

TERM LIMITS FOR THE SUPREME COURT: LIFE TENURE RECONSIDERED

STEVEN G. CALABREST* & JAMES LINDGREN**

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* George C. Dix Professor of Law, Northwestern University.

An earlier version of this Article appeared as a chapter in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* (Roger C. Cramton & Paul D. Carrington eds., 2006) and was presented at a conference at Duke Law School in the spring of 2005 and at the American Political Science Association Annual Meeting in September 2005. This version includes more data on the pattern of Supreme Court tenure and succession and additional responses to comments and criticisms from other scholars.

We wish to thank Jeff Oldham of the Northwestern Law School Class of 2003 for the very substantial contributions he made to this Article as a student. The idea for this project initiated with Professor Calabresi, a first draft was written by Jeff Oldham, the data were collected and analyzed by James Lindgren, and all subsequent drafts have been edited and partially rewritten by Professors Calabresi and Lindgren. Professors Calabresi and Lindgren had wanted Jeff Oldham to be listed as a co-author, but Jeff declined for professional reasons. We are also grateful for the helpful comments of Al Alschuler, Akhil Amar, Charles Fried, Richard Fallon, Philip Hamburger, John Harrison, Gary Lawson, Daniel Lev, Saikrishna Prakash, David Presser, and Ward Farnsworth.

** Benjamin Mazur Research Professor, Northwestern University.

Please note that all calculations and discussions in this Article are current as of January 31, 2006, the day when Justice Sandra Day O'Connor's resignation took effect and Justice Samuel A. Alito, Jr. was sworn in as her replacement. The only exception, our discussion of mental decrepitude, *infra* Part I.D.3, reflects the state of affairs when this manuscript was accepted in the summer of 2005.

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INTRODUCTION

In June 2005, at the end of its October 2004 Term, the U.S. Supreme Court’s nine members had served together for almost eleven years, longer than any other group of nine Justices in the nation’s history.¹ Although the average tenure of a Supreme

1. *See, e.g.*, Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23. By September 4, 2005 when Chief Justice William Rehnquist died, it had been about eleven years since the last vacancy on August 3, 1994, which Stephen Breyer filled. This gap between vacancies was the

Court Justice from 1789 through 1970 was 14.9 years, for those Justices who have retired since 1970, the average tenure has jumped to 26.1 years. Moreover, before the death of Chief Justice William Rehnquist in September 2005 and Justice Sandra Day O'Connor's announcement in July 2005 of her retirement that eventually took effect on January 31, 2006, five of the nine Justices had served on the Court for more than seventeen years, and three of those had served for more than twenty-three years.² The other four Justices had each already spent between ten and fourteen years on the Court. At the same time, four of these nine Justices were seventy years of age or older, and only one was under sixty-five—once the traditional retirement age in business.³ Because of the long tenure of these members of the Court, there were no vacancies on the high Court from 1994 to the middle of 2005.⁴

We believe the American constitutional rule granting life tenure to Supreme Court Justices⁵ is fundamentally flawed, resulting now in Justices remaining on the Court for longer periods and to a later age than ever before in American history. This trend has led to significantly less frequent vacancies on the Court, which reduces the efficacy of the democratic check that the appointment process provides on the Court's membership. The increase in the longevity of Justices' tenure means that life tenure now guarantees a much longer tenure on the Court than was the case in 1789 or over most of our constitutional history.⁶ Moreover, the combination of less frequent vacancies and longer tenures of office means that when vacancies do arise, there is so much at stake that confirmation battles have become much more intense. Finally, as was detailed in a recent article by Professor David Garrow, the advanced age of some Supreme Court Justices has at times led to a problem of "mental decrepitude" on the Court, whereby some Justices

second longest in the nation's history. The longest gap occurred between June 19, 1811 and March 18, 1823, a gap of eleven years and nine months between the vacancies filled by Gabriel Duvall and Smith Thompson. The third longest gap lasted only about six years.

2. For the tenure of the current and recently sitting Justices, see *infra* Appendix.

3. For the ages of the current and recently sitting Justices, see *infra* Appendix.

4. For the appointment year of the current and recently sitting Justices, see *infra* Appendix.

5. U.S. CONST. art III, § 1.

6. See Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?*, NEW REPUBLIC, Aug. 19, 1991, at 17 ("When the Constitutional Convention of 1787 conferred on Supreme Court Justices a lifetime tenure almost impossible to revoke, court membership did not mean what it means today.").

have become physically or mentally unable to fulfill their duties during the final stages of their careers.⁷ A regime that allows high government officials to exercise great power, totally unchecked, for periods of thirty to forty years, is essentially a relic of pre-democratic times. Although life tenure for Supreme Court Justices may have made sense in the eighteenth-century world of the Framers, it is particularly inappropriate now, given the enormous power that Supreme Court Justices have come to wield.⁸

In this Article, we call for a change to the life tenure rule for Supreme Court Justices. We begin in Part I by analyzing the historical data on the tenure of Supreme Court Justices and responding to a recent critique of this analysis. The causes and consequences of longer judicial tenures are also examined. Part I concludes by describing the approach to judicial tenure that all other major democratic nations and U.S. states have taken to demonstrate that, comparatively, the U.S. Supreme Court's system of life tenure is truly an outlier.⁹

To resolve the problems of life tenure, we propose in Part II that lawmakers pass a constitutional amendment pursuant to Article V of the Constitution instituting a system of staggered, eighteen-year term limits for Supreme Court Justices.¹⁰ The Court's membership would be constitutionally fixed at nine Justices, whose terms would be staggered such that a vacancy would occur on the Court every two years at the end of the term in every odd-numbered calendar year. Every one-term President would thus get to appoint two Justices and every two-term President would get to appoint four. Our proposal would not apply to any of the nine sitting Justices or to any nominee of the President in office when the constitutional amendment is ratified. Supreme Court term limits ought to be

7. David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000); see also DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END* (1999) (compiling a series of articles written during the 1970s and 1980s).

8. See, e.g., Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke*, 57 ALA. L. REV. 635 (2006); Steven G. Calabresi, *Overrule Casey!: The Originalist and Normative Case for Why the Supreme Court Ought to Follow Text over Precedent*, 23 CONST. COMMENT. (forthcoming 2006).

9. See *infra* Part I.E. Only one state, Rhode Island, has life tenure for its Supreme Court. See R.I. CONST. art. X, § 5.

10. We address the possibility of term limits only for Supreme Court Justices. Any attempt to institute term limits for lower federal court judges would present enormous administrative problems that might outweigh any benefits of limiting tenures for those judges.

phased in, as was done with the two-term limit for Presidents, which did not apply to the incumbent President when it was ratified.

Our proposal builds on the views of a number of distinguished commentators and judges from broadly varying backgrounds who have opposed life tenure for federal judges, including some of the most venerable figures in American history. Thomas Jefferson, for example, denounced life tenure as wholly inconsistent with our ordered republic.¹¹ Accordingly, he proposed renewable terms of four or six years for federal judges.¹² Robert Yates, who wrote as Brutus during the ratification period, denounced life tenure for federal judges and the degree to which it separated courts from democratic accountability.¹³

Most relevant to our own proposal are the writings of several modern commentators in support of term limits for Supreme Court Justices. In 1986, Professor Philip Oliver¹⁴ proposed fixed, staggered terms of eighteen years that would, among other benefits, allow for appointments every two years, balance the impact that Presidents can have on the Court's makeup, and eliminate the possibility of Justices' remaining on the Court beyond their vigorous years.¹⁵ Several other commentators have also called for term limits for Supreme Court Justices, or for federal judges generally, but did not propose terms of eighteen years.¹⁶ After an early version of this Article was writ-

11. Letter from Thomas Jefferson to William T. Barry (July 2, 1822), in 7 THE WRITINGS OF THOMAS JEFFERSON 255, 256 (H.A. Washington ed., 1854); see Letter from Thomas Jefferson to William Branch Giles (Apr. 20, 1807), in THOMAS JEFFERSON: A BIOGRAPHY IN HIS OWN WORDS (Joseph L. Gardener et al. eds., 1974); see also Charles Cooper, *Federalist Society Symposium: Term Limits for Judges?*, 13 J.L. & POL. 669, 674 (1997) (discussing Jefferson's criticism of life tenure and his proposal for term limits).

12. Letter from Thomas Jefferson to William T. Barry, *supra* note 11, at 256.

13. Robert Yates, *Brutus*, No. XV (Mar. 20, 1788), reprinted in THE ANTIFEDERALISTS 350, 350–52 (Cecilia M. Kenyon ed., 1966).

14. Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986).

15. *Id.* at 802–16.

16. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211–12 (1988) (recommending lawmakers consider both an age limit and a term limit of fifteen to twenty years for Supreme Court Justices); Laurence H. Silberman, *Federalist Society Symposium: Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997) (suggesting that Supreme Court Justices serve five-year terms and then sit on the federal courts of appeals for the remainder of their life appointment); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 570–73 (1999) (reviewing MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE

ten and discussed publicly, but before its publication, James DiTullio and John Schochet proposed a system of eighteen-year term limits for Supreme Court Justices in a student Note.¹⁷ Their primary concerns were not that Justices are staying too long on the Court but that the current system allows for strategic timing of retirements, encourages the appointment of young nominees to the Court, and fails to distribute appointments evenly across different presidencies.¹⁸ Finally, Professor L.A. Powe, Jr. recently identified life tenure for members of the Supreme Court as “the Framers’ greatest (lasting) mistake,”¹⁹ and called for eighteen-year term limits on Supreme Court Justices.²⁰ Of the leading legal scholars to write about Supreme Court term limits to date, only one figure, Professor Ward Farnsworth of Boston University, has defended life tenure as it currently operates.²¹

Although many commentators have thus called for term limits on Supreme Court Justices, their proposals have received little attention, perhaps for two reasons. First, many Americans mistakenly believe that a system of life tenure is necessary to preserve an independent judiciary. Second, despite these scholars’ various proposals, a comprehensive case has yet to be made in the literature for the need to reform life tenure. We seek to make that case by demonstrating that the real-world, practical meaning of life tenure has changed over time and is

COURTS (1999) and advocating fixed terms for federal judges on the basis that life tenure is fundamentally at odds with representative democracy); Easterbrook, *supra* note 6, at 18–19 (proposing a constitutional amendment to replace life tenure for Supreme Court Justices with renewable ten-year fixed terms followed by an option for retired Justices to serve on lower federal courts). Professor Prakash also argues that the President and Senate should have more power to remove Justices for improper decisions. *Id.* at 568. We decline to adopt this suggestion because we think it would threaten judicial independence. *See also* John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541–43 (1999) (advocating that members of lower federal courts should be assigned to serve on the Supreme Court for short periods, such as six months or a year, before returning to their life-tenured positions on the lower courts); Amar & Calabresi, *supra* note 1 (recommending either formal or informal limits on the Justices’ tenures).

17. James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004).

18. *Id.* at 1101–19.

19. L.A. Powe, Jr., *Old People and Good Behavior*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 77, 78 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998).

20. *Id.* at 79.

21. *See* Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 408.

very different now from what it was in 1789 or even 1939. This significant change provides a strong, nonpartisan justification for reconsidering life tenure.

Our proposal is ultimately a Burkean reform intended to move the Justices back toward an average tenure that is similar to what the average tenure of Justices has been over the totality of American history. Just as the two-term limit on Presidents restored a tradition of Presidents stepping down after eight years in office, our eighteen-year term limit on Supreme Court Justices would push the average tenure of Justices back toward the 14.9-year average tenures that prevailed between 1789 and 1970 and away from the astonishing 26.1 year average tenure enjoyed by Justices who stepped down between 1970 and 2005.²² Our proposed amendment would thus merely restore the practice that prevailed between 1789 and 1970 and would guarantee that vacancies on the Court would open up on average every two years, with no eleven-year periods without a vacancy as has happened between 1994 and 2005. This then is a fundamentally conservative call for reform, all the more so because we resist the calls of many commentators for a very short tenure for Supreme Court Justices. The eighteen-year nonrenewable term we propose is more than long enough to guarantee judicial independence without producing the pathologies associated with the current system of life tenure.

Our proposal for imposing on Supreme Court Justices a staggered, eighteen-year term limit, with a salary for life and an automatic right to sit on the lower federal courts for life, could theoretically be established in a variety of ways, but the only way we approve of is through passage of a constitutional amendment pursuant to Article V. Accordingly, we outline in Part II below our proposal for a constitutional amendment instituting term limits.²³ We then highlight the advantages of passing such an amendment and address potential counterarguments. Short of amending the Constitution, Professors Paul Carrington and Roger Cramton have recently proposed a system of term limits for Supreme Court Justices instituted by statute.²⁴ In Part III below, we consider two statutory proposals for instituting Supreme Court term limits, one of our own de-

22. See *infra* p. 778 Chart 1.

23. See *infra* Part II.B.1.

24. See Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in *REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES* 467 (Roger C. Cramton & Paul D. Carrington eds., 2006).

vising as well as the Carrington-Cramton proposal. We consider the arguments in favor of and against the constitutionality of these two proposed statutes, concluding that statutorily imposed term limits on Supreme Court Justices are unconstitutional. The statutory proposal presents some close constitutional questions, and one grave danger it poses is that it would be manipulable by future Congresses.²⁵ For these reasons, we believe that term limits ought to be established by a constitutional amendment and that the proposed statute is unconstitutional.

Finally, Part III concludes by arguing that a system of term limits could in theory be achieved more informally through a variety of measures.²⁶ Specifically, we consider the opportunities that the Senate, the Court, and even individual Justices have for informally instituting term limits: the Senate by imposing term-limit pledges on nominees during confirmation hearings,²⁷ the Court through an adjustment of its internal court rules and seniority system,²⁸ and individual Justices by establishing an informal tradition of leaving the Court after a term of years,²⁹ as Presidents did before passage of the Twenty-Second Amendment.³⁰ Finally, we conclude that the only way to realize a system of Supreme Court term limits is through the passage of a constitutional amendment. We urge lawmakers to consider passing such an amendment before a new wave of resignations occurs. Establishing a system of term limits is an important reform that would correct the problem of a real-world, practical increase in the actual tenure of Supreme Court Justices.

25. See McGinnis, *supra* note 16, at 546.

26. See *infra* Part III.B.

27. See *infra* Part III.B.1.

28. See *infra* Part III.B.2.

29. See *infra* Part III.B.3.

30. See DORIS KEARNS GOODWIN, NO ORDINARY TIME 106 (1994) ("Ever since George Washington refused a third term, no man had even tried to achieve the office of the Presidency more than twice."). See generally Bruce G. Peabody & Scott E. Gant, *The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment*, 83 MINN. L. REV. 565, 574-75 (1999) (summarizing the literature about the tradition of two-term Presidents, though challenging the existence of this tradition); DAVID E. KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 325 (1996) (stating the tradition of two-term Presidents was "established by George Washington, reinforced by Thomas Jefferson, and observed for one reason or another by the seven other once-re-elected chief executives" before Franklin Roosevelt).

I. THE NEED FOR REFORM: THE EXPANSION OF LIFE TENURE

A. *The Expansion of Life Tenure Documented*

Life tenure for Supreme Court Justices has been a part of our Constitution since 1789, when the Framers created one Supreme Court and provided that its members “shall hold their Offices during good Behaviour.”³¹ The Framers followed the eighteenth-century English practice, which developed in the wake of the Glorious Revolution of 1688, of securing judicial independence through life tenure in office for judges.³² But since 1789, Americans have experienced drastic changes in medicine, technology, politics, and social perceptions of judges and of the law that have changed the practical meaning of life tenure for Justices.

We analyzed this change by calculating the age and tenure in office for each Justice³³ and by examining the number of years between vacancies on the Court. This empirical analysis revealed three critical and significant trends: the real-world, practical meaning of life tenure has expanded over time; Justices have been staying on the Court to more advanced ages than in the past; and, as a result, vacancies have been occurring less frequently than ever before.

Surprisingly, these trends have not been gradual.

31. U.S. CONST. art. III, § 1.

32. Prior to the Act of Settlement of 1701, English judges served at the pleasure of the sovereign who appointed them. With the sovereign’s death, the judges’ terms came to an end. Proponents of the Glorious Revolution of 1688 saw life tenure of judges as vital to making them independent of the Crown, a notion borrowed by Americans in 1787. See, e.g., J.M. SOSIN, *THE ARISTOCRACY OF THE LONG ROBE: THE ORIGINS OF JUDICIAL REVIEW IN AMERICA* 118, 246–47 (1989).

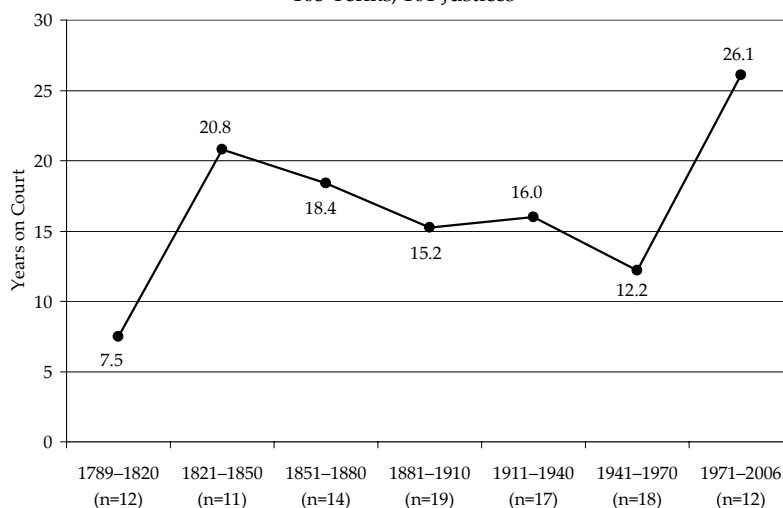
33. For the sources of this data, see HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* (rev. ed., 1999); Federal Judicial Center, *History of the Federal Judiciary*, <http://www.fjc.gov/history/home.nsf> (last visited Mar. 20, 2006). We counted two terms each for Justices Hughes and Rutledge, both of whom served as associate Justices, resigned their positions for a number of years, and then were reappointed as Chief Justices. In Rutledge’s case, his recess appointment was rejected by the Senate and he resigned. The date of swearing in was used as the start of a Justice’s service on the Court for purposes of computing tenure of office.

Chart 1: Length of Tenure on the U.S. Supreme Court

by Period of Leaving the Court

1789–Jan. 2006

103 Terms, 101 Justices



First, as Chart 1 summarizes, the average tenure of a Supreme Court Justice has increased considerably since the Court's creation in 1789, with the most dramatic increase occurring between 1971 and the present. In the first thirty-two years of the Supreme Court's history, Justices spent an average of just 7.5 years on the Court, perhaps due in large part to the difficult conditions of circuit riding and a series of very short-lived initial appointments, including a short recess appointment for Chief Justice Rutledge.³⁴ The average tenure of Justices then increased significantly between 1821 and 1850 to 20.8 years before declining over the next four thirty-year periods (spanning the period from 1851 through 1970) to an average tenure of only 12.2 years from 1941 through 1970. Then, from 1971 to 2000, Justices leaving office spent an average of 26.1 years on the Court, an astonishing fourteen-year increase over the prior period, 1941–1970.³⁵ Justices leaving office between 1971 and

34. See, e.g., Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 *CARDOZO L. REV.* 1753, 1765–67, 1779–81, 1797–98, 1806–07, 1810–11, 1814–15 (2003) (documenting the practice of circuit riding and the burdens it placed on the Justices, and noting the role that some Justices' dislike of circuit riding played into their retirement decisions).

35. As mentioned earlier, for purposes of our analysis, Justice O'Connor is treated as resigning when her resignation took effect, on January 31, 2006.

2006 thus spent more than double the amount of time in office, on average, than Justices leaving office between 1941 and 1970.

A cumulative average for the period of 1789–1970 puts this dramatic increase, reflected in the tenure of post-1970 retirees, in perspective. Compared to the average of 26.1 years in office for Justices retiring after 1970, the average Justice leaving office between 1789 and 1970 spent only 14.9 years on the bench. Thus, regardless of the basis for comparison—the average of 12.2 years for Justices leaving office during 1941 through 1970 or the average of 14.9 years for Justices leaving office from 1789 through 1970—the increase to an average tenure of 26.1 for Justices leaving office since 1970 is astounding. Indeed, four of the seven longest-serving Justices of all time are among the dozen Justices who have left the bench since 1970: Justices Douglas (36.6 years), Black (34.1 years), and Brennan (33.8 years), and Chief Justice Rehnquist (33.7 years).

One question that has arisen is whether the trends we document in Chart 1 are merely artifacts of how we defined our periods.³⁶ In Chart 1, the middle five periods are 30 years in length, whereas the first period is 32 years in length and the last period is 35 years.³⁷ We must note that the decision to remain on the Court is one that is made continuously, with, for example, Justice Black serving from 1937 to 1971 and Justice Douglas serving from 1939 to 1975. Thus, while the full realization of the trend toward longer tenures does not manifest itself until the retirements that occur after 1970, this post-1970 trend in part reflects behavior and decisions that were made in the 1950s and 1960s by Justices Black and Douglas. Perhaps with Black and Douglas as an example, recent Justices have been remaining on the bench much longer than was common for most of American history. Indeed, all of the last six Justices to leave the Court (starting in 1990) rank among the top quarter in longevity on the bench: all served for 24 years or more. If one adds the 1971–1975 retirees (Black, Harlan, and Douglas) to the 1941–1970 period, the new 1941–1975 mean tenure is 15 years (instead of 12.2 years for the next-to-last period in Chart 1), and the nine post-1975 retirees average 25.1 years on the bench (instead of 26.1 years in the last period in Chart 1). In other words, even if the two longest-serving Justices in the last half-century

36. David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1396, 1426 (2005).

37. When we made the first version of this chart in 2001, the last period was 30 years as well.

are lumped with an earlier period, the most recent period still shows a dramatic increase of ten years in the length of judicial tenure over the prior period and over the historical average tenure on the Supreme Court.

For those who would like to see the data on time in office without any period selected by the researcher, we present these same data as a set of overlapping averages to smooth out variations enough to see a trend line, but without assigning Justices to just one period. Chart 2 presents the same data as Chart 1 without any periodization. We chart the mean of the last nine Justices to leave the Court for every retirement or death starting with the ninth Justice to resign, retire, or die in office (in 1804). This graph plots all 95 overlapping sets of nine consecutive retirements, resignations, or deaths that the Court has experienced so far. In other words, if at the end of each judicial tenure, we looked back over the last nine Justices to leave the Court and computed an average tenure for this set of nine Justices, the average of those nine tenures in office (a nine-Justice *lagging average*) would be the data point represented in Chart 2.³⁸ For example, the first peak labeled in Chart 2 is a lagging average of 22 years in office corresponding to the year 1851. This is the average of the tenure in office of Justice Levi Woodbury, who died in office in 1851, combined with the tenure of the immediately prior eight Justices who left office by death or resignation between 1829 and 1851. The next data point is the lagging average of the nine Justices who left the Court between 1834 and 1852, when Justice John McKinley died in office.

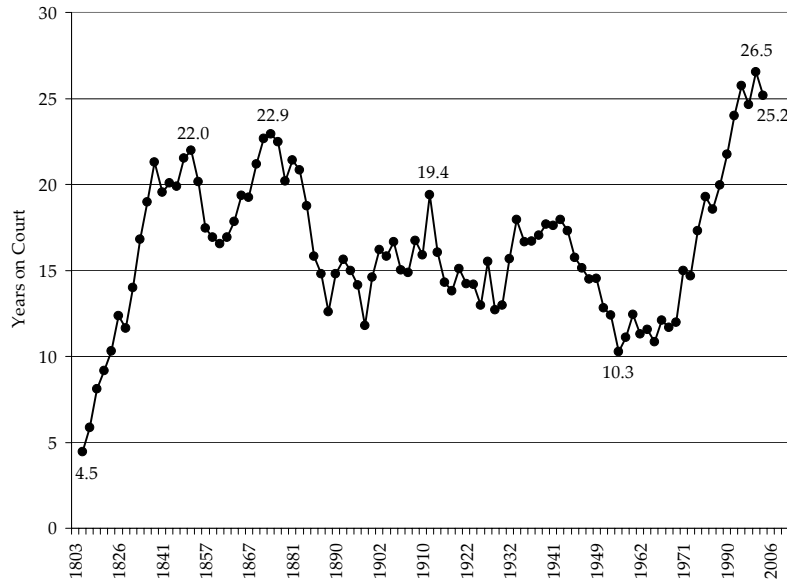
38. The years shown at the bottom of Chart 2 are not drawn to scale in years, since each data point is one retirement or death apart, not any specific number of years.

Chart 2: Length of Tenure on the U.S. Supreme Court

Lagging Average of the Last Nine Justices to Leave Office

1789–Jan. 2006

103 Terms, 95 Overlapping Sets of 9 Justices



As Chart 2 shows, the five longest of the 95 sets of nine consecutive retirements are the sets ending with the last five retirements (1991, 1993, 1994, 2005, and 2006). In the Nineteenth Century, we see a broad peak that consists of three spikes (three groups of nine Justices, the last of which retired in 1835, 1851, and 1873), then a gradual (but uneven) drop to a bottom in the 1956–1969 period, followed by a rise to the unprecedented levels that we have experienced since 1991. Chart 2 also shows much the same general pattern as Chart 1: a substantial rise, a gradual drop, followed by a rise starting for those Justices who retired after 1970, which by 1991 leads to unprecedented average levels for the last five groups of nine consecutive retirements. Chart 2 shows that our choice of periods in Chart 1 fairly represents the pattern of retirements measured at each individual Justice's departure from office.³⁹

39. If we had included more Justices in our lagging averages, such as a twelve-Justice lagging average, Chart 2 would have resembled Chart 1 even more closely, and the recent rise in judicial tenure would have appeared even more dramatic. See also *infra* p. 799 Chart 7, which fits a cubic model similar in shape to the pattern shown in Chart 1, another confirmation that the periodization in Chart 1 is appropriate.

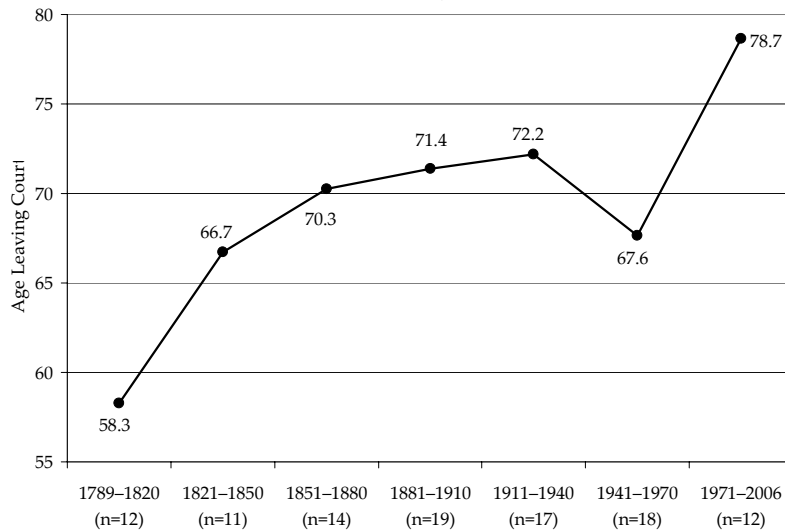
Not only are Justices staying on the Court for longer periods, but they are also leaving office at more advanced ages than ever before. As Chart 3 highlights, the average age at which Justices have left office has generally risen over time, but like the average tenure of office, it has dramatically increased for those retiring in the past thirty-five years.

Chart 3: Age at Leaving Office

by Period of Leaving the U.S. Supreme Court

1789–Jan. 2006

103 Terms, 101 Justices



In the five thirty-year intervals between 1789–1940, the average age of Justices upon leaving office rose from 58.3 to 72.2 years of age, but then dropped to about 67.6 years of age for the 1941–1970 period. Yet in the last period, 1971–2006, Justices left office at an average age of 78.7 years. Justices who have left office since 1970 have thus been, on average, eleven years older when leaving the Court than Justices who left office in the preceding thirty-year period, 1941–1970, and more than six years older than Justices in the next highest period, 1911–1940, one that famously included the era of the so-called nine old men. In addition, comparing the average retirement age since 1970 with a cumulative average age of all Justices retiring from 1789 through 1970 is equally revealing. The average Justice leaving office after 1970 (age 78.7) is ten years older than the average Justice leaving office prior to 1970 (age 68.3). Thus, the average age at which Justices have retired has increased markedly

throughout history, and most sharply in the past thirty-five years.

Chart 4: Age at Leaving Office

Lagging Average of the Last Nine Justices to Leave Office
U.S. Supreme Court, 1789–Jan. 2006
103 Terms, 95 Overlapping Sets of 9 Justices

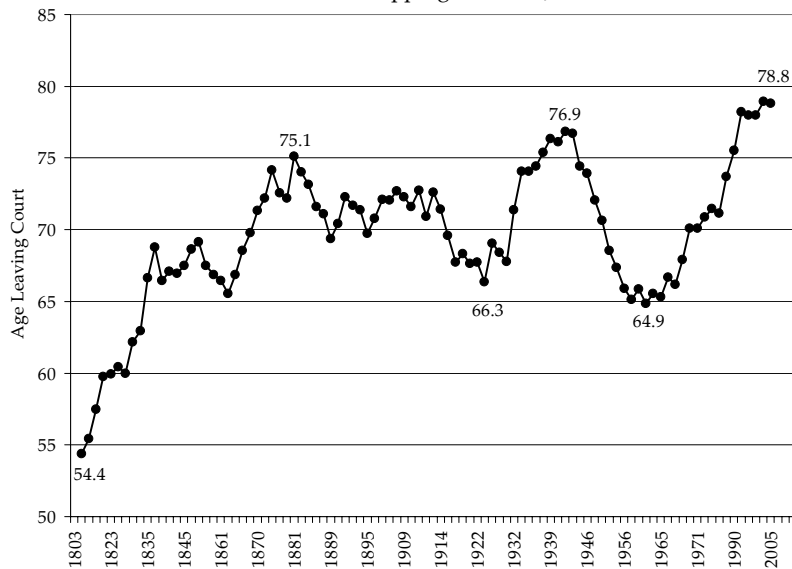


Chart 4 shows the same data without periodization, reflecting a lagging average age for 95 sets of nine consecutive Justices to leave office. This chart reveals peaks of 75 years old in 1881 (reflecting those leaving office in 1864–1881) and 77 years old in 1941 (reflecting those leaving office in 1930–1941). But since 1991, the lagging average age of the last nine retirements has been slightly higher than at those earlier peaks, and much higher than most prior years. Since 1991, the nine-Justice lagging average age at retirement has been an unprecedented 78 to 79 years old (reflecting those leaving office in 1969–1991 through those leaving in 1981–2006).

The mean age for both men and women electing to receive Social Security retirement benefits has hovered around 64 since 1970,⁴⁰ and the age for receiving full benefits is being increased to age 67 for those born after 1960. Although in 2000, 47% of Americans of ages 60–64 were still in the labor force, that pro-

40. William J. Wiatrowski, *Changing Retirement Age: Ups and Downs*, MONTHLY LAB. REV., Apr. 2001, at 3, 6.

portion drops by almost half for ages 65–69 (24%). Only 13.5% of Americans were still in the labor force at ages 70–74, and only 5.3% were still working at ages 75 and older.⁴¹ This contrasts with a mean retirement age on the Court since 1971 of 78.7 years. All but three Justices on the current Court, Chief Justice John Roberts and Justices Clarence Thomas and Samuel Alito, are at an age when most Americans have already retired.⁴² When one compares the age distribution of the current Supreme Court with the age distribution of all federal judges, the difference is similarly stark. From 1984 to 2002, less than 17% of Article III judges were 66 or older and less than 5% were 71 or older.⁴³

Given that Justices have been staying on the Court for longer periods and retiring later in life than ever before, it is not surprising that vacancies on the Court have been opening up much less frequently than in the past. Indeed, as Chart 5 indicates,⁴⁴ the average number of years between vacancies has increased sharply in the past thirty years.

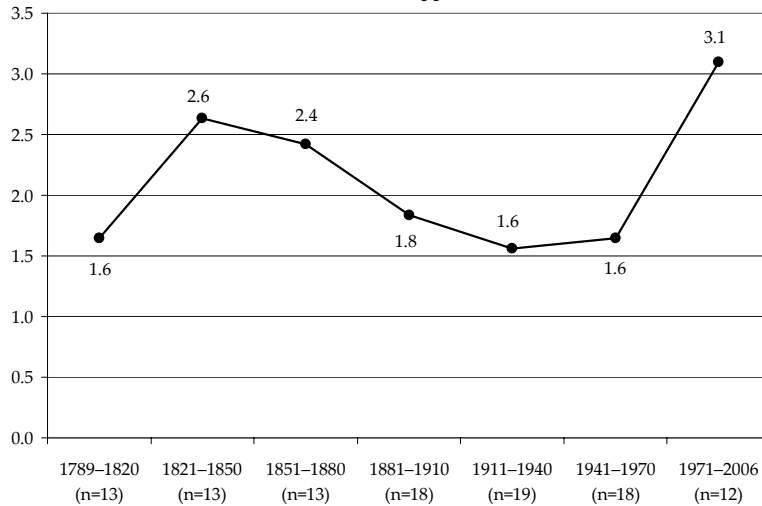
41. *Id.* at 8.

42. For the ages of the Justices, see *infra* Appendix.

43. See Albert Yoon, *The End of the Rainbow: Understanding Turnover Among Federal Judges*, 7 AM. L. & ECON. REV. (forthcoming 2006) (manuscript at 12, cited with permission of the author), available at <http://www.irs.princeton.edu/seminars/yoon.pdf>. For purposes of his calculations, Yoon measures the number of Article III judges in terms of judgeship-years, that is, the aggregate number of years that each judge served on active status.

44. For purposes of calculating the figures used in Chart 5, the first six appointments to the Court between 1789 and 1790 were excluded; the count begins after the last of the 1790 commissions. The lag between vacancies was computed by subtracting the date of the last time that a position (that was later filled) was created or opened up from the more recent date that a position (that was later filled) was created or opened up.

**Chart 5: Mean Years Since Last
Supreme Court Vacancy**
by Period, 1789–Jan. 2006
Excludes Initial Six Appointments



These figures are affected by the varying size of the Supreme Court over time.⁴⁵ During most of the first two periods, the Court had fewer than nine members, which means the figures calculated for those periods are higher than they would have been with a larger Court. With fewer Justices, seats can be expected to open up less frequently.⁴⁶ In the third period, from 1851 through 1880, the gaps between vacancies are more difficult to compare because the size of the Court varied from eight to ten members.⁴⁷ Yet, looking at the figures for the first two

45. Congress created the Supreme Court in 1789 with only six members, ABRAHAM, *supra* note 33, at 54, and expanded it to seven members in 1807, *id.* at 64. In 1837, Congress added two more seats to increase the Court from seven to nine members, *id.* at 76–77, and it added yet another seat in 1863 to bring the Court’s membership to ten, *id.* at 89–90. During President Andrew Johnson’s tenure, Congress passed bills to eliminate two of these seats, *id.* at 93, but added one more seat under President Ulysses Grant so that in 1870 the Court had nine members, *id.* at 95–96.

46. In the first period, 1789–1820, the Court had only six members for the first eighteen years of the period and only seven members for the last thirteen years. The second period, 1821–1850, contains a period (1821–1837) when the Court had only seven members, and a period (1837–1850) when the Court had nine members.

47. The third period, 1851–1880, contains two periods (1851–1863 and 1870–1880) comparable because the Court had nine members, a period (1863 to about

periods, it is probable that, if the Court had been the size it is today, the time between vacancies would tend to be closer to the figures from 1881 through 1970. Indeed, the increase in 1837 from seven to nine members, though primarily a power grab by the Jacksonians, may also have been in part a reaction to the longer tenure, advanced ages, and longer gaps between retirement after 1811 (as suggested by the data in Charts 1 through 5). Since 1869, the Court's membership has been fixed at nine Justices, which makes a comparison to the last four periods the most meaningful to current policy analyses. Chart 5 demonstrates that from 1881 through 1970, the average number of years between commissions stayed consistent at about 1.6 to 1.8; since 1970, it has nearly doubled to 3.1 years.

Moreover, the Court went for nearly eleven years—between 1994 and 2005—without a vacancy, the longest period between vacancies since the Court's membership settled at nine Justices.⁴⁸ Eleven years is long enough in theory to deprive a successful, two-term President of the chance to appoint even a single Justice.

The cumulative average from 1789 through 1970 further highlights the remarkable increase in time between vacancies that has occurred since 1970: on average, vacancies occurred on the Court every 1.9 years from 1789 to 1970 and then began occurring only every 3.1 years since 1971. After the two 1971 appointments, 3.4 years elapsed between vacancies. Thus, in the past few decades, vacancies have opened up every 3.1 to 3.4 years, which is about double those in the most comparable years—from 1881 through 1970—and more than one year longer than the cumulative average from 1789 through 1970.

Strikingly, since the Court was fixed at nine members in 1869, three of the five longest times between vacancies occurred in the last thirty years: between November 12, 1975 and July 3, 1981; between July 3, 1981 and September 26, 1986; and between August 3, 1994 and September 4, 2005. Jimmy Carter was the only President in American history to serve at least one

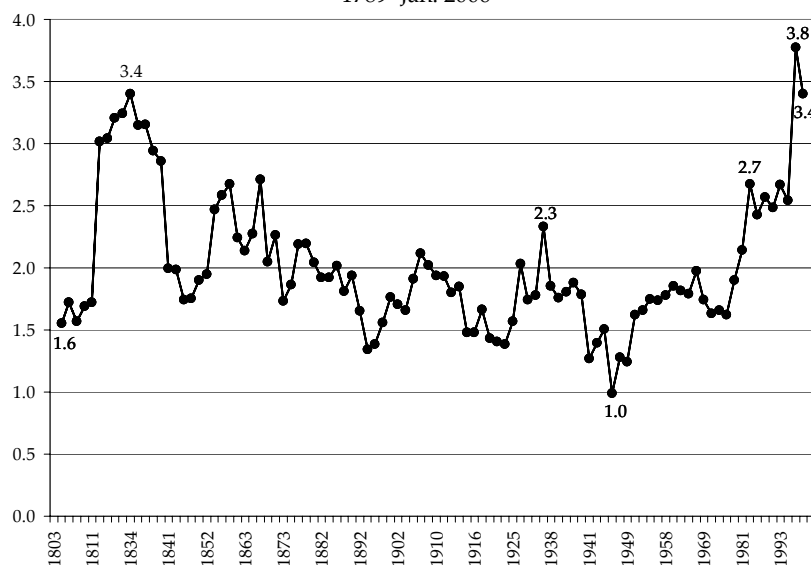
1866) when the Court had ten members, and a period (about 1866 to 1870) when the Court had eight members.

48. The longest period without vacancies in the Court's history was the twelve-year period between the 1811 vacancy that Justice Gabriel Duvall filled and the 1823 vacancy filled by Justice Smith Thompson. Measured by dates of swearing in, that period ran from the swearing in of Justice Joseph Story in 1812 (to a seat that opened in 1810) to the swearing in of Thompson in 1823. During this period there were only seven seats on the Supreme Court. See ABRAHAM, *supra* note 33, at 68.

complete term and never make an appointment to the Supreme Court. If George W. Bush had lost his bid for re-election in 2004, he would have been the second. As it is, he is only the third person elected twice to the Presidency who has had to wait until his second full term to make his first Supreme Court appointment (the others being Franklin Roosevelt and James Monroe). Of the thirty-four presidential four-year terms since the number of Justices was finally fixed at nine in 1869, only four expired without an appointment to the Supreme Court. Among the first twenty-seven terms from 1869 through 1973, only once did a four-year presidential term pass without an appointment (FDR, 1933–1937). By contrast, among the last seven completed terms, three—almost half—were devoid of Supreme Court appointments: Jimmy Carter’s term, Bill Clinton’s second term, and George W. Bush’s first term. There can be no doubt that Supreme Court vacancies are opening up much less often in the post-Warren Court era.

Chart 6 shows a lagging average of the last nine appointments to the Court when each Justice leaves the bench. The mean period between openings was 3.8 years when Chief Justice Rehnquist died, the longest lagging average in Chart 6, and was 3.4 years when Justice O’Connor was replaced, the third-longest nine-Justice average in history. Note that since 1869 when the Court was fixed at nine Justices, the average number of years for the last nine vacancies has gone above 2.1 years only twice: in 1937 when the “nine old men” held sway, and continuously since 1986, the entire period of the Rehnquist Court.

**Chart 6: Mean Years Since Last
Supreme Court Vacancy**
Lagging Average of the Last Nine Vacancies
1789–Jan. 2006



These historical trends represent a grand change in the practical meaning of the Constitution's grant of life tenure to Supreme Court Justices. The Founding Fathers were famously known for their disdain for "unaccountable autocrats out of touch with the typical citizen's concerns; who cling to power long after they have sufficient health to perform their duties; who cannot be removed from office by democratic agency."⁴⁹ The Framers gave Supreme Court Justices life tenure in an era when the average American could expect to live only thirty-five years.⁵⁰ Now, Justices are appointed at roughly the same average age as in the early years of our history,⁵¹ but they bene-

49. Easterbrook, *supra* note 6, at 17.

50. *Population Explosion Among Older Americans*, <http://www.infoplease.com/ipa/A0780132.html> (last visited Apr. 7, 2006) (statistics drawn from U.S. Census Bureau data). Although no precise background source is given for this commonly cited estimate, it may be based on 1799–1803 data from England and Wales showing a life expectancy of 35.9 years. See *YOU HAVE TO ADMIT IT'S GETTING BETTER* 59 tbl. 2.2 (Terry Anderson ed., 2004).

51. Chart 8, *infra* p. 801, demonstrates that although the average age of Justices upon commission has risen somewhat over the past 150 years, it was only fifty-three years of age in the most recent period (1971–2006), which is not significantly different from preceding periods.

fit from an average life expectancy of seventy-seven years.⁵² Of course, this statement alone significantly overstates the relevant difference because of higher rates of infant mortality two hundred years ago. Thus, a more relevant comparison might be that in 1850, white men who reached the age of forty could expect to live another 27.9 years, compared to such men in 2001, who could expect to live another 37.3 years. Largely as a result of this 9.4-year increase in life expectancy, today the average Justice who is appointed to the Court in his early fifties can expect to sit on the Court for nearly three decades, whereas the average Justice appointed to the Court in his early fifties in 1789 might have expected to sit on the Court for only two decades. Today's Justices enjoy a potential tenure that is fifty percent longer than that of their typical eighteenth- and nineteenth-century predecessors.

B. *Periodization and Related Empirical Issues*

In a somewhat odd article in the *Washington University Law Quarterly*, Professor David R. Stras and Ryan W. Scott first argue against some of the empirical claims of a trend toward longer tenures on the U.S. Supreme Court, but then suggest increasing retirement benefits as a solution to a problem whose existence they mostly reject or minimize.⁵³ As we expressed in public discussions at the Duke Law School conference on term limits for Justices in the spring of 2005, we too favor offering greater financial benefits as an inducement to earlier retirement from the Court. Unless these golden parachutes were extremely generous, however, we suspect that they would be effective only occasionally in the first few decades after implementation. But over time, expanded benefits could help introduce a norm of retirement by offering a focal point for norm creation. Thus, our disagreements with Stras and Scott are related to their empirical claims, not their policy proposals, which we believe offer considerable merit.

Disagreeing with our claim that Supreme Court tenure has increased dramatically for Justices retiring since 1971, Stras and Scott argue that our "claim is empirical, and a closer look at the data suggests that it depends more on the chosen period

52. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2001, at 73 tbl. 96, available at <http://www.census.gov/prod/2002pubs/01statab/vitstat.pdf> (last visited Mar. 20, 2006) (1850 data are from Massachusetts).

53. See Stras & Scott, *supra* note 36.

lengths than a bona fide trend.”⁵⁴ Thus, Stras and Scott’s main empirical argument is that the trend that we document in longer judicial tenures for the twelve Justices retiring since 1971 is a function of the periods we chose. They claim that splitting our data into other groupings makes the pattern in our data disappear:

A year here or there, on one side or the other of a cutoff, and the average for the period might rise or fall considerably. Yet a rendering of the data that flattens those periods, taking judges in groups of five, likewise reveals no dramatic recent trend or unprecedented length of service.⁵⁵

Note that Stras and Scott assert as if it were a fact that “[a] year here or there, on one side or the other of a cutoff, and the average for the period might rise or fall considerably.” As a quick check of our data revealed to us, this claim is simply false. We tried starting each of our seven Chart 1 periods a year earlier or a year later, or ending a year earlier or a year later. Examining all 28 different one-year changes in cutoff dates, we discovered that in every case, there were trivial differences at most. For 13 of the 28 changes in cutoff dates, there was no change at all in mean tenure on the Court with a year added or subtracted from a period; in 12 of the remaining cases the differences in mean tenure on the Court were less than one year. In only 3 cases did the differences in mean tenures for a period range as high as 1.0 years, with the largest difference being 1.3 years. In that case, if the 1941–1970 period had started in 1942 instead of 1941, the mean tenure for Justices leaving the Court in that slightly shorter period would have been 13.5 years, rather than 12.2 years, a trivial difference when contrasted with the jump to a mean tenure of 26.1 years in the 1971–2006 period. It appears that Stras and Scott never bothered to check their factual claim that a year here or there would make a considerable difference.

Then Stras and Scott argue that “a rendering of the data that flattens those periods, taking judges in groups of five, likewise reveals no dramatic recent trend or unprecedented length of service.”⁵⁶ They never explain why one would want to “flatten” effects. Such an approach is a recipe for committing Type II er-

54. *Id.* at 1426.

55. *Id.* at 1427.

56. *Id.*

ror (false acceptance of the null hypothesis).⁵⁷ To reject the null hypothesis that the data are random, one should test the possibility that there might be a trend in the data. If one wants to reduce data into groups to facilitate easier data presentation, one must be careful *not to eliminate* any trends or effects that might be in the data. Instead of testing any apparent trends in the data to see whether they are statistically significant, Stras and Scott appear to be straining to find ways of presenting the data that lump Justices together in a way that will make the patterns in the data disappear. Doing this tends to produce Type II error, which is precisely what happens with Stras and Scott's analysis.

We chose the periods in Chart 1 because they made the presentation of the data clearer and did not suppress the most important time trends in the data. For those worried about our periodization, Chart 2 presents the data without periodization,⁵⁸ charting the mean of the last nine Justices to retire for every retirement starting with the ninth Justice to resign, retire, or die in office (in 1804). Chart 2 nicely supports the periods we chose to use in Chart 1.⁵⁹

Instead of our Charts 1 or 2, Stras and Scott offer two simple charts, one that divides the Justices by the decade they retired⁶⁰ and another that divides the Justices into groups of five Justices based on when they were *appointed* to the Court.⁶¹ They do not report the cell counts for their chart dividing the Justices by decade,⁶² perhaps for a reason. In discussing this chart, they mention the average tenures for Justices retiring in four decades: the 1830s, the 1970s, the 1980s, and the 1990s.⁶³ Stras and Scott, however, fail to mention that the sample sizes for their estimates for length of tenure during these decades are only 3

57. Presumably, Stras and Scott want to reduce the chance of Type I error, false rejection of the null hypothesis, but their strategy is not a good way to do so: choosing groupings that flatten effects almost ensures that, if there is a real trend, they will suppress it, thus committing Type II error. The goal should be to try to reduce the chances of both types of error. The primary method for reducing the chance of Type I error is to use a high alpha (.05 is conventional).

58. A version of Chart 2 did not appear in our earlier manuscript, though other scholars could have done something like this themselves to determine whether periodization choices were driving our results.

59. See Chart 7, *infra* p. 799, which fits a cubic model similar in shape to the pattern shown in Chart 1.

60. Stras & Scott, *supra* note 36, at 1427 chart 1.

61. *Id.* at 1428 chart 2.

62. *Id.* at 1427 chart 1.

63. *Id.* at 1427.

cases for each of these first three decades and 4 cases for the 1990s. By contrast, in our Chart 1, by using periods of at least 30 years, the smallest sample size for any of our groups is 11 cases (for the 1821–1850 period). For Stras and Scott to report a mean for a cell count smaller than 5 cases is a questionable choice, a problem that can cause them to see patterns where there are none or to miss patterns that are present. The reason for presenting the data in grouped averages is to reduce the mass of individual data points to recognizable patterns or trends. If too few data points are combined, then one can mistake meaningful differences for random variation, as Stras and Scott appear to have done. Further, even in their highly unreliable chart with the very small sample sizes for each decade, three of the four decades with highest mean tenure are three of the last four decades (the 1970s, 1990s and 2000s), a result that tends to support, rather than reject, our hypothesis that the period since 1971 is indeed substantially different from the typical pre-1970 period. More importantly, Stras and Scott do not offer theoretical or empirical explanations for selecting time periods with small sample sizes and for encouraging Type II error that partially suppresses the pattern we hypothesize.

The problems with Stras and Scott's Chart 2 are even more serious than with their Chart 1. In their Chart 2,⁶⁴ Stras and Scott present data on the average tenure of Justices after they have combined the Justices into groups of five based on when the Justices were *appointed*. Given that we are writing about a problem of delayed retirement, not appointment, it is unclear why they would seek to test our hypothesis or our groupings by using the date of appointment rather than the date of retirement. They disclose the switch in a footnote, but do not offer a theoretical reason for making it. The most likely effect of this grouping would seem to be to facilitate Type II error by suppressing any patterns in the data.

Stras and Scott report that dividing the data into twenty-one groups of five Justices based on date of appointment "reveals no dramatic recent trend or unprecedented length of service."⁶⁵ We, of course, contend that those Justices *retiring* since 1971 serve longer on the court than those before. But by examining Justices in groups of five Justices by *year of appointment*, Stras and Scott's groupings do not contain even one complete set of

64. *Id.* at 1428 chart 2.

65. *Id.* at 1427.

five Justices who retired after 1970. Their last full group of five appointees includes Abe Fortas, who was appointed in 1965 and served only 3.6 years on the Court, and Arthur Goldberg, who was appointed in 1962 and served only 2.8 years. Because Fortas and Goldberg did not resign after 1970, they should not be lumped with the post-1970 retirees in testing our hypothesis about post-1970 retirees.

After this last *full* set of five appointees (including Goldberg and Fortas), Stras and Scott's last group of appointees (and last data point) has only three members—Justices Powell, Rehnquist, and O'Connor⁶⁶—again raising concerns about very small sample sizes. But indeed, most other ways of making groupings of five consecutive Justices would still not support Stras and Scott's claim that the trend since 1970 "reveals no dramatic recent trend or unprecedented length of service."⁶⁷ We tested every one of the 99 sets of five consecutive Justices *based on date of retirement or death*, and the longest average tenure for any set of five consecutive Justices leaving office occurred with the death of Justice Rehnquist in 2005.

In order to suppress (or, in their words, "flatten") the unprecedented length of tenure of retirees from the Court since 1971 (as revealed in our Charts 1 and 2), Stras and Scott went to extraordinary lengths. As we have shown, in their first chart based on tenure by decade, they routinely base conclusions on unreliable cell counts of three cases. Even given this questionable choice, three of the four decades with the longest average tenure are since 1970, which supports our conclusion. Their second chart, based on groupings of five Justices, has even more problems:

(1) Stras and Scott switch from date of retirement to date of appointment with no justification, though our hypothesis concerns length of tenure at retirement, not appointment;

(2) By using year of appointment, they are able to lump the short and highly unusual 1960s tenure and resignations of Abe Fortas and Arthur Goldberg with the post-1970 retirees;

66. *See id.* at 1427 n.164 (placing Chief Justice Rehnquist and Justices O'Connor and Powell in the final group of three Justices).

67. *Id.* at 1427.

(3) By using year of appointment, they have no complete set of five justices retiring after 1970 to test our hypothesis that post-1970 retirees are different.

The pattern of a recent unprecedented length of tenure on the Court is not an artifact of how the data are grouped; it is a real pattern in the data, which our grouping nicely reflects. We found one or more recent strings of Justices as the longest serving in history when we examined all 99 strings of five consecutive Justices leaving the Court; all 98 strings of six consecutive Justices leaving the Court; all 97 strings of seven consecutive Justices; all 96 strings of eight consecutive Justices, all 95 strings of nine consecutive Justices (shown in Chart 2); all 94 strings of ten consecutive Justices, all 93 strings of eleven consecutive Justices; and all 92 strings of twelve consecutive Justices. These robust results do not depend on any particular periodization, just on having a string of at least five Justices leaving office.⁶⁸

Stras and Scott also try to make our arguments and our periodization look arbitrary by creating a false impression of the contrasts that we (and those who report our data) find most important. After asserting that our empirical claim “depends more on the chosen period lengths than a bona fide trend,” Stras and Scott assert,

Calabresi and Lindgren document an increase in term length from an average of 12.2 years during 1941–1970 to an average of 26.1 years from 1971–2000. Related statistics have since popped up in a number of editorials in the popular press [Stras and Scott’s footnote here points to two popular newspaper columns]. On its face, the figure reveals an “astounding” and “dramatic” increase.⁶⁹

Stras and Scott then proceed to point out that the Justices leaving the bench in the 1941–1970 period had uncharacteristically short tenures, which our Chart 1 above nicely summarizes.

Stras and Scott here make it appear that the primary argument on changes in the length of tenure made by us and by the reporters and columnists they cite is a contrast of the 1941–1970 period, which is perhaps unusual, with the 1971–2000 period. This implication is false. Neither of the two articles they cite

68. Only if one strings fewer than five Justices in a row does any single string exceed one or more recent ones. The four Justices retiring in 1829–1835 served longer (29.65 years) than any recent set of four Justices, though the next three longest sets of four judicial tenures are the three most recent: 1990–1994 retirees (28.28 years), 1991–2005 retirees (28.25 years), and 1993–2006 retirees (28.34 years).

69. Stras & Scott, *supra* note 36, at 1426.

actually contrasts these two periods; both instead compare the post-1970 period to the 182-year period from 1789 to 1970.⁷⁰ The most prominent other news articles to discuss our data—in the *New York Times*⁷¹ and the *Boston Globe*⁷² (both cited in an earlier draft of Stras and Scott)⁷³—also compare the post-1970 period to the 182-year period from 1789 to 1970, with no mention of the 1941–1970 period.

In the public version of our 100-page manuscript,⁷⁴ other than in Chart 1 itself and in the one paragraph discussing Chart 1, we made only one mention of the 12.2 year tenure of Justices who left office in the 1941–1970 period. Furthermore, even those two mentions of the 1941–1970 tenure of Justices included contrasts of the entire pre-1970 period with the post-1970 period.⁷⁵

70. See Doug Bandow, *A Question of Justice*, STAR-LEDGER, Mar. 6, 2005, at 3 (“Before 1970, the average term served was a bit over 15 years. Since 1970, justices have averaged 25.5 years. The age at retirement has jumped a decade, to nearly 79.”) (emphasis added); Fred Graham, *In Need of Review: Life Tenure on the U.S. Supreme Court*, USA TODAY, Jan. 16, 2006, at 11A (“From 1789, the year the Supreme Court was created, to 1970, the average justice served 15 years and retired at 68. Since 1970, though, the average tenure has climbed to more than 25 years.”). Please note that the numbers cited in the press differ slightly from the numbers presented here because of changes between our early manuscripts and this Article, as well the inclusion of Chief Justice Rehnquist and Justice O’Connor.

71. Linda Greenhouse, *How Long Is Too Long for the Court’s Justices?*, N.Y. TIMES, Jan. 16, 2005, § 4, at 5 (“The trend is clear. From 1789 to 1970, the average Supreme Court Justice served for 15.2 years and retired at 68.5. But since 1970, the average tenure has risen to 25.5 years and the average age at departure to 78.8.”) (emphasis added).

72. Jeff Jacoby, *Don’t Let Judges Serve for Life*, BOSTON GLOBE, May 26, 2005, at A19 (“Between 1789 and 1970, Supreme Court Justices served an average of just over 15 years and retired at 65 1/2. Since 1970, Justices have stayed on the court for an average of 25.5 years, and their age at retirement has climbed to nearly 79.”) (emphasis added).

73. David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”* 32 n.167 (Minn. Legal Studies Research Paper No. 05-23, 2005), available at <http://ssrn.com/abstract=818724>.

74. See Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered* (Apr. 7, 2005) [hereafter April 2005 Term Limits] (unpublished manuscript, on file with authors). It is possible that Stras and Scott saw and responded to a different version, but the page citations that they include suggest that they probably used that April 2005 manuscript.

75. In our earlier 100-page April 7, 2005 manuscript, here is our entire discussion of the 12.2 year tenure in the 1941–1970 period:

The average tenure of Justices then increased significantly to 20.8 years between 1821 and 1850, before declining over the next four thirty-year periods (spanning from 1851 to 1970) to an average tenure of only 12.2 years. Then, from 1971 to 2000, Justices leaving office spent an average of 25.6 years on the Court—an astonishing 13-year increase over the prior period, 1941–1970. Justices leaving office between 1971 and 2000 thus

Indeed, one has only to read the first or the last paragraph of our April 2005 manuscript⁷⁶—or its abstract⁷⁷—to see that our primary contrast was between the pre-1970 and post-1970 periods. Neither the introduction, nor the conclusion, nor the abstract of our April 2005 manuscript makes any mention of the length of judicial tenure in the 1941–1970 period. From reading Stras and Scott’s discussion of our article, one would assume that our article based its empirical arguments on the increased length of judicial tenure primarily on a contrast between the perhaps uncharacteristic 1941–1970 period and the post-1970 period, when we clearly focused our empirical arguments re-

spent more than double the amount of time, on average, in office than did Justices leaving office between 1941 and 1970. To put this dramatic increase in the post-1970 period in perspective, we also calculated a cumulative average for the period of 1789–1970. Compared to the average of 25.6 years in office for Justices retiring since 1970, the average Justice leaving office between 1789 and 1970 spent only 14.9 years in office. Thus, regardless of the basis for comparison—compared to an average of 12.2 years for Justices leaving office during 1941–1970 or compared to an average of 14.9 years for Justices leaving office during 1789–1970—the increase to an average tenure of 25.6 for Justices leaving office since 1970 is astounding.

Id. at 12–13.

Our term limits proposal responds directly to the jump in the average tenure of Supreme Court Justices from an average of 12.2 years during 1941–1970, and 14.9 years during 1789–1970, to an average tenure of 25.6 years during 1971. *Id.* at 54. Note that, even in the two places where we discussed the increased tenure of Justices in the 1941–1970 period, we also included a more general mention of the longer pre-1970 period.

76. The first two sentences of our April 2005 manuscript are as follows:

The current members of the United States Supreme Court have served together for almost eleven years, longer than any other group of nine Justices in the nation’s history. The average tenure of a Supreme Court Justice from 1789 to 1970 was only 14.9 years, yet, of those Justices who have retired since 1970, the average tenure has jumped to 25.6 years.

Id. at 1. The last paragraph of our April 2005 manuscript began with a similar contrast:

We believe moving to a system of 18 year staggered terms for Supreme Court Justices is fundamentally a conservative, Burkean idea that would restore the norms in this country that prevailed between 1789 and 1970 as to the tenure of Supreme Court Justices. During that period of time, vacancies on the Supreme Court opened up about once every two years and Justices served an average of 14.9 years on the Court. It is only since 1970, after the Warren Court Revolution, that Supreme Court vacancies started occurring more than 3 years apart and that Justices started serving an average of 25.6 years.

Id. at 100.

77. See Steven G. Calabresi & James Lindgren, Abstract (Term Limits for the Supreme Court: Life Tenure Reconsidered) (Apr. 7, 2005), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=701121.

garding the growing length of judicial tenure on a contrast between the post-1970 period and the entire preceding period. And neither of the two popular articles they point to as support for their misleading presentation of our argument even mentions the increase from the 1941–1970 period to the post-1970 period.

Stras and Scott argue, “Average tenures actually were *higher* before 1940, so the trend looks more like a random walk than a steady climb.”⁷⁸ We believe that one of the main contributions of our work has been to demonstrate that the increase in judicial tenures over the last century is not a gradual increase driven solely by an increase in life expectancies, as was widely believed before we wrote. We have argued repeatedly that the growth in judicial tenure is not a gradual, steady climb. Moreover, whether the patterns in the data approximate a “random walk” is something that can be examined easily through statistical analysis. It is quite easy to test whether one could reject the null hypothesis of no time trend in these data if they were actually a random sample of Justices from a population of infinite size. In this Article, we report that the last twelve retirees as a group were indeed very different in length of tenure (26.1 years) from the typical Justice leaving the bench through 1970 (14.9 years). This is a very large difference, more than large enough to be statistically significant ($p=.0002$) if the data were a random sample of Justices.⁷⁹ The data do not appear to be random.

As we described in our discussion of Chart 1, the larger trend appears to be a quick rise in tenure into the mid-1800s, followed by a gradual decline in time served on the Court through the 1941–1970 period, followed by a quick rise in the 1971–2006 period. Indeed, from looking at Chart 1, the data appear to conform quite nicely to a curvilinear model, in this case, a cubic one. Chart 2 shows a slightly more complex pattern with early peaks in the 1830s and in the 1870s (when the introduction of pensions in 1869 induced some long-serving Justices to retire).

To explore whether the data approximate a random walk and what sort of curve might fit the data, we fit a linear model and ten different curvilinear ones. The linear model was sig-

78. Stras & Scott, *supra* note 36, at 1426.

79. Here we used an independent samples *t*-test for equality of means, without assuming equality of variance.

nificant at $p=.023$ ($R=.223$), while the cubic model was among the two best fitting models ($p=.00001$; $R=.478$). The other curvilinear models fit were logarithmic ($p=.002$), inverse ($p=.002$), compound ($p=.003$), power ($p=.000002$), logistic ($p=.003$), exponential ($p=.003$), S ($p=.00000005$), growth ($p=.003$), and quadratic ($p=.076$) models. Only the last of the eleven models tested, the quadratic model, was not statistically significant, and that would have been significant if one assumed a population of 250 Justices (over perhaps the first 500 years of the United States) rather than the less realistic assumption of an infinite population of Justices (as standard statistical techniques assume). We can reject the Stras and Scott null hypothesis that the data appear random with an extremely high degree of confidence. The probability that we would see the trend shown in the cubic model if the data were random is only one chance in 100,000.

Chart 7 shows both the linear (straight) trend line and the much better fitting cubic model (curved line). Note that the curved trend line in the cubic model looks remarkably like our Chart 1, which is an elegant confirmation that our periodization in Chart 1 presented the data fairly in a way that reflected, rather than suppressed, the time trend shown in the cubic model. The data do not appear to be random, and even a gradual trend line is a better description of the data than a random walk. But a cubic model fits the data much better than a linear trend line, though the sharp rate of increase shown in the model for recent years is not sustainable, given anticipated life expectancies. In other words, although recent increases in judicial tenure have been dramatic (just as we claimed), we would expect them to level off or grow much more slowly than the cubic model in Chart 7 would indicate.

Chart 7: Linear and Cubic Time Trends

in Years Served on the U.S. Supreme Court
101 Justices, 103 Terms

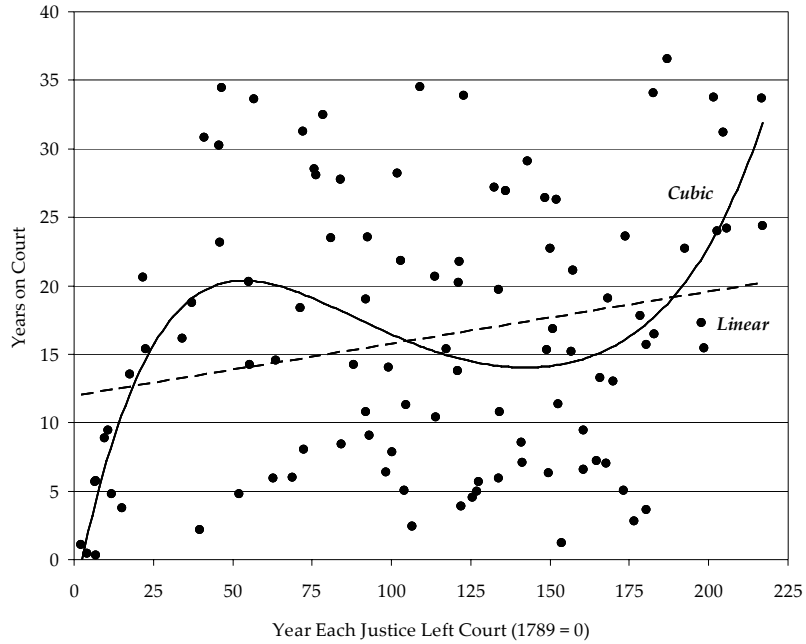


Table 1: Cubic Regression Model

Time Trend in Length of Supreme Court Tenure
By Year of Leaving Office
(n=103)

Dependent Variable: Time in Office

R=.478; R²=.229; F=9.789

Model Signif.=.00001

Coefficients

	B	Std. Error	t	Sig.
Year (1789=0)	.64981	.138	4.719	.00001
Year Squared	-.00708	.001	-4.748	.00001
Year Cubed	.00002	.000	4.788	.00001
(Constant)	1.458	3.465	.421	.67482

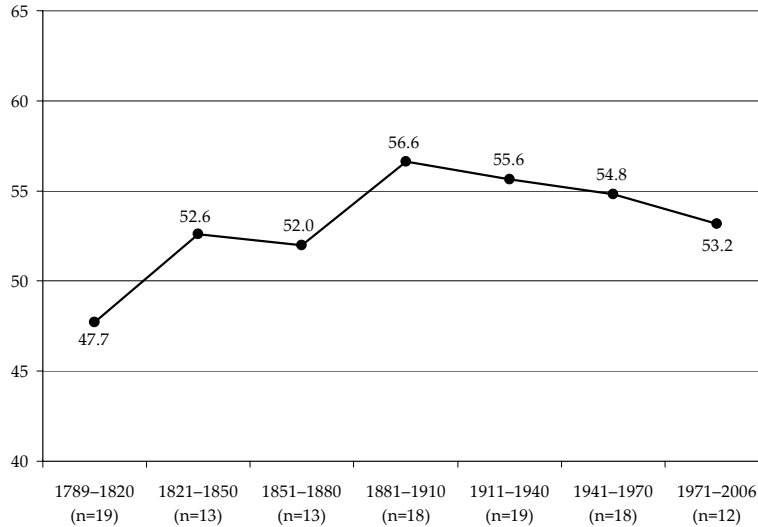
C. Explaining the Trends in Life Tenure

Identifying the trend toward longer tenures is much easier than explaining all of its causes. Nevertheless, one cause is the increased average lifespan of human beings who have lived to reach adulthood in recent times.⁸⁰ Presidents have appointed Justices of substantially similar ages throughout American history: between fifty-two and fifty-seven years old since 1811, as Chart 8 illustrates. Indeed, this consistency is shown by the average appointment age in the most recent period (1971–2006), 53.2 years, matching almost exactly the mean appointment age of 53.3 years throughout the Court's history (1789–2006). Yet Justices are retiring at much more advanced ages than ever before. Thus, the expansion of life tenure is caused not by Presidents' appointing younger Justices, but by the Justices' living longer and retiring later.

80. As the historical data indicate, the length of tenure and retirement age of Supreme Court Justices have increased fairly suddenly within the past thirty years. One could argue that the recentness of this change indicates that the historical trends cannot be explained only by increasing life expectancies, which, one might think, have been more gradual. E-mail conversation between Akhil Reed Amar, Southmayd Professor of Law, Yale Law School, and William J. Stuntz, Professor of Law, Harvard Law School (Aug. 9, 2002) (on file with authors). But average life expectancies throughout history may very well explain this sudden increase. When the nation was founded, the life expectancy of the average American was thirty-five years of age. Population Explosion Among Older Americans, *supra* note 50. From the Founding until 1850, the average life expectancy of white males increased only about three years, to thirty-eight years of age. *Id.* Similarly, from 1850 through 1890, the life expectancy increased only about four years of age, to forty-two years. Life Expectancy by Age, 1850–2003, <http://www.infoplease.com/ipa/A005140.html> (last visited Mar. 19, 2006) (statistics drawn from U.S. Census Bureau data). Then, in the next forty years—from 1890 through 1931—the life expectancy increased from forty-two years to almost sixty years—an increase of almost twenty years. Importantly, this dramatic increase in life expectancy corresponds to the dramatic increase in the tenure of Supreme Court Justices since 1970: Justices retiring after 1970 were born predominantly between 1890 and 1930. Moreover, since 1930, the life expectancy has continued to rise at a fast pace, as it rose another eight years to approximately sixty-eight years of age in 1971. *Id.* Based on these data, the dramatic increase in tenures of Supreme Court Justices since 1970 is understandable, given the enormous increase in life expectancy between the years of the most relevant period, from 1890 to 1930.

Chart 8: Mean Age at Swearing In

by Period of Joining Court
1789–Jan. 2006
112 Terms, 110 Justices



A second possible cause for longer tenures—the increased politicization of the Court over the last century—may have made political motives a more important factor in Justices’ retirement decisions, which could have resulted in their deciding to stay on the Court longer for strategic reasons.⁸¹ While it has always been recognized that the Court has had some influence on politics, in the last fifty to eighty years the Court has come to be seen as a more important player than ever before in effectuating political and social change.⁸² As a result, the political

81. See Amar & Calabresi, *supra* note 1.

82. For example, in the 1920s and 1930s, the legal realists exposed the subjectivity of judicial decisionmaking and the role of judges’ political viewpoints in the creation of law. The Warren Court then displayed a kind of social activism in the 1950s and 1960s that demonstrated how the Court could play an important role in shaping society and influencing politics, as evidenced most dramatically in *Brown v. Board of Education*. See, e.g., Garrow, *supra* note 7, at 1041 (“[The] previously uncontroversial political status of the United States Supreme Court had been utterly transformed by the burgeoning conflict kicked off by the Court’s initial . . . ruling in *Brown*.”). Such developments have made the Court a more political body than it has ever been—certainly one that the public increasingly recognizes as being political. See generally William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) (noting the Court’s increased social activism in the mid-

views of individual Justices have become correspondingly more important. To sitting Justices contemplating retirement, the political views of a likely replacement (and hence those of the presiding President) may lead to their timing their resignations strategically.⁸³ Such strategic resignations may have led more politically minded Justices to stay on the Court longer and later in age, which has expanded the real-world, practical meaning of life tenure.

Politics and strategic factors in Justices' retirement decisions may have been enhanced in recent years by frequent splits in party control of the Senate and the executive branch between 1968 and 2002. When one party controls both the Presidency and the Senate, that party should be more likely to name a Justice who reflects its views.⁸⁴ For this reason, a Justice thinking about retirement might feel more comfortable resigning if her party controlled both the White House and the Senate. But when different parties are in control, the likelihood of controversial confirmation hearings for any replacement goes up. A Justice considering retirement in such a political environment will naturally want to avoid putting the country, and his party, through political controversy and will therefore wish to remain on the Court for longer periods of time, hoping that his party will attain control of both in the future. Thus, the political dynamic of the Presidency and the Senate being controlled by different parties could lead to longer tenures on the Court, older Justices, and less regular vacancies. And because such split-party control of the Senate and the Presidency has been a mainstay of the last thirty-seven years, it could easily have contributed to the trend of Justices staying longer on the Court during that period.

Indeed, strategic, political behavior by a series of Justices may help explain part of the increase in Justices' terms on the Supreme Court since 1970. Chief Justice Earl Warren, for example, purportedly (and unsuccessfully) tried to time his resignation in order to let a Democratic President name his suc-

Twentieth Century and the increasing public recognition of the Court as a means of effecting political change).

83. See Amar & Calabresi, *supra* note 1.

84. Of course, with the increasing politicization of the confirmation process, even this principle is no longer accurate. Indeed, as evidenced by the recent filibusters by Senate Democrats to block a number of lower-court nominations, majority control by a political party in the Senate is no longer necessarily sufficient to guarantee confirmation of a President's nomination of qualified nominees, even at the lower court level.

cessor, although in Warren's case this did not involve staying longer in office.⁸⁵ Justices Black and Douglas, both very liberal in their jurisprudential outlook, allegedly stayed on the Court as long as possible, in futile attempts to avoid letting Presidents Nixon or Ford name their successors.⁸⁶ Likewise, Justices Marshall and Brennan supposedly stayed on the Court for as long as possible in order to wait out the twelve years of Presidents Reagan and Bush; ultimately, though, they had to retire.⁸⁷ Justice White, a Kennedy appointee, was alleged to have considered retirement in 1978 because of his concerns that President Carter would not be re-elected, and he ultimately remained in office long enough to allow fellow Democrat Bill Clinton to name his successor in 1993.⁸⁸ And some have speculated that several current Justices have remained on the Court for as long as they have in order to avoid letting President Clinton (or President Bush, depending on the Justice) name a successor.⁸⁹

Anecdotal evidence aside, the historical data are mixed on whether there is statistically significant evidence that Justices engage in strategic decision making regarding their retirements. On the one hand, several studies suggest that Justices do not strategically retire during the terms of Presidents of the same party as the President who initially appointed the Justice.⁹⁰ On the other hand, at least one study suggests that there is an effect.⁹¹ The data in yet another study suggests that there

85. See Oliver, *supra* note 14, at 805–06 (noting the politicized nature of Chief Justice Warren's departure from the Court) (citing BERNARD SCHWARTZ, *SUPER CHIEF* 680–83, 720–25 (1983), and G. WHITE, *EARL WARREN: A PUBLIC LIFE* 306–08 (1982)).

86. See, e.g., *id.* at 806–07 (noting that Justice Douglas remained on the Court in order to give a Democratic President the ability to name his successor); see also Bob Woodward and Scott Armstrong's probing investigation of the Court, *THE BROTHERS: INSIDE THE SUPREME COURT* 161 (1979).

87. See Oliver, *supra* note 14, at 808 (noting the speculation that then-Justices Brennan and Marshall would have been retired but for their desire not to let President Reagan name their successors).

88. Dennis Hutchinson, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF BYRON R. WHITE* 381 (1998).

89. See Amar & Calabresi, *supra* note 1; Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices Be Term-Limited?: A Dialogue*, *WRIT*, Aug. 23, 2002, <http://writ.findlaw.com/amar/20020823.html>.

90. See, e.g., Saul Brenner, *The Myth that Justices Strategically Retire*, 36 *SOC. SCI. J.* 431 (1999); Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 *POL. BEHAV.* 180 (1988); Yoon, *supra* note 43.

91. See Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 *POL. BEHAV.* 25 (1993); see also Artemus Ward, *How One Mistake Leads to Another: On the Importance of Verification/Replication*, *POL. AN-*

is a political effect, but this effect is not consistent.⁹² Without redoing the statistical analyses ourselves, we face several problems in trying to make sense of this conflicting research on the existence of strategic retirement.

First, one must understand that most traditional statistical techniques compute statistics on samples, assuming they were randomly drawn from a population of infinite size. For example, one might compare the mean tenure in office of two samples, testing the probability that two random samples drawn from the same population of infinite size would have mean tenures as different as what is observed. Most significance testing measures the probability that any observed difference is instead the result of sampling error. But when one has as a sample the entire population of interest, there is no sampling error; any measured differences are real, though some of these differences may be too trivial to be meaningful.

In computing Supreme Court tenure since 1789, we are not measuring a sample, but rather the entire population of all the Justices since 1789. Thus, any differences observed between groups of Justices in this population are actually the measured characteristics of those Justices, not statistical estimates of them that are subject to sampling error. Accordingly, while it is conventional to conduct and report significance testing even when one has the entire population, one should remember that we are not really testing statistical significance here. Moreover, if one is to do significance testing on the counterfactual assumption that one is testing a random sample of 103 Justices, why also assume that the population of Supreme Court Justices from which one is drawing is infinite in size (millions of Justices)? Instead, one might make a less heroic assumption that the first 103 Justices are a random sample drawn from a population of the first 250 Justices (representing the first 500 or so years of the U.S. Supreme Court). Adjusting the statistics to re-

ALYSIS, 2004, <http://polmeth.wustl.edu/polanalysis/vol/12/ward.doc> (criticizing studies finding no political effect).

92. See Christopher J. W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789–1992*, 22 POL. BEHAV. 145, 162 (2000). This study presents tables showing evidence of “strategic dying” in their mortality model, but not of “strategic retirement” in their retirement model (though if an interaction term were removed, the borderline significant results on retirement may well have become significant). *Id.* at 162. Zorn and Van Winkle nonetheless conclude, “Perhaps most striking, we uncover no *consistent* support for Justices taking partisan factors into account, either in their retirement decisions or in their decisions to remain on the bench.” *Id.* at 160 (emphasis added).

flect a smaller hypothetical population from which the sample of Justices was drawn would meaningfully alter what would be deemed statistically significant. When describing the patterns of strategic retirement and death, statistical significance testing is less important than looking at the size and meaning of any effect, since any measured effect is actually present in the underlying population of Justices.

Second, if one looks at the manner by which Justices leave office, there is an observed pattern in the raw data that is consistent with the hypothesis of strategic retirement. Of the forty-nine Justices who have died in office, twenty-nine died during the term of a President of the opposite party than the party appointing them.⁹³ In contrast, of the fifty-four Justices who resigned, thirty-five resigned during the term of a President of the same party as the one who appointed them. The odds that a Justice will retire when the President belongs to the Justice's party or that he will die in office when the President belongs to a different party are greater than the opposite occurrences. Since 1789, when a Justice has resigned, the odds that the President was of the same party have been 35:19; when a Justice has died in office, the odds that the President was of the same party have been 20:29. The relative odds for these two outcomes is a substantial 2.7 (and it would be statistically significant using a test for odds ratios if this were a sample). One should understand that (assuming no coding errors) these are not hypotheses. Rather, these are simple facts. Since 1789, Justices have been more likely to die while still on the bench when a President of the opposite party is in office and more likely to resign when a President is of the same party. To explore this pattern more carefully to determine what variables might account for it, one could, of course, use more sophisticated time-series techniques.

Third, none of the published studies reports even one model from which one could tell with confidence whether Justices tend to retire strategically. Optimally, a well designed study should not only use an appropriate statistical technique but use all Justices, rather than reducing the sample size by excluding many or most Justices.⁹⁴ And a thorough study should report the results of at least one parsimonious model testing just the

93. Here we follow the convention of coding Federalist, Whig, and Republican Presidents as being of the same party.

94. See, e.g., Brenner, *supra* note 90.

political effect that we (and others) hypothesize: that Justices are more likely to retire if a President is of the same party and more likely to hang on until death if the President is of the opposite party. Only after determining whether there is a political effect in the data should one try to decompose that effect by introducing other variables.

Further, several studies have serious coding problems, such as excluding Justices who retire immediately after becoming pension-eligible,⁹⁵ and coding Justices as being of the same party as the President only if the Justices were elected partisan politicians earlier in their career⁹⁶ (thus cutting the proportion of Justices retiring under a President of the same party almost in half). A study by Professor Brenner classifies three Justices who were appointed by Democrats and resigned under Democratic Presidents as having retired under opposing ideological Presidents. For example, not only are Justices Byron White and Felix Frankfurter classified as “conservatives,” but Professor Brenner identifies both Presidents Ronald Reagan and George H.W. Bush as “Ideologically Congruent” for Justice White, while President Dwight Eisenhower is identified as an “Ideologically Congruent President” for Justice Frankfurter. As we pointed out earlier, Justice White’s biographer relates that, rather than finding the Reagan and Bush presidencies ideologically compatible, Justice White was reported to have considered retirement in 1978 because he feared that President Carter would not be re-elected. Instead, White remained on the Court long enough to allow fellow Democrat Bill Clinton to name his successor in 1993.⁹⁷

Some studies use many more control variables than seem warranted,⁹⁸ at least before first determining and reporting whether there is any effect to be explained. Unfortunately, most of the studies enter several political variables in their models at once,⁹⁹ which means that one cannot tell whether only one of the political variables is significant by itself.

In short, the statistical picture is inconclusive, awaiting a well designed study of the existence, size, and meaning of any stra-

95. See, e.g., *id.* (restricting analysis of strategic retirement to judges who reached age 70); see also Ward, *supra* note 91, at 11 (identifying the problem).

96. See, e.g., Squire, *supra* note 90, at 190.

97. See generally HUTCHINSON, *supra* note 88.

98. See, e.g., Squire, *supra* note 90, at 185; Zorn & Van Winkle, *supra* note 92, at 161–62.

99. See, e.g., Zorn & Van Winkle, *supra* note 92, at 161–62.

tegic retirement by Supreme Court Justices. If, as the raw data suggest, Justices are indeed engaging in this kind of strategic behavior—delaying retirement in order to allow a particular President to name their successor—strategic retirement should lead directly to longer tenures on the Court.

A third explanation for the trend toward lengthier tenure is drastic improvement in the social status associated with being a Justice and in the social perception of law and of judges more generally. For example, the life of a Justice in the Court's early days was marked by time-consuming and physically demanding circuit riding. Indeed, the arduous lifestyle of Justices riding circuit is widely thought to have caused a number of premature resignations.¹⁰⁰ With the lack of a stable working environment and the other numerous difficulties involved in being a Supreme Court Justice in those days, it is not entirely surprising that many Justices retired relatively young after brief periods on the Court. Since the working conditions have improved dramatically with the elimination of circuit riding and the prestige of being a Supreme Court Justice has increased immensely,¹⁰¹ more recent Justices have understandably wanted to serve longer tenures and have been able to serve later in their lives.

Of course, the impact of circuit riding on the tenure and retirement age of Justices cannot begin to explain the most recent upward trends in tenure since the mid-Twentieth Century. Circuit riding was abolished early in the Twentieth Century, and longer life expectancies were already largely a reality by 1950. Interestingly, though, the longevity of Supreme Court Justices appears to have surged most dramatically only in the last thirty-five years. This appearance is somewhat misleading because some of the longest serving retirees of the 1971–2006 period were Justices Black and Douglas, both appointed in the late 1930s. The increase in Supreme Court tenure lengths was, for them at least, well underway during the 1960s. Yet this trend toward greater longevity may suggest that recent enhancements in the general social perception of law and of

100. See Ross Davies, *A Certain Mongrel Court: Congress's Past Power and Potential to Reinforce the Supreme Court*, 90 MINN. L. REV. 678, 691 (2006) (noting that "circuit-riding improperly hampered the capacity of Justices to sit as a Court").

101. See Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 625–34 (2000) (discussing judicial motivation of Supreme Court Justices and hypothesizing that they are motivated by prestige and influence).

judges—of Supreme Court Justices, in particular—might have made serving longer on the Court more prestigious and more desirable.

A fourth factor that could explain this longer tenure is the increase in the size of the Justices' law clerk support staff since the late 1960s.¹⁰² Prior to 1970, each Justice had two law clerks each; that number increased to the present-day four-clerk staff in 1978.¹⁰³ This doubling in the size of the law clerk support staff makes the job of serving as a Justice on the Court much less demanding, and allows a Justice to delegate significant amounts of work to law clerks. It is striking that the increase in the number of law clerks post-1970 corresponds precisely with the period during which Justices have been staying longer on the Court.

Fifth, reductions in the workload of the Court—stemming both from Congress's near elimination of the Court's mandatory caseload and from the Court's drastic reduction in the number of certiorari petitions that it grants each year¹⁰⁴—have probably also made it possible for Justices to serve longer. Over the past fifteen years, the Court's annual caseload has fallen from about 150 to about 80.¹⁰⁵ This, too, is a huge change: a staggering reduction of the Justices' workload by nearly half. The fact of the matter is that the job of being a Supreme Court Justice is much easier today with four law clerks, no mandatory appellate jurisdiction, fewer grants of certiorari, and three months of summer vacation, than was the case at other times in American history. These factors, coupled with lengthened life expectancies, less traveling, and the enhanced prestige of being a Supreme Court Justice, might help explain why Justices are staying on the Court for longer periods of time.

102. E-mail from William J. Stuntz, Professor of Law, Harvard Law School, to Akhil Reed Amar, Southmayd Professor of Law, Yale Law School (Aug. 9, 2002) (on file with authors); E-mail from Akhil Reed Amar, Southmayd Professor of Law, Yale Law School to William J. Stuntz, Professor of Law, Harvard Law School (Aug. 13, 2002) (on file with authors).

103. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 139 (1996).

104. During the October 1987 Term, the Supreme Court granted review in 157 cases. *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 59 U.S.L.W. 3064 (1990). Five years later, during the October 1992 Term, the Court granted review in only 83 cases. *Statistical Recap of Supreme Court's Workload During Last Three Terms*, 62 U.S.L.W. 3124 (1993).

105. See *supra* note 104.

D. *Consequences of the Expansion of Life Tenure*

These historical trends—namely, later retirement and less frequent vacancies—have three primary consequences for the current state of the judiciary: the Court's resistance to democratic accountability, the increased politicization of the judicial confirmation process, and the potential for greater mental decrepitude of those remaining too long on the bench. Based on these consequences alone, a change in the current tenure system is desirable.

1. *Reduced Democratic Accountability*

The Supreme Court is, by design, independent of the political branches of government.¹⁰⁶ Indeed, one of the most admired features of our judiciary is that Supreme Court Justices (and other federal judges) decide cases without the threat of political recourse or retaliation by other elected officials.¹⁰⁷ The Constitution provides only two channels of democratic accountability for the Supreme Court. The first is the appointment process, and the second is impeachment. The only democratic control over the Supreme Court beyond the selection and removal of its members is the very remote possibility that its decisions will be overturned by constitutional amendment.¹⁰⁸

Supreme Court Justices are nominated by the popularly elected President, and are then confirmed by the people's representatives in the Senate. Conversely, the people, through their representatives in the House and the Senate, retain the power to remove Supreme Court Justices. Other than these explicit mechanisms for controlling Justices, the Court is subject to no other formal checks or balances.¹⁰⁹

106. See WILLIAM H. REHNQUIST, *THE SUPREME COURT* 209 (2001) ("The performance of the judicial branch of the United States government for a period of nearly two hundred years has shown it to be remarkably independent of the other coordinate branches of that government.").

107. *Id.* at 210 ("We want our federal courts, and particularly the Supreme Court, to be independent of popular opinion when deciding the particular cases or controversies that come before them.").

108. Only four Supreme Court decisions have been overturned by constitutional amendment in 217 years. *Oregon v. Mitchell*, 400 U.S. 112 (1970), was overturned by the Twenty-Sixth Amendment. *Pollock v. Farmers Loan & Trust Co.*, 158 U.S. 601 (1895), was overturned by the Sixteenth Amendment. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856), was overturned by the Fourteenth Amendment. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), was overturned by the Eleventh Amendment.

109. To be sure, both Congress and the public have indirect means to impart the public's political values to the Court. For example, Congress holds the power to

Democratic checks on the Court via constitutional amendment are unlikely,¹¹⁰ and impeachment has been of no use whatsoever for controlling the behavior of Supreme Court Justices. In 217 years of American constitutional history, not a single Justice has ever been successfully impeached and removed from office by the Senate.¹¹¹ This is not for lack of Justices deserving of impeachment. Surely, at a minimum, those Justices who decided the *Dred Scott* case deserved to be impeached and removed.

The appointment process is thus the most direct and important formal source of democratic control over the Supreme Court.¹¹² Realistically, it is the only check that the other two branches have on the Court. Indeed, other countries that pro-

restructure judicial salaries, pensions, and other benefits, and it controls in large part the Court's jurisdiction. These are all tools that could, in theory, be used by Congress to attempt to influence the Court's decision making. See Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. L. 446, 449 (2003) ("Although Congress may not reduce the salary of judges, it may allow judicial compensation to be eroded over time by inflation. The legislature can, more generally, control the funding of the judicial branch."). Such tools, however, can hardly be considered effective means of rendering the Court democratically accountable.

Another, more important democratic check on the Supreme Court is public opinion. See Eskridge, *supra* note 82, at 2372 ("[P]olitics is the main constraint on an activist Court."). On most issues, public opinion establishes certain norms, or boundaries, that the Court cannot transgress without risking its ability to command respect in our democratic government. "Any Supreme Court decision . . . viewed as challenging a national equilibrium in favor of a norm or against a despised group will be subject to likely political discipline." *Id.* Although the Court's reliance on public opinion for its own legitimacy is an important check, it is ineffective as a practical tool for shaping the Court's jurisprudence, other than by setting very broad and permissive boundaries.

110. See *supra* note 108.

111. "Impeachment can never be used as a means of keeping judges accountable. Its hurdles are far too high. . . . Impeachment is a phantom menace." Prakash, *supra* note 16, at 571 n.141. The Republicans' attempted impeachment of Federalist Justice Samuel Chase might serve as a counterexample to this general proposition, although the attempt failed, again demonstrating the difficulty of the removal mechanism. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 224-30 (1973); Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 676 (1999).

112. See REHNQUIST, *supra* note 106, at 223 ("The Supreme Court is to be independent of the legislative and executive branch of the government, yet by reason of vacancies occurring on that Court, it is to be subjected to indirect infusions of the popular will in terms of the President's use of his appointment power."). Particularly if one believes that judges are inherently partisan, as legal realists claim, then monitoring the appointment process appears to be the most important means of controlling the political makeup of the Court. See Eskridge, *supra* note 82, at 2198-99.

vide for political appointments to their respective constitutional courts do so precisely because “the democratic legitimacy of constitutional review rests upon the appointment of judges by elected authorities.”¹¹³ Even former Chief Justice William Rehnquist made essentially this point, writing that “the institution has been constructed in such a way that . . . the public will, in the person of the President of the United States . . . have something to say about the membership of the Court, and thereby indirectly about its decisions.”¹¹⁴

For this process to work, turnover on the Court must be relatively frequent and regular. Although turnover occurred regularly from 1789 through 1970, since 1970 Justices have stayed on the Court for longer than ever before, and the democratic instillation of public values on the Court through the selection of new judges has been correspondingly infrequent and irregular. Moreover, as the Virginia Note-writers complain, when vacancies do occur they are sometimes packed together in “hot spots,” such that years will pass without any openings and, suddenly, two, three, or even four seats may open up within the space of a few years, followed by another long period without any vacancies.¹¹⁵ When this happens, the party in power at that particular time has a disproportionate impact on the Supreme Court, which can again prevent the American people from being able regularly to check the Court when it has strayed from following the Constitution’s text and original meaning.

We think that the problem of hot spots is a serious one that can contribute to the Court’s being out of step with the American people’s understanding for long periods of time. For example, the Court of the “nine old men” was largely a function

113. VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 474 (1999).

114. REHNQUIST, *supra* note 106, at 210. Chief Justice Rehnquist has also noted:

When a vacancy occurs on the Court, it is entirely appropriate that that vacancy be filled by the President, responsible to a national constituency, as advised by the Senate, whose members are responsible to regional constituencies. Thus, public opinion has some say in who shall become judges of the Supreme Court.

Id.

115. See DiTullio & Schochet, *supra* note 17, at 1116–19; see also E-mail from William J. Stuntz, Professor of Law, Harvard Law School, to Akhil Reed Amar, Southmayd Professor of Law, Yale Law School (Aug. 9, 2002) (on file with authors); E-mail from Akhil Reed Amar, Southmayd Professor of Law, Yale Law School, to William J. Stuntz, Professor of Law, Harvard Law School (Aug. 13, 2002) (on file with authors).

of the fact that Presidents Taft and Harding made six and four Supreme Court appointments, respectively, while Woodrow Wilson made only three appointments despite serving longer as President than both Taft and Harding combined. Other famous hot spots include Richard Nixon's appointment of four Justices in five years as President, followed by Jimmy Carter's inability to appoint even a single Justice in four years as President. It is hard to see why some four-year or eight-year Presidents should get so many more appointments than others, particularly when the phenomenon may be in part a result of strategic retirement decisions by the Justices. Spacing appointments out evenly, so that each President gets two in four years, and thus eliminating the incentive to retire strategically, would, in our view, do a great deal to promote the public's and the Justices' respect for the rule of law.

Of course, Supreme Court Justices ought to be independent of at least some political pressures and, with fixed eighteen-year nonrenewable terms, they would still be quite independent. As Professor Martin Redish has noted, "Absent an independent judiciary free from basic political pressures and influences, individual rights intended to be insulated from majoritarian interference would be threatened, as would the supremacy of the countermajoritarian Constitution as a whole."¹¹⁶ The point, however, is that judicial independence is not the only value at stake here. If it were, then there would be no reason not to allow the Justices to elect their own successors—as happens in some countries—because such an appointment process would lead to a judiciary that is even more independent of the political process than is the system we have now. The reason we do not allow the Justices to pick their own successors is precisely because we believe that the judiciary, just like the legislature and the executive, needs to be subject to popular control and to the system of checks and balances. As a practical matter, the only check and balance on the Supreme Court is the appointment process. With Justices staying on the Court since 1970 for ten years longer than they have historically, and with vacancies on the Court opening up only half as often, this key check on the Court has been allowed to atrophy. It is time to go back to our practice from 1789 to 1970 of having independent Justices who stay on the Court for closer to fifteen years than to twenty-six years.

116. Redish, *supra* note 111, at 683.

In sum, judicial independence is not an unqualified good. What we really need is a substantial measure of judicial independence, combined with some degree of a democratic check on the Court. To get back to the right balance, we need to amend the Constitution to provide for fixed, staggered eighteen-year terms for Supreme Court Justices. There should be no hot spots of vacancies and no eleven-year (or even four-year) droughts. There should also be no incentive to retire strategically and no ability of one political movement to lock up the Court for thirty years, as Republicans did at the start of the Twentieth Century and as Democrats did after the New Deal. A Supreme Court completely divorced from democratic accountability is an affront to the system of checks and balances. Accordingly, we should return to the practice that prevailed in this country from 1789 to 1970, when Supreme Court vacancies opened up on average once every two years and when justices stayed on the Court for closer to fifteen years than to twenty-six years.

2. *Increased Politicization of the Confirmation Process*

A second cost incurred by less frequent vacancies and by Justices serving for ever longer periods of time is that the process for confirming all federal judges can become so political and contentious as to grind to a halt.¹¹⁷ Under the current system, the irregular occurrence of vacancies on the Supreme Court means that when one does arise, the stakes are enormous, for neither the President nor the Senate can know when the next vacancy might arise. Moreover, a successful nominee has the potential to remain on the Court for a very long and uncertain period of time. So much is at stake in appointing a new Justice that the President and the Senate (especially when controlled by the party opposite the President) inevitably get drawn into a political fight that hurts the Court both directly and indirectly. The Court is affected directly, since it is deprived of one of its nine members, and indirectly, since rancorous confirmation battles lower the prestige of the Court.¹¹⁸

117. The Virginia Note-writers also make this point. See DiTullio and Schochet, *supra* note 17, at 1139–44.

118. See TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION, JUDICIAL ROULETTE 9 (1988) (concluding that “[t]he confirmation process, in short, has become extremely politicized in a way that denigrates the Court and serves to undermine its prestige as well as public respect for the rule of law”). *But see* William Ross, *The Supreme Court Appointment Process: A Search for a Synthesis*, 57 ALB.

Of course, a breakdown in the confirmation process is nothing new. Political battles between the President and the Senate over Supreme Court confirmations have occurred throughout history.¹¹⁹ However, in the last twenty years, with the lack of vacancies and the lengthening duration of the Justices' terms, the fighting between the political branches over the confirmation of Supreme Court Justices has reached new lows. The 1987 confirmation hearings of Judge Robert H. Bork and the 1991 confirmation hearings of Justice Clarence Thomas were among the most bitterly fought Supreme Court confirmations in all of American history. Moreover, the high profile confirmation fights over Bork and Thomas created a powerful (and undesirable) incentive for Presidents to find candidates without paper trails.¹²⁰ Thus, the increased politicization of the confirmation process for Supreme Court Justices in recent years has undermined the ability of the President to fulfill his constitutional duty to appoint the best new Justices to the Court and even the ability of the Supreme Court itself to function effectively.

Indeed, fighting over federal judicial appointments in general has been so intense that it has almost caused the confirmation process for lower federal court of appeals judges to break down completely. Many of the current President Bush's court of appeals nominees could hardly get hearings from the Democrat-controlled Senate Judiciary Committee between 2001 and 2003.¹²¹ More recently, President Bush's nominees have faced filibusters and other obstructionist tactics by the Democratic minority in the Republican-controlled Senate.¹²² Between 1995 and 2001, President Bill Clinton met similar resistance to his lower federal court judicial nominees from the Republican-controlled Senate, which refused to grant hearings to such qualified judicial nominees as the current dean of Harvard Law

L. REV. 993, 1041 ("It is unlikely that the turbulence of recent confirmation proceedings has diminished the Court's prestige.").

119. Indeed, as Professor Monaghan notes, in the first 105 years of our history, approximately one-fourth of all nominees to the Supreme Court were rejected by the Senate. Monaghan, *supra* note 16, at 1202 (noting the contentiousness throughout history of Senate confirmation of Supreme Court candidates, and the intensely political nature of these confirmation battles).

120. See Amar & Amar, *supra* note 89 (noting the tendency towards stealth candidates because of the heightened politicization of the appointment process).

121. See Sheryl Gay Stolberg, *Prepping for the Next Big Battle: The Supreme Court*, N.Y. TIMES, Dec. 8, 2004, at A24 ("Democrats used the filibuster to block 10 of Mr. Bush's judicial nominees" in 2003 alone).

122. Carl Hulse, *In Senate, a "Historic" Struggle; Court Nominations and Filibuster at Stake*, INT'L HERALD TRIB., May 20, 2005, at 5.

School, Elena Kagan.¹²³ Although it is debatable whether Supreme Court confirmations have ever before been so politicized,¹²⁴ there is no question that the fighting over court of appeals seats in the last decade has reached a new low. The irregular occurrence of vacancies on the Supreme Court and the lengthening terms of that Court's Justices have led to infirmities in the confirmation process that could be avoided with a shorter, fixed, and staggered tenure.

3. A Rise in "Mental Decrepitude"¹²⁵ on the Court

The problem of Justices suffering mental or physical health problems while serving on the Court, though occurring throughout American history, has arisen more frequently in recent years. This serious and persistent problem has been recognized by many as threatening the legitimacy of the Court.¹²⁶ The illnesses have on occasion been so severe as to deprive Justices of the ability to handle their duties competently without substantial help and influence from their law clerks and other staff. Professor David Garrow, who recently provided a comprehensive account of the historical evidence pertaining to the cases of mental decrepitude on the Court, notes that "the history of the Court is replete with repeated instances of Justices casting decisive votes or otherwise participating actively in the Court's work when their colleagues and/or families had serious doubts about their mental capacities."¹²⁷ In fact, the recurring problem of mentally incapacitated Justices has from time to time led to efforts by the American Bar Association, members of Congress, and even executive branch officials to institute a

123. Jonathan Groner, *Bush May Need to Show Restraint in Judge Picks: Even Split in Senate, Modest Mandate Mean Conservative Court Nominees May Face Confirmation Battles*, LEGAL TIMES, Nov. 13, 2000, at 9 ("In 1999, President Clinton tried to fill the previous vacancies . . . by nominating Hogan & Hartson partner Allen Snyder and Harvard Law School Visiting Professor Elena Kagan. Snyder got a confirmation hearing before Hatch's committee. Kagan did not have a hearing. Neither nominee reached a floor vote in the Senate, even though no controversy arose over their qualifications.").

124. For example, Professor Monaghan seems to argue that the Senate plays a smaller role in Supreme Court confirmations than it has historically. See Monaghan, *supra* note 16, at 1202–03.

125. This is the term used by Professor David Garrow. See Garrow, *supra* note 7, at 995.

126. See Amar & Calabresi, *supra* note 1; see also McGinnis, *supra* note 16, at 543; Monaghan, *supra* note 16, at 1211–12; Oliver, *supra* note 14, at 813–16; Easterbrook, *supra* note 6.

127. Garrow, *supra* note 7, at 995.

mandatory retirement age for Supreme Court Justices or for all federal judges.¹²⁸

Although mental decrepitude of Justices has been a problem on and off for 200 years, David Garrow reports that “a thorough survey of Supreme Court historiography reveals that mental decrepitude has been an even more frequent problem on the Twentieth-Century Court than it was during the nineteenth.”¹²⁹ Before the Twentieth Century, the Court was plagued by only five Justices whose mental abilities were diminished; in the Twentieth Century, at least twelve Justices served longer than they should have.¹³⁰ Of the Justices retiring in the 181 years from 1789 through 1970, twelve were decrepit; of the Justices retiring in the thirty-five years since 1970, five were allegedly suffering from mental or serious physical decrepitude making them unfit to serve.¹³¹ Thus, on average, a decrepit Justice retired once every fifteen years before 1970; since 1970, a decrepit Justice has retired once every seven years. Viewed by the years of their retirements,¹³² more mentally decrepit Justices

128. See *id.* at 1018–26 (detailing the movement for mandatory retirement age proposals during the New Deal, led by executive officials and members of Congress); *id.* at 1028–43 (detailing the movement in the 1940s and 1950s among Congressional members and the American Bar Association for a constitutional amendment imposing a mandatory retirement age on federal judges); *id.* at 1056–65 (detailing the movement in the 1970s and 1980s by the American Bar Association and congressional leaders for a constitutional amendment or statute imposing a mandatory retirement age limit on federal judges, but perhaps excluding Supreme Court Justices).

129. Garrow, *supra* note 7, at 995.

130. *Id.* at 1084–85. Professor Garrow notes that perhaps two more Justices from the pre-Twentieth Century might have suffered from mental decrepitude: Justices Rutledge and Cushing. *Id.* However, in Justice Rutledge’s second appointment he was never confirmed to serve on the Court and served only several months as a recess appointee. As Professor Garrow admits, there was not enough evidence of mental decrepitude regarding Justice Cushing to conclusively count him in the tally. *Id.* at 998–1001.

131. As Professor Garrow details, the following Justices, who all retired prior to 1970, were at some point evidently suffering from mental or physical decrepitude that affected their ability to perform their duties: Justice Henry Baldwin, Justice Robert C. Grier, Justice Nathan Clifford, Justice Ward Hunt, Justice Stephen J. Field, Justice Melville Fuller, Justice Joseph McKenna, Chief Justice William H. Taft, Justice Oliver Wendell Holmes, Justice Frank Murphy, Justice Sherman Minton, and Justice Charles E. Whittaker. *Id.* at 1001–51. The following Justices, who all retired after 1970, were recorded by Professor Garrow as having been affected by mental or serious physical decrepitude while serving in office: Justice Hugo L. Black, Justice William O. Douglas, Justice Lewis F. Powell, Justice William J. Brennan, and Justice Thurgood Marshall. *Id.* at 1051–80.

132. Using the same thirty-year periods from above: Between 1789 and 1820, no retiring Justices were decrepit (except perhaps for Justices Rutledge and Cushing, who, as we detail *supra* note 130, we do not count among the decrepit Justices).

have retired from the Court in the 1971–2000 period than at any other thirty-year period in American history. Of the six Justices with the longest tenures on the Court, four (67%) were mentally decrepit (Justices Field, Black, Brennan, and Douglas). Of the twenty-seven Justices with the longest tenures on the Court, ten (37%) were similarly mentally incompetent to serve by the time they died or retired. Of the twenty-three Justices who served longer than eighteen years and who retired since 1897, fully eight (35%) were mentally or seriously physically decrepit. Perhaps most stark is that nearly half of the last eleven Justices to leave office (45%) were mentally decrepit and half of the last six Justices to leave office were mentally decrepit in their last years on the Court.

For those commentators who pretend the current system does not need reform—“If it ain’t broke, don’t fix it”¹³³—it is time to recognize that the system is definitely broken. Whether one uses as the relevant rate of decrepitude 35% (of those leaving office after serving more than eighteen years since 1897), 45% (of the last eleven Justices leaving office), or 50% (of the last six Justices leaving the bench), the rate is unreasonably high. Mental decrepitude, a rare problem in the past, now strikes from a third to a half of Justices before they are willing to retire.

The most common responses to the problem of mental decrepitude on the Court, as detailed by Professor Garrow, have been proposals for a constitutional amendment or a statute imposing a mandatory retirement age upon Supreme Court Justices.¹³⁴ But a mandatory retirement age for Justices and judges

Between 1821 and 1850, only one Justice, Henry Baldwin (1844), retired after having served on the Court while stricken by mental decrepitude. Between 1851 and 1880, only one Justice, Robert C. Grier (1870), served on the Court despite being mentally incapacitated and physically ill. Between 1881 and 1910, four Justices, Nathan Clifford (1881), Ward Hunt (1882), Stephen J. Field (1897), and Melville Fuller (1910), served on the Court while being either mentally or physically disabled. Between 1911 and 1940, three Justices, Joseph McKenna (1925), Chief Justice William H. Taft (1930), and Oliver Wendell Holmes (1932), all were stricken by mental incapacity during part of their tenures on the Court. Between 1941 and 1970, three Justices, Frank Murphy (1949), Sherman Minton (1956), and Charles E. Whittaker (1962), remained on the Court for some period of time despite being mentally or physically incapacitated, or both. *Id.* at 1001–51. Yet in the period from 1971 to 2000, five Justices were recorded by Professor Garrow as having been affected by mental or physical decrepitude while serving in office. *Id.* at 1051–80.

133. See Monaghan, *supra* note 16, at 1212.

134. Such proposals have been supported by major movements three times. First, instead of FDR’s court-packing scheme during the New Deal, several execu-

would be unfair in that it would blindly discriminate against judicial service on the basis of age in a harsh way, one that does not take into account the actual mental condition of a given individual.¹³⁵ A term limit on the tenure of Supreme Court Justices, such as that which we propose, would achieve nearly all the goals intended by a mandatory retirement age in a more uniform and respectful manner, without discriminating against a member of the Court based solely on age.

tive branch officials pushed for the creation of a compulsory retirement age measure, and several Senators even proposed a constitutional amendment imposing mandatory retirement at age seventy for all federal judges. Garrow, *supra* note 7, at 1019–20, 1024–26. However, the likely delays of passing a constitutional amendment, and thus the lack of short-term impact of such a proposal, led FDR to disregard this idea and push instead for his court-packing statute that could have more immediate effect. *Id.* at 1020–21.

Second, another campaign for a constitutional amendment imposing mandatory retirement for Supreme Court Justices at age seventy-five occurred in the late 1940s and early 1950s, initiated by author Edwin A. Falk. This campaign was supported and led primarily by the American Bar Association, and several members of Congress introduced the idea as a formally proposed amendment. *Id.* at 1028–43. Importantly, this proposal received strong support by former Justice Owen J. Roberts, *id.* at 1040, and in the course of holding hearings, the Senate Judiciary Committee even concluded that “continued active service by Justices over the age of 75 tends to weaken public respect for the Supreme Court.” S. COMM. ON THE JUDICIARY, COMPOSITION AND JURISDICTION OF THE SUPREME COURT, S. REP. NO. 83-1091, 83rd Cong., 2d Sess. 10, at 5 (Mar. 24, 1954), reproduced in Garrow, *supra* note 7, at 1037. However, this second wave of support for a mandatory retirement age eventually collapsed after a series of Warren Court rulings shifted the focus of public attention to other matters. Garrow, *supra* note 7, at 1042–43.

Third, in the mid- to late-1970s, there was yet a third reform effort to set a mandatory retirement age for federal judges, perhaps arising as a reaction to the decrepit state of Justice William O. Douglas. *Id.* at 1056–57. This campaign was led by several members of Congress, most notably Senator Sam Nunn, and contemplated mandatory age retirements through statute, as well as by constitutional amendment. *Id.* at 1059–61. Ultimately, legislators rejected the application of a mandatory retirement age to Supreme Court Justices, and instead passed a statute that merely created a mechanism for the Judicial Conference to recommend to Congress that it impeach lower federal court judges who were deemed to be mentally incompetent. *Id.* at 1062–65.

Apart from these more concerted movements, there have been a number of other significant informal proposals for retirement age requirements. For example, Chief Justice William H. Taft wrote POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS (1913), which proposed mandatory judicial retirement at age seventy. *Id.* at 159. Ironically, Taft later served until he was seventy-two and, according to his biographer, beyond the point at which he was mentally healthy. Garrow, *supra* note 7, at 1016–17. Likewise, Charles Fairman, in 1938, argued for a mandatory retirement age in order to prevent disabled Justices from continuing in office. Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 433 (1938). Indeed, Professor Garrow himself recommends a mandatory retirement age. Garrow, *supra* note 7, at 1086–87.

135. See DiTullio & Schochet, *supra* note 17, at 1133–37.

E. *The Rarity of Life Tenure in the World's Constitutional Courts*

The United States is alone “among the constitutional courts of western democracies . . . that [have] had judicial review since at least the early 1980s,”¹³⁶ and it is alone among all but one of its own states in providing its Justices with life tenure. The American system of life tenure for Supreme Court Justices has been rejected by all other major democratic nations in setting up their highest constitutional courts.¹³⁷ Even the nation upon whose legal system the U.S. legal system is based—England—has eliminated the guarantee of life tenure for its judges. Every major democratic nation, without exception,¹³⁸ instead provides for some sort of limited tenure of office for its constitutional court judges.¹³⁹ Members of the constitutional courts of France,¹⁴⁰

136. JACKSON & TUSHNET, *supra* note 113, at 489.

137. By “constitutional courts,” we mean to compare the U.S. Supreme Court with the most similar courts of other nations, which are the highest courts in other countries that pass on the constitutionality of laws passed by other government bodies. *See id.* at 488–542 (discussing the structure, composition, appointment and jurisdiction of various constitutional courts around the world). In many countries, “constitutional courts” are specialized courts that are not necessarily the highest courts in that country, since in those countries not all courts can conduct constitutional review. *See id.* at 460–61. Yet these courts represent the most apt comparison to the U.S. Supreme Court, since these constitutional courts perform the same fundamental role as the U.S. Supreme Court in its constitutional review aspects. *Id.* at 462.

138. There is one country that has the potential to be considered an exception, though we do not consider it to be, and the leading comparative constitutional law textbook agrees. *See id.* at 540. In Russia, there is the Russian Constitutional Court and the Russian Supreme Court. The Russian Constitution does not explicitly create one “highest” court in Russia, and proponents of both the Russian Constitutional Court and the Russian Supreme Court claim their respective court as the “highest” court. *See* GENNADY M. DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 57–58 (2000). While the Russian Supreme Court grants life tenure to its members, judges on the Russian Constitutional Court serve twelve-year, nonrenewable terms of office. Since our focus is on the major constitutional courts around the world, we count the Russian Constitutional Court, which is arguably the highest court in Russia designed to pass on the constitutionality of government actions. *See* JACKSON & TUSHNET, *supra* note 113, at 540 (referring to the Russian Constitutional Court, which is limited by a twelve-year nonrenewable term, as the relevant court to analyze comparatively). Thus, in our view, the most relevant court to compare, the Russian Constitutional Court, fits within the overall global trend of limited tenure. To the extent that one views the Russian Supreme Court as the appropriate point of comparison, however, it would be the one exception to our general rule. *See generally* DANILENKO & BURNHAM, *supra*, at 62–63 (discussing the distinction between the Russian Constitutional and Supreme Courts, and the various roles and characteristics of each).

139. JACKSON & TUSHNET, *supra* note 113, at 489.

140. Judges on the French Constitutional Council serve nine-year, nonrenewable terms. 1958 CONST. 56 (Fr.); JOHN BELL, *FRENCH CONSTITUTIONAL LAW* 34 (1992).

Italy,¹⁴¹ Spain,¹⁴² Portugal,¹⁴³ Germany,¹⁴⁴ and Russia¹⁴⁵ serve fixed, limited terms of between six and twelve years. Moreover, judges on Germany's constitutional court also face a mandatory retirement age of sixty-eight, in addition to the twelve-year, nonrenewable term.¹⁴⁶ Likewise, members of the Russian Constitutional Court face a mandatory retirement age of seventy, in addition to the fixed term of twelve years.¹⁴⁷ Through term limits, many countries provide for regular, relatively frequent rotation in the membership of their constitutional courts.

Instead of fixed term limits, many other countries limit the tenure of their constitutional court justices and judges by imposing a mandatory retirement age. For example, the highest courts in such Western common-law democracies as Canada,¹⁴⁸ Australia,¹⁴⁹ and England¹⁵⁰ enjoy tenures limited by a mandatory retirement age of sixty-five, seventy, and seventy-five, respectively. In addition, other major countries, such as India¹⁵¹ and Japan,¹⁵² have instituted a mandatory retirement age in order to limit the tenure of members of their respective constitutional courts. Like Germany and Russia, South Africa has

141. Members of the Italian Constitutional Court serve nine-year terms, which are not immediately renewable. JACKSON & TUSHNET, *supra* note 113, at 490.

142. Members of the Spanish Constitutional Tribunal serve nine-year, renewable terms. *Id.* at 491.

143. Members of the Portuguese Constitutional Court serve six-year terms. *Id.*

144. Members of the Federal Constitutional Court of Germany serve twelve-year, nonrenewable terms. *Id.* at 490; DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 158 (1994).

145. Judges on the Russian Constitutional Court serve twelve-year, nonrenewable terms. JACKSON & TUSHNET, *supra* note 113, at 540. However, as earlier noted, it is not clear that the Russian Constitutional Court is the single "highest" court in Russia, and members of the other possible supreme tribunal enjoy life tenure. See *supra* note 137.

146. JACKSON & TUSHNET, *supra* note 113, at 490-91; CURRIE, *supra* note 144, at 158 & n.278.

147. JACKSON & TUSHNET, *supra* note 113, at 540.

148. Members of the Canadian Supreme Court face a mandatory retirement age of seventy-five. *Id.* at 490.

149. Members of the Australian High Court face a mandatory retirement age of seventy. *Id.*

150. Members of the House of Lords cannot participate in judicial business after age seventy-five unless holding the position of Lord Chancellor. Judicial Pensions and Retirement Act, 1993, c. 8, § 26(7)(b) (Eng.); see also HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 280-82 (7th ed. 1998).

151. Members of the constitutional court of India face a mandatory retirement age of sixty-five. JACKSON & TUSHNET, *supra* note 113, at 489.

152. Judges on the Japanese Supreme Court face a mandatory retirement age of seventy. KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 67 (1996).

added a compulsory retirement age onto a fixed term of office,¹⁵³ further limiting the tenure of its highest constitutional court judges.

Thus, every other major democratic nation that we know of—all of which drafted their respective constitutions or otherwise established their supreme constitutional courts after 1789—has chosen not to follow the American model of guaranteeing life tenure to justices equivalent to those on our highest court. In light of the strong worldwide trend against having lifetime tenure for members of the highest courts, the U.S. Supreme Court's system of life tenure is truly an anomaly.

Not only is lifetime tenure a rarity for judges worldwide, but, within the United States, nearly all states considering the question since 1789 have decided against giving life tenure to the members of their courts of last resort. Of the fifty U.S. states, only one—Rhode Island—provides for a system of life tenure for its Supreme Court justices.¹⁵⁴ However, it was not until 1984 that the Rhode Island Supreme Court declared that a state constitutional amendment nearly a century old actually barred the recalling of a justice by a majority vote of the state legislature.¹⁵⁵ Every one of the remaining states provides for an explicit limit on the tenure of its highest court members, in varying forms.¹⁵⁶ Justices on the high courts in Massachusetts and New Hampshire face a mandatory retirement age of seventy.¹⁵⁷ North Carolina's justices, who must be re-elected every eight years, must nonetheless retire at seventy-two.¹⁵⁸ The other forty-six states all provide for limited terms of office for the justices of their highest courts, with the terms ranging from six to four-

153. Members of the Constitutional Court of South Africa serve nonrenewable twelve-year terms, and must end their service by the time they turn seventy. JACKSON & TUSHNET, *supra* note 113, at 489.

154. See 37 COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 309, tbl. 5.1 (Keon S. Chi et al. eds., 2005).

155. See *In re Advisory Opinion* (Chief Justice), 507 A.2d 1316 (R.I. 1986) (holding that since there was no longer an "annual session for the election of public officers" the previously available removal of Supreme Court justices was no longer available).

156. See 37 COUNCIL OF STATE GOV'TS, *supra* note 154, at 309–10. New Jersey does provide for life tenure following an initial seven-year term, however. See *id.*

157. *Id.* at 309.

158. *Id.*; see also N.C.G.S. § 7A-4.20 (2005) ("No justice or judge of the General Court of Justice may continue in office beyond the last day of the month in which he attains his seventy-second birthday, but justices and judges so retired may be recalled for periods of temporary service as provided in Subchapters II and III of this chapter.").

teen years.¹⁵⁹ Moreover, all states with an intermediate appellate court have opted against providing life tenure for the members of that court as well.¹⁶⁰ The nearly unanimous consensus against life tenure for state judges, both on the highest courts and on intermediate appellate courts, is telling, and it provides further evidence of the undesirability of maintaining a system of lifetime tenure in the present-day federal system.

This comparative analysis—both outside the United States and within it—bolsters the case against life tenure and raises this question: Given the trend in all other jurisdictions as well as the pathologies associated with life tenure, if the Philadelphia Convention were reconvened today, would the Framers still opt for life tenure?

II. TERM LIMITS FOR THE SUPREME COURT

Historically, the most powerful case for life tenure for Supreme Court Justices was made by Alexander Hamilton in *The Federalist* No. 78.¹⁶¹ But Hamilton's argument has not stood the test of time. As Professor Prakash notes: "Some of [Hamilton's] empirical claims or predictions [in *Federalist* No. 78 defending life tenure] no longer ring true. . . . Other assertions never held water and contradicted the Constitution's first principles."¹⁶²

First, the Supreme Court is far more powerful today than Hamilton could ever have imagined in the 1780s, so it is far less

159. 37 COUNCIL OF STATE GOV'TS, *supra* note 154, at 309–10 & tbl. 5.1. Alabama, Arizona, Florida, Georgia, Idaho, Kansas, Minnesota, Nebraska are grouped in the "[m]ore than three years for first election and every six years thereafter" category. *Id.* Nevada, Ohio, Oklahoma, Oregon, Texas, Vermont, and Washington select their high court justices for six-year terms. *Id.* Maine and New Jersey provide for seven-year terms. *Id.* Arkansas, Connecticut, Iowa, Kentucky, Michigan, Mississippi, Montana, New Mexico, North Carolina, South Dakota, Tennessee, and Wyoming all provide for eight-year terms. *Id.* The following states have ten-year terms: Alaska, Colorado, Hawaii, Illinois, Indiana ("[i]nitial two years; retention 10 years"), Louisiana, Maryland, North Dakota, Pennsylvania, South Carolina, Utah ("[i]nitial three years; retention 10 years"), and Wisconsin. *Id.* California, Delaware, Missouri, Virginia, and West Virginia provide for twelve-year terms. *Id.* New York provides for fourteen-year terms for members of its highest court. *Id.*

160. *Id.* at 311–12.

161. THE FEDERALIST NO. 78 (Alexander Hamilton).

162. Prakash, *supra* note 16, at 574–75. Professor Monaghan also suggests that the defense for life tenure once made by Hamilton is not "fully persuasive," and argues that both a term limit and an age limit should be placed upon Supreme Court Justices' tenure in order to account for the fact that individuals might now be expected to serve on the Court for "four decades." Monaghan, *supra* note 16, at 1211–12.

in need of protection from the President and Congress than Hamilton expected.¹⁶³ Second, life tenure is no longer justified, as Hamilton claimed in *Federalist* No. 78, by the need to encourage the best candidates to aspire to become Justices.¹⁶⁴ Today, other incentives lure the best candidates to want to be Supreme Court Justices.¹⁶⁵ Third, Hamilton's desire to insulate the Supreme Court from public opinion has been turned on its head; we believe the post-1970 Supreme Court has become, if anything, too insulated from public opinion, because Justices stay on the Court for an average of twenty-six years and because vacancies have opened up only once every three years or so. The Supreme Court should be made more responsive to the popular understanding of the Constitution's meaning, not less so.¹⁶⁶ Fourth, contrary to Hamilton's argument that life tenure is necessary for us to attract Justices who will follow the Constitution, life tenure does not cause Justices to follow the text and original meaning of the Constitution. In fact, as Prakash argues, life-tenured Justices may be less likely to be textualists and originalists, not more so.¹⁶⁷ Long tenures on the Supreme Court can, and do, seem to corrupt the Justices and to cause them to become policymakers, instead of followers of the law. Thus, Alexander Hamilton's defense of life tenure in *Federalist* No. 78 rings hollow today.¹⁶⁸

All these arguments against life tenure for Supreme Court Justices support our belief that the United States should adopt a system of term limits for its Justices. The next section lays out constitutional, statutory, and other informal ways of imposing an eighteen-year term limit on Supreme Court Justices.

163. Prakash, *supra* note 16, at 575–76.

164. *Id.* at 577.

165. See Schauer, *supra* note 101, at 625–34.

166. See Prakash, *supra* note 16, at 578 (noting the possibility that “public opinion . . . [could] steer the courts toward the Constitution,” but expressing uncertainty “whether we should fear or laud the people’s influence”).

167. *Id.* at 578–80. This is a point also made by Professor McGinnis, who proposes short (six month or one year) periods of office for Supreme Court Justices because of the corrupting influence that long periods of time can have on Justices’ fidelity to the text of the Constitution. See McGinnis, *supra* note 16, at 541–43.

168. See Prakash, *supra* note 16, at 581 (“Life tenure, by completely insulating judges from accountability, ignores these fundamental truths of self-government. If people could be trusted with life tenure, we would not need government, let alone the courts. The very fact that we need government suggests that we cannot tolerate life tenure.”).

A. *Imposing Term Limits Through Constitutional Amendment*

We start with a proposed amendment to the United States Constitution. Article III, Section 1 of the Constitution says that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour”¹⁶⁹ It is well established that the Good Behavior Clause guarantees life tenure to all Article III judges. As a result, most of the advocates of Supreme Court term limits to date, except for Professors Carrington and Cramton,¹⁷⁰ have conceded that life tenure can only be limited by means of a constitutional amendment.¹⁷¹ We agree with the majority view, and we take up the merits of such an amendment below.

B. *The Term Limits Proposal*

We propose that, in accordance with the Article V amendment process,¹⁷² Congress and the states should pass a constitutional amendment imposing an eighteen-year, staggered term limit on the tenure of Supreme Court Justices.¹⁷³ Under our proposal, each Justice would serve for eighteen years, and the terms would be established so that a vacancy on the Court would occur every two years at the beginning of the summer recess in every odd-numbered year.¹⁷⁴ These terms would be structured so the turnover of Justices would occur during the

169. U.S. CONST. art. III, § 1.

170. For a discussion of the Carrington-Cramton proposal of statutory limits on tenure, see *infra* Part III.A.2; Carrington & Cramton, *supra* note 24, at 471. We feel that any statutory limit on tenure would suffer from both constitutional and practical problems. See *infra* Part III.A.3.

171. See Oliver, *supra* note 14, at 800 n.9; Prakash, *supra* note 16, at 568; Silberman, *supra* note 16, at 687; Easterbrook, *supra* note 6, at 18. *But see* McGinnis, *supra* note 16, at 545–46 (noting the possibility of instituting “Supreme Court riding,” his variant of term limits, through statute); Amar & Calabresi, *supra* note 1 (noting the possibility of a statutory term limits proposal).

172. See U.S. CONST. art. V.

173. As noted in the Introduction, and as discussed *infra*, this portion of our term limits proposal closely follows the proposal made by Professor Philip Oliver, *supra* note 14.

174. This configuration assumes that the size of the Court remains stable at nine members. In the event that the size of the Court were to be altered, then the terms would need to be changed to reflect the new size. One possibility is to include in the constitutional amendment a provision that would fix the size of the Court at nine. See Oliver, *supra* note 14, at 822–24. However, as Professor Oliver notes, the power to change the size of the Supreme Court, though not used since 1866, represents an important check that Congress has over the Court. *Id.* at 822–24, 833.

first and third year of a President's four-year term.¹⁷⁵ This would diminish the possibility of a Supreme Court appointment's being held up by Senate confirmation so as to deprive the President of the ability to nominate either of his two appointees to the Supreme Court.¹⁷⁶ The terms would also be set up so an outgoing Justice would complete his tenure on the last day of the Supreme Court's term and the new Justice could be confirmed in time to begin serving his term in October, before the beginning of the Supreme Court's next term.¹⁷⁷ The Justices' terms would be nonrenewable: no Justice could be reappointed to a second term.¹⁷⁸ This provision would help guarantee the independence of the Justices by removing any incentive for them to curry favor with politicians in order to win a second term on the high Court. Retired Justices would be permitted to sit, if they wanted to, on the lower federal courts for life.

Two problems concerning implementation of our proposal merit special discussion: its application to the current Justices or to the sitting President and its phase-in period, and the treatment of vacancies that arise mid-term due to the death or early resignation of a Justice.

First, we propose that any term limit would be prospective only and that it would take effect only upon the election in 2008 of a new President. Although a constitutional amendment abolishing life tenure and retroactively replacing it with a system of term limits would, by definition, be permissible both as to the current President and as to the current nine Justices, such

175. For example, if this amendment were currently in effect, President Bush would have been entitled to appoint a new Justice in the summer of 2001 and in the summer of 2003.

176. See Oliver, *supra* note 14, at 824–25. Indeed, as Oliver points out, having Supreme Court appointments fall in presidential election years would be a problem, as history shows that the Senate has oftentimes been willing to stall on nominations in order to deprive the sitting President of the chance to place his nominee on the Court and to permit the next President to make the selection. See generally Abraham, *supra* note 33.

177. See Oliver, *supra* note 14, at 824 (proposing a similar system, but with the start and end of each term on August 1). As this may have the unwanted effect of constitutionalizing the current structuring of the Court's term, this could be left to be worked out through practice or by statute.

178. See *id.* at 801. Professor Oliver, however, has a provision by which a successor Justice, if he is appointed to a term of less than two years and the appointing President will still be President when the next vacancy becomes available, will automatically be reappointed to serve a full term. *Id.* We do not include such a provision in our proposal because it permits Justices to serve longer than eighteen years, although we recognize that it has some appeal and are not entirely opposed to it.

a retroactive application of a Term Limits Amendment would be both unfair and unnecessary. Since the current Justices were appointed to the Court on the assumption that they would have life tenure, it would be unfair to them, as well as to the appointing parties (both the President and the Senate), to alter the arrangement struck in the appointment. Moreover, given the controversy that a retroactive amendment might generate, and given that a gradual phase-in of a system of term limits is feasible, it is unnecessary and unwise to apply the term limits to the current Justices.¹⁷⁹

Similar concerns apply to the sitting President and lead to the conclusion that any term limits proposal should apply only to new appointments made by the next-elected President after ratification. Most obviously, applying any term limits system to any sitting President might raise important fairness concerns, especially a President elected after substantial controversy over which presidential candidate would get to appoint life-tenured Justices to the Supreme Court. Instead, like the precedent set when the two-term limit on Presidents was adopted, the current incumbent Justices and President should be exempt from this proposed change. Thus, we propose that our term limits system, if passed immediately, become effective in 2009 following the next general election. Such a phase-in of Supreme Court term limits is the only fair way to accomplish this important constitutional change.

Instituting our proposal without immediately applying it to the current Justices or the sitting President would not be difficult. For example, suppose the amendment were ratified immediately.¹⁸⁰ When the first new vacancy occurs after a new President takes office, the new Justice would be put into the eighteen-year slot that, if an odd year, started that year. If the vacancy arose in an even year, the Justice would be put into the slot that started the following year, and she would also serve

179. Professor Oliver advocates making his term limits proposal applicable to current Justices, saying that the amendment needed to take immediate effect in order to alleviate the problems that life tenure creates. *See id.* at 825. However, given the likelihood that several openings on the Court could occur in the next few years, it is probable that our amendment, even if made applicable to current Justices, would not advance the effect of the proposal.

180. As we stated above, however, we do not propose immediate application of the amendment. Rather, we argue that the proposed amendment should apply only after an interceding presidential election occurs. But here we suppose immediate application for purposes of illustrating the amendment's phase-in procedure.

the additional year until that slot began. So if the first vacancy occurred in 2009, the first transitional Justice would be appointed to an eighteen-year term starting in 2009. If the first vacancy arose in 2010, then the newly appointed Justice would be appointed to the slot beginning in 2011, plus the period between appointment in 2010 and 2011. If the next vacancy occurred in 2015, then the slot starting that year would be filled. If the next slot were already filled with a transitional Justice, then the new Justice would be appointed to the next open slot, plus the time until that slot began. Thus, during the phase-in period, some Justices would be appointed to the Court for eighteen years, while others would be appointed to somewhat longer terms. Of course, those who replaced these transitional Justices would serve only eighteen years. If an Associate Justice were elevated to be Chief Justice, she would remain in her eighteen-year slot, and leave the Court after serving a total of eighteen years.

Another special problem that might arise under our system of term limits is the early death or resignation of a Justice. Indeed, our proposal of an eighteen-year term, which is longer than the fifteen-year average tenure of Supreme Court Justices from 1789 to 1970,¹⁸¹ would seem to make the occurrence of early deaths or resignations likely. To handle this situation, we propose that if a Justice dies or resigns prior to the expiration of her term, an interim Justice would be appointed through the regular confirmation process (presidential nomination and Senate confirmation) to fill the remainder of the deceased or retired Justice's term. For example, if a Justice were to leave the Court following her tenth year of service, the sitting President at the time of death or resignation would be entitled to appoint a replacement Justice who, subject to confirmation by the Senate, would then serve only the remaining eight years of the departing Justice's eighteen-year term. She would then be constitutionally ineligible for reappointment to the Court. This method of naming successor Justices to complete only the original eighteen-year term of the predecessor Justice would enable mid-term turnover without sacrificing the benefits of staggered term limits—namely, the regularized updating of the membership of the Court.¹⁸² This would also eliminate the cur-

181. *See supra* p. 779.

182. Professor Oliver raises the possible objection that, if the early retirement of a Justice were to leave a short remainder period on the Court, the best-qualified candidates may be uninterested in the position of succeeding the Justice for a brief

rent incentive of Justices to time their retirements strategically, since retiring early would not result in one's successor being able to serve longer than the eighteen-year term to which one was appointed initially.¹⁸³

This proposed system of appointing an interim Justice to serve only a limited portion of the term finds support both in the high courts of other nations and in many other government positions in this country. For example, the judges of the French Constitutional Council serve a nonrenewable term of nine

period. Oliver, *supra* note 14, at 827. However, we agree with Oliver that "[w]hen one considers the prestige of the United States Supreme Court in the American legal community, the argument sinks of its own weight," since large numbers of highly qualified individuals "would form a very long line for the privilege of serving for a week, not to speak of a year or two." *Id.* Moreover, since our proposal would provide for automatic designation of even a successor Justice to a federal circuit court, there would be additional incentives for the best-qualified candidates to take a Supreme Court position for even a short period of time.

183. Professor Oliver, who advocates a similar replacement provision, also raises a very interesting possibility: if a Justice retires mid-term during the tenure of a President of the opposing party, it might be appropriate for the congressional members of the Justice's party, rather than the President, to name a successor. For example, assume that a particular Justice was appointed by a Republican President. Since the winning party in a presidential (and senatorial) election is entitled to appoint Justices, then that Justice basically would be on the Court as a Republican representative. Now suppose that the Justice resigned or died after nine years, and his resignation or death occurred while a Democrat was President. At that time, the public would have voted for a Democrat as the person deserving of appointing two Supreme Court members. Should the unexpectedly vacant seat be controlled by Republicans, since the original Justice's appointment was the result of a Republican-leaning public, or should the seat be controlled by the Democratic President that the public more recently elected? *See id.* at 811 n.70.

Although it is a close question, we advocate using the normal (and constitutionally provided) appointment method of allowing the sitting President to appoint a successor, regardless of who had appointed the predecessor Justice. First, we agree with Professor Oliver that devising the alternative scheme would require at least some recognition of political parties in the Constitution, which is an extremely controversial proposition. Second, we believe that if any popular mandate should be adhered to, it is that of the President inhabiting the White House at the time of an unexpected resignation or death. In short, voters will be aware of the possibility of more than two vacancies when they elect a President, and it can hardly be maintained that a public that elects one President to name two Supreme Court Justices would have changed their minds if they knew that the President would get more than two vacancies. Third, although we favor staggered terms on the Supreme Court, we do not want to encourage Justices or the public to think of particular seats as belonging to one party or the other. We would prefer to encourage Americans to view the Court as an impartial arbiter of the law and for this reason we do not support Professor Oliver's proposal. As a result, we think that when a Justice leaves the Court prior to completing her term, the sitting President ought to nominate, and the Senate ought to confirm, a successor Justice to finish the unexpired portion of the term.

years.¹⁸⁴ When a vacancy occurs prior to the expiration of a member's term, a new member is then nominated for the Council for the remainder of the deceased member's term.¹⁸⁵ Likewise, Vice-Presidents of the United States, when acting for longer than two years as replacements for deceased Presidents, lose their eligibility to run as an elected President for one term.¹⁸⁶ More generally, Vice-Presidents, senators, and representatives in this country who succeed a deceased or a resigned predecessor always fill out only the unfinished portion of their predecessor's term before they must be re-elected. Such a provisional replacement system is a sensible way of preserving the consistency of the staggered term limits proposal, as evidenced by substantial precedent in the United States and abroad.

184. BELL, *supra* note 140, at 34.

185. *Id.* It is true, as Bell notes, that in France the replacement "is then usually nominated for a 9-year term in his own right" after fulfilling the remainder of the deceased member's term. *Id.* at 34 n.57. Thus, a replacement judge could potentially serve on the Council for longer than nine years. A similar provision permits a U.S. Vice-President who becomes President for less than two years to still serve two full terms as an elected President. See U.S. CONST. amend. XXII.

Such a system could also be incorporated into our proposal. For example, a provision could be made that if a Justice died with less than one-third of his term remaining, any replacement Justice would be eligible for appointment to a full eighteen-year term following his completion of the remainder of the deceased member's term. However, this generally creates problems of judicial independence, since the replacement Justice would (like in a retention election) feel compelled to act in certain ways in order to receive the re-appointment following his completion of the first term. For this reason, we do not make this provision part of our proposal, though we note that it is a possibility that deserves consideration.

An especially interesting and unique situation could arise if a Justice retired with less than two years in his term, and his retirement occurred during the first year of a President's term. Thus, the successor Justice would be serving out less than two years and the President appointing him would have another appointment to the Court following the successor Justice's two-year service. Under Professor Oliver's proposal, which does not incorporate automatic designation to a federal court of appeals, he worries about the "serious danger of a lack of independence [that] would arise where the Justice, after completing his stint on the Court, hoped to obtain appointment to another position from the same President who named him to the Court." Oliver, *supra* note 14, at 828. To account for this situation, Oliver advocates a provision whereby the successor Justice that would be able to serve less than two years of an unexpired term would automatically be reappointed to the Supreme Court for a full eighteen-year term. *Id.* We do not support such a provision, as we do not want to permit any tenures of longer than eighteen years, and as, under our proposal where re-appointment to a lower federal court would be automatic, the problem of a lack of judicial independence would not arise.

186. See U.S. CONST. amend. XXII.

Our term limits proposal resurrects the views of Thomas Jefferson¹⁸⁷ and our American Brutus, Robert Yates.¹⁸⁸ Both long ago advocated limits on the tenure of Supreme Court Justices and predicted calamity as a result of the life-tenured judges who, in Yates's words, "will generally soon feel themselves independent of heaven itself."¹⁸⁹ Moreover, our specific proposal is a combination of the suggestions and plans advocated by Judge Laurence Silberman¹⁹⁰ and Professor Oliver¹⁹¹ and draws heavily on the plans put forth by others like Gregg Easterbrook¹⁹² and Professors John McGinnis,¹⁹³ Saikrishna Prakash,¹⁹⁴ and Henry Monaghan.¹⁹⁵

The most persuasive of the many prior commentaries advocating Supreme Court term limits is the term limits proposal first made by Professor Oliver in 1986.¹⁹⁶ Oliver begins by stating that "[t]he primary features of the proposal are that Justices should serve for staggered eighteen-year terms, and that if a Justice did not serve his full term, a successor would be appointed only to fill out the remainder of the term. Reappointment would be barred in all cases."¹⁹⁷ Although our justification for abolishing life tenure and replacing it with term limits is different from Oliver's, and although our complete proposal has important differences from Oliver's plan, we explicitly endorse his proposal.¹⁹⁸ Our final proposal is therefore an amal-

187. See Letter from Thomas Jefferson to William T. Barry, *supra* note 11, at 256. Jefferson even went so far as to propose the institution of a four- or six-year renewable term. *Id.*

188. See Yates, *supra* note 13.

189. See *id.* at 352.

190. See Silberman, *supra* note 16.

191. See Oliver, *supra* note 14.

192. See Easterbrook, *supra* note 6.

193. See McGinnis, *supra* note 16.

194. See Prakash, *supra* note 16.

195. See Monaghan, *supra* note 16.

196. See Oliver, *supra* note 14.

197. *Id.* at 800.

198. Like Professor Oliver, several other commentators have advocated comparable term limits that are reflected in our plan. For example, Gregg Easterbrook's ten-year term limit proposal is structured similar to ours, though we disagree with his provision for reappointment of Justices to additional terms and we advocate a longer term than ten years. See Easterbrook, *supra* note 6. Similarly, our proposal mirrors Professor McGinnis's "Supreme Court riding" proposal, except that we propose a significantly longer term than his suggested six months to one year. McGinnis, *supra* note 16, at 541. Professor Monaghan also proposes term limits, as well as age limits, and suggests both a mandatory retirement age requirement and fixed terms of fifteen to twenty years. Monaghan, *supra* note 16, at 1211-12. While we do not support a mandatory age retirement, as we discuss

gamation of the views of Professors Oliver, McGinnis, Prakash, the students DiTullio and Schochet, Gregg Easterbrook, Judge Silberman and the most advantageous aspects from all previous proposals that have gone before it.¹⁹⁹

C. *Advantages of the Proposal*

Our term limits proposal responds directly to the jump in the average tenure of Supreme Court Justices from an average of 12.2 years during 1941–1970, and 14.9 years during 1789–1970, to an average tenure of 26.1 years during 1971–2006.²⁰⁰ It also responds to the fact that, since 1970, Justices have retired or died at an average age of 78.7 years, while the average age for the prior 200-year period was 68.5 years.²⁰¹ Finally, because of these other two trends, our proposal responds to the fact that vacancies on the Court have occurred with much less regularity since 1970 than over the whole of American history. Although between 1789 and 1970, a vacancy on the Court occurred, on average, every 1.9 years, in the last thirty-five years, a vacancy has occurred only every 3.1 years.²⁰²

Our proposal should reverse all these trends. First, our term limits proposal would set eighteen years as the fixed term, in sharp contrast to the norm since 1970 of 26.1 years.²⁰³ Since the average tenure of all Justices throughout history is 16.2 years,²⁰⁴ our proposal would guarantee Justices a term longer than the historical average from 1789 to 2006, yet shorter than the cur-

further below, we agree with Monaghan's call for term limits and propose a scheme that is similar to his suggestions. The Virginia Note-writers endorse an eighteen-year term limit proposal that is similar to our plan, though their phase-in proposal results in extremely short initial terms. *See* DiTullio & Schochet, *supra* note 17. Finally, Professor Prakash advocated instituting fixed term limits of three, four, or more years in order to "bring the judiciary much closer to the people" and "usher in a populist constitutional law." Prakash, *supra* note 16, at 568. Prakash went even further and also proposed either a stronger removal power or a reappointment option, *id.* at 571–72, which we do not advance here because we believe that both provisions would risk undermining the independence of the judiciary. Yet we embrace the spirit of Prakash's proposal, and, like the proposals of the other commentators, we endorse his specific call for fixed terms for Supreme Court Justices.

199. Indeed, the diversity of political and jurisprudential viewpoints of the various commentators we follow demonstrates the nonpartisan nature of our proposal.

200. *See supra* text accompanying Chart 1.

201. *See supra* text accompanying Chart 3.

202. *See supra* Charts 5–6.

203. *See supra* Chart 1.

204. *See id.*

rent post-1970 trend of alarmingly long terms. Our proposed term limit is considerably more moderate than the proposals of commentators like Judge Silberman,²⁰⁵ Gregg Easterbrook,²⁰⁶ Professors Prakash,²⁰⁷ and Professor McGinnis,²⁰⁸ who all propose much shorter term limits.

Second, our proposed fixed term of only eighteen years would likely lead in practice to a younger average retirement age for Justices than the current age of 78.7 years. For example, assuming Presidents continued to appoint new Justices who are on average between fifty and fifty-five years old,²⁰⁹ those Justices would complete their terms at an average age of sixty-eight to seventy-three years. Thus, while our proposed amendment does not absolutely guarantee that the average retirement age of Justices would decline, since it does not set a mandatory retirement age and since it does not set a maximum appointment age, it increases the likelihood that Justices will no longer serve into their late seventies. Moreover, our proposal makes it significantly more likely that the average retirement age will not go even higher than its current level, 78.7 years of age,²¹⁰ and very likely that the average retirement age will decline.

Third, and perhaps most important, our proposal would respond to the problem of hot spots and the increasingly irregular timing of vacancies by guaranteeing that a vacancy on the Court will occur like clockwork once every two years.²¹¹ As Chart 5 reveals, and as we argued above, the number of years between vacancies has historically been about two years, but has risen dramatically in the last thirty years.²¹² By fixing terms of eighteen years, and staggering them, a vacancy would occur at least once every two years. This would have two important effects. First, it would guarantee that every elected President would be able to appoint two individuals to the Court in a four-year presidential term.²¹³ Second, it would reduce the

205. See Silberman, *supra* note 16, at 687 (proposing a five-year term limit).

206. See Easterbrook, *supra* note 6, at 18 (proposing a ten-year term limit).

207. See Prakash, *supra* note 16, at 568 (proposing a term limit of three, four, or more years).

208. See McGinnis, *supra* note 16, at 541 (proposing a term limit of six months or a year).

209. See *supra* text accompanying Chart 8.

210. See *supra* Chart 3.

211. See DiTullio & Schochet, *supra* note 17, at 1116–19.

212. See *supra* text accompanying Chart 5.

213. As we noted above, see *supra* notes 172–75 and accompanying text, the vacancies would arise in the first and third years of a President's four-year term.

stakes of the nomination process and eliminate the uncertainty that now exists regarding when vacancies will occur, which has had bad consequences for the confirmation process of Justices and for democracy itself.

Our proposal would not only correct all the current problems posed by life tenure for Justices, but it would make the Supreme Court more democratically accountable and legitimate by providing for regular updating of the Court's membership through the appointment process. Each time the public elects a President, that President will make at least two nominations to the Supreme Court,²¹⁴ leading to a more direct link between the will of the people and the tenor of the Court.²¹⁵ Our proposed term limit "would ensure that high courts that have become too conservative or too liberal can be turned over on a reasonable basis in keeping with the people's will (as reflected by the party they put in the White House)."²¹⁶ While this would not make the Court accountable to popular sentiment in any direct sense, avoiding any threat to judicial independence, it would reinforce the one formal check on the Court's understanding of the Constitution that actually works.

At this point, it is logical to ask whether the popular understanding of the Constitution's meaning ought to guide the Supreme Court's understanding more directly. We believe that it should: the general public is more likely than are nine life-tenured lawyers to interpret the Constitution in a way that is faithful to its text and history, which is how constitutional decision making ought to proceed.²¹⁷ The general public has a great reverence for the constitutional text and for our history, and much of the public intuitively understands that radical depar-

214. See Oliver, *supra* note 14, at 809–12.

215. See *id.* at 810 ("As voters have historically changed the occupants of the White House, they have, indirectly but inexorably, changed the makeup of that Court.").

216. Easterbrook, *supra* note 6, at 18. Easterbrook also notes that a proposal like ours would permit a more pluralistic representation of society on the Court: "Supreme Court term limits would also help make the Court a pluralistic institution whose composition reflects American society, since regular succession of seats would provide many more opportunities to appoint women and members of minority groups." *Id.*

217. See generally ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990) (setting forth and defending the theory of originalism in constitutional interpretation); Randy Barnett, *An Originalism for Non-originalists*, 45 *LOY. L. REV.* 611 (1999); Calabresi, *supra* note 8. One of us, James Lindgren, believes that one should *begin* with a careful analysis of the original meaning of a text, but is less certain of what interpretive principles should guide further analysis.

tures from text and history are illegitimate. The lawyer class in this country, on the other hand, is still imbued with a legal realist or post-modernist cynicism about the constraints imposed by the constitutional text. For this reason, we believe that enhancing popular control over the Court's constitutional interpretations will actually lead to better decisions than are produced under the current system.

Further, regularizing the occurrence of Supreme Court vacancies would equalize the impact of each President on the composition of the Court and would eliminate occasional hot spots of multiple vacancies. Under our current system of life tenure, the irregular occurrence of vacancies means that some Presidents have a hugely disproportionate impact on the Court, while others are unlucky and are unable to make even a single appointment.²¹⁸ The variability of appointments under our current system of life tenure thus leads to an inequitable allocation of vacancies among Presidents. By requiring that a vacancy occur once every two years, and by thus guaranteeing that each President will be able to make at least two appointments to the Court, our proposal would equalize the impact each President has on the Court.²¹⁹ And “[e]nsuring that every chief executive would have regular influence on the makeup of the Court . . . would not only restore some of the check-and-balance pressure the Founders intended for all government branches but also inject more public interest into presidential campaigns.”²²⁰

Because of this democracy-enhancing goal of term limits for the Supreme Court, our proposal should not be viewed as merely another tired application of the once popular term limits movement. Term limits for elected officials (like Presidents, congressmen, or governors) restrict the ability of one candidate to seek office in a regularly scheduled election, which is arguably undemocratic because it limits the choices for the voting public. Term limits for unelected officials like Supreme Court Justices, on the other hand, provide for regular and more frequent appointments. Regularizing the timing of appointments to the Court thus has a dramatic democracy-enhancing effect, since it permits the people, through their elected representa-

218. See Oliver, *supra* note 14, at 809–12.

219. See Easterbrook, *supra* note 6, at 18 (noting that staggered term limits like those we are proposing “would afford the [P]resident a fairly steady . . . Supreme Court appointment”).

220. *Id.*

tives in the Senate and through the President, to update the membership of the Court more frequently and predictably to keep it in line with popular understandings of constitutional meaning. For this reason, a limit on the tenure of Supreme Court Justices, unlike other forms of term limits, would actually provide for a Supreme Court that is more, rather than less, democratically accountable.

By making vacancies a regular occurrence, and by limiting the stakes of each confirmation to an eighteen-year term rather than the increasingly frequent thirty-year period that has recently prevailed for some Justices, our proposal would greatly reduce the intensity of partisan warfare in the confirmation process. Under the current system of life tenure, the uncertainty over when the next vacancy on the Supreme Court might arise, as well as the possibility that any given nominee could serve up to four decades on the Court,²²¹ means the political pressures on the President and Senate in filling any Supreme Court vacancy are tremendous.²²² Our proposed amendment, by eliminating nearly all of the uncertainty over the timing of vacancies and by reducing the stakes associated with each appointment,²²³ promises to reduce the intensity of the political fights over confirmation.²²⁴

Some may argue that our proposed amendment would actually increase the politics surrounding confirmations: because there is so much at stake in appointing Supreme Court Justices (or even lower federal appellate judges), our systematizing of the process would only make the already political event occur more often. This increased frequency, some might argue, would cumulatively increase the political nature of confirma-

221. If Justice Thomas serves to the same age as did Justice Thurgood Marshall, he will have served on the Court for forty years. *Id.* at 17.

222. *See supra* Part II.D.2.

223. Given the length of an eighteen-year term and the consequence that some Justices will likely leave the Court prior to the completion of their terms, there is still some uncertainty. Yet this uncertainty is of a completely different nature than the uncertainty that plagues the confirmation process under the system of life tenure. In the case of an early retirement, the only effect is that a democratically elected President gets a third appointment to the Court, and this extra choice is limited by the fact that the successor Justice would serve only the remainder of the original Justice's term. Increasing the number of appointments for such a limited time should not raise the political stakes of any given nomination because it would not affect any subsequent vacancy.

224. *See* Easterbrook, *supra* note 6, at 18 (stating that a term limit for Supreme Court Justices "would end the ridiculous Borkstyle snippet battles that push the Senate and the White House both to their lowest common denominators").

tions and, by letting parties plan on when the next vacancy might occur, our proposal would make the politics of confirmations begin even before the vacancy occurs.²²⁵ We disagree. The regularization of vacancies on the Court and the more frequent appointments to the Court would make each appointment less important politically and should have a net effect of reducing the politicization of the process.

From the current appointment battles we have direct evidence that the stakes do matter. President George W. Bush's federal district court nominees were seldom opposed, while many of his circuit court of appeals nominees were filibustered or not acted on. And when John Roberts was confirmed for the U.S. Court of Appeals, his confirmation on the Senate floor was by acclamation, whereas when he was nominated to be Chief Justice, many Senate Democrats opposed him. To those academics who would argue that lowering the stakes of a Supreme Court appointment would not lower the acrimony, we have ample evidence tending to support the opposite conclusion. By creating a predictable schedule of frequent appointments, our proposed amendment should reduce the intensity of the politics associated with confirmations at the Supreme Court level.

Our proposal's institution of a fixed term would also reduce the incentive Presidents currently have to appoint the youngest confirmable candidate they can get away with.²²⁶ If Presidents know in advance that their Supreme Court nominees can serve only eighteen years, there will no longer be any reason for them to avoid nominating a healthy sixty- or sixty-five-year-old to the high Court. In so doing, our amendment will enlarge and improve the pool of potential nominees. Since nominating a forty-five-year-old will not lock up a Supreme Court seat for the next thirty-five years, and since Presidents will know the seat they are filling will open up again in eighteen years, Presidents will have much less of an incentive than they do now to discriminate against older candidates. By reducing the impact

225. Similarly, one might argue that by setting term limits, interest groups and the Senate will know better what issues would be presented to that Justice during his tenure, and therefore these groups will more vigorously follow and seek to influence Senate confirmations, which would additionally increase the politicization of the process. See Kyle Still Free Press, <http://kylestill.blogspot.com> (Aug. 9, 2002, 22:05 EDT). Yet we are proposing an eighteen-year term, which is a significantly long period of time, and therefore this argument becomes irrelevant.

226. See DiTullio & Schochet, *supra* note 17, at 1110–16; see also Oliver, *supra* note 14, at 802–04.

of age as a factor in making nominations, our proposed amendment could lead to the appointment of more experienced Justices to the Supreme Court.

To be sure, a relatively long fixed term means that Presidents will probably still tend to select younger individuals rather than seventy- or seventy-five-year-olds. In fact, for Presidents considering new vacancies, our proposal may have no impact on the current trend of appointing individuals in their fifties.²²⁷ Yet our amendment will still have a critical impact on age as a factor in selecting Supreme Court Justices, for several reasons.

First, the amendment will eliminate the incentive Presidents currently have to find candidates who are even younger than the average appointment age of fifty to fifty-five.²²⁸ Second, under our proposed system, a President will, within the constraints of finding a candidate young enough to be likely to complete an eighteen-year term,²²⁹ consider experience and talent to be more important, since a few more years of possible service on the Court would be irrelevant. Third, since the length of our proposed term could result in some instances of early resignations or deaths followed by short interim terms, Presidents could appoint older, more experienced candidates to finish only that term. These individuals might not otherwise be considered for full eighteen-year terms but might well turn out to be the best possible choices for a shorter replacement term of, say, three or four years.²³⁰ Therefore, although our proposal would not eliminate the practice of Presidents considering the age of potential nominees in selecting Justices—indeed, we would not desire such an outcome—it would, at the mar-

227. The current average age of appointments is shown *supra* Chart 8.

228. See Oliver, *supra* note 14, at 804 (“Because the proposed amendment would reduce any preference for very young candidates, it would be more likely that the appointment would be made on the basis of the relative qualifications of the potential appointees.”). Admittedly, the fact that our proposal incorporates automatic designation to a lower federal court for life may negate this advantage, since Presidents will still be appointing persons for a lifetime judicial position. However, we believe that the incentives for nominating youthful candidates, at the expense perhaps of experience, is a more common practice—or at least a larger problem—in Supreme Court nominations than it is for lower federal court judges.

229. See *id.* (“If a President wished for his appointee to exercise continuing influence for as long as possible, a President would prefer to appoint as Justice someone young enough that it would be reasonable to expect that good health and sufficient vigor for a demanding job would continue for eighteen years.”).

230. *Id.* at 804, 814 n.79.

gins, play a very positive role in reducing the central importance that age has played in recent years.

Fourth and finally, our proposal, though not directly responsive to the problem of mental decrepitude on the Court, would significantly further the goal of preventing mentally or physically decrepit Justices from serving on the Court. Limiting the length of service of any Justice to only eighteen years would reduce greatly the likelihood of a Justice continuing service on the Court despite incapacity.²³¹ Of the eighteen instances of mental decrepitude on the Supreme Court discussed by Professor David Garrow,²³² nine—fifty percent—involved Justices who had been on the Court for more than eighteen years, and most of the more serious instances of decrepitude involved Justices serving for even longer than our proposed term.²³³ Strik-

231. See Easterbrook, *supra* note 6, at 18 (“A term limit would also put a halt to the spectacle of Justices being carried from the Court chambers on stretchers moments before they expire, and end the psychological and political pressure on Justices to hang on long after their mental acuity falters.”); Oliver, *supra* note 14, at 813 (“By assuring that Justices would serve no more than eighteen years, the proposed amendment would tend to assure a relatively vigorous Court, and tend to protect the Court from an infirm Justice who refused to retire.”).

232. The eighteen mentally decrepit Justices discussed by Garrow include: (1) John Rutledge, who ought never to have been nominated; (2) William Cushing, who served twenty-one years, became decrepit after seven, and could not retire for lack of a pension; (3) Henry Baldwin, who ought never to have been nominated; (4) Robert Grier, who served for twenty-four years and became mentally decrepit after twenty-one years; (5) Nathan Clifford, who served for twenty-three years and had mental problems after nineteen years; (6) Stephen Field, who served for thirty-five years and suffered mental decline after twenty-seven years; (7) Joseph McKenna, who served for twenty-seven years and suffered mental decline after twenty-three years; (8) William Howard Taft, who suffered only a slight mental decline and then retired; (9) Oliver Wendell Holmes, who served thirty years and showed signs of decrepitude after twenty-six years; (10) Frank Murphy, who served nine years and should have stepped down one year earlier than he did; (11) Sherman Minton, who served seven years and was feeble at the end; (12) Charles Whittaker, who served five years, had mental problems from the start, and ought never to have been nominated; (13) Hugo Black, who served thirty-four years and suffered mental decline after thirty years; (14) William O. Douglas, who served thirty-six years and was decrepit after thirty-five years; (15) William Rehnquist, who had a drug addiction after ten years; (16) Lewis Powell, who served for sixteen years, which was two years too long; (17) William J. Brennan, who served for thirty-four years and fell asleep once on the bench in his final year; and (18) Thurgood Marshall, who served for twenty-four years and was decrepit after twenty years. See Garrow, *supra* note 7.

233. For example, Garrow claims that the following nine Justices who served more than eighteen years all showed signs of mental decrepitude sometime after their eighteenth year in office: Robert Grier (decrepit after twenty-one years), *id.* at 1003; Nathan Clifford (decrepit after nineteen years), *id.* at 1006; Stephen Field (decrepit after approximately twenty-seven years), *id.* at 1008; Joseph McKenna (decrepit after twenty-three years), *id.* at 1012–14; Oliver Wendell Holmes (de-

ingly, not one of these nine instances of mental decrepitude would have occurred had our proposed constitutional amendment been in place.

Admittedly, even given an eighteen-year term,²³⁴ some Justices could still become mentally or physically decrepit during their tenure and continue to serve on the Court. Nonetheless, an eighteen-year term would still be an improvement over the status quo, for one thing because term limits would “end the psychological and political pressure on Justices to hang on long after their mental acuity falters.”²³⁵ Whereas life tenure would allow, and perhaps even persuade, a disabled Justice to continue serving on the Court until his death, an eighteen-year tenure would affirmatively cap the Justice’s career. This would ameliorate such situations “because forced retirement at the end of a stated term of office, rather than at death, would cause the situation to arise less often.”²³⁶ Moreover, Presidents would likely formulate some informal maximum ages for their appointees; those maximum ages would necessarily impose a mandatory retirement age eighteen years older than the age at nomination.²³⁷ Thus, if a President were to choose nominees no older than sixty when nominated, those Justices, once appointed, could retire at an age no older than seventy-eight.

Several scholars have instead proposed an alternate solution of mandatory retirement ages for the Justices as a way of reducing mental decrepitude on the Supreme Court.²³⁸ A manda-

crepit after approximately twenty-six years), *id.* at 1017–18; Hugo Black (decrepit after thirty years), *id.* at 1050; William O. Douglas (decrepit after thirty-five years), *id.* at 1052–54; William J. Brennan (decrepit after thirty-three years), *id.* at 1071; and Thurgood Marshall (decrepit after approximately twenty years), *id.* at 1072–73.

234. For example, a term limit of six months to one year, such as that proposed by Professor McGinnis, *supra* note 16, at 541, would more effectively eliminate the problem of mental decrepitude. *See id.* at 543 (noting that his “Supreme Court riding” proposal would have “curtailed the effects of senility and the excessive delegation of power to young and energetic law clerks by reducing the temptation to cling to the bench into very old age”).

235. Easterbrook, *supra* note 6, at 18.

236. Oliver, *supra* note 14, at 815.

237. *See id.* at 813–14.

238. For example, Professor Garrow, *supra* note 7, at 1086–87, and Professor Monaghan, *supra* note 16, at 1211–12, have both proposed the enactment of a mandatory retirement age. Proposals such as these commonly call for mandatory retirement of judges at the ages of sixty-five, seventy, or seventy-five. Moreover, many foreign countries impose mandatory retirement ages as limits on the tenure of the members of their highest constitutional courts. *See supra* notes 136–53 and accompanying text. Thus, instituting a mandatory retirement age does stand as an alternative, or a complement, to our own proposal.

tory retirement age is undesirable, however, either as a substitute or as a complement to an eighteen-year term. First, a mandatory retirement age is unfair, for it blindly discriminates against individuals based on age and cannot account for the capability of a seventy-year-old continuing in office, while a sixty-year-old might be best advised to retire due to differing individual capacities.²³⁹ A term limit, however, would more fairly permit individualized and informal determinations of capacity.²⁴⁰

Second, it is a mistake in general to write numbers into the Constitution because they can become obsolete with the passage of time.²⁴¹ The requirements that Presidents be at least thirty-five years old and that the right to jury trial be preserved in all suits at common law in which more than twenty dollars is at stake are classic examples of this. It seems quite possible that in fifty or one hundred years a mandatory retirement age of seventy or even seventy-five might seem absurdly young if people were routinely living to be over 100. It would be a bad

239. There are two other arguments against mandatory retirement ages. First, a mandatory retirement age requirement, as compared with a fixed term limit, would not accomplish any greater deterrent to mentally or physically decrepit Justices continuing in office. Admittedly it is possible under a system of fixed terms that a Justice could become senile or physically unable to perform his duties within the first eight years of his term. Yet at the same time, under a system with mandatory retirement ages, there is also a chance of a sixty-year-old Justice becoming mentally or physically decrepit notwithstanding a mandatory retirement age of sixty-five or seventy. Thus, while a mandatory retirement age can perhaps be tied more closely than a term limit to what scientific experience teaches is an age at which the average individual becomes incapacitated, the imprecise nature of such calculations severely limits the value of a mandatory retirement age.

Second, our proposed amendment would indirectly produce the benefits of a mandatory retirement age because, as noted above, it would enable the President and the Senate to plan in order to avoid the problem of mental decrepitude. Importantly, allowing individualized determinations of the likelihood of any particular nominee experiencing mental decrepitude is fairer and more effective than a blanket rule against all persons over a particular age continuing in office.

240. Similarly, we oppose the notion of allowing individualized determinations by a political body as to the competence of a given Justice. Professor Prakash suggests something similar to this, arguing for a stronger removal power that would enable the President or the Senate to remove judges and Justices based on senility or even a disagreement with substantive decisions. Prakash, *supra* note 16, at 571–72. Even if such a removal power were limited to determinations of senility and physical capacity, we would disagree with such a provision because of the manipulability and politicization of the Supreme Court that it might cause.

241. See generally GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (discussing statutory law and its slow response to change in the legal world). For a discussion of how the twenty dollars amount, see U.S. CONST. amend. VII, has become “anachronistic,” see Note, *The Twenty Dollars Clause*, 118 HARV. L. REV. 1665, 1672 (2005).

idea to insert a mandatory retirement age for Justices into constitutional law, and it would not solve problems associated with life tenure on the Court.

An eighteen-year term offers several other benefits, including bringing the tenure of the members of our highest court into conformity with the practice of the rest of the world and of forty-nine of our fifty states.²⁴² Assuming an eighteen-year term were coupled with permitting retired Justices to sit on the lower federal courts following their Supreme Court service, the lower federal courts would be enriched with the Justices' experiences and knowledge.²⁴³

Finally and of critical importance, our proposal would eliminate the current practice of Justices strategically timing their resignations, a practice that embroils Justices in unseemly political calculations that undermine judicial independence and that cause the public to view the Court as a more nakedly political institution than it ought to be.²⁴⁴ This concern with strategically timed resignations was the principal focus of the recent Virginia student Note advocating an eighteen-year term limit for Justices.²⁴⁵ We noted above that there is mixed evidence that Justices throughout American history have timed their resignations for political reasons, including what is often a delay in retirement in order to avoid allowing a sitting President of the opposite party to name a successor.²⁴⁶ Our eighteen-year fixed term limit, however, would make it impossible for a Justice to time his resignation strategically.²⁴⁷ Of course, a Justice still could leave the Court prior to the completion of her term for political reasons, but under our proposal the retiring Justice's successor would be appointed only to complete the remainder of a fixed eighteen-year term. Therefore, an early strategic retirement decision would be of no avail, for it would

242. See generally *supra* Part I.E (comparatively analyzing the tenures of judges on the highest constitutional courts of major Western democracies and of U.S. states, evincing the conclusion that the U.S. provision for life tenure for its Justices is a true outlier).

243. Easterbrook, *supra* note 6, at 19; Amar & Amar, *supra* note 89. Our proposed amendment, by providing that a judge sit on the Court for eighteen years and afterward be eligible for service on the lower federal courts, would closely parallel the current system where retired Justices, or other senior district or circuit judges, can sit on the lower federal courts.

244. See Amar & Calabresi, *supra* note 1; Oliver, *supra* note 14, at 805–09.

245. DiTullio & Schochet, *supra* note 17, at 1101–10.

246. See *supra* notes 85–89 and accompanying text.

247. See Oliver, *supra* note 14, at 808.

not permit a President to lock up a Supreme Court seat for another eighteen years.²⁴⁸ As a result, under our proposal the Justices would lose the power they now have to keep a Supreme Court seat in the hands of their own political party by retiring strategically. This would promote the rule of law and the public's respect for the Court by precluding nakedly political decision making by Justices with respect to retirement.

D. Objections to the Proposal (and Responses Thereto)

Moving to a system of Supreme Court term limits would significantly enhance the overall legitimacy and functioning of the Court and our constitutional democracy. Yet our proposal is not uncontroversial.²⁴⁹ To date, by far the best case against Supreme Court term limits has been made by Professor Ward Farnsworth of Boston University, and we highly recommend his article to anyone interested in this subject.²⁵⁰

First, some might argue that our proposed amendment would impair judicial independence, a value our Constitution was designed to protect²⁵¹ through the Compensation Clause²⁵² and the guarantee of life tenure.²⁵³ As Alexander Hamilton argued, life tenure secures the freedom of a judge from the political branches, as well as from public opinion, ensuring that judges can objectively interpret the law without risk of political reprisal.²⁵⁴ This benefit of life tenure is still recognized as critical. Professor Martin Redish argues, "Article III's provision of life tenure is quite obviously intended to insulate federal judges from undue external political pressures on their decisionmaking, which would undermine and possibly preclude effective performance of the federal judiciary's function in our

248. *Id.* at 809.

249. We surely have not addressed all of the arguments that could be waged against our proposal. Yet by dispelling—or at least considering—some of the most important objections, we hope to strengthen the case for our term limits proposal and therefore put the onus on proponents of life tenure to formulate a strong case for that system.

250. Farnsworth, *supra* note 21; see also Ward Farnsworth, *The Ideological Stakes of Eliminating Life Tenure*, 29 HARV. J.L. & PUB. POL'Y 879 (2006).

251. THE FEDERALIST NO. 78, at 466 (Alexander Hamilton) (Clinton Rossiter, ed., 1961); see also *supra* note 161 and accompanying text.

252. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, . . . shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.").

253. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.").

254. See THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 251, at 469.

system.”²⁵⁵ Impinging upon life tenure, it is argued, would weaken this insulation, jeopardizing judicial independence.

We would not favor this proposed constitutional amendment if we thought it would undermine judicial independence in any serious way. As others have argued, moving from life tenure to a lengthy fixed term—a term longer than the average tenure of Justices who have served on the Court between 1789 and 2006—means that no independence will be lost relative to the other branches or to the public generally.²⁵⁶ Professor Monaghan states:

But even assuming that such complete judicial independence is desirable, eliminating life tenure need not materially undermine it. Presumably, what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches. Independence, therefore, could be achieved by mandating fixed, nonrenewable terms of service.²⁵⁷

As Monaghan points out, the key to securing judicial independence is to guarantee that a Justice’s tenure is not subject to the political decisions of the other branches or the public. Life tenure has made judges independent of the political branches, and we believe that this independence would be secured by our lengthy eighteen-year nonrenewable term limit with a salary set for life.²⁵⁸ Our eighteen-year term limit proposal would preserve judicial independence because it does not allow for reappointment, because it guarantees the Justices a longer tenure on average than they have historically had between 1789 and 2006, because it guarantees Justices their salary for life, and because the Justices would be secure from new means of removal by the political branches. As a result, except for the minimal and positive effect that more regular appointments would make the Supreme Court more responsive to the public and the political branches’ understanding of the Constitution’s meaning, there is no plausible argument that judicial independence would be endangered by our proposal.

255. See Redish, *supra* note 111, at 685.

256. See McGinnis, *supra* note 16, at 543; Monaghan, *supra* note 16, at 1211; Oliver, *supra* note 14, at 816–21.

257. Monaghan, *supra* note 16, at 1211.

258. The importance of the eighteen-year terms’ being nonrenewable and long is discussed in DiTullio & Schochet, *supra* note 17, at 1127–31.

Professor Ward Farnsworth offers a pragmatic defense of life tenure and suggests that an advantage of the current constitutional structure is that its resulting judicial independence contributes to a faster and a slower form of lawmaking: the first accomplished by Congress through the ordinary legislative process and the second accomplished by the Supreme Court.²⁵⁹ That the Supreme Court represents the political forces that prevailed ten or fifteen years ago and that it may take decades for a political movement to gain control over the Supreme Court's slower lawmaking process appeals to this scholar, whose argument is fundamentally conservative. In essence, Farnsworth thinks it is a good thing that progressives had to struggle from 1901 to 1937 to gain a majority on the Supreme Court and that conservatives had to struggle from 1968 to 1991 to get five solidly Republican Justices who even then refused to overrule *Roe v. Wade*.²⁶⁰ Farnsworth sees the Court as a major anchor to windward that slows down social movements for change, and he argues that to some extent judicial independence is desirable because a slowed-down lawmaking process is desirable as a matter of good public policy.²⁶¹

Farnsworth's argument is a powerful one, and we are sympathetic to his claim that it is desirable for the Court to slow down the forces of change in our democracy. Indeed, for these very reasons we favor the cumbersome lawmaking system crafted by the Framers with separation of powers, checks and balances, and federalism instead of a national, parliamentary, British-style regime where change can happen very suddenly. The question, however, is just how much conservatism one wants in one's lawmaking processes. Arguably, with separation of powers, checks and balances, federalism, and the Senate filibuster, we do not also need a Supreme Court whose fundamental direction can be reversed only by a sustained twenty-five or thirty year campaign. Different conservatives will answer this question in different ways, and those who are most averse to legal change may join Professor Farnsworth in praising life tenure. A Supreme Court with eighteen-year term limits will still be an anchor to windward in the American polity; it just will not be as much of an anchor to windward as has become the case in the last thirty-five years.

259. See Farnsworth, *supra* note 21, at 411–21.

260. 410 U.S. 113 (1973).

261. See Farnsworth, *supra* note 21, at 419–21.

A second big objection that could be raised against our proposal is that it could lead to “Supreme Court capture.” If a particular party were to prevail in five consecutive presidential elections, then, assuming that the President nominates and the Senate confirms individuals of the President’s party,²⁶² that party would have “captured” the entire Supreme Court for itself, a result that life tenure is designed to protect against. And, as Professor Farnsworth points out, even the appointment of four Justices by a two-term President could be enough to tip the ideological balance on the Court from Republicans to Democrats or vice versa.²⁶³ Accordingly, Professor Charles Fried has suggested to us that our proposal could cause the Supreme Court to become like the National Labor Relations Board, which is always captured by labor under Democratic administrations and by management under Republican rule.²⁶⁴ Farnsworth adds that because a “two-term President may reflect a single national mood . . . there may be value in a court that cannot be remade by one such gust.”²⁶⁵

As a practical matter, however, Supreme Court capture would be extremely difficult to accomplish. First, members of either political party represent a diversity of viewpoints on judicial philosophy. For example, both Presidents and Justices range from extreme to moderate in their viewpoints, and sometimes moderates cannot be thought of as Democrats or Republicans as we label them.²⁶⁶ The six Republican appointees on the current Supreme Court certainly do not vote as a bloc any more than Democrat Byron White voted in lock-step with Democrat Thurgood Marshall. Indeed, the most left-wing and most right-wing members of the current Court (Justices Stevens and Thomas)²⁶⁷ were both appointed by Republicans. That some of our most liberal Justices were appointed by surprised Republican

262. Admittedly, this entire discussion is simplistic in that it assumes that if a Democrat wins the Presidency, then the selected Justice will properly be thought of as a Democrat, or a liberal, during his tenure on the Court. This assumption has proven wrong in reality. See *infra* notes 266–69 and accompanying text.

263. Farnsworth, *supra* note 21, at 416, 435.

264. Conversation between Steven Calabresi, George C. Dix Professor of Law, Northwestern University, and Charles Fried, Beneficial Professor of Law, Harvard Law School (fall 2003).

265. Farnsworth, *supra* note 21, at 416.

266. Justice Kennedy and Justice O’Connor serve as two recent examples of this fact as do Justices Powell and White.

267. See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 131 (2005).

Presidents²⁶⁸ and some of our more conservative Justices were appointed by surprised Democrats²⁶⁹ makes Supreme Court capture an unlikely result, regardless of the tenure term.

Second, giving a two-term President four seats on the Court should not bother traditionalists like Farnsworth. From the time that the Court was fixed at nine Justices in 1869 until 1980, every President who served two full terms except Wilson was able to appoint at least four Justices: Presidents Grant (four), Cleveland (four), Franklin Roosevelt (eight, with five in his first two terms), and Eisenhower (five).²⁷⁰ Indeed, five Presidents who served less than two full terms got at least four appointments: Harrison (four), Taft (five), Harding (four), Truman (four), and Nixon (four). Wilson got three appointments, as did Hoover and Theodore Roosevelt (as well as Ronald Reagan after the temporal meaning of life tenure had changed). If our term limit proposal had been in force from 1869 through 1980, it would have enabled Wilson to get his fourth slot, but its primary effect on capture would have been to *reduce* the number of Presidents who got to choose four or five Justices though they served as President less than two full terms.

Third, with the gradual change that staggered terms would encourage, we should expect less violent lurches to the left or to the right of the kind that we have experienced since the 1930s. Any capture that did occur would tend to be mild and temporary. For example, the longest that one party has held the White House in the last sixty years is the twelve-year period from 1981 to 1993 when it was held by the Republicans. Some commentators worried about our proposal imagine a Court with four Reagan appointees and two by George H.W. Bush. But remember that such a Court should have had two Carter appointees as well, and if the elder President Bush's first appointment remained Justice Souter, he might well have replaced Justice Rehnquist when he would have stepped down in

268. The classic example is Chief Justice Earl Warren, whose liberal activism that changed the Court forever resulted from the appointment by conservative President Dwight Eisenhower. Eisenhower later remarked that appointing Warren to the Court was among his biggest mistakes as President. See ABRAHAM, *supra* note 33, at 192–97.

269. Perhaps the best example from recent history, though not as extreme as Eisenhower's appointment of Chief Justice Warren, *see id.*, is that Democratic President John F. Kennedy appointed Justice Byron White, who ended up being far more conservative (particularly on civil liberty and criminal procedure issues) than Kennedy expected. *Id.* at 210–11.

270. See Members of the Supreme Court of the United States, *supra* note 66.

1989. Thus, even at the height of Republican influence in the brief window between 1991 and 1993, the Court might plausibly have had Justices Stevens, Souter, and two Carter appointees on the left, Justices O'Connor and Kennedy in the middle, Justices Scalia and Thomas on the right, and another Reagan appointee in the middle or on the right. Instead of Justices Blackmun and White, we should have had two Carter appointees and instead of Rehnquist, we might have had a Reagan appointee like O'Connor, Kennedy, or Scalia. In short, at the height of possible Republican capture, the likeliest of many possible 1991 to 1993 Courts might well have been to the left of the one that we in fact had in 1993. And the probable stability of the Court under our proposal is also suggested by considering the likely effect of adding four Clinton appointees starting in 1993. The Clinton Justices might not have shifted the Court much to the left because the first three should have been replacing Stevens and the two Carter appointees, and the last would have replaced O'Connor. The point of this counterfactual scenario is not to pretend that we know what the world would have been like (we don't), but simply to suggest that the sudden swings that can be imagined in capture scenarios would have been unlikely to have occurred in our last period of maximum capture by one party.

In addition to these practical difficulties of Supreme Court capture, the political check of Senate confirmation can, and often does, prevent a party from capturing the Court. While it is not uncommon for one of the two major political parties to prevail in consecutive presidential elections,²⁷¹ since the election of President Nixon nearly forty years ago, it has been relatively rare for a President and the Senate to be controlled by the same party for more than two to four years.²⁷² The Senate, when controlled by the party opposite the President, can use its constitutional role in confirming Justices to ensure that a President will appoint moderate individuals.²⁷³ For example, during the twenty years of Democratic rule when Presidents Franklin Roosevelt and Harry Truman were in office, of the twelve ap-

271. Indeed, it appears that political parties have tended to win two to four consecutive elections at a time. See ABRAHAM, *supra* note 33, at 377–81.

272. See L. David Roper, Party Control of U.S. Government, <http://arts.bev.net/roperldavid/politics/PartyControl.htm> (last visited Mar. 19, 2006).

273. U.S. CONST. art. II, § 2 (“[The President] shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint . . . Judges of the supreme Court . . .”) (emphasis added).

pointments they made, one seat went to an Independent (Frankfurter) and two seats went to Republicans (Stone and Burton).²⁷⁴ Moreover, even some of the Democrats that Roosevelt and Truman appointed were quite conservative, such as Justice Reed and Chief Justice Vinson.²⁷⁵ Thus, even in an era in which one party ruled the White House for twenty years and the Senate for sixteen of those years, that political party was not able to pack the Court completely with Justices sharing its views, in large part because of the political checks of public opinion and Senate confirmation. A Senate controlled by the party opposite to that of a President will tend to mitigate the influence of a Presidency long controlled by one party and will make Supreme Court capture much less likely.

Moreover, even to the extent that our proposed system permits a party to “capture” the Supreme Court, the current system of life tenure permits precisely the same result. For example, during the twenty years of Democratic rule between 1933 and 1953, Presidents Franklin Roosevelt and Harry Truman were able to appoint a total of twelve Justices.²⁷⁶ This provided a perfect opportunity to capture the Court, a capture that was realized as to economic issues but not as to judicial protections of civil liberties. Additional examples abound: from 1829 to 1841, two Democratic Presidents (Jackson and Van Buren) appointed eight Justices;²⁷⁷ from 1861 to 1885, five Republican Presidents (Lincoln, Grant, Hayes, Garfield, and Arthur) appointed fourteen Justices;²⁷⁸ from 1897 to 1913, three Republican Presidents (McKinley, Theodore Roosevelt, and Taft) appointed nine Justices;²⁷⁹ and, most recently, from 1969 to 1993, four Republican Presidents (Nixon, Ford, Reagan, and George H.W. Bush) were also able to appoint ten Justices.²⁸⁰ Therefore, while our proposed term limit might make it slightly more likely that capture of the Court would arise, since our proposal leads to vacancies at reliable two-year intervals, the fact is that, even under the current system of life tenure, Supreme Court

274. See ABRAHAM, *supra* note 33, at 380.

275. *See id.*

276. *See id.*

277. *See id.* at 378.

278. *See id.* at 378–79.

279. *See id.* at 379.

280. *See id.* at 381.

capture is always a real possibility.²⁸¹ The primary effect of our proposal on capture should be to make it less intense and less persistent. Thus, we do not believe our proposal would make Supreme Court capture a substantially more serious problem than is presently the case. This is so in part because our proposal has the Burkean feature that it simply restores the practice of Justices serving for less than twenty years which prevailed between 1789 and 1970—a practice we have departed from only recently.

Nevertheless, one overriding goal of our proposal is to make the Supreme Court somewhat more reflective of the popular understanding of the Constitution than is presently the case.²⁸² If a party manages to “capture” the popular will for consecutive elections with its vision of constitutional law, then that party will best represent the popular understanding of the Constitution’s text and original meaning; it is only proper that the Supreme Court reflect that understanding. By tying the makeup of the Court more closely to presidential elections, we will allow the people to select (albeit indirectly) the kind of Justices they want on the Court, given the prevailing public understanding of the Constitution’s text and original meaning. If the public becomes dissatisfied with the Court, then an eighteen-year term would permit the public to elect a new President who could initiate change on the Court with the next two appointments. Thus, our proposal causes the Supreme Court’s judicial philosophy and understanding of constitutional meaning to reflect more truly that of the public’s judicial philosophy and understanding of constitutional meaning than is currently the case. We emphatically believe this would be both a good thing and a return to the practice that prevailed for most of American history.

A third objection that might be raised against our proposed constitutional amendment is that imposing a limit on the tenure of Supreme Court Justices would force them to become too activist. Justice Kennedy, responding to a Judiciary Committee questionnaire during his confirmation process, wrote, “Life

281. Significantly, these examples show that even when parties win consecutive elections, and consequently appoint several Justices, it still does not necessarily lead to a captured Court. For example, although Presidents Nixon through Bush appointed ten Justices, *see id.*, only a moderately conservative Court resulted. This historical evidence strengthens the earlier points about the checking power of Senate confirmation and the difficulty of appointing like-minded Justices.

282. *See supra* Part II.D.1 and text accompanying notes 214–20.

tenure is in part a constitutional mandate to the federal judiciary to proceed with caution, to avoid reaching issues not necessary to the resolution of the suit at hand, and to defer to the political process."²⁸³ Eliminating life tenure, one might argue, would endanger the virtue of patience that life tenure affords a Supreme Court Justice. Individuals with a limited opportunity period in which to affect the law might overreach in important cases and actively seek out opportunities to change doctrine. Alternatively, Justices serving their last years in office might face a final-period incentive to go out with a splash, knowing that in a short time they might no longer have to work and live with their current Supreme Court colleagues.

Any proposal leading to such judicial activism would undermine one of the chief advantages of an independent (and life-tenured) Supreme Court. Indeed, some of the more radical term limit proposals would more predictably lead to such problems. For example, under a term ranging from one to five years as proposed by Judge Silberman²⁸⁴ and Professors McGinnis²⁸⁵ and Prakash,²⁸⁶ Justices would likely feel pressure to accomplish a great deal in a very short amount of time.²⁸⁷ Under an eighteen-year term limit, however, no such activism should result, for such a period is sufficiently long that any individual Justice ought not to feel hurried in making his impact on the law. Under our proposed term, Justices would have the luxury,

283. Nadine Cohodas, *Kennedy Finds Bork an Easy Act to Follow*, 45 CONG. Q. WKLY. REP. 2989, 2989 (1987).

284. See Silberman, *supra* note 16, at 687 (proposing a five-year term limit).

285. See McGinnis, *supra* note 16, at 541 (proposing a term limit of six months to one year).

286. See Prakash, *supra* note 16, at 568 (proposing a term limit of three, four, or more years).

287. In the term limit proposals made by Silberman and McGinnis, where the Justices would be designated to lower federal courts following their service on the Court, there might be less reason to worry about such judicial activism resulting from short terms. See McGinnis, *supra* note 16, at 543–44. Yet, contrary to McGinnis's reassurances that "[n]ew Justices have typically behaved for their first few years much as they did as lower court judges," *id.* at 544, the fact that the proposed terms are so short makes it inevitable that there is a larger risk of judicial activism than if a term were longer, such as our eighteen-year term.

Those who believe that very short terms on the Court and the promise of either becoming a lower court judge following that short period or being subject to congressional removal would cause Justices to act in a more restrained manner and with a greater sense of duty to the Constitution may object that we have not gone far enough in limiting the tenure of Justices. They might argue that our proposal preserves the current incentive structure for Justices to act on personal motives instead of their sense of duty to the Constitution.

in Justice Kennedy's words, to "proceed with caution" and "defer to the political process."²⁸⁸

Moreover, it is hard to believe that final-period problems would be more severe under our proposal than under the current system, in which old, life-tenured Justices know that retirement is just around the bend. Surely, on the current Court, Justice Stevens knows that he is in the final period of his tenure. Yet no one suggests his voting behavior has been influenced by a final-period problem. Nor did Chief Justice Rehnquist's and Justice O'Connor's behavior change during their last years on the Court, when they each knew they faced a final-period problem. We do not see why such a final-period problem would be any more likely under our system of fixed eighteen-year terms. Except for those Justices who die suddenly and unexpectedly like Justice Robert Jackson, there will be a final-period problem under any system. Therefore, the current system of life tenure poses virtually the same risk of final-period problems for each Justice as would our proposed system of eighteen-year term limits.

A fourth objection that could be made against our term limits proposal is its potential to erode the prestige of the Court by producing constant turnover. A system of staggered term limits, however, would in no way erode the prestige associated with the job of being a Supreme Court Justice. Significantly, each Justice's term would still be eighteen years long, which is ample time for Justices to become known individually and to acquire prestige. Nor would the Justices suffer a loss of prestige from performing a less weighty task: the immense powers and responsibilities of the Court's members would remain unchanged from what they are now. At most, the public's esteem and respect might be shifted from individual Justices and onto the Supreme Court as an institution—a very positive development in our view.

A fifth objection that might be raised against our proposal is that by making the Court more obviously responsive to public opinion, our amendment would cause the public to think of the Court as being even more of a policymaking body and even less a body restrained by law than is presently the case. Our proposal could thus be faulted on the ground that it would undermine the textual and historical constraints that ought to bind the Court by making everyone think of the Court more as

288. Cohodas, *supra* note 283, at 2989.

being an indirectly elected, political body. As Professor Farnsworth puts it, our eighteen-year term proposal “may cause Justices to think of themselves as political officeholders in a more traditional way than they now do.”²⁸⁹ This is a very substantial objection, and it is one that gives us pause. Happily, we think there are a number of responses that can be made to this point.

First, our amendment would end the current distasteful process whereby Justices strategically time their departures depending on which party controls the White House and the Senate when they retire. This process causes informed elites to view the Justices as being very political creatures, and it surely breeds cynicism about whether the Justices are currently applying the law or are simply making it up. We think getting rid of the strategic timing of retirements would do a lot to encourage both the public and the Justices themselves to think of the Court as being an ongoing legal institution. Justices might be restrained in what they do by the knowledge that Justices appointed by the opposing political party could soon regain a majority on the Court and overrule any activist decisions that a current majority might have the votes to impose.

Second, we think the American public is now more committed than are lawyerly elites to the notion that constitutional cases should be decided based on text and history. We thus think that augmenting public control over the Court will lead to more decisions grounded in text and history than are arrived at by life-tenured lawyers schooled in legal realism or post-modernism. The American public has a more old-fashioned belief in law as a constraining force than do lawyerly elites. It is for this very reason that we consider it so desirable to empower the American public relative to those lawyerly elites.

Professor Farnsworth challenges this idea and, citing Richard Posner, he argues that “the popular demand for originalism is weak.”²⁹⁰ We disagree. We think the public has consistently voted since 1968 for presidential candidates who have promised to appoint Supreme Court Justices who would interpret the law rather than making it up. Even the Democrats who have won the Presidency since 1968 (Jimmy Carter and Bill Clinton) were from the moderate wings of the Democratic party, and the two Democrats appointed to the Court since

289. Farnsworth, *supra* note 21, at 438.

290. *Id.* at 431 (citing RICHARD A. POSNER, *OVERCOMING LAW* 253–55 (1995)); see also Farnsworth, *supra* note 250, at 885–89.

1968 are well to the right of Earl Warren or William Brennan. We think the public, while it is not very well informed about what outcomes originalism leads to, is still more originalist than are members of the elite lawyer class that under a system of life tenure dominates the Supreme Court, which is why Supreme Court opinions claim to follow text and precedent rather than claiming to follow Rawls, Nozick, Dworkin, Ackerman, or Tribe. The public may be induced, as it was in the Bork confirmation, into opposing an occasional originalist nominee. (Even so, it should be noted that in the Thomas, Roberts, and Alito confirmation fights, public opinion supported Thomas's, Roberts's, and Alito's appointments.) Overall, however, we think the public is more supportive of text and history in constitutional interpretation than are elite realist or post-modernist lawyers. We thus disagree with Farnsworth and Posner that popular support for originalism is weak.

Finally, we note again that the system our amendment would create of vacancies opening up on the Supreme Court once every two years is merely a return to the system that prevailed between 1789 and 1970. Ours, then, is a conservative reform—a restoration, if you will, of the traditional American status quo. What is revolutionary is for the nine-member Court to go for eleven years without a single vacancy opening up on the Supreme Court and for the Justices to stay on that Court for twenty-six years on average instead of fifteen years. Our amendment, like the amendment restoring the two-term limit on Presidents, is a return to the way things used to be.

A sixth objection that might be raised to our proposal is that it could lead to strategic behavior by senators who would know that additional vacancies on the Court were going to open up in two and four years. Imagine, hypothetically, that the Court has five Republican- and four Democrat-leaning Justices and that one of the Republicans is scheduled to step down in the third year of the presidency of an unpopular Republican President. Imagine too that the next two seats to come open are held by Democrats and so, even if the Democrats were to win the next presidential election and get to fill those two seats, the Court would remain five-to-four Republican. Under these circumstances, a Democrat-controlled Senate might refuse to confirm *any* Republican nominee put forward in the third year of an unpopular Republican President's term. This would hold the crucial fifth swing seat open until after the next presidential election, allowing Democrats to gain control of the Court.

In response to this concern, it might be noted first that a similar incentive exists now for senators to hold seats open and for this reason it is widely assumed that any Supreme Court seat that opens up in a presidential election year will be unfillable because of filibuster threats. Our proposed amendment then does not make it any more likely than is currently the case that senators would block a President from filling a Supreme Court seat in the third year of his term. Second, under the hypothetical constructed above, where Democrats control the Senate and are clearly going to recapture the White House in two years, it may be arguably appropriate that the Supreme Court seat in question ought to go to a Democrat or at least to a Democrat who is also acceptable to the unpopular incumbent Republican President. We believe that in these situations public opinion will force the President and the Senate to arrive at a reasonable compromise, just as public opinion forced Senate Democrats in 1988 to accept President Reagan's nomination of "moderate" Justice Anthony Kennedy, his third nominee for that seat, rather than waiting for the 1988 presidential elections and hoping to claim the seat outright for themselves.

Undoubtedly, there are additional objections to our proposal that we have failed to address. But those who would object should remember that our amendment merely restores American practice with respect to Supreme Court vacancies to what it was between 1789 and 1970.²⁹¹ Quite simply, until now, the system of life tenure has been retained mostly by inertia; the affirmative defenses of life tenure, and the objections to term limits for Supreme Court Justices, have not been thoroughly made. Our hope is that making a strong case for abolishing life tenure and replacing it with eighteen-year term limits will put the burden on the proponents of life tenure to make a reasoned case for preserving the current system.²⁹²

291. There are a number of objections we have not taken up in this subsection that are addressed in other sections of the Article. For example, to the criticism that our proposal might be unfair to current Justices, we have stated that our proposal would be prospective only. *See supra* text accompanying note 179. Also, to the argument that our proposal might not be feasible, we argue below that we recognize the difficulty in passing a constitutional amendment and therefore consider alternative ways of imposing term limits. *See infra* Part IV.A–B. At the same time, by making our proposal relatively modest, we believe we have presented a term limits amendment that can garner widespread support, thereby making even a constitutional amendment more likely.

292. *See* Monaghan, *supra* note 16, at 1212 (“[T]he burden should be on those who favor the continuation of the present arrangement to come forth with their argument.”).

III. ALTERNATIVE MEANS OF SOLVING THE TENURE PROBLEM AND THEIR DRAWBACKS

Other methods for solving the increasing tenure problem exist: methods that might be viewed as less drastic than the constitutional amendment we have proposed here. The first of these solutions is the imposition of term limits by statute. At first glance, this appears to be a viable option but upon further review, it must be seen as being unconstitutional and undesirable. The second type of solution would impose term limits through an informal process—by Senate-imposed limits through pledges obtained during confirmation hearings, by Court-imposed limits through the adoption of internal rules, or by Justice-imposed limits through tradition—all of which suffer from large drawbacks and lack enforceability. We address each of these solutions in turn.

A. *Imposing Term Limits by Statute*

In light of the great difficulty of passing an amendment, some have asked whether Supreme Court term limits could instead be created by statute. Here we consider two statutory proposals: one of our own devising and one by Professors Paul Carrington and Roger Cramton. Because we conclude both are unconstitutional, we believe instituting term limits will require a constitutional amendment, as we have proposed above.

1. *The Calabresi-Lindgren Proposal*

The Calabresi-Lindgren statutory proposal essentially provides for the same kind of term limits as would be accomplished by our constitutional amendment. The statute is carefully tailored, however, in the ultimately vain hope of avoiding constitutional problems.²⁹³ Our proposed statute would provide, first, that the President would appoint an individual to a vacancy on one of the lower federal courts,²⁹⁴ where, as Article III dictates, that person must enjoy life tenure.²⁹⁵ Then, by a

293. For purposes of illustrating how our statute would work, we assume that the Senate would confirm the President's nomination.

294. We suggest that Supreme Court nominees not already on the lower federal courts would be appointed to a federal circuit court, since this would make the later re-designation simpler.

295. See U.S. CONST. art. III, § 1. Of course, if the President were appointing to the Court an individual who was already a federal judge, then this first step might be unnecessary.

separate act of presidential nomination and senatorial confirmation, that life-tenured lower federal court judge would be “designated”²⁹⁶ to serve on the Supreme Court for a term dictated by statute to last for eighteen years.²⁹⁷ At the end of the eighteen years, the statutory designation of the lower federal court judge to sit on the Supreme Court would expire, ending the Justice’s tenure on the Court, and returning him to the federal circuit court or district court bench for life.²⁹⁸ Thus, the individual would always enjoy life tenure (subject to impeachment) as a member of the federal judiciary, but he would serve on the Supreme Court for only eighteen years. In constitutional terms, the judge would at all times “hold [his] Office[] during good Behaviour” on “the supreme and inferior Courts.”²⁹⁹ As Professor Vikram Amar writes, “The Justices would be federal judges with life tenure—but not all of that tenure would be served on the Supreme Court.”³⁰⁰

This statutory proposal strongly resembles two judicial practices our country has permitted, one of which still exists. The first is the early practice of circuit riding, under which Justices would sit by statutory designation on the lower federal courts in addition to fulfilling duties as Supreme Court Justices.³⁰¹ In effect, an individual was implicitly appointed by the President and served simultaneously as both an inferior federal judge and as a Supreme Court Justice. Even though the Constitution arguably contemplates that these two positions would be sepa-

296. By “designate,” we do not mean to suggest that this would involve a different process than the typical appointment process. *See* U.S. CONST. art. II, § 2 (giving the President the power to appoint Supreme Court Justices, subject to Senate confirmation). The President would nominate, and “by and with the Advice and Consent of the Senate,” *id.*, would appoint the judge as a Justice. We use the term “designate” merely because it helps to conceptualize the process in the same way that circuit riding and sitting by designation work.

297. Although the process would technically involve two confirmation processes—one for the individual to become a life-tenured federal judge, and another for the individual to become a Justice—we believe that an informal arrangement can easily be struck between Presidents and Senates to hold one hearing for both purposes.

298. The statute would thus operate like the current provision for the position of chief judge on each individual circuit. According to circuit rules or customs, a particular judge on that circuit is named to become chief judge. Following her years of service as chief judge, she becomes a simple judge again, as she was before.

299. U.S. CONST. art. III, § 1.

300. Amar & Amar, *supra* note 89.

301. *See generally* Glick, *supra* note 34.

rate,³⁰² this practice is a historical antecedent to the Calabresi-Lindgren statutory proposal, under which individuals would serve on both courts as if the positions were interchangeable. “[O]ur early traditions suggest that the inferior courts and the Supreme Court did not have to possess completely separate personnel.”³⁰³

Second, we currently allow active lower federal court judges, as well as retired Justices and senior lower court judges, to sit by designation on other lower federal courts. This “sitting by designation” system takes several forms, in each of which the judge or Justice is designated to a lower court by its chief judge (or, in the case of retired judges, by the Chief Justice). Active circuit court judges and district court judges can be designated to serve on a lower federal court;³⁰⁴ active or retired Supreme Court Justices likewise may sit on circuit courts or district courts.³⁰⁵ Senior circuit court judges are authorized to sit on panels of sister circuits and on district courts by application of the chief judge of that court to the Chief Justice of the Supreme Court.³⁰⁶ Moreover, senior district court judges are permitted to sit on circuit court panels anywhere in the country through the same process.³⁰⁷ In all of these arrangements, the statutory power to “designate” a judge to sit temporarily on a court to which he was not commissioned belongs to the chief judge of the respective circuit or district or to the Chief Justice of the Supreme Court.³⁰⁸

Importantly, as with circuit riding, this practice of sitting by designation permits a Justice to serve on an inferior court and decide cases, even though she is never actually commissioned or appointed to that court. Similarly, it permits active and senior judges of circuit and district courts to serve on other circuits and on the district courts without an additional commission or appointment. Finally, it even authorizes federal district court judges to sit at the circuit court level by designation, despite their not having been appointed to that higher appellate court.

302. See, e.g., U.S. CONST. art. III, § 1 (“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.”) (emphasis added).

303. McGinnis, *supra* note 16, at 545.

304. See 28 U.S.C. §§ 291(b), 292(a) (2000).

305. See *id.* § 294(a), (c).

306. See *id.* § 294(c)–(d).

307. See *id.*

308. See *id.* §§ 291(b), 292(a), 294(a), (c)–(d).

This custom of sitting by designation, in its different forms, therefore is an additional instance in which Congress treats the Supreme Court and the various inferior courts interchangeably, apparently without undermining the Constitution.³⁰⁹

The Calabresi-Lindgren proposal for Supreme Court statutory term limits draws on these historical precedents for authority. Under our proposal, lower federal court judges would “ride” temporarily for eighteen years on the Supreme Court, in exactly inverse fashion to the way Supreme Court Justices originally rode on the circuit courts. Moreover, the act of designating a lower court judge to ride on the Supreme Court for eighteen years would be by a separate act of presidential nomination and senatorial confirmation instead of by the order of a chief judge or the Chief Justice. If circuit riding was constitutional, as the first Congress thought, and as the Supreme Court held in *Stuart v. Laird*,³¹⁰ then Supreme Court riding for an eighteen-year period of designation ought to be constitutional as well.

2. *The Carrington-Cramton Proposal*

Under the statutory proposal put forward by Professors Paul Carrington and Roger Cramton, the Court’s membership would be constitutionally fixed at nine Justices, and one new Justice would be appointed in each two-year session of Congress.³¹¹ At any given time, the Supreme Court would consist of the nine most junior commissioned Justices.³¹² Other, more senior Justices would be eligible to sit by designation on the lower federal courts.³¹³ Those senior Justices could also be called back to the Court if one of the nine junior Justices were recused or during any period when the Senate failed to fill a vacancy on

309. We do not address at length in this Article the serious possibility that the arrangements for sitting by designation and circuit riding are unconstitutional violations of the Appointments Clause under its original meaning. Both practices are well established in our constitutional system, and although circuit riding is no longer used, the reasons for its termination were practical, not constitutional. See generally Glick, *supra* note 34. Specifically, the physical and practical difficulties in riding circuit and its detrimental impact on the ability to attract the best-qualified candidates to the Court, coupled by the geographic expansion in the United States, caused Congress to create separate inferior courts that do not require Supreme Court Justices to sit by designation. See *id.*

310. 5 U.S. (1 Cranch) 299 (1803).

311. Carrington & Cramton, *supra* note 24, at 471.

312. *Id.*

313. *Id.*

the Court during a session of Congress.³¹⁴ Since a session of Congress is two years, Congress and the President would have it in their power to determine precisely when during that period a particular Justice would be replaced by a newly appointed Justice—a significant weakness in this proposal, both practically and constitutionally.

As with our statutory proposal, the Carrington-Cramton version is bolstered by the constitutional tradition of circuit riding whereby membership on different Article III courts could be exercised by someone commissioned to sit only on the Supreme Court. The main difference between the Carrington-Cramton proposal and circuit riding is that, under the former, Justices would spend their first eighteen years on the Supreme Court and any other time beyond that sitting by designation on the lower federal courts.³¹⁵

3. *The Constitutionality of the Two Statutory Proposals*

One major objection to both our proposal and the Carrington-Cramton proposal is that the text of the Appointments Clause specifically contemplates a separate office of Supreme Court Justice.³¹⁶ Thus the Clause provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”³¹⁷ Neither the Calabresi-Lindgren nor the Carrington-Cramton proposal provides life tenure as an active duty Supreme Court Justice for those appointed to the Supreme Court. Given that the Appointments Clause plainly contemplates a separate office of judge of the Supreme Court, it is hard to see how that office could constitutionally be filled for only eighteen years and not for life. Furthermore, the Carrington-Cramton proposal contemplates dual service of Supreme Court Justices on the Supreme Court and on the lower federal courts, with the first eighteen years being served on the Supreme Court and any remaining time being on the lower federal courts. In this respect, the Carrington-Cramton proposal contemplates com-

314. *Id.*

315. *Id.*

316. U.S. CONST. art. III, § 2.

317. *Id.*

missioned Supreme Court Justices having duties on both the Supreme and inferior federal courts, which is arguably inconsistent with the constitutional requirement that there be a separate and distinct office of Supreme Court judge.

Under the U.S. Supreme Court's Appointments Clause case law, it is permissible for Congress to annex new duties to an existing office so long as those duties are germane to the duties of the existing office. In *Weiss v. United States*,³¹⁸ the Court considered the question whether military judges could be picked from the ranks of commissioned officers of the armed services without those military judges being separately nominated by the President and confirmed by the Senate to their positions as military judges.³¹⁹ The Court rightly concluded that it had been settled by history and practice that the duty of serving as a military judge and meting out military discipline was germane to the ordinary and accepted duties of all commissioned military officers.³²⁰ Therefore, the Court concluded it was constitutional for Congress to allow judge advocates general to appoint commissioned officers to be military judges even without a separate act of presidential nomination and senatorial confirmation.

Applying the *Weiss* germaneness analysis to the Calabresi-Lindgren statutory proposal, the issue raised would be whether it is germane to the duties of a lower federal court judge to take time out from serving on their lower federal court for eighteen years to be a Supreme Court Justice. Quite simply, this seems preposterous. An eighteen-year total sabbatical from one's regular duties as a lower federal court judge is hardly germane to those duties in the way that occasionally sitting by designation on other lower courts might be. The same criticism applies to the Carrington-Cramton proposal as well. Under their proposal, after eighteen years Supreme Court Justices will do little work on the Supreme Court except rulemaking and (for the most recently retired Justice) occasionally filling in for recused Justices. Their duties would consist almost entirely of sitting on the lower federal courts. Such lower federal court service—done to the exclusion of Supreme Court work—hardly seems to us to be germane to the job of being a Supreme Court Justice. Thus, both the Calabresi-Lindgren and the Carrington-Cramton

318. 510 U.S. 163 (1994).

319. *Id.* at 173–76.

320. *Id.* at 176.

statutory proposals for instituting an eighteen-year term limit fail the Appointments Clause test of *Weiss v. United States*. Both statutes unconstitutionally attach nongermane duties to an office rendering that officer the holder of two offices rather than one, thus violating the Appointments Clause.

Defenders of the two statutes might respond, as previously noted,³²¹ that the statutes in question would require an act of presidential nomination and senatorial confirmation before a judge could come to sit by designation or otherwise on the Supreme Court. In this way, the statutory proposals preserve the President's power to appoint any judges or Justices to the federal judiciary and to the Supreme Court. In fact, because the Calabresi-Lindgren statutory proposal preserves the President's appointment power even for designations, ours is arguably *more* constitutional than the prevailing sitting-by-designation systems, whereby the chief judges of the various circuits (and the Chief Justice of the Supreme Court) hold the power to designate.³²² Thus, the two statutory proposals arguably pose no more of a threat to the President's appointment power than was posed by the ancient practice of Justices commissioned to sit on the Supreme Court being required as well to ride circuit and sit as circuit judges—a post to which they had not been commissioned.

It is a close question, but we believe that the best and most plausible reading of the Appointments Clause is that it does contemplate a separately commissioned office of Justice of the Supreme Court. We thus do not believe that someone who has been confirmed to a lower federal court judgeship can be authorized to sit by designation on the Supreme Court for eighteen years, since the duty of serving for eighteen years on the Supreme Court would not be germane to the job of being a lower federal court judge. If this were to happen, there would be no separately commissioned offices of Supreme Court Justice and lower court judge. This seems to us to be contrary to the situation the Appointments Clause presumes will prevail. Arguably, circuit riding, which involved appending some limited lower court duties to the job of being a Supreme Court Justice, still respected the mandate of the Appointments Clause that there be a separate office of Supreme Court Justice. More-

321. See *supra* notes 293–300 and accompanying text, and particularly *supra* note 296.

322. See *supra* note 308.

over, spending most of each year as a Supreme Court Justice and only a few months circuit riding arguably meant that some germane lower court duties had been attached to the job of being a Supreme Court Justice. Under a system of lower court judges riding on the Supreme Court, there would be no separate office of Supreme Court Justice and the lower court judge would take an eighteen-year complete sabbatical from his lower federal court judgeship. This can hardly be described as the addition of a germane additional duty. We are thus in the end unpersuaded that the circuit-riding precedent permits a practice of lower court judges sitting by designation on the Supreme Court.

Moreover, we are not completely persuaded, *Stuart v. Laird*³²³ notwithstanding, that circuit riding was itself constitutional as a matter of pure originalism. The question depends on whether the Justices' lower court duties were so extensive that they were not germane to the job of being a Supreme Court Justice. While we think that some limited lower court duties, like riding circuit for a month or two, might be germane to the job of being a Supreme Court Justice, the very onerous lower court duties imposed on Supreme Court Justices during our early constitutional history were arguably not germane and were a threat to judicial independence.³²⁴ It is not even clear that the ancient practice of chief judges designating judges commissioned on other courts to sit on their courts does not raise an Appointments Clause issue, although here, at least, the duties of occasionally sitting on courts other than the one to which a judge has been commissioned are germane. In any event, the constitutionality of judges sitting by designation is certainly established as a matter of practice.

On the other hand, many of the original Supreme Court Justices apparently thought circuit riding was unconstitutional because they had been appointed and commissioned to sit on the Supreme Court and not on the circuit courts. It has been suggested by Professor Bruce Ackerman that the Federalist Justices decided *Stuart v. Laird* the way they did more out of fear of the Jeffersonians who were then clearly in power, than because they agreed that circuit riding was constitutional.³²⁵ *Stu-*

323. 5 U.S. (1 Cranch) 299 (1803).

324. See Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386, 1392–99 (2006).

325. See BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 195–98* (2005).

art v. Laird upholds circuit riding by saying it was established as a matter of precedent when the First Congress provided for circuit riding in the Judiciary Act of 1789.³²⁶ This is not the same thing as saying that as an original matter circuit riding was constitutionally permissible. If circuit riding duties are constitutionally dubious as an original matter, then perhaps *Stuart v. Laird* ought not be extended to allow a new practice of lower federal court judges riding on the Supreme Court—a practice that unlike circuit riding would fly in the face of 217 years of contrary practice. Nor should we extrapolate from the dubious circuit riding precedent the notion that one can be assigned to spend one’s first eighteen years as a Supreme Court Justice sitting on the Supreme Court and any subsequent years sitting on the lower federal courts, as Carrington and Cramton would do. The circuit riding precedent suggests that Supreme Court Justices can in the same year have duties on both the Supreme and inferior federal courts. It does not necessarily suggest that one can further carve up a Justice’s total term and allocate the first eighteen years of it to Supreme Court business and the remainder to lower federal court cases. What Carrington and Cramton propose is an extension beyond circuit riding. If one thinks extensive and onerous circuit riding duties were constitutionally dubious as an original matter, as we do, one ought not to extend this dubious precedent to the new situation Carrington and Cramton contemplate.

At the end of the day, we think that originalists ought to find both the Calabresi-Lindgren and the Carrington-Cramton statutory proposals to be constitutionally problematic as violating the Appointments and Commission Clauses, which presume that the office of Supreme Court Justice is a separate and distinct office to which nongermane duties cannot be attached. Burkean constitutional law traditionalists ought to conclude that the precedent of circuit riding cannot be extended to allow Supreme Court riding because of 217 years of contrary practice wherein we have always assumed that the offices of Supreme Court Justice and lower court judge were separate and distinct offices. We conclude, therefore, that the best reading of the Appointments Clause is that it contemplates a separate office of Supreme Court Justice to which individuals must be appointed for life and not merely for eighteen years.

326. *Stuart*, 5 U.S. (1 Cranch) at 309.

This reading of the Appointments Clause is in our view bolstered by the Clause in Article I that provides that there shall be a Chief Justice of the United States who shall preside over Senate impeachment trials of the President.³²⁷ That Clause clearly contemplates a separate office of Chief Justice, much as the Appointments Clause contemplates a separate office of Justices of the Supreme Court. Put together, we think the most plausible reading of these two clauses—and the reading most in accord with 217 years of actual practice—is that the office of Supreme Court Justice is a separately commissioned office.

Just as important, the two statutory proposals could be challenged under the provision granting life tenure to members of the federal judiciary. Article III, Section 1 of the Constitution provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”³²⁸ There are two distinct readings of the language in this Clause. First, because of the phrase “both of” and because of the placement of “their,” the provision might require that “Judges” of the Supreme Court must have life tenure, as must “Judges” of the inferior courts. This reading, probably the more natural one, would dictate that the Supreme Court and the inferior courts are distinct entities, and therefore life tenure must be guaranteed to members of both courts.³²⁹ It would follow that limiting the tenure of “Judges” of the “supreme Court,” under both statutory proposals violates this provision even though it would grant life tenure to the former Justice as a judge of the “inferior” court.

A second plausible interpretation of the language would be that it simply requires that “Judges” at all levels (“both of the supreme and inferior Courts”) must enjoy life tenure,³³⁰ a proposition that does not at all mandate that life tenure on the Supreme Court and life tenure on the inferior courts be mutually exclusive. Under this interpretation, limiting an individual’s tenure on the Supreme Court would pass constitutional muster so long as that individual otherwise enjoyed life tenure on the federal bench (that is, on the “supreme and inferior Courts”). The statutory term limits proposals, which would limit the tenure of Supreme Court Justices while guaranteeing

327. U.S. CONST. art. I, § 3, cl. 6.

328. U.S. CONST. art. III, § 1.

329. See McGinnis, *supra* note 16, at 545 (noting that, although ambiguity exists, this interpretation is probably the more natural reading).

330. U.S. CONST. art. III, § 1.

life tenure as a federal judge, would thus be constitutionally valid.

The text of Article III, Section 1 (unlike that of the Appointments Clause) is ambiguous on whether it specifies a Supreme Court distinct from inferior courts.³³¹ It could be read to mean that life tenure must be guaranteed to Supreme Court Justices, as well as to lower federal judges, in distinct capacities. Or it could as easily be read to support the Carrington-Cramton interpretation that judges at all levels must enjoy life tenure. Under this latter reading, the text poses no special requirement that judges have life tenure on a particular court. In fact, had the Framers intended to ensure that all persons appointed to the Supreme Court have life tenure on that Court, and that all persons appointed to the inferior courts should have life tenure to those particular courts, they easily could have done so by providing that "The Judges, both of the supreme and inferior Courts, shall hold their respective Offices during good behaviour." Such a clarification would have shown conclusively that the first reading is correct. Yet the constitutional text as it now stands is ambiguous between these two interpretations since it also plausibly supports the Carrington-Cramton reading that life tenure is guaranteed to members of the federal judiciary in general.³³²

Despite the availability of alternative methods, the Appointments Clause and the Clause providing for the Chief Justice to preside at Senate impeachment trials of the President seem to us most plausibly to suggest that the office of being a Supreme Court Justice is a separate and distinct office to which nongermane lower federal court duties cannot be attached. Admittedly, this is a somewhat formalistic reading of these two Clauses in conjunction with the Good Behavior Clause, but separation of powers rules often rely on such formalism. Absent the Appointments Clause and the Chief Justice Presiding Clause, we might agree with Carrington and Cramton that the Good Behavior Clause standing alone is ambiguous, although even then we would argue that for 217 years we have acted as though the office of Supreme Court Justice was a separate office to which nongermane lower federal court duties cannot be

331. See McGinnis, *supra* note 16, at 545 ("The most natural reading may require (and the Framers certainly expected) judges to be appointed to a distinct Supreme Court, but the language is ambiguous.").

332. See Amar & Calabresi, *supra* note 1; see also Carrington & Cramton, *supra* note 24, at 471.

attached. Reading all of these clauses together, however, and knowing what the practice has been for 217 years, we are not persuaded that the Carrington-Cramton reading of the Good Behavior Clause is a permissible one. For that reason, we think both our statutory term limits proposal and the Carrington-Cramton statutory proposal are doomed.

Carrington and Cramton might nonetheless argue that their reading of the Good Behavior Clause is consistent with the purpose behind the life tenure provision—to preserve judicial independence³³³—by ensuring judges do not depend on the political branches for their tenure of office. To achieve this purpose, it is not at all necessary that life tenure be guaranteed for any particular court.³³⁴ Rather, judges need only be guaranteed that they may stay on the federal bench for life and that they will not face retaliation for their decisions by Congress, the President, or the public. Both statutory proposals would satisfy this purpose and would guarantee that judges have life tenure and that their terms on the Supreme Court are fixed by time.

The Appointments Clause and the Chief Justice Presiding Clause, however, both seem to contemplate a separate office of Supreme Court Justice—a problem unaddressed by this functionalist argument. The Carrington-Cramton proposal runs afoul of these two clauses, no matter what functional justifications might underlie it. Under a textualist approach to constitutional interpretation, the purposes underlying a constitutional provision cannot be allowed to trump the plain meaning of the constitutional text.³³⁵

Carrington and Cramton might also argue that their interpretation of the Good Behavior Clause providing for life tenure is supported by historical practice. The practices of circuit riding and sitting by designation are indeed important historical antecedents to both statutory term limits proposals.³³⁶

333. THE FEDERALIST NO. 78 (Alexander Hamilton), *supra* note 251, at 465.

334. Of course, one could easily argue that life tenure in appointment to a particular court is important, since Congress could otherwise punish judges for their decisions by demoting them to a lower court. We completely agree with this argument, which is why we believe that a fixed term is the only justifiable limit on the tenure of Justices (as opposed to retention elections, stronger removal powers, or renewable term limits). See *supra* Part III.A.1.

335. See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1184–85 (1989).

336. Indeed, the Calabresi-Lindgren statutory term limits proposal would be even better because it preserves the President's nomination power and the Senate's confirmation power, whereas the other practices permit (or once permitted,

[T]he early Supreme Court Justices who rode circuit sat as members of inferior courts and thus our early traditions suggest that the inferior courts and the Supreme Court did not have to possess completely separate personnel. Even today, retired Justices sometimes sit by designation on courts to which they were never appointed, as do many district and circuit judges.³³⁷

Indeed, historical practice demonstrates that the first interpretation, that life tenure on the “inferior and supreme Courts” must be treated as mutually exclusive, did not carry the day in 1789 when the Judiciary Act was passed by the First Congress.³³⁸ Rather, the established practices of circuit riding and sitting by designation could support the interpretation of Carrington and Cramton that life tenure must be preserved for members of the federal judiciary generally, without any distinction between the two courts. And this has been the prevailing view. Given the textual ambiguity of the Good Behavior Clause and the fact that the purpose of life tenure is satisfied by the statutory term limits proposals as effectively as by the current system of life tenure, this historical support should be an important factor for consideration.

The problem with this historical argument is, again, that it assumes that extensive and onerous circuit riding duties were constitutional, a point we are not convinced is correct, and, second, it assumes that if circuit riding is constitutional its mirror image—Supreme Court riding—must be constitutional as well. Alternatively, in the case of the Carrington-Cramton proposal, the historical argument presumes that, just because Congress could ask Justices to sit in the same year on both the Supreme and inferior federal courts, it could therefore carve up a Justice’s total tenure and allocate the first eighteen years of it solely to Supreme Court business and any time beyond eighteen years to lower court business.

All of this, however, seems to us to fly in the face of the Appointments Clause’s and the Chief Justice Presiding Clause’s presumption that the office of Supreme Court Justice is a separate and distinct office to which nongermane lower federal court duties may not be attached. We think this presumption has been sanctioned by 217 years of unbroken practice, which

in the case of circuit riding) sitting by designation with the approval of only the chief judge of the circuit courts.

337. McGinnis, *supra* note 16, at 545.

338. *See id.*

is why most people's first instinct is that statutorily imposed term limits on Supreme Court Justices are unconstitutional. In this case, we think most people's first instinct is also the conclusion that one ought to reach. The argument that the Good Behavior Clause does not contemplate separate offices for Supreme and inferior court federal judges is too clever by half.

4. *The Desirability of Imposing Term Limits by Statute*

Even if the two statutory proposals could pass constitutional muster, which we believe they cannot, the question remains whether it is desirable to institute a system of Supreme Court term limits by statute. The primary advantage of reforming life tenure through a statute, as opposed to a constitutional amendment, is that passing a statute is far easier than amending the Constitution. To pass an amendment, two-thirds of both Houses of Congress, or two-thirds of the states, would first have to propose the amendment.³³⁹ Then, three-fourths of the states would have to ratify it.³⁴⁰ Throughout history, excluding the Bill of Rights, only seventeen provisions have successfully made it through this process.³⁴¹ Moreover, many of the amendments that made it through the Article V process were the product of incredibly strong historical forces, as was the case with the Reconstruction Amendments,³⁴² or they were the result of historical incidents that exposed fundamental flaws in the original Constitution.³⁴³

There is, however, a key problem in the concept of establishing term limits through a statute, which is that term limits established by statute rather than by constitutional amendment are subject to greater manipulation by future Congresses:

If statutory Supreme Court riding had been adopted and had proved superior to our current system in curbing the Supreme Court's nationalizing tendencies, interest groups that generally benefit from eviscerating the restraints of federalism would have tried to amend the statute. Moreover,

339. See U.S. CONST. art. V.

340. See *id.*

341. See U.S. CONST. amends. XI–XXVII. This includes, of course, the two amendments on prohibition that cancel out. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

342. See U.S. CONST. amend. XIII (ratified 1865); U.S. CONST. amend. XIV (ratified 1868); U.S. CONST. amend. XV (ratified 1870).

343. See, e.g., U.S. CONST. amend. XXV (providing for presidential succession, the need for which was revealed after the assassination of President Kennedy). The Reconstruction Amendments would also fit in this category.

the President and a Congress of one party might have been tempted to create the position of Supreme Court Justice instead of Supreme Court rider to give more power to their prospective appointees.³⁴⁴

Thus, adopting a statutory term limits proposal runs the risk, as Professor Farnsworth points out, that interest groups, Congress, or the President might attempt to tamper with the statutory scheme of term limits in the future in order to achieve political gain.³⁴⁵ For example, if one party were to gain control over both the Presidency and Congress, they might manipulate the statute to permit their appointees to serve for longer than eighteen years or even for life, a result that would be particularly pernicious if the other party had abided by the statutory term limits during preceding years when they were in power. This risk of manipulation through the political process, which would not exist for a term limits constitutional amendment, greatly undermines the desirability of any effort to reform life tenure by statute. Of even greater concern is that, if Congress were to establish a precedent of being able to change the tenure of Justices and other federal judges by statute, Congress might become even more daring and later experiment with other independence-threatening forms of limits, perhaps even in substantive ways. For example, as Professor Redish suggests, interpreting the constitutional provision as Carrington and Cramton have suggested might permit Congress to pass a statute that allows it to demote a single Justice to the lower federal courts whenever it chooses.³⁴⁶ By sanctioning statutory alterations in the Justices' tenure, the argument continues, Congress could be empowered to undermine judicial independence in a disastrous way.

Carrington and Cramton might respond to this objection by claiming that there would be immense political pressures on Congress and the President (including the possible political check of the President on Congress, or vice versa) to make the theoretical possibility of abuse one that is unlikely to occur in practice. Moreover, Carrington and Cramton might contend that the statutory analysis conducted above reveals that the Court should find a term limits proposal to be constitutional

344. McGinnis, *supra* note 16, at 546.

345. See Farnsworth, *supra* note 21, at 432–34.

346. Conversation between Jeff Oldham and Professor Martin Redish, Louis and Harriet Ancel Professor of Law, Northwestern University School of Law (Oct. 16, 2002).

only if it preserves the core of judicial independence from political pressure, which is a fundamental requirement of Article III.³⁴⁷ Indeed, using the structural constitutional analysis of judicial independence that Professor Redish advocates, a term limits statute that enabled Congress to demote Justices for political reasons would violate more fundamental constitutional principles of independence than the Article III salary or tenure provisions.³⁴⁸ Carrington and Cramton might claim that their specific proposal protects the Court from political pressure at the same time as it modestly limits Justices' tenure. If Congress were to venture beyond this proposal and attempt to provide substantive limits on Justices' tenure, then the Court would be justified in striking down those efforts.

We think the manipulability of statutory term limits by future Congresses makes this a very dangerous constitutional road to go down. We are not persuaded that, once Congress has tampered with the life tenure of Supreme Court Justices by instituting eighteen-year terms, it might not be tempted to tamper with that independence further to manipulate the outcomes of particular cases. The tenure of Justices of the Supreme Court is not a matter that should be settled by Congress as a matter of good public policy; it is something that ought to be constitutionally fixed. Thus, even if the statutory term limits proposals were constitutional, which they are not, we believe it would be a bad idea as a matter of policy for Congress to start tinkering by statute with the tenure of Supreme Court Justices for the first time in American history.

The Carrington-Cramton statutory proposal suffers from an additional and very serious defect because it provides that if Congress does not fill a vacancy during a two year session of Congress, a senior Justice who would otherwise be unable to sit as an active Supreme Court Justice would again become an active member of the Court. Imagine a situation where a Justice in his eighteenth year about to be bumped into retirement is a Democrat. Now imagine that a Republican President was to try to fill the statutory vacancy with a Republican, but that President was faced with a Democratic Senate. The President would want to fill the vacancy right away to remove the Democratic Justice. The Democratic Senate, on the other hand, would want to wait until the very end of the session to fill the vacancy to

347. See *supra* notes 253–55 and accompanying text.

348. See Redish, *supra* note 111, at 677.

keep the Democratic Justice present and voting on the Supreme Court for a longer time. The Democratic Senate might even refuse to fill the vacancy altogether, thus keeping the eighteen year Democratic Justice on active Supreme Court duty beyond his supposed eighteen-year term. This is a statutory scheme rife with possibilities for abuse. For this reason alone, we would reject any such statute.

B. Imposing Term Limits through Informal Practice

Aside from constitutional amendments or statutory term limits proposals, a variety of informal options are available both to lawmakers and to the Justices themselves for reforming the system of life tenure. This Section focuses on ways in which the Senate, the Court, or the individual Justices might move a technically life-tenured Court toward a de facto system of term limits, eventually leading to a formal system of term limits.³⁴⁹

1. Senate-Imposed Limits Through Term Limit Pledges

The Senate could use its crucial constitutional role in the appointments process to push toward a system of term limits for the Supreme Court by “insist[ing] that all future [C]ourt nominees publicly agree to term limits, or risk nonconfirmation. Though such agreements would be legally unenforceable, [J]ustices could feel honor-bound to keep their word.”³⁵⁰

Like the recent movement toward term limits pledges for federal legislators³⁵¹ that has developed since *U.S. Term Limits, Inc. v. Thornton*,³⁵² in which the Court struck down state legislative attempts to set term limits on federal legislators,³⁵³ senators could require each nominee to agree to retire after eighteen years or after some other suitable term. Of course, such an agreement would be unenforceable, and there is no guarantee that a Justice would feel compelled to follow the pledge. Indeed, having made a term limits pledge has not deterred some legislators from continuing to run for Congress beyond their self-imposed limits.³⁵⁴ The most common justification for such

349. See Amar & Calabresi, *supra* note 1.

350. *Id.*

351. See generally Jonathan L. Entin, *Insubstantial Questions and Federal Jurisdiction: A Footnote to the Term-Limits Debate*, 2 NEV. L.J. 608 (2002).

352. 514 U.S. 779 (1995).

353. *Id.* at 837–38.

354. For example, Former Congressman J.C. Watts ran for re-election a third time despite a 1994 pledge to serve no more than three terms. See Republican

actions has been, in short, that if “the people” want the legislator to continue in office, then the term limits pledge has been drowned out by the voice of democracy.³⁵⁵ This justification for not abiding by the term limits pledge would not aid Justices, of course, since their continuance in office would not be a direct result of the will of “the people.” But a Justice’s failure to resign after the promised term could generate a public backlash leading eventually to a constitutional amendment establishing term limits.

This kind of term limits pledge “would not raise judicial independence or due process problems” that accompany the kinds of “promises” that nominated Justices are sometimes asked to make in Senate confirmations, like pledges to rule certain ways on particular issues.³⁵⁶ Unlike such substantive promises, term limits pledges are merely “a promise to resign on a fixed date, . . . comport[ing] with judicial integrity.”³⁵⁷

Notwithstanding these considerations, we do not favor term limit pledges. Any Justice who arrives on the Court having pledged to step down after a term of years will likely be viewed by the other members of the Supreme Court as having compromised a key bulwark of judicial independence. He would look so eager to serve on the Court that he was willing to undercut a standard practice of the Court, thereby increasing pressures on future nominees. If a Justice thinks it proper to step down after eighteen years, he may do so; what he probably should not do is appear to offer a promise to step down to gain a place on the Court. We think the other Justices would so disapprove of a new Justice having taken a term limit pledge that it could compromise that Justice’s ability to function in his job. Voluntary term limit pledges might be observed by some Justices and not by others, which would make a mockery of the whole idea of eighteen-year limited and staggered terms. For both of these reasons, we would encourage any Supreme Court nominee who was importuned to take a term limit pledge to decline to do so on judicial independence grounds.

Term Limits Debate and Poll, http://www.youdebate.com/DEBATES/term_limits_rep.HTM (last visited Apr. 7, 2006). Watts was re-elected in 2000, but decided not to run for a fifth term.

355. See Catherine Edwards, *The Promise of Term Limits*, INSIGHT, June 28, 1999, <http://www.termlimits.org/Research/1999articles/990628insight.html>.

356. Amar & Amar, *supra* note 89.

357. Amar & Calabresi, *supra* note 1.

2. *Limits Imposed Through Internal Court Rules*

The Supreme Court itself could play a role in deterring Justices from serving as long as possible on the Court and in moving us toward a system of de facto term limits. The Court holds powerful tools for moving us toward such a system, such as its internal court rules, or, more subtly, its ability to modify the seniority system: just as the House of Representatives adopted internal term limits in 1994 for some committee chairs.³⁵⁸ As Professors Akhil Amar and Calabresi observed, “perhaps the justices themselves might collectively codify retirement guidelines in court rules modifying the seniority system or creating an ethical norm of retirement at certain milestones.”³⁵⁹ The Court could thus adopt a retirement rule requiring Justices to step down after eighteen years of service on the Court. Though such internal rules would not be legally enforceable, the pressure on a Justice from his fellow Justices, as well as from the institution, could be a valuable method of limiting tenure. Moreover, the Court’s imposition of such limits on itself would be a highly desirable way of bringing about term limits for its Justices.

Another way for the Court itself to decrease the incentives for Justices to remain on the bench is to modify its seniority system.³⁶⁰ Currently, the most senior Justice in the majority decides which Justice will write the majority opinion.³⁶¹ Accordingly, the Chief Justice assigns the opinion whenever he finds himself in the majority; if the Chief Justice dissents, then the next most senior Justice assigns the majority opinion.³⁶² Rewarding the most senior Justices with priority in assigning opinions creates an incentive for Justices to remain on the Court for long periods and to a later age.³⁶³ By eliminating this seniority system, or modifying it in some regard, the Court can eliminate these incentives.³⁶⁴

358. This follows much along the lines of what the House of Representatives did in 1994 by accepting internal term limits for some committee chairs. See Kenneth J. Cooper, *House Changes Rules with Generally Strong Democratic Backing*, WASH. POST, Jan. 5, 1995, at A11.

359. Amar & Calabresi, *supra* note 1.

360. *See id.*

361. *See, e.g.*, J. Clark Kelso & Charles D. Kelso, *Statutory Interpretation: Four Theories in Disarray*, 53 SMU L. REV. 81, 92 n.55 (2000).

362. *See id.*

363. *See* Amar & Calabresi, *supra* note 1.

364. *See id.*

To be sure, appointing more senior Justices to assign decisions is logical, and abolishing the seniority system might seem too drastic. Alternatively, through its various political checks on the Court, Congress could play a positive role in persuading the Court to develop a system of term limits through its internal court rules. For example, "Congress could . . . restructure judicial salaries, pensions, office space and other perks to give future justices incentives" to step down after a set number of years.³⁶⁵ Giving a huge pension to any Supreme Court Justice who retired after his eighteenth year of service might well accomplish a de facto term limit. Or Congress could reduce the number of law clerks allowed each Justice, which, by increasing the Justice's personal responsibilities, might reduce the ability or willingness of a Justice to continue serving as late in age as they currently do.³⁶⁶ Likewise, by statutorily increasing the mandatory jurisdiction of the Court or otherwise adding to the Court's workload, Congress can reduce the incentives for Justices to remain on the Court as long as they currently do.³⁶⁷

Of course, a political war between Congress and the Court over these incentives is undesirable, and Congress must be cautious and deliberative in using these mechanisms as a way of encouraging the Court to move voluntarily toward a system of term limits. But these measures may be effective ways for Congress to encourage the Justices to move toward informal term limits. And, short of amending the Constitution, Court-imposed term limits on Justices, with or without congressional prodding, might be the most desirable method of reforming life tenure.

3. *Justice-Imposed Limits Through Voluntary Retirement*

In theory, at least, Supreme Court Justices themselves could individually lead the way toward a reform of life tenure, even without a formal Court-ordered arrangement. Conceivably, a group of Justices could try to start a tradition of retiring from the Court after a certain number of years, or at a set age, in the

365. *Id.*

366. E-mail discussion between William J. Stuntz, Professor of Law, Harvard Law School, and Akhil Reed Amar, Southmayd Professor of Law, Yale Law School (Aug. 9, 2002) (on file with authors).

367. *See* U.S. CONST. art. III. Congress may increase the workload of the Supreme Court in numerous ways through its power granted in Article III to establish lower courts. By eliminating or regulating lower courts, Congress could expand the caseload for the Supreme Court itself and increase pressure on the Justices.

hopes that institutional pressure could develop that would bear on all future Justices. Some federal courts of appeals, like the Second Circuit, do have an established norm that all judges on the court take senior status on the first day they are legally eligible to do so. Eventually, one might hope such a practice might lead to a custom of Justices resigning from the Court after a fixed number of years, or perhaps even at a certain age.³⁶⁸ After enough iterations of custom, such a practice might even be formalized by passage of a constitutional amendment much as the two-term tradition for Presidents was eventually formalized by constitutional amendment.³⁶⁹

But this solution has its own difficulties. Is it realistic or even desirable for one or two Justices to try to start a tradition of retiring from the Supreme Court after a set number of years? Probably not. Such Justices would face a major collective-action problem in trying to persuade their long-serving colleagues to follow their good example. Given the level of partisan hostility on the Supreme Court, and given the extent to which most recent Justices seem to have tried to practice strategic retirement, we believe urging a Justice to retire after a set term without regard to strategic considerations would be like unilateral disarmament during the Cold War. There is quite simply very little reason to hope that, if one Justice were to retire early, any other Justice currently on the Court would follow such a good example. In this respect, the Supreme Court is fundamentally different from the Presidency because one President like George Washington or Thomas Jefferson could set a tradition for all succeeding Presidents, whereas one of nine Justices essentially cannot. We therefore do not urge any of the current Justices to retire early but hope instead for a Supreme Court term limits amendment that will prospectively usher in such an era of term limits after 2009.

CONCLUSION

We join in Professor Prakash's view that "Life tenure is a long-lived constitutional aberration that we should belatedly repudiate."³⁷⁰ Although defenders of life tenure have long been able to say, "If it ain't broke, don't fix it,"³⁷¹ this Article has

368. See Amar & Calabresi, *supra* note 1.

369. U.S. CONST. amend. XXII.

370. Prakash, *supra* note 16, at 581.

371. Monaghan, *supra* note 16, at 1212.

shown that the current system of life tenure for Justices is deeply flawed. The effects are subtle and not readily visible to the American public, but the dangers are real and the threat is severe. Life tenure deserves serious reconsideration; indeed, it should be abolished. Inertia should no longer justify its continuation.

In place of life tenure, we join several other commentators in advocating a system of staggered, nonrenewable term limits of eighteen years, after which Justices would be able, if they wanted, to sit on the lower federal courts. We believe this system must be achieved through a constitutional amendment; it cannot be done, as Professors Carrington and Cramton propose, by statute. We do not favor a system whereby Supreme Court nominees are forced to take term limits pledges in their confirmation hearings. We do, however, favor other informal methods of encouraging Justices to step down after eighteen years, such as offering a pension at that time or modifying the Court's internal seniority rule so no Justice who stayed longer than eighteen years would have the power by virtue of his seniority to assign an opinion. We do not think it realistic to hope that the Justices would follow George Washington's example and relinquish power voluntarily because we doubt any Justice could trust her colleagues to follow her example.

Moving to a system of eighteen-year, staggered terms for Supreme Court Justices is fundamentally a conservative, Burkean idea that would restore the norms in this country that prevailed on the Court between 1789 and 1970. During that period, vacancies occurred about once every two years, and Justices served an average of 14.9 years on the Court. Only since 1970, after the Warren Court revolution, have Supreme Court vacancies begun to occur more than three years apart. Only since 1970 have Justices been leaving the bench after serving an average of 26.1 years. We recommend a Burkean, conservative revolution, whereby the country recommits itself by constitutional amendment to the tenure practices that held for Supreme Court Justices for most of our history. The United States Supreme Court ought not to become a gerontocracy like the leadership cadre of the Chinese Communist Party. It is high time that we imposed a reasonable system of term limits on the Justices of the U.S. Supreme Court.

APPENDIX

Table 2: Justices of the U.S. Supreme Court**End of October 2004 Term**

June 30, 2005

	<i>Age</i>	<i>Year Appointed</i>	<i>Years on Court</i>
Chief Justice William H. Rehnquist	80.7	1971	33.5
Justice John Paul Stevens	85.2	1975	29.5
Justice Sandra Day O'Connor	75.3	1981	23.8
Justice Antonin Scalia	69.3	1986	18.8
Justice Anthony M. Kennedy	68.9	1988	17.4
Justice David H. Souter	65.8	1990	14.7
Justice Clarence Thomas	57.0	1991	13.7
Justice Ruth Bader Ginsburg	72.3	1993	11.9
Justice Stephen G. Breyer	66.9	1994	10.9
<i>Mean</i>	71.3	1985	19.3
<i>Median</i>	69.3	1988	17.4

Four Months into October 2005 Term

January 31, 2006

	<i>Age</i>	<i>Year Appointed</i>	<i>Years on Court</i>
Justice John Paul Stevens	85.8	1975	30.1
Justice Antonin Scalia	69.9	1986	19.3
Justice Anthony M. Kennedy	69.5	1988	18.0
Justice David H. Souter	66.4	1990	15.3
Justice Clarence Thomas	57.6	1991	14.3
Justice Ruth Bader Ginsburg	72.9	1993	12.5
Justice Stephen G. Breyer	67.5	1994	11.5
Chief Justice John G. Roberts, Jr.	51.0	2005	0.3
Justice Samuel A. Alito, Jr.	55.8	2006	0.0
<i>Mean</i>	66.3	1992	13.5
<i>Median</i>	67.5	1991	14.3