</sup>

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Telephone Interview with John Paul Stevens, *supra* note 7 (“Standards of recusal are totally independent of what would occur after recusal.”).

81. For insight into how the thinking behind this strategic decisionmaking might work, see generally Albert H. Hastorf & Hadley Cantril, *They Saw a Game: A Case Study*, 49 J. ABNORMAL & SOC. PSYCHOL. 129 (1954).

82. Justice Stevens offered the example of recalling Justice Blackmun when the Court was shorthanded on tax cases, had the proposal been in effect between Justice Blackmun's retirement and death. Telephone Interview with John Paul Stevens, *supra* note 7; see generally Robert A. Green, *Justice Blackmun's Federal Tax Jurisprudence*, 26 HASTINGS CONST. L.Q. 109 (1998) (describing Justice Blackmun's experience in writing tax opinions).

83. Strategic opportunities become even more obvious under the language of the proposed law. According to the Leahy bill, “a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice.” S. 3871, 111th Cong. sec. 1, § 2(b) (2010). Therefore, according to the bill's plain language, when choosing a retired Justice to fill the seat of a recused Justice, the selection would not be random. Instead, the eight remaining sitting Justices would choose the retired Justice who would substitute. Therefore, the four Justices who vote to grant certiorari could push for a particular retired Justice to sit in, and they would effectively win the case before it is even argued.

84. Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569, 607 (2003) (“It is often observed—correctly—that logrolling

*F. Administrability*

The Leahy proposal leaves open many issues of administration: Would the retired Justice write opinions? Would she participate in the conference at which certiorari is granted if the recusal occurred before certiorari were granted? Would she share her one law clerk with another chambers for that particular case, or would a screening mechanism be adopted to prevent the retired Justice's law clerk from acting as a conduit of information between chambers? Would that one clerk take on a disproportionate amount of work<sup>85</sup> as compared to the chambers of sitting Justices, where four clerks routinely serve?<sup>86</sup> If there were only one living retired Justice, as was the case, for example, when Justice O'Connor retired,<sup>87</sup> would the proposal require that individual to serve as a substitute in every case in which a sitting Justice recused herself, even if, as in October Term 2010, that would mean participating in one-third of the Court's caseload for the term?<sup>88</sup>

Beyond the practicalities of implementing a substitution system, as we have already suggested, the system itself would require a mechanism to select which retired Justice would serve when multiple retired Justices were available. The two most obvious approaches are random selection and strict rotation. A strict rotation system could lead to some of the problems already discussed, with Justices, at least subconsciously, making recusal decisions and voting on whether to substitute a retired Justice based in part on how the particular substitute would be likely to vote on the merits. The same problem arises out of a different proposal suggested to us by Justice Stevens—

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is prohibited under the decisional norms of the Supreme Court, but it is impossible to erase considerations of good will entirely from human behavior.” (footnote omitted)).

85. In addition to drafting opinions, law clerks in many chambers routinely, *inter alia*, participate in the certiorari pool, write bench memos, help prepare their Justice for conference and oral argument, work on petitions for stays of executions, and write speeches. *See generally* TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* (2006) (describing the multi-faceted responsibilities of Supreme Court clerks).

86. EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, *SUPREME COURT PRACTICE* 37 (9th ed. 2007).

87. The same was also true when several other Justices retired, as well as for many Justices who left the Court in the years before retirement was possible. *See, e.g.*, ATKINSON, *supra* note 12, at 80 (describing the retirement of Justice Moody).

88. The Supreme Court decided eighty-two merits cases during the 2010 term. *Stat Pack for October Term 2010*, *supra* note 1, at 27. Justice Kagan was recused in twenty-eight, Chief Justice Roberts in one, and Justice Sotomayor in two. *Id.* at 43–51.

using an “expert” retired Justice in a case involving specialized expertise.<sup>89</sup>

According to the Leahy bill, a majority of active Justices would have to vote to substitute a retired Justice for a recused one. If Justices voted for or against a *particular* Justice,<sup>90</sup> then the mechanism would almost surely fail in precisely those cases in which it might be thought most useful: predictably ideologically divisive 4–4 splits. The decision to bring in a particular Justice would be made with knowledge of the outcome to which that Justice’s participation would likely lead.<sup>91</sup> That fact, in turn, suggests that no substitution would occur in ideologically divisive cases or that some other system of selection would have to be used.

For these reasons, we think that a lottery system would likely be deemed most practicable, although with a small number of retired Justices at any given time, strategic factors could still play a role. For example, the three Justices that were retired in 2011—Justice Stevens, Justice O’Connor, and Justice Souter—were all more liberal on most issues than the median Justice—Justice Kennedy. Thus, under these—and most foreseeable—circumstances, just about any selection method could give rise to strategic behavior.

We do not mean to suggest that the foregoing objections are impossible to answer, but merely that no answer will be perfect or even mostly satisfactory. Indeed, it is not even clear what mechanism would be used to provide the answers: All of these issues could be resolved in an amended version of the Leahy bill, but for Congress to specify too much about what is in substantial measure a matter of the Court’s internal decisional processes could be seen as a threat to separation of powers. Within the Court, such matters could be resolved by any number of mechanisms, including the promulgation by a majority of the Court of an amendment to the Supreme Court

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89. See *supra* note 82.

90. The bill is unclear as to whether the Justices would vote to substitute a particular retired Justice or just a retired Justice in general. By its plain language, it would appear to suggest that a particular Justice would somehow come before the conference for a vote (“a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice”), but the bill does not specify how that Justice would be selected. S. 3871, 111th Cong. sec. 1, § 2 (2010).

91. The Leahy bill is also unclear in defining exactly who constitutes the majority, saying only “a majority of active justices vote to designate and assign that retired Chief Justice or Associate Justice.” *Id.* Would the “majority” number include the recused Justice, meaning that only four Justices involved in the case would have to vote to substitute in the retired Justice? Or would the number include only the eight Justices involved in the case?

Rules.<sup>92</sup> Alternatively, the Court could adopt an internal practice for the selection of retired Justice substitutes without codifying that practice in any formal rule, presumably by consensus.<sup>93</sup> The procedure adopted for choosing a method of selecting retired Justices could in turn affect what method would be chosen.

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There appears to be no pressing need for retired Justices to substitute for recused or otherwise absent Justices, and the adoption of a scheme permitting such substitutions could give rise to strategic behavior and implementation difficulties. Even so, these concerns, although serious, are not so grave as to render proposals along the lines of the Leahy bill complete nonstarters. As noted at the beginning of this Part, retired Justices are a valuable resource whose continued engagement in Supreme Court decisionmaking could provide genuine, if modest, benefits.

### III. IS THE LEAHY PROPOSAL CONSTITUTIONAL?

Based on the foregoing considerations, we think the case for the Leahy bill is at best uncertain. Nonetheless, others may weigh the costs and benefits differently. For those who conclude that the proposal, on balance, deserves support, a further issue arises: Is it constitutional? This Part considers the constitutional limits on the ability of Congress to authorize retired Justices to perform judicial duties. Although there is a nonfrivolous argument that the Leahy proposal would violate Article III's requirement that there be "one supreme Court," we ultimately reject that argument. We conclude that as long as Justices have only retired from active duty, rather than having resigned their commissions, neither Article III nor any other constitutional provision forbids them from serving on the Supreme Court or on lower federal courts by designation.<sup>94</sup>

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92. See 28 U.S.C. § 2071(a) (2006) (setting forth the power of the Supreme Court and the lower courts to promulgate rules of practice and procedure consistent with acts of Congress).

93. The so-called "Rule of Four" for granting a petition for a writ of certiorari is an example of such an uncodified practice. See GRESSMAN ET AL., *supra* note 86, at 323–24 (explaining the Court's "Rule of Four").

94. Indeed, federal statutory law not only permits retired Justices to serve on the lower federal courts by designation, but, subject to an exception for disabled Justices, it mandates such service or other work for retirees who wish to receive any judicial pay raises authorized after their retirement. See 28 U.S.C. § 371(b)–(c), (e) (2006).



A. *Service on Lower Courts*

The Constitution nowhere expressly provides for the retirement of Supreme Court Justices or Article III judges, but from the earliest days of the Republic, it has been understood that Justices and judges can resign their commissions.<sup>95</sup> Most prominently, John Jay, the first Chief Justice, left his seat on the Court to become governor of New York.<sup>96</sup>

Retirement differs from resignation, however. Lower court judges who accept senior status and Supreme Court Justices who retire but remain available to serve by designation on lower courts continue to be members of the Article III judiciary.<sup>97</sup> The relevant statutory language formerly distinguished between a judge who “resigns his office” and one who chooses instead to “retire.”<sup>98</sup> In its current form, however, the U.S. Code distinguishes between a judge or Justice who chooses to “retire from the office” and one who chooses instead to “retain the office but retire from regular active service,” hearing cases only by occasional designation.<sup>99</sup> For clarity and simplicity, we use the older terminology, distinguishing between “resignation” and “retirement.”

The notion that a retired Supreme Court Justice remains an Article III judge was endorsed by the Supreme Court itself. In 1934, in *Booth v. United States*,<sup>100</sup> the Court held that a retired judge is—so far as the salary-protection provision of Article III is concerned—just like any other Article III judge.<sup>101</sup> As a matter of doctrine, then, *Booth* appears to dispose of any constitutional challenge to the practice of retired judges’ and Justices’ providing some form of occasional Article III judicial service.

Moreover, the reasoning in *Booth* remains sound. At least as far as lower federal court judges are concerned, a retired judge is, constitutionally speaking, just another Article III judge. Judges who

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95. WARD, *supra* note 35, at 26.

96. HENRY B. RENWICK, LIVES OF JOHN JAY AND ALEXANDER HAMILTON 119–20 (New York, Harper & Bros. 1841).

97. See *Booth v. United States*, 291 U.S. 339, 352 (1934) (holding that Article III bars Congress from reducing the salary of a retired judge).

98. *Id.* at 348 n.1 (quoting 28 U.S.C. § 375 (1926) (current version at 28 U.S.C. § 371 (2006))).

99. 28 U.S.C. § 371(a)–(b)(1).

100. *Booth v. United States*, 291 U.S. 339 (1934).

101. *Id.* at 351 (concluding that the “status” of a retired judge when sitting by designation “is the same as that of any active judge”).

find themselves no longer able or willing to handle a full docket may still have the energy to oversee a partial docket. Given the Constitution's silence on these matters, Congress should be permitted to take advantage of the cost savings and accumulated wisdom that retired judges provide.

Similarly, service by retired Supreme Court Justices on lower federal courts appears to be constitutionally unobjectionable. As early as 1803, the Supreme Court deemed the practice of assigning active Justices to lower federal courts—via circuit riding—to be so well established as to be beyond constitutional doubt.<sup>102</sup> Admittedly, the Court's ruling in that case, *Stuart v. Laird*,<sup>103</sup> was arguably issued under threat of impeachment or worse from the Jeffersonian Congress.<sup>104</sup> But that fact makes *Stuart* problematic only insofar as it upheld the abolition of judgeships; its terse analysis of the permissibility of circuit riding appears sound.

To be sure, it is possible to parse the text of Article III to mandate a different result by reading the terms “Offices” and “Office” in Section 1 to imply that a judge or Justice is appointed to a particular court only. But this is hardly a required reading. “Office” historically has been read to mean something more generic, such as “judicial office.”<sup>105</sup>

And for good reason. Because an Article III judge cannot be fired or have her salary reduced once named to the judiciary, a rigid reading of “Office” would greatly impede Congress's ability to adjust the organization of the lower courts, as Congress did, for example, when it split the former Fifth Circuit into the current Fifth and

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102. See *Stuart v. Laird*, 5 U.S. (1 Cranch) 299, 309 (1803) (determining that “practice and acquiescence under” the system of circuit riding “for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction” of Article III).

103. *Stuart v. Laird*, 5 U.S. (1 Cranch) 299 (1803).

104. See Michael W. McConnell, *The Story of Marbury v. Madison: Making Defeat Look Like Victory*, in CONSTITUTIONAL LAW STORIES 13, 31 (Michael C. Dorf ed., 2d ed. 2009) (noting that the *Stuart* Court was “powerless to confront [the Judiciary Act repeal] directly”).

105. In *Booth*, the Court took a broad view of the term “office” by holding that a retired judge or Justice retains her “office” even when she is not hearing cases. *Booth*, 291 U.S. at 351. Further, the Court has concluded that Article III allows retired Supreme Court Justices to ride circuit without requiring that they go through the confirmation process again. See *supra* note 102 and accompanying text. This lends support to the idea that the term “office” in section 1 refers broadly to *some* federal judicial office rather than to a seat on any *particular* Article III court.

Eleventh Circuits.<sup>106</sup> Such a reading would also prevent Congress from assigning judges to fulfill temporary judicial duties when the need arises. Instead, Congress would have to create and staff new judicial offices at substantial expense. This disincentive in turn would put pressure on Congress to substitute administrative adjudication for judicial adjudication whenever permissible.<sup>107</sup> Given the overall purpose of Article III—to ensure an independent judiciary—a reading of the protean term “Office” that would lead to the circumvention of the independent judiciary should be avoided. Accordingly, the longstanding practice of assigning retired judges and Justices to hear cases on the lower federal courts raises no substantial questions under Article III.

*B. Article III's Requirement of One Supreme Court*

What about the proposal to permit retired Supreme Court Justices to sit by designation on the Supreme Court itself? Here there is at least a *prima facie* textual obstacle. Article III vests the judicial power in “one supreme Court.”<sup>108</sup> A Court with fluctuating membership, the objection goes, would not be “one” Supreme Court, but several different Courts.

This constitutional objection has some substance. Thus, we do not go quite so far as the late Justice White, who once proposed, without even pausing to consider the text of Article III, that “[r]ather than one Supreme Court, there might be two, one for statutory issues and one for constitutional cases; or one for criminal and one for civil cases.”<sup>109</sup> Even this seemingly radical proposal might have been reconcilable with Article III’s text,<sup>110</sup> but at the least, it should have

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106. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (codified as amended at 28 U.S.C. § 41 (2006)).

107. The outer limits of congressional power to assign potential Article III business to non-Article III bodies are, to say the least, unclear, *see* RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 363 (6th ed. 2009) (suggesting that the Supreme Court’s cases have “brought little but confusion to this area since” 1932), but it is clear that Congress has considerable power in this regard.

108. U.S. CONST. art. III, § 1.

109. Byron R. White, *Challenges for the U.S. Supreme Court and the Bar: Contemporary Reflections*, 51 ANTITRUST L.J. 275, 281 (1982).

110. We describe two arguments for reconciling a divided Supreme Court with the requirement of “one supreme Court.” First, we suggest that the availability of en banc review would satisfy the requirement. *See infra* text accompanying notes 121–122. Second, we note how the constitutionally “real” Supreme Court need not have jurisdiction over all cases to qualify as

raised a prima facie worry. Nonetheless, although the matter is not entirely free from doubt, we believe that the better reading of Article III's requirement of "one supreme Court" would permit retired Justices to serve as substitutes for recused or otherwise-unavailable Justices.

To see why, consider a related question: Could Congress authorize the Supreme Court to sit in panels, rather than in plenary sessions? In two provocative articles, Professors Tracey George and Chris Guthrie offer just such a proposal.<sup>111</sup> They argue that a move to panels, accompanied by an increase in the Court's size, would provide benefits that would outweigh the costs,<sup>112</sup> but they do not address the constitutional objection in any detail.<sup>113</sup> Instead, they assume the validity of Supreme Court panels because Congress and others have repeatedly considered them, because there is a longstanding practice of single-Justice decisions, and because there is no clear prohibition in the constitutional text or history.<sup>114</sup>

We agree with George and Guthrie as a matter of text. Certainly a court that regularly sits in panels—like the U.S. Court of Appeals for the Second Circuit—can be understood as "one" court.<sup>115</sup> But the original understanding of Article III is somewhat more complicated. Professor Ross Davies argues that participants in the debates at the

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the "one supreme Court" in light of the Exceptions Clause. *See infra* text accompanying notes 122–124. Depending on how the courts' jurisdiction was carved up, both arguments would be available in principle to defend Justice White's proposal.

111. Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1458–65 (2009); Tracey E. George & Chris Guthrie, "*The Threes*": *Re-Imagining Supreme Court Decisionmaking*, 61 VAND. L. REV. 1825 (2008) [hereinafter George & Guthrie, "*The Threes*"].

112. *See* George & Guthrie, "*The Threes*," *supra* note 111, at 1847 ("[W]e believe that the benefits associated with doubling or tripling the Court's output—even if this means that some panel decisions would differ from decisions the Court would make as a whole, or that some of the decisions would be of lower quality—would be worth it."). For skepticism toward the policy grounds for the George and Guthrie proposal, see generally Erwin Chemerinsky, Response, *No Warrant for Radical Change: A Response to Professors George and Guthrie*, 58 DUKE L.J. 1691 (2009).

113. *See* George & Guthrie, "*The Threes*," *supra* note 111, at 1847 n.85 ("We do not consider in this paper whether Article III's dictate of 'one supreme Court' requires that all Justices participate in all decisions.").

114. *Id.*

115. The concept of multiple combinations of players making up one team is familiar from sports. In American football, different players take the field for offense and defense; hockey players typically take the ice in shifts; substitutes check in and out of the game in basketball; and baseball teams routinely change at least the pitcher from one game to the next. Yet in each of these examples we have no difficulty referring to the single team that these various combinations of players compose.

Philadelphia Convention assumed that “one supreme Court” meant one *indivisible* Supreme Court.<sup>116</sup> That may only show, however, that the Framers expected the Supreme Court to be indivisible. Davies himself acknowledges that the indivisibility question did not arise during the public debate over ratification.<sup>117</sup> Insofar as the original understanding is the original *public* meaning of the document,<sup>118</sup> we are thus thrown back upon the plain text, which did not and does not answer the question whether the “one supreme Court” must be indivisible.

Postenactment history is also equivocal. Professor Davies characterizes the assumption of Supreme Court indivisibility as “consistently shared by almost all judges, bureaucrats, and scholars” since the Founding.<sup>119</sup> This is an overstatement, as illustrated by the examples—both those that have been adopted and those that were merely proposed—cited by Professors George and Guthrie,<sup>120</sup> as well as one example Davies discusses at length himself: from 1802 to 1839, a single Justice was empowered to act on many matters in place of the entire Supreme Court during an “August Term.”<sup>121</sup>

Even if one thinks the 1802–1839 experience was a constitutional anomaly, there remains a fatal flaw in the argument that Congress

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116. See Ross E. Davies, *A Certain Mongrel Court: Congress's Past Power and Present Potential To Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 685–87 (2006) (discussing this assumption in relation to a debate at the Convention over whether Congress should have the power to raise judicial salaries).

117. See *id.* at 686 (noting that, aside from the Convention debate over judicial salaries, “[t]he ‘one supreme Court’ question was never again an issue in the framing or ratification of the Constitution”).

118. Although neither of the present authors is an originalist in the sense of one who gives decisive weight to the original understanding when it is clear, we both recognize the important role of original understanding in constitutional interpretation. See, e.g., Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. 1765, 1800–22 (1997) (explaining why original understanding may be relevant for nonoriginalists). And we generally agree with those “new originalists” who argue that the original meaning that matters most is the original public understanding rather than the subjective expected applications of the drafters. See, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 89 (2004) (“[T]he words of the Constitution should be interpreted according to the meaning they had at the time they were enacted.”).

119. Davies, *supra* note 116, at 687.

120. See George & Guthrie, “*The Threes*,” *supra* note 111, at 1853–55 (describing past proposals by Congress and in foreign nations to have high courts sit in panels).

121. See Davies, *supra* note 116, at 696–705 (describing the single-Justice “rump Court”); see also Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 268 n.213 (1985) (explaining that Supreme Court panels are not anomalous unless “we confuse the historically familiar with the constitutionally necessary”).

could not authorize the Supreme Court to conduct most of its business in panels. So long as Supreme Court en banc review of panel decisions were available, even a formalist reading of the “one supreme Court” requirement would still be satisfied: The Court sitting en banc would be the “real” indivisible Supreme Court, while the panels could be understood as lower federal courts. The experience of circuit riding—not to mention the service of retired Justices on lower federal courts—validates the service of Supreme Court Justices on lower federal courts, and nothing in Article III prohibits Congress from creating a lower federal court staffed entirely by Supreme Court Justices.

To be sure, en banc review would not always be available to validate the participation of retired Justices in Supreme Court cases. Suppose that, as now, there are two or more retired Justices available to serve on a substitute basis, and that one active Justice is recused. Using the designated procedure—random selection, let us say—one of the retired Justices is chosen to replace the recused active Justice. Now it becomes impossible to locate a single, indivisible Supreme Court that is available for en banc review. One need not be troubled by the absence of the recused Justice, for the possibility of recusal surely does not undermine indivisibility. If it did, then every recusal would violate Article III’s supposed indivisibility requirement. But neither will the remaining retired Justice or Justices who were not chosen as substitutes be called upon to serve on an en banc Court to review the judgment. Consequently, it appears that one might be left to draw the conclusion that substituting a retired Justice for an active one violates the putative indivisibility requirement, even if the use of Supreme Court panels would not.

But such a counterintuitive conclusion would be unwarranted. At the very least, one can concoct a technical fix. Suppose one really thought that Article III required that there be a single indivisible Supreme Court. If so, Congress could denominate the active Justices as the constitutionally required “real” Supreme Court while limiting that body to hearing original-jurisdiction cases and a tiny fraction of the appellate-jurisdiction cases described in Article III. Retired Justices would then be ineligible to serve on original-jurisdiction cases, of which there are precious few.<sup>122</sup> Under such a scheme, the

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122. The Court disposed of fifteen original-jurisdiction cases between 1999 and 2009, averaging fewer than two per term. For the number of original-jurisdiction cases disposed of in each term from 1999 to 2009, see ADMIN. OFFICE OF THE U.S. COURTS, 2010 ANNUAL REPORT

vast majority of the de facto Supreme Court's appellate work—including cases in which a retired Justice substituted for a recused or otherwise unavailable Justice—would be conceptualized for Article III purposes as “really” the work of a lower federal court, much in the way that under the Judiciary Act of 1789, Justices sat on lower federal courts while riding circuit.

The key to this odd arrangement would be that Congress has the power to whittle away the Court's appellate jurisdiction under Article III itself, which authorizes “Exceptions.”<sup>123</sup> It is even possible that Congress could “except” *all* cases from the “real” Supreme Court's appellate jurisdiction, but if one took the view that the very notion of “an ‘exception’ implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases”<sup>124</sup> or some other residual category.

We do not actually favor this clunky arrangement, but we introduce it to show that a highly formalistic reading of “one supreme Court” can be met by a highly formalistic reading of other provisions of Article III. The better course, however, is to look to the functional reality. The technical details of the argument for the constitutionality of Supreme Court adjudication in panels are less important than the bottom line. If so radical a change as Supreme Court panels satisfies Article III—as it arguably does—then it should be very difficult to find constitutional fault with a change so minor as a statute that would permit retired Supreme Court Justices to occasionally

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OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 82 tbl.A-1 (2011); ADMIN. OFFICE OF THE U.S. COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 84 tbl.A-1 (2008); ADMIN. OFFICE OF THE U.S. COURTS, 2003 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 69 tbl.A-1 (2004).

123. See U.S. CONST. art. III, § 2, cl. 2 (“[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).

124. Henry M. Hart, Jr., *The Power of Congress To Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1364–65 (1953). Hart apparently meant this suggestion facetiously. See FALLON ET AL., *supra* note 107, at 296 (assuming that “Hart’s own view” was captured by the dialogue’s other speaker, who posits that “exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan”). The Supreme Court itself, however, has not articulated any real limits on the Exceptions Clause other than those that follow from the constraints on suspension of the privilege of the writ of habeas corpus. U.S. CONST. art. I, § 9, cl. 2; *cf.* *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (noting, but not addressing, “grave questions about Congress’ authority to impinge upon this Court’s appellate jurisdiction, particularly in habeas cases”); *id.* at 672 (Scalia, J., dissenting) (wondering “how there could be any such lurking questions, in light of the aptly named ‘Exceptions Clause’”).

substitute for recused or otherwise-unavailable Justices. One must remember that Article III nowhere expressly states that the “one supreme Court” must be indivisible, so these mental gymnastics may not even be necessary. Thus, we ultimately find no obstacle in Article III to service on the Court by retired Justices. Were Congress to make a policy judgment in favor of the Leahy bill, it should pass constitutional muster under Article III.

#### IV. ETHICAL CONSTRAINTS ON ADJUDICATION BY RETIRED JUSTICES

The Leahy proposal is still not out of the woods, though, and not just because the policy case for it is uncertain. Federal statutory provisions governing disqualifications<sup>125</sup>—and in rare circumstances, the Fifth Amendment’s Due Process Clause<sup>126</sup>—require judges and Justices to recuse themselves from cases in which they are or may be biased. Such recusals will typically provide the very occasion for the substitution of a retired Justice under the Leahy proposal. In addition, retired Justices may themselves be subject to recusal based on the reality or appearance of a conflict of interest.

Indeed, some retired Justices may face conflicts requiring recusal in a relatively large proportion of the cases on which they would otherwise be asked to sit because, unlike that of active Justices, most of a retired Justice’s time will be taken up with nonjudicial tasks, thereby creating the potential for more occasions for recusal. By speaking out on such matters as the death penalty<sup>127</sup> and state judicial

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125. 28 U.S.C. § 455 (2006). The statute expressly applies to “any justice” as well as “any . . . judge.” *Id.* § 455(a). By contrast, the further ethical rules that have been adopted by the Judicial Conference for federal judges do not apply to Supreme Court Justices. *See* CODE OF CONDUCT FOR UNITED STATES JUDGES 2 (2009), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/RulesAndPolicies/conduct/Vol02A-Ch02.pdf> (“This Code applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges.”).

126. *See* *Caperton v. A.T. Massey Coal Co.*, 129 S. Ct. 2252, 2267 (2009) (“Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution.”). Although *Caperton* involved state judges and, thus, the Fourteenth Amendment’s Due Process Clause, the standard is the same for federal judges and Justices under the Fifth Amendment. *Cf.* *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3035 (2010) (noting that the Bill of Rights generally applies the same standards to the federal government as the Fourteenth Amendment applies to the states).

127. Retired Justice Powell chaired a commission that recommended reforms of habeas corpus in cases relating to the death penalty and beyond. *See* AD HOC COMM. ON FED. HABEAS CORPUS IN CAPITAL CASES, JUDICIAL CONFERENCE OF THE U.S., COMMITTEE REPORT (1989), reprinted in 45 *Crim. L. Rep.* 3239 (1989); *see also* *O’Connor Questions Death Penalty Fairness*,



elections,<sup>128</sup> a publicly engaged retired Justice may develop the appearance or reality of a bias more often than would an active Justice who spends the lion's share of her time on Court business.

To be sure, a retired Justice will likely spend a smaller portion of her typical day working than she spent before retirement. That is, after all, the usual point of retiring. Still, if the retired Justice remains reasonably active in public life—as will typically be true of those retired Justices willing to serve as substitutes on the Supreme Court<sup>129</sup>—then she likely will still spend more time on average pursuing extrajudicial matters than before retirement.

In this Part, we ask whether retired Justices' taking an active role in public life is compatible with occasional service as a substitute on the Supreme Court. After concluding that retired Justices ought to have at least as much freedom as active Justices and other Article III judges to perform nonjudicial functions, we ask whether the limits on such activities ought to be relaxed for retired Justices in light of the fact that they only occasionally serve judicial functions. Although the cleaner answer would treat retired and active Justices identically, we tentatively suggest that there may be some room for a wider nonjudicial role by retired Justices.

#### A. *Recusal of Retired Justices Under Existing Law*

Current law provides what might be thought to be a fully dispositive answer to the question of whether retired Justices can return to hear cases. When sitting by designation on a lower federal court, a retired Supreme Court Justice is subject to recusal in exactly the same circumstances as those in which an active judge or Justice would be.

The relevant statute first requires federal judges, Justices, and magistrates to recuse themselves “in any proceeding in which [their] impartiality might reasonably be questioned.”<sup>130</sup> The statute then lists

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ABC NEWS (July 3, 2010), <http://abcnews.go.com/US/story?id=92961> (reporting statements by retired Justice O'Connor expressing reservations about the administration of the death penalty).

128. Retired Justice O'Connor has criticized the politicization of state judicial elections and has called for states to choose their judges by a merit-based selection system. For examples of her public statements on this issue, see Sandra Day O'Connor, *Fair & Independent Courts*, DAEDALUS, Fall 2008, at 8; Sandra Day O'Connor, *How To Save Our Courts*, PARADE, Feb. 24, 2008, at 5; and Sandra Day O'Connor, Op-Ed., *Take Justice off the Ballot*, N.Y. TIMES, May 23, 2010, at WK9.

129. See, e.g., *supra* text accompanying notes 26–30.

130. 28 U.S.C. § 455(a).

further grounds for disqualification, including a provision that will sometimes be triggered by retired Justices who serve on government panels or advisory bodies.<sup>131</sup> It requires recusal when the Justice “has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy.”<sup>132</sup>

Permitting retired Justices to serve on the Supreme Court as well as on lower federal courts would not, and should not, change the recusal standard with respect to particular cases. If a retired Justice has a financial or other conflict that would require recusal from a lower court case, it should require recusal from the Supreme Court itself.<sup>133</sup> With respect to recusal in particular cases, we see no reason to distinguish active from retired Justices or service on the lower federal courts from service on the Supreme Court. One has reason to doubt the impartiality of a retired Justice with a financial interest in a case in exactly the same way one might doubt an active judge or Justice with such an interest, regardless of whether the judge or Justice is sitting on a lower federal court or on the Supreme Court.

#### *B. Retired Justices as Elder Statespersons*

Beyond the requirement of recusal in particular cases, retired Justices and, to the extent that they perform similar functions, lower court judges who have taken senior status,<sup>134</sup> may face conflicts that current law discounts. The issue arises because retired Justices have sometimes taken on the role of “elder statespersons” by serving the country in a nonjudicial capacity.

Consider Justice O’Connor’s service following her retirement on the Iraq Study Group, which produced analysis and concrete policy recommendations on military and foreign-policy matters that fall squarely within the purview of the political branches.<sup>135</sup> We think that

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131. See, e.g., *infra* text accompanying notes 135–143.

132. 28 U.S.C. § 455(b)(3).

133. See *id.* § 455(b)(4) (providing recusal standards for Justices, judges, and magistrates based on financial interest).

134. For simplicity, the balance of this Part omits discussion of lower court judges who have taken senior status.

135. JAMES A. BAKER, III, LEE H. HAMILTON, LAWRENCE S. EAGLEBURGER, VERNON E. JORDAN, JR., EDWARD MEESE III, SANDRA DAY O’CONNOR, LEON E. PANETTA, WILLIAM J. PERRY, CHARLES S. ROBB & ALAN K. SIMPSON, *THE IRAQ STUDY GROUP REPORT* (2006), available at <http://www.usip.org/programs/initiatives/iraq-study-group>.

her service on the Iraq Study Group was proper and should not have categorically disqualified her from continuing to serve in a judicial capacity on the lower courts or, if authorized by a statutory change, the Supreme Court.<sup>136</sup> No doubt Congress named Justice O'Connor to the group because of her demonstrated wisdom and judgment during her distinguished career on the Court. But it is nonetheless noteworthy that this sort of activity could be considered inappropriate for an active Justice.<sup>137</sup>

By way of comparison, Justice Fortas's close relationship with President Lyndon Johnson—which apparently included consultation on the Vietnam War—was a factor in Fortas's failure to secure confirmation to the Chief Justice's seat and his eventual resignation from the Court.<sup>138</sup> Those outcomes likely reflected a widespread perception that Fortas's extrajudicial activities were inconsistent with his continuing service as a Justice. Likewise, although it did not come to light at the time, Chief Justice Vinson's informal advice to President Truman regarding the legality of seizing the steel mills was also improper.<sup>139</sup>

We do not mean to say that Justice O'Connor's activities are indistinguishable from Justice Fortas's or Chief Justice Vinson's. On the contrary, O'Connor served openly on the Iraq Study Group, whereas Fortas and Vinson met with Presidents Johnson and Truman, respectively, in secret. Moreover, and more to the present point, O'Connor was retired when she served on the Iraq Study Group.

Yet if a retired Justice is simply another judge or Justice as far as the ethical rules are concerned, does that mean that Justice O'Connor was wrong to serve on the Iraq Study Group after all? If not, did she thereby disqualify herself from hearing all cases by designation on a lower court and, in the event that something like the Leahy proposal were enacted, on the Supreme Court?

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136. Justice Stevens agreed. See Telephone Interview with John Paul Stevens, *supra* note 7 (commenting that he saw no reason for Justice O'Connor to keep her views on social and political issues private).

137. MODEL CODE OF JUDICIAL CONDUCT R. 3.1, 3.4 (2007) (providing ethical rules regarding extrajudicial activities and the acceptance of appointments to governmental positions).

138. See Jeffrey W. Stempel, *Rehnquist, Recusal, and Reform*, 53 BROOK. L. REV. 589, 625 (1987) (noting that Justice Fortas was widely known to be giving advice to President Johnson on Vietnam War issues and reelection strategy).

139. See DAVID McCULLOUGH, *TRUMAN* 897 (1992) (noting that Chief Justice Vinson confidentially advised President Truman, in violation of the separation-of-powers doctrine).

Part of the answer may be that there are only weak formal constraints on extrajudicial activities, even for active judges and Justices. Perhaps Justice O'Connor would have been within her rights to serve on the Iraq Study Group even had she not retired. Certainly, we can find historical precedents. Five Supreme Court Justices joined ten members of Congress to compose the electoral commission that resolved the contested election of 1876;<sup>140</sup> Justice Jackson took a leave of absence from, but did not give up his seat on, the Supreme Court to serve as a Nuremberg prosecutor;<sup>141</sup> Chief Justice Warren chaired the President's Commission on the Assassination of President Kennedy, popularly known as the "Warren Commission";<sup>142</sup> and Justices and judges routinely serve on such bodies as the U.S. Sentencing Commission and the rules advisory committees.<sup>143</sup>

Longstanding case law confirms the compatibility of such moonlighting with holding an Article III office. Consider Chief Justice Jay's view in *Hayburn's Case*.<sup>144</sup> After determining that Congress could not constitutionally assign nonjudicial business to an Article III court, he and the two other judges with whom he was sitting nonetheless undertook the precise business assigned—determining invalid veterans' pension eligibility—"in the capacity of commissioners."<sup>145</sup> That decision—and the long history of subsequent performance of nonjudicial service by Article III judges and

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140. See Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 341 n.30 (2001) ("Congress appointed an electoral commission composed of five Senators, five Representatives, and five Supreme Court Justices.").

141. Jeffrey W. Stempel, *Chief William's Ghost: The Problematic Persistence of the Duty To Sit*, 57 BUFF. L. REV. 813, 845 (2009).

142. See REPORT OF THE PRESIDENT'S COMMISSION ON THE ASSASSINATION OF PRESIDENT KENNEDY, at v (1964) (listing Chief Justice Warren as the commission's chairman); see also Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1137 (1994) (noting the controversy caused by Chief Justice Warren's appointment as chairman of the commission).

143. Justice Breyer served as a member of the U.S. Sentencing Commission from 1985–1989 when he was a judge on the Court of Appeals for the First Circuit. *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE U.S., <http://www.supremecourt.gov/about/biographies.aspx> (last visited Sept. 5, 2011). For a list of current members of the federal rules advisory committees, see *Committees of the Judicial Conference of the United States*, U.S. COURTS (Oct. 2010), [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Committee\\_Membership\\_Lists/2010\\_Committee\\_Members.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Committee_Membership_Lists/2010_Committee_Members.pdf).

144. *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

145. *Id.* at 410 n.†.

Justices<sup>146</sup>—suggests that perhaps there would have been nothing objectionable about even a fully active Justice serving on a body charged with extricating the United States from a foreign war.

Yet surely at some point there is a line beyond which one becomes categorically ineligible to serve as a judge or Justice. Suppose then Justice Hughes had run for president without giving up his seat on the Court, or more fantastically still, that he had won, and then attempted to execute the offices of president and Supreme Court Justice simultaneously.

There is some well-known precedent for even that degree of moonlighting, of course. As every first-year student of constitutional law learns when studying *Marbury v. Madison*,<sup>147</sup> John Marshall retained his position as secretary of state for some time after his appointment to the Court as Chief Justice.<sup>148</sup> The casebooks routinely ask whether Marshall ought to have recused himself in *Marbury*,<sup>149</sup> to which the answer under modern recusal standards is almost certainly “yes.” But the broader question is whether—quite apart from a bias that may arise in any particular case—being a judge or Justice is inconsistent with some other jobs.

The constitutional text is at best silent on this issue. Indeed, it could be said by negative implication to authorize concurrent judicial and executive service. Article I, section 6 bars members of Congress from simultaneously holding “any Office under the United States,”<sup>150</sup> a term that clearly encompasses judicial office. In thus barring a judge or Justice from also serving in Congress, the Constitution tacitly permits judges and Justices to hold positions in the executive branch.

Nonetheless, principles of separation of powers should be understood to bar anyone from simultaneously holding office in the executive and judicial branches. Finding such a principle in the tacit postulates of the Constitution creates some textual embarrassment, to

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146. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 402–03 (1989) (discussing cases relating to the legality of judges’ extrajudicial services); see also *supra* text accompanying notes 135–143.

147. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

148. See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 1 (3d ed. 2009) (noting that John Marshall served as both secretary of state and Chief Justice from January 1801 to the end of John Adams’s presidency).

149. E.g., RANDY E. BARNETT, *CONSTITUTIONAL LAW: CASES IN CONTEXT* 96 (2008); FALLON ET AL., *supra* note 107, at 68; KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 10 (16th ed. 2007).

150. U.S. CONST. art. I, § 6, cl. 2.

be sure; it renders the Incompatibility Clause of Article I superfluous.<sup>151</sup> But that is a relatively small price to pay to preserve a core structural feature of the Constitution—even if it is one that was violated by John Adams and the Federalist Congress that confirmed Chief Justice Marshall.

Thus, we assume that there are constitutional limits on the ability of active judges and Justices to play other roles in government, even advisory ones. We do not find it necessary to say here where exactly those limits are, although service on something like the Iraq Study Group—given the assignment of the war powers to the political branches—probably comes close to the line.

How do we reconcile that judgment with the judgment that Justice O'Connor was permitted to serve on the Iraq Study Group? Without attempting to define the boundaries precisely, we would say that the limits on the performance of nonjudicial tasks by retired Justices should be somewhat less strict than the limits for active Justices, in part because of the accumulated experience and wisdom reposed in the elite group of retired Justices and the service they could continue to offer the United States. The rules and standards governing permissible extrajudicial activities focus in substantial part on appearances, after all, and a vigorous schedule of moonlighting will typically appear worse when undertaken by an active judge or Justice than when undertaken by a retired one.

To be sure, there are limits, even for retired Justices and senior judges. For example, suppose then-Justice Hughes had retired rather than resigned his seat as an Associate Justice before running for president, won, and then attempted to adjudicate cases by designation (assuming statutory authorization for doing so existed). Even if

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151. Professor Seth Tillman argues that the Incompatibility Clause itself does not apply to the president, only to officers serving under the president, but Professor Steven Calabresi disagrees. Seth Barrett Tillman & Steven G. Calabresi, Debate, *The Great Divorce: The Current Understanding of Separation of Powers and the Original Meaning of the Incompatibility Clause*, 157 U. PA. L. REV. PENNUMBRA 134, 134 (2008), <http://www.pennumbra.com/debates/pdfs/GreatDivorce.pdf>. If one were to agree with Tillman that the president is permitted to serve in Congress notwithstanding the Incompatibility Clause, then one would be very unlikely to find in the general principle of separation of powers a prohibition on joint executive/judicial officeholding. But we do not agree with Tillman, whose methodology neglects what Professor Charles Black called “structural” inferences from the document and, for the reasons given by Calabresi, appears to fail even on its own terms. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 11 (1969) (expounding the structural method, in which the relations among institutions created and recognized by the Constitution give rise to principles of constitutional law).

President/Justice Hughes only heard cases in which the United States was not a party, we still think that this sort of arrangement would have violated the separation of powers, and we expect that most readers would share that view.

Where is the line between serving on the Iraq Study Group—permissible for a retired Justice, in our view—and serving as secretary of state or president—impermissible, in our view? The constitutional text, history, and case law provide insufficient materials to answer this question definitively. Our goal here is not to propound any particular answer but instead simply to suggest that some kinds of moonlighting that would be constitutionally impermissible if performed by active judges and Justices may be permissible if performed by retired Justices.<sup>152</sup>

Why? Chiefly because a retired Justice, even if still part of the judiciary in some sense, is, after all, *retired*. No longer a central part of the business of the Court, retired Justices have a unique perspective, that of both insiders and outsiders. Given the vagueness of the separation-of-powers norm at issue, it would be a shame to deprive the nation of that perspective or to make ineligibility to serve on the Article III courts its price—if one thought that the Leahy proposal were otherwise justified.

Of course, much of what retired Justices do when not hearing cases on the lower courts, or—should something like the Leahy proposal be adopted—on the Supreme Court, will be uncontroversial. They can undertake judicial-administration projects, serve on blue-ribbon panels that address matters relating to the judiciary, and speak and write on public affairs. Such activities are clearly compatible with judicial office for active judges and Justices, thus leaving no doubt that they are also permissible for retired Justices.

We do not suggest that there is some category of activities that retired Justices and judges may undertake that is currently forbidden to them. Our proposed modest relaxation of the restrictions on retired Justices' activities is one of degree rather than of kind. It can perhaps be best illustrated by the example of the most prominent federal court of appeals judge of the modern era, Richard Posner.

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152. We refer in the text to retired Justices who wish to remain eligible to serve by designation on the Supreme Court or on lower federal courts. Even the weak restrictions we identify here would be inapplicable to retired Justices who chose not to be available for such service, and, of course, nothing in this Article should be read to mean that we think retired Justices should be required to continue to serve.

Before ascending the bench, then-Professor Posner did not hesitate to tackle controversial issues in his scholarship,<sup>153</sup> nor has he hesitated to do so since donning a judicial robe. While a judge on the Seventh Circuit, Judge Posner has written a book about sex in which he suggests that some unattractive women are lesbians because appearance is less important to women than to men,<sup>154</sup> has written a critical evaluation of *The 9/11 Commission Report*<sup>155</sup> that addressed matters of national-security policy that would ordinarily be thought far outside the ken of judicial competence,<sup>156</sup> and has said that one of the most reviled decisions in the history of the United States, *Korematsu v. United States*,<sup>157</sup> was “defensible.”<sup>158</sup>

There is room for disagreement about the propriety of Judge Posner’s extrajudicial activities, but there would likely be agreement that he pushes the envelope for a sitting federal judge. That consensus partly reflects the provocative nature of some of what Judge Posner says, but it also partly reflects a judgment that a judge should not be a public intellectual. According to this view, judges ought not opine publicly at all about some topics, no matter how sensible or sober-minded their substantive views on those topics.

By contrast, a retired and well-respected judge or Justice, as an elder statesperson, is well situated to speak on judicial questions<sup>159</sup> and, more broadly, on issues of the day. Consider a 2010 essay that

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153. See, e.g., Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 342–46 (1978) (discussing the negative effects of the legal prohibition on selling babies).

154. See RICHARD A. POSNER, SEX AND REASON 123 (1994) (“[H]omely women should have relatively better lesbian than heterosexual opportunities because women tend to place less value on good looks in a sexual partner than men do.”).

155. NAT’L COMM’N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT (2004), available at <http://www.gpoaccess.gov/911/pdf/fullreport.pdf>.

156. Richard A. Posner, *The 9/11 Report: A Dissent*, N.Y. TIMES, Aug. 29, 2004, § 7 (Book Review), at 1.

157. *Korematsu v. United States*, 323 U.S. 214 (1944).

158. Pamela Karlan & Richard Posner, *The Triumph of Expedience: How America Lost the Election to the Courts*, HARPER’S MAG., May 2001, at 31, 39. The statement was Posner’s alone. Karlan, in dialogue with Posner, characterized the decision as “disastrous.” *Id.* at 37.

159. Recently, retired Justice Stevens made news by stating how he would have voted on cases decided by his erstwhile colleagues. See Adam Liptak, *Justice Stevens Is off the Bench but Not Out of Opinions*, N.Y. TIMES, May 31, 2011, at A14 (discussing a speech by Justice Stevens, in which the retired Justice explained how he would have voted on several Supreme Court decisions issued after his retirement). After Justice Powell retired, he announced that he had changed his mind about the constitutionality of the death penalty. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR. 451–54 (1994).



Justice O'Connor coauthored for the *New York Times*.<sup>160</sup> In it, she and her coauthors called on Congress to allocate \$2 billion in funding for research on Alzheimer's disease.<sup>161</sup> Principles of separation of powers and judicial ethics could be invoked to call into question an active judge or Justice's attempting to influence the quintessentially legislative power of the purse in this way—at least when the allocations sought have nothing to do with the legal system. And indeed, even though she was retired, Justice O'Connor was criticized on just this ground.<sup>162</sup> But notwithstanding the fact that at the time she coauthored the essay Justice O'Connor was in some sense still “a serving federal judge,”<sup>163</sup> in another sense, she was not. Given her extraordinarily high profile, her quite public struggle with her husband's Alzheimer's affliction—which occasioned her retirement<sup>164</sup>—and the fact that she had retired from active service on the Supreme Court, it oversimplifies matters to treat her as just another judge. If a case involving Alzheimer's funding were to come before Justice O'Connor, whether sitting by designation on a lower federal court or, if the Leahy bill were to pass, on the Supreme Court, her past advocacy on the subject might require recusal, but the advocacy, standing alone, strikes us as appropriate in light of her status as a retired Justice.

#### CONCLUSION

The Leahy bill will not likely be enacted into law in the near future, and mostly for good reason. As discussed in Part III, even during a term in which Justice Kagan was recused in roughly one-third of the Court's cases, there was no dire need for retired Justices to serve as substitutes. Barring extraordinary circumstances, the Court will soon return to its customarily small number of recusals, rendering the bill even less necessary.

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160. Sandra Day O'Connor, Stanley Prusiner & Ken Dychtwald, Op-Ed., *The Age of Alzheimer's*, N.Y. TIMES, Oct. 28, 2010, at A33.

161. *Id.*

162. See Ed Whelan, *Justice O'Connor on Alzheimer's Funding*, NAT'L REV. ONLINE (Oct. 28, 2010, 1:03 PM), <http://www.nationalreview.com/bench-memos/251347/justice-o-connor-alzheimer-s-funding-ed-whelan> (questioning Justice O'Connor's activities urging the legislature to act).

163. *Id.*

164. Dennis Hevesi, *John J. O'Connor III, 79, Husband of Ex-Justice*, N.Y. TIMES, Nov. 12, 2009, at B19.

Moreover, even if a strong administrative case could be made for the Leahy bill, politics would likely stymie it. All of the currently retired Justices are, on average, more liberal than the Court's current median Justice, Justice Kennedy. Accordingly, the majority-Republican House of Representatives would be unlikely to support a measure that would, in the short run and on average, move the Court to the left in those cases in which it is salient. More broadly, in times of divided government, one party or the other would have reasons to oppose reactivating the retired Justices, on the ground that they would either be too liberal or too conservative.

Nonetheless, the Leahy proposal warrants serious consideration because it reveals a great deal about the Supreme Court as an institution and about retired Justices. The evident constitutionality of the Leahy proposal—and of the far more radical proposals that it resembles in some important particulars—underscores just how minimally the Constitution constrains Congress in its ability to shape the federal courts.

As for retired Justices themselves, they already do not ride quietly into the sunset, never to be heard from again. Retired Justices in the modern era typically remain active in public life, speaking out on important issues and calling upon the expertise that long judicial service confers. Balancing the roles of elder statesperson and part-time judge or Justice can raise delicate questions of judicial ethics. Nevertheless, the operative legal principles should be interpreted broadly to permit retired Justices to serve in both capacities, lest the public be deprived of their perspective on policy matters or the courts be deprived of their contributions to the law.