

TERM LIMITS FOR THE SUPREME COURT: Life Tenure Reconsidered

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¹ George C. Dix Professor of Law, Northwestern University. I began working on this idea – an idea that originated with me - in the summer of 2001 with Jeff Oldham of the Northwestern Law School Class of 2003. Jeff was helping me at the time as a summer research assistant, and this was the project I was working on. I set Jeff to work compiling the data on the increasing tenure of Supreme Court Justices on the Court, the increasing length of time between vacancies on the Court, the older average age upon retirement of Justices, and comparative data about judicial term limits in foreign countries and in the 50 U.S. states. Once I realized the very substantial empirical nature of the project I had launched, I invited my colleague and friend, Jim Lindgren, a trained social scientist, to join us in gathering data and crunching the numbers. Subsequently, Jeff Oldham did substantially more work on the project as part of a third year legal writing paper, which he wrote in several drafts under my close supervision. Jeff produced the critical first draft of this article under my close supervision and with considerable help from Jim Lindgren on the empirical data. Jim and I have subsequently done multiple additional drafts. We, of course, invited Jeff to be a co-author on the paper; he had been planning to be a co-author with the two of us until for professional reasons (he has been a court clerk), he decided he had to decline to be listed as a co-author. The bottom line, gentle reader, is that Jeff Oldham made as big a contribution to the execution of this piece as did Professors Calabresi and Lindgren. Although Jeff has not been involved in the later drafts, he has encouraged us to go forward without him. We hope to co-author follow-up pieces on this topic with him in the future. Beyond thanking Jeff Oldham, we are also grateful for the helpful comments of: Al Alschuler, Akhil Amar, Roger Cramton, Charles Fried, Richard Fallon, Philip Hamburger, John Harrison, Gary Lawson, and Saikrishna Prakash.

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I. Introduction

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.³ 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. Moreover, five of the current nine Justices have served on the Court for more than 17 years, two of those have served on the Court for more than 23 and 29 years respectively, and one, Chief Justice Rehnquist, has served for more than 33 years.⁴ The other four Justices have already spent between ten and fourteen years on the Court. At the same time, four of the nine members of the Court are 70 years of age or older, and only one of them is under 65 years of age, which used to be the traditional retirement age in business.⁵ Because of the length of tenure of the current Justices, there have been no vacancies on the High Court since 1994.⁶

****Note:** All calculations and discussions in this Article are current as of June 24, 2005, roughly corresponding to the effective end of the October 2004 Term.

³ See Akhil Reed Amar and Steven G. Calabresi, *Term Limits for the High Court*, WASHINGTON POST, at A23 (Aug. 9, 2002). By June 24, 2005, it will be nearly 10 years and 11 months since a vacancy arose on August 3, 1994, a vacancy that was filled by Stephen Breyer. That is the second longest gap between vacancies in the nation's history, the longest one being between June 19, 1811 and March 18, 1823, a gap of 11 years and 9 months between the vacancies filled by Gabriel Duvall and Smith Thompson. The third longest gap between vacancies was only about 6 years.

⁴ As of June 24, 2005, the tenure of the current Justices is as follows:

<u>Name of Justice</u>	<u>Number of Years on the Supreme Court</u>
Chief Justice William H. Rehnquist	33.5
Justice John Paul Stevens	29.5
Justice Sandra Day O'Connor	23.7
Justice Antonin Scalia	18.7
Justice Anthony M. Kennedy	17.3
Justice David H. Souter	14.7
Justice Clarence Thomas	13.7
Justice Ruth Bader Ginsburg	11.9
Justice Stephen G. Breyer	10.9

Statistics were calculated using the Justices' date of commission as the starting date, and are based on data provided by the Federal Judicial Center, Washington, DC, *History of the Federal Judiciary*.

⁵ As of June 24, 2005, the ages of the current Justices are as follows:

<u>Name of Justice</u>	<u>Age</u>
Chief Justice William H. Rehnquist	80.7
Justice John Paul Stevens	85.2

We believe the American constitutional rule granting life tenure to Supreme Court justices is fundamentally flawed, now resulting in Justices remaining on the Court for longer periods of time and later in age than ever before in American history. This leads 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.⁷ Possible causes of this lengthening tenure of Supreme Court justices include improvements in modern medicine that have expanded the average life expectancy of Americans, increasing political incentives to stay on the Court longer due to a growth in the prestige of being a judge or a Justice, and changes in the working conditions of the Justices which have made it easier for them to stay on the Court into their extreme old age. For all three of these reasons, we believe "life tenure" today has a different temporal meaning than when it was established in the late eighteenth century.

Justice Sandra Day O'Connor	75.2
Justice Antonin Scalia	69.3
Justice Anthony M. Kennedy	68.9
Justice David H. Souter	65.8
Justice Clarence Thomas	57.0
Justice Ruth Bader Ginsburg	72.3
Justice Stephen G. Breyer	66.9

Statistics were calculated based on dates collected from: Web site of the Federal Judicial Center, Washington, DC, *History of the Federal Judiciary*, at <<http://air.fjc.gov/history/>> (Aug. 4, 2002).

⁶ The year of appointment of the current Justices are as follows:

<u>Name of Justice</u>	<u>Year of Appointment</u>
Chief Justice William H. Rehnquist	1971
Justice John Paul Stevens	1975
Justice Sandra Day O'Connor	1981
Justice Antonin Scalia	1986
Justice Anthony M. Kennedy	1988
Justice David H. Souter	1990
Justice Clarence Thomas	1991
Justice Ruth Bader Ginsburg	1993
Justice Stephen G. Breyer	1994

Statistics were calculated using the Justices' date of commission as the starting date, and are based on dates collected from: Web site of the Federal Judicial Center, Washington, DC, *History of the Federal Judiciary*, at <<http://air.fjc.gov/history/>> (Aug. 4, 2002).

⁷ See Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?*, THE NEW REPUBLIC, Aug. 19, 1991 ("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.").

The concern raised by lengthening tenure on the Court is that one of the two explicit democratic checks on the Court – the appointment process – occurs too rarely and irregularly to achieve its purpose. 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 become much more intense. Recent highly contentious and overly political judicial confirmation battles show that there has been a breakdown in the confirmation process, even for lower court judges. In light of these trends, many political observers expect that the next confirmation battle for the U.S Supreme Court will be one of the most bitter in our history. In addition, another problem raised by the lengthening tenure of Supreme Court justices is that it has created too strong an incentive for presidents to appoint young justices to maximize their impact on the Court with the result being that many of our nation’s ablest jurists are passed over merely because of their advanced age, though as we shall show, the decrease in the age at appointment has been slight.⁸ Finally, as was detailed in a recent article by Professor David Garrow,⁹ the advancing age of past Supreme Court Justices has at times led to the problem of “mental decrepitude” on the Court, whereby some Justices have been physically or mentally unable to fulfill their duties at the final stages of their career.

We are concerned about the trend toward longer service on the Supreme Court not because we believe the longevity of service or the age of any of the current nine Justices is itself a problem. As far as we can tell, they are all actively engaged in their work on the Court and are not behaving inappropriately in failing to resign. Instead, we believe that the dramatic expansion in the practical real-world meaning of life tenure is a growing threat to the democratic legitimacy of the Supreme Court and to the effective operation of the confirmation process for judges. We believe that a regime which allows high government officials to exercise great power, totally unchecked, for periods of 30 to 40 years is essentially a relic of pre-democratic times. While life tenure for Supreme Court justices may have made sense in the 18th Century world of the Framers, we believe it is inappropriate in our day and age, given the enormous power that Supreme Court justices have now come to wield and the essentially arbitrary way in which many of them wield it.¹⁰

⁸ Note, James E. DiTullio and John B. Schochet, *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).

⁹ 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* (Kansas 1999) (combining a series of articles, written during the 1970’s and 1980’s, into a book).

¹⁰ See, e.g., *Planned Parenthood of South-Eastern Pennsylvania v. Casey*, get cite (1992) (plurality opinion of Justices O’Connor, Kennedy, and Souter) (arbitrarily invoking the doctrine of stare decisis for abortion cases only, a doctrine that none of these Justices appear to follow in any other

In this Article, therefore, we call for change. We begin in Section I by analyzing the historical data on the tenure of Supreme Court Justices, showing that the Justices are in fact staying on the Court longer and retiring at more advanced ages than they have historically. The end result is that turnover on the Supreme Court is occurring much less frequently than in the past.¹¹ We also consider the causes of these historical trends¹² and the harmful effects that these trends have had on the Court, on the confirmation process for all judges, and on democracy itself.¹³ We conclude Section I by describing the approach that all other major democratic nations and the U.S. states have taken to the tenure of their highest courts, yielding a comparative analysis that shows that the U.S. Supreme Court's system of life tenure is truly an outlier.¹⁴ We believe that Section I presents the most comprehensive case made in the literature today for the need to reconsider life tenure. While we believe Professor Sai Prakash is correct that "there is no clamor to eliminate life tenure" because "most reflexively support it,"¹⁵ in light of our historical and comparative analysis, this issue should be considered more than merely an academic one. We believe this is a major problem that threatens the continued role of the Supreme Court in our constitutional democracy.

We then offer our proposed solution in Section II. In particular, we follow a number of prior public figures and scholars who have written on this subject and urge lawmakers to pass a constitutional amendment instituting a system of staggered, eighteen-year term limits for Supreme Court Justices.¹⁶ Under our proposal, the Court's membership would be constitutionally fixed at nine justices and their terms would be staggered, such that a vacancy would occur on the Court every two years on June 30th of 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. We would specifically not apply our term limits proposal to any of the nine currently sitting Justices, and we believe the proposal should also not apply to any of the current President Bush's High Court nominees. We think this since the current President Bush was elected, in 2004, in an election

important context). For more discussion, see Steven G. Calabresi, *The Tradition of the Written Constitution: Text, Precedent, and Burke* (forthcoming 2005).

¹¹ See *infra* pp. 9-19.

¹² See *infra* pp. 19-24.

¹³ See *infra* pp. 24-38.

¹⁴ See *infra* pp. 38-44.

¹⁵ Saikrishna B. Prakash, *American's Aristocracy*, 109 YALE L.J. 541, 569 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)).

¹⁶ We address the possibility of term limits only for the Supreme Court, and not for lower federal courts. By imposing term limits on Supreme Court Justices – the "level at which members hold unchecked power" – the entire judiciary would become more democratic in a structural sense, thus achieving the goals of our proposal. Easterbrook, *supra* note 7. And any attempt to institute a set of term limits for lower federal court judges would present enormous administrative complexities that may outweigh any benefit of limited tenures for those judges.

in which the assumed power of the winner to appoint life tenured justices was a big issue for many voters. We thus feel it would be changing the rules of the game to disadvantage Republicans to suddenly make President Bush's Supreme Court nominees the first in American history to be term limited. We believe Supreme Court term limits ought to be phased in, as was done with the two term limit for presidents which did not apply to the incumbent president when it was ratified. We suggest the term limit begin to apply during the tenure of whoever is elected President in 2008. Since we are all behind a veil of ignorance as to the partisan identity of the winner in 2008, that seems to us to be a fair and optimal time for term limits to start.

Our proposal builds on the views of a number of distinguished commentators and judges, from a broad set of varying political backgrounds. Indeed, some of the most venerable figures in American history have fiercely opposed life tenure for federal judges. Thomas Jefferson, for example, denounced life tenure as being wholly inconsistent with our ordered republic, and, accordingly, he proposed four- or six-year, renewable term limits for federal judges.¹⁷ And Robert Yates, who wrote as Brutus during the ratification period, railed against the provision for life tenure for federal judges and the disastrous degrees of independence from democratic accountability that it would lead to.¹⁸

Most relevant to our own proposal are the thoughtful suggestions in favor of imposing term limits made by several modern commentators. First, in 1986, Professor Philip Oliver carefully considered the issue of how best to restructure the tenure of Supreme Court Justices.¹⁹ Oliver proposed fixed, staggered terms of eighteen years, and he explained that such a system would allow for more regular appointments (every two years), would balance the impact that all Presidents can have on the Court's makeup, and would eliminate the possibility of Justices remaining on the Court beyond their vigorous years, among other benefits.²⁰ Then in 1997, Judge Laurence H. Silberman, an eminent judge on the U.S. Court of Appeals for the District of Columbia, suggested the desirability of a limit on the tenure of Supreme Court Justices.²¹ Judge Silberman's proposal would modify the

¹⁷ Letter from Thomas Jefferson to William T. Barry (July 2, 1822), in 7 THE WRITINGS OF THOMAS JEFFERSON 256 (H.A. Washington ed., 1859); THOMAS JEFFERSON, A BIOGRAPHY IN HIS OWN WORDS (Newsweek Book eds., 1974); see also Charles Cooper, *Federalist Society Symposium: Term Limits for Judges?*, 13 J.L. & POL. 669, 674-75 (Summer 1997) (discussing Jefferson's criticism of life tenure and his proposals for term limits).

¹⁸ Robert Yates, Brutus No. XV (1788), reprinted in THE ANTI-FEDERALISTS 350, 352 (Cecilia M. Kenyon ed., 1966).

¹⁹ 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).

²⁰ *Id.* at 802-16.

²¹ See Laurence H. Silberman, *Federalist Society Symposium: Term Limits for Judges?*, 13 J.L. & POL. 669, 683-87 (Summer 1997).

appointment system so that individuals would be selected to sit on the Supreme Court by designation for a term of five years, and then would automatically revert to the federal courts of appeals for life tenure on those inferior courts.²²

Other commentators have similarly called for limits to the tenure of Supreme Court Justices, or of federal judges generally. In 1991, Gregg Easterbrook proposed a constitutional amendment to abolish life tenure for the Justices, and to put in its place fixed terms of ten years with the option for retired Justices to serve on lower federal courts.²³ Professor Henry Paul Monaghan recommended even earlier that in order to remedy the problem of an aging and unaccountable Court, lawmakers should consider both an age limit and a term limit of fifteen to twenty years for Justices.²⁴ More recently, Professor Prakash argued that the notion of life-tenured judges – what Prakash calls “America’s home-grown aristocracy” – is fundamentally at odds with representative democracy.²⁵ As a result, Professor Prakash advocated term limits for all federal judges.²⁶ Professor John McGinnis also has written in support of term limits, specifically proposing a model he calls “Supreme Court riding.”²⁷ This model is similar to Judge Silberman’s proposal, in that members of the lower federal courts would be assigned to serve on the Supreme Court for short periods of time, like a year, and then return to their positions on the lower courts for life.²⁸ Professor Akhil Amar (writing with one of us) has also expressed his support for either formal or informal limits on the Justices’ tenures,²⁹ and, after this Article was written but before it was published, two students proposed a system of term limits in a Note in the Virginia Law Review. Their primary concerns were not that Justices are staying too long on the Court but that the current system allows strategic timing of retirements, encourages young nominees to the Court, and fails to distribute appointments evenly across different presidencies.³⁰ Finally, Professor L.A. Powe, Jr. wrote a short essay in a recent academic press book identifying life tenure on the Supreme Court as being the stupidest feature of the American Constitution,³¹ and he, too,

²² Silberman, *supra* note 21, at 687.

²³ Easterbrook, *supra* note 7.

²⁴ Henry Paul Monaghan, *The Confirmation Process: Law or Politics*, 101 HARV. L. REV. 1202 (1988).

²⁵ Prakash, *supra* note 15, at 570-73.

²⁶ *Id.* at 571-72. Professor Prakash also advocates a more potent removal power whereby the President or the Senate could remove Justices for improper decisions. *Id.* Given the risk this would pose for undermining judicial independence, we do not advocate such a provision here.

²⁷ John O. McGinnis, *Justice Without Justices*, 16 CONST. COMM. 541, 541-43 (1999).

²⁸ *Id.* at 541.

²⁹ Amar and Calabresi, *supra* note 3.

³⁰ See Note, *Saving this Honorable Court*, *supra*, at note ____.

³¹ L.A. Powe, Jr., *Old People and Good Behavior*, in **Constitutional Stupidities, Constitutional Tragedies** at 77- 80 (William N. Eskridge, Jr. and Sanford Levinson, eds.).

called for 18 year term limits on Supreme Court justices.³² Of the leading scholars to write about Supreme Court term limits to date only one major figure – Professor Ward Farnsworth – has defended life tenure.³³

Many commentators have thus called for term limits on Supreme Court Justices, yet their proposals have received little attention, for two reasons. First, many Americans mistakenly believe that a system of life tenure is necessary to preserve an independent judiciary. As George Priest observed several years ago when he urged reconsideration of the civil jury system, there is such an automatic affection for some institutions that any criticism of their existence borders on “treason.”³⁴ But this gut reaction is misguided: as we show, life tenure for high court judges is by no means inevitable in a constitutional democracy. The term limits proposal we suggest would protect judicial independence as much as life tenure and would further the goals of democracy rather than undermine them. Thus, we aim to dispel the myth that life tenure for Justices is necessary to protect an independent, rule of law promoting Supreme Court..

Second, these scholars’ proposals have received little attention because, even apart from romanticized resistance, a complete case has not yet been made in the literature for the need to reform life tenure. We seek to make that case by showing that there is a strong, non-partisan justification for reconsidering life tenure, which is that the real-world, practical, meaning of life tenure has changed over time and is very different now from what it was in 1789 or even in 1939. This change has had a number of alarming effects on our constitutional democracy. We believe that our historical and comparative analysis bolsters the case against life tenure by showing that no other major country and only one of the fifty American states has chosen to give life tenure to its high court judges.

We believe our proposal is ultimately a very Burkean and conservative call for reform because all we would do is 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 8 years in office, our 18 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 25.6 year average tenure enjoyed by Justices who stepped down between 1970 and 2005. Our proposed amendment would thus merely restore the practice that prevailed between 1789 and 1970 and would guarantee that vacancies

³² *Id.*, at 79.

³³ Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, forthcoming **University of Illinois L. Rev.** (2005).

³⁴ *Cf.* George Priest, *Justifying the Civil Jury*, in *VERDICT: ASSESSING THE CIVIL JURY SYSTEM* 103, 103-05 (Robert Litan ed., 1993) (making this observation in the context of civil juries, though we submit that it applies with equal force to life tenure).

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 18 year non-renewable 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.³⁵ Accordingly, in Section II.A we outline our proposal for a constitutional amendment instituting term limits.³⁶ We then highlight the advantages to passing such an amendment³⁷ and address potential counter-arguments.³⁸

Short of amending the Constitution, Professors Paul Carrington and Roger Cramton have recently proposed system of term limits for Supreme Court Justices instituted by statute. In Section II.B, we consider two statutory proposals for instituting Supreme Court term limits, one of our own devising and the other being the Carrington-Cramton proposal.³⁹ We consider the arguments in favor of and against the constitutionality of these two proposed statutes and conclude 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.⁴⁰ For these reasons, we believe that term limits ought to be established by a constitutional amendment and that the proposed statute is unconstitutional.

Finally, as we detail in Section II.C, a system of term limits could in theory be achieved more informally through a variety of measures.⁴¹ 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 limits pledges on nominees in confirmation hearings;⁴² the Court through adjustment of

³⁵ See U.S. CONST., art. V.

³⁶ See *infra* pp. 46-54.

³⁷ See *infra* pp. 54-64.

³⁸ See *infra* pp. 64-80.

³⁹ See Amar and Calabresi, *supra* note 3. The Carrington-Cramton proposal has changed so often and so substantially that some of our arguments do not apply to their latest iteration.

⁴⁰ See McGinnis, *supra* note 27, at 546 (noting the problem of manipulability if a system of term limits were instituted under a statute).

⁴¹ See Amar and Calabresi, *supra* note 3.

⁴² See *infra* pp. 95-96.

its internal court rules and seniority system;⁴³ and individual Justices by establishing an informal tradition of leaving the Court after a term of years,⁴⁴ as Presidents did before passage of the Twenty-second amendment.⁴⁵

We are opposed to term limit pledges exacted by the Senate during the confirmation process, since we believe this practice would greatly weaken a newly appointed justice in the eyes of his colleagues since that newly appointed justice would be seen as having compromised judicial independence by taking a term limits pledge to win confirmation. We are similarly quite skeptical of the idea that individual justices ought to try to establish a tradition of retiring after 18 years. Even if one or two Justices were to try to set such a good example, we believe, given current levels of partisanship on the Supreme Court, that the other Justices on the Court would fail to follow their good example. We thus conclude that the only way to realize a system of Supreme Court term limits is by passage of a constitutional amendment. We urge lawmakers to consider passage of 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.

II. The Need for Reform: The Expansion of Life Tenure, Its Potential Causes, and Its Detrimental Effects

A. *The Expansion of Life Tenure*

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.”⁴⁶ In so providing, the Framers followed the 18th century English practice in the wake of the Glorious Revolution of 1688 of securing judicial independence through life tenure in office

⁴³ See *infra* pp. 96-98.

⁴⁴ See *infra* pp. 98-99.

⁴⁵ See DAVID KYVIG, EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995, at 325 (1996) (stating that the two-term tradition of Presidents was “established by George Washington, reinforced by Thomas Jefferson, and observed for one reason or another by the seven other once-reelected chief executives” before President F.D. Roosevelt); DORIS KEARNS GOODWIN, NO ORDINARY TIME 106 (1994) (noting that “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 covering the two-term tradition, though challenging the existence of this tradition).

⁴⁶ U.S. CONST. art. III, sec. 1.

for judges.⁴⁷ But since 1789, Americans have seen drastic changes in medicine, technology, politics, and social perceptions of judges and of the law, which all have changed the practical meaning of life tenure for justices. Average life expectancies have risen substantially since 1789. In the founding era, the average American could expect to live to be 35 years old, whereas the average American born in 2000 can expect to live to the age of 77.⁴⁸ Naturally, this means that men and women today are likely to serve longer tenures and retire at later ages than in the past.⁴⁹ This overstates the relevant difference because in 1850, white men who reached the age of 40 could expect to live another 27.9 years, compared to in 2001 an expected 37.3 years of additional life for a 40 year old white man—an increase of just 9.4 years since 1850. Whatever the specific cause, which we consider further in the next section,⁵⁰ changes in life expectancy have fundamentally altered the real world meaning of the Constitution’s grant of life tenure to Supreme Court justices.

In order to study how the practical meaning of lifetime tenure has changed over time, we collected relevant historical data on every Supreme Court Justice. Using several sources,⁵¹ we compiled the dates of birth and death, the dates of

⁴⁷ Prior to the Act of Settlement of 1703, English judges served for the term of the King who appointed them. When a King die, all his judges’ terms came to an end. The proponents of the Glorious Revolution of 1688 saw life tenure of judges as vital to making them independent of the Crown. Americans in 1787 borrowed the idea of life tenure for judges from their English Whig ancestors.

⁴⁸ “U.S. Society – Census & Demographics,” U.S. Diplomatic Mission to Germany, at <<http://www.usembassy.de/usa/society-demographics.htm>> (Aug. 28, 2002) (statistics based on data from U.S. Census Bureau); “Population Explosion Among Older Americans,” *at* <<http://www.infoplease.com/ipa/A0780132.html>> (Aug. 28, 2002) (statistics based on data from U.S. Census Bureau); “Vital Statistics,” Statistical Abstract of the United States 2001, U.S. Census Bureau, *at* 73, available at <www.census.gov/prod/2002pubs/01statab/vitstat.pdf> (Aug. 28, 2001).

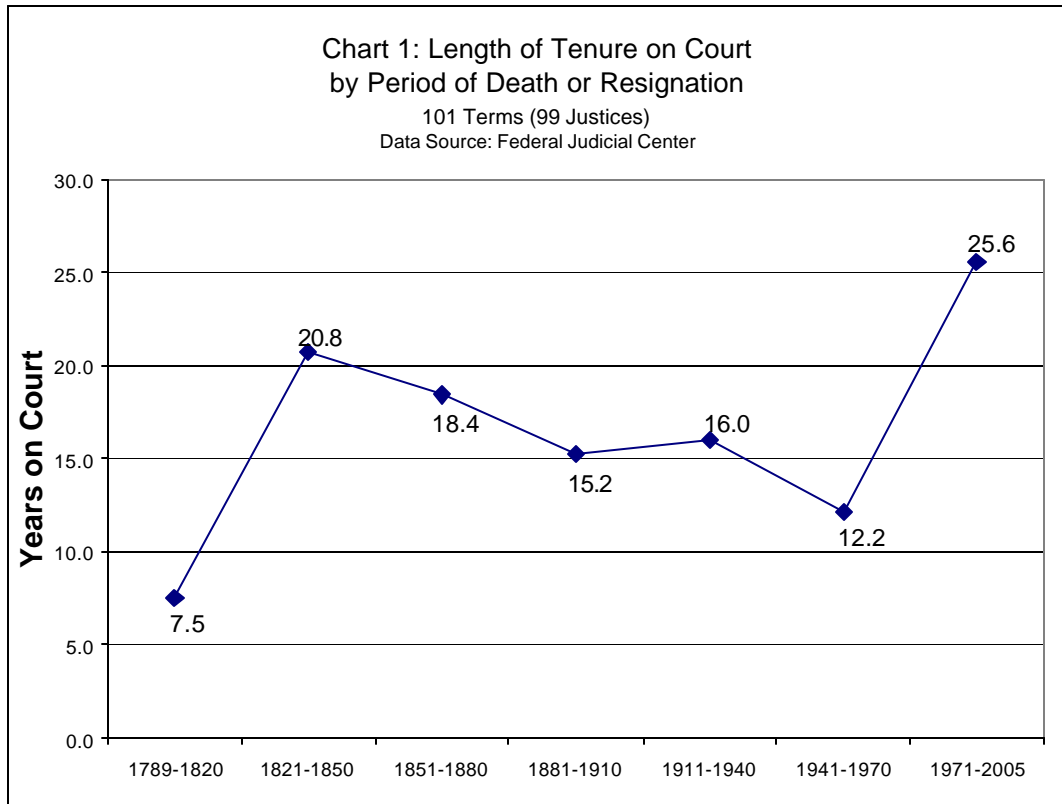
⁴⁹ Of course, a significant reason that the life expectancy has risen so dramatically is that infant mortality and child deaths have declined sharply. For example, just in the past 50 years, the rate of infant death has fallen by 75%. Laura Meckler, *U.S. Life Expectancy Hits New High*, WASHINGTON POST, Sept. 12, 2002. Similarly, in the same 50 years, the incidents of mortality among children and young adults (ages 1 through 24) has declined by more than half. *Id.* Thus, a significant amount of the rises in life expectancy can be explained by the reduction of infant mortality. Still, another very significant reason for the increases in life expectancy is that people are able to live to more advanced ages, given improvements in medicine and technology that have reduced the occurrences of strokes, heart disease, cancer, and other diseases or injuries that plagued adults in the past more than they do today. *Id.*

⁵⁰ See *infra* pp. 19-24.

⁵¹ We relied on two extremely helpful sources in compiling this data: Web site of the Federal Judicial Center, Washington, DC, *History of the Federal Judiciary*, at <<http://air.fjc.gov/history/>> (Aug. 4, 2002); HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS* (Rev. ed., 1999). We counted two terms each for Justices Hughes and Rutledge, who both 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.

commission and swearing in,⁵² and the date of resignations for every Justice who served on the Court. We then calculated the age of each Justice when he or she took office and when he or she left the Court, either by death or resignation. Using these dates, we computed the tenure of office of each Justice. Finally, we calculated the number of years between openings on the Court by using the dates of resignation or death. Our analysis of all these figures reveals three critical and significant trends: the real-world, practical meaning of life tenure has been expanding over time, Justices have been staying on the Court to more advanced ages than in the past, and, as a result, vacancies have been opening up less frequently than ever before.

⁵² For purposes of computing tenure of office and other figures, we consistently used the date of swearing in as the start of a Justice's service on the Court.

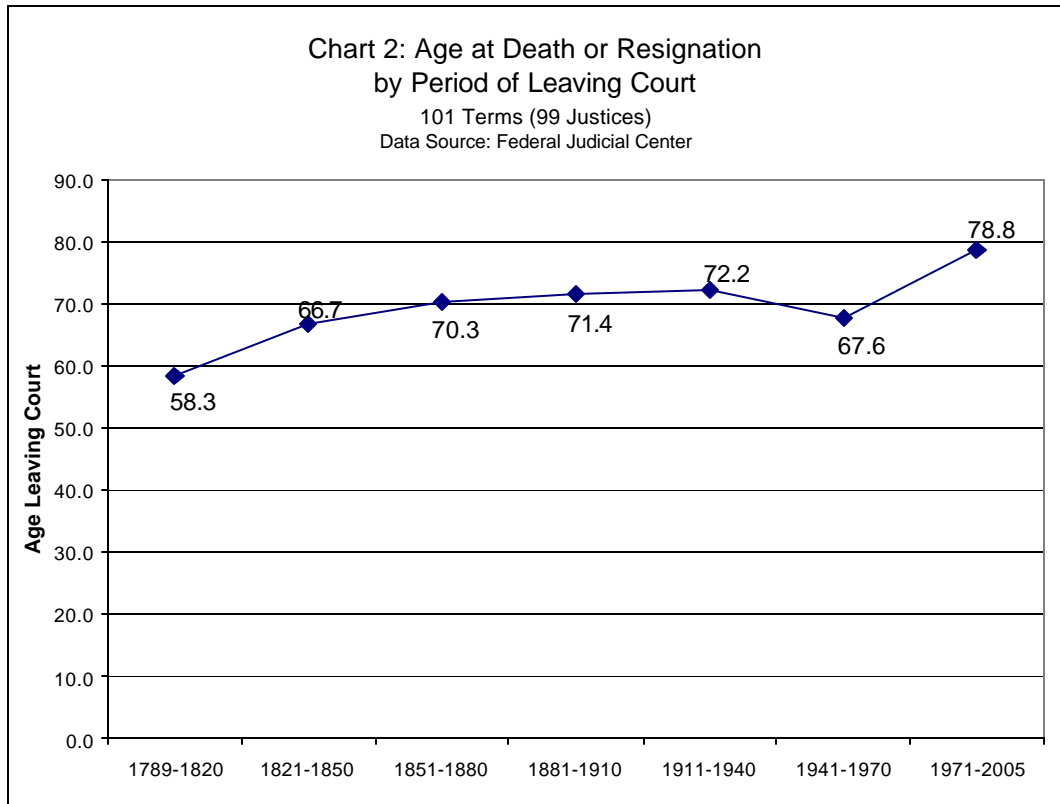


First, as Chart 1 summarizes, the average tenure of a Supreme Court Justice has increased considerably since the Court's creation in 1789, with the most dramatic increase occurring between 1970 and the present. In the first thirty years of the Supreme Court's history, Justices spent an average of just 7.5 years on the Court, which may be 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.⁵³ 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 spent *more than double* the amount of time, on average, in office than did Justices leaving

⁵³ See, e.g., Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1765-67, 1780-81, 1797-98, 1806-07, 1810-11, 1814-15 (2003) (documenting the practice of circuit riding and the immense physical and mental burdens it placed on the Justices, and noting the role that some Justices' disliking of circuit-riding played in retirement decisions).

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.

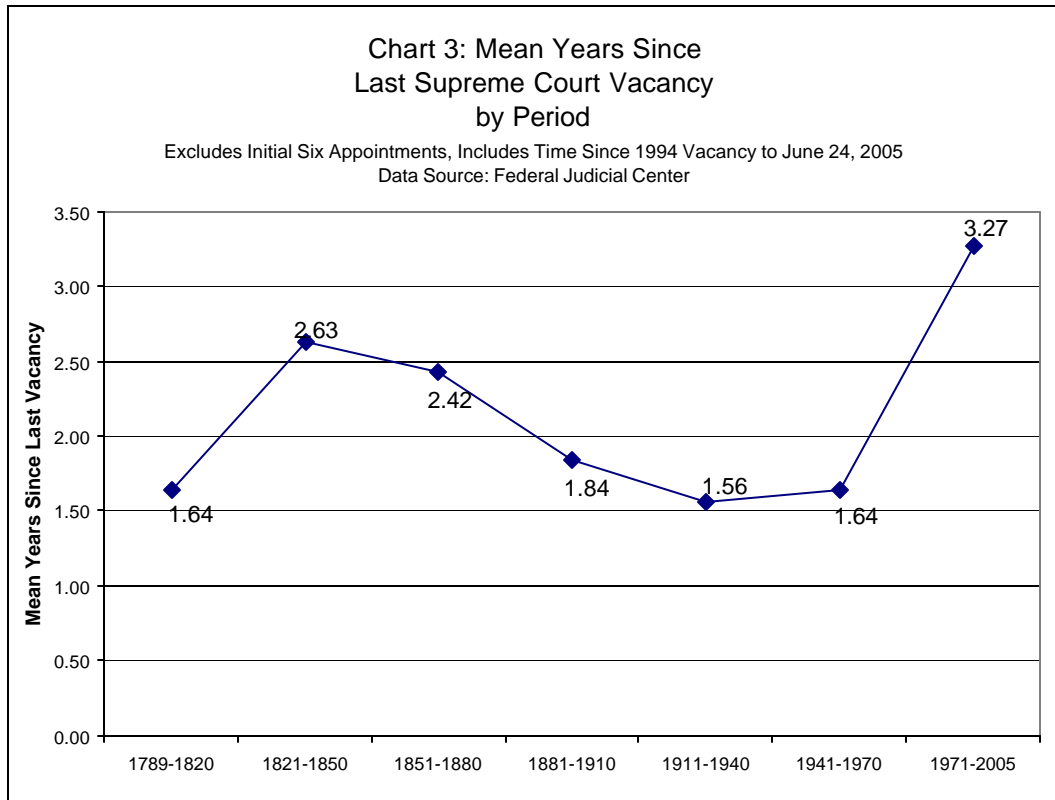
Not only are Justices staying on the Court for longer periods of time, but they also are leaving office at more advanced ages than ever before. As Chart 2 highlights, the average age at which Justices have left office generally has risen over time, but, as for the trend in the average tenure of office, it has dramatically increased in the past thirty years.



In the five thirty-year intervals between 1789 and 1940, the average age upon leaving office rose steadily from 58 to 72 years of age, but then dropped to about 68 years for the 1941-1970 period. Yet in the next thirty-year period, from 1971 to 2001, Justices have left office at an average age of almost 79 years of age. Justices that have left office since 1970 have thus been, on average, a full eleven years older when leaving the Court than Justices that 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), a time period that famously included the era of the so-called nine old men. In addition, comparing the average age since 1970 with a cumulative average age of all Justices retiring from 1789 to 1970 is revealing. The average Justice leaving office after 1970 (age 78.8) is more than ten years older than the average Justice leaving office prior to 1970 (age 68.3). Thus, the average age at which Justices have left office has increased remarkably throughout history, and most sharply in the past thirty years, which explains why justices are staying on the Court for longer terms. Life tenure today means a significantly longer tenure than it meant in 1789.

Given that Justices have been staying on the Court for longer periods of time and later in life than ever before, it is not surprising that vacancies on the Court have been opening up much less frequently than historically was the case. Indeed, as Chart 3 indicates,⁵⁴ the average number of years between vacancies has increased sharply in the past thirty years.

⁵⁴ For purposes of calculating the figures used in Chart 3, we excluded the first six appointments to the Court in 1789-1790 and started the count with the last of the 1790 commissions.



In reading these figures, it is important to remember that the size of the Supreme Court has varied over time.⁵⁵ During most of the first two 30-year periods, the Court had less than nine members, which means that the figures calculated for those periods are artificially high because, with fewer Justices, open seats will naturally occur less frequently, all other things being equal.⁵⁶ In the third period, from 1851 to 1880, it is more difficult to determine whether the figure is artificially high or low, or even on-target, since the size of the Court varied from 8

⁵⁵ Congress created the Supreme Court in 1789 with only six members, see ABRAHAM, *supra* note 51, at 53-54, and extended it to seven members in 1807, *see id.* at 64. In 1837 Congress added two more seats to expand the Court from seven to nine members, *see id.* at 76-77, and it added yet another seat in 1863 to bring the Court's membership to ten, *see id.* at 89-90. During President Andrew Johnson's tenure, Congress passed bills to eliminate two of these seats, *see id.* at 93, but in 1870 it added one more seat to bring the Court to nine members, *see id.* at 95-96.

⁵⁶ In the first period, 1789-1820, the Court had only six members for the first 18 years of the period and only seven members for the last 13 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.

to 10 members.⁵⁷ Yet it is safe to assume, without undertaking speculative calculations, that the figures for the first two periods are deceptively high because of the smaller Court at the time, and that (if the Court had been larger) they would tend to be closer to the figures from 1881-1970. Indeed, the increase in 1837 from 7 to 9 members, though primarily a power grab by the Jacksonians to pack the Court, may also have been in small part a reaction to the longer tenure, advanced ages, and longer gaps between retirement after 1811 (as suggested by the data in charts 1-3). Since 1870, the Court's membership has been fixed at nine justices, which makes a comparison between the last four thirty-year periods the most meaningful for our purposes. Chart 3 demonstrates that from 1881 to 1970, the average number of years between commissions stayed consistent at about 1.6-1.8, but that since 1970 it has doubled to over 3.3 years. If one takes a lagging average of the last nine appointments to the Court (starting after the two 1971 appointments), the mean period between appointments is now 3.75 years, the longest in history. Moreover, between 1994 and 2005 the Court has gone for nearly 11 years without a vacancy, the longest period between vacancies since the Court's membership was fixed at nine justices. To highlight further the remarkable increase in time between vacancies that has occurred since 1970, we also calculated the cumulative average from 1789-1970. On average, vacancies occurred on the Court every 1.91 years from 1789-1970, and then began occurring only every 3.27 years since 1971 and 3.75 years between vacancies after the two 1971 appointments. Thus, in the past three decades, vacancies have been opening up every three to four years, which is about double the most comparable years – from 1881-1970 – and is more than one year longer than the cumulative average from 1789 through 1970.

What is more, this already significant increase in the number of years between commissions does not tell the entire story because it does not take into account the absence of any vacancies between 1994 and 2005.⁵⁸ Recent experience thus suggests that a period of eleven years can pass without any new vacancies, which in the abstract is a period of time long enough to deprive a successful, two-term President of the chance to appoint even a single Justice.

Strikingly, since the Court was fixed at 9 members in 1870, three of the five longest times between vacancies occurred in the last thirty years: between

⁵⁷ The third period – 1851-1880 – contains two periods (1851-1863 and 1870-1880) that are comparable because the Court had nine members, a period (1863-about 1866) when the Court had ten members, and a period (about 1866-1870) when the Court had eight members.

⁵⁸ 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. If one were to measure by dates of swearing in, then the period would run from the swearing in of Justice Joseph Story in 1812 (to a seat that opened in 1810) and the swearing in of Thompson in 1823. During this period, there were only seven seats on the Supreme Court. See ABRAHAM, *supra* note 51, at 68.

November 12, 1975 and July 3, 1981, between July 3, 1981 and September 26, 1986, and between August 3, 1994 and the present. In the years since 1970, Jimmy Carter became the only President in American history who served at least one complete term and who never made 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, Bush 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 34 four-year presidential terms since the number of justices was finally fixed at nine in 1869, there have been only four four-year presidential terms in which there were no appointments made to the Supreme Court. Among the first 27 of these four-year terms from 1869 to 1973, only once did a four-year presidential term pass without an appointment (FDR, 1933-1937). Among the seven last four-year presidential terms, three of them – almost 50% -- 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 Revolution era.

These historical trends represent nothing short of a revolution in the practical meaning of the Constitution's grant of life tenure to Supreme Court justices. As Gregg Easterbrook noted, 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."⁵⁹ Given the Framers' abhorrence of such unchecked exercises of great power, it seems highly likely that were they alive today, the Framers would be concerned by the current justices "prolonged quasi-regal personal dominion."⁶⁰ The Framers gave Supreme Court justices life tenure in an era when the average American could expect to live to only 35 years of age.⁶¹ Now, Justices are appointed at roughly the same average age as was the case in the early years of our history,⁶² but they benefit from an

⁵⁹ Easterbrook, *supra* note 7.

⁶⁰ *Id.*

⁶¹ "Population Explosion Among Older Americans," *at*

<<http://www.infoplease.com/ipa/A0780132.html>> (Aug. 28, 2002). Although no precise background source is given for this estimate, it may be based on 1799-1803 data from England and Wales showing a life expectancy of 35.9 years. See Indur M. Goklany, *Economic Growth, Technological Change, and Human Well-Being*, at 59, Table 2.2.

⁶² Chart 4 demonstrates that although the average age of Justices upon commission has risen somewhat over the past 150 years, it was only 53 years in the most recent period (1971-2000), which is not significantly different from preceding periods.

average life expectancy of 77 years.⁶³ Yet most of this shift was related to infant mortality and death at younger ages. Those hardy enough to survive to age 40 or 50 could expect relatively long lives, both in the 1800s and today. For example, white men who reached the age of 40 could expect to live another 27.9 years, compared to in 2001 an expected 37.3 years of additional life for a 40 year old white man—an increase of 9.4 years since 1850. Nonetheless, the net result is that 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. This is a fundamental change, which has drastically altered the real-world operation of the Framers' system of life tenure for Supreme Court Justices. We contend this change requires an updating of the U.S. Constitution.

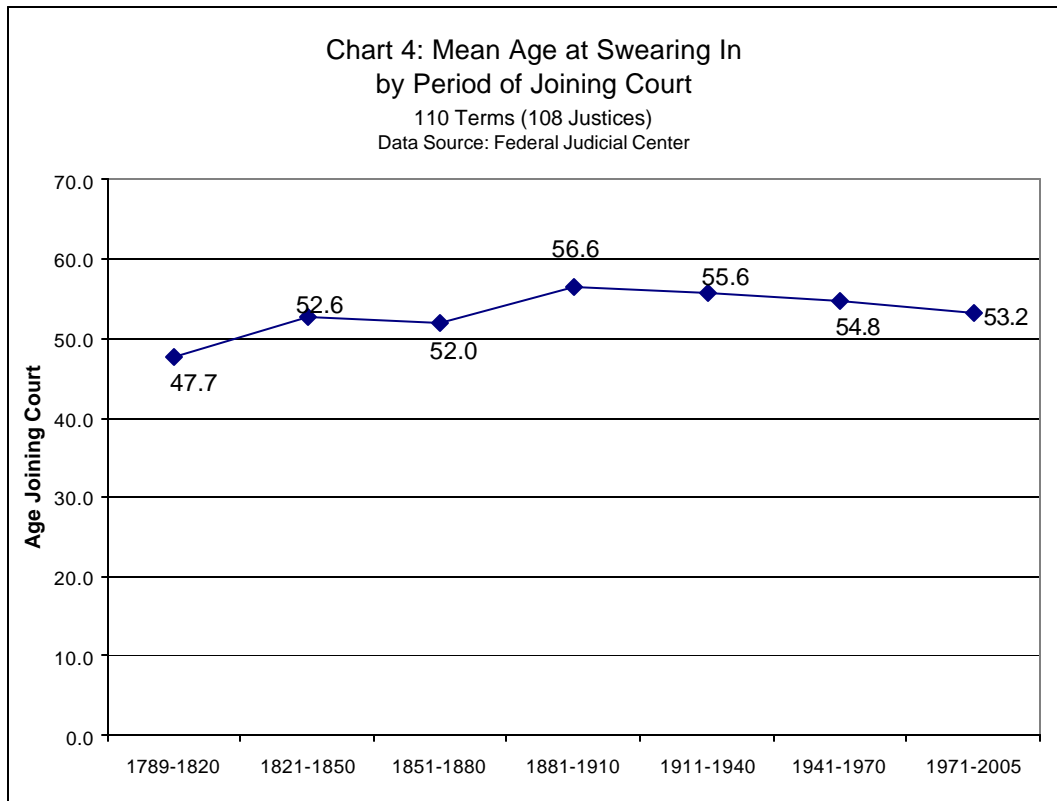
B. Explaining the Trends in Life Tenure

A quick review of the reasons why justices are staying for longer on the Court seems to be in order. Yet identifying the trend toward longer tenures is much easier than explaining all of its causes. First, as indicated, the average life span of human beings has increased substantially in recent times,⁶⁴ and, as a result of modern medicine and healthier living, more and more men and women live into their eighties and nineties than ever before. Social awareness of the dangers of smoking and alcohol, and of the importance of maintaining physical and mental health, have contributed significantly to longer life spans.⁶⁵ Moreover, because of technological advances that have made life safer and simpler and that have improved the physical condition of persons both young and old, men and women can remain physically and mentally active until later in life. As a result, people not only live longer lives, but they are also able to work later into their lives at very high levels of intensity. As a result, in recent years Justices have been able to serve on the Court for longer periods of time on average, and later in life, than ever before in American history.

⁶³ Meckler, *supra* note 49; "Vital Statistics," Statistical Abstract of the United States 2001, U.S. Census Bureau, at 73, available at <www.census.gov/prod/2002pubs/01statab/vitstat.pdf> (Aug. 28, 2001).

⁶⁴ As the historical data indicates, there has been a fairly sudden increase within the past thirty years in the length of tenure and retirement age of Supreme Court Justices. One could argue that the recency of this change indicates that the historical trends cannot be explained only by increasing life expectancies, a trend that, one might think, has been more gradual throughout history. Professor Akhil Amar, E-mail conversation between Professors Akhil Amar and Bill Stuntz, Aug. 9, 2002 (on file with authors).

⁶⁵ "Population Explosion Among Older Americans," at <<http://www.infoplease.com/ipa/A0780132.html>> (Aug. 28, 2002) (statistics based on data from U.S. Census Bureau) (noting that the improvements in life expectancy are largely attributable to medical advances which have, among other things, reduced infectious diseases).



The average age of Justices when they are appointed or commissioned has remained relatively constant throughout history. As Chart 4 below demonstrates, the average age of Justices upon being commissioned to the Court has stayed between 52 and 57 years of age since 1811. Indeed, the consistency of age of appointment throughout history is shown by the fact that the average from the most recent period (1971-2005) is 53 years of age, which matches the average throughout history of 53 years of age (1789-2005). Presidents have thus appointed Justices of substantially similar ages throughout American history. Yet as we proved earlier, Justices are retiring at much more advanced ages than ever before. Thus, the expansion of life tenure is not caused simply by Presidents appointing younger Justices, but rather by the fact that the Justices being appointed are living longer. Modern medicine and technology, and particularly a greater social consciousness of healthy living, are therefore critical factors in explaining the historical trends identified above.

Second, 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 Justices deciding to stay on the Court longer for strategic reasons.⁶⁶ 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 considered as being a more important player than ever before in leading to political and social change.⁶⁷ As a result, the political views of individual Justices have become more important in recent times and, from the perspective of a sitting Justice contemplating retirement, the political views of a likely replacement (and hence the political views of the presiding President) have become a more important consideration. This may lead to more Justices strategically timing their resignations in order to give a President from their party the ability to name a replacement than was the case historically.⁶⁸ The net result of such strategically timed resignations is that more politically minded Justices have stayed on the Court longer, and later in age, which has expanded the real world practical meaning of life tenure in recent years.

Politics and strategic decision-making in Justices' retirement decisions may have been augmented 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 is more likely to name a Justice that reflects its views.⁶⁹ For this reason, a Justice thinking about retirement might feel more comfortable resigning if his or her party controls both the White House and the Senate. But, where different parties are in control, the likelihood of controversial confirmation hearings for any replacement goes up. A Justice

⁶⁶ See Amar and Calabresi, *supra* note 3.

⁶⁷ For example, in the 1920's and 1930's, the legal realists exposed the subjectivity of judicial decision-making and the role of judges' political viewpoints in the creation of law. The Warren Court then displayed a kind of social activism in the 1950's and 1960's that demonstrated how the Supreme 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 9, at 1041 (noting that 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, and 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* (forthcoming MICH. L. REV.) (noting the increased social activism of the Court in the mid-twentieth century, and the increasing public recognition of the Court as a means of effecting political change).

⁶⁸ Amar and Calabresi, *supra* note 3.

⁶⁹ 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 the lower-court nominations of Miguel Estrada and others, majority control by a political party in the Senate is no longer sufficient to guarantee passage of a President's nomination of qualified nominees – even at the lower court level.

considering retirement in such a political environment will naturally want to avoid putting the country, and his party, through political controversy, and will therefore remain on the Court for longer periods of time. 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 37 years,⁷⁰ it could easily have contributed to the trend of justices staying longer on the Court during that period that we have described.

Indeed, strategic, political behavior by a series of Justices may help to explain the abruptness of the increase in Justices' terms on the Supreme Court since 1970,⁷¹ as the Virginia Note-writers explain in detail.⁷² For example, Chief Justice Earl Warren purportedly (and unsuccessfully) tried to time his resignation in order to let a Democratic President name his successor, although in Warren's case this did not involve staying longer in office.⁷³ Justices Black and Douglas, both very liberal in their jurisprudential outlook, allegedly stayed on the Court as long as possible, to avoid letting Presidents Nixon or Ford name their successors.⁷⁴ 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, but ultimately they had to retire.⁷⁵ 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 1993.⁷⁶ And there has been speculation that several of the 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 their successor.⁷⁷

Anecdotal evidence aside, the historical data reveals a statistically significant trend of Justices engaging in strategic decision-making in their

⁷⁰ Citation needed

⁷¹ Professors Akhil Amar and Bill Stuntz, E-mail conversation between Akhil Amar and Bill Stuntz, Aug. 9, 2002 and Aug. 13, 2002 (on file with authors).

⁷² See Note, *Saving This Honorable Court*, *supra* note ___, at 1101-06.

⁷³ See Oliver, *supra* note 19, at 805-06 (noting the politicized nature of Chief Justice Warren's departure from the Court) (*citing to* G. WHITE, EARL WARREN: A PUBLIC LIFE 306-08 (1982); BERNARD SCHWARTZ, SUPER CHIEF 680-83, 720-25 (1983)).

⁷⁴ See Oliver, *supra* note 19, at 806-07 (noting that Justice Douglas remained on the Court in order to give a Democratic President the ability to name his successor). [Need citation for Black – Woodward?]

⁷⁵ See Oliver, *supra* note 19, 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).

⁷⁶ [Cite to Professor Dennis Hutchinson, a White biographer]

⁷⁷ See Amar and Calabresi, *supra* note 3; Akhil Reed Amar and Vikram David Amar, *Should U.S. Supreme Court Justices be Term-Limited?: A Dialogue*, at <http://writ.corporate.findlaw.com/amar/20020823.html> (Aug. 23, 2002).

retirement decisions as Professor Farnsworth notes.⁷⁸ Of the 48 Justices who have died in office, 29 of them died during the term of a President of the opposite party that appointed them. In contrast, of the 53 Justices who resigned, 34 of them resigned in the term of a President of the same party as the one who appointed him. There is thus are statistically significant differences in the odds that Justices will retire when the President belongs to the Justice's party and die in office when the President belongs to a different party than that of the Justice.

The odds of a Justice resigning while the President is of the same party are 34/19, while the odds of a Justice dying while the President is of the same party are 19/29. The relative odds for these two outcomes is 2.7 to 1, which supports the hypothesis that Justices make strategic retirement decisions, resigning when a President is of the same party, and not resigning (but dying while trying to hold out) when the President is of the opposite party. While this statistical analysis does not prove that Justices have engaged in strategic gaming, the data are consistent with that conclusion, which is bolstered by the anecdotal evidence. When Justices engage in this kind of strategic behavior, delaying their retirements in order to allow a particular President to name their successors, it leads directly to longer tenures on the Court, retirements at an older age, and more time passing between vacancies.

Third, since the Court's inception in 1789, drastic improvements in the social status associated with being a Supreme Court Justice, and in the social perception of law and of judges more generally, have made being a Justice a more prestigious and desirable career and have likely contributed to longer tenures on the Court. 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 in the Court's early days is widely known to have caused a number of premature resignations. With the lack of a stable working environment and the numerous difficulties involved in being a Supreme Court Justice in those days, it is not surprising that many early Justices retired after short periods on the Court and at relatively young ages. Since the working conditions of Supreme Court Justices have improved dramatically with the elimination of circuit-riding, and since the prestige of the job of being a Supreme Court Justice has increased accordingly, Justices have understandably wanted to serve longer tenures and have been able to serve late into 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 the historical data between 1970 and 2005. Circuit riding was abolished at the end of the 19th Century and longer life expectancies were already largely a reality by 1950, and yet we see the most dramatic surge in the longevity of Supreme Court Justices in the last few

⁷⁸ Farnsworth, *supra* note ___, at 41 citing Timothy M. Hagel, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 **Political Behav.** 25 (1993).

decades. This may suggest that recent enhancements in the general social perception of law and of judges – and of Supreme Court Justices, in particular – may have made serving on the Court for longer more desirable as a career option. To be sure, judges have always been among the most respected government officials in England and in America, and throughout American history the job of being a Supreme Court Justice has been the ultimate achievement for any lawyer. Yet, until recently, it was also viewed as a temporary position, or a reward at the end of one's successful career. Not until more modern times has the judiciary (including the Supreme Court) been viewed as a place to spend the bulk of one's career. Moreover, the Supreme Court is watched more closely by the public, due largely to the increased politicization of the Court in recent years. As the nation's attention has focused more and more on the Court – especially with the advent of divided party control of the White House and Congress -- membership on the Court has become more desirable than ever before.⁷⁹ The added prestige associated with being a Supreme Court Justice has undoubtedly led to Justices serving on the Court for longer terms.

There are, of course, a number of other factors that may contribute to the historical trends we identified above. For example, increases in the size of the Justices' law clerk support staff in the late 1960's have likely enabled the Justices to serve on the Court for much longer periods of time since 1970.⁸⁰ Justices William J. Brennan, Thurgood Marshall, and Harry Blackmun were essentially kept afloat during the Reagan-Bush years by their law clerks who were to a substantial extent doing their jobs for them. Additionally, 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 reduction in the number of cert petitions granted each year⁸¹ – have probably also made it possible for Justices to serve longer. The fact of the matter is that the job of being a Supreme Court Justice is much easier with four law clerks, no mandatory jurisdiction, reduced grants of certiorari, and three months of summer vacation time than was the case at other times in American history. These additional factors, coupled with lengthening life expectancies and enhanced prestige from being a Justice, help explain why the Justices are staying on the Court now for ever longer periods of time.

C. Consequences of the Expansion of Life Tenure

The historical trends identified above – that Justices are retiring later than they have historically and at a much more advanced age than they have historically,

⁷⁹ [Citation]

⁸⁰ Professor Bill Stuntz, E-mail conversation between Akhil Amar and Bill Stuntz, Aug. 9, 2002 and Aug. 13, 2002 (on file with authors); [citation to Posner's Federal Courts?].

⁸¹ [Citation – Posner's Federal Courts?]

with the result being that vacancies are opening up less often than they have historically – have important consequences for the current state of the judiciary. We explore in this subsection four primary (though not by any means exhaustive) consequences that the expansion of life tenure, and its related historical trends, have for the judiciary.

1. A Supreme Court Divorced from Democratic Accountability

The Supreme Court is, by design, independent of the political branches of government.⁸² 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.⁸³ Only two methods of democratic accountability for the Justices are expressly provided for by the Constitution: the appointment process, and impeachment. In other words, the democratic controls over the Supreme Court are essentially limited to the selection and removal of its members and, secondarily, to the very remote possibility that Supreme Court decisions can be overturned by constitutional amendment. When selecting Supreme Court Justices, the popularly elected President nominates an individual, who then must be 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 Constitution provides for a judiciary independent of the political branches, except through the remote prospect of passage of a constitutional amendment.⁸⁴

⁸² 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.”).

⁸³ *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.”).

⁸⁴ To be sure, there are other indirect means for Congress or the public to impute the public's political values into the Court. For example, Congress holds the power to restructure judicial salaries, pensions, and other benefits, and it controls in large part the Court's jurisdiction, which are tools that it could in theory use to attempt to indirectly influence the Court's decision-making. Yet while such tools could be utilized in some circumstances, they can hardly be considered effective means of instilling public political values into the Court or its jurisprudence.

As another example, perhaps the most powerful means by which democracy checks the Supreme Court is the importance of public opinion to the Court's legitimacy. See Eskridge, *supra* note 67, at 84 (“[P]olitics is the main constraint on an activist Court.”). On most issues, public opinion establishes certain norms, or boundaries, which the Court could not transgress without risking its ability to command respect in our democratic government. As Professor Eskridge notes, “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.* One could hardly

Moreover, impeachment has been of no use for controlling the behavior of Supreme Court Justices, since no Justice has ever been successfully impeached and then removed by the Senate from office.⁸⁵ One can thus reasonably say that the appointment process is far and away the most direct and important source of democratic control on the Supreme Court.⁸⁶ Indeed, Professors Vicki Jackson and Mark Tushnet note that other countries, like the United States, provide for political appointments to their respective constitutional courts precisely because “the democratic legitimacy of constitutional review rests upon the appointment of judges by elected authorities.”⁸⁷ When a vacancy occurs on the Supreme Court, the President, with the input of his advisors, a variety of other officials, interest groups, and the public, selects a nominee. The nominee is then subject to confirmation by the Senate, which holds hearings and receives input from advisors, interest groups, and the public.⁸⁸ Upon confirmation by the Senate, the nominee becomes

imagine, for example, the Court today holding that blatant racial discrimination by the government is constitutional. Such a decision would easily fall outside the realm of publicly acceptable outcomes, and it would be met with disobedience and disapproval rather than a change in society’s own views. At the margins, the Court is bound by the general political views of the public. *Id.* Yet, though 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 setting very broad and permissive boundaries. It surely provides a less potent way of ensuring that the Court reflects the public’s political values than does the appointment process.

⁸⁵ As Professor Prakash notes, “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 15, at 571 n. 141. Of course, the example of the Republican’s attempted impeachment of Federalist Justice Samuel Chase may serve as a counterexample to this general proposition, although the fact that the attempt failed supports the proposition. 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).

⁸⁶ See REHNQUIST, *supra* note 82, 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 . . .”). 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 67, at 36-37.

⁸⁷ VICKI C. JACKSON & MARK TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 474 (Foundation Press 1999).

⁸⁸ As we have seen in the current Senate confirmation environment, the Senate “advise and consent” role has become increasingly important in the appointment process, as the Senate no longer restricts its inquiry to the general qualifications of the nominees but instead conducts searching analyses into the political ideology and judicial philosophy of the candidate. For an argument that such an ideological-checking role for the Senate is almost constitutionally necessary, and that the Senate’s inquiry of a candidate’s ideological and constitutional views should be “the heart of the process,” see Douglas Laycock, *Forging Ideological Compromise*, THE NEW YORK TIMES, Sept. 18, 2002 (“The Senate is the principal constitutional safeguard against a president appointing judges who would undermine the Constitution rather than enforce it. Political judgments cannot be avoided, and

commissioned as a Supreme Court justice. The mechanism of the appointment process with the President nominating candidates and the Senate confirming them is the main and really the only guarantee that the Supreme Court will reflect public norms.

This political process of nomination and confirmation, along with the political lobbying and public reaction to the nominee that is involved, therefore serves as an important democratic check on the Court, as the people approve (and perhaps influence) the views of the Court's members.⁸⁹ Chief Justice Rehnquist writes that "the institution has been constructed in such a way that . . . the public will, in the person of the President of the United States . . . [has] something to say about the membership of the Court, and thereby indirectly about its decisions."⁹⁰ Professor Henry Monaghan notes that "the political nature of the Senate's role, like that of the President, helps [to] ameliorate the 'counter-majoritarian difficulty'." "[B]y increasing the likelihood that Supreme Court judges will hold views not too different from those of the people's representatives, the Senate can reduce the tension between the institution of judicial review and democratic government."⁹¹ Similarly, Professor Laycock states, "constitutional understandings change over time, and the selection of new judges is a principal means by which such changes find their way into our laws."⁹² It is the primary mechanism by which the Supreme Court is tied directly to the democratic process, in a political sense. Through the appointment process democracy instills popular values of constitutional interpretation into the membership of the Court.

For this process to work there must be relatively frequent and regular turnover on the Court and from 1789 until 1970 there was such regular turnover. Since 1970, however, Justices have been staying on the Court for longer than ever

both the president and the Senate must necessarily act on their own judgment about a judicial nominee's ideology."). Similarly, Professor Henry Monaghan commented a number of years ago on the importance of (and historical support for) the Senate playing a very active role in the confirmation process, as there is "no affirmative constitutional compulsion to confirm" and the Senate therefore "has a duty to reject any nominee whose appointment it believes will not advance the public good as the Senate understands it." Monaghan, *supra* note 23, at 1206. We agree that the Senate ought to take account of the judicial philosophy of the justices in the Senate confirmation process but do not think the recent imposition of political ideological litmus tests during the confirmation hearings on Judge Robert H. Bork's nomination were appropriate.

⁸⁹ Chief Justice Rehnquist has 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.

REHNQUIST, *supra* note 82, at 210.

⁹⁰ *Id.* at 209-10.

⁹¹ Monaghan, *supra* note 23, at 1203.

⁹² Laycock, *supra* note 88.

before, which means that they are not accountable to current popular understandings of constitutional meaning. Vacancies on the Court are opening up much less frequently than in the past, which means that the democratic instillation of public values on the Court is occurring more irregularly. All of this combines to undermine the Court's ability to reflect the country's political values and thereby damages its democratic legitimacy.⁹³

Furthermore, as the Virginia Note-writers complain, when vacancies do occur they tend to be packed together, such that a number of 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.⁹⁴ When this happens, the party in power at that particular time will be able to make a disproportionate impact on the political values of the Supreme Court. The result is invariably that the Court will no longer accurately reflect the country's political values.⁹⁵ Without more regular and frequent appointments, the Court becomes too far removed from democratic control and popular understandings of constitutional meaning.

Indeed, the problem of democratic unaccountability is the primary reason cited by scholars for reconsidering life tenure. Calling the judiciary "America's home-grown aristocracy" because of the privileged position of judges, Professor Prakash argues that the notion of a life-tenured elite that decides the most basic constitutional rights and freedoms of the people is fundamentally inconsistent with the needs of a democratic republic.⁹⁶ Due to the lack of strong checks on their actions, Prakash argues that the life-tenured judges act contrary to "the obvious republican grain of the rest of the Constitution" and that they are improperly liberated "from their role as agents of the people."⁹⁷ Similarly, Professor McGinnis argues that the provision for life tenure makes Justices imperious and unaccountable to democracy.⁹⁸ Gregg Easterbrook also laments that the continuing provision of life tenure for Supreme Court Justices permits "unaccountable autocrats out of touch with the typical citizen's concerns" to decide important fundamental rights.⁹⁹ Professor Monaghan likewise argues that a common "distrust of relatively unaccountable powerholders" makes life tenure a "dubious policy" that must be abolished.¹⁰⁰ The system of life tenure thus poses a danger to our democratic form of government. And it is only getting worse, as the dramatic

⁹³ See Note *Saving This Honorable Court*, *supra* note __, at 1116-1119.

⁹⁴ *Id.*, at 1116-1119. Professor Bill Stuntz, E-mail conversation between Akhil Amar and Bill Stuntz, Aug. 9, 2002 and Aug. 13, 2002 (on file with authors).

⁹⁵ *Id.*

⁹⁶ Prakash, *supra* note 15, at 571-73.

⁹⁷ *Id.* at 573, 584.

⁹⁸ McGinnis, *supra* note 27, at 541-43.

⁹⁹ Easterbrook, *supra* note 7.

¹⁰⁰ Monaghan, *supra* note 24, at 1212.

historical trends identified above are exacerbating the democracy-reducing impact of life tenure.

Of course, none of this is intended to suggest that Supreme Court Justices (or other federal judges) should be deprived of any of their independence from political pressures. As Professor Martin Redish has noted, the Constitution deliberately insulates judges from political pressures and therefore intentionally makes the judiciary less responsive to democratic pressures than the other branches.¹⁰¹ “Absent an independent judiciary free from basic political pressures and influences, individual rights intended to be insulated from majoritarian interferences would be threatened, as would the supremacy of the countermajoritarian Constitution as a whole.”¹⁰² Indeed, we believe that judicial independence is a critical component of a constitutional democracy, and our proposal would undoubtedly preserve such judicial independence for Justices through a long fixed 18 year non-renewable term that cannot be changed by the other branches.¹⁰³ However, the fact that the only constitutionally explicit method of controlling the political values of the Supreme Court is being rendered ineffective by dramatic historical changes in the real-world practical tenures of Supreme Court Justices is cause for alarm. Without regular and frequent vacancies, the public and political branches are deprived of their one constitutionally provided method of ensuring that the Supreme Court accurately reflects the popular understanding of what the Constitution requires.

2. Increased Politicization of the Confirmation Process

A second cost of vacancies on the Court occurring less frequently and of justices serving for ever longer periods of time is that the process for confirming all federal judges has become so political and contentious that it has, effectively, broken down.¹⁰⁴ Under the current system, vacancies on the Supreme Court arise very irregularly, which means that when one does arise, the President and Senate both act without knowing when the next vacancy might be. Moreover, a successful nominee has the potential to remain on the Court for a very long (and uncertain) period of time. As a result, the political pressures on the President and the Senate are overwhelming. There is simply so much at stake in appointing a new Justice that the President and the Senate (when controlled by the party opposite the President) inevitably become engaged in a bitter political contest that harms the Court both directly and indirectly. The Court is harmed directly, since it is

¹⁰¹ See Redish, *supra* note 85, at 673-74.

¹⁰² *Id.* at 683.

¹⁰³ See *infra* pp. 54-64 for further discussion.

¹⁰⁴ The Virginia Note writers also make this point. See Note, *Saving This Honorable Court*, *supra* note ___, at 1139-1144.

deprived one of its nine members, and it is harmed indirectly, since bitter confirmation battles politicize and generally degrade the prestige of the Court.

Of course, this breakdown in the confirmation process is not a recent development. Throughout history there have been intense political confrontations between the President and the Senate regarding Supreme Court confirmations.¹⁰⁵ However, in the last twenty years, with the lack of vacancies and the lengthening duration of Justices' terms, the contentiousness and partisanship between the political branches over the confirmation of Supreme Court Justices has reached new levels of acrimony. 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.¹⁰⁶ Moreover, the high profile confirmation fights over Bork and Thomas, have created a powerful incentive for Presidents to find candidates without paper trails.¹⁰⁷ 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 Justices, and even the ability of the Supreme Court to function effectively.

Indeed, the increased politicization of the Supreme Court selection process has been so intense that it has affected the confirmation process for federal court of appeals judges and has caused that process totally to break down. The current President Bush's court of appeals nominees could hardly get hearings from the Democrat-controlled Senate Judiciary Committee between 2001 and 2003, and now Bush's nominees are facing filibusters and other obstructionist activities by the Democratic minority in the Republican-controlled Senate.¹⁰⁸ Prior to this experience under President Bush, President Bill Clinton experienced enormous resistance to his lower court judicial nominees from the Republican-controlled Senate between 1995 and 2001, which refused to grant hearings to some qualified judicial nominees such as current Harvard Law School Dean, Elena Kagan¹⁰⁹ Although it is debatable whether Supreme Court confirmations have ever before been so politicized,¹¹⁰ there is no question that the intense politicization of lower

¹⁰⁵ 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 23, at 1202 (noting the contentiousness throughout history of Senate confirmation of Supreme Court candidates, and the intensely political nature of these confirmation battles).

¹⁰⁶ [Citation to Bork hearings]

¹⁰⁷ [Souter as a stealth candidate? Estrada incident?] See Amar & Amar, *supra* note 77 (noting the tendency towards stealth candidates because of the heightened politicization of the appointment process).

¹⁰⁸ [Citation]

¹⁰⁹ [Citation]

¹¹⁰ Indeed, Professor Monaghan seems to argue that the Senate plays a smaller role in Supreme Court confirmations than it has historically. See Monaghan, *supra* note 23, at 1202-03.

court judicial confirmations has never before reached the current levels of hostility.¹¹¹ And, ironically, the current stalemate between President Bush and the Democrats in the Senate over lower court judges (like the former stalemate between President Clinton and the Republican-controlled Senate), has also likely raised the stakes for any Supreme Court vacancy that may arise in the near future. If any of the current Justices were considering retirement, the logjam of court of appeals nominees in the Senate, and the bitterness of the politics involved in the filibuster of court of appeals nominees would surely deter them from putting the country (or their party) through an even larger battle to fill a vacancy on the Supreme Court.¹¹² Thus, the irregular occurrence of vacancies on the Supreme Court and the lengthening terms of that Court's justices have substantially contributed to a breakdown of the confirmation process for judges at all levels.

3. An Improper Emphasis on the Age of Potential Nominees

As the Virginia Note-writers observe, under the current system of life tenure for Supreme Court Justices and infrequent vacancies on the High Court, Presidents have a big incentive to maximize their impact on the Court when a vacancy finally occurs by nominating younger, less-experienced candidates.¹¹³ This incentive cannot possibly be a good thing for the selection process for our nation's most important court. Given the opportunity to appoint an individual to serve on the Court for life, Presidents will naturally want to appoint a person who will be able to fill that position for a longer period of time.¹¹⁴ Indeed, the temptation for a President to select young nominees is strong – by appointing a young candidate, a President can extend his own legacy, and he can perpetuate his party's control over the Supreme Court.¹¹⁵ For this reason, the average age of Justices when commissioned to the Court has consistently been around 53 years.¹¹⁶ What this means in practice is that the most experienced candidates – for example, 58 - to 68-year-old judges – will not be considered for promotion to the Supreme Court simply because they will not be as likely to serve a long tenure as a 50 year old. In fact, there is evidence that Presidents Franklin Roosevelt and Eisenhower either established upper age limits for potential candidates or at least used age as a factor in their judicial selections.¹¹⁷ The net effect of this tendency is that age has

¹¹¹ [Citation to Estrada filibuster as being first ever for lower court]

¹¹² See Amar and Calabresi, *supra* note 3.

¹¹³ See Note, *Saving This Honorable Court*, *supra* note ___, at 1110-1116.

¹¹⁴ See Oliver, *supra* note 19, at 802-04.

¹¹⁵ See Amar and Amar, *supra* note 77.

¹¹⁶ See Chart 4.

¹¹⁷ Oliver, *supra* note 19, at 802-04 and n. 30-31.

become a disproportionately important consideration for Presidents when nominating individuals to the Court.¹¹⁸

Moreover, the recent trend of justices staying ever longer on the Supreme Court has only exacerbated this already established practice of Presidents nominating young candidates. As Chart 4 reveals, the average age of Justices when commissioned to the Court has remained relatively stable over time, varying between 48 and 57 years from 1789-2000. Given the fact that Justices are now serving longer tenures than ever before, and given that they are retiring at much older ages than ever before, the temptation for Presidents to appoint younger and younger candidates will only increase. And indeed, the historical data shows (though not to a statistically significant degree) that Presidents have given in to this temptation, as the trend in the most recent periods has been towards slightly younger nominees. Furthermore, if one views these statistics in conjunction with increasing life expectancies, we can see that 53 years of age, the average age at commission from 1971-2005, is earlier in the life cycle than was 52-53 years of age in 1821-1880. For example, a 50-year old white male in 1850 could expect to live another 21.6 years, while in 2001 a 50-year old white male could expect to live another 28.4 years, a 6.8 year difference. The fact that Justices can now serve into their late seventies and eighties has focused Presidential attention on the age of nominees and has increased the incentive to nominate 50 year olds instead of 60 year olds.

Presidential focus on youthful nominees is disturbing because youth ought not to trump experience in selecting justices. In a perfect world –and also in the world that we believe our proposal will help create – age should indirectly be a critical factor for Presidents to consider, but in the directly opposite way: the older and more experienced a candidate, the better should be his or her prospects of serving on the Court.¹¹⁹ Yet the system of life tenure has distorted the incentives of Presidents at the nominating stage since a President can lengthen his influence on the Court and extend his legacy by excluding from consideration older more experienced potential nominees.¹²⁰

Importantly, we are not saying that Presidents should be blamed given the obvious incentives the current system creates to appoint young Justices. And we also are not saying that Presidents have responded to these incentives by nominating unqualified or inexperienced individuals. The average age of Justices

¹¹⁸ See Oliver, *supra* note 19, at 802-03 (“Under the present system, however, a President desiring to exert the greatest possible influence on the Court through an appointment will have an incentive to choose a relatively young candidate.”).

¹¹⁹ Moreover, even apart from the concern that younger nominees will lack experience, Professor Monaghan notes that Walter Dellinger has suggested that young appointees are “handicap[ped]” because “they will cease to grow further because of the constant special treatment that Supreme Court judges receive.” Monaghan, *supra* note 23, at 1211 n. 37.

¹²⁰ Oliver, *supra* note 19, at 802-04.

when commissioned to the Court is 53 years of age, which is an age that certainly yields extremely capable nominees to serve on the Court. Yet the exclusion of the most experienced potential nominees our nation has to offer such as 60 year olds is a troubling by-product of our current system of life tenure that bolsters the case for our proposed reform.

4. A Rise in “Mental Decrepitude”¹²¹ on the Court

Throughout our nation’s history, and occurring more frequently in recent years, there has been a serious but relatively under-appreciated problem of Justices suffering from mental or physical health problems while serving on the Court. The illnesses have on occasion been so severe as to deprive Justices of the ability to competently handle their duties 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.”¹²² In fact, the recurring problem of mentally incapacitated Justices has from time to time led to major efforts by the American Bar Association, Congressional members, and even executive branch officials to institute a mandatory retirement age for Supreme Court Justices, or for all federal judges.¹²³ This persistent problem is thus well documented and has been recognized by lawmakers as one that threatens the legitimacy of the Court.¹²⁴

The problem of mental decrepitude is troubling on a number of levels.¹²⁵ First, it dramatically affects the ability of the Court to function, given that one (or more) members of the Court are unavailable to perform their normal duties, and

¹²¹ This is the term used by Professor David Garrow. See Garrow, *supra* note 9.

¹²² *Id.* at 995.

¹²³ 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 1940’s and 1950’s 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 1970’s and 1980’s by the American Bar Association and Congressional leaders for a constitutional amendment or a statute imposing a mandatory retirement age limit on federal judges, but perhaps excluding Supreme Court Justices).

¹²⁴ See Amar and Calabresi, *supra* note 3; Easterbrook, *supra* note 7; McGinnis, *supra* note 27, at 543; Monaghan, *supra* note 24, at 1211-12; Oliver, *supra* note 19, at 813-16.

¹²⁵ See Garrow, *supra* note 9, at 997 (“Whenever a justice no longer possesses mental acuity and intellectual energy sufficient to understand, remember, and analyze the cases and arguments that come before the Court, both the immediate parties and American democracy suffer tangible harm.”). Professor Monaghan has similarly noted that “the graying of the Court can only work to ensure even greater delegation of responsibility to law clerks.” Monaghan, *supra* note 24, at 1212.

other Justices, clerks, and Court personnel have to make up the work.¹²⁶ Second, to the extent that news of a Justice's incapacitated state becomes public, the Court's prestige and respect in the public's eye suffers.¹²⁷ The public's awareness that a particular decision was made with the decisive vote of a mentally decrepit Justice undermines the Court and the legitimacy of its decisions.¹²⁸ Third, it is a bad thing for the Court to be effectively reduced from nine to only eight members. Where one of the Justices essentially has been eliminated from the Court's everyday decision-making process and no longer casts a meaningful vote, the result is a Court creating precedent without the full input of its requisite membership.¹²⁹ This becomes even more troublesome where a Court's decision turns on the decisive vote of a mentally decrepit Justice.¹³⁰ Thus, given the impact of the mental decrepitude problem on the Court's every-day functioning and on its legitimacy

¹²⁶ For example, when Justice William O. Douglas refused to retire for almost one year after being hospitalized and, according to other Justices and his close friends, mentally incapacitated, it caused the Court to hold over a substantial number of its closest cases for long periods of time, which "forced the Court into 'a crisis mentality' for parts of two successive terms" and thereby undermined the Court's smooth functioning. Garrow, *supra* note 9, at 1056 (citations omitted). Similarly, when Justice Marshall was largely unable to perform his duties, he apparently followed Justice Brennan in voting and then permitted his clerks to perform all of his opinion-writing and other duties. *Id.* at 1072. Other examples abound, as Professor Garrow demonstrates that the reliance by decrepit Justices on other Justices and on Court personnel has been a serious problem that has delayed the Court's business. *See also* McGinnis, *supra* note 27, at 543 (noting the "excessive delegation of power to young and energetic law clerks"); Monaghan, *supra* note 24, at 1212 (same).

¹²⁷ The best example of this is Justice Douglas, whose mental incapacity was widely reported by the press and was center stage in some public forums, such as a single-justice hearing on an application for a stay at a federal courthouse in Washington, where Douglas was reported as being "clearly incapacitated." Garrow, *supra* note 9, at 1053-54. *See also id.* at 1007-08 (noting that the observation by *The Nation* magazine that Justice Clifford had been ill for some time prior to his death, which made his seat "practically vacant," caused "clear public harm upon the Supreme Court"); *id.* at 1072-77 (noting the public nature of Justice Marshall's mental incapacity in his later years of Court service, and its harm to the public's respect for the Court).

¹²⁸ For example, as Professor Garrow notes, Justice Grier was mentally incapacitated when he cast the decisive vote in a case striking down the Legal Tender Act. As soon as he retired shortly thereafter, his replacement provided the deciding vote to overturn the earlier ruling. This flip-flop in decision-making by the Court, especially since it was caused by the vote of a mentally-incapacitated Justice, naturally harmed the Court's reputation with the public. *Id.* at 1003-06.

¹²⁹ For example, Professor Garrow notes that Justice Baldwin remained a voting member on the Court for a full eleven years after other Justices and public officials were aware of his mental incapacity. *Id.* at 1002-03.

¹³⁰ Justice Grier, whose "mental incapacity was beyond any doubt" at the time, cast the deciding vote in an important case involving the Legal Tender Act, which led one commentator to note that the Court was effectively "declaring an Act of Congress invalid by the vote of a confused mind." CHARLES FAIRMAN, 6 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-1888 716 (Macmillan 1971).

and prestige, it must be considered a serious problem that adds support to our proposed reform.

Moreover, while mental decrepitude of justices has been a problem on and off for 200 years, “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.”¹³¹ According to Professor Garrow, prior to the twentieth century, the Court was plagued by only four Justices whose mental abilities were diminished; in the twentieth century, at least *eleven* Justices served longer than they should have.¹³² Thus, the last century has seen more than twice the number of Justices who suffered from mental decrepitude than the previous century-and-a-half had seen, which roughly corresponds with the historical trend of justices staying on the Court for longer which is the subject of this Article. Precisely because Justices are retiring later in age than ever before, and are staying on the Court longer than ever before, we quite naturally have more instances of mentally or physically decrepit Justices serving on the Court than was formerly the case.

Furthermore, the dramatic increase in longevity of Justices’ tenures since 1970 has matched the similarly dramatic increase in the number of decrepit Justices during that period. While twelve Justices¹³³ retiring in the 181 years from 1789 to 1970 were decrepit, five Justices retiring in the 35 years after 1970 were allegedly suffering from physical or mental decrepitude.¹³⁴ Of the six Justices with the longest tenures on the Court, four (67%) were mentally decrepit (Justices Field, Black, Brennan, and Douglas). Of the 26 Justices with the longest tenures on the Court, 10 (38%) were similarly mentally incompetent to serve by the time they

¹³¹ Garrow, *supra* note 9, at 995.

¹³² *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 never was confirmed to serve on the Court and served only several months in a recess appointment. 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.

¹³³ This excludes Justices Rutledge and Cushing, who, for the reasons detailed *supra* note 132, were borderline cases that Professor Garrow, who extensively studied the historical documentation, did not conclude were definitely stricken with mental decrepitude that affected their judicial abilities.

¹³⁴ 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 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.

retired or died in office. Of the 22 Justices who served longer than 18 years retiring since 1898, fully 8 (36%) were mentally or physically decrepit. Perhaps most stark is that *half of the last ten Justices to leave office (50%) were decrepit and a majority of the last five Justices (60%) to leave office were decrepit* in their last years on the Court.

For those commentators who want to pretend that the current system does not need reform (“If it ain’t broke, don’t fix it”), it is time to recognize that the system is definitely broken. Whether one uses as the relevant rate of decrepitude 36% (of those serving more than 18 years since 1898), 50% (of the last 10 retirees), or 60% (of the last 5 retirees), the rate is unreasonably high. Mental or physical decrepitude, a rare problem in the past, now strikes the majority 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. Three times in history, there were major movements to institute such proposals. First, instead of FDR’s court-packing scheme during the New Deal, several executive 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.¹³⁵ 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.¹³⁶

Second, another campaign for a constitutional amendment imposing mandatory retirement for Supreme Court justices at age seventy-five occurred in the late 1940’s and early 1950’s, 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.¹³⁷ Importantly, this proposal received strong support by former Justice Owen J. Roberts,¹³⁸ 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.”¹³⁹ 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.¹⁴⁰

¹³⁵ *Id.* at 1019-20, 1024-26.

¹³⁶ *Id.* at 1020-21.

¹³⁷ *Id.* at 1028-43.

¹³⁸ *Id.* at 1040.

¹³⁹ Composition and Jurisdiction of the Supreme Court, S. Rep. No. 1091, 83d Cong., 2d Sess. 10, at 5 (Mar. 24, 1954), reproduced in Garrow, *supra* note 9, at 1037.

¹⁴⁰ Garrow, *supra* note 9, at 1042-43.

Third, in the mid- to late-1970's, 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.¹⁴¹ 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.¹⁴² Ultimately, legislators rejected the application of a mandatory retirement age on 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 are deemed to be mentally incompetent.¹⁴³

Apart from these more concerted movements, there have been a number of other significant informal proposals for mandatory retirement age requirements. For example, Chief Justice William H. Taft wrote a book in 1913¹⁴⁴ that proposed mandatory judicial retirement at age seventy. Ironically, Taft later served until he was seventy-two and, according to his biographer, beyond the point at which he was mentally healthy.¹⁴⁵ Likewise, Charles Fairman, in 1938, argued for a mandatory retirement age in order to prevent disabled Justices from continuing in office.¹⁴⁶ Indeed, Professor Garrow himself recommends a mandatory retirement age requirement.¹⁴⁷

Significantly, like the Virginia Note-writers, we oppose a mandatory retirement age for justices and judges.¹⁴⁸ We believe such a requirement is unfair in that it blindly discriminates against judicial service on the basis of age, in a harsh way, that does not take into account the actual condition of a given individual. A term limit on the tenure of Supreme Court Justices, such as the one that we propose, will achieve nearly all of the goals intended by a mandatory retirement age, but will do so in a more uniform and respectful manner that does not blindly discriminate against a member of the Court based solely on age. Yet for purposes of this Article, it is important to see that the problem of mental decrepitude on the Court is a serious one that it is worsening because of the historical trends we identified above, and that past reform efforts have stalled for a variety of different reasons.

¹⁴¹ *Id.* at 1056-57.

¹⁴² *Id.* at 1059-61.

¹⁴³ *Id.* at 1062-65.

¹⁴⁴ See WILLIAM HOWARD TAFT, *POPULAR GOVERNMENT: ITS ESSENCE, ITS PERMANENCE AND ITS PERILS* 159 (Yale 1913).

¹⁴⁵ Garrow, *supra* note 9, at 1016-17 and n. 100 (describing Chief Justice Taft's proposals and the irony in the fact that he did not take his own advice, and that he instead continued to serve even after his mental abilities had substantially deteriorated).

¹⁴⁶ Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 433 (1938).

¹⁴⁷ Garrow, *supra* note 9, at 1086-87.

¹⁴⁸ See Note, *Saving This Honorable Court*, *supra* note ___, at 1133-1137.

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

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,¹⁴⁹ and it has also been rejected by 49 out of 50 U.S. states in setting up their state Supreme Courts. The life-tenured U.S. Supreme Court is thus an odd rarity among the world's high courts in continuing to retain its members for life. Indeed, the nation upon whose legal system the U.S. legal system is based – England – has eliminated the guarantee of life tenure for its judges, and nearly all other major countries and U.S. states that have considered the question since 1789 have also decided against establishing life tenure for the members of their respective constitutional courts of last resort.

First, the United States is alone among the leading nations of the world in preserving life tenure for the members of its highest constitutional court. Every major democratic nation, without exception,¹⁵⁰ provides for some sort of a limited tenure of office for its constitutional court judges, and thereby refuses to follow the U.S. model of life tenure. As Professors Jackson and Tushnet stated, “among the constitutional courts of western democracies that had had judicial review since at

¹⁴⁹ By “constitutional courts,” we mean to compare the U.S. Supreme Court to 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 generally* JACKSON & TUSHNET, *supra* note 87, 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.

¹⁵⁰ 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* JACKSON & TUSHNET, *supra* note 87, at 540. In Russia, there is the Russian Constitutional Court and the Russian Supreme Court. The Russian Constitution does not create one “highest” court in Russia, and proponents of both the Russian Constitutional Court and the Russian Supreme Court claim the respective courts as the “highest” court. *See* GENNADY M. DANILENKO & WILLIAM BURNHAM, *LAW AND LEGAL SYSTEM OF THE RUSSIAN FEDERATION* 62-63 (Juris Publishing 1999). 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 87, at 540 (referring to the Russian Constitutional Court, which is limited by a 12-year nonrenewable term, as the relevant court to comparatively analyze). 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).

least the early 1980s, the U.S. is singular in its provisions for life tenure.”¹⁵¹ In many countries, founders provided for a direct limit on the tenure of members of their respective constitutional courts through fixed term limits. Members of the constitutional courts in France,¹⁵² Italy,¹⁵³ Spain,¹⁵⁴ Portugal,¹⁵⁵ Germany,¹⁵⁶ and Russia¹⁵⁷ serve limited terms of between six and twelve years. Moreover, judges on Germany’s constitutional court also face a mandatory retirement age of 68, in addition to the twelve-year, nonrenewable term.¹⁵⁸ Likewise, members of the Russian Constitutional Court face a mandatory retirement age of 70, in addition to the fixed term of twelve years.¹⁵⁹ Through term limits, many countries provide for regular, relatively frequent rotation in the membership of their constitutional courts. Germany and France are illustrative examples of countries that provide for a fixed term of years for judges on their constitutional courts. In Germany, the Federal Constitutional Court was created in 1951 by the Federal Constitutional Court Act (FCCA).¹⁶⁰ The Federal Constitutional Court is charged with the function of interpreting and applying the constitution, and it is the only body with the authority to strike down a statute on the grounds of unconstitutionality.¹⁶¹ This Court, pursuant to the FCCA, is divided into two bodies called senates, each consisting of eight members.¹⁶² As it is currently established, “the allocation of cases between the two panels is determined partly by the procedural posture of the case, partly by the substantive issues presented, and partly by alphabetical order.”¹⁶³ Under the German Constitution, called the Basic Law, the Bundestag and the Bundesrat each appoint half of the members of the Federal Constitutional Court.¹⁶⁴ As it pertains

¹⁵¹ JACKSON & TUSHNET, *supra* note 87, at 489.

¹⁵² Judges on the French Constitutional Council serve nine-year, nonrenewable terms. FR. CONST. art. 56; JOHN BELL, FRENCH CONSTITUTIONAL LAW 34 (Oxford University Press 1992).

¹⁵³ Members of the Italian Constitutional Court serve nine-year terms, which are not immediately renewable. JACKSON & TUSHNET, *supra* note 87, at 490-91.

¹⁵⁴ Members of the Spanish Constitutional Tribunal serve nine-year, renewable terms. *Id.*

¹⁵⁵ Members of the Portuguese Constitutional Court serve six-year terms. *Id.*

¹⁵⁶ Members of the Federal Constitutional Court of Germany serve twelve-year, nonrenewable terms. JACKSON & TUSHNET, *supra* note 87, at 490-91; DAVID P. CURRIE, THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY 27 (1994).

¹⁵⁷ Judges on the Russian Constitutional Court serve twelve-year nonrenewable terms. DANILENKO & BURNHAM, *supra* note 150, at 62-63. However, as noted previously, 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 150.

¹⁵⁸ JACKSON & TUSHNET, *supra* note 87, at 490-91; CURRIE, *supra* note 156, at 27.

¹⁵⁹ JACKSON & TUSHNET, *supra* note 87, at 540.

¹⁶⁰ *Id.* at 520; DONALD KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 9 (2d ed. 1997).

¹⁶¹ CURRIE, *supra* note 156, at 27.

¹⁶² *Id.* at 29; JACKSON & TUSHNET, *supra* note 87, at 521; KOMMERS, *supra* note 160, at 16-18.

¹⁶³ CURRIE, *supra* note 156, at 29.

¹⁶⁴ *Id.* at 27; JACKSON & TUSHNET, *supra* note 87, at 525.

to the degree of judicial independence provided for German constitutional Justices, the Basic Law and the FCCA are very similar to U.S. provisions, since Justices can be removed only for specific reasons and they are otherwise protected from political influences.¹⁶⁵

Importantly, however, the characteristics of the German constitutional court differ from the U.S. model in one critical way: tenure of office. Since, “unlike the U.S. Constitution, the Basic Law allows the legislature to modify the term of appointment for the Constitutional Court Justices,” the FCCA governs the tenure of office for members of the Federal Constitutional Court.¹⁶⁶ While the FCCA initially provided for life tenure for some members of the Federal Constitutional Court, since 1970, it has provided that *all* Justices on the Court are appointed for a twelve-year, nonrenewable term, which is further limited by a mandatory retirement age of 68.¹⁶⁷ As Professors Jackson and Tushnet detail, during the debates in 1970 where legislators moved to institute term limits and compulsory retirement at age 68, the German Constitutional Court Justices favored lifetime appointment.¹⁶⁸ However, the government rejected life tenure and instead imposed the fixed, nonrenewable term limits.¹⁶⁹ Thus, the term of appointment for German Justices is not a constitutional issue, but rather a legislative one; and, as a matter of policy, the legislature has limited the terms of office for these Justices since 1970. In France, the Constitutional Council, established in 1958, is the primary body charged with constitutional review in that country.¹⁷⁰ The French Constitutional Council generally has jurisdiction over election issues, conflicts between legislative and executive branches, the constitutionality of rules of a chamber of Parliament, the constitutionality of international treaties, and the constitutionality of laws.¹⁷¹ Although the Council acts in a less judicial manner than most constitutional courts, and more like an administrative body that advises the government,¹⁷² its decisions on constitutionality have broad, binding authority on all relevant governmental parties.¹⁷³ The Council consists of nine judges: three of whom are appointed by the President of the Republic, three of whom are appointed by the President of the

¹⁶⁵ CURRIE, *supra* note 156, at 27; JACKSON & TUSHNET, *supra* note 87, at 524-26.

¹⁶⁶ *Id.* at 525.

¹⁶⁷ *Id.*; CURRIE, *supra* note 156, at 27; KOMMERS, *supra* note 160, at 20-21.

¹⁶⁸ JACKSON & TUSHNET, *supra* note 87, at 525.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 471. Of course, the Council does not necessarily have a monopoly on constitutional interpretation, as Article 5 of the French Constitution provides that “the President of the Republic shall ensure the respect of the Constitution,” which may indicate a more departmentalist form of constitutional interpretive authority. See ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 46-53, 57-59 (1992), reprinted in JACKSON & TUSHNET, *supra* note 87, at 507-16.

¹⁷¹ *Id.* at 471; BELL, *supra* note 152, at 30-32.

¹⁷² BELL, *supra* note 152, at 41-42.

¹⁷³ BELL, *supra* note 152, at 48-53.

Senate, and three of whom are appointed by the President of the National Assembly.¹⁷⁴ Every three years, one member is appointed to the Council by each of these appointers, and the judges serve a single, nonrenewable term of nine years.¹⁷⁵ Through this staggered, fixed term of years, the tenures of office of French constitutional judges are strictly limited, like in Germany and many of the world's other major democratic nations.¹⁷⁶

Russia, another nation that uses fixed term limits for the members of its Constitutional Court, provides an excellent example of yet another country that deliberately departed from the U.S. model of life tenure.¹⁷⁷ After the breakup of the former Soviet Union, Russia in 1991 passed a Constitutional Court Act to create its constitutional court.¹⁷⁸ In this Act, as Professors Jackson and Tushnet point out, Russia went towards the European model of limited tenure, as opposed to the U.S. lifetime tenure, by limiting the tenures of members of the Russian Constitutional Court through a mandatory retirement age of 65.¹⁷⁹ Russian officials then amended this provision in the Constitutional Court Act of 1994 by limiting newly appointed judges to a single twelve-year, nonrenewable term.¹⁸⁰ At the same time, the Act preserved the mandatory retirement age, but moved it up to age 70.¹⁸¹ Thus, although there have been changes to the term of appointment for constitutional judges in Russia, there is a consistent practice of limited tenure.

Russia's support for term limited constitutional court justices has been copied by a number of Eastern European nations since the revolutions of 1989. Professors Jackson and Tushnet cite a 1992 study by Professor Herman Schwartz,¹⁸² which covered six east European nations – Czechoslovakia, Romania, Bulgaria, Russia, Hungary, and Poland – and found that life tenure had not been

¹⁷⁴ JACKSON & TUSHNET, *supra* note 87, at 471; BELL, *supra* note 152, at 34. In addition, all former Presidents of the Republic are members on the Council for life. However, in practice, former Presidents have not taken their seats, and no former President has taken part in a decision of the Council since 1962. *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ It may accurately be argued that the French and German experiences are distinguishable from the experience in the United States. In France and Germany, as opposed to the United States, there is a long history of suspicion of judges that has led to sharper limits on the judiciary. *See, e.g.*, BELL, *supra* note 152, at 20-21 (noting the distrust of judges that led framers of the French Constitution to limit the powers of the judiciary). Yet while this would naturally lead French and German founders to limit the *powers* of the judiciary, it does not at all mean that they would limit the *length of service* of the constitutional judges.

¹⁷⁷ *See* JACKSON & TUSHNET, *supra* note 87, at 539-42 (summarizing the constitutional court of Russia, and of Eastern European nations).

¹⁷⁸ *Id.* at 540.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Herman Schwartz, *The New East European Constitutional Courts*, 13 MICH. J. INTL. L. 741 (1992).

adopted by a single country.¹⁸³ For example, both Hungary and Poland permit their judges to serve nine-year, nonrenewable terms.¹⁸⁴ Importantly, all of these countries have just recently considered the question, and all have consciously followed the model of limited terms of office for justices, rather than the U.S. model of lifetime tenure.¹⁸⁵

Instead of imposing 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,¹⁸⁶ Australia,¹⁸⁷ and England¹⁸⁸ enjoy tenures limited by a mandatory retirement age of 65, 70 or 75, respectively. Most interestingly, England, whose system of life tenure was the precursor for the U.S. system of life tenure, now imposes on the members of its highest court, the House of Lords' Lords of Appeal in Ordinary, a mandatory retirement age of 75. In addition, other major countries, such as India¹⁸⁹ and Japan,¹⁹⁰ have instituted a mandatory retirement age in order to limit the tenure of members of their respective constitutional courts. Several other nations also add a compulsory retirement age onto a fixed term of office, such as Germany and Russia, as noted above, and South Africa.¹⁹¹ By setting a mandatory age retirement, these countries have limited the tenure of their highest constitutional court judges, though not to the exacting degree that fixed term limits would achieve.

Thus, every other single major democratic nation we know of – all of which drafted their respective constitutions or otherwise established their supreme constitutional courts after 1789 – has chosen not to follow American model of guaranteeing life tenure to the Justices of its equivalent to the Supreme Court. Most notably, given the importance of English common law and the English judiciary in establishing our own institutions, England has chosen to limit the tenure of its top jurists by imposing a mandatory retirement age of 75. In light of

¹⁸³ JACKSON & TUSHNET, *supra* note 87, at 539-40.

¹⁸⁴ *Id.* at 540 and note "s".

¹⁸⁵ *Id.* at 539-40.

¹⁸⁶ Members of the Canadian Supreme Court face a mandatory retirement age of 75. JACKSON & TUSHNET, *supra* note 87, at 490-91.

¹⁸⁷ Members of the Australian High Court face a mandatory retirement age of 70. *Id.*

¹⁸⁸ Members of the English House of Lords' Lords of Appeal in Ordinary face a mandatory retirement age of 75. HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 31-32, 280-82 (7th ed. 1998).

¹⁸⁹ Members of the constitutional court of India face a mandatory retirement age of 65. JACKSON & TUSHNET, *supra* note 87, at 489.

¹⁹⁰ Judges on the Japanese Supreme Court face a mandatory retirement age of 70. KENNETH L. PORT, *COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN* 65-67 (Carolina Academic Press 1996).

¹⁹¹ Members of the Constitutional Court of South Africa serve nonrenewable twelve-year terms and also are compelled to retire by age 70. JACKSON & TUSHNET, *supra* note 87, at 489.

the strong worldwide trend against having lifetime tenure for members of the highest courts, the U.S. Supreme Court system of life tenure is truly an anomaly.

Second, comparative analysis within the United States reveals that 49 of the 50 American states have chosen *not* to follow the federal Supreme Court in providing lifetime tenure for members of their respective state supreme courts. Of the 50 U.S. states, only one – Rhode Island – provides for a system of life tenure for its Supreme Court justices.¹⁹² Every one of the remaining states provides for a limit on the tenure of its highest court members, in varying forms.¹⁹³ For example, justices on the high courts in Massachusetts and New Hampshire face a mandatory retirement age of 70.¹⁹⁴ The other 47 states all provide for limited terms of office for the justices of their highest courts, with the terms ranging from six to fourteen years.¹⁹⁵ Moreover, all states that have an intermediate appellate court have opted against providing life tenure for the members of that court as well.¹⁹⁶ There is thus a nearly unanimous consensus among the U.S. states against life tenure for state judges, both on the highest courts and on intermediate appellate courts of the states. The fact that 49 out of 50 U.S. states have so uniformly departed from the model of the federal judiciary is telling, and it provides further evidence of the undesirability of maintaining a system of lifetime tenure in the present day.

This comparative analysis – both outside the United States and within it – bolsters the case against life tenure we made earlier. This naturally raises the question of whether if we could reconvene the Philadelphia Convention, today, the Framers would still choose to opt for life tenure given the trend in all other jurisdictions, except Rhode Island, and given the other pathologies associated with life tenure discussed above. In light of this strong comparative case against using lifetime tenures, it is surprising that lawmakers in this country have never seriously reconsidered the question of life tenure for Supreme Court Justices. We contend that it is high time for them to do so now.

¹⁹² THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES vol. 33, at 131, Table 4.1 (2000).

¹⁹³ *See id.* at 131-32. New Jersey does provide for tenure following an initial seven-year term limit, however. *See id.*

¹⁹⁴ *Id.* at 131.

¹⁹⁵ *Id.* at 131-32. States with a six-year term limit on the justices of their highest courts are Alabama, Arizona, Florida, Georgia, Idaho, Kansas, Minnesota, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Texas, Vermont, and Washington. Maine and New Jersey provide for seven-year term limits. Arkansas, Connecticut, Iowa, Kentucky, Michigan, Mississippi, Montana, New Mexico, North Carolina, South Dakota, Tennessee, and Wyoming all provide for eight-year term limits. States with a ten-year term limit are Alaska, Colorado, Hawaii, Illinois, Indiana, Louisiana, Maryland, North Dakota, Pennsylvania, South Carolina, Utah, and Wisconsin. California, Delaware, Missouri, Virginia, and West Virginia provide for twelve-year term limits. New York provides for a fourteen-year term limit for members of its highest court. *Id.*

¹⁹⁶ *Id.* at 133-34.

III. Term Limits for the Supreme Court

We have offered substantial grounds for reconsidering life tenure and its role in our constitutional order. Specifically, we have shown that the real-world, practical meaning of “life tenure” on the Supreme Court has changed, that the Justices are staying on the Court later in age than ever before, and that the net result has been less frequent vacancies on the Court. These phenomena in turn have led to a less democratically accountable Supreme Court, a more intensely political confirmation process for Justices, a disproportionate emphasis on the age of potential nominees, and the “mental decrepitude” that now strikes most justices before they retire from the Court. Indeed, all of these concerns may help explain why every other major democratic country in the world and 49 out of the 50 U.S. states have limited the tenure of the judges on their highest courts, through either term limits or mandatory age requirements.

Moreover, adding to what we think is already a powerful case for constitutional change, we agree with Professor Prakash and others that some of the original justifications put forward for life tenure have disappeared. For example, Professor Prakash notes that “Some of [Alexander Hamilton’s] empirical claims or predictions [in Federalist Number 78 defending life tenure] no longer ring true. . . . Other assertions never held water and contradicted the Constitution’s first principles.”¹⁹⁷ First, we no longer need to protect the very powerful Supreme Court from the hostile action of the other branches as much as Hamilton thought was necessary in the 1780’s, and, even assuming the need for protection, eliminating life tenure and replacing it with a lengthy fixed term of 18 years would not undermine the Supreme Court’s independence from the other branches in any meaningful way.¹⁹⁸ Second, life tenure is no longer justified because of the need to attract the best candidates to the job, as Hamilton claimed it was in Federalist Number 78, both because of the other incredible incentives that have for the best candidates to aspire to be justices¹⁹⁹ and because of the fact that, under our proposal, any Justice would still to serve on the Court for a significant period of time.

Third, Hamilton’s fear of a lack of judicial independence from the public has been turned on its head, since, as we argued above, we believe that if anything the

¹⁹⁷ Prakash, *supra* note 15, at 574-75. Professor Monaghan also suggests that the defense for life tenure once made by Hamilton is no longer “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 are now able to serve on the Court for “four decades.” Monaghan, *supra* note 24, at 1211-12.

¹⁹⁸ Prakash, *supra* note 15, at 575-76.

¹⁹⁹ *Id.* at 577.

modern Supreme Court ought to be made *more* democratic and responsive to the popular understanding of the Constitution's meaning, not less so.²⁰⁰ At the same time, our proposal would not make the Court too dependent on public opinion, since we propose nonrenewable terms for the Justices and since we favor a long 18 year term on the High Court.²⁰¹ Fourth, contrary to Hamilton's argument that life tenure is necessary to the judiciary's ability to faithfully defend the Constitution, Prakash persuasively argues that life tenure has little relation to constitutional fidelity and that, in fact, life-tenured Justices are more likely to be less loyal to the Constitutional text.²⁰² Thus, Alexander Hamilton's once-powerful defense of life tenure seems considerably less compelling in the modern world,²⁰³ although it has recently been supplemented by a powerful defense of life tenure by Professor Ward Farnsworth.²⁰⁴

Accordingly, in this Section we discuss constitutional, statutory, and other informal ways of imposing an 18 term limit on Supreme Court Justices. We begin in Section II.A by presenting and defending our term limits proposal in its theoretically purest, and we conclude in its only acceptable form, as a constitutional amendment. In Section II.B, we then explore how our term limits proposal might be enacted through a creative statutory scheme of our own devising and through a creative statutory proposal put forward by Professors Paul Carrington and Roger Cramton. We conclude that neither of these statutory proposals is constitutional. Finally, in Section II.C, we consider several informal measures that could be taken by a variety of actors—the Senate, the Court, or the individual Justices—to indirectly impose term limits on the Supreme Court Justices. We conclude that these informal ways of achieving term limits are unsatisfactory as well.

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 states that “the Judges, both of the

²⁰⁰ *Id.* at 578.

²⁰¹ *See infra* notes 306-326 and accompanying text (defending our proposal as maintaining judicial independence); Monaghan, *supra* note 24, at 1211 (noting that a fixed, nonrenewable term limit would not threaten judicial independence).

²⁰² Prakash, *supra* note 15, at 578-80. This is a point also made by Professor McGinnis, who proposes short (6 month or 1 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 27, at 541-43.

²⁰³ *See* Prakash, *supra* note 15, 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.”).

²⁰⁴ Farnsworth, *supra* note ____.

supreme and inferior Courts, shall hold their Offices during good Behavior”²⁰⁵ It is well-established that this provision guarantees life tenure for federal judges, though not explicitly. Consequently, nearly all commentators, except Professors Carrington and Cramton, who have proposed term limits have specified that any changes to life tenure for the Supreme Court would require a constitutional amendment.²⁰⁶ We agree with these commentators that abolishing life tenure for Supreme Court justices can only be done by constitutional amendment, and we defend the desirability of such an amendment below.

1. The Term Limits Proposal

We propose that, in accordance with the Article V amendment process,²⁰⁷ Congress and the states pass a constitutional amendment imposing an eighteen-year, staggered term limit on the tenure of Supreme Court Justices.²⁰⁸ Under our proposal, each Justice would serve a fixed term of eighteen years, and the terms would be established so that a vacancy on the Court occurs every two years beginning on July 1st of every odd-numbered year. These terms would be structured so that the turnover of Justices occurs during the first and third year of a President’s four-year term,²⁰⁹ such that there will be little possibility of a Supreme Court appointment being held up by Senate confirmation in a way that deprives the President of the ability to nominate either of his two Justices.²¹⁰ The terms also would be set up so that an outgoing Justice would complete his tenure on the last day of the Supreme Court’s term, and the new Justice should be confirmed in time to begin officially serving his term in October before the beginning of the Supreme

²⁰⁵ U.S. CONST. art. III, sec. 1.

²⁰⁶ See Silberman, *supra* note 21, at 687; Oliver, *supra* note 19, at 800 n.9; Easterbrook, *supra* note 7; Prakash, *supra* note 15, at 567. *But see* McGinnis, *supra* note 27, at 545-46 (noting the possibility of instituting “Supreme Court riding,” his version of a term limits proposal, through statute); Amar and Calabresi, *supra* note 3 (noting the possibility of a statutory term limits proposal).

²⁰⁷ See U.S. CONST. art. V.

²⁰⁸ As we noted in the Introduction, and as we discuss below, this portion of our term limits proposal closely follows the proposal made by Professor Philip Oliver, *supra* note 19.

²⁰⁹ For example, if this amendment were currently in effect and fully phased in, President Bush would have been entitled to appoint a new Justice in the summer of 2001 and in the summer of 2003.

²¹⁰ See Oliver, *supra* note 19, 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 Supreme Court nomination and to permit the next President to make the selection. *See generally* ABRAHAM, *supra* note 51 (summarizing the history of Supreme Court nominations and noting that Senate confirmations have sometimes been stalled in order to deprive an outgoing President with the ability to nominate an individual to the Court).

Court's next term.²¹¹ Thus, Supreme Court term limits would function in a manner most likely to guarantee that every elected President would make two appointments to the Supreme Court, and in a manner most convenient to the Court's schedule. Importantly, the proposed amendment would mandate that the terms are nonrenewable, so that there would be no possibility for a Justice to be re-appointed to a second term.²¹² This 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. Two problems concerning implementation of our proposal merit special discussion: the application of our proposal to the current Justices or to the sitting President, 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 after the election in 2008 of a new President. While 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, we think such retroactive application of a Term Limits Amendment would be both unfair and unnecessary. Given the fact that the current Justices were appointed to the Court with the assumption being that they would have life tenure, it would be unfair to the Justices, 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 the fact 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.²¹³

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 George W. Bush and after the institution of the proposal. Most obviously, applying any term limits system to the sitting President would raise important fairness concerns because the current President was re-elected in 2004 in an election in which there was substantial controversy over

²¹¹ Oliver, *supra* note 19, at 824. Of course, as this may have the unwanted effect of constitutionalizing the current structuring of the Court's term, this aspect of our proposal could be left out of the express proposal and instead be worked out through practice or by statute.

²¹² See Oliver, *supra* note 19, 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.* As we argue below, 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. See *infra* note 220.

²¹³ 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 Oliver, *supra* note 19, at 825-26.

whether George Bush or John Kerry would get to appoint potentially three life tenured Justices to the Supreme Court. George Bush won that election by a clear margin, and it would be most unfair to change the rules of the game after the election to make him the first President in American history who could not appoint Justices who would serve for life. Instead, we would follow the precedent set when the two term limit on Presidents was adopted and exempt the current incumbent Justices and President from the operation of our proposed change. Thus, we propose that our term limits system (though passed immediately) become effective with the subsequent general election of a new president: if a term limits proposal were passed today, for example, lawmakers could make it applicable beginning in 2009. We think such a phase-in of Supreme Court term limits is the only fair way in which 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, supposing hypothetically that the amendment were to be ratified immediately.²¹⁴ When the first vacancy occurs, the new Justice would be put into the 18-year slot that started that year if it were an odd year. If it were an even year, the Justice would be put into the slot that started the following year, plus the additional year until that slot began. So if the first vacancy occurred in 2009, the first transitional Justice would be appointed to an 18 year term starting in 2009. If the first vacancy instead arose in 2010, then the newly appointed Justice would be appointed to the slot beginning in 2011, plus the period of time 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 Justice would be appointed to the next open slot, plus the time until that slot began.

Another special problem that might arise under our system of term limits is the early death or resignation of a Justice. Indeed, the fact that we propose an eighteen-year term, which is longer than the sixteen-year average tenure of Supreme Court Justices throughout history,²¹⁵ 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 fulfill 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 only to appoint a replacement Justice that, subject to confirmation by the Senate,

²¹⁴ 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 and a different president is elected. But here we suppose immediate application for purposes of illustrating the amendment's phase-in procedure.

²¹⁵ See *supra* pp. 1, 9-19.

could then serve the remaining eight years left in the departing Justice's 18 year term and then be constitutionally ineligible for reappointment to the Court. Through this method of naming successor Justices to complete only the original eighteen-year term of the predecessor Justice, our proposal would enable mid-term turnover without sacrificing the benefits of staggered term limits, namely, regularizing the updating of the membership of the Supreme Court.²¹⁶ This also, guarantees that our Amendment would reduce the current incentive the Justices have to strategically time their retirements, since retiring early would not result in one's successor being able to serve longer than the 18 year term to which one was appointed initially.

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.²¹⁷ 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?

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.²¹⁸ Second, we believe that if any popular mandate should be adhered to, it is that of the President inhabiting the White House

²¹⁶ Professor Oliver raises the possible objection that, if the early retirement of a Justice were to leave a short period on the Court, the best-qualified candidates may be uninterested in the position of succeeding the Justice for a brief period. Oliver, *supra* note 19, at 827. However, we agree with Oliver that "when one considers the prestige of the United States Supreme Court in the American legal community, the argument sinks of its own weight," since plenty of tremendously 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.

²¹⁷ *Id.* at 811 n.70.

²¹⁸ *Id.*

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 like 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.

This proposed system of appointing an interim Justice to serve only a limited portion of time 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 non-renewable term of nine years.²¹⁹ 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.²²⁰

²¹⁹ BELL, *supra* note 152, at 34.

²²⁰ *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 Vice-President who becomes President for less than two years to still serve two full terms as an elected President.

Such a system could also be incorporated into our proposal, though it would necessitate significant changes to it. For example, a provision could be made that if a Justice dies with less than one-third of his term remaining, any replacement Justice would be eligible to be nominated and confirmed for 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 courts 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 19, 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. Oliver, *supra* note 19, at 828. We do not support such a provision, since we do not want to permit any tenures of longer than eighteen years, and since,

Likewise, Vice-Presidents of the United States, when acting as replacements for deceased Presidents for longer than two years, lose their eligibility to run as an elected President for one term.²²¹ More generally, Vice Presidents, Senators, and Representatives in this country who succeed a deceased or a resigned predecessor always fill out only the stub unfinished portion of their predecessor's term. Thus, there is substantial precedent in the United States and abroad for such a provisional replacement system, and we endorse it as a sensible way of preserving the consistency of the staggered term limits proposal.

As noted earlier, our term limits proposal resurrects the views of Thomas Jefferson²²² and our American Brutus, Robert Yates,²²³ who 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."²²⁴ Moreover, our specific proposal is a combination of the suggestions and plans advocated by Judge Silberman²²⁵ and Professor Oliver,²²⁶ and it also draws heavily on the plans put forth by other notable scholars, like Gregg Easterbrook²²⁷ and Professors McGinnis,²²⁸ Prakash,²²⁹ and Monaghan.²³⁰ In a 1997 symposium, while speaking on the topic of how to provide better restraint of Supreme Court Justices, Judge Silberman remarked:

I would suggest a constitutional change: Supreme Court justices would be appointed for five-year terms, and thereafter, would sit on the court of appeals. They would be appointed for life, but for only five years on the Supreme Court. Judges could be elevated from the court of appeals to the Supreme Court at any time, or people outside of the judiciary could be newly appointed directly to the Supreme Court, but both would fall back to the court of appeals after five years. Then, I think, they would think of themselves more as judges and less as platonic guardians, and I think that would reduce the extent of the corruption which exists today.²³¹

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.

²²¹ See U.S. Const. amend. XXII.

²²² See Jefferson, *supra* note 17, at 256. Jefferson even went so far as to propose the institution of a four- or six-year term limit that would be renewable. *Id.*

²²³ See Yates, Brutus No. XV, *supra* note 18.

²²⁴ Yates, Brutus No. XV, *supra* note 18, at 352.

²²⁵ See Silberman, *supra* note 21.

²²⁶ See Oliver, *supra* note 19.

²²⁷ See Easterbrook, *supra* note 7.

²²⁸ See McGinnis, *supra* note 27.

²²⁹ See Prakash, *supra* note 15.

²³⁰ See Monaghan, *supra* note 24.

²³¹ Silberman, *supra* note 21, at 687.

Thus, Judge Silberman prescribed a system whereby appointees would serve on the judiciary for life, but would serve as a Supreme Court Justice for a fixed, limited term. We differ from Judge Silberman in advocating a significantly longer term – eighteen years instead of five – and we would not require retired Justices to sit on the federal Courts of Appeals, although we would allow them to do so if they so chose. We would also give retired Supreme Court Justices their salary for life so as to augment their independence during the 18 years they were serving on the High Court. Knowing they had a salary for life would diminish any incentive a Justice might feel to curry favor with powerful members of the bar or politicians to secure a new job after their tenure on the Supreme Court had come to an end.

Gregg Easterbrook and Professor McGinnis have also recommended plans, similar to Judge Silberman's proposal, whereby Justices would sit on a lower federal court following completion of their terms on the Supreme Court. Easterbrook, after proposing a ten-year term limit for Justices, suggested that "the amendment would provide justices leaving the Court at the end of their terms first-call on any openings on federal trial or appeals courts, encouraging them to bring the benefits of their wisdom and experience to other areas of the judicial system."²³² Likewise, Professor McGinnis proposed a system of "Supreme Court riding," whereby "federal judges sitting on the inferior courts of the United States [would be] randomly assigned to the Supreme Court for short periods, such as six months or a year," and after completion of those terms would return to their lower court.²³³ Professor McGinnis believes that life tenure has led Supreme Court Justices to act more like political "statesmen" rather than "humble arbitrators of legal disputes," and he argues that by combining life tenure on the judiciary with a limited term on the Court, "Supreme Court riding" would preserve judicial independence at the same time as it forced Justices to become more restrained in their decision-making.²³⁴ Thus, although we advocate longer much terms for Supreme Court Justices than do Judge Silberman and Professor McGinnis, we like and adopt their proposals that retired Supreme Court Justices be made eligible to sit on the lower federal courts, if they so choose.

At the same time as our proposal incorporates Judge Silberman's suggestion that retired Justices be eligible to serve on the federal courts of appeals following completion of their Supreme Court term, it also closely tracks the term limits proposal made by Professor Oliver in 1986.²³⁵ For example, Oliver begins by stating that "the 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.

²³² Easterbrook, *supra* note 7.

²³³ McGinnis, *supra* note 27, at 541-43.

²³⁴ *Id.* at 542-43.

²³⁵ See Oliver, *supra* note 19.

Reappointment would be barred in all cases.²³⁶ Thus, while our justification for abolishing life tenure and replacing it with term limits is different from Oliver's, and while our complete proposal has important differences from Oliver's plan, we explicitly endorse his proposal.

Like Professor Oliver, several other commentators have advocated comparable term limits that are reflected in our plan. For example, Gregg Easterbrook's 10 year term limit proposal is structured similar to ours, though we disagree with his provision for re-appointment of Justices to additional terms and we advocate a longer term than 10 years.²³⁷ 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.²³⁸ Professor Monaghan also proposed term limits, as well as age limits, and suggested both a mandatory retirement age requirement and fixed terms of fifteen to twenty years.²³⁹ While we do not support a mandatory age retirement, as we discuss 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 18 year term limit proposal that is similar to our plan, though their phase-in proposal results in extremely short initial terms.²⁴⁰ 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."²⁴¹ Prakash went even further and also proposed either a stronger removal power or a reappointment option,²⁴² 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.

Our proposal is therefore an amalgamation of all these commentators' views, and it benefits from the cumulative experience and knowledge of the authors' varying perspectives.²⁴³ By combining what we believe to be the most

²³⁶ *Id.* at 800.

²³⁷ See Easterbrook, *supra* note 7.

²³⁸ McGinnis, *supra* note 27, at 541.

²³⁹ Monaghan, *supra* note 24, at 1211-12.

²⁴⁰ See Note, *Saving This Honorable Court*, *supra* note ___. Our differences with the Virginia Note's proposal will be delineated in the next draft of this paper.

²⁴¹ Prakash, *supra* note 15, at 568.

²⁴² *Id.* at 571-72 ("If a removal option were part of the proposed amendment, it might even be possible to discharge judges rather painlessly. At the first sign of mendacity or bias, we could remove judges. We could even remove judges who conscientiously advocated an interpretation that seemed wrong to us as a matter of constitutional interpretation.").

²⁴³ Indeed, as we argue below, the diversity of political and jurisprudential viewpoints of the various commentators we follow demonstrates the non-partisan nature of our proposal. See *infra* notes 364-370 and accompanying text.

critical and desirable aspects of their suggestions, we have developed a proposal that uniquely responds to the case we have made for the need to reform life tenure.

2. 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 25.6 years during 1971-2005.²⁴⁴ Our proposal also responds to the fact that, since 1970, Justices have retired or died at an average of 78.8 years old, while the average for the almost two-hundred-year period before that was 68.5 years.²⁴⁵ Finally, because of these other two trends, our proposal responds to the fact that vacancies on the Court have occurred much less regularly since 1970 than over the whole of American history. While a vacancy on the Court occurred, on average, every 1.9 years between 1789 and 1970, in the last 35 years a vacancy has occurred only every 3.3 years.²⁴⁶

Our proposal would correct all of these trends. First, in response to the fact that the average tenure of Supreme Court Justices has risen dramatically to 25.6 years,²⁴⁷ our term limits proposal would set eighteen years as the fixed term. Since the average tenure of all Justices throughout history is 16.0 years,²⁴⁸ our proposal would thus guarantee Justices a tenure that is longer than the historical average from 1789 to 2005, yet shorter than the current post 1970 trend of alarmingly long tenures. In this way, our proposal is considerably more moderate than the proposals of commentators like Judge Silberman,²⁴⁹ Gregg Easterbrook,²⁵⁰ Professors Prakash,²⁵¹ and Professor McGinnis,²⁵² who propose much shorter term limits than we do. Yet despite the moderate length of the term we suggest, our proposal would put a stop to the ever-lengthening terms being served by the Justices.

Second, our proposed fixed term of only eighteen years would, though not directly, tend to prevent the increasing average retirement age of Justices. For example, assuming that Presidents continued to appoint individuals between 50 and 55 years of age,²⁵³ the Justices would be completing their terms at an average of 68 to 72 years of age. In this way, while our proposal does not guarantee that the

²⁴⁴ See *supra* pp. 9-19; Chart 1.

²⁴⁵ See *supra* note ; Chart 2.

²⁴⁶ See *supra* note ; Chart 3.

²⁴⁷ See Chart 1.

²⁴⁸ See *supra* text accompanying note 4.

²⁴⁹ See Silberman, *supra* note 21, at 687 (proposing five-year term limit).

²⁵⁰ See Easterbrook, *supra* note 7 (proposing ten-year term limit).

²⁵¹ See Prakash, *supra* note 15, at 568 (proposing a term limit of three to four years).

²⁵² See McGinnis, *supra* note 27, at 541 (proposing a term limit of six months to a year).

²⁵³ See Chart 4.

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 makes it significantly more likely that the average retirement age will not go even higher than its current level, 78 years of age,²⁵⁴ and very likely that the retirement age will decline.

Third, and perhaps most importantly, our proposal would respond to the increasingly irregular timing of vacancies by guaranteeing that a vacancy on the Court will occur once every two years.²⁵⁵ As Chart 3 reveals, and as we argued above, the number of years between vacancies has historically been 2 years, but has risen dramatically in the last thirty years.²⁵⁶ By fixing terms of eighteen years, and staggering them as our proposal suggests, we would fix as a constitutional requirement that a vacancy occur at least once every two years.²⁵⁷ This has two important effects: first, it guarantees once our proposal has fully phased in that every elected President would get to appoint two individuals to the Court in a four-year presidential term.²⁵⁸ And, second, our term limits proposal eliminates the uncertainty that presently exists as to when vacancies will occur, which has had negative consequences for the confirmation process of Justices and for democracy itself. Thus, by providing for regular appointments to the Court every two years, and by fixing terms of Supreme Court Justices at eighteen years, our proposal would correct all of the problems with the current system we identified above.

Specifically, in remedying these problems, our proposal will alleviate the important negative consequences we discussed in Section I. First, and most important, our proposal will improve the democratic accountability and legitimacy of the Supreme Court by providing for a more regular updating of the membership of the Court through the political appointment process. By providing for more frequent and predictable turnover, our term limits proposal would make the Supreme Court a more democratically accountable institution. As Gregg Easterbrook stated, a 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).”²⁵⁹ Each time that the public elects a President, our proposal would guarantee to that

²⁵⁴ See Chart 2.

²⁵⁵ See Note, *Saving This Honorable Court*, *supra* note ___, at 1116-1119.

²⁵⁶ See Chart 3; *supra* pp. 9-19.

²⁵⁷ See *supra* pp. 46-54.

²⁵⁸ As we noted above, *see supra* notes 209-210 and accompanying text, the vacancies would arise in the first and third year of a President’s four-year term.

²⁵⁹ Easterbrook, *supra* note 7. 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.*

President the ability to nominate two individuals to the Supreme Court.²⁶⁰ The amendment would therefore provide a more direct link between the contemporary public understanding of the Constitution's meaning and the understanding held by the members of the Supreme Court.²⁶¹ Although this certainly does not make the Court accountable to popular sentiment in any direct sense, which would endanger the independence of the judiciary, it does make the one constitutional check on the Court's political viewpoints a more viable method of ensuring that the Court reflects the popular understanding of what the Constitution requires.

At this point, a logical question that arises is whether the popular understanding of the Constitution's meaning ought to more directly guide the Supreme Court's understanding. We believe that it should because we believe 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. We think the general public has a great reverence for the constitutional text and that the public intuitively understands that radical departures from that text 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 by the current system.

Moreover, we believe that regularizing the occurrence of vacancies on the Supreme Court would have the related benefit of equalizing the impact that each President has on the composition of the Court. As Professor Oliver has noted, under the system of life tenure, the random nature of vacancies has created a situation whereby some Presidents have a hugely disproportionate impact on the Court, while others have been unlucky and were unable to make even a single appointment.²⁶² For example, President Nixon made four appointments to the Court in five and a half years, and President Ford named one Justice in two and a half years; yet, President Carter made no nominations in his four-year term, and President Clinton made only two in his eight-year term.²⁶³ The random occurrence of appointments under a system of life tenure thus results in an inequitable allocation of vacancies among presidents. By requiring that a vacancy occur reliably once every two years, and by guaranteeing that each elected President will thus be able to make at least two appointments to the Court, our proposal would

²⁶⁰ See Oliver, *supra* note 19, at 809-12.

²⁶¹ 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.").

²⁶² See *id.* at 809-12.

²⁶³ *Id.* at 810.

equalize the impact that each President has on the Court.²⁶⁴ And, as Gregg Easterbrook points out, “ensuring 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.”²⁶⁵

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 increasingly popular term-limits movement. Term limits for elected officials (like presidents, congressmen, or governors) are aimed at restricting the ability of one candidate to seek office in a regularly scheduled election, which is arguably an anti-democratic initiative because it limits the choices for the voting public. Term limits for unelected officials like Supreme Court Justices, on the other hand, are aimed at providing 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 representatives in the Senate and through the President, to more frequently and predictably update the membership of the Court 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.

Second, by making vacancies a regular occurrence, and by limiting the stakes of each confirmation to an 18 year rather than a 40 year term, our proposal would greatly reduce the intensity of partisan warfare in the confirmation process. As noted above, under the current system of life tenure, the uncertainty over when the next vacancy on the Supreme Court might arise, as well as the fact that any given nominee could serve up to four decades on the Court,²⁶⁶ means that the political pressures on the President and the Senate are tremendous in filling any Supreme Court vacancy.²⁶⁷ The result has been that the politics swirling around the Supreme Court confirmation process have been remarkably intense. Moreover, this politicization of the confirmation process has become so great that it has led to a breakdown in the confirmation process even for lower court judges, which makes it highly likely that the next Supreme Court confirmation will be unbelievably contentious. Our proposed amendment, by eliminating nearly all of the uncertainty over the timing of vacancies and by reducing the stakes associated with each

²⁶⁴ See Easterbrook, *supra* note 7 (noting that staggered term limits like the one we are proposing “would afford the president a fairly steady . . . Supreme Court appointment . . .”).

²⁶⁵ Easterbrook, *supra* note 7.

²⁶⁶ As Easterbrook notes, if Justice Thomas serves to the same age as did Justice Marshall, he will serve on the Court for forty years. Easterbrook, *supra* note 7.

²⁶⁷ See *supra* pp. 29-31.

appointment,²⁶⁸ promises to reduce the intensity of the political fights over confirmation.²⁶⁹

Some may argue that our proposed amendment would actually increase the politics surrounding confirmations. They might contend that 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. Having such an intense political event occur almost twice as often would cumulatively increase the political nature of confirmations, 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.²⁷⁰

We disagree and believe instead that the regularization of vacancies on the Court and the more frequent appointments to the Court will make each and every appointment less important politically, which will have a net effect of reducing the politicization of the process. Moreover, Professor Oliver argues:

The proposal would substitute an orderly succession . . . for one in which Presidents try to push through nominations . . . and Senators oppose those nominations either in the hope that a new President will fill the vacancy with a different Justice or simply to make political points for an upcoming senatorial election.²⁷¹

Thus, by creating a predictable schedule of frequent appointments, our proposed amendment would reduce the intensity of the politics associated with confirmations at the Supreme Court level, as well as perhaps in the lower federal courts.

²⁶⁸ Given that an eighteen-year term is long and therefore some Justices will likely leave the Court prior to the completion of their term, 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 vacancies.

²⁶⁹ See Easterbrook, *supra* note 7 (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").

²⁷⁰ 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 they will more vigorously follow and become active in Senate confirmations, which would additionally increase the politicization of the process. See Kyle Still, *Kyle Still Free Press*, at http://kylestill.blogspot.com/2002_08_01_kylestill_archive.html, Aug. 9, 2002. Yet we are proposing an eighteen-year term, which is a significantly long period of time, and therefore this argument becomes irrelevant.

²⁷¹ Oliver, *supra* note 19, at 819 n.112.

Third, our proposal's institution of a fixed term would reduce the incentive presidents currently have to appoint the youngest possible candidate they can get away with.²⁷² If presidents know in advance that their Supreme Court nominees can serve only 18 years, there will no longer be any reason for them to avoid nominating a healthy 60 or 65 year old to the High Court. In so doing, our amendment will enlarge and improve the pool of potential nominees that a President will consider. Since nominating a 40 year old will not lock up a Supreme Court seat for the next 40 years, and since Presidents will know that the seat they are filling will automatically open up again in 18 years even if they name a 65 year old to that seat and he dies in office, Presidents will have much less of an incentive than they do now to discriminate against older candidates. By reducing the impact of age as a factor in making nominations, our proposed amendment may lead to the appointment of even more experienced jurists to the Supreme Court.

To be sure, the fact that we have proposed a relatively long fixed term means that Presidents will probably still tend to select younger individuals rather than 70 or 75 year olds. In fact, for Presidents considering new vacancies, our proposal may have no impact on the current trend of appointing individuals aged 50-55,²⁷³ an age level that may be justifiable, although we suspect it excludes some of the best candidates who may be older than that. 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 incentives for Presidents to continue finding candidates that are even younger than the average appointment age of 50-55.²⁷⁴ Forty or forty-five year old nominees to the Court will probably be put forward less often under our system than is presently the case. 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, consider experience and talent as being more important than a few more years of possible service.²⁷⁵ In other words, at the margins, our proposal would reduce youth as the deciding

²⁷² See Note, *Saving This Honorable Court*, *supra* note ___, at 1110-1116. See also Oliver, *supra* note 19, at 802-04.

²⁷³ See Chart 4.

²⁷⁴ See Oliver, *supra* note 19, 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.

²⁷⁵ See Oliver, *supra* note 19, at 804 ("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.").

factor. Third, since the length of our proposed term may result in many instances of early resignations or deaths, and Presidents would be appointing successors to finish only that term, older, more experienced candidates that still might not be considered for full eighteen-year terms might well turn out to be the best possible choices for a shorter replacement term of, say, three or four years.²⁷⁶ 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 margins, play a very positive role in reducing the central importance that age has played in recent years.

Fourth, 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. We showed above that the problem of mental decrepitude, which has been most acute in the past century and in recent decades, can largely be explained by the real world practical increase in the meaning of life tenure and the increasing average age at which Justices have been retiring.²⁷⁷ As other scholars have noted, the problem of senility or physical incapacity is a dangerous one, as it slows down the Court's efficient functioning at the same time as it weakens the political legitimacy of the Court's decisions and the affected Justice.²⁷⁸

Our term limits proposal would respond to the problem of mental decrepitude among Justices by limiting the length of service of any Justice to only eighteen years, thereby reducing the likelihood of a Justice continuing service on the Court despite incapacity.²⁷⁹ Admittedly, given the length of our proposed term,²⁸⁰ there is still the possibility that some Justices could become mentally or physically incapacitated during their eighteen-year tenure and continue to serve on the Court. In this way, our proposal is not as responsive to the problem of mental decrepitude as we might like. However, our term limits proposal would still significantly reduce the problem in several ways. First, as Gregg Easterbrook notes, at the margins, a term limits proposal would “end the psychological and

²⁷⁶ Oliver, *supra* note 19, at 804, 814 n. 79.

²⁷⁷ See *supra* pp. 33-38.

²⁷⁸ See *supra* note 124.

²⁷⁹ See Easterbrook, *supra* note 7 (“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 19, 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.”).

²⁸⁰ For example, term limit of six months to one year, such as that proposed by Professor McGinnis, *supra* note 27, at 541, would more effectively eliminate the problem of mental decrepitude. See *id.* at 543 (noting that his “Supreme Court riding” 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”).

political pressure on justices to hang on long after their mental acuity falters.”²⁸¹ In other words, whereas life tenure would permit (and perhaps even persuade) a disabled Justice to continue serving on the Court until his death, our proposed system would affirmatively cap the Justice’s career at eighteen years. Professor Oliver puts it as follows: “the proposed amendment would constitute an improvement regarding infirm Justices simply because forced retirement at the end of a stated term of office, rather than at death, would cause the situation to arise less often.”²⁸² Our proposed system therefore protects against mental decrepitude better than life tenure.²⁸³

Second, we believe that our term limits proposal will lead Presidents and confirming Senators to take into account the possible future mental decrepitude of nominees when those nominees are initially put forward for the Court. Presidents ought to be able, given a fixed 18 year term for Justices, to take into account the specific health and family history of candidates for the High Court, thus making an individualized determination of the likelihood of future mental decrepitude of a potential Justice. Moreover, Presidents will likely formulate some informal maximum ages for their appointees and those maximum ages for nomination will in effect put in place a mandatory retirement age that is 18 years older than the age at nomination.²⁸⁴ In other words, if Presidents were to decide their nominees ought to be no older than 60 when nominated, this would in effect make it impossible under our proposal for Justices to serve beyond the age of 78. Thus, our proposed term limit for Justices will help Presidents and Senators to plan better for the problem of mental decrepitude and thereby reduce its occurrence.

Rather than (or in addition to) term limits, a number scholars concerned about the problem of mental decrepitude on the Supreme Court have also proposed mandatory retirement ages for the Justices.²⁸⁵ For example, Professor Garrow²⁸⁶ and Professor Monaghan²⁸⁷ have both proposed the enactment of a mandatory retirement age and commonly, these proposals call for mandatory retirement of judges at the ages of 65, 70, or 75. Moreover, as we have seen, many foreign countries impose mandatory retirement ages as limits on the tenure of the members

²⁸¹ Easterbrook, *supra* note 7.

²⁸² Oliver, *supra* note 19, at 815.

²⁸³ Of course, if a Justice becomes incapacitated during his eighteen-year term, our proposed amendment could handle the problem no better than could the present system of life tenure. We simply mean that our system would make it less likely that the situation would come about that a Justice is incapacitated.

²⁸⁴ See Oliver, *supra* note 19, at 813-14.

²⁸⁵ See *supra* notes 135-147 and accompanying text.

²⁸⁶ See Garrow, *supra* note 9, at 1086-87.

²⁸⁷ See Monaghan, *supra* note 24, at 1211-12.

of their highest constitutional courts.²⁸⁸ Thus, instituting a mandatory retirement age does stand as an alternative, or a complement, to our own proposal.

However, we do not support the institution of a mandatory retirement age, either as a substitute or a complement to our own proposal, for three reasons. First, we do not believe that a mandatory retirement age requirement, as compared to a fixed term limit, would accomplish any greater deterrent to mentally or physically decrepit Justices continuing in office. For example, 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 60-year-old Justice becoming mentally or physically decrepit notwithstanding a mandatory retirement age of 65 or 70. 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 Presidents and Senators to plan in order to avoid the problem of mental decrepitude.²⁸⁹ 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. Third, and related to this point, we are opposed to mandatory retirement age requirements generally because they blindly discriminate against individuals based on age, and therefore cannot take into account the fact that a great many 70-year-olds are perfectly capable of continuing in office, while perhaps many 60-year-olds would be better advised to retire. “A mandatory retirement age provision has the effect of forcing the retirement of perfectly competent and effective, if elderly, Justices.”²⁹⁰ A term limit would therefore more fairly permit individualized and informal determinations of capacity.²⁹¹

Apart from these advantages, there are several other benefits to our proposal. First, it would bring our treatment of the members of our highest constitutional court into conformity with the practice of the rest of the world and

²⁸⁸ See *supra* notes 186-191 and accompanying text.

²⁸⁹ See Oliver, *supra* note 19, at 813-14.

²⁹⁰ *Id.* at 814.

²⁹¹ 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 15, 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 may cause.

with the practice of the overwhelming majority of U.S. states.²⁹² Second, our proposed constitutional amendment could, assuming it provides that retired Justices should be able to sit on the lower federal courts following their Supreme Court service, allow former Justices to enrich the lower federal courts with their experiences and knowledge.²⁹³ In so doing, as Gregg Easterbrook notes, our proposal would encourage Justices “to bring the benefits of their wisdom and experience to other areas of the justice system.”²⁹⁴ Our proposed amendment, by providing that a judge sit on the Court for eighteen years and then become eligible for service on the lower federal courts, would closely track the current system whereby retired Justices, or other senior district or circuit judges, currently can sit on the lower federal courts.²⁹⁵ This would permit extraordinary opportunities for our lower federal courts to benefit from the experiences and talents of the former Justices. Moreover, the fact that sitting Justices might know that in the future they could end up sitting by designation on a lower federal court would have a big impact on the way that sitting Justices would decide cases. As Judge Silberman thoughtfully suggested, “if [Justices] knew that after [their term], they would themselves be subject to appellate review, the justices would have an easier time seeing themselves as only temporarily there to really judge.”²⁹⁶ Similarly, Professor McGinnis notes that the impending return of a Justice to a lower court, where she would be restrained by Supreme Court precedent, “would ... lessen[a] Justices’ vested interest in the development of constitutional law according to some personal vision,” and, rather, would [make] it more likely that the Justice would reflect “the habits of constrained judgment contemplated by Federalist 78.”²⁹⁷

We recognize that to the extent that this last point suggests our proposal might encourage judicial restraint it could be controversial. Advocacy of judicial restraint is more a refrain of politically (or, arguably, jurisprudentially) conservative politicians, judges, law professors, and students than it is of judicial liberals. Therefore, we should point out that our proposed amendment would lead only to modest judicial restraint because the length of the eighteen-year term limit would substantially moderate the pro-judicial restraint effect described above. Indeed, Judge Silberman and Professor McGinnis, who advocate judicial restraint the most strongly, suggest significantly shorter terms than we do: 5 years and

²⁹² See generally pp. 38-44 (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).

²⁹³ Easterbrook, *supra* note 7; Amar and Amar, *supra* note 77.

²⁹⁴ Easterbrook, *supra* note 7.

²⁹⁵ See McGinnis, *supra* note 27, at 545 (noting the current practice of permitting “retired Justices [to] sometimes sit by designation on courts to which they were never appointed, as do many district and circuit judges”); [Other citations to retired Justices serving on lower courts by designation]

²⁹⁶ Silberman, *supra* note 21, at 696.

²⁹⁷ McGinnis, *supra* note 27, at 542.

between six months and a year, respectively.²⁹⁸ Under Silberman or McGinnis's super short terms, the force of precedent would be much stronger, and Justices would surely become even more restrained. Yet under our system of relatively more generous 18 year term limits, the judicial restraint enhancing effect would be at most a moderate one. Still, our term limits proposal ought to lead to at least a modicum of judicial restraint, and we count that as a good thing.

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.²⁹⁹ This concern with strategically timed resignations was the principal focus of the recent Virginia student Note advocating an 18 year term limit for Justices.³⁰⁰ We noted above that there is substantial evidence that Justices throughout American history have timed their resignations for political reasons, including what is oftentimes a delay in retirement in order to avoid allowing a sitting President of the opposite party to name a successor.³⁰¹ Our 18 year fixed term limit, however, would remove the possibility of a Justice timing her resignation in order to subvert a particular President's appointment power.³⁰² Of course, a Justice still could leave the Court prior to the completion of her term, based on political factors. However, the retiring Justice's successor would only be appointed to complete that term, and therefore the retirement decision would not permit a President the ability to lock up a Supreme Court seat for a new eighteen-year term.³⁰³ As a result, the Justices would totally lose the power they currently possess 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.

3. Objections to the Proposal

Given all the advantages of our proposed constitutional amendment, we firmly believe that moving to a system of Supreme Court term limits system would significantly enhance the overall legitimacy and functioning of the Court and of our constitutional democracy. Yet our proposal is not uncontroversial, and we attempt

²⁹⁸ See Silberman, *supra* note 21, at 687; McGinnis, *supra* note 27, at 541.

²⁹⁹ See Amar and Calabresi, *supra* note 3; Oliver, *supra* note 19, at 805-09.

³⁰⁰ See Note, *Saving This Honorable Court*, *supra* note ___, at 1101-1110.

³⁰¹ See *supra* notes 66- and accompanying text.

³⁰² See Oliver, *supra* note 19, at 808.

³⁰³ *Id.* at 809.

in this subsection to address a few of the more important objections.³⁰⁴ 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.³⁰⁵

First, many will argue that our proposed amendment would impair judicial independence, a value that our Constitution fervently protects and that our legal system is based upon. According to this argument, the guarantee of life tenure,³⁰⁶ along with the Compensation Clause,³⁰⁷ was particularly designed in order to protect the independence of the judiciary.³⁰⁸ As Alexander Hamilton argued long ago, life tenure secures the freedom of a judge from the political branches, as well as from public opinion, which thus ensures that judges can objectively interpret the law without risk of political reprisal.³⁰⁹ Likewise, Professor Marty Redish argues that “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 system.”³¹⁰ Impinging upon life tenure, the argument goes, would weaken the barriers put between the Justices and political pressure and would risk undermining 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 2005 -- means that no independence will be lost relative to the other branches or to the public generally.³¹¹ 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

³⁰⁴ 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, which we believe has not yet been done.

³⁰⁵ Farnsworth, *supra* note __.

³⁰⁶ U.S. CONST. art. III, sec. 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . .”).

³⁰⁷ U.S. CONST. art. III, sec. 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.”).

³⁰⁸ See Hamilton, Federalist No. 78, *supra* note .

³⁰⁹ *Id.*

³¹⁰ See Redish, *supra* note 85, at 685.

³¹¹ See McGinnis, *supra* note 27, at 543; Monaghan, *supra* note 24, at 1211; Oliver, *supra* note 19, at 816-21.

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.³¹²

As this quote shows, the critical factor in securing judicial independence is to guarantee that a Justice's tenure is in no way subject to the political decisions of the other branches or to the public. The system of life tenure accomplished this objective, and our proposed amendment, with a fixed, nonrenewable 18 year term and a salary guaranteed for life, accomplishes this objective just as effectively.³¹³ Moreover, with Justices being entitled to sit by designation on the lower courts for life tenure following their service on the Supreme Court, there would be no pressure for a Justice to behave in any particular way in order to receive post-Court jobs.³¹⁴ 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 simply can be no plausible argument that judicial independence is endangered by our proposal.

In addition, the objection that our proposal will threaten the independence of the judiciary fails to recognize the existing political checks on the Court and the impact that our proposal would have on those checks. We must remember that the Constitution, though it provides for an independent judiciary, in some regards,³¹⁵ also creates political checks on the Court by allowing Congress to determine the extent of judicial authority,³¹⁶ by allowing Congress to determine the number of seats on the Court,³¹⁷ and, most importantly for this discussion, by allowing the

³¹² Monaghan, *supra* note 24, at 1211.

³¹³ The importance of 18 year terms being nonrenewable and long is discussed in Note, *Saving This Honorable Court*, *supra* note __, at 1127-1131.

³¹⁴ See McGinnis, *supra* note 27, at 543 ("Federal judges would have continued to enjoy the independence afforded by life tenure because they would have returned to their home courts, whatever decisions they made while on loan to the Supreme Court."). In this way, we avoid Professor Oliver's conclusion that a fixed term limits proposal might increase the influence of the political branches on the Court because of the fact that Justices "would alter their votes in order to smooth their way into post-Court professional or political careers." See Oliver, *supra* note 19, at 818-19. Similarly, this automatic designation with a lifetime tenure for even successor Justices serving only one- or two-year terms would avoid Oliver's conclusion that the independence of successor Justices would be undermined. See *id.* at 819-21.

³¹⁵ See *supra* notes 306-307.

³¹⁶ Of course, there are certain constitutional requirements, see, e.g., *Marbury v. Madison*, 5 U.S. 137 (1803) (holding that Congress is without power to expand the original jurisdiction of the Court beyond the Constitution's provision), but Congress otherwise has enormous discretion in determining the jurisdiction and power of the federal courts.

³¹⁷ See *supra* notes 55-57 and accompanying text.

President and Congress to determine the Court's membership.³¹⁸ Thus, the Constitution does not completely insulate the judiciary from being checked and balanced by the political branches of our government. Our proposed amendment would create no new political checks for Congress to hold over the Court, but rather would make more systematic, regular, and frequent the use of an existing political check, the appointment process.

Of course, some versions of a term limits proposal could endanger judicial independence. For example, Professor Prakash proposes the creation of a more robust removal power that would permit the Senate or the President to discharge judges for senility, bias, or even ideological or jurisprudential disagreements.³¹⁹ In the same spirit, Charles Cooper raises the possibility of using retention elections for federal judges as a way of making the Court more democratic.³²⁰ Similarly, a number of scholars have proposed term limits with the Justices being eligible for appointment to renewable terms through the traditional method of appointment.³²¹ These mechanisms would make judges much more accountable to political bodies through either the risk of removal or the promise of regular evaluations. And, as the proponents of these ideas admit,³²² these proposals would weaken the

³¹⁸ See U.S. CONST. art. II, sec. 2 (providing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court . . .").

³¹⁹ Prakash, *supra* note 15, at 568, 572.

³²⁰ See Cooper, *supra* note 18, at 694-95 ("Perhaps a mechanism would be for the Congress to have the ability to place a justice's name on a ballot for the simple question, yes or no, shall this justice be retained in office?").

³²¹ See Easterbrook, *supra* note 7 ("Presidents would be free to renominate justices for additional ten-year appointments, but each new term would be subject to Senate approval."); Cooper, *supra* note 18, at 694 ("I would see a system of renewable term as preferable because I think that would provide some back-end restraint . . ."); Prakash, *supra* note 15, at 568 ("A fixed term would ensure that the judge would be dislodged automatically after a set number of years unless the President and the Senate wished to reappoint him.").

³²² Indeed, these scholars admit the independence-reducing impact of renewable terms or retention elections or the removal power and argue that this would be a significant, positive improvement. Cooper, for example, contends that such a "political restraint" as a renewable term limit, with a "back-end restraint" on Justices, is "necessary now, because the Court is a political institution now." Cooper, *supra* note 18, at 694. Similarly, Professor Prakash believes that Justices should be treated like other government officials that "must seek renomination and reconfirmation if they are to stay in office beyond their initial limited terms." Prakash, *supra* note 15, at 570-71. As a result, Prakash advocates a removal power and short, renewable terms in order to make Justices accountable to the public for their substantive decisions. *Id.* at 571-72. Thus, these scholars wish to make the Court less independent and more politically accountable.

We disagree with this approach because we are, like Judge Silberman stated in responding to Cooper's remarks, "not prepared to take that step [of admitting that the Supreme Court is a political body, or a "quasi-legislature,"] because [we] still think it is conceivable that the Court could work its way back." Silberman, *supra* note 21, at 695-96. Although we admit the fact that the Court is increasingly political – or at least, the fact that the public increasingly views the Court as being political – we believe that treating it as a political institution in the way that these scholars

independence that the judiciary currently enjoys from the political branches and from the public.³²³

Our proposal excludes all of these options, and it places special emphasis on the importance of preserving judicial independence at the same time as it reforms life tenure. We believe that the stronger power to remove Justices argued for by other advocates of reform would risk undermining the essence of American judicial independence, since the enormous amount of political pressure on judges would make them resemble administrative officials more than Article III judges.³²⁴ Although such a removal power would have the advantage of creating a “populist public law” (as Prakash puts it³²⁵), it would have the significant disadvantage of eliminating detached, considered decision-making. Similarly, providing for retention elections, or permitting the possibility of reappointment, would force Justices to look constantly to political opinion in making decisions and would thereby eliminate the unique advantage of our judiciary that it protects basic constitutional freedoms against tyrannical majorities.³²⁶ Thus, we believe that our term limits proposal would preserve judicial independence because it would give the Justices a lengthy 18 year term, which is longer than the average tenure of Justices between 1789 and 2005, because it does not allow for reappointment, because it guarantees them their salary for life, and because it does not give the political branches any new power to remove Justices.

Professor Ward Farnsworth offers a pragmatic defense of life tenure and suggests that an advantage of our current constitutional structure is that it creates 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

suggest would be an overreaction and would serve to make the Court even more political. In this Article, we start with the assumptions that judicial independence is a desirable aspect of our constitutional democracy and that transforming the Supreme Court into a mere political body would seriously undermine the foundations of our republican government.

³²³ See Oliver, *supra* note 19, at 826-27.

³²⁴ Although we agree with Professor Prakash that Alexander Hamilton’s arguments in Federalist 78 no longer support life tenure as a way of preserving judicial independence, *see supra* pp. 44-45, we do not think that Prakash’s arguments work to undermine the justification for judicial independence.

³²⁵ Prakash, *supra* note 15, at 581.

³²⁶ Though Easterbrook permits reappointment in his proposal, he suggests that, in practice, this possibility of reappointment would not affect Justices’ decisions for two reasons: first, reappointment is unlikely given the logistics that would be necessary, i.e., the president must be of the same party that appointed the Justice; and second, “at the Supreme Court level, where every written word is microanalyzed, decisions viewed as politically motivated would be as likely to backfire on a justice’s prospects as enhance them.” Easterbrook, *supra* note 7. We are not persuaded, however, because regardless of the rarity of actual reappointment and even with public scrutiny of Supreme Court decisions, the existence of a reappointment possibility would impact the behavior of Justices and would, even if only in perception, undermine the independence of the judiciary.

Court.³²⁷ Professor Farnsworth likes the idea that the Supreme Court represents the political forces that prevailed 10 or 15 years ago, and he also approves of the fact that it may take decades for a political movement to gain control over the Supreme Court's slower law-making process. Farnsworth's argument is fundamentally conservative. He basically 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*.³²⁸ 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 law-making process is desirable as a matter of good public policy.³²⁹

Farnsworth 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 law-making 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 ones law-making processes and, 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 only be reversed by a sustained 25 or 30 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. We think life tenure for Supreme Court Justices, as it works in the real world today, makes it too hard for democratic majorities to bring the Supreme Court into line with their understandings of constitutional meaning. We find support for our conclusion in the fact that all our proposed amendment would do is to return us to the historical situation that prevailed between 1789 and 1970 where Supreme Court vacancies opened up every two years and when Justices died or retired on average after serving 14.9 years on the Court instead of 25.6 years. It is the status quo on Supreme Court life tenure which Farnsworth defends, which departs from our usual historical practice, not the amendment that we propose. Our amendment, like the two term limit on Presidents, is a conservative amendment that brings us back to the practice that largely prevailed from 1789 to 1970. Thus, we believe we have the true Burkean, conservative position in this debate and that Farnsworth is the one who is defending a modern aberration that departs from the broad stream of our historical practice. A Supreme Court with 18 year term limits will still be an anchor to windward in the

³²⁷ Farnsworth, *supra* note ___, at ___.

³²⁸ Get cite

³²⁹ Farnsworth, *supra* note ___, at ___.

American polity: it just will not be as much of an anchor to windward as has become the case in the last 35 years.

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,³³⁰ that party will have “captured” the entire Supreme Court for its party, a result which life tenure is designed to protect against. For example, assume, somewhat unrealistically, that the Court is empty, or that it consists entirely of Republicans.³³¹ Suppose that a Democratic President is elected to (and serves) two full terms. During those eight years, the President would be guaranteed to appoint four Justices to the Supreme Court. Then, assume that another Democrat is elected to (and serves) two full terms. That President would be guaranteed to appoint four more Justices, which would bring the total number of Democrats on the Court to eight. Then, suppose a Democrat prevails in the fifth consecutive election. The result of these five elections would be a completely Democratic Supreme Court.

Moreover, the above hypothetical shows that, even if the Court consisted of all Republicans to start, after only three Presidential elections the Democrats on the Court would outnumber the Republican Justices 6-3. Although this is not a complete domination of the Court, it is arguably enough to allow a political party to “capture” the Court for all practical purposes. With six Democrats on the Court, even taking into account the diversity of viewpoints among Democrats and the risk that not all Democrat-appointed Justices would be liberal in practice, the Court would likely be effectively captured. Thus, this admittedly simplistic illustration shows that by providing for more frequent and regular appointments, our term limits proposal would create a risk of Supreme Court capture. And, as Ward 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.³³² 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.³³³ Farnsworth adds

³³⁰ 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 to be very wrong in reality.

³³¹ More realistically, we should assume a Court that is relatively evenly split, such as one that consists of five Republicans (or conservative Justices) and four Democrats (or liberal Justices). In this case, depending on the order in which the seats opened up, it might take as little as two or three consecutive victories by Democratic Presidents in order for the Democrats to “capture” the Court.

³³² Farnsworth, *supra* note ___, at ___.

³³³ Conversation between Professor Steven Calabresi and Professor Charles Fried, Fall of 2003.

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.”³³⁴

In response to this argument, we begin by noting that, as a practical matter, Supreme Court capture would be extremely difficult to accomplish in practice. First, our hypothetical simplistically suggests that Justices can be neatly described as being just Democrats or Republicans when the truth is that there is enormous diversity of viewpoints on judicial philosophy among members of both political parties. 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.³³⁵ The seven Republican appointees on the current Supreme Court certainly do not vote together as a block any more than Democrat Byron White voted in lock-step with Democrat Thurgood Marshall. For this reason, we think the fear of Supreme Court capture is somewhat overstated. The fact that some of our most liberal Justices were appointed by surprised Republican Presidents³³⁶ and some of our more conservative Justices were appointed by surprised Democrats,³³⁷ makes Supreme Court capture a less likely result.

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, a point that Farnsworth does not give enough weight to. While it is not uncommon for one of the two major political parties to prevail in consecutive presidential elections,³³⁸ it is relatively rare today for a President to enjoy a Senate controlled by the same party for very long.³³⁹ 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.³⁴⁰ For example, during the twenty years of Democratic rule when Presidents Franklin D. Roosevelt and Harry S. Truman were in office, of the thirteen appointments they made, one seat went to an Independent (Frankfurter) and two seats went to

³³⁴ Farnsworth, *supra* note ___, at 10.

³³⁵ Clearly, Justices Kennedy and O’Connor serve as two examples on the current Court of this fact, and before them, Justices Powell and White.

³³⁶ The classic example is Chief Justice Earl Warren, whose liberal activism that changed the Court forever shockingly resulted from the appointment by conservative President Dwight Eisenhower, who later remarked that appointing Warren to the Court was among his biggest mistakes as President. See ABRAHAM, *supra* note 51, at 192-97.

³³⁷ Perhaps the best example from recent history, though not as extreme as Eisenhower’s appointment of Warren, see *supra* note 336, is the fact 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 suspected. See *id.* at 210-11.

³³⁸ Indeed, it appears that political parties have tended to win 2-4 consecutive elections at a time. See ABRAHAM, *supra* note 51, at 377-81 (listing the Presidents throughout history).

³³⁹ [Citation]

³⁴⁰ U.S. CONST. art. II, sec. 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).

Republicans (Stone and Burton).³⁴¹ Moreover, even some of the Democrats FDR and Truman appointed were quite conservative, such as Justices Reed and Vinson.³⁴² Thus, even in an era where one party ruled the White House for 20 years and the Senate for 16 of those 20 years, that political party was not able to completely pack the Court with Justices sharing its views, in large part because of the political check of public opinion and of Senate confirmation. A Senate controlled by the opposite party of a President will tend to mitigate the impact of a long-held Presidency by one party and will make Supreme Court capture much less likely.

Moreover, even to the extent that our system permits a party to “capture” the Supreme Court, the current system of life tenure would permit precisely the same result. For example, returning to Presidents Franklin Roosevelt and Harry Truman, during the twenty years of Democratic rule between 1933 and 1953, they were able to appoint a total of thirteen Justices.³⁴³ Thus, during this time period, these Presidents had a perfect opportunity to capture the Supreme Court an opportunity that was realized as to economic issues but not as to issues of judicial protection of civil liberties. Additional examples abound: from 1829-1841, two Democratic Presidents – Jackson and Van Buren – were able to appoint eight Justices;³⁴⁴ from 1861-1885, four Republican Presidents – Lincoln, Grant, Hayes, and Arthur – were able to appoint fourteen Justices;³⁴⁵ from 1897-1913, three Republican Presidents – McKinley, Theodore Roosevelt, and Taft – were able to appoint ten Justices;³⁴⁶ and, most recently, from 1969-1993, four Republican Presidents – Nixon, Ford, Reagan, and the first President Bush – were able to appoint eleven Justices.³⁴⁷ As a result, although our proposed term limit might make it slightly more likely that opportunities to capture 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 capture is always a real possibility.³⁴⁸

³⁴¹ See ABRAHAM, *supra* note 51, at 380.

³⁴² See *id.*

³⁴³ See *id.*

³⁴⁴ See *id.* at 378.

³⁴⁵ See *id.* at 378-79.

³⁴⁶ See *id.* at 379.

³⁴⁷ See *id.* at 381.

³⁴⁸ Significantly, this list of historical examples shows that even when parties win consecutive elections, and the result is that that party gets to make many appointments to the Court, it still cannot lead to a captured Court. For example, although Presidents Nixon through Bush appointed eleven Justices, the result is still only a moderately conservative Court. Thus, this historical evidence strengthens the earlier points about the importance of Senate confirmation and the fact that appointing a like-minded Justice is not as easy as it might appear.

Thus, we do not believe our proposal would make Supreme Court capture a substantially more likely result 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 20 years which prevailed between 1789 and 1970 – a practice we have departed from only recently. Moreover, as we have argued, there are too many factors that would prevent such capture from occurring. These factors include: the difficulty Presidents face in selecting reliably conservative or liberal candidates on a whole range of issues, the fact that many Justices have been moderates or centrists, and the existence of the constitutional requirement of Senate confirmation. In addition, as we just showed, the possibility of Supreme Court capture also exists under the current system of life tenure.

Yet even after all these arguments, which we believe cast substantial doubt on the validity of the capture argument, we must still remember that 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.³⁴⁹ As a result, if a party manages to “capture” the popular will for consecutive elections with its vision of constitutional law, then the popular understanding of the Constitution’s meaning will clearly be best represented by that party, and it is only proper that this dominant party be able to make the Supreme Court reflect its values. 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 meaning. If the public becomes dissatisfied with the Court, then our proposed amendment would permit the public to elect a new President who could start to change the Court with the next two appointments. Thus, our proposal causes the Supreme Court’s judicial philosophy and understanding of constitutional meaning to be more reflective 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 from 1789 to 1970 for most of American history.

A third possible objection that might be raised against our proposed constitutional amendment is that one might plausibly argue that imposing a limit on the tenure of Supreme Court Justices would force Justices to become too activist. Justice Kennedy, responding to a Judiciary Committee questionnaire during his confirmation process, wrote that “life 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.”³⁵⁰ Thus, the argument might proceed, eliminating life tenure would endanger the virtue of

³⁴⁹ See *supra* pp. 25-29, 54-64.

³⁵⁰ Quoted in Nadine Cohodas, “Kennedy Finds Bork an Easy Act to Follow,” 45 CONG. QTRLY. _____, 2989, Weekly Report (1987).

patience that life tenure affords a Supreme Court Justice. Individuals with only a short period of time to affect the law as Supreme Court Justices might overreach in important cases and actively seek out opportunities to change existing doctrine. Alternatively, Justices in their final 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 with and live with their current Supreme Court colleagues. If our proposal were truly to lead to such judicial activism or final period problems, we would surely think this could undermine one of the chief advantages of an independent (and life-tenured) Supreme Court. Given that one of the goals of our proposed constitutional amendment is to redress the undemocratic way in which life tenure leads Justices to act in an unrestrained manner,³⁵¹ the possibility of Supreme Court term limits causing the Justices to become more activist seems especially problematic.

Indeed, some of the more radical term limits proposals we have discussed could lead to problems of judicial activism or to final period problems. For example, under the terms ranging from one to five years proposed by Judge Silberman³⁵² and Professors McGinnis³⁵³ and Prakash,³⁵⁴ we would genuinely worry about Justices feeling pressure to quickly accomplish a great deal in a very short amount of time.³⁵⁵ However, under the term limit that we are proposing – an eighteen-year term limit – no such activism should result. An eighteen-year period is sufficiently long that any individual Justice ought not feel hurried in making his impact on the law. Indeed, as the historical evidence demonstrates, a period of eighteen years is longer than most Justices have served under our current system of life tenure.³⁵⁶ Thus, because of the length of the term, under our proposed system, Justices would be afforded the luxury to, in Justice Kennedy's words, "proceed with caution" and "defer to the political process."³⁵⁷

Moreover, we find it hard to believe that final period problems would be more severe under our proposal than under the current system where old, life tenured justices know that retirement is just around the bend. Surely, Justices

³⁵¹ See *supra* notes 96-100 and 296-298 and accompanying text.

³⁵² See Silberman, *supra* note 21, at 687 (proposing a five-year term limit).

³⁵³ See McGinnis, *supra* note 27, at 541 (proposing a term limit of six months to one year).

³⁵⁴ See Prakash, *supra* note 15, at 568 (proposing a term limit of three to four years).

³⁵⁵ In the term limits 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 27, at 543-44. Yet, contrary to McGinnis's reassurances that "new 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.

³⁵⁶ See text accompanying *supra* note 4 (noting that the average tenure of Justices throughout history is 16.2 years); Chart 1.

³⁵⁷ See *supra* note 350 and accompanying text.

Rehnquist, Stevens, and O'Connor on the current Court know that they are in the final period of their life tenure on the Supreme Court. Yet no-one suggests that these Justices are behaving in a way that suggests the existence of a final period problem. We do not see why such a final period problem would be any more likely under our system of fixed 18 year terms. The fact of the matter is, that except for those Justices who die suddenly and youthfully, like Justice Robert Jackson, the current system of life tenure poses just as much risk of final period problems as would our proposed system of 18 year term limits.

Rather than causing Justices to become too activist, the length of our proposed 18 year Supreme Court terms actually undermines the justifications for term limits put forward by several scholars. For example, as just noted,³⁵⁸ Judge Silberman and Professors McGinnis and Prakash advocate shorter fixed terms for Supreme Court justices than we do – five years, six months to a year, and three to four years, respectively. This is because they believe that, with very short terms on the Court and with the promise of becoming a lower court judge following that short period,³⁵⁹ Justices would act more restrained and with a greater sense of duty to the Constitution.³⁶⁰ Thus, these scholars will object that we have not gone far enough in limiting the tenure of Justices because by permitting such a long tenure, they would claim we will preserve the current incentive structure for Justices to act on their own personal motives instead of out of their sense of duty to the Constitution.³⁶¹

³⁵⁸ See *supra* notes 352-354.

³⁵⁹ Professor Prakash does not include such a provision, but instead provides a removal mechanism whereby Justices will become more politically accountable. See Prakash, *supra* note 15, at 571-72.

³⁶⁰ See Silberman, *supra* note 21, at 687, 695 (“If [the justices] knew that after five years, they would themselves be subject to appellate review, the justices would have an easier time seeing themselves as only temporarily there to really judge.”); McGinnis, *supra* note 27, at 541-43 (“Supreme Court riding would have lessened Justices’ vested interest in the development of constitutional law according to some personal vision because they would have returned to their home courts to dine on a diet of mundane commercial and criminal matters, as well as constitutional issues for which they were not the final arbiters.”).

³⁶¹ In the same way, we would also disappoint Judge Robert Bork, who believes that reforming the appointments process, or even putting more care into selecting conservative Justices, will not lead to better Constitutional interpretation by the Court. Rather, Bork proposes a more potent political check on the Court: “a constitutional amendment saying that any court decision – not just the Supreme Court, but any court decision – can be overruled by a majority vote of the House and the Senate.” Robert H. Bork, *Federalist Society Symposium: Tenth Anniversary Banquet Speech*, 13 J.L. & POL. 513, 517-18 (Summer 1997). Thus, Bork would argue that if the Court is really an anti-democratic institution, abolishing life tenure may not go far enough, but rather we need to give to Congress the power to overrule judicial decisions. See *id.* at 517-18, 520-21. Professor Calabresi, at least, would support a constitutional amendment that authorized a two-thirds majority of both houses of Congress to overrule judicial decisions – the same margin required to override a presidential veto.

We admit that by permitting an eighteen-year term for Supreme Court Justices, our term limits proposal is relatively modest and will not aggressively correct what many perceive to be an inappropriate level of activism among Supreme Court Justices.³⁶² Of course, we would maintain that our proposal, by limiting the tenure of Justices and by automatically allowing retired Justices to sit on the lower federal courts, would contribute towards a more restrained Court.³⁶³ Still, we admit that our proposal will not further the goal of restraining Justices as much as would the proposals by Judge Silberman and Professors McGinnis and Prakash.

Yet we consider this to be a significant benefit of our proposal. Our term limits proposal is emphatically not a partisan idea, and it is not intended to advance only one particular method of constitutional interpretation.³⁶⁴ As an example, our proposal furthers the stated goals of a broad set of politically oriented individuals, ranging from Professor Monaghan³⁶⁵ to Judge Silberman³⁶⁶ to Gregg Easterbrook³⁶⁷ to Professors McGinnis³⁶⁸ and Prakash.³⁶⁹ Moreover, Professor Akhil Amar³⁷⁰ is an important defender of term limits, and he supports our proposal. We therefore believe that our proposal, because of its moderation, will appeal to those who are rightfully alarmed at the negative impact that the system of life tenure is having on our constitutional system, regardless of political persuasion.

We would emphasize again that our proposal of 18 year term limits is ultimately a very Burkean reform of the system of Supreme Court terms because it would only return us to a maximum Supreme Court term that is much closer to the average tenure of Justices between 1789 and 2005. Just as the two term limit on Presidents restored an ancient and sanctioned tradition of Presidents limiting themselves to two terms, an 18 year term limit on Supreme Court Justices would merely return us to the regime we lived under from 1789 to 1970 and which we have departed from ever since. Unlike the radically short term limits proposals of Silberman, McGinnis, and Prakash, our term limits proposal builds on an inherently conservative idea. All we are trying to do with our proposal is to restore the status

³⁶² See, e.g., Silberman, *supra* note 21, at 687; McGinnis, *supra* note 27, at 541; Prakash, *supra* note 15, at 570-73.

³⁶³ See *supra* notes 296-298 and accompanying text.

³⁶⁴ We do not mean to imply that the proposals made by these other thoughtful judges and scholars are politically motivated or are geared towards pushing an interpretive agenda. We only mean to suggest that the goal of making Justices more restrained is a view not universally shared, and therefore we consider it an advantage of our proposal that we are not primarily driven by this goal.

³⁶⁵ See Monaghan, *supra* note 24.

³⁶⁶ See Silberman, *supra* note 21.

³⁶⁷ See Easterbrook, *supra* note 7.

³⁶⁸ See McGinnis, *supra* note 27.

³⁶⁹ See Prakash, *supra* note 15.

³⁷⁰ See Amar and Calabresi, *supra* note 3.

quo before 1970 not to introduce a new and radical redefinition of the job of a Supreme Court Justice. We thus believe our proposal of 18 year term limits for Supreme Court Justices is an eminently moderate and Burkean idea.

A fourth objection that could be made against our term limits proposal is that it could erode the prestige of the Supreme Court and of the position of being a Supreme Court Justice. According to this argument, the constant turnover in the membership of the Supreme Court that our proposal might lead to could erode the prestige of the position of being a Supreme Court Justice. Moreover, making the Court more directly influenced by political pressures might cause the Court to become viewed as more of a bureaucratic institution. We agree that our proposal would make the Court's composition more responsive to the political process,³⁷¹ but we disagree that having a system of staggered term limits would in any way erode the prestige of the position of Supreme Court Justice. Significantly, each Justice's term would still be eighteen years long, which is plenty of time for Justices to become known individually and to acquire prestige. Moreover, the immense powers and responsibilities of the Court's members would not change under our proposal from what they are currently, so it seems more likely than not that our proposal would not affect the prestige associated with being a Supreme Court Justice. At the very most, our proposal might shift the public's esteem and respect away from individual Justices and onto the Supreme Court as an institution. We think this would be an enormously positive improvement, and, for these reasons, we believe the argument that our proposal would diminish the prestige of being a Justice should carry little weight.

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 policy-making 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 being an indirectly elected, political body. As Ward Farnsworth says, our 18 year term proposal "may cause the justices to think of themselves as political office-holders in a more traditional way than they now do."³⁷² 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 making it up. We

³⁷¹ See *supra* notes -261 and accompanying text.

³⁷² Farnsworth, *supra* note ___, at 31.

think getting rid of 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 of 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 more relative to those lawyerly elites.

Professor Farnsworth challenges this idea and, citing Richard Posner, he argues that “the popular demand for originalism is weak.”³⁷³ 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 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 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 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, or Tribe. The public may be fooled, as it was in the Bork confirmation, into opposing an occasional originalist nominee. (Even then, it should be noted that in the Thomas confirmation fight public opinion supported Thomas’s appointment). 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 11 years without a single vacancy opening up on the Supreme Court and for the Justices to stay on

³⁷³ Farnsworth, *supra* note __, at 25 citing Richard Posner, *Overcoming Law* 254-55 (1995).

that Court for 25.6 years on average instead of for 14.9 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 Democratic leaning Presidents 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 Democrats win the next presidential election and get to fill those two seats, the Court will remain 5 to 4 Republican. Under these circumstances, a Democratically 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 will 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 entirely 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.

There are undoubtedly more objections to our proposal that we have not addressed, but the basic point is that our amendment merely restores American practice with respect to Supreme Court vacancies to what it was between 1789 and 1970.³⁷⁴ Quite simply, until now, the system of life tenure has been retained mostly

³⁷⁴ There are a number of arguments that we have not taken up in this subsection, but which we have addressed in other sections of the paper. For example, to the objection that our proposal might be unfair to current Justices, we have stated that our proposal would be prospective only. *See supra* pp. 46-54. Also, to the argument that our proposal might not be feasible, *see* Easterbrook, *supra* note 7, we argue below that we recognize the difficulty in passing a constitutional amendment and therefore

because of inertia, and therefore the affirmative defenses of life tenure, and the objections to term limits for Supreme Court Justices, have not been thoroughly presented. Our hope is that by making a strong case for abolishing life tenure and replacing it with 18 year term limits, we will put the burden on the proponents of life tenure to make a reasoned case for preserving the current system.³⁷⁵

B. Imposing Term Limits by Statute

In the preceding part, we outlined our term limits proposal and we argued that a staggered, eighteen-year term limit would remedy the historical trends that have fundamentally changed the real world, practical meaning of life tenure. Instituting our proposal through a constitutional amendment thus seems to us clearly desirable. But, in light of the great difficulty that exists in passing an amendment, it is not surprising that some have asked whether Supreme Court term limits could be created by statute. In this section we consider two statutory proposals for Supreme Court term limits and conclude they are both unconstitutional. The first proposal we consider is one of our own devising and the second proposal is one that has been floated by Professors Paul Carrington and Roger Cramton.

1. Two Statutory Term Limits Proposal

The Calabresi-Lindgren proposed statutory term limits idea would essentially provide for the same kind of term limits as would be accomplished by our suggested constitutional amendment. The statute would, however, be carefully tailored in the ultimately vain hope of avoiding constitutional problems.³⁷⁶ Our statutory proposal would provide that, when a President wishes to appoint a particular individual to the Supreme Court, the appointment process would proceed as follows: First, the President would appoint an individual to a seat on one of the lower federal courts,³⁷⁷ where, as Article III, Section 1 dictates, that person must enjoy life tenure.³⁷⁸ Then, by a separate act of presidential nomination and

consider alternative ways of imposing term limits. *See infra* pp. 80-99. 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. *See supra* notes 362-370 and accompanying text.

³⁷⁵ *See* Monaghan, *supra* note 24, at 1212 (first raising such a call, over ten years ago).

³⁷⁶ For purposes of illustrating how our statute would work, we assume that the Senate would confirm the President's nomination.

³⁷⁷ We suggest that Supreme Court nominees that are not already on the lower federal courts would be appointed to a federal circuit court, since this would make the later re-designation simpler.

³⁷⁸ *See* U.S. CONST. art. III, sec. 1. Of course, if the President were appointing to the Court an individual who was already a federal judge, then this first step may be unnecessary.

senatorial confirmation that life tenured lower federal court judge would be “designated”³⁷⁹ to serve on the Supreme Court for a term, which by statute would last for eighteen years.³⁸⁰ At the end of the eighteen years, the statutory designation of the lower federal court judge to sit on the Supreme Court would expire. This would automatically end the Justice’s tenure on the Supreme Court, and the justice in question would revert to being a federal circuit court or district court judge for life.³⁸¹ Thus, the individual would always enjoy life tenure (subject to impeachment) as a member of the federal judiciary, but he would be statutorily designated to serve on the Supreme Court for only eighteen years. This means in constitutional terms, the judge would at all times “hold [his] Office[] during good Behaviour” on “the supreme and inferior Courts.”³⁸² As Professor Vik Amar writes, “the Justices would be federal judges with life tenure – but not all of that tenure would be served on the Court.”³⁸³

In this way, the Calabresi-Lindgren statutory proposal bears strong resemblance to two different judicial practices that our country has permitted, and in one case is still using. First, during the early years of our government, Justices engaged in the practice of circuit-riding, whereby they would sit by statutory designation on the lower federal courts in addition to fulfilling their duties as a Supreme Court Justice.³⁸⁴ In effect, under this practice, a particular individual was serving as both an inferior federal judge and as a Supreme Court Justice, and was implicitly appointed by the President to both positions.³⁸⁵ This practice of having

³⁷⁹ 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, sec. 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,” would appoint the judge as a Justice. See *id.* 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.

³⁸⁰ Although the process would technically involve two confirmations 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.

³⁸¹ The statute would thus operate like the current provision for the position of Chief Judge on each individual circuit. According to circuit rules, a particular judge on that circuit is named to become Chief Judge. Following her years of service as Chief Judge, the rules operate so that she is no longer Chief Judge, but rather is simply a judge once again, as she was before becoming a Chief Judge.

[Citation]

³⁸² U.S. CONST. art. III, sec. 1.

³⁸³ Amar and Amar, *supra* note 77.

³⁸⁴ [Citation to circuit-riding]

³⁸⁵ To be sure, there were not two separate appointments. Rather, the practice was simply established that Supreme Court Justices also served on lower federal courts. We do not claim otherwise, but our point here is to demonstrate that under circuit-riding, the effect of the practice was to have a judge simultaneously serving two positions – both inferior judge and Supreme Court Justice.

one individual simultaneously serve in two positions – despite the fact that the Constitution arguably contemplates that these two positions would be separate³⁸⁶ – provides a historical antecedent to the Calabresi-Lindgren statutory proposal, which would similarly have individuals serving on both courts as if the positions were interchangeable. Professor McGinnis similarly argues that a proposal like ours finds support in circuit-riding, stating that, because in the early days of our constitutional history “Justices who rode circuit sat as members of inferior courts,” then “our early traditions suggest that the inferior courts and the Supreme Court did not have to possess completely separate personnel.”³⁸⁷ Thus, as we further demonstrate below,³⁸⁸ it could be argued that the old practice of circuit-riding, which was provided for by the quasi-constitutional Judiciary Act of 1789 and the constitutionality of which was upheld in Stuart v. Laird³⁸⁹ serves as precedential support for our statutory proposal.

Second, there is a currently prevailing system in our country and critically also in England³⁹⁰ (although not in any civil law countries) of allowing 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. For instance, active circuit court judges and district court judges can be designated to serve on other lower federal courts by order of the Chief Judge of the court in question.³⁹¹ Retired and active Supreme Court Justices are allowed to sit on circuit courts or even on district courts by order of the Chief Judge of the respective court, and Chief Justice Rehnquist has himself sat by designation as a district judge in Virginia.³⁹² Senior circuit court judges are authorized to sit on panels of sister circuits and on district courts by order of the Chief Judge of that court.³⁹³ Moreover, senior district court judges are permitted to sit on circuit court panels anywhere in the country by order of the Chief Judge of the Circuit Court in question.³⁹⁴ 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.³⁹⁵

³⁸⁶ See, e.g., U.S. CONST. art. III, sec. 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).

³⁸⁷ McGinnis, *supra* note 27, at 545.

³⁸⁸ See *infra* text accompanying notes 409- .

³⁸⁹ Get cite

³⁹⁰ cite Glendon casebook

³⁹¹ See 28 U.S.C. §§ 291(b), 292(a) (2003).

³⁹² See *id.* §§ 294(a), 294(c).

³⁹³ See *id.* § 294(c).

³⁹⁴ See *id.*

³⁹⁵ See *id.* §§ 291(b), 292(a), 294(a), 294(c).

Importantly, as with circuit-riding, this practice of sitting by designation basically permits a Justice to serve on an inferior court and decide cases, even though he is never actually commissioned or appointed to that court, and it similarly 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. This statutory system of sitting-by-designation even authorizes federal district court judges to sit on the circuit court level by designation, despite their not having been appointed to that higher appellate court. This custom of sitting-by-designation, in its different forms, therefore serves as an additional instance of the Supreme Court and the various inferior courts being treated interchangeably by Congress, apparently without undermining the Constitution.³⁹⁶ The Calabresi-Lindgren proposal for instituting statutory term limits for Supreme Court Justices thus draws on these rich historical precedents for authority. Under this proposal, lower federal court judges would “ride” temporarily for 18 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 18 years would be by a separate act of presidential nomination and senatorial confirmation instead of by the order of a Chief Judge or Justice. If circuit riding was constitutional, as the First Congress thought, and, as the Supreme Court held in *Stuart v. Laird*, then Supreme Court riding for an 18 year period of designation ought to be constitutional as well.

The second statutory proposal for instituting a system of 18 year term limits for Supreme Court Justices is the one put forward in December of 2004 by Professors Paul Carrington and Roger Cramton. Under the Carrington-Cramton proposal, the Supreme Court’s membership would be constitutionally fixed at nine Justices, and one new Justice would be appointed in each two year session of Congress. At any given time, the Supreme Court would consist of the nine most junior commissioned Justices. Other more senior Justices would be eligible to sit by designation on the lower federal courts. Those senior Justices could also be called back to active duty if one of the nine Justices junior to him were recused or during any period of time when the Senate failed to fill a vacancy on the Supreme Court during a two year session of Congress. Since a term of Congress lasts two years, that means that Congress and the President have it in their power to

³⁹⁶ We do not address at length, in this Article, the serious possibility that the arrangements for sitting-by-designation and circuit-riding are unconstitutional as a matter of the original meaning of the Constitution because they violate the Appointments Clause. 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* [citation on difficulty of circuit-riding]. 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 on by designation. *See* [circuit-riding citation].

determine precisely when during a two-year period a particular justice will be bumped in hearing cases by a new appointed justice—significant weakness in their 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 18 years on the Supreme Court and any other time beyond that sitting by designation on the lower federal courts. With circuit riding, justices simultaneously spent part of each year either sitting on the Supreme Court or riding circuit.

The Carrington-Cramton proposal also gains support from the historical practice of judges sitting by designation on courts other than the one they were commissioned to. Since Carrington and Cramton would allow senior Supreme Court Justices to sit by designation of the Chief Justice on lower federal courts, this proposal definitely draws on our historical tradition of designating judges to serve on courts other than the one they were commissioned to. Finally, the Carrington-Cramton proposal maintains as a fiction the notion the Supreme Court Justices sit as Justices for life, but the proposal disallows any Justice from actually participating in Supreme Court business (other than rulemaking) after 18 years have passed unless one of the nine junior Justices is recused or Congress fails to fill a vacancy. In that case, the most junior of the senior Justice would get recalled to active duty.

2. Assessing the Constitutionality of the Two Proposed Statutes

The two statutory term limits proposals discussed above would undoubtedly face serious constitutional challenges, and many might reflexively oppose these ideas as being obviously unconstitutional. Although these views echo traditional (if not romanticized³⁹⁷) thought on life tenure and its importance to judicial independence, we believe that the constitutional questions are not nearly as clear-

³⁹⁷ Indeed, as is the case with the civil jury system, which arguably is outdated and of negative consequence to our civil litigation system yet still enjoys broad public support, many will reflexively dislike any argument that challenges life tenure because the system has become so ingrained in the minds of Americans as a necessary safeguard for judicial independence and integrity. *Cf.* Priest, *supra* note 34, at 103-05 (noting the deep resistance to any change to the jury system stems from an ingrained belief that the jury system is essential to American democracy, and quipping that to propose even modest change to the jury system comes “at the acknowledged risk of being accused of treason”). As Professor Priest does in his critique of the jury system, we emphasize that our reconsideration of life tenure and our proposal for fixed term limits springs from a desire to enhance democracy, not to undermine it. *See supra* pp. 54-64.

cut as many might initially suppose. We therefore proceed with our analysis by considering the two relevant constitutional provisions, demonstrating that a superficially plausible case can be made for the constitutionality of imposing our term limits proposal by statute, even though in the end, we conclude these two proposed statutes are both unconstitutional.

First, the Calabresi-Lindgren statutory proposal could be challenged as violating the Appointments Clause. In Article II, Section 2, the Constitution specifically provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court”³⁹⁸ Thus, one might argue that by permitting the mere “designation” of a lower court judge to the Supreme Court, the statute would undermine the President’s appointment power. One might go even further and say that the Constitution itself clearly contemplates the office of being a Supreme Court Justice as being a separate and distinctly commissioned office. A separate clause of the Constitution which provides that the Chief Justice of the United States shall preside over Senate impeachment trials of the President could be argued to contemplate a separate and distinct office of Chief Justice, as well.

The objection that the Appointments Clause contemplates a separate office of Supreme Court justice might also be made to the Carrington-Cramton proposal which contemplates something less than life tenure as an active duty Supreme Court justice for officers commissioned to the Supreme Court. Given that the Appointments Clause seems to contemplate a separate office of judge of the Supreme Court, it is hard to see how that office could be filled for only 18 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 18 years being on the Supreme Court and any remaining time being on the lower federal courts. In this respect, Carrington and Cramton proposal contemplates commissioned Supreme Court justices as 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.

Defenders of the two statutes might respond, as previously noted,³⁹⁹ 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 would preserve the President’s power to appoint any judges or Justices to the federal judiciary and to the Supreme Court. In fact, by preserving the President’s appointment power even for designations, the Calabresi-Lindgren statutory proposal could be argued to be *more* constitutional than the prevailing sitting-by-designation systems, whereby the Chief

³⁹⁸ U.S. CONST. art. II, sec. 2.

³⁹⁹ See *supra* notes 377-383 and accompanying text, and particularly *supra* note 379.

Judges of the various circuits and districts are authorized to designate active and senior judges and Justices to sit on other circuit or district courts.⁴⁰⁰ Thus, the two statutory proposals could be argued to 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 18 years. If this were to happen there would be no separately commissioned office of being a Supreme Court Justice. This seems to us to be contrary to the situation the Appointments Clause presumes will prevail. Arguably, circuit riding, which involved appending 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. Under a system of lower court judges riding on the Supreme Court, there would be no such separate office. 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 persuaded, Stuart v. Laird notwithstanding, that circuit riding was itself constitutional as a matter of pure originalism. Nor are we persuaded that the ancient practice of Chief Judges designating judges commissioned to sit on other courts to sit on their courts does not violate the Appointments Clause. Many of the 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. Stuart v. Laird upholds circuit riding by saying it was established as a matter of precedent by the First Congress when that Congress provided for circuit riding in the Judiciary Act of 1789. This is not the same thing as saying that as an original matter circuit riding (and sitting-by-designation on courts other than the one a judge is commissioned to) was constitutionally permissible. If circuit riding is constitutionally dubious as an original matter, then perhaps Stuart v. Laird ought not to 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 215 years of contrary practice. Nor should we extrapolate from the dubious circuit riding precedent the notion that

⁴⁰⁰ See *supra* note 395.

one can be assigned to spend one's first 18 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 further that one can carve up a Justice's total term and allocate the first 18 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 and if one thinks circuit riding was 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 circuit riding and Supreme Court riding 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. Burkean constitutional law traditionalists ought to conclude that the precedent of circuit riding cannot be extended to allow Supreme Court riding because of 215 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 18 years.

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. That clause clearly contemplates a separate office of Chief Justice much as the Appointments Clause contemplates a separate office of judges of the Supreme Court. Put together, we think the most plausible reading of these two clauses and, clearly the reading that is most in accord with 215 years of actual practice, is that the office of Supreme Court Justice is a separately commissioned office.

Second, and most importantly, the two statutory proposals could also be challenged under the provision granting life tenure to members of the federal judiciary. Article III, Section 1 of the Constitution provides that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior . . ." ⁴⁰¹ This language might be read in two different ways. First, based upon what is perhaps the more natural reading – because of the inclusion of the phrase "both of" and because of the placement of the word "their" – the provision might require that "Judges" of the Supreme Court must have life tenure, and that "Judges" of the inferior courts must also have life tenure. This reading would dictate that the Supreme Court and the inferior courts are to be distinct entities, and therefore that

⁴⁰¹ U.S. CONST. art. III, sec. 1.

life tenure must be guaranteed to members of both courts.⁴⁰² Under this interpretation, it would follow that the two statutory proposals, by limiting the tenure of “Judges” of the “supreme Court,” violates this provision regardless of the fact that it would automatically grant life tenure to the former-Justice as a “Judge” of the “inferior Court[.]”

Significantly, this is not the only plausible way to interpret this provision for life tenure. In short, the provision can easily be read to require simply that “Judges” at all levels (“both of the supreme and inferior Courts”) must enjoy life tenure,⁴⁰³ a proposition which does not at all mandate that life tenure on the Supreme Court and life tenure on the inferior courts are mutually exclusive. Under this interpretation, there would be nothing wrong with limiting an individual’s tenure on the Supreme Court if that individual would otherwise enjoy life tenure on the federal judiciary, *i.e.*, on the “supreme and inferior Courts.” Based on this reading, the statutory term limits proposals, which would limit the tenure of Supreme Court Justices while still guaranteeing life tenure as a federal judge, would represent constitutionally valid statutes.

First, as to the textual plausibility of this interpretation, we agree with Professor McGinnis that the text of Article III, Section 1 (unlike the text of the Appointments Clause) is ambiguous whether it specifies a Supreme Court distinct from inferior courts.⁴⁰⁴ Although one might plausibly argue that the language should be read to support the first interpretation – that life tenure must be guaranteed to Supreme Court Justices, as well as to lower federal judges, in distinct capacities – it can just as easily be read to support the interpretation Carrington and Cramton would defend: that Judges at all levels (“both of the supreme and inferior Courts”) must enjoy life tenure. Under this second reading, there is no special requirement that judges on each court must have life tenure as a member of that particular Court. In fact, if the Framers intended to ensure that all persons appointed to the Supreme Court should have life tenure to that Court, and that all persons appointed to the inferior courts should have life tenure to those courts, they easily could have done so. For example, they might have provided, “The Judges, both of the supreme and inferior Courts, shall hold their *respective* Offices during good behavior.” Such a simple clarification would have shown conclusively that the first reading is correct. Yet the constitutional text, as it stands, is ambiguous as to these two interpretations, and it very plausibly supports the Carrington-Cramton

⁴⁰² See McGinnis, *supra* note 27, at 545 (noting that this interpretation is probably the more natural reading).

⁴⁰³ U.S. CONST. art. III, sec. 1.

⁴⁰⁴ *Id.* 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.”).

reading that life tenure is guaranteed to members of the federal judiciary in general.⁴⁰⁵

The response to this point, however, is that the Appointments Clause and the Clause providing for the Chief Justice to preside at Senate impeachment trials of the President seem most plausibly to us to suggest that the office of being a Supreme Court Justice is a separate and distinct office. Admittedly, this is a somewhat formalistic reading of these two clauses in conjunction with the good behavior clause, but separation of powers rules are often somewhat formalistic. 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 215 years we have acted as though the office of Supreme Court Justice was a separate office. Reading all of these clauses together, however, and knowing what the practice has been for 215 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 suggested reading of the Good Behavior Clause is consistent with the basic purpose behind the provision for life tenure. It might be argued that the purpose of life tenure is to preserve judicial independence; in other words, to ensure that judges do not depend on the political branches for their tenure of office, such that they can act independently of political and public pressures in their decision-making.⁴⁰⁶ To achieve this purpose, it is not at all necessary that life tenure be guaranteed for any particular court.⁴⁰⁷ Rather, as was demonstrated above, all that is necessary to ensure judicial independence is that judges be guaranteed their position on the judiciary for life, and that judges will not face potential retaliation by Congress, the President, or the public.⁴⁰⁸ Responsive to this purpose, both of the two statutory proposals would guarantee that judges are given life tenure, and that their terms on the Supreme Court are fixed by time.

The problem, of course, with this functionalist argument is that it does not address the fact that the Appointments Clause and the Chief Justice Presiding Clause both seem to contemplate a separate office of being a Supreme Court Justice to which one must presumably be appointed for life. Formally speaking, the Carrington-Cramton proposal runs afoul of these two clauses no matter what

⁴⁰⁵ See Amar and Calabresi, *supra* note 3.

⁴⁰⁶ [Citation]

⁴⁰⁷ 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* notes 319-326 and accompanying text.

⁴⁰⁸ See *supra* pp. 64-80.

functional justifications might be put forward for it. Under our textualist approach to constitutional interpretation, one cannot let the purposes underlying a constitutional provision trump the plain meaning of the constitutional text.

Carrington and Cramton might also argue that their interpretation of the Good Behavior Clause providing for life tenure is more supported by historical practice than the first interpretation. As we noted above, the practices of circuit-riding and sitting-by-designation are important historical antecedents to the both statutory term limits proposals.⁴⁰⁹ As Professor McGinnis puts it:

[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.⁴¹⁰

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. Rather, the established practices of circuit-riding and sitting-by-designation could be said to show that the interpretation Carrington and Cramton defend – that life tenure must be preserved for members of the federal judiciary generally, without any distinction between the two courts – has been the prevailing view.⁴¹¹ 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 as a given that circuit riding was 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 simultaneously in the same year sit on both the Supreme and inferior federal courts that therefore it can carve up a Justices total tenure and allocate the first 18 years of it to only Supreme Court business and any time beyond 18 years to lower court business.

⁴⁰⁹ 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(ed) sitting-by-designation with the approval of only the Chief Judge of the circuit courts. See *supra* notes 398-400 and accompanying text.

⁴¹⁰ McGinnis, *supra* note 27, at 545.

⁴¹¹ See McGinnis, *supra* note 27, at 545.

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. We think this presumption has been sanctioned by 215 years of unbroken practice, which is the reason 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.

In sum, we believe that the best reading of the Constitutional provision guaranteeing life tenure supports the proposition that individuals must enjoy life tenure as separately commissioned Supreme Court judges, and that they can not be limited by statute in their tenure on the Supreme Court.⁴¹² The text of the Good Behavior clause, though ambiguous, is best read in light of the Appointments and Chief Justice Presiding Clauses as creating a separate office of Supreme Court Justice. There are two historical practices – circuit-riding and sitting-by-designation – which serve could be argued to serve as precedents for statutory term limits proposals, but we think it would be a stretch to extend these historical practices to make the tenure of Supreme Court Justices anything less than life tenure. Doing so would require innovating beyond historical practices that were themselves of dubious constitutionality and would be unprecedented in limiting the tenure of Supreme Court Justices.

3. Desirability of Imposing Term Limits by Statute

Even if the two statutory proposals could pass constitutional muster, which we believe they cannot, there would still remain the question 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 the fact 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.⁴¹³ Then, three-fourths of the states would have to ratify it.⁴¹⁴ Throughout history, excluding the Bill of Rights, only seventeen provisions have successfully passed this process.⁴¹⁵ Moreover, many of the amendments that made it through the Article V

⁴¹² See McGinnis, *supra* note 27, at 545; Amar and Calabresi, *supra* note 3.

⁴¹³ See U.S. CONST. art. V.

⁴¹⁴ See *id.*

⁴¹⁵ See U.S. CONST. amend. XI – XXVII. This includes, of course, the two amendments on prohibition that cancel out. See U.S. CONST. amend. XVIII, amend. XXI (repealing the Eighteenth Amendment).

process were the result of incredibly strong historical forces that developed over time, such as the Reconstruction Amendments,⁴¹⁶ or were the result of historical incidents that revealed fundamental gaps in the Constitution.⁴¹⁷

However, two very important policy drawbacks to the two statutory proposals must be considered. First, all would have to admit that a system of statutory term limits at best presents a close constitutional question. Even if the Court were to find that a statutory term limits scheme is constitutional, which we doubt, the bold move of passing such a statute would certainly roil public opinion and create severe tension between the Supreme Court and the other branches. Congress already has several important checks over the Court: it controls to a large extent the Court's jurisdiction,⁴¹⁸ it controls the salaries of the Justices,⁴¹⁹ it controls the pensions of the Justices, and it controls a number of other administrative functions like office space and law clerks and other support staff.⁴²⁰ Using these current checks in very political ways would likely risk straining the relationship between the two branches. In the same way, by passing a statute limiting the tenure of Supreme Court Justices, the Court and its members might be viewed as a relative power grab on Congress's and the President's part. The result may be increased tension between the various branches.

Second, a more significant weakness in establishing term limits through a statute is that it is subject to greater manipulability by future Congresses. Professor McGinnis writes:

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, 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.⁴²¹

Thus, effectuating a statutory term limits proposal risks the possibility, as Ward Farnsworth points out, that interest groups, Congress, or the President might

⁴¹⁶ See U.S. CONST. amend. XIII (ratified in 1865), amend. XIV (ratified in 1868), amend. XV (ratified in 1870).

⁴¹⁷ 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.

⁴¹⁸ See *supra* note 316.

⁴¹⁹ Subject, of course, to the Compensation Clause's requirement that judges' salaries may not be diminished while they are in office. See U.S. CONST. art. III, sec. 1.

⁴²⁰ See Amar and Calabresi, *supra* note 3.

⁴²¹ McGinnis, *supra* note 27, at 546.

attempt to tamper with the statutory scheme of term limits in the future in order to achieve political gain.⁴²² 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 18 years or even for life, a result which is particularly pernicious if the other party had abided by the statutory term limits during preceding years when they had power.⁴²³ This possibility for manipulation through the political process, which would not exist for a term limits constitutional amendment, greatly undermines the desirability of our effort to reform life tenure by statute. This is a strong objection, and it is true that formally there is little to prevent future Congresses or Presidents or interest groups from taking advantage of the statute to further their own goals

An even more powerful form of the counterargument based on potential manipulation is that, if Congress were to establish a precedent of being able to change the tenure of Justices and other federal judges, they may become even more daring and later try to tamper 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 Justice to the lower federal courts whenever it chooses.⁴²⁴ By creating such a limit, the argument continues, Congress could 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 this theoretical possibility an unrealistic one. Moreover, Carrington and Cramton might contend that the statutory analysis conducted above revealed that the Court should find a term limits proposal to be constitutional only if it preserves the core of judicial independence from political pressure, which is a fundamental requirement of Article III.⁴²⁵ 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.⁴²⁶ Carrington and Cramton might claim that their specific

⁴²² Farnsworth, *supra* note __, at 44.

⁴²³ For example, suppose that Democrats are in control of both the executive and legislative branches, and, after passing the statute, they abide by it for three appointments. Their appointments are therefore bound by the eighteen-year term limit. Then, suppose that Republicans gained control of both the executive and legislative branches, repealed the statute in order to re-institute life tenure, and then appointed several members to the Court for life. This outcome demonstrates the dangers that this manipulability problem presents.

⁴²⁴ Conversation between Jeff Oldham and Professor Martin Redish, Oct. 16, 2002.

⁴²⁵ See *supra* pp. 84-91.

⁴²⁶ See Redish, *supra* note 85, at 677.

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 Congress's makes this a very dangerous constitutional road to go down. We are not at all persuaded that once Congress has tampered with the life tenure of Supreme Court Justices by instituting 18 year terms that 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 very 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 the justice in his 18th year about to be bumped into retirement is a Democrat. Now imagine that a Republican president were to try to fill the statutory vacancy with a Republican but that president had to persuade a Democratic Senate to go along. The President would want to fill the vacancy right away to bump off the Democratic Justice. The Democratic Senate, however, would want to wait until the very end of the session to fill the vacancy to 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 at all thus keeping the 18 year Democratic Justice on active Supreme Court duty beyond his supposed 18 year term. This is a statutory scheme that is rife with possibilities for abuse. We would reject any such statute for this reason alone out of hand.⁴²⁷

C. Imposing Term Limits through Informal Practice

Aside from constitutional amendments or statutory term limits proposals, there are a variety of informal options available to lawmakers, and to the

⁴²⁷ Our public criticisms on this point may already have had some effect because the December Carrington-Cramton that we criticize on this point was recently revised (in March 2005) to remove this defect and adopt fixed terms much like the Calabresi-Lindgren proposal. Future drafts of this article will delineate these changes and these differences more carefully.

Justices themselves, to bring about reforms to the system of life tenure.⁴²⁸ As Professor Akhil Amar states, “there’s almost always more than one way to get where you want to constitutionally go.”⁴²⁹ In this subsection, we briefly consider some of the different ways in which term limits can be imposed on the Supreme Court even without formal lawmaking. Specifically, expounding upon Professors Akhil Amar’s and Calabresi’s ideas in their 2002 op-ed piece for the *Washington Post*,⁴³⁰ we focus on the ways in which the Senate, the Court, or the individual Justices might try to push a technically life-tenured Court toward a de facto system of term limits. The following informal measures, while inadequate to effectuate our specific proposal of the preceding sections, can begin moving the Court (and society’s expectations) towards limited tenure, which might eventually lead to a more formal system of term limits.⁴³¹

1. Senate-Imposed Limits through Term Limit Pledges

The Senate has an important constitutional role to play in the appointment process, and it could try to utilize this role to push us towards a system of term limits for the Supreme Court. Thus, Professors Akhil Amar and Calabresi suggested in their op-ed: “[T]he Senate could insist that all future court nominees publicly agree to term limits, or risk nonconfirmation. Though such agreements would be legally unenforceable, justices could feel honor-bound to keep their word.”⁴³²

Like the recent movement towards term limits pledges for federal legislators,⁴³³ which has grown largely out of the Supreme Court’s decision in *U.S. Term Limits, Inc. v. Thornton*,⁴³⁴ Senators could try to require the (necessarily unenforceable) agreement by any nominee to resign after eighteen years, or some other suitable term. Of course, there is no guarantee that a Justice would feel compelled to follow his confirmation pledge. Indeed, term limits pledges have not deterred some legislators who have made the pledges from continuing to run for Congress beyond their allotted terms.⁴³⁵ The most common justification for such actions has been, in short, that if “the people” want that legislator to continue in

⁴²⁸ See generally Amar and Calabresi, *supra* note 3 (carefully detailing the various possibilities for informally achieving term limits).

⁴²⁹ Amar and Amar, *supra* note 77.

⁴³⁰ See Amar and Calabresi, *supra* note 3.

⁴³¹ See Amar and Calabresi, *supra* note 3 (“Congress should try to nudge the justices toward a better model of judicial independence based on fixed judicial terms.”).

⁴³² *Id.*

⁴³³ [Citation to term limit pledges literature – Eskridge legislation casebook]

⁴³⁴ 514 U.S. 779 (1995) (striking down state legislative attempts to set term limits on federal legislators).

⁴³⁵ [Citation – JC Watts is example]

office, then the legislator believes that the term limits pledge has been outweighed by the voice of democracy.⁴³⁶ Importantly, this justification for not abiding by the term limits pledge could not aid Justices, since, unlike legislators, they would not be continuing in office as a direct result of “the will of the people.” If a Justice were to not resign after the promised term, that event could potentially generate a public backlash that might lead to the eventual passing of a constitutional amendment establishing term limits.

Importantly, as noted by Professors Akhil Amar, Vik Amar, and Calabresi, this kind of term limits pledge “would not raise judicial independence or due process problems” that accompany the kind of “promises” that nominated Justices are sometimes asked to make in Senate confirmations, like pledges to rule certain ways on particular issues.⁴³⁷ Unlike such substantive promises, term limits pledges are merely “a promise to resign on a fixed date,” and it therefore “comports with judicial integrity.”⁴³⁸

Notwithstanding these considerations we do not favor term limit pledges.⁴³⁹ 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 18 years, he may always do so; what he probably should not do seem to trade a promise to step down to gain a place on the Court. We think the other justices would be so disapproving of a new justice having taken a term limits pledge that it could compromise that Justice’s ability to function in his job. We thus think term limit pledges in confirmation hearings are too much to ask of prospective nominees, and we would encourage any prospective nominee who was asked to make such a pledge to decline to do so. Voluntary term limits pledges might be observed by some justices and not by others, which would make a mockery of the whole idea of 18 year limited and staggered terms. For both of these reasons, we would encourage any Supreme Court nominee who was importuned to take a term limits pledge to decline to do so on judicial independence grounds.

2. Court-Imposed Limits through Internal Court Rules

⁴³⁶ [Citation – JC Watts is example]

⁴³⁷ Amar and Amar, *supra* note 77.

⁴³⁸ Amar and Calabresi, *supra* note 3.

⁴³⁹ Professor Calabresi was persuaded by Professor Lindgren that it was a bad idea for him to endorse term limits pledges in confirmation hearings in his 2002 op-ed piece with Professor Akhil Amar.

The Supreme Court itself can play an important role in pushing justices not to serve for as long as possible on the High Court and thus to move us toward a system of de facto term limits. Indeed, the Court holds powerful tools for moving us toward such a system, such as through its internal court rules, or more subtly through possible modifications to the seniority system. 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, just as the House in 1994 adopted internal term limits for certain committee chairs.”⁴⁴⁰ Thus, one possible way for the Court as an institution to impose term limits on its individual members would be for the Court to adopt a retirement rule, stating that Justices ought to step down after eighteen years of service on the Court. As Professors Amar and Calabresi suggest,⁴⁴¹ this system could follow the example of the 1994 House rules that, as part of the Republican “Contract with America,” imposed term limits on the chairpersons of various internal committees.⁴⁴² Though not legally enforceable, these internal rules are very effective ways of limiting the terms of its members. If the Court were to create such an internal rule,⁴⁴³ the pressure on a Justice from his fellow Justices and from the institution, could prove to be a valuable method of limiting the tenure of Supreme Court Justices. Moreover, it would be a highly desirable way of bringing about term limits, given that the Court would be imposing such limits on itself.

Alternatively, a way for the Court to decrease the incentives for Justices to remain on the Court later in age, though not explicitly limiting their tenure, is to modify its seniority system.⁴⁴⁴ Currently, the Court’s system of seniority provides that the decision of which Justice will write any given opinion belongs to the most senior Justice in the majority.⁴⁴⁵ In the current Court, Chief Justice Rehnquist assigns the opinion whenever he finds himself in the majority; otherwise, if Chief Justice Rehnquist is a dissenter, then the next most-senior Justice is permitted to assign the opinion.⁴⁴⁶ This seniority system, by rewarding the most senior Justices with priority in deciding which opinions to write, creates enormous incentives for Justices to remain on the Court for long periods of time and later in age.⁴⁴⁷ Indeed, once Justices finally reach the point when they are one of the most senior Justices,

⁴⁴⁰ Amar and Calabresi, *supra* note 3.

⁴⁴¹ *See id.*

⁴⁴² [Citation to congressional committee term limits]

⁴⁴³ As may be obvious, instituting such a rule would be the most difficult part. Once a rule were passed, it would be difficult and might take a number of years (and changes to the Court’s membership) for the rule to be undone.

⁴⁴⁴ *See* Amar and Calabresi, *supra* note 3.

⁴⁴⁵ [Citation to seniority system]

⁴⁴⁶ [Citation to seniority system]

⁴⁴⁷ *See* Amar and Calabresi, *supra* note 3.

they will likely relish in that role and will have every incentive to retain that power. By eliminating this seniority system, or modifying it in some regard, as Professors Akhil Amar and Calabresi propose, the Court can eliminate these incentives for Justices to remain on the Court longer.⁴⁴⁸

Moreover, Congress, through its various political checks on the Court, can play a positive role in persuading the Court to develop a system of term limits through its internal court rules. For example, as Professors Amar and Calabresi have noted, “Congress could also restructure judicial salaries, pensions, office space and other perks to give future justices incentives” to step down after a set number of years.⁴⁴⁹ Giving a huge pension to any justice who stepped down after his 18th year of Supreme Court service might well accomplish many of the goals we advocate in arguing for Supreme Court term limits. Moreover, as Professor Bill Stuntz suggests, Congress can reduce the number of law clerks allowed to each Justice, which, by making the Justice’s personal responsibilities far greater, might reduce the ability of Justices to continue serving as late in age as they currently do.⁴⁵⁰ 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. Of course, we do not want to cause a political war between Congress and the Court; Congress must be conservative and deliberative in its use of these mechanisms as a way of encouraging the Court to voluntarily move toward a system of term limits. But, we believe that these measures may be effective ways for Congress to encourage the Justices to move toward an informal set of term limits. And, short of amending the Constitution to provide for term limits, Court-imposed term limits on Justices might be the most desirable method of reforming life tenure.

3. Justice-Imposed Limits through Tradition

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 hopes that institutional pressure could develop that would bear on all future Justices.

⁴⁴⁸ See Amar and Calabresi, *supra* note 3. To be sure, there is great logic behind appointing more senior Justices to appoint decision-writing. Thus, abolishing the seniority system might seem too drastic. However, some more moderate modifications might be possible, which would eliminate the huge incentives for senior Justices to keep getting more “senior” at the same time as it preserves the logic behind the seniority system.

⁴⁴⁹ Amar and Calabresi, *supra* note 3.

⁴⁵⁰ Professor Bill Stuntz, Email conversation between Professors Akhil Amar and Bill Stuntz, Aug. 9, 2002 (on file with authors).

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.⁴⁵¹ 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.

After more reflection, Professor Calabresi is no longer convinced that it is 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. Such justices would face a major collective action problem trying to persuade their long-serving colleagues to follow the good example the retiring justices were trying to set. Given the level of partisan hostility on the Supreme Court at the moment, and given the extent to which all of the recent justices seem to have practiced 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 any other justice currently on the Court would follow such a good example even if one justice were to retire early. 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.

IV. Conclusion

We join Professor Prakash in emphatically stating, “life tenure is a long-lived constitutional aberration that we should belatedly repudiate.”⁴⁵² Although, as Professor Monaghan suggests, defenders of life tenure have long been able to say, “If it ain’t broke, don’t fix it,”⁴⁵³ we believe this Article has 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 and, as we argue, it should be abolished. Inertia ought no longer to justify the continuation of life tenure.

⁴⁵¹ See Amar and Calabresi, *supra* note 3.

⁴⁵² Prakash, *supra* note 15, at 581.

⁴⁵³ Monaghan, *supra* note 24, at 1212.

In place of life tenure, we join several commentators before us in advocating a system of staggered, nonrenewable term limits of eighteen years, after which Justices would be able, if they wanted to, to sit on the lower federal courts. We believe this system must be achieved through a constitutional amendment and that 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, but we would favor other informal methods of encouraging justices to step down after 18 years such as by offering them a huge pension at that time if they retired or modifying the Court's internal seniority rule so that no justice who stayed longer than 18 years would have the power, when in the majority, to assign an opinion. We do not think it is realistic to hope that the Justices will decide to follow George Washington's good example and relinquish power voluntarily because we doubt any one Justice could trust his colleagues to follow their good example.

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. We recommend a Burkean, conservative revolution – a coming full circle – whereby the country recommits itself by constitutional amendment to the practices that pertained with respect to the tenure of 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.