

THE IDEOLOGICAL STAKES OF ELIMINATING LIFE TENURE

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Professors Calabresi and Lindgren have written the strongest attack yet on life tenure for Supreme Court Justices. I congratulate them on their effort and am grateful for the chance to offer some comments on it. I saw a previous draft of their paper before publishing my article taking a different view in the *University of Illinois Law Review*,¹ so in that piece I was able to discuss most of their arguments; here I will briefly treat just a few additional issues. Mostly I wish to talk about some ideological implications and consequences of the authors' proposals that they do not emphasize. I also will offer a few words in reply to a point on which they take issue with my prior article.

I. IDEOLOGICAL CONSEQUENCES

First, the authors say that theirs is a “nonpartisan” proposal.² That term, and its fit to their plan, calls for some reflection. Let us start by distinguishing between two sorts of stakes in efforts to get rid of life tenure: the ideological and the non-ideological. The non-ideological stakes are things that people with different political priors nevertheless can agree about. Everyone can agree that mental decrepitude on the Court is a bad thing; nobody is *for* it. The same goes, I think, for the uneven distribution of appointments to Presidents, or for possibilities of strategic retirement. Nobody praises these consequences of life tenure or would be sorry to see them go. They are costs of our current regime, and the question is simply whether one would rather bear them than switch to an alternative rule with other trade-offs.

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

2. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 775 (2006).

The ideological arguments for abolishing life tenure are different; they involve the Court's role in public life. When someone says that the Court has become too unaccountable, or that life tenure makes the Justices arrogant, or that it encourages judicial activism, these are ideological claims: their appeal will depend on the listener's satisfaction with the Court's current performance and predictions about how the substance of its output would change under a new rule to govern turnover. These disputes generally have a zero-sum character. If some given reform makes one audience happy because it causes the Court to decide cases differently—especially those cases that cause the frequent concerns about the Court's "activism"—it is likely to make another audience comparably unhappy. The different reactions of the audiences are likely to track their political commitments.

The advocates of fixed terms differ in the emphasis they give to these two sorts of stakes. Professor Oliver makes his case only on non-ideological grounds.³ Others, such as Professor Prakash, seem mostly focused on the ideological side: he wants a more "populist" Supreme Court, and thinks that abolishing life tenure will help get us there.⁴ Still other commentators draw on both sorts of arguments; that is Calabresi and Lindgren's approach. They claim, for example, that fixed terms will help relieve the problem of mental decrepitude⁵ (a non-ideological point) and that they also will help promote originalism (an ideological or "partisan" point).⁶ I suppose one could try to avoid this conclusion by saying there is nothing partisan about originalism—that it's merely a preference for the rule of law—but that is the sort of argument which appeals only to those already converted to the cause.

3. See 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, 802 (1986) (arguing for the imposition of term limits as a means of pushing the political system to "operate in a fairer and more rational manner").

4. Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541 (1999) (book review).

5. See Calabresi & Lindgren, *supra* note 2, at 815–18.

6. *Id.* at 852 ("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."). But excessively short fixed terms could lead to judicial activism. See *id.* at 850 ("Indeed, some of the more radical term limit proposals would more predictably lead to [problems of judicial activism].").

I think the “nonpartisan” label is best reserved for proposals that will create no losers predictably identifiable by their politics. It strikes me as quite strained to declare a proposal “nonpartisan” just because it is supported by some academics whose politics vary. Life tenure is a complicated issue involving many different trade-offs, and people take positions on it for all sorts of reasons. Some academics might support its abolition despite the partisan consequences they think the proposal would have, concluding that fixed terms have other offsetting advantages. Nor does “nonpartisan” seem very interesting if it is merely a claim by the authors that their own interest in the proposal arises from its non-zero-sum features—the ones that everyone is likely to consider good. For why would anyone care what the authors’ own motives are? Consequences are what count; whatever Calabresi and Lindgren’s motives might be, they believe their proposal will have some consequences that would be certain to provoke very different reactions among different sorts of partisans.

I emphasize all this not because the semantics are of any great interest. The authors’ use of the term “nonpartisan” mildly offends my taste for truth in advertising, but so do many other descriptions of academic projects. The reason I fuss about the point here is that the ideological stakes of this debate may be quite high, and are too easily lost in the long discussions of the other parts of the question; the measurement of the ideological stakes, and the use of structural reform to advance them, both raise interesting questions that are of some general interest.

What *are* the ideological effects of life tenure? Nobody knows for sure, and the empirical void is curious. When I have had the pleasure of debating Professor Calabresi on these issues in live settings, he has been more emphatic than he allows in his article that *of course* there is a trend of Justices becoming more liberal as they serve longer (and, perhaps, as they grow older). He hopes and expects fixed terms to help curb this tendency. Many other conservative theorists likewise feel sure that life tenure is at least partly to blame for decisions they dislike.⁷ Yet

7. See, e.g., John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 542 (1999) (“Vested for life . . . , Supreme Court Justices generally cannot help but come to see themselves as statesmen rather than as humble arbitrators of legal disputes.”); Prakash, *supra* note 4, at 572 (eliminating life tenure would cause judges to “feel less empowered to construct their own statutes and constitutions because they would know that judicial self-indulgence could be punished with

if it really were so clear that Justices drift to the left as time goes by, one would expect to see a rigorous empirical case to that effect. No such case has been made. The most careful study of the effect of aging on Supreme Court Justices found no general trend toward liberalism.⁸ The case instead depends on the casual observations of the Court's critics. They see Harry Blackmun and John Paul Stevens, both Republican appointees who seemed to move to the left during their careers, and they become convinced that there is a general and insidious dynamic at work. They may imagine that one reason for the dearth of empirical evidence on the dynamic is that it is too recent: it results from the modern conflation of elite liberal culture, pressure from the media, and a Court that has assumed a larger role in the country's life over the past forty years than it ever had before.

Perhaps they are right. In any event, though, the weakness of the empirical case for ideological drift raises a nice question about the role of impressionistic judgments in debates of this kind. The impressions of the critics might be an illusion—a story that the Court's critics repeat to each other and of which they become ever more convinced—when in reality Justices Blackmun and Stevens might be random and perhaps exaggerated cases. But it also is possible that there is wisdom embedded in their unrigorous impressions, especially given the absence of anyone making the contrary claim (there may be those who deny that Justices drift to the left, but I know of nobody who argues that they systematically drift to the right). An interesting literature considers the accuracy of judgments reached by pooling the unscientific estimates of onlookers to a situation and finds that the average guesses in such circumstances—say, the average estimate of the number of jelly beans in a jar—sometimes are remarkably accurate.⁹ Perhaps the accumulated impressions of the Court watchers, though of a dif-

removal or failure to reappoint"); *Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997) (remarks of Judge Laurence H. Silberman indicating that five-year fixed terms would cause Supreme Court Justices to "think of themselves more as judges and less as platonic guardians," which would have the effect of "reduc[ing] the extent of the corruption which exists today").

8. See Glendon Schubert, *Aging, Conservatism, and Judicial Behavior*, 3 MICROPOLITICS 159–63 (1983).

9. See generally JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004); Cass R. Sunstein, *Group Judgments: Statistical Means, Deliberation, and Information Markets*, 80 N.Y.U. L. REV. 962 (2005) (discussing problems involved in eliciting information from groups).

ferent character than the impressions in the jelly bean case, are likewise accurate. Maybe we do owe partly to life tenure decisions like *Roe v. Wade*, *Planned Parenthood v. Casey*, *Romer v. Evans*, and *Lawrence v. Texas*—or for that matter *Brown v. Board of Education*. In the end it all is a question of odds. The conservative opponents of life tenure are prepared to gamble that its elimination would do no harm and might well do their interests a good turn. Those who prefer a liberal Court would be prudent to regard the movement for fixed terms with corresponding alarm. (I do not quite put myself in that category, but I do like a liberty-loving Supreme Court, so the alarm that I feel at the prospect of fixed terms is modest.) There certainly is no guarantee that the result would be a permanently more conservative Court, but when playing for stakes of this sort one need not wait for a guarantee before deciding to take precautions. The enthusiasm of one's opponents ought to be enough.

II. THE EFFECT OF LIFE TENURE ON THE SELECTION OF JUSTICES

Professors Calabresi and Lindgren try to gain support for their proposal by pointing out the vicious recent struggles over appointments to the courts of appeals and, sometimes, the Supreme Court. Calabresi and Lindgren say that

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.¹⁰

The most natural reaction to this claim is a double-take; it just doesn't seem true. The last four nominations of Supreme Court Justices were not particularly rancorous. Perhaps the authors would reply that in all those cases the Senate was controlled by the President's party. But the Souter confirmation was not rancorous; nor, particularly, was the O'Connor confirmation or even the Scalia confirmation. So far as appears, the authors are fixated on the cases of Bork and Thomas. Those nominations do suggest that ideologically robust nominees will

10. Calabresi & Lindgren, *supra* note 2, at 813.

tend to produce ugly confirmation fights; they certainly do not suggest that life tenure makes ugliness inevitable.

The authors fortify their claim in an odd manner. They point out that confirmations of appellate judges are more acrimonious than confirmations of trial judges, and that Supreme Court confirmations are the hardest of all.¹¹ They say this shows that acrimony in the confirmation process rises with the stakes; so reducing the stakes, by replacing life tenure for Supreme Court Justices with fixed terms, naturally will reduce the acrimony. The argument works fine until the last step, which doesn't follow at all. There is an obvious reason why acrimony increases as we move from nominations to trial courts to appellate courts to the Supreme Court. It is that each of those courts is far more powerful than the last; that is why the stakes rise from one case to the next, and this wouldn't be changed by the authors' proposal. I believe they are mistaken to think life tenure creates much higher stakes than terms of "only" eighteen years would; the stakes in either case are high enough to provoke plenty of passion. As I mentioned in my earlier paper, Robert Bork was sixty years old at the time of his nomination. Does anyone really think that the prospect of "only" eighteen years of Justice Bork would have provoked different reactions to his nomination?

Possibly it is true that, as Calabresi and Lindgren claim, eliminating life tenure would make Supreme Court nominations seem a bit less important and therefore reduce the heat brought to bear on them. Let me then note, however, a likely side effect: elimination of life tenure will produce more ideologically extreme Justices. If life tenure helps make a Supreme Court nomination a high-stakes affair, this has the nice consequence—appealing to me, anyway—of forcing Presidents to play toward the middle when they pick Justices. Relaxing the stakes at the margin will reduce that moderating effect at the margin. It will make it easier for the next Bork to be confirmed; that really is the practical point of this part of their argument, and one of its most important consequences if they are right.

In reply it might be said that abolishing life tenure would reduce the stakes on both sides—the stakes for the President as well as for the Senate—and therefore cause no net change in the politics of nominees. The Senate wouldn't resist as much,

11. *See id.* at 836.

since the nominees would be serving for “only” eighteen years; but for the same reason, the President wouldn’t push his nominees as hard, either. I think this vision of the likely outcome almost certainly is wrong. The reason has to do with asymmetries between the President’s role and the Senate’s role in the confirmation process. The President is one person. He is negotiating with a body consisting of a hundred people, and needs the votes of fifty of them. Imagine, to oversimplify a bit, that the members of the Senate are arrayed, from one to one hundred, in order of their preferences for Supreme Court Justices. Each senator has preferences that can be weighted by their intensity and each has a breaking point: a nominee objectionable enough to cause the senator to stand in opposition. The President’s goal, whether he is making a nomination for life or for eighteen years, is to pick the nominee he likes best who also can secure fifty votes in the Senate. If abolishing life tenure causes some senators to care a little less who ends up on the Supreme Court, that makes the President’s task a bit easier; it won’t be quite as hard to find fifty votes. Again, this model is simplified at various junctures, but in its essentials I believe it is accurate. To put the point in more straightforward terms, fixed terms will give the proponents of an extreme nominee another tool they can use to try to beat any opponents into submission: the appointment isn’t for *life*, after all, and there are certain to be other chances to make more nominations after the next election.

III. THE DEMAND FOR ORIGINALISM

In my earlier article I discussed the possibility that fixed terms would give the public more frequent chances to replace wayward Justices with others who will adhere to the original understanding of the Constitution.¹² I found the claim unconvincing because I don’t think the voting public has much interest in originalism or any other theory of interpretation; they *do* care about the results the Court reaches, but interpretive theories are of interest only as means to those ends. Professors Calabresi and Lindgren dispute this claim; they say the public does have an appetite for originalists.¹³ Resolving this point is important not only to evaluate the claim just described, but

12. See Farnsworth, *supra* note 1, at 421.

13. See Calabresi & Lindgren, *supra* note 2, at 852–53.

also because the authors use it as a basis for doubting that fixed terms might cause the public to view nominations to the Court as more political events than they already are. I suggested that this might happen because fixed terms would make two nominating chances a guaranteed spoil of every presidential election. The authors downplay this concern because, they say, the public doesn't view the Court's work as political; the public just wants originalists.

The support the authors offer for this claim comes in two forms. First is the observation that "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."¹⁴ I offer these points by way of refutation:

1. A presidential candidate's likely choice of Supreme Court appointments tends to be low on the list of things that most voters use as a basis for decision, ranking far behind considerations of economic and foreign policy.¹⁵ Most surveys of such questions do not even ask voters how much they care about the sorts of Justices a President would appoint; they ask instead about the importance of abortion rights. This makes it hard to draw any conclusions about the public's views on interpretive theory from the Presidents they elect.

2. Saying that the public has shown it prefers "Justices who would interpret the law rather than making it up" seems to me a nearly comical straw man. I struggle to recall a presidential candidate saying he wanted Justices who would make up the law, or any Justices or nominees describing that as their activity. The more usual debate is between those who want the Constitution interpreted according to the original understanding of its text and those who want enforcement of what it might seem to mean to a modern reader. Well, there are much better ways than that to state the question, but this version has the advantage of being subject to an opinion poll. When the question was put that way, a 1987 poll showed a preference for "modern interpretation" over the "founding fathers' interpreta-

14. *Id.* at 852.

15. In a November 2000 Harris Poll, one percent of respondents said that Supreme Court appointments were among the two most important issues to them in the upcoming presidential election. Humphrey Taylor, *The Harris Poll #67: Some Near Final Thoughts on the Presidential Election* (Nov. 3, 2000), http://www.harrisinteractive.com/harris_poll/index.asp?PID=129.

tion" by a margin of fifty-five to forty-two percent.¹⁶ Other polls produce different results; the outcomes seem to be highly sensitive to the way the questions are phrased.¹⁷

3. Meanwhile, however, public opinion polls consistently show that substantial majorities believe *Roe v. Wade* was rightly decided and that it should not be overruled.¹⁸ This suggests that a majority of voters either don't want originalism or don't understand its implications. What most members of the public more probably want, as Judge Posner has suggested,¹⁹ is originalism *and* their preferred results. But they often can't have both, and I find it implausible to think that most people, if pressed to make a sacrifice, are more committed to ideas about legal theory (which they rarely understand; see the data in the previous paragraph) than to the results they like. Some evidence of a preference for results is supplied by the fate of Robert Bork, the last Supreme Court nominee to step forward as an open and vigorous defender of originalism. The authors suggest that the public was "induced" to oppose Bork.²⁰ They can't bring themselves to credit the possibility that his nomination failed because large numbers of the public either didn't like his theory of interpretation or didn't like the results it would produce (and considered the results more important than the theory). This seems a very reasonable view of the nomination's failure, and far more probative of the public's ju-

16. ABC News/Wash. Post, National Poll: September 1987 (1988), http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/Catalog40/Catalog40.htx;start=summary_link?archno=USABCWASH1987-7262.

17. A Gallup/Newsweek poll, also from September 1987, asked respondents whether the Justices should apply the intentions of the original authors of the Constitution or should be "free to apply their own values as well." Fifty-two percent preferred the first approach; forty percent preferred the second. The Gallup Org., Gallup/Newsweek Poll: The Supreme Court (1987), http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/Catalog40/Catalog40.htx;start=summary_link?archno=USAIPOSPGONEW1987-87238.

18. See Dan Balz, *Democratic Candidates Vow to Protect Abortion Rights*, WASH. POST, Jan. 22, 2003, at A8 (citing an ABC News/Washington Post poll showing fifty-four percent of respondents in favor of the ruling in *Roe v. Wade* and forty-four percent opposed); Hart/McInturff, Study No. 6059, NBC News/Wall Street Journal Survey 13 (2005), <http://www.pos.org/latestnumbers/wsdec2005.pdf> (finding that sixty-six percent of respondents did not want *Roe v. Wade* reversed in December 2005 and reporting results on five other polls conducted over a span of sixteen years finding support for *Roe* ranging between fifty-seven and sixty-five percent).

19. See RICHARD A. POSNER, *OVERCOMING LAW* 255 (1995).

20. Calabresi & Lindgren, *supra* note 2, at 853.

dicial preferences than the fact that Republicans have been winning more presidential elections than Democrats lately.

The authors also point out that the public generally supported confirmation of Justices Thomas, Roberts, and Alito; they say this, too, shows that the public wants originalists on the Court.²¹ Again the argument is weak:

1. Justice Thomas did not present himself as an originalist. This is easy to forget now because of his work as a Justice, but in his confirmation hearings he was careful not to align himself with any particular interpretive approach. Public accounts, which are what matter for purposes of this inquiry, treated his position as ambiguous.²² It often was suggested that he had been advised to follow this path because more specificity might have doomed his chances for confirmation.²³

2. Chief Justice Roberts did not present himself as an originalist. He said at his hearings, "I do not have an overarching judicial philosophy that I bring to every case. . . . I tend to look at the cases from the bottom up rather than the top down."²⁴ One astute observer of his confirmation hearings thus concluded that Roberts "is not in the mold of Scalia and Thomas. . . . They have more of a theory of how to decide cases, and they look to text and original meaning. Roberts will look at text and original meaning, but he will also look to precedent and the consequences of his decisions."²⁵ The observer was Professor Calabresi.

3. Justice Alito came closer to presenting himself as an originalist, though it still wasn't considered clear.²⁶ But against this data point there are others the authors do not mention. Ruth

21. *See id.*

22. *See* Linda Greenhouse, *Etching a Portrait of Judge Thomas*, N.Y. TIMES, Sept. 15, 1991, § 1, at 28 ("[I]t is far from clear where Judge Thomas would fit within the conservative bloc"); *see also* David Margolick, *Questions to Thomas Fall Short of the Mark*, N.Y. TIMES, Sept. 15, 1991, § 4, at 1 ("Senator Howell Heflin, an Alabama Democrat, confessed he couldn't tell whether the nominee was 'a closet liberal, a conservative, or an opportunist.'").

23. *See* Margolick, *supra* note 22.

24. Adam Liptak, *Speaking Volumes*, N.Y. TIMES, Sept. 16, 2005, § 1, at A1.

25. *Id.*

26. *See* Jeffrey Rosen, *Alito vs. Roberts, Word by Word*, N.Y. TIMES, Jan. 15, 2006, § 4, at 1 ("While it's clear that Judge Alito is a conservative, it's not easy to figure out what kind. There are several brands of conservative legal theory. Is Judge Alito more like the late Chief Justice William H. Rehnquist, who was a pragmatist? Or more like Justice Antonin Scalia, who believes that the original meaning of the Constitution matters more than 50-year-old precedents?").

Bader Ginsburg's nomination met with similar public support,²⁷ as did Stephen Breyer's.²⁸ There is no evidence to support the authors' apparent view that originalist or even just conservative nominees are received more enthusiastically by the public than nominees of other sorts.

I do not claim, of course, that these points about public opinion bear on who ought to be nominated to the Court. The point is merely that fixed terms likely would just give the public or its representatives more chances to press for nominees who they hope will produce the kinds of results they want. The notion that more frequent nominating chances will be used to impose theoretical discipline on the Court seems to me a fantasy.

27. See Joan Biskupic, *Ginsburg Sworn in as 107th Justice and 2nd Woman on Supreme Court*, WASH. POST, Aug. 11, 1993, at A6 (citing poll showing sixty-seven percent approval of Ginsburg's nomination).

28. See Ruth Marcus, *Judge Breyer Gets Day in Rose Garden*, WASH. POST, May 17, 1994, at A8 (noting poll finding fifty-three percent of the public approving of Breyer's nomination, and eleven percent disapproving).