RETIRING LIFE TENURE: ON TERM LIMITS AND REGULAR APPOINTMENTS AT THE SUPREME COURT

Tyler Cooper†, *Amanda Dworkin, Dylan Hosmer-Quint & Amanda Pescovitz*†

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INTRODUCTION

The notorious gridlock between Congress and the Executive—and often between houses of Congress—this century has created a power vacuum the U.S. Supreme Court has been more than happy to fill. On race, guns, healthcare, marriage, campaign finance, school choice,

† Senior Researcher, Fix the Court, a national, nonpartisan organization that advocates for non- ideological "fixes" that would make the federal courts, and primarily the U.S. Supreme Court, more open and more accountable to the American people.

† Dworkin, Hosmer-Quint, and Pescovitz are Fix the Court Law Clerks. The four authors would like to thank Fix the Court Executive Director Gabe Roth for his edits and comments.

religious liberty, abortion, voting, and immigration,[1] lawmakers sit paralyzed as the unaccountable third branch decides for 330 million of us what the law is on each of these issues.

What's worse, the Justices of the Supreme Court are serving longer on average than ever before, nearly twice as long as they served just two generations ago. In short, the politicians in robes[2] wield too much power, and they wield that power for too long.

Limiting a Justice's tenure on the High Court to a more reasonable length would address these problems head on.

Future Justices serving a nonrenewable eighteen-year term, as the most common proposal dictates, would decrease the amount of power that any one Justice would hold over American jurisprudence. It would lower the political consequences of any one judicial confirmation battle by ensuring that another chance at a nomination would soon come. And it would ensure that no particular nominee would hold his or her seat for decades, with no end in sight.[3]

The current system incentivizes several objectionable practices—finding a nominee as young as possible who could serve forty or fifty years, holding a vacancy open for as long as possible to thwart an

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1 *See, e.g.*, Fisher v. United States, 136 S. Ct. 2198 (2016) (considering college affirmative action programs based on race); District of Columbia v. Heller, 554 U.S. 570 (2008) (striking down D.C.'s gun regulations as Second Amendment violation); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (upholding the Affordable Care Act); Citizens United v. FEC, 558 U.S. 310 (2009) (striking down restrictions on corporate political donations as First Amendment violation);Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246 (2020) (determining law barring state scholarships at religious schools was First Amendment violation); June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020) (striking down Louisiana abortion law); Dep't of Homeland Sec. v.Regents of the Univ. of Cal., 140 S. Ct. 1891 (2020) (determining that recission of the Deferred Action for Childhood Arrivals program was unlawful).

2 Former President Trump routinely articulated a vision of the courts as an extension of partisan politics,the Senate now accepts or rejects Supreme Court nominees almost entirely by party-line votes, andover sixty percent of both registered Republicans and registered Democrats view Supreme Court appointments as "very important" to their vote in the upcoming presidential election. *See Important Issues in the 2020 Election*, PEW RESEARCH CTR. (Aug. 13, 2020), https://www.pewresearch.org/politics/2020/08/13/important-issues-in-the-2020-election [https://perma.cc/M9VV-T5M8]; *see, e.g.*, PBS NewsHour, *WATCH: 'We'll End up in the Supreme Court,' Trump Predicts for Emergency Declaration*, YOUTUBE (Feb. 15, 2019), https://youtu.be/lYqkzWGWkiE [https://perma.cc/73HF-KTM6]; *Roll Call Vote 115th Congress - 2nd Session*, U.S. SENATE (last visited Oct. 10, 2020), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00223 [https://perma.cc/Y569-LWN5] (vote on the confirmation of Brett M. Kavanaugh to the U.S. Supreme Court).

3 The most recent Justices to conclude their service each served for close to three decades: Ginsburg (27 years); Kennedy (30 years); Scalia (29 years); Stevens (35 years). *See Justices 1789 to Present*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/BL3H-5FJB]; Press Release, SUP. CT. OF THE U.S. (Sept. 18, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-18-20 [https://perma.cc/HA4Y-2TUB].

opposite-party nominee and rushing to confirm a justice without ample time for vetting—that we can't stop right now. But these do make it clear that the system of appointing Justices is in dire need of fixing.

A. *Justice Today Holds Too Much Power*

The Supreme Court today holds too much power not only because of choices made by the Court itself, but also because of the choices made by the other branches. The legislative branch has all but abandoned articulating its own interpretation of the Constitution and its own duly passed legislation. Congressional overrides of the Supreme Court's statutory decision-making were once an important yet routine practice; this practice, however, has recently declined precipitously.[4]

Adding to the increase in power the Justices wield today is that major cases are increasingly decided by narrow margins, often turning onthe vote of a single Justice. This has not always been the way the Court has operated, as perhaps most clearly evidenced by the Court ruling unanimously in *Brown v. Board of Education* despite the fact that the outcome was highly politically contentious at the time.[5] Over the last 20 years, however most "major cases" have been decided 5-4.[6]

Justice Ruth Bader Ginsburg, a renowned liberal, being replaced by a Justice Amy Coney Barrett, a renowned conservative, has widely been expected to swing American jurisprudence on a panoply of hot-button

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4 Richard L. Hasen, End of the Dialogue? Political Polarization, the Supreme Court, and Congress, 86 S. CAL. L. REV. 205, 209 (2013) ("[I]n the last two decades the rate of congressional overriding of Supreme Court statutory decisions has plummeted dramatically, from an average of twelve overrides of Supreme Court cases in each two-year congressional term during the 1975–1990 period, to an average of 5.8 overrides foreach term from 1991–2000, and to a mere 2.8 average number of overrides for each termfrom 2001–2012.").

5 *See* Dennis J. Hutchinson, *Unanimity and Desegregation: Decisionmaking in the Supreme Court, 1948–1958*, 68 GEO. L.J. 1, 87 (1980).

6 There are several ways to gauge the impact of a Supreme Court case. One way is to note whether the Court granted the media's request for audio to be released on the afternoon following an argument. Prior to the COVID-19 pandemic argument audio had typically been released at the end of an argument week, but the media prefers a primary source in major cases as soon as possible. So, of the twenty-seven times between 2000 and 2020 that the Court granted a same-day audio request, two-thirds of those cases were decided 5-4. *The 27 Times the Supreme Court Granted Same-Day Audio, Dec. 2000–Apr. 2020*, FIX CT. (Oct. 6, 2020), https://fixthecourt.com/wp-content/uploads/2020/10/Same-day-audio-grants-as-of-Apr-2020.pdf [https://perma.cc/7CCE-KPQW].

political issues including abortion rights,[7] healthcare access,[8] and LGBTQ+ rights.[9]

B. *A Justice Today Serves for Too Long*

The average tenure of a Supreme Court Justice from 1789 to 1970 was 14.9 years.[10] Of the Justices who have left the Court since then, the average length of service has risen to 26.1 years.[11] A natural consequence is that more frequently we have seen Justices serve longer than they have been mentally fit for the job.

Serving for thirty-six years, Justice William Douglas's mental incapacity was described in contemporaneous press accounts[12] and was asource of concern among his peers on the bench.[13]

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7 Martin Pengelly & Richard Luscombe, *Trump Says Overturning* Roe v. Wade *'Possible' with Barrett on Supreme Court*, GUARDIAN (Sept. 27, 2020, 7:39 PM) https://www.theguardian.com/us-news/2020/sep/27/trump-amy-coney-barrett-supreme-court-roe-v-wade [https://perma.cc/N2H2-EWR2].

8 Sarah Elbeshbishi, *'This is All About Your Healthcare': Biden Says Trump Nominated Amy Coney Barrett to End Affordable Care Act*, USA TODAY (Sept. 27, 2020, 6:30 PM), https://www.usatoday.com/story/news/politics/elections/2020/09/27/biden-amy-coney-barrett-nomination-affordable-care-act/3555305001 [https://perma.cc/VT8P-M399].

9 Samantha Schmidt & Sara Pulliam Bailey, *A New Conservative Supreme Court Justice Could Boost Religious Rights at the Cost of LGBTQ Protections*, WASH. POST (Sept. 22, 2020, 11:20 AM), https://www.washingtonpost.com/dc-md-va/2020/09/22/new-conservative-supreme-court-justice-could-boost-religious-rights-cost-lgbtq-protections [https://perma.cc/A9P9-JU9P].

10 Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 770–71 (2006) ("[T]he average tenure of a Supreme Court Justice from 1789 to 1970 was 14.9 years, for those Justices who have retired since 1970, the average tenure has jumped to 26.1 years.").

11 *Id.*

12 David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L.R. 995, 1052–56 (2000).

13 Weeks before Douglas's 1975 retirement, Justice Byron White wrote, "I am convinced that it would have been better had retirement been required at a specified age by the Constitution . . . a constitutional amendment to that effect should be proposed and adopted." Garrow, *supra* note 12, at 1055.

Justice	Oath Taken	Service Terminated	Years in Service
Ruth Bader Ginsburg	1993	2020	27
David Souter	1990	2009	19
Anthony Kennedy	1988	2018	30
Antonin Scalia	1986	2016	30
Sandra Day O'Connor	1981	2006	25
John Paul Stevens	1975	2010	35
William Rehnquist	1972	2005	33
Lewis Powell	1972	1987	15
Harry Blackmun	1970	1994	24
Warren Burger	1969	1986	17
Thurgood Marshall	1967	1991	24
Byron White	1962	1993	31
Potter Stewart	1958	1981	23
William Brennan	1956	1990	34
John Marshall Harlan	1955	1971	16
William Douglas	1939	1975	36
Hugo Black	1937	1971	34

More recent examples of Justices serving through diminished capacities are those of Justice Thurgood Marshall, who retired in 1991,[14] and Chief Justice William Rehnquist, who died in 2005 without having retired.[15]

Justice Marshall became dependent on the other Justices as he lost his hearing and began making mistakes in his work such as forgetting which attorney was representing which party during the oral argument for *Fed. Trade Comm'n v. Superior Ct. Trial Law. Ass'n*.[16]

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14 Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES (June 28, 1991), https://www.nytimes.com/1991/06/28/us/marshall-retires-from-high-court-blow-to-liberals.html [https://perma.cc/D5LC-99UG].

15 Linda Greenhouse, *Chief Justice Rehnquist Dies at 80*, N.Y. TIMES (Sept. 4, 2005), https://www.nytimes.com/2005/09/04/politics/chief-justice-rehnquist-dies-at-80.html [https://perma.cc/3BX3-HEAP].

16 *See* Garrow, *supra* note 12, at 1072 (1994) (citing JOHN C. JEFFRIES JR., JUSTICE LEWIS F. POWELL, JR. 638); Transcript of Oral Argument at 27–28, Fed. Trade Comm'n v. Superior Ct. Trial Law. Ass'n, 493 U.S. 411 (1990) (No. 88-1198).

Justice Rehnquist[17] began slurring his words more often, and had such awkward, lengthy pauses as he struggled to form his words that theother Justices sometimes finished his questions for him.[18]

It has been reported that law clerks picked up much of the slack left at times by Justices Brennan, Marshall, and also Harry Blackmun duringeach of their terms that spanned thirty-four, twenty-four, and twenty-four years, respectively.[19]

These elongated tenures stand in stark contrast to the brief stints many of the first Supreme Court Justices served. The first ten Justices served on average for fewer than eight years, and three of them left the Court to take other positions.[20]

The Founders conceptualized government positions like the presidency and the bench to be a public duty, something to be completed before starting a new chapter in life, rather than a lifetime job.[21] George Washington famously stepped down after the second term of his presidency.[22] Similarly, the first Chief Justice of the United States, John Jay, resigned after being elected Governor of New York.[23] Chief Justice John Roberts had even expressed a similar sentiment in 1983 while working as an attorney in theWhite House.[24]

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17 Justice Rehnquist was prescribed the sedative Placidyl—which is not recommended to be taken for more than two weeks—for nine years, with his dosage increasing from 500 milligrams per day in 1972 to 1500 milligrams per day in 1976. Garrow, *supra* note 12, at 1068 (citing Richard L. Berke, *Data on Rehnquist Said to Detail Increased Doses*, N.Y. TIMES (Aug. 13, 1986) at A19).

18 *Id.* at 1067.

19 *See* Calabresi & Lindgren, *supra* note 10, at 808; *Justices 1789 to Present*, *supra* note 3.

20 Stuart Taylor, Jr., *A Life Tenure Is Too Long for Supreme Court Justices*, ATLANTIC (June 2005), https://www.theatlantic.com/magazine/archive/2005/06/life-tenure-is-too-long-for-supreme-court-justices/304134 [https://perma.cc/V2WS-A92B].

21 Roger C. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1315 (2007).

22 *Id.*

23 History.com Editors, *John Jay*, HISTORY (Aug. 21, 2018), https://www.history.com/topics/us-government/john-jay [https://perma.cc/Z6HH-SPST].

24 Memorandum for Fred F. Fielding from John G. Roberts, Re: DOJ Proposed Report on S.J. Res. 39, a Bill which Proposes a Constitutional Amendment to Establish a Ten-Year Term of Office for Federal Judges (Oct. 3, 1983), https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1110&context=historical [https://perma.cc/D4QJ-NSUE] ("[T]here is much to be said for changing life tenure to a term of years, *without* possibility of reappointment. The Framers adopted life tenure at a time when people simply did not live as long as they do now. A judge insulated from the normal currents of life for twenty-five or thirty years was a rarity then, but is becoming commonplace today. Setting a term of, say, fifteen years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence. It would also provide a more regular and greater degree of turnover among the judges. Both developments would, in my view, be healthy ones.") (emphasis in original).

Additionally, the job was simply less attractive in the past than it is now. At its outset, the Supreme Court was a relatively weak body.[25] *Marbury v. Madison* is largely credited with establishing judicial review in 1803,[26] meaning that the Court operated for years without it being apparent that judicial review was necessarily a part of the Court's mandate. However, it was long understood that Justices would be responsible for rigorous circuit riding, a practice not eliminated until 1911, which required traversing the expansive nation without the adventof modern modes of transportation.[27]

I. REGULARIZATION OF THE SUPREME COURT APPOINTMENTS

Limiting tenures and regularizing appointments would work to reduce the arbitrariness and political strategizing that has come to define Supreme Court vacancies. The first change, limiting tenure, changes the calculus of Justices by removing the strategic political thinking that currently influences Justices' retirement considerations. The second change, regularizing the nominations process, would abrogate the arbitrariness and gamesmanship surrounding the process by which Justices are currently nominated and confirmed.

A. *Independent or Anti-Democratic?*

The judiciary faces the least democratic accountability of the three branches of government. Since the drafting of the Constitution, the democratic responsiveness of the other two branches has grown. While Congress and the Executive maintain anti-democratic elements, notably the electoral college for the presidency and the overrepresentation of small states in the Senate, they have each made strides toward democratization. Most Americans can now cast ballots, and senators are elected directly by voters in the states they represent. The judiciary has undergone no such similar reform.

The power of unelected judges does not comfortably fit within the common conception of a democracy. Academics have long waged this

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25 FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 2003) ("It proves incontestably, that the judiciary is beyond comparison the weakest of the three departmentsof power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.").

26 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* William W. Van Alstyne, *A Critical Guide to* Marbury v. Madison, 1969 DUKE L.J. 1, 1.

27 *Circuit Riding*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/circuit-riding [https://perma.cc/27AZ-7PA7].

debate; the "counter-majoritarian difficulty," posited by Alexander Bickel in 1962, questions the power of unelected jurors to counter elected legislators.[28] The debate has evolved over the years, as liberals saw the Warren Court as an ally but came to see the Rehnquist Court as an enemy.[29]

Many would argue that the judiciary should not be directly responsive to the public. In *The Federalist No. 78*, for example, Alexander Hamilton argues that if judicial appointments rested directly with the people, "there would be too great a disposition to consult popularity."[30]

Life tenure, however, rather than providing for an independent judiciary as the Framers envisioned, has created an anti-democratic institution. And because the institution need not regularly respond to the will of the people, it has become the greatest prize in partisan politics.

Term limits thread the proverbial needle. By providing long terms, we are assured of Justices' independence from partisan influence. But by regularizing appointments, the Court remains tethered to the democratic process.

B. *Arbitrary Nominations and Political Gamesmanship*

Ending life tenure would mean the end to the arbitrary nature of Supreme Court nominations and confirmations. In the current system of life tenure, judicial openings are dictated either by the human mortality or political calculation of the Justices.[31]

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28 Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 155, 159 (2002).

29 *Id.* at 155.

30 FEDERALIST NO. 78, *supra* note 25, at 470 ("If the power of making [appointments] was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify reliance that nothing would be consulted by the Constitution and the laws.").

31 Justice Stephen Breyer acknowledged as much when he stated his support for term limits. *Breyer Says He Might Support an 18-Year Term Limit for Justices*, FIX THE CT. (Apr. 24, 2019), https://fixthecourt.com/2019/04/breyer-says-he-supports-18-year-terms-for-supreme-court-justices [https://perma.cc/SG7A-S3QN] ("It would make life easier. You know, I wouldn't have to worry about when I'm going to retire or not.").

President	Years in Office	Seats Filled
Donald J. Trump	2017-2021 (4)	3
Barack Obama	2009-2017 (8)	2
George W. Bush	2001-2009 (8)	2
William Clinton	1993-2001 (8)	2
George H. W. Bush	1989-1993 (4)	2
Ronald Reagan	1981-1989 (8)	4
James Carter	1977-1981 (4)	0

A quick look at the numbers reveals the uneven impact that life tenure has on presidents from different political parties. Over the past forty-four years, Democratic presidents have been in office for twenty years and have appointed four Justices. Republican presidents have been in office for twenty-four years and have appointed ten or eleven Justices.

Politically motivated retirements are a common problem. Nearly two-thirds of resigning Justices retired when a president of the same party was in office, while fifty-nine percent of Justices who died in office died during the term of a President of the opposing party.[32] Take as recent examples, the retirement of Justice Anthony Kennedy during the Trumpadministration and the deaths of Justices Antonin Scalia and Ruth Bader Ginsburg during the Obama and Trump administrations, respectively.[33]

II. OVERCOMING OBSTACLES TO REFORM

A. *Constitutional Considerations*

A reoccurring concern regarding proposals to set term limits for the Supreme Court by statute remains the Constitution itself—or to be

32 *See* Calabresi & Lindgren, *supra* note 10, at 805.

33 *See* Lydia Wheeler, *Kennedy Announces Retirement from the Court*, HILL (June 27, 2018, 2:01 PM), https://thehill.com/regulation/court-battles/393357-kennedy-announces-retirement-from-supreme-court [https://perma.cc/L9MH-FXH3] (stating Justice Kennedy retired at age eighty-two after serving thirty years on the Court.); Jamie Gangel, Ariane de Vogue, Evan Perez, & Kevin Bohn, *Antonin Scalia, Supreme Court Justice, Dies at 79*, CNN POLITICS (Feb. 15, 2016, 7:22 AM), https://www.cnn.com/2016/02/13/politics/supreme-court-justice-antonin-scalia-dies-at- 79/index.html [https://perma.cc/6P5K-HN7N] (stating Justice Scalia served thirty years on the Court.); Sam Levine, *Supreme Court Justice Ruth Bader Ginsburg Dead at 87*, HUFFINGTON POST (Sept. 18, 2020), https://www.huffpost.com/entry/ruth-bader-ginsburg-dead_n_573b34d6e4b0ef86171c12cc?ncid=engmodushpmg00000006 [https://perma.cc/7H5R-SR7P] (stating Justice Ginsburg served for twenty-seven years on the Court.).

moreaccurate, the widely held belief that the current system of life tenure is required by the Constitution's text. In establishing the Supreme Court, the Constitution states that the Justices "shall hold their Offices during good Behaviour . . . ."[34] Many people, including scholars and commentators, assume that this requires life tenure, with impeachment the only possible way other than death a Justice could be removed.[35] But "[e]quating good-behavior tenure with 'life tenure' subject to removal only via impeachment is a mistake."[36]

While it could be argued that, "in the absence of qualifying language" specifying a term of years, the founding-era understanding was that good-behavior tenure was tenure for life,[37] it could also be understood only as imposing a limit on the reasons a judge or Justice could be removed before the end of an unspecified period. While Congress cannot repudiate constitutional terms by statute, it can bring clarity to the interpretation of its generalities.

That "good behavior" and "life tenure" are synonymous is assumed by many scholars but is far from certain. In *The Federalist No. 78*, Alexander Hamilton justified the grant of good-behavior tenure while referring to the Supreme Court as "the least dangerous" of the branches of the new federal government.[38] But the changed role of the Court over time has undermined Hamilton's argument, most notably how much more powerful today's Court is than the Court of the founding era.[39]

Importantly for constitutional purposes, Supreme Court term limits proposals would apply prospectively, exempting Justices serving at the time of enactment.[40] No Justice appointed before the law is enacted would have the term of their service retroactively altered, and no Justice appointed after such a law is enacted would be deprived of the ability to

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34 U.S. CONST. art. III, § 1.

35 *See, e.g.*, Ilya Somin, *Pitfalls of Statutory Term Limits for Supreme Court Justices*, REASON (Sept. 29, 2020, 4:17 PM), https://reason.com/2020/09/29/pitfalls-of-statutory-term-limits-for-supreme-court-justices [https://perma.cc/C8F6-ZN9J].

36 Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72, 89 (2006).

37 *Id.* at 90.

38 FEDERALIST NO. 78, *supra* note 25, at 464 ("Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.").*But see* Calabresi & Lindgren, *supra* note 10, at 822 (describing how Mr. Hamilton's vision of thejudiciary either "no longer ring true" or "never held water and contradicted the Constitution's firstprinciples").

39 Calabresi & Lindgren, *supra* note 10, at 822–23.

40 *See, e.g.*, Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. § 2(a) (2020).

serve "during good Behaviour" for a determinate period of years before being required to take senior status.

In fact, non-life-tenured judges already exist within the federal judiciary, offering support for such a plan. Just as magistrate judges, established by statute, are able to wield the judicial power,[41] "Article III [of the Constitution] could similarly be reinterpreted to require guaranteed terms" that are fixed by statute.[42] The "powerful precedent" of senior status for lower federal judges could be extended to the Justices of the Supreme Court without raising constitutional concerns.[43]

B. *A Supreme Final Period Problem?*

Some critics worry that term limits for Supreme Court Justices would create a "final period problem"—a situation where Justices are incentivized to rule in their self-interest during the final portion of their judicial term—without acknowledging the reality of the similar "final period problem" that life tenure creates.[44]

These concerns can largely be categorized into three major topics: partisan decision-making, legacy creation, and collegiality.[45]

First, critics suggest that Justices will rule in partisan ways to be more appealing to future employers.[46] But this suggestion assumes that Justices would not otherwise be exceedingly employable after their tenure on the Court regardless of their rulings, and assumes that Justices are not making partisan decisions under pressure from Congress, the President, and other entities that the Justice may benefit from politically or economically.

Second, critics assert that Justices will spend the last year of their term focused on creating a legacy rather than in coming to the best

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41 *See generally* Peter G. McCabe, *A Guide to the Federal Magistrate Judges System,* FED. BAR ASS'N (Oct. 2016), https://www.fedbar.org/wp-content/uploads/2019/10/FBA-White-Paper-2016-pdf-2.pdf [https://perma.cc/SX3E-4DL8].

42 Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 641 (2005).

43 Tyler Cooper, *INSIGHT: Fixed Terms for Supreme Court Justices Checks Constitutionality Boxes*, BLOOMBERG LAW (June 3, 2019, 4:01 AM), https://news.bloomberglaw.com/us-law-week/insight-fixed-terms-for-supreme-court-justices-checks-constitutionality-boxes [https://perma.cc/HB89-P2KC].

44 For more on this topic, see Tyler Cooper, *SCOTUS Term Limits and the Final Period Problem*, FIX THE CT. (Mar. 23, 2020), https://fixthecourt.com/2020/03/scotus-term-limits-final-period-problem [https://perma.cc/DLJ6-DDEV].

45 *Id.*

46 *See* Suzanna Sherry, *No: Short-Term Appointments Will Escalate Divisiveness*, PHILA. INQUIRER, https://www.inquirer.com/opinion/commentary/supreme-court-term-limits-lifetime- appointment-ruth-bader-ginsburg-20200924.html [https://perma.cc/E8P7-QL9W].

ruling.[47] But this assertion, questionably, assumes either that Justices do not already focus on crafting a legacy in the period before their retirement or death or that a legacy making motivation would detract from a justice's jurisprudence.

Third, critics opine that term limits may result in less collegiality on the Court because Justices would know that they would only be working with each other for a couple of years.[48] But one could also argue the opposite effect: interminable tenures result in less collegiality on the Court because Justices know that they will work with each other for years to come regardless of their behavior. It is also not self-evident that collegiality on the bench serves the public good.

Moreover, voiced concerns about the possibility of creating a "final period problem" often ignore the already existing final period problem—that Justices either time their retirement based on partisan factors or work well past their capacity to avoid retiring completely.

C. *More Frequent Confirmation Battles, But Lower Stakes*

Other critics suggest that establishing term limits would result in more frequent high-octane confirmation battles like those of Merrick Garland, Brett Kavanaugh, and Amy Coney Barrett. But that ignores the history of confirmation battles and fails to take into consideration how a predetermined term of service, and the guarantee of subsequent appointments in the near future, would lessen the consequences of any one appointment.

Before 1970, a new Justice rotated in about every two years.[49] After 1970, new Justices have joined the Court sporadically, with a new Justice rotating in on average more than once every three years.[50] Gaps between new vacancies can be anywhere from a couple of months to eleven years.[51]

For example, Jimmy Carter got no nominations to the Court during the four years of his presidency, while Nixon filled four seats during the five-and-a-half years of his presidency.[52]

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47 *See* Calabresi & Lindgren, *supra* note 10, at 850.

48 *See generally* Morgan L.W. Hazelton, Rachel K. Hinkle, & Michael J. Nelson, *The Elevator Effect: How Collegiality Impacts Dissent* (unpublished manuscript).

49 Cramton, *supra* note 21, at 1316.

50 *Id.*

51 Calabresi & Lindgren, *supra* note 10, at 784–86.

52 David Leonhardt, *The Supreme Court Needs Term Limits*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/opinion/columnists/brett-kavanaugh-supreme-court-term- limits.html [https://perma.cc/3XUL-5U33].

An eighteen-year term limit would blunt the effects of the rise of average tenure and negate the incentive to nominate younger jurists while overlooking more seasoned candidates. Two-year staggered term limits would mirror the average two-year rotation of judges common until 1970s rather than the undemocratic and inefficient random gaps invacancies present today. Both aspects of the reform would reinstate limitations that act as a consistent, routine democratic check to keep the Court accountable to its constituents and that could take some of the fireout of confirmation hearing battles.[53]

CONCLUSION

Just because this is the current situation at the Supreme Court—life tenure with unchecked power—does not mean it will always be the situation at the Supreme Court. A standardized appointment process, already a popular reform, has picked up momentum of late in the halls of Congress.

U.S. Representatives Ro Khanna (D-Cal.), Don Beyer (D-Va.), and Joe Kennedy III (D-Mass.) introduced the Supreme Court Term Limits and Regular Appointments Act on September 29, 2020.[54] The bill would, upon enactment, limit future Justices to eighteen years—the current eight would be exempt—and would create a senior status for retired Justices; in case of sudden vacancy, they could return for a time to fill out the bench. The bill was reintroduced by U.S. Representatives Ro Khanna (D-Cal.), Don Beyer (D-Va.), Barbara Lee (D-Cal.), and Rashida Tlaib (D-Mich.) on August 31, 2021.[55]

The stakes for each appointment would be lower. The power of each Justice would be reduced. And every President would receive two appointments per presidential term.

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53 In 2018, Justice Kagan said, "Could you do that [tenure] with sufficiently long terms? Eighteen years seems to be the going proposal. Maybe. I'm not saying that there's nothing to proposals like that. I think that what those proposals are trying to do is to take some of the high stakes out of the confirmation process, and certainly to the extent that that worked, and that people . . . could feel as though no single confirmation was going to be a life and death issue, thatthat would be a good thing. So I think it's a balance among good goals." *Justice Kagan on SCOTUS Term Limits: "Maybe,"* C-SPAN (Oct. 25, 2018), https://www.c-span.org/video/?c4757264/user-clip-justice-kagan-scotus-term-limits-maybe [https://perma.cc/B32H-HNBY].

54 Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020); *see* Kalvis Golde, *House Democrats to Introduce New Bill for Supreme Court Term Limits*, SCOTUSBLOG (Sept. 25, 2020, 4:00 PM), https://www.scotusblog.com/2020/09/house-democrats-to-introduce-new-bill-for-supreme-court-term-limits [https://perma.cc/7TWF-XLU6].

55 Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Cong. (2021).

The bill was actually drafted in the summer of 2019 but was put on hold because last September, the House began the impeachment process,with COVID-19 soon to follow. Our Capitol Hill sources tell us that all the current vacancy did was move the introduction date of the bill up two weeks.

Whether there's a vacancy now or in the future, whether it's a forty-something Democratic appointee who's poised to serve until superannuation or a Republican one, a less powerful Court makes for a more powerful citizenry, which is exactly the point of living in a democracy.