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Short-Circuited: How Constitutional Silence and Politicized Federalism Led to Erosion of "Judicial Hallmarks" in Federal Appellate Process

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SHORT-CIRCUITED: HOW CONSTITUTIONAL SILENCE AND POLITICIZED FEDERALISM LED TO EROSION OF "JUDICIAL HALLMARKS" IN FEDERAL APPELLATE PROCESS

The judiciary is now under consideration. I view it as you do, as defective both in its general structure, and many of its particular regulations. The attachment of the Eastern members, the difficulty of substituting another plan, with the consent of those who agree in disliking the bill, the defect of time &c. will however prevent any radical alterations. The most I hope is that some offensive violations of Southern jurisprudence may be corrected, and that the system may speedily undergo a re-consideration under the auspices of the Judges who alone will be able perhaps to set it to rights.

-James Madison [1789]

I. THE CIRCUIT COURTS HAVE DETERIORATED FROM A PERSONALLY CONDUCTED TO A BUREAUCRATICALLY CONDUCTED APPELLATE PROCESS.

In drafting Article Three of the United States Constitution, James Madison and his co-authors did not include methods for efficiently adapting the federal courts to an ever-evolving caseload.[1] This profound lack of direction planted an infection in the federal court system, a potentially fatal illness called the "crisis of volume."[2] Politicized federalism has served as a catalyst, perpetually spreading the infection and exacerbating the crisis.[3]

The term *crisis* is a misnomer in this instance, as most crises are temporary emergencies so pressing that they demand immediate attention and resolution. Ironically, warnings regarding the "crisis of volume" have been neglected for decades.[4] This Comment will address the crisis, which currently plagues the United States Courts of Appeals (hereinafter "the Circuits").[5] The Circuits are weighed down by an overwhelming caseload in the same way Atlas was weighed down by the world; except that Atlas was never expected to dispense justice effectively while shouldering his burden.[6]

The Circuits have endured the nagging "crisis of volume" because no expedient manner of adapting the federal courts is mentioned in the United States Constitution.[7] The Founding Fathers set forth the structure of the legislature in Article One, the executive in Article Two, and the judiciary in Article Three.[8] With significantly less text than those preceding, Article Three is silent regarding the inner workings of the federal courts, and the proper measures for maintaining reasonably efficient courts were left to the discretion of Congress.[9] However, the discretion of Congress is often in opposition to the needs of the federal courts; that opposition is largely caused by a fundamental principle at the heart of American government, federalism.[10]

Federalism is the oldest, most pervasive, and politically polarizing debate in American history.[11] Justice O'Connor, in *New York v. United States*, described federalism as a "constitutional question . . . as old as the Constitution: It consists of discerning the

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1. *See* U.S. CONST. art. III.

2. FED. CTS. STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 109 (Apr. 2, 1990). The term "crisis of volume" was used by the Federal Courts Study Committee in its 1990 report to refer to the danger the judiciary faced under an overwhelming caseload.

3. *See generally* Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691 (2004) (discussing the politicization of judicial issues, in the context of the appointment process); Carl M. McGowan, *Federalism – Old and New – and the Federal Courts*, 70 GEO. L.J. 1421 (1982) (explaining the ways in which federalism has affected the federal courts).

4. *See* FED. CTS. STUDY COMM., *supra* note 2, at 109; Miner '56, Roger J., *Dealing with the Appellate Caseload Crisis: The Report of the Federal Courts Study Committee Revisited*, 57 N.Y.L. SCH. L. REV. 517 (2013) (clarifying that the crisis worsened following the publication of the Federal Courts Study Committee's report).

5. FED. CTS. STUDY COMM., *supra* note 2, at 109.

6. FED. CTS. STUDY COMM., *supra* note 2, at 109; ROBIN HARD & H. J. ROSE, THE ROUTLEDGE HANDBOOK OF GREEK MYTHOLOGY: BASED ON H.J. ROSE'S HANDBOOK OF GREEK MYTHOLOGY 49 (2004) (providing an explanation of the Greek myth of Atlas, known for helping the Titans rebel against the Olympians. Zeus punished Atlas' rebellion by mandating that he hold up the sky for eternity).

7. *See* U.S. CONST. art. III.

8. *See* U.S. CONST. arts. I–III.

9. *See* U.S. CONST. art. III.

10. New York v. United States, 505 U.S. 144, 149 (1992).

11. *Id*.

proper division of authority between the Federal Government and the States."[12] Any matter that invokes a question of federalism—of where the authority to govern lies—will be accompanied by the politicization of the issue.[13] This Comment refers to those parallel manifestations of politics and federalism as politicized federalism.

Politicized federalism is rampant in areas of confusion caused by constitutional silence.[14] The absence of provision in Article Three for adapting the courts has meant a prevalence of politicized federalism in moments when that adaptation is needed.[15] With politicized federalism acting as a catalyst for the infection, the federal judiciary has been unable to defend itself, as if there were no judicial immune system at all.[16] Lawmakers must consider a new approach for addressing the "crisis of volume," and the judiciary requires its own immune system to ward off future attacks.[17]

Article Three's silence and politicized federalism allow the "crisis of volume" to reverberate throughout each Circuit, without treatment or cure.[18] Since the United States Supreme Court grants a writ of *certiorari* in only a handful of cases, the Circuits answer most legal questions brought before them with finality.[19] Therefore, the bulk of *stare decisis* originates in the Circuits, which have long been infected by the "crisis of volume."[20]

The infection has persisted for so long that it has caused serious harm to the "hallmarks of our judiciary."[21] With politicized federalism preventing necessary adaptation, the Circuits were unable to preserve those judicial hallmarks.[22] The erosion of judicial hallmarks eventually led to an unplanned evolution in the Circuits, from a "personally conducted" appellate process to a "bureaucratically conducted" appellate process.[23] The bureaucratic appellate process has had detrimental effects; in light of these, lawmakers must address the "crisis of volume" and ensure that the judiciary is protected from further harm.[24]

Part II of this Comment will study an ancestor of the "crisis of volume" infection, the early practice of circuit riding, to demonstrate that the current illness stems from a flaw

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12. *Id.*

13. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1923 (2014).

14. John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2006–08 (2009).

15. *Infra* Part III.

16. *Infra* Parts III–IV.

17. FED. CTS. STUDY COMM., *supra* note 2, at 109.

18. Thomas B. Marvell, *Appellate Capacity and Caseload Growth*, 16 AKRON L. REV. 43, 59 (1982) (discussing the growth of appellate caseloads, how those caseloads apply increasing pressure on the Circuits, and the negative consequences of an appellate court exceeding its capacity).

19. *About the Supreme Court*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/about (last visited Sept. 27, 2019).

20. Shay Lavie, *Appellate Courts and Caseload Pressure*, 27 STAN. L. & POL'Y REV. 57, 58 (2016) (discussing the importance of the appellate courts in the federal system and the implications of the crisis of volume on those courts).

21. FED. CTS. STUDY COMM., *supra* note 2, at 109.

22. *Id.*

23. Howard T. Markey, *On the Present Deterioration of the Federal Appellate Process: Never Another Learned Hand*, 33 S.D. L. REV. 371, 376–77 (1988).

24. FED. CTS. STUDY COMM., *supra* note 2, at 109.

in what could be described as the judiciary's DNA, Article Three of the Constitution. Furthermore, Part II will illustrate the daily challenges legal practitioners experienced in the early years of the judiciary, through the eyes of a young nineteenth-century attorney, Abraham Lincoln. Next, Part II will offer background for analysis and provide evidence of the burden that the early United States Supreme Court justices grudgingly endured, for over a century, until the practice of circuit riding was finally abolished. Lastly, Part II will compare the judicial burdens of circuit riding with the modern crisis of volume; constitutional silence and politicized federalism will be identified as the causes of both burdens.

Part III will examine the relationship between Congress and the Judiciary in three steps. First, Part III will look to Article Three and the limited authority its language delegates to Congress. Next, Part III will provide a brief history of legislative acts that affected the judicial framework. Lastly, Part III will examine the judiciary's efforts to cure the crisis of volume and will identify politicized federalism as the reason for Congress' failure to treat the infection.

Part IV will analyze the crisis of volume as it was described in the Report of the Federal Courts Study Committee in 1990. Then, Part IV will show that the crisis has become more severe since that report was released and discuss the harmful consequences of its current state. Lastly, Part IV will mourn the erosion of the "personally conducted" federal appellate process that occurred as a direct result of the crisis of volume; the need for a new approach to judicial adaptation will be explained.

II. CIRCUIT RIDING WAS AN EARLY EXAMPLE OF CONGRESS' TENDENCY TO HINDER JUDICIAL ADAPTATION.

There are clear similarities between the current crisis of volume and its now-extinct ancestor, the practice of circuit riding.[25] As Congress statutorily mandated under the Judiciary Act of 1789, the federal circuit courts were divided into regional jurisdictions.[26] For about half of American history, justices of the United States Supreme Court were assigned to and presided over these regional jurisdictions.[27] This arrangement meant that justices were obligated to travel across frontier country so they could fulfill their duties at their assigned circuit court.[28] The practice consumed an enormous amount of judicial time and energy, as travel across long distances through largely unsettled terrains by way of slow, unreliable, and often dangerous means of transportation took its toll.[29]

Beyond the difficulties of geography, perceptions of potential unconstitutionality swirled around the practice, as it left open the possibility of judges rehearing cases at different levels of the federal court system.[30] The original circuit courts were composed of three-judge panels, which included a district judge from the local community and two

25. *Infra* Part II.C.

26. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74.

27. *Id*. at 74–75.

28. *Id*.

29. Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1765 (2003).

30. *Id*. at 1794–95.

circuit riding Supreme Court justices.[31] Given the right circumstances, a district judge could rehear a case they had previously presided over in their district, although the language of the Judiciary Act of 1789 prohibited a district judge from voting in "any case of appeal or error from his own decision . . . "[32] However, if appealed, a decision at the circuit level could reach the Supreme Court, and a justice that had been involved in the circuit court's decision could hear the matter again.[33]

Justices of the Supreme Court, raising concerns of the practice's impracticality and perceived unconstitutionality, repeatedly asked Congress to abolish the practice and create circuit judgeship positions.[34] However, as a result of Federalist political motivations, the early Court could not persuade Congress to end the practice.[35] Like the modern crisis of volume, circuit riding strained the administration of justice in a variety of ways and persisted for decades despite judges' concerns.[36] Both circuit riding and the contemporary crisis of volume were allowed to continue for the same reasons: (1) Article Three of the Constitution does not provide an adequate avenue for remedying either infection, and (2) politicized federalism prevented Congress from addressing the negative consequences of each.[37] The circuit riding practice should serve as a reminder that the judiciary's current crisis is not new, but rather the latest manifestation of an old illness.

A. Until Five Score and Nine Years Ago, Circuit Riding Plagued the Federal Judiciary.

The practice of circuit riding infected the judiciary for over a century.[38] Attorneys and judges trekked through wild landscapes to uphold order in the courts, enduring frontier travel over vast distances.[39] Among these frontier practitioners was Abraham Lincoln, a young circuit riding attorney from Illinois.[40] Lincoln practiced in the Eighth Circuit of Illinois–not a federal jurisdiction–but the daily challenges of circuit riding were similar at the state and federal levels.[41] Lincoln's career is an interesting example of the circuit riding practice.[42]

It is commonly known that Lincoln was a practicing attorney before his presidency, but the nature of his time practicing law is rarely discussed outside the wood-paneled offices of legal scholars and historians.[43] Rather than being confined to a prestigious law firm, Lincoln chose to be a traveling practitioner and received considerably less pay for

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31. Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.
32. *Id.* at 75.
33. Glick, *supra* note 29, at 1794–95.
34. *Id*. at 1777.
35. *Id*. at 1777–78. Justice Iredell wrote to his wife, Hannah, in 1796 upon realization that Congress would not abolish circuit riding, stating "[w]e are still doomed, I fear, to be wretched Drudges." *Id.* at 1778.
36. *Id*. at 1767. (explaining the justices' desire to change the system before "institutional ossification" set in) (quoting 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801, at 554 (Paul A. Freund gen. ed., 1971)).
37. *Infra* Part II.C.
38. Glick, *supra* note 29, at 1754, 1755.
39. *Id.* at 1757.
40. ALBERT A. WOLDMAN, LAWYER LINCOLN 82 (2001).
41. *Id.* at 85.
42. *See generally id.*
43. *Id.* at 6.

his efforts.[44] Lincoln was admitted to the Illinois Bar on September 9, 1836.[45] He practiced law as a circuit rider, which meant he traveled a geographical circuit to statutorily designated locations where court was held.[46] Lincoln's reputation as an elite orator was arguably first cultivated when he returned to circuit riding in Illinois after a brief period running for the state's legislature.[47]

In the Eighth Circuit of Illinois, Lincoln was well-known and witnessed the ongoing overhaul of the state's court system.[48] David Davis, an attorney Lincoln knew well, was elected to the Supreme Court of Illinois, taking on the Eighth Circuit jurisdiction and its requisite circuit riding duties.[49] For most of Lincoln's legal career, the Eighth Circuit was composed of fourteen counties, which were still largely unsettled.[50] The daily challenges of practicing law while riding circuit are completely foreign to attorneys today.[51]

Lincoln's traveling companions were fellow prominent attorneys and judges of the time, as he was part of the "'big five' of this early horseback circuit."[52] The "big five" consisted of Abraham Lincoln, John Stuart, Stephen Logan, David Davis, and Edward Baker, all renowned for their prowess in the legal profession.[53] Davis, later appointed by Lincoln as a justice of the United States Supreme Court, wrote to family about his experiences traveling the circuit, explaining in one letter that he and his traveling companions were "deluged by rain [that] spring. The windows of heaven [were] certainly

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44. *Id.* at 82.

45. Lawyer Profile of Abraham Lincoln, ATT'Y REGISTRATION & DISCIPLINARY COMM'N OF THE SUP. CT. OF ILL., https://www.iardc.org/ (follow "Lawyer Search" hyperlink; then search last name field for "Lincoln" and search first name field for "Abraham").

46. *Circuit Riding*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/circuit-riding (last visited Sept. 15, 2019).

47. WOLDMAN, *supra* note 40, at 82.

48. *Id.* at 85–86; Lincoln's admittance to the bar in 1836 came at a critical time for Illinois' courts, and Lincoln had a front row seat to the judicial evolution of his home state. *Timeline of Judicial History*, NINETEENTH JUD. CIRCUIT CT., 19thcircuitcourt.state.il.us/1289/Timeline-of-Judicial-History (last visited Sept. 11, 2019). The Supreme Court of Illinois Territory and the county courts were established in 1814; the state's supreme court judges had jurisdiction over civil and criminal matters, along with the responsibility of each to ride their own circuits. *Id*. A few years later in 1818, Illinois became the twenty-first state to enter the Union, and the state's constitution established its judicial system. *Id*. The state's circuit courts remained under the jurisdiction of the Illinois Supreme Court judges until 1835, when circuit judgeships were created, and the Illinois Supreme Court justices were relieved of their circuit duties. *Id*. In 1841, Illinois' legislature abolished the circuit judgeships and, again, required the justices to ride circuit. *Id.* The creation and subsequent abolition of circuit judgeships also occurred at the federal level. *Infra* Part III.B.ii.

49. WOLDMAN, *supra* note 40, at 81. In 1841, Judge Samuel H. Treat was elected to the Supreme Court of Illinois and presided over the Eighth Circuit, holding court for two days at a time, twice annually, in each county under his jurisdiction. *Id.*

50. *Id*. at 87.

51. Guy C. Fraker, *The Real Lincoln Highway: The Forgotten Lincoln Circuit Markers*, 25 J. ABRAHAM LINCOLN ASS'N 76, 76 (Winter 2004).

> The riders are on the road from Metamora, the seat of Woodford County, to Bloomington, seat of McLean County. They are in the vicinity of the county line. Other than an occasional farmstead and a rare passing rider, they have seen no other sign of settlement for some time. As they ride, their conversation is accompanied by the whistle of quail, interrupted by the flushing of grouse. They have seen retreating wolves keeping their distance, and they have frequently startled deer from their grassy hiding places.

Id.

52. WOLDMAN, *supra* note 40, at 80.

53. *Id*.

open. Bad roads, broken bridges, swimming of horses and constant wettings [were] the main incidents in Western travel."[54]

The Eighth Circuit covered about one-fifth of Illinois.[55] Judge Davis held court in all of its fourteen counties, which entailed a round trip of approximately 500 miles.[56] Lincoln and Judge Davis were the only members of the Illinois Bar that consistently travelled to *all* of the counties in the Eighth Circuit.[57] On horseback, Lincoln would set out for the circuit carrying "his saddle-bags stuffed with documents and a few changes of lighter apparel, a huge weatherbeaten cotton umbrella to shelter him from the elements, and a law book or two, to be gone for weeks at a stretch."[58] The Eighth Circuit educated Lincoln, provided him with myriad lessons in legal practice, and prepared him for political challenges to come.[59]

It could be argued that Lincoln's humble beginnings riding the Eighth Circuit in Illinois molded him into the man that history now applauds.[60] The unique and burdensome challenges of circuit riding required both trail-smarts and book-smarts.[61] A camaraderie formed between Lincoln and his colleagues as they tackled these challenges together, and Lincoln's ability to lead in trial or on trail made him a well-rounded practitioner.[62] Lincoln and his peers encountered an array of challenges in their circuit travels.[63] For instance:

> Lincoln's extremely long legs caused his circuit-riding companions to appoint him as scout in testing the depth of the streams. By taking off his boots and stockings and rolling up his trousers he could easily find the shallow crossing-places and lead his cronies through the current. On one occasion after a severe rainstorm, a party of itinerant lawyers, including Judge Davis, stripped naked and with their clothes thrown in bundles over their shoulders, mounted their horses, and led by the gigantic, rawboned Lincoln, crossed the flood.[64]

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54. *Id*. (quoting Letter from David Davis to Julius Rockewelle (May 14, 1844), *in* HARRY EDWARD PRATT, TRANSACTIONS OF THE ILLINOIS HISTORICAL SOCIETY 162, 162–63 (1930)).

55. *Id.* at 81.

56. *Id*.

57. WOLDMAN, *supra* note 40, at 82.

58. *Id*.

59. ROGER L. SEVERNS, PRAIRIE JUSTICE: A HISTORY OF ILLINOIS COURTS UNDER FRENCH, ENGLISH, AND AMERICAN LAW 172 (John A. Lupton ed., 2015). Many of Lincoln's greatest challenges would be dealt from a stack of cards held by an old friend, Stephen H. Douglas, who grew up alongside Lincoln. *Id.* They received their educations from the same school; the pair were friends and, at times, fervent rivals in their careers. *Id.* Lincoln and Douglas also went by Big Sucker and Little Giant, respectively, nicknames they obtained early in their careers as clear references to their starkly different statures. *Id.* Lincoln spent the majority of his early career practicing law, notwithstanding a brief period running for the Senate of Illinois. *Id.* He suffered defeat to none other than Douglas, in the famous Lincoln-Douglas debates, and thus returned home to the Eighth Circuit. *Id.* Douglas was already a judge on the Supreme Court of Illinois, and now he had defeated Lincoln in a race to the Illinois Senate. *Id.* Honest Abe returned home from that battle defeated, but he was undoubtedly triumphant in the war. *Id.* With a reputation that now had national appeal, he became the Republican Party's candidate in the next presidential election. *Id.* Big Sucker would go on to win that election, becoming the sixteenth President of the United States of America and, undeniably, one of the greatest Presidents the American Republic has had the privilege of electing. Now, in the law library at the University of Tulsa, College of Law, Lincoln's statue stands about fifty feet from the desk at which this Comment was drafted.

60. WOLDMAN, *supra* note 40, at 5–6.

61. *Id.* at 80.

62. *Id*. at 83–84.

63. *Id*. at 80.

64. *Id*. at 82–83.

Lincoln represents an array of practitioners who rode circuit in the frontier of American law, clearing a path for future generations of attorneys and judges.[65] Although Lincoln rode circuit at the state level, judges also endured the circuit riding practice in federal jurisdictions, including justices of the United States Supreme Court.[66]

B. The Supreme Court Endured Circuit Riding for Over a Century.

In their circuit duties, justices of the nation's highest Court endured the same type of perilous travel as was required of Lincoln in Illinois.[67] Two justices of the Supreme Court traveled twice each year to a circuit where they sat on a panel, along with a district judge of the state with original jurisdiction.[68] About a half-century before Lincoln's career began, the Judiciary Act of 1789 established three federal circuit jurisdictions: the Eastern Circuit, the Middle Circuit, and the Southern Circuit.[69] Each of these three jurisdictions posed unique challenges to its presiding justices; the Eastern and Middle Circuits were relatively well-established, but the Southern Circuit was largely frontier at the time.[70] Beyond the issues of landscape and geography, the physical health of the justices posed additional challenges, as older justices struggled with the hardships of strenuous travel.[71] To further complicate matters, the time required for justices to complete their circuit duties meant spending nearly half a year away from their responsibilities back home.[72]

Justices of the early Supreme Court strongly opposed the practice of circuit riding, as it required an extraordinary amount of frontier travel at a time when transportation was anything but comfortable.[73] The first Chief Justice of the Supreme Court, John Jay, even wrote to President George Washington describing the difficulties of riding circuit and requesting that Washington ask Congress to address the issue.[74] Riding circuit was so despised amongst the early Supreme Court justices that "the first Court agreed to take a reduction in salary in exchange for Congress appointing a separate circuit judiciary."[75] Still, a primarily Federalist Congress refused to address the justices' circuit riding concerns.[76] Instead of listening to the Court's pleas for change, Congress asked the Attorney General to review and report on whether the procedure required modification.[77]

At that time, the Supreme Court did not have the power to choose which cases

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65. The discussion in this section of President Lincoln's experiences riding circuit in Illinois should serve as an illustration for the subsequent section, where the circuit riding practice is examined at the federal level, and those enduring hardships are justices of the Supreme Court of the United States.

66. Glick, *supra* note 29, at 1754.

67. *Id*.

68. *Id*. at 1757.

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

70. Glick, *supra* note 29, at 1765.

71. *Id*. at 1766.

72. *Id*.

73. *Id*. at 1754.

74. *Id*. at 1768.

75. Glick, *supra* note 29, at 1754.

76. *Id.* at 1769.

77. *Id*. Congress has a tendency to hear the judiciary's pleas for change, assign officials to report on the issue, and subsequently never follow up on the report. For more recent examples, see FED. CTS. STUDY COMM., *supra* note 2; FED. JUD. CTR., *infra* note 249.

deserved its attention.[78] Rather, Congress dictated which cases and controversies would be heard by the Court after appeal from the district or circuit courts.[79] The justices often heard the same case during the course of their circuit duties and later on appeal to the Supreme Court.[80] At first, the Circuits were primarily trial courts of original jurisdiction; thus, a justice could serve as both a trial and an appellant judge in the same case.[81] Justices typically recused themselves from cases they had previously presided over.[82] However, this was not always true as all available justices were sometimes required to participate in a case for a quorum to exist.[83]

The early Court made the most of its circuit duties, spreading judicial influence and setting the stage for American jurisprudence while on the circuit.[84] Justices often expressed legal theories at the circuit level that they would later elaborate in opinions of the highest Court.[85] For example, in discussing the prototype principle of judicial review, Justice Chase explained that "some of the judges [had] individually in the Circuits decided that the Supreme Court [could] declare an Act of Congress to be unconstitutional, and therefore invalid, but there [was] no adjudication of the Supreme Court itself upon this point."[86]

The early Supreme Court justices complied with their statutory obligation to ride circuit, but their compliance should not be construed as consent.[87] Rather, the early Court had no other choice.[88] Possessing the power neither of the purse nor of the sword, the Court was relatively weak and uncertain of its authority.[89] Unfortunately, the early Congress was quite sure of its powers and had little incentive to wield them in favor of the judiciary.[90]

C. Congress Is Historically Uncooperative When Adaptation Is Needed in the Circuits.

The early Congress regarded the circuit riding practice as an apparatus for furthering Federalist ideals.[91] Congress believed "circuit riding transformed the justices into 'republican schoolmaster[s],'" endowed with federal authority and the ability to disperse national political views amongst the states.[92] At a time when the competing principles of Federalism and Anti-Federalism dominated American politics, Federalists viewed the

78. Glick, *supra* note 29, at 1761.
79. *Id*. at 1762.
80. *Id*.
81. *Id*.
82. *Id*. at 1762–63.
83. Glick, *supra* note 29, at 1763.
84. *See* Cooper v. Telfair, 4 U.S. 14 (4 Dall. 1800) (dealing with the issue of judicial review, at the circuit level, three years prior to the Court's decision in Marbury v. Madison, 5 U.S. 137 (1 Cranch 1803)).
85. *Id*.
86. *Id*. at 19.
87. Glick, *supra* note 29, at 1755.
88. *Id*.
89. *Id*.
90. *Id*.
91. *Id.* at 1754.
92. Glick, *supra* note 29, at 1754.

practice of circuit riding as a means of advancing their political philosophy.[93] From a Federalist perspective, there was value in the highest Court's justices riding circuit because they "could lecture the local citizens not only on the relevant law, but also on the nature of centralized government, the responsibility of the citizenry, and the ways in which the new government served their needs."[94] Furthermore, "[f]avorable public opinion was necessary to ensure the survival of the young Republic and the active and visible presence of the justices would help foster loyalty toward the new form of government and somewhat weaken the people's previous allegiance to their state's government."[95]

When the Judiciary Act of 1789 was enacted, the United States House of Representatives and Senate were both controlled by the Pro-Administration party, an early name attributed to Federalist ideals.[96] The first Senate was composed of eighteen Pro-Administration and eight Anti-Administration senators, while the first House of Representatives consisted of thirty-seven Pro-Administration and twenty-eight Anti-Administration representatives.[97] Since the Federalist, or Pro-Administration, ideology benefited from justices riding circuit, there was little political incentive to end the practice, despite the justices' complaints.[98]

The highest Court in America rode circuit for over a hundred years.[99] There were two prominent issues raised by justices during this period.[100] Justices dealt with "serious physical hardships during the burgeoning days of the Republic . . . [and] found it impossible to attend simultaneously to the ever-growing docket of the Supreme Court and to their circuit duties."[101] Nonetheless, it is apparent that the young American judiciary was powerless to modify its own procedures without a cooperative Congress.[102]

Those hoping to end circuit riding sought recourse in the courts when efforts to do so in Congress proved futile.[103] The constitutionality of circuit riding was questioned in *Stuart v. Laird*.[104] Justice Patterson, writing for the Court, gently alluded to Congress' refusal to abolish circuit riding.[105] Patterson identified the quarrels of the Federalist and

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93. *Id*.

94. *Id*. at 1760.

95. *Id.*

96. *See Party Division*, U.S. SENATE, senate.gov/history/partydiv.htm (last visited Sept. 16, 2019); *Party Divisions of the House of Representatives, 1789 to Present*, U.S. HOUSE OF REPRESENTATIVES, history.house.gov/Institution/Party-Divisions/Party-Divisions/ (last visited Sept. 16, 2019).

97. *See* sources cited *supra* note 96.

98. Glick, *supra* note 29, at 1754.

99. *Id*.

100. *Id*.

101. *Id*.

102. *Id*. at 1755.

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

104. *Id.* at 305 (elucidating that "[b]esides, *as judge of the supreme court*, he could not exercise the duties or jurisdiction assigned to the court of the fifth circuit, because, by the constitution of the United States, the supreme court has *only appellate* jurisdiction; except in the two cases where a state or foreign minister shall be a party. The jurisdiction of the supreme court, therefore, being *appellate only*, no judge of that court, *as such*, is authorized to hold a court of *original* jurisdiction. No act of congress can extend the original jurisdiction of the supreme court beyond the bounds limited by the constitution." This opinion comes shortly after and in response to the Judiciary Act of 1802, which again gave the Supreme Court justices jurisdiction over the circuit courts, after the Judiciary Act of 1801 had delegated circuit court jurisdiction to circuit judges a year earlier.).

105. *Id*. at 304. Congress was not the first to pass legislation that required judicial officials to ride circuit.

Anti-Federalist parties in the early Congress as clear causes of that refusal.[106] Discussing Article Three, Patterson explained that "[t]his provision of the constitution was intended to place the judges not only beyond the reach of executive power . . . but also to shield them from the attack of that party spirit which always predominates in popular assemblies."[107] The Court held that the practice of circuit riding was constitutional, but the preceding portion of the opinion appears to illustrate the judiciary and legislature's strained relationship when attempting to adapt the federal courts.[108]

Congress ignored the practical disadvantages and embraced the political value of circuit riding, as the legislative body perceived a need for national politicians to remain in touch with citizens at the local level.[109] In the young Republic, citizens were "dependent upon court sessions to receive the news of the day, or to learn about and discuss the doings of the politicians."[110] As Congress valued the political benefits of circuit riding justices, it mandated the continuance of the practice, and the concerns of those in the judiciary were simply not enough to convince Congress to act on the issue.[111] The same trend holds true today, as the crisis of volume, despite significant warnings issued by federal judges, has yet to be addressed.[112]

III. CONSTITUTIONAL SILENCE AND POLITICIZED FEDERALISM HAVE PREVENTED EFFICIENT ADAPTATION SINCE THE JUDICIARY'S FOUNDING.

A. The Constitution Does Not Provide a Method for Adapting the Federal Courts Over Time.

The foregoing discussion raises the question: Where did the early Congress obtain its authority to dictate the internal procedures of the judiciary? The text of the Constitution does not provide an answer[113]; rather, its language established the Court, announced its jurisdiction (both actual and potential), and *limited* the legislature's authority over that jurisdiction.[114] An examination of the Constitution's language does not warrant the conclusion, or even justify an inference, that Congress has power over the internal

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Circuit riding was first implemented in thirteenth-century England, when, under duress from the freemen, King John signed the Magna Carta. One provision of the famous charter declared that the "chief justiciary, shall send two justiciaries through every county four times a year, who, with the four knights chosen out of every shire by the people, shall hold the said assizes in the county, on the day and at the place appointed." *English Translation of Magna Carta*, BRITISH LIBR. (July 28, 2014), https://www.bl.uk/magna-carta/articles/magna-carta-english-translation.

106. 5 U.S. at 304.

107. *Id*.

108. *Id.* at 309 (elaborating that "[a]nother reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the constructions." This disposition follows pages of analysis where the Court seemed to outline the unconstitutionality of circuit riding.).

109. Henry C. Clark, *Circuit Riding a Former National Asset*, 8 A.B.A. J. 772, 774 (1922).

110. *Id*.

111. *Id*.

112. *See* Markey, *supra* note 23, at 377.

113. *See* U.S. CONST. art. III.

114. *Id*.

procedures of the Court.[115]

When the National Constitutional Convention toiled over the principles that would outline a new experimental government, it easily reached the conclusion that a federal judiciary was imperative.[116] An independent federal judiciary was necessary in the democratic system, and it was clear that the supreme interpreter of laws needed separation from both the creator and the enforcer of laws.[117] However, the Convention did find cause for debate regarding the organization of the federal judiciary.[118] The Federalists desired far-reaching national authority in the federal courts, while the Anti-Federalists wished for localized federal courts and judges with ties to the local community.[119]

The following excerpt of Article Three describes the full scope of authority that Congress was given over the judiciary:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts *as the Congress may from time to time ordain and establish*. The Judges . . . shall hold their Offices *during good Behaviour*, and shall, *at stated Times*, receive for their Services, a Compensation, *which shall not be diminished during their Continuance in Office* . . . .
>
> . . . In all the other Cases before mentioned, 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*.
>
> . . . .
>
> The Trial of all Crimes, except in Cases of Impeachment; shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but *when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed*.[120]

This text delegates only a handful of authorities to Congress, in their respective order: Congress may ordain and establish inferior courts,[121] suspend justices when they fail to maintain good behavior,[122] determine the compensation of justices,[123] and regulate any extension of the Court's appellate jurisdiction under exceptions Congress chooses to establish.[124]

The language stating that Congress "may from time to time ordain and establish" inferior courts seems to warrant the inference that the authors of the Constitution predicted the inevitable need to expand and adapt the court system over time.[125] However, no portion of Article Three expressly grants Congress authority over the procedures for

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115. *Id.*

116. MULLER, WILLIAM HENRY, EARLY HISTORY OF THE FEDERAL SUPREME COURT 13 (1922).

117. *Id.*

118. *Id.*

119. GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 409 (2011).

120. U.S. CONST. art. III, §§ 1–2 (emphasis added to indicate text relevant to Congress' authority).

121. U.S. CONST. art. III, § 1 ("from time to time," an early indicator that the Founding Fathers understood there would be an inevitable need to adapt the courts).

122. *Id.*

123. *Id* (but not "diminish" that compensation during their time in office).

124. U.S. CONST. art. III, § 2 (providing for the limiting of *extensions* to appellate jurisdiction that Congress chooses to give the Court).

125. U.S. CONST. art. III, § 1.

adapting or expanding the judiciary.[126] This authority is distinct from Congress' authority over the expansion or limitation of jurisdiction in inferior courts.[127]

Rather, Congress assumed this authority as falling under its power of the purse, because Article Three did not say otherwise.[128] Since the courts often need pecuniary resources to expand or adapt with their caseloads, Congress is the inevitable gatekeeper for such efforts.[129] However, due to politicized federalism, the gates rarely open.[130] Congress, composed of a body of elected officials in a state of perpetual feud between Federalists and Anti-Federalists, failed to provide assistance to the courts for fear of advancing the opposition's political stance.[131] While this tendency was not protected against in the text of the Constitution, it cannot necessarily be concluded that it was condoned by its authors.[132]

B. Judicial Acts Illustrate the Ineffective Relationship Between the Judiciary and Congress.

Notwithstanding the absence of direction in Article Three, there were nonetheless periods when expansion and adaptation of the courts were required to keep up with the caseloads they faced at a given time in the nation's history. The relevant legislative measures often were rushed, lacked foresight, or catered more to political goals than the judiciary's requested needs.[133] All of the judicial acts were affected in some manner or other by politicized federalism, but some were enacted in such a way as to render them more harmful than helpful to the judiciary.[134] Congress has consistently failed to expand or adapt the federal courts as needed throughout the nation's history, as illustrated by the following relevant legislation.[135]

i. The Judiciary Act of 1789 Established a Flawed Federal Court System.

After the states ratified the Constitution, the primary goal of the newly established Congress upon entering office was drafting a judicial bill; a committee led by Oliver Ellsworth was entrusted with this responsibility.[136] Since Article Three of the Constitution only vaguely outlined the judicial framework, Ellsworth's committee had no direction for

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126. *See generally* U.S. CONST. art. III.

127. *Id*.

128. *Id*.

129. G. Gregg Webb & Keith E. Whittington, *Judicial Independence, the Power of the Purse, and Inherent Judicial Powers*, 88 JUDICATURE 12, 13 (2005).

130. *Infra* Part II.C.

131. *Id*.

132. Surrency, *The Judiciary Act of 1801*, 2 AM. J. LEGAL HIST. 53, 64 (1958).

133. *Infra* Part III.B.

134. *Id*.

135. *Id*.

136. WOOD, *supra* note 119, at 408–09. Ellsworth played a key role in shaping the first draft of the Constitution. Specifically, he helped draft the Connecticut Compromise, creating a bicameral legislature with the states being equally represented in the Senate. Seven years after his work establishing the federal court system, in 1796, Ellsworth became the Chief Justice of the United States Supreme Court. *Senator Ellsworth's Judiciary Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senator_Ellsworths_Judiciary_Act.htm (last visited Mar. 7, 2020).

drafting the specific structure of the judiciary.[137] In a void of constitutional guidance, the committee could shape the judicial framework however it saw fit.[138] However, the committee had to consider both Federalist desires and Anti-Federalist concerns to ensure its bill would be enacted.[139]

At one end of the spectrum, Federalists desired a far-reaching federal judicial power.[140] They advocated for implementation of several district courts and judges, all capable of enforcing federal law.[141] Federalists envisioned the judiciary as a means of transmitting their ideals throughout the nation and a necessary instrumentality for pushing back against innate state loyalties.[142] At the other end of the spectrum, Anti-Federalists sought a limited judicial authority, believing the states fully capable of enforcing federal law within their borders.[143] Because federal judges were appointed, rather than popularly elected, Anti-Federalists deemed them inherently un-democratic.[144]

So, in drafting the Judiciary Act of 1789 ("1789 Act"), Ellsworth's committee searched for middle ground between two starkly contrasting political positions.[145] This meant that the 1789 Act contained several protections against Anti-Federalists concerns.[146] Furthermore, the Bill of Rights was enacted around the same time and protected individual rights from government encroachment.[147] These assurances of individual liberty allowed the 1789 Act to receive enough political support from both parties for ratification.[148]

The 1789 Act established a tiered system of federal courts, which consisted of the Supreme Court, circuit courts, and district courts.[149] Circuit and district courts served as the "inferior courts" alluded to in Article Three; however, the Act only prescribed judges to the district courts.[150] Chief Justice William H. Rehnquist once remarked, "[f]ew lawyers and law students are aware that the Judiciary Act of 1789 created circuit courts but no circuit judges."[151] Ellsworth's committee responded to an immense weight of political pressure—specifically Anti-Federalists against an excess of federal judges—more than it tailored a judiciary around sound policies of efficiency; the foresight to include long-term bulwarks against erosion of judicial hallmarks, while it may have been present in some members, could not outweigh the party spirit of the legislative body as a whole.[152] The system's potential impracticality was overlooked, as both political parties

137. WOOD, *supra* note 119, at 409.
138. *Id*.
139. *Id*.
140. *Id*.
141. WOOD, *supra* note 119, at 409.
142. *Id*.
143. *Id*.
144. *Id*. at 408.
145. *Id*. at 409.
146. WOOD, *supra* note 119, at 409.
147. *Id.*; *see* U.S. CONST. amends. I–X.
148. WOOD, *supra* note 119, at 409.
149. *Id.*; *see* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75.
150. U.S. CONST. art. III, § 1; *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73.
151. Glick, *supra* note 29, at 1754 (quoting 2 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1790–1800: THE JUSTICES ON CIRCUIT: 1790–1794, at xxv (Maeva Marcus ed., 1988)).
152. Eduardo C. Robreno, *Learning to Do Justice: An Essay on the Development of the Lower Federal Courts*

understood that a federal judiciary needed to be established immediately.[153] But this hurried ratification raises the questions: What compromises were made, and were there negative consequences?

The 1789 Act required the Circuits to hold jury trials as courts of law and equity.[154] As noted earlier, trials in these courts were conducted by a panel of three judges.[155] Two circuit riding Supreme Court justices would travel to the site of circuit court trials, and a district judge completed the panel.[156] Structuring the circuit courts in this compromised fashion meant that justices of the highest Court were mandated to endure the same kind of perilous travel as Lincoln, discussed earlier.[157]

Supreme Court justices endured the circuit riding practice for over a century, despite the physical strain of traveling long distances and the exorbitant amount of time the practice consumed.[158] In assessing the structure of the federal courts set forth in the 1789 Act, one author concluded that "[t]he Judiciary Act of 1789 was never satisfactory to anyone, least of all the litigant who had to depend upon the success of the justice of the Supreme Court in braving the elements of his travels . . . "[159] It is clear that the physical impracticality of requiring such strenuous travel took its toll on the judiciary.[160] Because Congress did not address the impracticalities of circuit riding, "[t]he administration of justice on this basis was limited by the tedium of poor transportation, and the vagaries of inclement weather."[161]

A host of judges voiced concerns of the 1789 Act's potential unconstitutionality.[162] Many believed that the judicial framework was incompatible with the Constitution, primarily because of instances where a judge might hear a case for a second time after appeal from an earlier decision.[163] This could occur if a district judge's opinion was appealed, as that same district judge could be a member of the three-judge panel at a circuit court trial.[164] Moreover, Supreme Court justices could hear a case while sitting in panel at the circuit level, and later they might rehear the same case if it came before the Supreme Court.[165]

The 1789 Act was indicative of the rampant politicized federalism of the time, and the resulting judicial system was inherently flawed as a result.[166] Whether based on grounds of practicality or unconstitutionality, the 1789 Act established a federal court

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in the Early Years of the Republic, 29 RUTGERS L. J. 555, 561 (1998).

153. *Id*.

154. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

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

156. *Id*.

157. *See* Glick, *supra* note 29, at 1754.

158. *Id*.

159. Surrency, *supra* note 132, at 58.

160. *Id*.

161. *Id*.

162. *Id*. at 58–59.

163. *Id*.

164. Surrency, *supra* note 132, at 58.

165. *Id*.

166. *Id*. at 58–59 (discussing a variety of concerns regarding the Judiciary Act of 1789 raised by judges at different levels of the judiciary).

structure that many found irrational.[167] In hindsight, the only logical explanation for the inherently flawed system is that politicized federalism manifested itself between Congress and the judiciary, and the courts suffered as a result.

Only ten days prior to the Act becoming law on September 24, 1789, James Madison lamented the inadequacies of the bill with Edmund Pendleton, a fellow Federalist, member of the Continental Congress, and signer of the Constitution:

> The judiciary is now under consideration. I view it as you do, as defective both in its general structure, and many of its particular regulations. The attachment of the Eastern members, the difficulty of substituting another plan, with the consent of those who agree in disliking the bill, the defect of time &c. will however prevent any radical alterations. The most I hope is that some offensive violations of Southern jurisprudence may be corrected, and that the system may speedily undergo a reconsideration under the auspices of the Judges who alone will be able perhaps to set it to rights.[168]

In other words, the author of the United States Constitution recognized the flaws of the judiciary before the 1789 Act was enacted.[169] Possessing a keen eye for long-term consequences, Madison identified flaws in the structure of the proposed system and also in its specific procedural provisions.[170] His concerns stemmed from what he perceived to be inevitabilities, such as the need for new courts and the predictable failure of Congress to provide those courts due to politicized federalism.[171] James Madison, more than familiar with the underpinning philosophies of the new experimental government, considered the judges of the new system responsible for "set[ting] it to rights."[172]

James Madison, the father of the Constitution, knew that Congress would be unhelpful to the judiciary and even predicted the reason—referred to by a new name in this Comment—politicized federalism.[173] In describing the entrenched nature of warring political factions in the legislature, Madison went on to explain, "[t]he difficulty of uniting the minds of men accustomed to think and act differently can only be conceived by those who have witnessed it."[174]

ii. The Judiciary Acts of 1801 and 1802 Demonstrate How Politicized Federalism Harms the Federal Courts.

The imperfections of the judiciary established under the 1789 Act were apparent, and Congress often revisited the organization of the courts.[175] Between the passage of the

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167. *Id*.

168. Letter from James Madison to Edmund Pendleton (Sept. 14, 1789) (on file with the National Archives and accessible at https://founders.archives.gov/documents/Madison/01-12-02-0258) (written ten days before the ratification of the Judiciary Act of 1789) ("&c" being a Latin term equivalent to "etc.").

169. *Id*.

170. *Id*.

171. *Id*.

172. *Id*.

173. *See* Letter from James Madison to Edmund Pendleton, *supra* note 168.

174. *Id*.

175. Surrency, *supra* note 132, at 59. In discussing the Judiciary Act of 1789, the Supreme Court justices wrote a letter to President Washington, stating:

> [t]hat when the present Judicial arrangements took place, it appeared to be a general and well founded opinion, that the Act then passed was to be considered rather as introducing a temporary expedient,

1789 Act and the Judiciary Act of 1801 ("1801 Act"), Congress passed a total of thirty-seven acts that affected the organization, place, or time of court sessions in some manner.[176] However, any significant changes to the organization of the judiciary would implicate partisan considerations, as was the case when the 1801 Act was proposed.[177]

The 1801 Act was steeped in political controversy, flowing directly from the perpetual feud between Federalists and Anti-Federalists.[178] John Adams, a Federalist, occupied the presidency when the legislation was enacted, and the Act's creation of new circuit courts allowed him to fill several positions with Federalist judges.[179] Trials in the circuit courts had been conducted by three-judge panels, consisting of two Supreme Court justices and a local district judge.[180] Now, the 1801 Act created a new system composed of six circuit courts.[181] Each of these new circuit courts would employ a panel of three judges, positions that had previously been filled by circuit riding Supreme Court justices and a local district judge.[182] In adding six circuits to the federal court system, the 1801 Act created sixteen circuit judgeships, and President Adams rushed to fill the vacancies in those newly created circuit courts with Federalist judges.[183]

Anti-Federalists, who rallied behind Thomas Jefferson, heavily criticized the 1801 Act, as it was wholly incompatible with their ideology.[184] Jefferson believed the new federal court structure as laid out under the 1801 Act would be utilized to implement Federalist principles.[185] Infuriated by the actions of President Adams and an opposition-controlled Congress, Jefferson "had no doubt that the Federalist Judiciary Act of 1801 was

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> than a permanent System, and that it would be revised as soon as a period of greater leisure should arrive.

The justices further explained:

> [t]hat the task of holding twenty seven circuit Courts a year, in the different States, from New Hampshire to Georgia, besides two Sessions of the Supreme Court at Philadelphia, in the two most severe seasons of the year, is a task which considering the extent of the United States, and the small number of Judges, is too burthensome.

Letter from Supreme Court Justices to President George Washington (Aug. 9, 1792) (on file with the National Archives and accessible at https://founders.archives.gov/documents/Washington/05-10-02-0425).

176. Surrency, *supra* note 132, at 64.

177. *Id*.

178. *Id*. at 53.

179. *Id*. at 53–54.

180. *Id*. at 56.

181. *Compare* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75 (stating "[t]hat the before mentioned districts . . . shall be divided into three circuits . . . and that there shall be held annually in each district of said circuits, two courts, which shall be called Circuit Courts, and shall consist of any two justices of the Supreme Court, and the district judge of such districts, any two of whom shall constitute a quorum . . . ."), *with* Judiciary Act of 1801, ch. 4, § 6, 2 Stat. 89, 90 (stating "[t]hat the said districts shall be classed into six circuits . . . there shall be in each of the aforesaid circuits . . . three judges of the United States, to be called circuit judges, one of whom shall be commissioned as chief judge; and that there shall be a circuit court of the United States, in and for each of the aforesaid circuits, to be composed of the circuit judges . . . .").

182. Judiciary Act of 1801, ch. 4, § 7, 2 Stat. 89, 90.

183. *Id*. Only sixteen circuit judgeships were created under the legislation rather than eighteen because of the unique structure of the sixth circuit under the 1801 Act. Five of the six newly created circuits would be composed of three-judge panels, while the sixth circuit would be composed of "a circuit judge, and the judges of the district courts of Kentucky and Tennessee; the duty of all of whom it shall be to attend, but any two of whom shall form a quorum . . . " *Id.*

184. Surrency, *supra* note 132, at 53.

185. *Id*.

a 'parasitical plant engrafted at the last session on the judiciary body,' a plant that had to be lopped off."[186]

Senator Breckenridge, on January 4, 1802, brought the repeal of the 1801 Act to the forefront of congressional debates.[187] He compiled caseload data and aimed to prove that the newly created judgeships were unnecessary.[188] Furthermore, Senator Breckenridge argued that Congress' ability to create new courts also implied its authority to abolish those same courts.[189] He concluded that Congress had the right to rectify the mistakes of its predecessors.[190]

Federalists, on the other hand, contended that it would be blatantly unconstitutional to repeal the 1801 Act.[191] This argument hinged on the constitutional provision that gave federal judges life tenure during good behavior.[192] Because the circuit judge positions had already been created, and judges already appointed, Federalists considered the removal of the positions a clear violation of the life tenure provision of the Constitution.[193]

Congress fervently debated the repeal of the 1801 Act until a majority, consisting of Anti-Federalists, succeeded in returning the federal judiciary to its prior structure under the 1789 Act.[194] The Anti-Federalists, in the Judiciary Act of 1802 ("1802 Act"), eliminated the circuit courts the year after their creation and, for the only time in history, revoked the tenure of federal judges.[195] The Anti-Federalists claimed they were not "legislatively removing the judges" but rather "abolishing the courts."[196] Justice Samuel Chase, unimpressed by this reasoning, stated that "[t]he distinction of taking the Office from the Judge, and not the Judge from the Office" was "puerile and nonsensical."[197]

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186. WOOD, *supra* note 119, at 420.

187. Lowell H. Harrison, *John Breckenridge: Western Statesmen*, 18 J. SOUTHERN HIST'Y 137, 142 (1952).

188. *Id*.

189. *Id*.

190. *Id*. Senator Breckenridge clarified that he:

> could not agree that a judge could hold an office once it ceased to exist, and he found nothing unconstitutional in his proposals. If some judges were unable to perform circuit duty, they should be allowed "to return to that state of tranquility and retirement, from which they must have been no doubt reluctantly drawn."

Id. at 142–43.

191. *Id*. at 143. Governor Morris "led the Federalists in defense of the existing bill. Once established, they contended, a court was inviolate. Morris hoped that the Supreme Court would take a part, if necessary, to save the Constitution." *Id.* Discussion earlier in this Comment, regarding the case of *Stuart v. Laird*, shows that Morris' desire for Supreme Court involvement was satisfied, but the result was not at all what he had hoped. *See supra* notes 103–08 and accompanying text.

192. *See* Harrison, *supra* note 187, at 142–43; *see also* U.S. CONST. art. III, § 1.

193. Harrison, *supra* note 187, at 142–43.

194. *Id.* "[Breckenridge] denied the power of a court to declare unconstitutional an act of Congress; each branch of government had exclusive authority in its own sphere. On Wednesday, February 3, as twilight darkened the windows, the bill passed the Senate 16-15, and the House concurred a month later." *Id.* Breckenridge's denial of a court's ability to strike down legislation as unconstitutional is an interesting precursor to the landmark decision in *Marbury v. Madison*, decided one year later in 1803. *See* Marbury v. Madison, 5 U.S. 137 (1 Cranch 1803).

195. WOOD, *supra* note 119, at 420–21.

196. *Id*. at 421.

197. *Id*. Chief Justice John Marshall agreed with Justice Chase's viewpoint. However, Justices Cushing and Patterson, as well as President Washington, thought it best to accept the new legislation anyway. Marshall accepted this, and he himself returned to circuit riding as the Judiciary Act of 1802 required. In one instance, Chief Justice John Marshall forgot to pack a pair of pants, so "[h]e had to sit in judgment, covering his legs with

The judges who had been appointed to the circuit positions created in the 1801 Act, only to have those positions done away with a year later in the 1802 Act, petitioned Congress as to the constitutionality of their judgeships being removed.[198] Congress then referred the judges' petition to a committee.[199] The committee recommended that the Attorney General file a *quo warranto* against one of the circuit judges, so that the nature of the circuit judgeship could be judicially considered.[200] The *quo warranto* suit was never filed, likely because President Jefferson's Attorney General lacked sympathy for the Federalist circuit judges' plight.[201] Therefore, the constitutionality of repealing the 1801 Act was never considered, despite the doubts held by justices of the highest Court about the constitutionality of the legislature's actions.[202]

iii. Legislation Aimed Directly at the Circuits Is Not Immune from Politicized Federalism.

Throughout the Nineteenth Century, Congress continued to pass politically motivated judicial acts that altered the judiciary in a variety of ways. While Jefferson still occupied the presidency in 1807, the Seventh Circuit Act ("1807 Act") was ratified and a new seat on the Supreme Court created.[203] The total number of justices went from six to seven, and the additional justice would ride circuit in the newly created Seventh Circuit.[204] Kentucky, Tennessee, and Ohio were all included within the Seventh Circuit boundary, and these states proved challenging for justices traveling westward in an expanding nation.[205] The Seventh Circuit Act required the Supreme Court justice presiding over the Seventh Circuit to reside within the boundaries of that jurisdiction.[206] This is the only instance in the judiciary's history of a residency requirement having been imposed on a Supreme Court justice, a requirement that appealed to Anti-Federalists who sought a close connection between federal politicians and local communities.[207]

The Tenth Circuit Act of 1863 ("1863 Act") raised the number of circuit courts to ten and the total number of Supreme Court justices to ten as well.[208] The Tenth Circuit established in 1863 was not the same Tenth Circuit that exists today.[209] The 1863 Act

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his robe." RICHARD BROOKHISER, JOHN MARSHALL: THE MAN WHO MADE THE SUPREME COURT 85 (2018).

198. Surrency, *supra* note 132, at 64.

199. *Id*.

200. *Id*.

201. *Id*.

202. *Id*.

203. *See Landmark Legislation: Seventh Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-3 (last visited Nov. 4, 2019); *see generally* Seventh Circuit Act, ch. 16, 2 Stat. 420 (1807).

204. *Landmark Legislation: Seventh Circuit*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-3 (last visited Nov. 4, 2019).

205. *Id*.

206. *Id*.

207. *Id*.

208. Tenth Circuit Act, ch. 100, 12 Stat. 794 (1863); Stanley & Russell, *The Political and Administrative History of the U.S. Court of Appeals for the Tenth Circuit*, 60 DENV. L.J. 119, 119 (1982).

209. Stanley & Russell, *supra* note 208, at 122.

included California and Oregon, states currently included in the Ninth Circuit.[210] Congress abolished the Tenth Circuit three years after its creation and redistributed the states in its jurisdiction among the other nine circuits.[211] Subsequently, any other states that joined the Union were also assigned to one of the existing nine circuits.[212]

The abolition of the Tenth Circuit was achieved through the Judicial Circuits Act of 1866 ("1866 Act"), only a year after the conclusion of the American Civil War.[213] The legislation provided for a total of nine circuit courts, and it expressly listed the states to be included within each circuit's jurisdiction.[214] In a major departure from the 1863 Act passed three years prior, California and Oregon were included under the Ninth Circuit's purview, where they remain today.[215] In its passage of the 1866 Act, a majority Republican Congress, primarily concerned with post-war reconstruction efforts, refused to give President Johnson, an opponent of the reconstruction effort, the opportunity to appoint a Supreme Court justice.[216] Thus, Congress designed the 1866 Act to prevent that outcome.[217] To do this, Congress specified that no new appointments could be made to the Supreme Court until the Court's membership had been reduced, by justices' deaths or resignations, from nine to seven.[218]

The jurisdictional boundaries set forth in the 1866 Act have remained largely the same for over 150 years.[219] Congress has subsequently only adjusted the boundaries to include new states in existing circuits and to divide two large circuits.[220] The 1866 Act was part of the Republican Party's broader goal of lessening the disproportionate representation of southern states prior to the American Civil War.[221] Before the war began, five of the nine circuits were composed entirely of slave states.[222]

iv. Politicized Federalism Continued Influencing the Federal Courts Throughout the Nineteenth Century.

In 1891, the Chairman of the Senate Judiciary Committee, William Evarts, introduced legislation that would address an overwhelming caseload in the federal judiciary, similar to the modern crisis of volume.[223] At a time when the Supreme Court

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210. *Id*.
211. *Id.*; *see* Judicial Circuits Act, ch. 210, 14 Stat. 209 (1866).
212. Stanley & Russell, *supra* note 208, at 122.
213. *Id*.; *see* Judicial Circuits Act, ch. 210, 14 Stat. 209 (1866).
214. Stanley & Russell, *supra* note 208, at 122.
215. *Id*.
216. David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 432 (2008).
217. *Id*.
218. *Id*.
219. *Landmark Legislation: Reorganization of the Judicial Circuits*, FED. JUD. CTR., https://www.fjc.gov/history/legislation/landmark-judicial-legislation-text-document-7 (last visited Dec. 1, 2019).
220. *Id*.
221. *Id*.
222. *Id*.
223. James L. Oakes, Chief Judge of the Second Circuit, Address at the Centennial Celebration of the Evarts Act and the United States Court of Appeals for the Second Circuit (June 13, 1991), *in* 46 REC. ASS'N B. CITY N.Y. 480, 482 (1991). Evarts had been President Lincoln's second choice to succeed Chief Justice Taney in 1864, but instead, he would become the United States Attorney General. *Id.*

had 1600 cases awaiting its attention, Evarts understood that the highest Court needed relief.[224] Evarts sympathized with the overburdened judiciary, and he led the legislative effort to provide a remedy for its ailment.[225]

The Judiciary Act of 1891 ("1891 Act") created the United States Circuit Courts of Appeals.[226] The new circuit courts were given appellate jurisdiction over cases heard by the federal district courts, and new circuit judgeships were created, thus eliminating the need for justices of the Court to continue their circuit riding duties.[227] Evarts' legislation established the Circuits as they are today and was one of the farthest-reaching judicial reforms in American history, as it re-delegated around three-quarters of the Supreme Court's jurisdiction to the newly created United States Courts of Appeals.[228] In total, over 100 years passed between the time the federal courts were instituted and the abolition of circuit riding came to fruition.[229]

Later, the Judicial Code of 1911 ("1911 Act") was enacted and primarily intended to re-codify the laws pertaining to the judiciary, which are now found in Title 28 of the United States Code.[230] Outside of that primary function, the 1911 Act also unburdened the Circuits of their trial jurisdiction.[231] Since the Circuits no longer possessed trial jurisdiction, the perception of potential unconstitutionality faded from the federal courts, at least insofar as the same judge could no longer hear a case at both the trial and appellate levels.[232]

In a subsequent effort to lessen the caseload of the Supreme Court, the Judiciary Act of 1925 ("1925 Act") gave the Court the option of "deciding not to decide" by designating the writ of *certiorari* as a means by which the Court could either grant or deny review of cases.[233] After the 1925 Act was enacted, the vast majority of cases appealed to the Supreme Court were denied *certiorari*, greatly reducing the Court's caseload.[234] The legislation meant that the Circuits' decisions carried even more importance, as they were much less likely to be overturned by the Supreme Court.[235]

The 1925 Act, while reducing the Supreme Court's caseload, drastically increased the caseload of the Circuits.[236] As a result, the Circuits had significantly more influence in the shaping of *stare decisis*.[237] The Circuits have since become the courts of last resort in 99% of cases brought before them due to increasingly restrictive rules of *certiorari* in

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224. *Id*.
225. *Id*.
226. *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826.
227. Judiciary Act of 1891, ch. 517, § 2, 26 Stat. 826, 826.
228. R. Bunn, *Proposed Changes in the Federal Judiciary Act of March 3, 1891*, 1 N. W. L. REV. 139, 139 (1893).
229. *Id.*
230. *See generally* 28 U.S.C.
231. *See* Judicial Code of 1911, ch. 231, 36 Stat. 1087.
232. *See id*. (for the statutory language that removed trial jurisdiction from the Circuits).
233. Jonathan Sternberg, *Deciding Not to Decide: The Judiciary Act of 1925 and the Discretionary Court*, 33 J. SUP. CT. HIST. 1, 1 (2008).
234. *Id*.
235. *Id*. at 2.
236. *Id*.
237. *Id*.

the Supreme Court,[238] and the effects of the crisis of volume have manifested more broadly in the nation's jurisprudence with an infinitesimal chance of further review by the highest Court.[239]

v. The Federal Judgeship Act of 1990 Is the Most Recent Example of Legislation That Was Inadequate Because of Politicized Federalism.

The Federal Judgeship Act of 1990 ("1990 Act") was Title Two of the Civil Justice Reform Act of 1990.[240] The legislation, now thirty years old, is the most recent example of Congress adding judgeships to the federal courts.[241] The 1990 Act provided for an addition of eleven circuit judgeships, sixty-one district judgeships, and thirteen temporary district judgeships.[242] In the years prior to the Act's ratification in 1990, the Circuits' workload grew by approximately 30% from 1984.[243]

The 1990 Act was a step in the right direction, but it provided far fewer judgeships than were sought by the judiciary.[244] In 1990, Chief Justice Rehnquist thanked the congressional leaders who made the additional judgeships possible, but he also made it clear that there was a need for more, stating "[w]ith our overall caseload continuing to multiply, the judiciary will be facing a continued need for expansion of our budget."[245] The 1990 Act, with respect to the Circuits, provided about half of the judgeships that the Federal Courts Study Committee had recommended.[246] Of the twenty judgeships that the committee had recommended, eleven were granted under the enacted legislation.[247]

The need for ongoing adaptation of the federal courts was at least acknowledged by the 1990 Act, as the legislation included a provision that would require further study of the issue.[248] This further study came to fruition when the Federal Judicial Center presented

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238. Stephanie K. Seymour, *The Judicial Appointment Process: How Broken Is It?*, 39 TULSA L. REV. 691, 691 (2004) (citing John Anthony Maltese, *Confirmation Gridlock: The Federal Judicial Appointments Process Under Bill Clinton and George W. Bush*, 5 J. APP. PRAC. & PROCESS 1, 27 (2003)).

239. *Id*.

240. *See generally* Federal Judgeship Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089.

241. *Id*.

242. *Id*.

243. *Id*.

244. *Id*.

245. WILLIAM H. REHNQUIST, STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 11 (ed. Shelley L. Dowling, 1990).

246. FED. JUD. CTR., FEDERAL JUDGESHIP ACT OF 1990 – COMPARATIVE ANALYSIS 1 (1990).

247. *Id*. Chairman of the Senate Judiciary Committee, Joseph Biden, introducing the Judgeship Act of 1990 in the Senate, stated:

> We have taken the recommendations [of the Judicial Conference] seriously, as the Judiciary Committee has always done. But in the end, the Judicial Conference's recommendations are just that– recommendations. Nothing more, nothing less . . . I know of no other part of the Federal Government where regional agencies call national headquarters, ask for a multi-million dollar commitment of resources, and then are given by the Congress exactly what they want, no questions asked . . . [In the Judgeship Act of 1990, changes were made in the Judicial Conference's recommendations principally] to ensure that high-intensity drug areas get the resources they need to hear the cases, preside over the trials and sentence those who are convicted.

COMM. ON THE JUDICIARY, REPORT OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE ON S. 2648, at 28 (1990) (illustrating the way in which temporary political motivations affect the support that the judiciary receives from Congress).

248. Federal Judgeship Act of 1990, Pub. L. No. 101-650. In Chief Justice Rehnquist's 1990 Report of the

a report titled "Structural and Other Alternatives for the Federal Courts of Appeals" to Congress in 1993.[249] The report discussed several threats to the judicial process that scholars and judges had identified, and it also suggested structural alternatives to remedy those threats.[250] Despite the enormous amount of resources that were dedicated to the production of that report, no significant alterations to the judicial structure, or addition of judgeship positions, were implemented following its release.[251]

C. Constitutional Silence and Politicized Federalism Have Always Been the True Culprits.

Politicized federalism has affected the judiciary in largely the same way throughout all of American history.[252] Whether it be the struggles of the early Court in abolishing circuit riding or the contemporary crisis of volume, the same roadblock impedes the federal judiciary when it seeks adaptation of the courts to keep up with an evolving caseload.[253] This roadblock results from the inherent characteristics of the legislature and the judiciary, as well as the powers possessed by each.[254] As the Constitution instructs, Congress legislates in response to an ever-present need for new policy, while the Circuits and Supreme Court naturally look at those same laws in retrospect.[255] With one branch passing laws in anticipation of policy needs and the other branch reviewing those laws after the fact, some degree of tension will inevitably result, but this tension was expected and desired by the Constitutional Convention.[256] Beyond that desired degree of tension, politicized federalism increased the strain exponentially.[257]

In the founding of the nation, the concept of federalism was viewed as a compromise rather than a perfect solution for either the Federalist or Anti-Federalist party individually.[258] The government established under the Articles of Confederation had left each state to act as its own sovereign entity and not a cohesive union, which led to a variety of problems.[259] However, the Founding Fathers had not forgotten the consequences of an all-powerful centralized government either; the Declaration of Independence serves as an immortal reminder of that sentiment, as its language repeatedly rebuked the tyranny that resulted from a single entity, the King of England, possessing exclusive authority to

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State of the Judiciary, he thanked Senator Joseph Biden and Representative Jack Brooks, the respective chairmen of the Senate and House Judiciary Committees at that time, for their leading roles in enacting the Federal Judgeship Act of 1990. REHNQUIST, *supra* note 245, at 9.

249. *See generally* FED. JUD. CTR., STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS (1993).

250. *See generally id*.

251. *Id*.

252. *Supra* Part II.B.

253. *Id*.

254. *Id*.

255. *See* U.S. CONST. arts. I, III.

256. *Id*.

257. *Id*.

258. Loren P. Beth, *The Supreme Court and American Federalism*, 10 ST. LOUIS U. L.J. 376, 378 (1965).

259. *See* ARTICLES OF CONFEDERATION of 1781; *see also* THE FEDERALIST No. 6, at 21 (John Jay) (Am. Bar Ass'n ed. 2009) ("To look for a continuation of harmony between a number of independent, unconnected sovereignties situated in the same neighborhood would be to disregard the uniform course of human events, and to set at defiance the accumulated experience of ages.").

govern.[260] Another compromised aspect of an experimental government, federalism was a calculated hypothesis of how best to delegate authority, and the branches of government were its variables.[261] It was apparent early on that the judiciary would not be isolated from the uncertainty of the experiment.[262]

Federalism contributed in a tangible way to the strained relationship between the early courts and Congress.[263] The Court, as the supreme interpreter of laws, proposed the elimination of circuit riding and the creation of intermediate appellate courts, as the court system established under the 1789 Act had been impractical and the administration of justice strained.[264] Congress ignored those pleas for over a century because it was politically advantageous to keep the status quo or politically unworkable to do otherwise.[265]

The perpetual feud between Federalists and Anti-Federalists rages on today.[266] The Federalists and Anti-Federalists identify themselves under different names but hold largely the same ideals.[267] The Democratic Party advocates for similar policy considerations as Federalists did centuries earlier, such as an emphasis on centralized government to regulate when state governments are inadequate to handle national issues.[268] Similarly but conversely, the Republican Party holds many of the same foundational views as the Anti-Federalists, such as minimizing the federal government's reach and states having a broader authoritative role.[269] Whatever names the political parties attribute to their platforms, the effects of their partisan differences on the judiciary remain largely the same. Two centuries ago, justices of the Supreme Court endured cross-country travel because they were mandated to do so, despite the swarm of concerns surrounding the circuit riding practice.[270] Today, the Circuits endure an overwhelming caseload because Congress has not addressed the crisis of volume, despite judicial requests for legislative relief.[271]

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260. *See* THE DECLARATION OF INDEPENDENCE (U.S. 1776) ("The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States.")

261. *See generally* Beth, *supra* note 258.

262. *Id.*

263. *See supra* Part III.B.ii.

264. *See generally* Glick, *supra* note 31.

265. *See supra* Part III.B.i–ii.

266. *See generally Republican Platform*, GOP, https://www.gop.com/platform/ (last visited Dec. 9, 2019) ("Government should be smaller, smarter and more efficient"); *Party Platform*, DNC, https://democrats.org/where-we-stand/party-platform/ (last visited Dec. 9, 2019).

267. *See* sources cited *supra* note 266.

268. *See generally* DNC, *supra* note 266.

269. *See generally* GOP, *supra* note 266.

270. *Supra* Part II.B.

271. *Infra* Part IV. Politicized federalism can appear in the relationship between a State and Congress as well. In October of 2015, Arizona's Governor wrote a letter to Speaker of the House, Paul Ryan, and Senate Majority Leader, Mitch McConnell, requesting that legislation be considered to remove Arizona from the Ninth Circuit's jurisdiction. Letter from Governor Douglas A. Ducey to Speaker of the House Paul Ryan and Senate Majority Leader Mitch McConnell (Oct. 30, 2015) (accessible at https://azgovernor.gov/governor/governor-duceys-letter-house-speaker-ryan-senate-majority-leader-mcconnell). The State of Arizona has been frustrated in recent years with, *inter alia*, the Ninth Circuit's caseload (14, 076 pending cases, nearly three times greater than the next largest circuit), Supreme Court reversal rate (77%), and average disposition time (fifteen months). *Id.* In his letter, Governor Ducey cited calls for reform of the Ninth Circuit by Supreme Court Justices Byron White and Sandra Day O'Connor. *Id.* Justice White had stated that "[t]he volume of opinions produced by the Ninth Circuit's Court

Comparing the early practice of circuit riding with the modern crisis of volume, it is clear that both threatened—and the latter continues to threaten—the effectiveness of the judiciary in administering justice.[272] The federal courts reached out to Congress in response to both judicial ailments and sought remedies that would allow them to administer justice more effectively.[273] However, then and now, Congress has proven inadequate to help the courts in a timely manner.[274]

IV. THE "CRISIS OF VOLUME" IS THE LATEST EXAMPLE OF AN OLD INFECTION.

The "crisis of volume" is a multifaceted issue with an array of potential solutions;[275] however, the most effective solutions to a problem can only be identified when informed by analysis of the root cause. The root cause of the crisis of volume can be gleaned from the way the infection has repeatedly manifested itself throughout the history of the judiciary.[276] The practice of circuit riding that strained the early Circuit jurisdictions, and the modern crisis of volume currently weighing down the Circuits, are one in the same.[277] When the same infection plagues the same victim and causes the same symptoms since the time the victim was born, the only logical conclusion is that the infection must stem from a fundamental flaw in the victim's DNA; in this instance, that fundamental flaw is the absence of a provision for judicial adaptation in Article Three of the Constitution.[278] In the absence of that provision, attempts to adapt the courts by legislative means have been rendered ineffective due to politicized federalism.[279]

A. The Report of the Federal Courts Study Committee Addressed the Problem Thirty Years Ago.

In 1990, the Federal Courts Study Committee ("Study Committee") issued the Report of the Federal Courts Study Committee ("1990 Report") and declared that the Circuits' caseload had reached a state of crisis, threatening the "hallmarks of our judiciary."[280] The Study Committee described those hallmarks to include that:

> judges do most of their own work, grant oral argument in cases that need it, decide cases with sufficient thought, and produce opinions in cases of precedential importance with the care they deserve, including independent, constructive insight and criticism from judges on the court and the panel other than the judge writing the opinion.[281]

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of Appeals and the judges' overall workload combine to make it impossible for all the court's judges to read all the court's published opinions when they are issued." *Id.* However, despite several calls for restructuring the Ninth Circuit, such a reform has proven politically unpalatable in Congress thus far.

272. *See generally* Glick, *supra* note 29; Markey, *supra* note 23.

273. *Supra* Part III.C.

274. *Id*.

275. George D. Brown, *Nonideological Judicial Reform and Its Limits – The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV 973, 973 (1990).

276. *Supra* Part III.B–C.

277. *Supra* Part III.C.

278. *See* U.S. CONST. art. III.

279. *Supra* Part III.C.

280. FED. CTS. STUDY COMM., *supra* note 2, at 109.

281. *Id*.

With first-hand experience handling the burgeoning caseload, Judge Miner, of the Second Circuit, gave remarks in 2013, in which he stated that "Congress ha[d] failed to act effectively in responding to the 'major structural or procedural options' identified in the [1990] Report."[282] Judge Miner is not the only judge to proclaim in recent years that the "crisis of volume" is alive and well today, but, thirty years later, the solutions offered in the 1990 Report have yet to be attempted.[283] In light of these judges' first-hand knowledge regarding the crisis, paired with the truth that crises are meant to be addressed, the issue must–again–be examined.

The judiciary should be able to adapt efficiently in response to an ever-evolving caseload, but Article Three offers no efficient apparatus for such a purpose.[284] The federal courts have had little alternative but to request Congress' assistance, but the history surrounding those requests suggests that the congressional avenue is inadequate.[285] One commentator points out that "the only dialogue is between the Court and law review writers. Perhaps Congress will step in, but this is likely to happen in the context of a specific issue . . . rather than as part of an overall look at the federal courts."[286] Unfortunately, such a multifaceted problem cannot be addressed by the occasional correction of one facet individually.[287] Further complicating the issue, truly meaningful reform would implicate partisan considerations.[288] Thus, politicized federalism enters the conversation.[289]

"An ideological approach to federal judicial reform emphasizes basic systemic value issues such as balancing the need to vindicate national authority against claims of some form of state sovereignty . . . "[290] In the early years of the American Republic, federalism penetrated all aspects of political discussion, and the judiciary was not immune from the effects of partisan interests.[291] One prime example discussed earlier in this Comment, Thomas Jefferson and John Adams passionately fought against each other to see their visions of the federal judiciary realized in the judicial acts of 1801 and 1802.[292]

The politicization of judicial issues is inherent within the design of the American government, and politicized federalism manifesting itself within the context of judicial

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282. Miner, *supra* note 4, at 552–53.

283. *Id.*

284. *Supra* Part III.A.

285. *See supra* Part III.B.; *see also* JOHN G. ROBERTS, JR., STATE OF THE FEDERAL JUDICIARY: ANNUAL REPORTS OF THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES 1, 3 (2013)

> I would like to choose a fresher topic, but duty calls. The budget remains the single most important issue facing the courts . . . We in the Judiciary recognize what should be clear to all: The Nation needs a balanced financial ledger to remain strong at home and abroad. We do not consider ourselves immune from the fiscal constraints that affect every department of government. But, as I have pointed out previously, the independent Judicial Branch consumes only the tiniest sliver of federal revenues, just *two-tenths of one percent* of the federal government's total outlays.

Id.

286. Brown, *supra* note 275, at 994.

287. *Id*.

288. *Id.* at 974.

289. *Id*.

290. *Id*.

291. *Supra* Part II.B.

292. *Supra* Part III.B.ii.

adaptation is not, in and of itself, a problem. However, when politicized federalism manifested itself within the void of uncertainty created by constitutional silence, a serious illness began to spread. This illness, commonly referred to as the "crisis of volume," damages the judiciary in often intangible ways and gradually harms the system of justice that the Founding Fathers envisioned over two centuries ago.[293]

In its 1990 Report, the Study Committee presented an ultimatum for the judiciary's future.[294] Contemplating how changes in the appellate courts might be brought about, the Study Committee queried, will those changes be "insidious and unplanned; will oral argument and reasoned opinions simply fade away . . . [o]r will Congress and the courts fashion new structures and procedures specifically designed to preserve the hallmarks of our judiciary?"[295] Unfortunately, three decades have passed since the 1990 Report, and the Study Committee's questions have been answered; the changes were "insidious and unplanned."[296]

B. What Is the Current State of the "Crisis of Volume?"

The American population has consistently grown since the founding of the nation.[297] Generally, this has meant a corresponding increase in cases filed in the federal courts.[298] In 1790, immediately following the ratification of the 1789 Act, estimates of the population were around 3.9 million.[299] In 1800, one year prior to the controversy surrounding the acts of 1801 and 1802, the population was estimated at around 5.3 million.[300] Jumping forward to 1890, one year before circuit riding was abolished, the population had grown to about 63 million.[301] In 1920, five years before Congress gave the Supreme Court the power to deny review of cases, the population was estimated at around 118 million.[302] In 1990, the year Congress last added judgeships to the Circuits, the population was estimated at 248 million.[303] As of 2010, the population was estimated at 309 million,[304] and the current estimate in 2019 is 330 million.[305]

While it seems like common sense that rises in population would result in increases of litigation, not all have accepted that connection as factual.[306] Some commentators point to the overall decrease of federal filings in recent years as evidence that the crisis has faded; however, one group of individuals has more first-hand experience with caseload trends than any other–the judges that hear the cases–and judges have made it clear that the

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293. FED. CTS. STUDY COMM., *supra* note 2, at 109.
294. *Id*.
295. *Id*.
296. *Id*.
297. U.S. CENSUS BUREAU, HISTORICAL STATISTICS OF THE UNITED STATES 1789–1940, at 25 (1949).
298. *See* Thomas B. Marvell, *Caseload Growth–Past and Future Trends*, 71 JUDICATURE 151, 151 (1987).
299. U.S. CENSUS BUREAU, *supra* note 297, at 25.
300. *Id*.
301. *Id*.
302. *Id*.
303. BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION GENERAL POPULATION STATISTICS 1.
304. *2010 Census*, U.S. CENSUS BUREAU, https://www.census.gov/programs-surveys/decennial-census/decade.2010.html (last visited Mar. 7, 2020).
305. *Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/ (last visited Dec. 2, 2019).
306. Marvell, *supra* note 298, at 151.

crisis of volume is alive and well despite the recent decrease in filings.[307] While the overall number of appeals has decreased slightly in recent years, the filings have still increased by about 20% since the 1990 Report was released.[308] A close examination of case management statistics reveals alarming trends that indicate the crisis has deepened since the 1990 Report.[309]

Certain statistics relate directly to those "hallmarks of our judiciary" as described by the Study Committee in its 1990 Report.[310] The first of those hallmarks was that "judges do their own work."[311] Since 1990, there has been a 15.2% increase in procedural terminations of cases by staff rather than by judge.[312] The Study Committee identified another hallmark, that judges "grant oral argument in cases that need it."[313] In 2018, cases were terminated on the merits without oral argument 24.9% more often than they were in 1990.[314] The Study Committee further stated that judges should give each case the amount of time and thought it deserved.[315] In 2018, the use of unpublished opinions had increased by just under 20% since the 1990 Report.[316]

In light of these particularized statistics, it is obvious that the infection persists, even despite the slight decline of appeals in recent years.[317] But what do those statistics mean for the day-to-day functions of the Circuits? About half a century ago, the federal appellate process looked drastically different.[318] In 1988, Chief Judge Markey of the Federal Circuit lamented the deterioration of the "personally conducted" federal appellate process:

> As performed as recently as twenty years ago, the personally conducted federal appellate process comprised: (1) review of the record and briefs by the judge; (2) oral argument of thirty or forty-five minutes on a side; (3) preparation by the judge of a written opinion; (4) assistance in each chambers by one elbow law clerk and one secretary; and (5) frequent and adequate conferences of the judges on the cases.
>
> As performed today, the bureaucratically conducted federal appellate process comprises: (1) screening and track-setting by staff attorneys; (2) review of records and briefs by a law clerk or a staff attorney; (3) oral argument in less than one third of the cases, and then for fifteen or twenty minutes on a side; (4) preparation of opinions by law clerks and staff attorneys; (5) dispositions without opinions in two-thirds of the cases; (6) assistance in each chambers by three law clerks and two secretaries and assistance to all chambers by a corps of staff attorneys; and (7) infrequent, short judicial conferences on the cases. In sum, all appellate opinions were once the product of judges; today most are the product of an

307. *See* Miner, *supra* note 4; *see also* Markey, *supra* note 23.
308. U.S. CTS., U.S. COURTS OF APPEALS – CASES FILED, TERMINATED, AND PENDING (SUMMARY) tbl.2.1 (Sept. 30, 2018).
309. *Id.*
310. FED. CTS. STUDY COMM., *supra* note 2, at 109.
311. *Id*.
312. U.S. CTS., *supra* note 308.
313. FED. CTS. STUDY COMM., *supra* note 2, at 109.
314. U.S. CTS., *supra* note 308.
315. FED. CTS. STUDY COMM., *supra* note 2, at 109.
316. U.S. CTS., *supra* note 308.
317. *Id*.
318. Markey, *supra* note 23, at 376.

institution.[319]

The ever-increasing caseload, in a manner similar to tactics of attrition warfare, overpowered the "personally conducted" federal appellate process, and, since Congress rendered no aid, the Circuits succumbed to unjustifiable means of dispensing justice.[320] Judge Markey concluded that "[t]he churning, feverish effort to 'keep up' has saved the 'system's' façade;–but lost its soul–a judge with fully adequate time to contemplate, think, write and re-write."[321]

In hearing appeals from the federal district courts, the Circuits play a pivotal role in maintaining American jurisprudence by *stare decisis*.[322] State courts are often persuaded to follow precedent established in their respective circuit, and federal district courts are obligated to do so, but the development and quality of this precedent is hindered when the Circuits are overburdened.[323] Tragically, the crisis overwhelmed the Circuits to such an extent that an evolution of the judicial process was unavoidable.[324] Without congressional intervention, each Circuit had no choice but to adapt in ways that were reactive rather than proactive.[325] The harmful effects of this "insidious and unplanned" evolution have undoubtedly hampered the production of quality *stare decisis* in the Circuits.[326]

Each Circuit reacted to its caseload in unique ways.[327] For example, the Second Circuit and Ninth Circuit each implemented starkly contrasting strategies for keeping up with their cases.[328] Both the Second Circuit and Ninth Circuit dealt with the judicial chaos that followed the 9/11 attacks and the ensuing increase of immigration cases.[329] The Second Circuit ensured that each litigant in those cases was allowed time for oral argument, but the Ninth Circuit allowed less than 10% of litigants the chance to present oral argument.[330] The Second Circuit maintained its reputation for upholding the right to oral argument of every litigant, at the cost of reducing its reversal rate.[331] The Ninth Circuit, with the largest appellate caseload of all, significantly limited its allowance of oral arguments, and a reduction in its reversal rate did not occur.[332]

This was only one instance of a seemingly endless number of "circuit-specific tradeoffs" that developed as judges coped with the crisis of volume.[333] These individualized methods of adaptation developed out of necessity rather than careful consideration or forward-thinking strategy, and each circuit-specific tradeoff reflects the

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319. *Id*. at 376–77.
320. *Id*. at 377.
321. *Id*. at 379.
322. Sloan, Amy E., *The Dog That Didn't Bark: Stealth Procedures and the Erosion of Stare Decisis in the Federal Courts of Appeals*, 78 FORDHAM L. REV. 713, 718–19 (2009).
323. *Id*.
324. Markey, *supra* note 23, at 377.
325. *Id.*
326. *Id*.
327. Lavie, *supra* note 20, at 68–69 (discussing what Lavie calls "divergent reaction" in various circuits).
328. *Id*. at 82.
329. *Id*. at 91.
330. *Id*. at 88.
331. *Id*. at 82.
332. Lavie, *supra* note 20, at 88.
333. *Id*.

unique circumstances of the particular Circuit that implemented them.[334] While each Circuit dealt with the crisis in unique ways, the overall effect of the infection remained the same.[335] Judges became less involved, law clerks and staff attorneys were relied on more heavily, and published opinions were issued with substantially less frequency.[336]

The judge's role in the new era of the federal appellate process looks nothing like it did just a few decades ago.[337] As Judge Markey explained, "the *judicial* process at the appellate level has been replaced by the judicial *process* . . . the reputations of appellate judges and courts turn today on fast processing–on 'getting the cases out'–not on personal scholarship, memorable elucidation, or clear, forward thinking."[338] In response to the overwhelming volume of cases, the judiciary implored Congress to help with the crisis, just as it had centuries earlier with the practice of circuit riding, but Congress again sat idly by while the judiciary suffered.[339] As a result, "personal, deliberative judicial decisionmaking" dissipated, and the modern appellate process became an institutionalized conveyor belt of justice.[340]

C. The Death of the "Personally Conducted" Federal Appellate Process Must Be Mourned if It Is Ever to Be Born Again.

The Founding Fathers would likely scoff at the modern federal appellate process.[341] Federalist Paper No. 78 offers some insight into the founders' intentions for the judicial process:

> If, then, *the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments*, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that *independent spirit in the judges* which must be essential to the *faithful performance of so arduous a duty*.
>
> This *independence of the judges* is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community . . . *But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution*, where legislative invasions of it had been instigated by the major voice of the community.[342]

As Alexander Hamilton stated in the above passage, a judge's role requires independence, time for contemplation, and fortitude against the erosion of constitutional

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334. *Id*.
335. Markey, *supra* note 23, at 377.
336. *Id*.
337. *Id*.
338. *Id*. at 373.
339. *Id*.
340. Markey, *supra* note 23, at 378.
341. *See* The Federalist No. 78 (Alexander Hamilton).
342. The Federalist No. 78, at 453 (Alexander Hamilton) (Am. Bar Ass'n ed. 2009).

values.[343] Federal judges were intended as a sword in the sheath of the minority.[344] Hamilton spoke of a government in which an often unwieldy bicameral legislature succumbed to the momentary desires of its constituents, and, as the path to hell is often paved with good intentions, the fortitude of independent judges was meant to protect against the irrationality of the temporary.[345]

This Comment does not seek to degrade the work of federal judges as if they have forsaken their guardianship of the Constitution; rather, it is intended to illustrate the way judges have been hamstrung in their efforts.[346] The judges were once the sole mechanism by which the judiciary functioned, and they were allotted ample time to perform their tasks.[347] In dealing with the crisis of volume, judges had no choice but to delegate work to their staffs, and the ample time they once had was reduced to the bare minimum necessary to keep up with the cases.[348] The nature of justice speaks for itself on the seriousness of this issue. It calls to mind an image of the blindfolded woman, balancing her scales with the utmost care and contemplation. Justice cannot become synonymous with a conveyor belt.

If the crisis of volume is cured and the "personally conducted" appellate process successfully restored, that will not be the end of the judiciary's predicament.[349] The DNA of the patient is still flawed; the Constitution still does not provide the judiciary with an efficient apparatus for adaptation.[350] As stated earlier, the judiciary needs its own immune system to ward off recurring attacks. Whether it be the practice of circuit riding or the crisis of volume, history has consistently demonstrated the inability of the judiciary to adapt with the needs of the present day.[351] But what does a judicial immune system look like?

An immune system must be able to identify and neutralize threats against the body it protects. The identification of threats has not been the primary issue, as judges, scholars, and the legal community all naturally monitor the federal courts for these potential issues; however, once those threats are identified, the judiciary has consistently been unable to neutralize them.[352] Article Three's silence and politicized federalism created a two-pronged dilemma: (1) at what point has the judiciary crossed a threshold beyond which it is no longer healthy, and (2) what is the most efficient method for remedying the ailments that initially pushed it beyond that threshold to begin with?

Both of these prongs are addressable, regardless of political ideology, by simply drawing a line in the sand that the hallmarks of the judiciary must never fall below. The statistical data that is released each year, in conjunction with warnings from judges, is

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343. *Id*.
344. *Id*.
345. *Id*.
346. *Id*.
347. Markey, *supra* note 272, at 380.
348. *Id*.
349. *Id.* at 376.
350. *See generally* U.S. CONST. art. III.
351. *Supra* Part III.C.
352. *Id*.

sufficient to identify when the judiciary is threatened.[353] But the identification of the problem is only one half of an immune system's responsibility. For effective response to an identified threat, there must be a clear threshold at which lawmakers are required to act, irrespective of partisan considerations.

The "hallmarks of our judiciary" erode away when the workload of judges becomes too strained, and while the intangible sanctity of the judicial process is hard to measure, statistics and first-hand experience of judges are more than sufficient to inform lawmakers of the need for action.[354] The reports addressing the crisis of volume illustrate this reality.[355] All that is truly needed to complete the judicial immune system is an enumeration of the thresholds that cannot be crossed. For example, if a Circuit reaches "x" number of cases per judge, lawmakers must address the issue. These thresholds would be simple measures of judicial capacity, and, when that capacity is exceeded, assistance must be rendered if the judicial "hallmarks" are to avoid erosion.[356]

The legislature must be persuaded to implement these thresholds if the fundamental flaw in the judiciary's DNA is ever to be remedied, and the remedy must be tailored in such a way as to avoid the perpetual debate in congress that is politicized federalism. All that is required to understand the need for such thresholds is a bipartisan respect for the judiciary, and, in theory at least, that should still exist.

V. CONCLUSION

This Comment was never intended to set forth specific methods for addressing the caseload of the United States Courts of Appeals. Other authors, cited throughout, have spoken to the specific needs of the judiciary in addressing the crisis.[357] However, this Comment does aim to inform the implementation of potential solutions by describing the root causes of the infection plaguing the courts today. Furthermore, it should illustrate that the current appellate process is dysfunctional.[358] A crisis ignored does not go away, and the American judiciary may remain *short-circuited* indefinitely without the aid of those who cherish it enough to find a cure for its ailment.

Statistics indicate that the "hallmarks of our judiciary" continue to erode further the longer the crisis of volume spreads without cure.[359] The current generation of law students will be oblivious to the "personally conducted" appellate process that once existed, as the "bureaucratically conducted" appellate process has become the norm.[360] Unfamiliar with a history that is rarely discussed, students are unaware of how prevalent oral arguments used to be, how direct the link was between a judge's own work and the opinions they

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353. *See generally* FED. CTS. STUDY COMM., *supra* note 2; Miner, *supra* note 4; Markey, *supra* note 23; U.S. CTS., *supra* note 308.

354. *See generally* sources cited *supra* note 353.

355. *See generally* FED. CTS. STUDY COMM., *supra* note 2; FED. JUD. CTR., *supra* note 249; U.S. CTS., *supra* note 308. *See also generally* COMM'N ON REVISION OF THE FED. CT. APP. SYS., STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE (1975).

356. FED. CTS. STUDY COMM., *supra* note 2, at 109.

357. *See generally* Miner, *supra* note 4; Markey, *supra* note 23.

358. Markey, *supra* note 23, at 371.

359. FED. CTS. STUDY COMM., *supra* note 2, at 109.

360. Markey, *supra* note 23, at 376–77.

produced, and how published opinions used to be more common than unpublished.[361] This generation of law students will begin their careers ignorant of the fact that the Circuits' boundaries were last drawn in 1866, when the Ninth Circuit was mostly unsettled territory.[362] The legacy of those judges that endured the circuit riding practice has mostly been forgotten, and the burden of the current judges is largely overlooked.[363]

The federal court system was flawed from the time of its inception, as Article Three provided no efficient method for necessary adaptation or expansion of the judiciary.[364] Subsequent legislation has failed to address the judiciary's symptoms, and the weakened state of the judicial body has become the norm.[365] The failure of Congress to support the judiciary stems from the manifestation of politicized federalism in the relationship between the two branches.[366] The harmful effects of the judiciary's current state are too significant to be accepted as the norm, and the hallmarks of the judiciary must be fortified.[367] Once the judiciary is returned to a healthy state, legislative action must be taken to ensure that those judicial hallmarks never fall below stated thresholds of health again.[368] And for the love of the judiciary, Congress should put partisan differences aside when considering legislation aimed at preserving the judicial hallmarks.[369]

- Adam Heavin[*]

361. *Id.*
362. *See* FED. JUD. CTR., *supra* note 219.
363. *See generally* Glick, *supra* note 31; Markey, *supra* note 23.
364. *See generally* U.S. CONST. art. III.
365. *See generally* Markey, *supra* note 23.
366. *Supra* Part III.C.
367. *See generally* Markey, *supra* note 23.
368. FED. CTS. STUDY COMM., *supra* note 2, at 109.
369. *Id.*

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