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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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

Senator Patrick Leahy recently introduced a bill that would override 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 authorize 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 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 extra-judicial activities should be the same for active and retired judges and justices. In addition to relying on published material, the authors draw on information gleaned from their interview with retired Justice John Paul Stevens, who was the original source of the Leahy proposal.

I. Introduction

In her first Term as an Associate Justice of the Supreme Court of the United States, Elena Kagan recused herself from roughly a third of the cases on the Court’s docket.¹ Although justices do not typically divulge their grounds for recusing,² here the

¹ As of December 2010, Kagan had recused herself from 27 cases. See, e.g.,
reason 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. Perhaps Kagan could have taken a narrower view and recused in fewer cases, but once the deed was done, the Court was left shorthanded.

Into the breach stepped Senate Judiciary Chair Patrick Leahy, who offered a bill that would lift a New Deal-era prohibition on retired Supreme Court justices sitting by designation on the high court. Under the Leahy proposal, a majority of the active justices could designate a retired justice to substitute for a recused justice. The proposal seemed especially timely in autumn 2010 because there were (and as this Article goes to


See, e.g., The Antitrust Counselor, Court to Rule on Preemption of State Law Claims Against Vaccine Makers, 194 ANTITRUST COUNS. 9, 9 (2011) (“Justice Elena Kagan recused herself because she was serving as U.S. solicitor general.”).

Senator Patrick Leahy’s September, 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.” In other words, in any Supreme Court case where 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.” S. 3871, 111th Cong. (2010).

28 U.S.C. § 294(d) (“No such designation or assignment shall be made to the Supreme Court.”).


Senator Patrick Leahy introduced this bill on September 29, 2010. On November 8, 2010, the authors spoke for approximately 20 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-Justice Rehnquist originally had the idea several years ago to enlist retired justices as substitutes for recused justices, but were unable to persuade their colleagues to adopt the proposal. Following his retirement, in January, 2010, Justice Stevens met with Senator
press, continue to be) three retired justices in good mental and physical condition.

Adoption of the Leahy bill could avoid some 4-4 splits, but the proposal also raises the broader question of how retired justices who wish to remain active in public life may do so consistent with judicial ethics and constitutional constraints. Furthermore, in seeking to draw on the experience and expertise of retired justices, the Leahy proposal and 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.

Although this Article concedes that there is not now, nor was there ever, a pressing need for the Leahy bill, it nonetheless argues for a robust role for retired Supreme Court justices because they currently represent a valuable and underutilized human resource. Part II briefly recounts the history of retirements on the Court. Part III canvasses the costs and benefits of asking retired justices to participate in a substitution system. Part IV considers constitutional objections to the Leahy bill. Part V considers other roles that have in the past, and could in the future, be assigned to willing retired justices. We argue for broad utilization of the services of retired justices. Part VI concludes.

II. RETIRED JUSTICES OVER HISTORY AND TODAY

The end of the twentieth and the beginning of the twenty-first centuries brought many changes to the American judicial system, but one largely overlooked development was the prevalence of living, retired Supreme Court justices, most of them able-bodied and mentally sharp. Over the course of modern 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 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. Telephone Interview with Justice John Paul Stevens (Nov. 8, 2010) (Notes on file with authors) (hereinafter Stevens Interview).

8 As discussed infra at notes 40-52, according to longstanding tradition, 4-4 splits do not create precedent but result in the lower court’s decision being affirmed. See Durant v. Essex Co., 74 U.S. 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).

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

10 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. See DIARY OF EDWARD BATES 358 (Howard K. Beale ed., 1933). Edward Bates, Attorney General under Abraham Lincoln, wrote on April 12, 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. Taney died that year and left his orphaned daughters a tiny estate. Seven years later, his children were in such reduced circumstances that the Supreme Court petitioned to set up a fund on their behalf. See Ross E. Davies, The Judiciary Fund: A Modest Proposal That the Bar Give to Judges What Congress
Thurgood Marshall gave when he retired in 1991 at the age of 83: “I’m old and falling apart.”

Indeed, before the 1990s, it was not unusual for a justice to retire when no other retired Justice was living and competent. And before 1937, when Congress passed the Retirement Act, retirement was not even possible, with resignation the only available option.

But in the 1990s, Chief Justice Burger and Justices Powell, White, and Blackmun were simultaneously alive and in reasonably good health for at least some part of their retirements. Between 2005 and 2010, Justices O’Connor, Souter, and Stevens retired from their positions on the Court, all before their health or mental competence required them to. Even though modern justices often serve longer than their historical counterparts, it may not come as a surprise that they find themselves ready to retire after 20, or even 35 years in their demanding roles on the Court.

Will Not Let Them Earn, 11 GREEN BAG 2d 357, 359 (2008). Meanwhile, the Judiciary Act of 1869 provided living justices who had reached the age of 70 and who had served for at least 10 years with a lifetime pension of their yearly salary as of the date of retirement. Ch. 22, 16 Stat. 44 (1869). 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 decision to cease active service with pension eligibility, see 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.

As the previous quotation indicates, Justice Marshall was retired and living from 1991-93, but he was in very poor health, and his physical condition precipitated his retirement.

Justice O’Connor announced her intended retirement in July, 2005, but did not actually retire until the confirmation and investiture of her successor, Samuel Alito, in January, 2006. Justice Roberts was originally chosen to replace Justice O’Connor. Upon Rehnquist’s death, his nomination was withdrawn so that he could be named as chief justice. O’Connor’s successor, Samuel Alito, was finally confirmed on January 31, 2006. Alito Sworn In as Justice After Senate Gives Approval, N.Y. Times, Feb. 1, 2006, http://www.nytimes.com/2006/02/01/politics/politicsspecial1/01confirm.html.

According to news and self reports, Justice O’Connor retired primarily to care for her husband, who had Alzheimer’s disease; Justice Souter retired primarily to return to his native New Hampshire; and Justice Stevens 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 in other pursuits. See Richard W. Stevenson, O’Connor to Retire, Touching Off Battle Over Court, N.Y. TIMES July 2, 2005, p 1.; Peter Baker & Jeff Zeleny, Souter’s Exit to Give Obama First Opening, N.Y. TIMES, May 2, 2009 at p 1.; Jeffrey Toobin, Profiles, “After Stevens”, NEW YORKER, March 22, 2010 at p. 39, available at http://www.newyorker.com/reporting/2010/03/22/100322fa_fact_toobin?currentPage=1.

ATKINSON, supra note 12, at 188-89.

David Souter received his associate justice commission on October 3, 1990, and assumed senior status on
Indeed, as David Atkinson has noted, 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 voluntary choice even though they remain capable of doing the work.” And for whatever reason a justice chooses to retire, “early” retirement is made easier by the statutory pension scheme set out for retired justices. Justices who retire under the “rule of eighty” may collect their full salary as it was set at the time of their retirement. Justices who wish to continue to serve on the lower federal courts are entitled to subsequently enacted judicial pay raises, if they occur.

But when relatively young and healthy, even vigorous justices retire, they do not tend to sit idly by and watch as the world marches on without them. The eight justices who have retired within the last twenty years have tended to engage in a wide range of activities: they give interviews and speeches; they teach law students and other adults, June 30, 2009. Biographical Directory of Federal Judges: Souter, David Hackett http://www.fjc.gov/servlet/nGetInfo?jid=2244&cid=999&ctype=na&instate=na


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, like 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. However, retiring justices tend to deny such motivation. Cf. Anthony Lewis, Op-Ed., Abroad at Home; 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”) (ellipsis 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 (“the rates at which federal judges—at all levels—leave active status are largely unaffected by either political or institutional environment”).

Of course, a person who retires at age 90, as Justice Stevens did, can hardly be said to be taking early retirement in any other profession. However, as noted supra, over the course of Supreme Court history, justices have rarely retired before they were forced to do so by declining health or even death.

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23 28 U.S.C. § 371(c). See http://www.uscourts.gov/Common/FAQS.aspx (“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 Supreme Court justices, as well as judges on the lower federal courts.

24 For example, Justice O’Connor interviewed Justice Stevens in Newsweek at the end of 2010. Jeffrey Bartholet, moderator, Sandra Day O’Connor Interviews John Paul Stevens, NEWSWEEK, Dec. 17,
often in exotic locations;\textsuperscript{25} they chair or otherwise serve on commissions;\textsuperscript{26} they speak out on issues related to the judiciary and beyond;\textsuperscript{27} and they sit by designation on the lower federal courts.\textsuperscript{28} One retired justice even acted in a Hollywood movie, portraying, as might be expected, a famous justice from history.\textsuperscript{29}

Retired justices have notably been absent, however, from a most 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 that court 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

\textsuperscript{25} For example, retired Justice Potter Stewart taught a class for Paul Gewirtz, Potter Stewart Professor of Constitutional Law at Yale Law School. 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, On "I Know It When I See It," 105 YALE L.J. 1023, 1047 (1996). Justice O’Connor is listed as faculty in the law school that carries her name at Arizona State University. http://apps.law.asu.edu/Apps/Faculty/FacultyIndex.aspx. Over 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 to Halifax, Nova Scotia. Forum On Global Engagement to Feature Justice Sandra Day O’Connor and Activist/Historian Julian Bond, Semester at Sea, 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


\textsuperscript{27} Earl Warren worked with the group World Peace through Law in his retirement. He also spoke against creation of 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’, ABA J. (May 9, 2009), available at http://www.abajournal.com/news/article/oconnor_chemerinsky_sound_warnings_at_abanewsconferenceabout_the_dangers_of_sl/ . And, according to one judge who has been extremely active since taking senior status roughly a quarter century ago, retired judges should write even more than they do. See Ruggiero J. Aldisert, All Right, Retired Judges, Write! 8 J. APP. PRAC. & PROC. 227, 227 (2007).

\textsuperscript{28} In order to be eligible for judicial pay raises, retired justices must annually perform at least the work that an active judge would perform in three months, or other work for the courts as specified in detail under the statutory scheme. See 28 U.S.C. § 371(e)(1)(a) and (b)(2).

several reform proposals over the years, most recently the Leahy bill.\textsuperscript{30}

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 limits on Supreme Court justices, either through constitutional amendment\textsuperscript{31} or, more controversially, by statute.\textsuperscript{32} These proposals aim to remedy over politicization,\textsuperscript{33} “decrepitude,”\textsuperscript{34} ossification, excessive counter-majoritarianism, and other perceived ills that purportedly result from life tenure.\textsuperscript{35}

We take no position here on the wisdom of life tenure or on the constitutionality of those proposals that would restrict it without a textual 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.

\section*{III. The “Problem” and Potential Solution}

\subsection*{A. The problem}

As time passes, the case for the Leahy proposal—which, as we confirmed when we interviewed retired Justice John Paul Stevens on the subject, we might more accurately call the “Rehnquist/Stevens proposal”\textsuperscript{36}—becomes less urgent. Soon the cases

\textsuperscript{30} Several bills authorizing the recall of Supreme Court justices were introduced in the 78\textsuperscript{th} Congress (1943-44) after a small handful of Supreme Court cases were dismissed for lack of a quorum. For more information about these proposals, see, e.g., Note: The Problem of the Supreme Court Quorum, 12 GEO. WASH. L. REV. 175, 185-189 (1943-1944). The proposal was also discussed in 1954 when Congress considered several resolutions proposing constitutional amendments to change the composition and jurisdiction of the Supreme Court. Composition and Jurisdiction of the Supreme Court: Hearing on S. J. Res 44 and H.J. Res 194, H.J. Res. 27 & H.J. Res. 91Before Comm. No. 4 of the H. Committee on the Judiciary, 83\textsuperscript{rd} Cong. 26 (1954) and Composition and Jurisdiction of the Supreme Court: Hearing on S. J. Res 44, Before S. Comm. on the Judiciary 27 (1954).

\textsuperscript{31} See, e.g., Steven G. Calabresi & James Lindgren, Term Limits for the Supreme Court: Life Tenure Reconsidered, 29 HARV. J.L. & PUB. POL’Y 269, 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.” (citations and footnote omitted)).

\textsuperscript{32} See, e.g., Paul D. Carrington & Roger C. Cramton, The Supreme Court Renewal Act: A Return to Basic Principles (proposing statute under which a justice would serve eighteen years on the Supreme Court and then on a lower federal court by designation), in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 471 (Roger C. Cramton & Paul D. Carrington eds., 2006). But see Calabresi & Lindgren, supra note 31, at 855–56 (arguing that such a statute would be unconstitutional).

\textsuperscript{33} See Akhil Reed Amar & Steven G. Calabresi, Term Limits for the High Court, Wash. Post, Aug. 9, 2002, at A23.

\textsuperscript{34} ARTEMUS WARD, DECIDING TO LEAVE 244-45 (2003).

\textsuperscript{35} See id. at 244.

\textsuperscript{36} See Stevens Interview, supra note 6; see also Letter from John Paul Stevens to William H. Rehnquist, October 28, 1998, in WARD, supra note 34, app. c at 255-57; Interview with Hon. Harry A. Blackmun, Justice (then-retired), U.S. Supreme Court, in Justice Blackmun’s chambers in the U.S. Supreme Court, Washington, D.C. (Nov. 1, 1995), in SUPREME COURT HISTORICAL SOC’Y AND FEDERAL
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.

Nonetheless, the Leahy proposal warrants serious consideration. Even if only occasionally employed, it could be beneficial in avoiding needless delay in resolving important legal questions because of the happenstance of a recusal – or it could create more problems than it would solve.

In beginning with a discussion of the “retired justices problem,” this Part declines to identify that problem as limited to 4-4 splits. In fact, as explained below, the 4-4 split may not be a real problem in search of a solution. But that is not to say that there are not other reasons to support the proposal to permit 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 current statutory scheme. 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 the question of how to structure incentives for retired justices to continue to serve the public.

B. Retirement’s Costs

In some ways, a justice’s decision to retire resembles any other retirement decision in any other profession, and, in many respects, the outcome is the same. The job loses someone with years of experience. 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.

But the retirement of a Supreme Court justice differs from other retirements. Unlike an employee in any other profession, justices retire, then remain completely disengaged from the Supreme Court decision making 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 with the possibility of serving as a consultant. Retired oncologists and Hall of Fame coaches may remain available to review difficult files, assist in tough cases, or offer their expertise for a fee, to whoever needs it, wherever they might be, but particularly to their former employers.

JUDICIAL CTR., THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT 352 (Harold Hongju Koh, interviewer, 1997), available at http://lcweb2.loc.gov/diglib/blackmun-public/page.html?page=350&size=640&SERIESID=D09&FOLDERID=D0901 (“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.”).

37 See supra, note 5.
And, to be certain, the decision to consult need not be motivated by financial remuneration, because by retirement most professionals are financially secure.38 Rather, they assist both because they can and because they enjoy the work.39

When it comes to Supreme Court justices, however—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 a justice’s retirement, proposals to permit them to return and “pinch hit” typically target a more specific issue: the 4-4 split due to a recusal. When the Court divides evenly, the lower court ruling stands, but no precedent is set.40 An analysis of any proposal along the lines of the Leahy bill should therefore consider how serious a problem the 4-4 split really is.41

The answer appears to be: “not very.” On average, more than a third of Supreme Court cases are decided unanimously.42 For example, in October Term 2009,43 40 of 86

38 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(c). As Chief Justice Roberts has noted in his annual Reports on the 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 of the Federal Judiciary 8 (Jan. 1, 2009), available at http://www.uscourts.gov/uscourts/News/2008/docs/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.”)


40 Scholars have discussed whether letting the lower court decision stand is, in fact, a problem. See, e.g., Hartnett, supra note 38; William L. Reynolds and Gordon G. Young, Equal Divisions in the Supreme Court: History, Problems, and Proposals, 62 N.C. L. REV. 29 (1983); Thomas E. Baker, Why We Call the Supreme Court “Supreme,”” 4 GREEN BAG 2D 129 (2001); Jason Mazzone, 4-4 is Fine, BALKANIZATION (Oct. 8, 2010), http://balkin.blogspot.com/2010/10/4-4-is-fine.html. In our view, if a case presented an issue of sufficient importance to warrant granting Supreme Court review in the first place, then failure to resolve the issue is harmful, regardless of the outcome in any particular case. 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 Stevens Interview, supra note 6.

41 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.” See http://leahy.senate.gov/press/press_releases/release/?id=D8C57B55-3988-4E00-BDE7-13459F4AB540.

42 See http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf, p. 4 (citing statistics for OT06 (38% of cases decided unanimously), OT07 (30% decided unanimously), and OT08 (33% decided unanimously), as well as for OT09. For all four reported Terms, more cases were decided unanimously than by a 5-4 vote split).
cases resulted in unanimous decisions.\textsuperscript{44} Out of the cases that are not decided unanimously, most are decided 8-1, 7-2 or 6-3.\textsuperscript{45} Therefore, while the general public may have the perception that most cases split the Court 5-4,\textsuperscript{46} often along ideological lines with Justice Kennedy casting the swing vote,\textsuperscript{47} 5-4 votes in fact constitute a small percentage of the Court’s decided cases.\textsuperscript{48} Even in these cases, some are not split along ideological lines.\textsuperscript{49} In a typical Term, the Court will decide fewer than one case by a 4-4 vote as a result of a recusal.\textsuperscript{50}

Indeed, the problem remains small even in an extraordinary Term, such as October Term 2010. When Justice Kagan promised to recuse herself from roughly a third of the Court’s docket, the 4-4 split was still not likely to be a serious problem. Based on the voting pattern from the October 2009 Term, one of us predicted that Justice Kagan’s recusal in roughly a third of the Court’s cases would only result in two or three 4-4 splits.\textsuperscript{51} Thus, there was hardly a compelling case for the Leahy bill based on resolving 4-4 splits even when it was proposed; as Justice Kagan’s recusal rate settles to normal, the argument becomes weaker still. We would be hard-pressed to disagree with Jason Mazzone’s characterization of the Leahy proposal as “a solution in search of a problem.”\textsuperscript{52}—at least so long as the proposal is understood as aiming to transform 4-4 splits into 5-4 rulings.

\footnotesize{\textsuperscript{43} As of this writing, the most recent full Term for which there are data.\textsuperscript{44} See, http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf, p. 4.\textsuperscript{45} See id. (citing statistics for OT06 (12\% of cases decided 8-1, 12\% decided 7-2, 4\% decided 6-3), OT07 (8\% of cases decided 8-1, 28\% decided 7-2, 14\% decided 6-3), OT08 (5\% of cases decided 8-1, 16\% decided 7-2, 16\% decided 6-3), and OT09 (9\% of cases decided 8-1, 15\% decided 7-2, 10\% decided 6-3).\textsuperscript{46} Adam Liptak, The Roberts Court: Justices Long on Words but Short on Guidance, N.Y. TIMES, Nov. 18, 2010, A1.\textsuperscript{47} Adam Liptak, The Roberts Court, Tipped by Kennedy, N.Y. TIMES, July 1, 2009, at A1. Pg. A0; Robert Barnes, Term Saw High Court Move to The Right; Roberts-Led March Likely to Continue, WASH. POST, July 1, 2009, at A1 (stating that the Court is bitterly divided in conservative and liberal wings even though the Term that ended that year only saw a third of its cases end in 5-4 splits).\textsuperscript{48} In the 2009 Term, the Court split 5-4 in only 16 of 72 cases in which it issued signed merits opinions. http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf, p. 4. But see Leahy statement, supra note 41.\textsuperscript{49} Five of the sixteen 5-4 decisions were not split along ideological lines. http://www.scotusblog.com/wp-content/uploads/2010/07/Final-Stats-OT09-0707101.pdf, p. 3.\textsuperscript{50} 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 1986-2003). For a discussion of how many 5-4 splits occur in high profile cases, making them seem more common than they actually are, see supra text accompanying notes 48-49.\textsuperscript{51} See Dorf, FINDLAW, supra note 39. Moreover, the Leahy bill seems poorly suited for resolving ideologically divisive 4-4 splits. See id.; infra, text accompanying notes 79-81.\textsuperscript{52} See Mazzone, supra note 40.}
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 would be available to resolve an important case. 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 each justice may have for a recusal tend to be uncorrelated with the reasons for recusal of the other Justices. And in the sorts of cases in which we might expect recusals to be correlated—such as disputes over judicial pay or the participation of so many corporate parties that multiple justices can be expected to have a financial stake or substantial prior relationship with at least one of them—retired justices could also be recused. In these circumstances, the so-called “rule of necessity” may be a sufficient safeguard for ensuring that important cases are heard.

To be sure, one can imagine tragic circumstances in which multiple vacancies cripple the Court: a plague, terrorist attack, or fatal accident that simultaneously kills or disables 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 contemplated by the Leahy bill. In the ordinary course of events, the justices have lately shown a considerable capacity for accommodating one another’s career timetables. Even when events have outpaced the justices’ plans—such as when Chief Justice Rehnquist died after Justice O’Connor had announced her retirement, thus creating two simultaneous vacancies—the Court and the political system have quickly adjusted. In that event, President Bush re-designated 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 O’Connor retained her seat pending the confirmation of her own eventual successor.

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53 A quorum for Supreme Court purposes is six justices. See SUP. CT. R. 5 and 28 U. S. C. § 1.
54 See, e.g., Hearings Before House Committee on the Judiciary, 78th Cong., 1st Sess. (1943).
55 Most justices’ conflicts due to prior professional experience disappear after a year or two on the Court. But see, e.g., Connecticut v. Am. Elec. Power Co., Inc., 582 F.3d 309, 314 (2d Cir. 2009), cert. granted, 131 S. Ct. 813, (U.S. 2010) (Sotomayor, J. recused). When he was confirmed in 1967 after serving as Solicitor General, Justice Thurgood Marshall recused himself in 61 cases, 53 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, 96 A.B.A.J. 24 (October, 2010) (quoting Thomas C. Goldstein). 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 of Corporations, N.Y. TIMES, Sept. 29, 2010, at A20 (citing Chief Justice Roberts’ selling of Pfizer stock so that he could participate in two cases the company had before the Court). But cf. Cheney v. United States District Court for the District of Columbia, 541 U.S. 913 (2004) (Scalia, J. declining to recuse after some called into question as raising a potential conflict his duck-hunting activities with Vice President Cheney, the petitioner in the case).
57 The “rule of necessity” provides that although 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 (1980).
58 Thus, the Court was not shorthanded, even though it took three nominees to fill O’Connor’s seat:
What about cases in which only one, two, or three justices are recused? Even though not needed to create a quorum, substituting a retired justice for a recused justice in such circumstances might have important effects beyond the simple addition of one vote because an additional participant in the argument and conference could change the group dynamics within the Court. 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 where a majority prevails?

Undoubtedly, deliberations among a Court of six will be somewhat different from deliberations among a Court of nine, although it is difficult to say exactly how. In any event, a seriously shorthanded Court occurs with sufficient infrequency to suggest that this situation, too, is generally a non-problem.

E. Strategic Considerations Under the Leahy Bill

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

With recusal at the discretion of each justice, a justice already makes a difficult decision in each case that might warrant recusal. While justices seek to avoid the

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60 Cf. Berkolow, Much Ado About Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-Percolation After Rapanos, 15 V.A. J. SOC. POL’Y & L. 299, 331 n. 142 (2008) (“While this is troubling in the fractured opinion [setting], 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.”)

61 While 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 et al., Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups, 7 PSYCH. PUB. POL’Y & L. 622, 624-44 (2001) (summarizing dozens of studies showing a complex relationship between jury size and outcomes). See, also, e.g., Ballew v. Georgia, 435 U.S. 223, 232 (1978) (citing research in effort to determine what size jury was necessary to guarantee Sixth Amendment right to trial by jury in criminal cases).

62 Even during a period 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 over 98 percent of the Court’s cases. See Black & Epstein, supra note 50, at 90 n.59.

appearance of impropriety,\(^6^4\) answers to questions about when a failure to recuse gives rise to such an appearance are subtle and may be debated. Because the Court is largely impervious to criticism in such cases,\(^6^5\) because justices would almost certainly recuse in clear-cut conflict situations, and because impeachment is the only available remedy for clearly unethical decisions not to recuse\(^6^6\) (if it can even be called “available”), 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.\(^6^7\)

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 create the appearance of impropriety.\(^6^8\) But were Congress to

\(^{64}\) 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 (discussing Justice Scalia’s recusal from a Ninth Circuit case in which he had criticized the Ninth Circuit prior to the Court hearing the case) (citing Elk Grove Unified Sch. Dist. v. Newdow, 540 U.S. 945 (2003)); 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.”).

\(^{65}\) See Cheney, 541 U.S. at 914.

\(^{66}\) U.S. CONST. ART. III SEC. 1.

\(^{67}\) Because recusal almost always occurs before the justices discuss the certiorari petition at Conference, a justice must make a decision about whether to recuse before she knows whether four of her colleagues will vote to grant certiorari. \textit{But see}, e.g., Newdow, 540 U.S. at 18 (Justice Scalia recusing after cert. granted); Taylor v. Dennis, 336 U.S. 907, 908 (1949) (per curiam) (Justice Black recusing after cert. granted).

\(^{68}\) According to Senator Leahy, some justices might choose not to recuse simply because their absence from the case might create a 4-4 split. See Leahy statement, supra note 41 (“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 Scalia Memorandum, supra note 2 (“Let me respond, at the outset, to Sierra Club’s suggestion that I should “resolve any doubts in favor of recusal.” Motion to Recuse at 8. That might be sound advice if I were sitting on a Court of Appeals. \textit{But see} In re Agunda, 241 F. 3d 194, 201 (2d. Cir. 2000). 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.”). See also, e.g., Ruth Bader Ginsburg, An Open Discussion With Ruth Bader Ginsburg, 36 CONN. L. REV. 1033, 1038–39 (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.”); Black & Epstein, supra note 50, at 75–81 (describing the commonly held sentiment among recent Supreme
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.\textsuperscript{69}

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.

And 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.\textsuperscript{70} But as human beings, justices are subject to all of the same cognitive biases as the rest of us, and so they can be expected to make close recusal decisions under the influence of their strategic perceptions of the consequences for the merits.\textsuperscript{71} Even if only unconsciously, a justice might choose not to recuse under a rotation system (where she knew exactly which retired justice was next in line to fill an empty seat) or under a random system (where 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 in a system such as one suggested by Justice Stevens, where a retired justice would be slotted in based on his or her legal expertise,\textsuperscript{72} so long as that justice’s views on the issue in the case are well-known or at least easily anticipated and do not align with the potentially-recused justice’s own.\textsuperscript{73}

Strategic decision making 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 “un-retired” for the purposes of some case down the road. With that in mind, they might not choose to overrule a case in which a retired colleague wrote

\textsuperscript{69} Note that Senator Leahy himself did not view this problem as likely to arise. Barring retired justices from pitching in “defies common sense,” he added, while their availability “would encourage sitting justices to recuse themselves when there is even an appearance of a conflict of interest.” \textit{See} Leahy statement, \textit{supra} note 41.

\textsuperscript{70} Justice Stevens is emphatic that justices must recuse when recusal rules so dictate, without regard for strategic considerations, including the possibility of a 4-4 split. \textit{See Stevens Interview, supra} note 6.

\textsuperscript{71} For insight into how the thinking behind this strategic decision making might work, see A. Hastorf & H. Cantril, \textit{They Saw a Game: A Case Study}, 49 J. OF ABNORMAL & SOCIAL PSYCHOLOGY 129 (1954).

\textsuperscript{72} Justice Stevens suggested the example of recalling Justice Blackmun when the Court was shorthanded on tax cases (had the proposal been in effect between the latter’s retirement and death). \textit{See Stevens Interview, supra} note 6. \textit{See also generally} Robert Green, \textit{Justice Blackmun’s Federal Tax Jurisprudence}, 26 CONST. L. Q. 109(1998).

\textsuperscript{73} 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. (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 cert could push for a particular retired justice to sit in, and they would effectively win the case before it is even argued.
the majority because they might need that very same colleague’s vote in a future case down the road. Although the Court’s culture does not allow explicit logrolling, that does not mean that justices never consider one another’s presumed preferences across a range of cases in interacting over any specific case.74

F. Administrability

The Leahy proposal leaves open many issues of administration: Would the retired justice write opinions? Would she participate in the Conference where cert. is granted (when the recusal occurs before cert. is granted)? Would she share her one law clerk with another chambers in this 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 as compared to the chambers of sitting justices, where four clerks routinely serve? If there were only one living retired justice (as was the case, for example, when Justice O’Connor retired), would we expect that one individual to substitute in every case where a sitting justice is recused, even if, as in October Term 2010, that number is more than a third of the Court’s caseload for the Term?

Beyond the practicalities of implementing a substitution system, as we have already alluded, the very system itself requires a mechanism to select which retired justice will serve, when multiple retired justices are available. The two most obvious approaches are random selection and strict rotation. A strict rotation system could lead to some of the problems discussed above, with justices (at least sub-consciously) making recusal decisions and voting on whether to substitute a retired justice based on how the particular substitute is likely to vote on the merits. The same problem arises out of a different proposal suggested to us by Justice Stevens—using an “expert” retired justice in a case involving specialized expertise.

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 vote for or against a particular

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

75 In addition to drafting opinions, law clerks in many chambers routinely, inter alia, participate in the cert. pool, write bench memos, help prepare their justice for Conference and oral argument, work on petitions for stays of executions, and write speeches.

76 EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 37 (9th ed. 2009).

77 The same was also true when Justices Moody, Minton, Stewart, and Burger (C.J.) retired, as well as for many justices who left the Court in the years before retirement was possible. ATKINSON, supra note 12 at 80.

78 As of December 17, 2010, the Supreme Court had granted certiorari in seventy-four cases, see October Term 2010, SCOTUSBLOG, http://www.scotusblog.com/case-files/terms/ot2010/, and Justice Kagan was recused in twenty-seven, Chief Justice Roberts in one, and Justice Sotomayor in two. See id.

79 See Stevens Interview, supra note 6.
justice, then the mechanism will almost surely fail in just 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. That fact, in turn, suggests that no substitution would occur in ideologically divisive cases or that some other system of selection would 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 currently retired justices—Stevens, O’Connor, and Souter—are all more liberal on most issues than the median justice—Kennedy. Thus, under current 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 the issues identified above 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 threatening separation of powers. Within the Court, such matters could be resolved by any number of mechanisms, including promulgation by a majority of the Court as an amendment to the Supreme Court Rules. 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. The procedure adopted for choosing a method of selecting retired justices could in turn affect what method would be chosen.

* * *

To summarize the analysis of this Part, 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 itself give rise to strategic behavior and implementation difficulties. Even so, these concerns, while serious, are not so grave as to render proposals along the lines of the Leahy bill complete non-starters. As noted at the

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80 The bill is unclear in its language 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 does not specify how that justice would be selected. See S. 3871, 111th Cong. (2010).

81 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.” Would the “majority” number include the recused justice, meaning that only four justices involved in the case would have to vote to sub in the retired justice? Or would the number include only the eight justices involved in the case?


83 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 76, at 323-24.
beginning of this Part, retired justices are a valuable resource whose continued engagement in Supreme Court decision making could provide genuine, if modest, benefits.

IV. Is the Leahy Proposal Constitutional?

The conclusion that, on balance, the Leahy proposal warrants support would be for nought if it were unconstitutional. Accordingly, this Part considers constitutional limits on the ability of Congress to authorize retired justices to perform judicial duties. Although there is a non-frivolous 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 so long as justices have only retired from active duty, rather than resigned their commissions, neither Article III nor any other constitutional provision forbids them from serving on the Supreme Court or lower federal courts by designation.84

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 could resign their commissions.85 Most prominently, John Jay, the first Chief Justice, left his seat on the Court to become Governor of New York.86

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.87 The relevant statutory language formerly distinguished between a judge who “resign[s] his office” and one who chooses instead to “retire.”88 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.89 For clarity and simplicity, we shall 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, the Court held that a retired judge is - so far as the salary protection provision of Article III is concerned

84 Indeed, federal statutory law not only permits retired justices to serve on the lower federal courts by designation, but it mandates such service for retirees who wish to earn certain salary benefits. 28 U.S.C. § 371(c) (2000).
85 WARD, supra note 34, at 26.
86 HENRY B. RENWICK, LIVES OF JOHN JAY AND ALEXANDER HAMILTON 96–120 (1841).
87 See Booth v. United States, 291 U.S. 339 (1934) (holding that Article III barred Congress from reducing the salary of a retired judge).
- just like any other Article III judge.\textsuperscript{90} As a matter of doctrine, then, \textit{Booth} would appear 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 \textit{Booth} remains sound. At least so far as lower federal courts judges are concerned, a retired judge is, constitutionally speaking, just another Article III judge. Judges who 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.\textsuperscript{91} Admittedly, the Court’s ruling in that case, \textit{Stuart v. Laird}, was arguably issued under threat of impeachment or worse from the Jeffersonian Congress.\textsuperscript{92} But that fact only makes \textit{Stuart} problematic 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 necessary reading. “Office” historically has been read to mean something more generic, such as “judicial office.”\textsuperscript{93}

And for good reason. Because an Article III judge cannot be fired or have his or her salary reduced once named to the judiciary, a rigid reading of “Office” would greatly impede Congress in adjusting the organization of the lower courts, as Congress did, for example, when it split the former Fifth Circuit into the current Fifth and Eleventh Circuits.\textsuperscript{94} Such a reading would also prevent Congress from assigning judges to 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 for judicial adjudication wherever permissible.\textsuperscript{95} Given the overall purpose of Article III—to ensure an independent

\textsuperscript{90} Booth, 291 U.S. at 351 (concluding that the status of a retired judge, when sitting by designation, “is the same as that of any active judge.”)

\textsuperscript{91} See \textit{Stuart v. Laird}, 5 U.S. (1 Cranch) 299, 309 (1803) (“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).


\textsuperscript{93} In \textit{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. Further, Article III allows retired Supreme Court justices to ride circuit without requiring that they go through the confirmation process again. See \textit{Stuart v. Laird}, 5 U.S. (1 Cranch) 299 (1803). This lends support to the idea that the term “office” refers broadly to \textit{some} federal judicial office rather than to a seat on any \textit{particular} Article III court.


\textsuperscript{95} The outer limits of Congressional power to assign potential Article III business to non-Article III bodies
judiciary—a reading of the protean term “Office” that would lead to 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 “[O]ne [S]upreme 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.” 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 Byron 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.” Even this seemingly radical proposal might have been reconcilable with Article III’s text, but at the least, it should have 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 plenum? In two provocative articles, Tracey George and Chris Guthrie offer just such a proposal. They argue that a move to panels (accompanied by an increase in the Court’s size) would provide benefits that outweigh its costs, but they do not address the constitutional objection in any detail. Instead, they are, to the least, unclear.

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

97 Below 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 108-110. Second, we note how the constitutionally “real” Supreme Court need not have jurisdiction over all cases in order to qualify as the “one Supreme Court” in light of the Exceptions Clause. See infra, text accompanying notes 109-110 Depending on how the courts’ jurisdiction were carved up, both arguments would be available in principle to defend Justice White’s proposal.


99 For skepticism of the policy grounds for the George and Guthrie proposal, see Erwin Chemerinsky, No Warrant for Radical Change: A Response to Professors George and Guthrie, 58 DUKE L.J. 1691 (2009).

100 See George & Guthrie, “The Threes,” supra note 98, at 1847 n.85.
assume the validity of Supreme Court panels because: Congress and others have repeatedly considered it; there is a longstanding practice of single-justice decisions; and there is no clear prohibition in the constitutional text or history.\textsuperscript{101}

We agree with George and Guthrie as a matter of text. Certainly a court that regularly sits in panels—like the United States Court of Appeals for the Second Circuit—can be understood as “one” court.\textsuperscript{102}

The original understanding is somewhat more complicated. Ross Davies has argued that participants in the debates at the Philadelphia Convention assumed that “one Supreme Court” meant one\textit{ indivisible} Supreme Court.\textsuperscript{103} But that may only show that the Conventioners expected the Supreme Court to be indivisible. Davies himself acknowledges that the indivisibility question did not arise during the public debate over ratification.\textsuperscript{104} Insofar as the original understanding is the original \textit{public} meaning of the document,\textsuperscript{105} we are thus thrown back upon the plain text, which does not and did not answer the question whether the “one Supreme Court” must be indivisible.

Post-enactment history is also equivocal. Davies characterizes the assumption of Supreme Court indivisibility as “consistently shared by almost all judges, bureaucrats, and scholars” since the Founding.\textsuperscript{106} This is an overstatement, as illustrated by the precedents—both those that have been adopted and those that were merely proposed—cited by George and Guthrie,\textsuperscript{107} as well as one example discussed at length by Davies 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.”\textsuperscript{108}

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\textsuperscript{101}\textsuperscript{ }\textsuperscript{See id.}
\textsuperscript{102}\textsuperscript{ }\textsuperscript{The concept of multiple combinations of players making up one team is familiar from sports. In college and professional (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 comprise.}
\textsuperscript{103}\textsuperscript{ }\textsuperscript{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).}
\textsuperscript{104}\textsuperscript{ }\textsuperscript{See id. at 686.}
\textsuperscript{105}\textsuperscript{ }\textsuperscript{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, \textit{Integrating Normative and Constitutional Theory: The Case of Original Meaning}, 85 Geo. L.J. 1765, 1800-22 (1997) (explaining why original understanding may be relevant for non-originalists). 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., R\textsc{andy} E. B\textsc{arnett}, \textit{Restoring the Lost Constitution: The Presumption of Liberty} (2004); K\textsc{eith} E. W\textsc{hittington}, \textit{Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review} (1999).}
\textsuperscript{106}\textsuperscript{ }\textsuperscript{See Davies, supra note 103, at 687.}
\textsuperscript{107}\textsuperscript{ }\textsuperscript{See George & Guthrie, “The Threes,” supra note 98, at 1853–55.}
\textsuperscript{108}\textsuperscript{ }\textsuperscript{See Davies, supra note 103, at 688-705. See also Akhil Reed Amar, \textit{A Neo-Federalist View of Article III}, 65 B.U. L. Rev. 205, 268 n.213 (1985) (to say that Supreme Court panels are invalid would
Even if one thinks the 1802-1839 experience was a constitutional anomaly, there remains a fatal flaw in the argument that Congress 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 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, the possibility of *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 we cannot locate a single, indivisible Supreme Court that is available for *en banc* review. We 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 though Supreme Court panels does not.

But such a counter-intuitive conclusion would be unwarranted. At the very least, we can concoct a technical fix. Suppose one really thought that Article III required that there be a single indivisible Supreme Court. Even if so, Congress could denominate the active justices as the constitutionally required “real” Supreme Court, while limiting this body to hearing original jurisdiction cases and a tiny fraction of the appellate jurisdiction described in Article III. Retired Justices would then be ineligible to serve on original jurisdiction cases, of which there are precious few in any event. Under such a scheme, the 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.”*109* 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

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*109* See U.S. Const. art. III, § 2 (stating that “the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”).
test by excluding everything but patent cases\textsuperscript{110} 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 would seem 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 substitute for recused or otherwise unavailable justices. In this exercise, one must remember that Article III nowhere expressly states that the “one supreme Court” must be indivisible, and so these mental gymnastics may not even be necessary. Thus, we ultimately find no obstacle in Article III to substitute service on the Court by retired justices.

V. Other Functions that Retired Justices Can Perform

The Constitution is not the only obstacle to the Leahy bill. Federal statutory provisions governing disqualifications\textsuperscript{111}—and in rare circumstances, the Fifth Amendment’s Due Process Clause\textsuperscript{112}—require judges and justices to recuse themselves from cases in which they are or may be biased. As discussed above in Parts I and III, such recusals will typically provide the occasion for 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 active justices, most of a retired justice’s time will be taken up with non-judicial tasks, thereby creating the potential for more occasions for recusal. By speaking out on

\textsuperscript{110} Henry M. Hart, Jr., The Power of Congress to Limit the Jurisdiction of the 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 95, 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”). However, the Supreme Court itself 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. 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”). See also id. at 672 (Scalia, J., dissenting) (wondering “how there could be any such lurking questions, in light of the aptly named ‘Exceptions Clause”’).


\textsuperscript{112} See Caperton v. A.T. Massey Coal, 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 will be the same for federal judges and justices under the Fifth Amendment.
such matters as the death penalty and state judicial elections, 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 his or her typical day working on all tasks 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 just those retired justices willing to serve as substitutes on the Supreme Court—then she likely will still spend more time on average pursuing extra-judicial 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 non-judicial 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 non-judicial role by retired justices.

A. Recusal of Retired Justices Under Existing Law

Current law provides what might be thought 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 would be an active judge or justice.

The relevant statute first requires federal judges, justices, and magistrates to recuse themselves “in any proceeding in which [their] impartiality might reasonably be questioned.” The statute then lists further grounds for disqualification, including a provision that will sometimes be triggered by the tendency of retired justices to serve on various government panels and advisory bodies. It requires recusal where 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

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115 See, e.g., supra text accompanying notes 24-29 (summarizing some common recent activities of retired justices).


117 See, e.g., infra text accompanying notes 126-129 (summarizing some such recent service).
concerning the merits of the particular case in controversy."

Permitting retired justices to serve on the Supreme Court as well as 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 in the Supreme Court itself.\footnote{28 U.S.C.A. § 455(b)(3) (2006).} 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 that one might doubt an active judge or justice with such an interest, and regardless of whether the judge or justice is sitting on a lower federal court or 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)\footnote{For simplicity, the balance of this Part omits discussion of lower court judges who have taken senior status.} may face conflicts that current law under-counts. The issue arises because retired justices have sometimes taken on the role of “elder statesperson” by serving the country in a non-judicial 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.\footnote{See The Iraq Study Group Report (James A. Baker and Lee H. Hamilton, chairs, 2006), available at http://www.bakerinstitute.org/publications/iraqstudygroup_findings.pdf.} We think that 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.\footnote{Justice Stevens agreed. See Stevens Interview, supra note 6.} 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.\footnote{Jeffrey W. Stempel, Rehnquist, Recusal and Reform, 53 Brook. L. Rev. 589, 625 (1987).}

By way of comparison, Justice Abe Fortas’s close relationship with President 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 eventual resignation from the Court.\footnote{MODEL CODE OF JUDICIAL CONDUCT R. 3.1 & 3.4 (2008).} That outcome likely reflected a widespread perception that Fortas’s extra-judicial activities were inconsistent with his continuing service as a justice. Likewise, although it did not come to light at the time, Chief Justice Fred Vinson’s
informal advice to President Truman regarding the legality of seizing the steel mills was also improper.\footnote{125}{See \textit{David McCullough, Truman} 897 (1992).}

We do not mean to say that Justice O’Connor’s activities were indistinguishable from Fortas’s or Vinson. On the contrary, O’Connor served openly on the Iraq Study Group, whereas Fortas and Vinson respectively met with Johnson and Truman 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 so 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?

Part of the answer may be that there are only weak formal constraints on extra-judicial 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 comprise the Electoral Commission that resolved the contested election of 1876;\footnote{126}{See Jesse H. Choper, \textit{Why the Supreme Court Should Not Have Decided the Presidential Election of 2000}, 18 CONST. COMMENT 335, n.30 (2001).} Justice Robert Jackson took a leave of absence from, but did not give up his seat on, the Supreme Court, to serve as a Nuremberg prosecutor;\footnote{127}{Jeffrey W. Stempel, \textit{Chief William’s Ghost; The Problematic Persistence of the Duty to Sit}, 57 BUFF. L. REV. 813, 845 (2009).} Chief Justice Earl Warren chaired the President’s Commission on the Assassination of President Kennedy (popularly known as the “Warren Commission”);\footnote{128}{See \textit{Report of the President’s Commission on the Assassination of President Kennedy}, Title Page, Members, and Transmittal Letter, available at http://www.archives.gov/research/jfk/warren-commission-report/letter.html. See also Steven G. Calabresi & Joan L. Larsen, \textit{One Person, One Office: Separation of Powers or Separation of Personnel?}, 79 CORNELL L. REV. 1045, 1137 (1994).} and justices and judges routinely serve on such bodies as the federal Sentencing Commission and the Rules Advisory Committee.\footnote{129}{Justice Breyer served as a member of the Sentencing Commission from 1985–1989 when he was a judge on the Court of Appeals for the First Circuit. \textit{See The Justices of the Supreme Court}, http://www.supremecourt.gov/about/biographies.aspx (last visited Feb. 12, 2011).}

Longstanding case law confirms the compatibility of such moonlighting with holding Article III office. Consider Chief Justice John Jay’s view in \textit{Case of Hayburn}.\footnote{130}{Case of Hayburn, 2 U.S. 408, 410 (1792).} After determining that Congress could not constitutionally assign non-judicial business to an Article III court, he and the two other judges with whom he was sitting nonetheless undertook the precise business assigned (determining veteran invalid pension eligibility) “in the capacity of commissioners.”\footnote{131}{Id. at 410.} That decision—and the long history of subsequent performance of non-judicial service by Article III judges and justices—\footnote{132}{See, \textit{e.g.}, \textit{Mistretta v. United States}, 488 U.S. 361, 402 (1989); \textit{see also supra} text accompanying notes}
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 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 the Presidency and Supreme Court justice simultaneously.

There is some well-known precedent for even that degree of moonlighting, of course. As every first-year constitutional law student learns when studying *Marbury v. Madison*, John Marshall retained his position as Secretary of State for some time after his appointment to the Court as Chief Justice. The casebooks routinely ask whether Marshall ought to have recused himself in *Marbury*, 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 dual Judicial/Executive service. Article I, Section 6 bars members of Congress from simultaneously holding “any Office under the United States.” In thus barring a judge or justice (an “Office”) 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 be sure; it renders the Incompatibility Clause of Article I superfluous. 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 John Marshall.

126-129 (discussing judges and justices taking on non-judicial tasks and roles).

133 5 U.S. (1 Cranch) 137 (1803).

134 See, e.g., ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 1 (3rd ed. 2009).


136 Seth Tillman argues that the Incompatibility Clause itself does not apply to the President, only to officers serving under the President, while Steven Calabresi disagrees. See 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 (2008). 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 office-holding. But we do not agree with Tillman, whose methodology neglects what 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 (1969) (expounding the structural method in which the relations among institutions created and recognized by the Constitution give rise to principles of constitutional law).
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—is very close to the line, if not past it.

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 quantify the point precisely, we would say that the limits on the performance of non-judicial tasks by retired justices should be somewhat less strict than for active justices, in part because of the accumulated experience and wisdom represented by the elite group of retired justices and the service they could continue to offer the United States. The rules and standards governing permissible extra-judicial 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 by a retired one.

To be sure, there are limits, even for retired justices (and senior judges). For example, suppose 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 had existed). Even if 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 separation of powers, and we expect that most readers 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.137

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 may have a unique perspective, that of both insider and outsider. 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.

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.

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137 We refer in the text to retired justices who wish to remain eligible to serve by designation on the Supreme Court or 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.
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 kind. It can perhaps be best illustrated by the example of the most prominent lower court federal judge of the last generation, Richard Posner.

Before ascending the bench, then-professor Posner did not hesitate to tackle controversial issues in his scholarship,138 nor has he so hesitated since donning a judicial robe. While a judge on the Seventh Circuit, Judge Posner has written a book about sex in which he suggested that some unattractive women are lesbian because appearance is less important to women than to men,139 has written a critical evaluation of the Report of the 9/11 Commission that addressed matters of national security policy that would ordinarily be thought far outside the ken of judicial competence,140 and said that one of the most reviled decisions in the history of the United States, Korematsu v. United States,141 was “defensible.”142

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

By contrast, a retired and well-respected judge or justice, as an elder statesperson, is well situated to speak broadly on issues of the day. Consider a 2010 essay that Justice O’Connor co-authored for the New York Times.143 In it, she and her co-authors called on Congress to allocate $2 billion in funding for research on Alzheimer’s disease. Principles of separation of powers and judicial ethics could be invoked to call into question an active judge or justice attempting to influence the quintessentially legislative power of the purse in this way—at least where the allocations sought have nothing to do with the legal system. And indeed, Justice O’Connor was criticized on just this ground.144 But

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139 See Richard A. Posner, Sex and Reason 123 (1994) (opining that “homely 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”).


141 323 U.S. 214 (1944).


notwithstanding the fact that at the time she co-authored the essay Justice O’Connor was in some sense still “serving as a federal judge,”\textsuperscript{145} in another sense, she was not. Given her extraordinarily high profile, her quite public struggle with her husband’s affliction by Alzheimer’s (which itself occasioned her retirement),\textsuperscript{146} 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 in the future, her past advocacy on the subject might require recusal, but the advocacy, standing alone, strikes us as appropriate in light of her status as retired.

VI. Conclusion

The Leahy bill will not likely be enacted into law in the near future. As discussed in Part III, even during a Term in which Justice Kagan was recused in roughly a 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. 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, Anthony 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.

Nonetheless, the Leahy proposal warrants and rewards serious consideration because of what that consideration reveals about the Supreme Court as an institution and 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, already they 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 bringing the authority 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.

\textsuperscript{145} \textit{Id.}