

Supreme Court Term Limits

A Path to a More Accountable High Court

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PUBLISHED JUNE 20, 2023

Today's Supreme Court has assumed a degree of power and importance that would have been unrecognizable in the founding era.¹ A recent cascade of ethics scandals has laid bare a system in which justices wield tremendous power for decades with little accountability,² while the Court's rulings are increasingly unmoored from democratic values and the principle of judicial restraint.³ At the same time, polarization among the political parties and the justices themselves has dramatically increased the partisan stakes of the confirmation process, leading to a broken system.⁴ Public trust in the Court is at a historical low.⁵

For all these reasons, there are growing calls for reform. Proposals range from creating an ethics code to expanding the Court to stripping its jurisdiction. One of the most popular options would also be among the most transformative: establishing 18-year terms and regularized appointments for justices. Under this system, justices would sit in staggered terms of active service on the Court, such that a new vacancy would open every two years. Each president would have two, and only two, appointments during a four-year term.

This paper explains how such a reform would work, why it would bolster the Court's legitimacy, and how to transition from the current system. It also discusses how the core elements of this reform could be adopted by statute, consistent with the Constitution, by establishing the

role of "senior justice." Among other things, senior justices would hear cases by designation on the lower courts, step in to hear cases on the Supreme Court in the event of a recusal or unexpected vacancy, and assist with the management and administration of the federal courts. This framework is similar to the existing system of senior judges that has been in place for more than a century and has applied to the justices since 1937.⁶ However, rather than leave the timing of senior status up to the justices' discretion, under this reform Congress would create a schedule by which justices assume senior status automatically after 18 years of active service on the Court.

The case for reform is compelling. On average, justices today sit on the bench for more than a decade longer than their predecessors did as recently as the 1960s.⁷ Several justices now on the Court are likely to hold office over as many as nine presidential terms. Unbounded tenure allows a single justice to shape the direction of the law for generations, without regard for the evolving views and composition of the electorate. It puts justices in an elite and unaccountable bubble for decades. No other major democracy in the world provides life tenure for high court judges who hear constitutional cases.⁸

With today's intense ideological polarization, every Supreme Court vacancy also takes on monumental stakes. Exercises of raw power have replaced long-established constitutional norms, upending the confirmation

process.⁹ This constitutional hardball¹⁰ was illustrated most notoriously when Republican senators refused to consider President Barack Obama’s March 2016 nomination of Merrick Garland, claiming that it was too close to the presidential election, only to rush through a vote for Amy Coney Barrett in October 2020, when early voting in that year’s presidential election had already started.

One result of these dynamics has been that presidents have had starkly disparate imprints on the Court. President Donald Trump appointed three justices in four years, whereas Presidents Bill Clinton, George W. Bush, and Barack Obama each appointed two justices in eight years. This wide variation, as well as its impact on the development of American law, is impossible to square with principles of democratic legitimacy.

By contrast, with 18-year active terms and regularized appointments, every president would have an equal imprint on the Court during a four-year term. Such a system would enhance the democratic link between the Court and the public, making the institution more reflective of changing public values while preserving judicial independence.

This reform would also encourage a better-functioning and less politically charged confirmation process. Shorter terms would lower the stakes of each nomination, while regularized appointments would both encourage compromise and allow for public accountability in the event of confirmation impasses. Regularized appointments would also eliminate the destabilizing impact of late-term vacancies because an unexpected death or retirement would not create a new seat to fill; instead, a senior justice would temporarily step in. And this reform would ensure that no individual holds largely unchecked power for decades at a time.

Broad swaths of Americans support term limits for justices. Since 2022, several polls have found that more than two-thirds of the public are in favor of this reform, including more than three-quarters of Democrats, two-thirds of independents, and more than half of Republicans. This bipartisan support is long-standing: since at least 2014, polls have consistently shown supermajority support for term limits (see appendix).

A broad array of scholars likewise support term limits. When the National Constitution Center convened separate groups of conservative and progressive scholars in 2020 to draft their ideal constitutions, both proposed 18-year terms.¹¹ The Presidential Commission on the Supreme Court, which was created by President Joe Biden to evaluate options for Supreme Court reform, described term limits as enjoying “considerable, bipartisan support.”¹²

The Constitution gives Congress wide latitude to determine the Supreme Court’s structure and responsibilities. Congress should use its power now to reform the Supreme Court.

An Increasingly Unaccountable Court

In *Federalist 78*, Alexander Hamilton famously described the Supreme Court as the “least dangerous branch” of government.¹³ At the time, it was an accurate description. In its first decade, the Supreme Court heard an average of just six cases per year.¹⁴ The first chief justice, John Jay, stayed on the bench for only five years and declined to be renominated after serving as governor of New York because, he said, the Court lacked “energy, weight, and dignity.”¹⁵ In 1803, Chief Justice John Marshall asserted the power of judicial review in *Marbury v. Madison*. Yet the Supreme Court did not strike down another federal law as unconstitutional for more than 50 years, when, in *Dred Scott v. Sandford*, it notoriously barred Congress from freeing slaves within federal territories.¹⁶

But times have changed. As the size, scope, and power of the federal government expanded, first with the post-Civil War Reconstruction Amendments and then again in the 20th century with the rise of the administrative state and the civil rights movement, so too did the Supreme Court’s power and national importance.¹⁷ This has altered the incentives of justices to stay in office and the incentives of presidents and senators in the confirmation process. And it has encouraged the political branches to cast aside governing norms to secure seats on the Court — particularly as both the Court and the political parties have grown increasingly polarized.¹⁸ Together these trends have led to a dysfunctional system.

Excessive Terms

Modern justices are serving unusually long terms.¹⁹ For the first 180 years of U.S. history, justices served an average of approximately 15 years. But in the 1970s, the average tenure began to balloon. In recent years, justices have served an average of 26 years — equivalent to six and a half presidential terms.²⁰ Justices appointed at around the age of 50 — which includes a supermajority of justices on the Court today — could serve as long as 35 years.²¹ In the future, justices are likely to serve even longer, as the average age of retirement continues to climb while the average age of appointment keeps declining.²²

These lengthening terms mean justices leave a substantially greater imprint on the Court and the country than did their predecessors. At the same time, the elected branches — and the people they represent — have far fewer opportunities to shape the Court’s direction.²³ Today a 30-year-old has seen only 10 new justices join the Court; 60 years ago, a person of the same age would have seen twice as many.²⁴

Generational seats also leave individual justices with too much power for too long, giving nine people control

over an entire branch of government for decades. This is especially concerning because justices, by design, enjoy a rarefied and largely unaccountable position. As Chief Justice John Roberts once acknowledged while working as a White House attorney, “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.”²⁵ The trend toward lengthening terms also heightens the risk that justices will stay on the Court after their capacity as jurists begins to decline.²⁶

Strategic Retirements

Justices routinely time their retirements to create vacancies for ideologically aligned presidents to fill. These so-called strategic retirements enable justices to lock in their jurisprudence on the Court for multiple generations — a practice inconsistent with the principle that it is the values of the public, not of individual justices, that should shape the future direction of the law.²⁷ Strategic retirements also reinforce the view that justices are simply extensions of the political parties that appointed them. As former federal judge Michael McConnell observed in testimony before the Presidential Commission on the Supreme Court, the current system “puts unseemly pressure on sitting justices to time their retirement to permit a president of their political party to name the replacement.”²⁸ The practice also opens the door to inappropriate horse trading between justices and the presidents who would fill their seats.²⁹ Prior to announcing his retirement, for example, Justice Anthony Kennedy reportedly lobbied President Trump to include then judge Brett Kavanaugh’s name on his list of potential Supreme Court nominees.³⁰

Strategic retirements have become the norm since the 1960s.³¹ The last time a justice retired when a vacancy would likely result in the appointment of a justice with an opposing ideology was more than 30 years ago, when Justice Thurgood Marshall stepped down due to declining health.³² President George H. W. Bush appointed Justice Clarence Thomas to replace him.

A Dysfunctional Confirmation Process

Due in large part to lengthening terms and strategic retirements, the Supreme Court confirmation process has become highly dysfunctional. Nominees are increasingly confirmed on near party-line votes regardless of their underlying merit or commitment to values such as equal justice.³³ Chief Justice Roberts is the only sitting justice to have received the support of a majority of senators not in the nominating president’s political party.³⁴ The confirmation process has likewise become awash in dark money,³⁵ which creates risks of conflicts of interest and contributes to an appearance of politicization.³⁶

The long-standing Senate norm of granting every nomi-

nee a hearing and a vote as part of the Senate’s constitutional responsibility to provide advice and consent on judicial appointments has been replaced with exercises in raw power.³⁷ These dynamics were on full display during the confirmation battles over the Supreme Court seats vacated by Justices Antonin Scalia and Ruth Bader Ginsburg, who both died unexpectedly during a presidential election year. By refusing to give Merrick Garland a hearing or a vote in 2016, the Republican Senate majority broke a norm of more than 100 years to evaluate every Supreme Court nominee’s fitness for the office.³⁸ (Prior to this incident, the last time the Senate refused to take action on a Supreme Court nominee during a legislative session was shortly after the Civil War.)³⁹ The Republican majority ended up holding the seat open for more than a year — until after Trump was elected and assumed the presidency.⁴⁰ Four years later, when Justice Ginsburg died 45 days before Election Day,⁴¹ President Trump and Senate Republicans rushed to fill the seat, holding a confirmation hearing for Amy Coney Barrett while early voting was already under way.⁴²

While the constitutional brawls over the vacancies of Justices Ginsburg and Scalia were particularly hostile, even less bitter confirmation fights have been characterized by vitriol and threats of escalation.⁴³ If existing dynamics continue, appointing justices during periods of divided government may simply become impossible.

A Lack of Democratic Legitimacy

Checks and balances are deeply rooted in our constitutional system. With respect to the judiciary, the Constitution achieves this in large part by giving elected officials — the president, with the advice and consent of the Senate — the power to appoint justices, so that over time the Court’s membership reflects prevailing public values.⁴⁴ For example, proponents of the Seventeenth Amendment, which provides for the direct election of senators, advocated for its passage in part so that the public could more directly hold the judicial branch accountable during a period when it was perceived to be captured by corporate interests.⁴⁵

But this connection between the Court and the public has grown tenuous, undercutting the Court’s democratic legitimacy.⁴⁶ For instance, it is increasingly common for presidents to have no opportunity to fill a single Supreme Court seat during a four-year term. Up until President Jimmy Carter, this was a rare occurrence: from President George Washington through President Gerald Ford, only 5 out of 47 presidential terms were without any Supreme Court appointments. But in the 12 presidential terms since then, there have already been 4 with no appointments.⁴⁷

There are also wide disparities in the number of seats individual presidents have had the opportunity to fill, contributing to stark imbalances on the Court. Beginning

with President George H. W. Bush, who appointed the longest-serving justice currently on the bench (Justice Thomas), Republicans have won four out of nine presidential terms and won the popular vote only twice. But Republicans have appointed six of the current nine justices.⁴⁸ This supermajority has already had a transformative effect, handing down rulings on issues including civil rights, gun rights, and abortion that disproportionately harm vulnerable communities and are unmoored from the values of the American public.⁴⁹ Not surprisingly, public confidence in the Court has plummeted.⁵⁰

A Global Outlier

Among democracies, the United States stands virtually alone when it comes to the tenure of its justices. Today no other major democracy gives lifetime seats to judges who sit on constitutional courts.⁵¹ This includes both common law countries, such as Ireland, New Zealand, and South Africa, and civil law countries, such as France, Germany, and Spain, as well as former U.S. territories whose constitutions were heavily influenced by the U.S. Constitution, such as the Philippines.⁵² Even democracies that previously granted constitutional high court judges unbounded life tenure, including Australia, Canada, and the United Kingdom, have since abandoned this practice.⁵³ Nearly all countries with specialized constitutional courts impose fixed terms for the judges who sit on them, most of which are nonrenewable.⁵⁴

Virtually every state court system has likewise rejected life tenure. Forty-seven states require that their supreme court justices serve for fixed terms, subject to reelection or reappointment processes. Most states have mandatory retirement ages. Only three provide justices with indefinite terms, but two of them — Massachusetts and New Hampshire — impose age limits. Only Rhode Island grants its high court justices life tenure without an age limit.⁵⁵ Federal bankruptcy and magistrate judges likewise serve fixed terms.⁵⁶

Term limits are also widely used in the United States for other important offices. George Washington famously set a two-term norm for the presidency by leaving office after eight years. When Franklin D. Roosevelt broke the tradition with a four-term presidency, the country responded by passing the Twenty-Second Amendment to limit presidents to two terms. Thirty-seven states impose term limits on governors, 15 states impose term limits on legislators, and 9 of the 10 largest cities in the nation impose term limits on mayors.⁵⁷ Not surprisingly, large, bipartisan majorities of Americans likewise support term limits for Supreme Court justices.⁵⁸

Reform by Statute: Design and Structure

Congress can address many of the Supreme Court's structural shortcomings and help restore public confidence in the Court by passing a statute that establishes an 18-year active term for justices and a regularized process for creating and filling vacancies. Specific proposals vary.⁵⁹ But at its core, this reform has two components that work in tandem: restructuring life tenure for justices into two phases (active service and senior service) and regularizing appointments so that there are two vacancies per four-year presidential term.

Restructuring Life Tenure: The Active/Senior Justice Model

Article III of the Constitution creates a system of life tenure for justices by providing that they “shall hold their Offices during good Behaviour.”⁶⁰ Under the active/senior justice model, Supreme Court justices retain life tenure, but their tenure is divided into two distinct periods: a phase of active service lasting 18 years and a senior phase lasting for the remainder of a justice's life term.⁶¹ This framework would apply to both associate justices and the chief justice. After 18 years, a new chief justice would be appointed and the prior chief would assume senior status.⁶²

Under this system, senior justices would no longer regularly decide cases on the Court's docket. Instead they would be tasked with performing other important judicial duties, including sitting by designation to hear cases in the lower federal courts, assisting the chief justice with management and administration of the federal judiciary, and stepping in to hear cases on the Supreme Court's docket upon a recusal by an active justice or in the event of an unexpected vacancy. Some versions of this proposal further provide that senior justices would continue to hear cases falling under the Supreme Court's original jurisdiction.⁶³

This model builds off an existing system that has applied to lower court judges for more than a century and to Supreme Court justices for nearly 90 years.⁶⁴ Under federal law, judges, including Supreme Court justices, who reach age 65 with 15 years of service, or who otherwise qualify on the basis of their age and years of service, become eligible to either retire from their judicial office or retire from active service.⁶⁵ (They can also continue service as an active judge.) Judges who retire from their office are freed from the performance of judicial duties, can pursue other employment, and receive an annuity for life equal to their salary at the time of retirement.⁶⁶ By contrast, judges who

retire from active service (on the lower courts they are called “senior judges”) retain their office, continue to perform judicial duties, and receive their salary with ongoing increases and cost-of-living adjustments.⁶⁷

To maintain senior status, judges must either carry a reduced annual caseload in an amount equivalent to three months of work by an active judge or perform other substantial judicial duties not involving courtroom participation.⁶⁸ With respect to the Supreme Court, federal law authorizes the chief justice to designate justices who have retired from active service to sit on lower federal courts.⁶⁹ Justices regularly do so. For example, since retiring from active service in 2009, Justice David Souter has sat by designation in the First Circuit and heard more than 500 cases, and Justice Sandra Day O’Connor regularly heard cases on federal appeals courts for more than a decade after her retirement in 2006.⁷⁰ Justices who have retired from active service also regularly maintain chambers and employ law clerks.⁷¹

The active/senior justice model largely tracks this existing framework but provides a fixed schedule for the assumption of senior status rather than leaving the timing to the justices’ discretion. It also provides senior justices with a more extensive set of responsibilities than does the current system.⁷² As discussed later, Congress has the constitutional power to make these changes by statute because, as in the current system, justices would continue to hold their judicial office during good behavior.

Regularizing Appointments: Two per Presidential Term

The other main component of this reform is regularized appointments, with a Supreme Court seat opening in the first and third years of a president’s term. With 18-year terms and nine active justices, Supreme Court appointments can be fully regularized so that each president fills two, and only two, seats every four years.⁷³

This reform creates predictability in the event of a death or premature departure by a justice from the bench. Such occurrences should be relatively rare given that justices would be in active service for only 18 years; it has been more than half a century since a justice served for less than 18 years. Still, the implementing statute can provide that under such circumstances the most recently elevated senior justice would step in until there is a scheduled vacancy.⁷⁴ (If no senior justice is available, there would be no changes until the next scheduled appointment.)

The thornier concern is how to harmonize a regularized appointment process with polarized politics and recurring periods of divided government. In light of Senate Republicans’ obstruction of Merrick Garland’s nomination and subsequent threats of further escalation over Supreme Court appointments, the possibility of Senate impasses looms large.⁷⁵

There are good reasons to believe a regularized appoint-

ment system would help disincentivize partisan gamesmanship. First, term limits reform would reduce the benefits of obstruction because Supreme Court seats would no longer offer the promise of a multigenerational imprint on the Court.⁷⁶ Second, obstruction during periods of divided government would become increasingly politically costly as the public would come to expect that each president should be able to fill two Supreme Court seats per term. Obstruction would exact a particularly heavy toll if the statute is structured so that seats become vacant on the first day of each new Congress. In that case, the opposition would need to block a nominee for at least two years (and often four) in order to deny the president a seat. While sitting senators have expressed an openness to blocking Supreme Court nominees from the opposing party for the duration of a presidential election year, far fewer have expressed willingness to do so for an entire congressional or presidential term.⁷⁷ And in the event that senators did chart a course for four years of obstruction on a purely partisan basis, voters would have an opportunity to voice their opposition during the midterms.

Establishing two vacancies per presidential term would also create greater potential for compromise than is generally available under the current system, reducing incentives for obstruction. Knowing ahead of time the number and timing of vacancies that will occur over a president’s term creates opportunities for bargaining over nominees or settling on consensus choices during periods of divided government. For example, should a president’s term begin with divided government, an impasse over confirmations could be resolved by appointing one justice supported by the president’s party on the condition that the president nominate a compromise justice to fill the next available vacancy.⁷⁸ Unexpected vacancies late in a president’s term would no longer be destabilizing because they would not create a new seat to fill.

Finally, to further induce senators to act on a president’s nomination, Congress could accompany this reform with “fast-track” statutory mechanisms to help ensure that nominees receive an up-or-down vote on the Senate floor.⁷⁹ Fast-track legislation is a common vehicle that Congress uses to prevent certain measures from being indefinitely obstructed. It does so by requiring automatic discharge from committee or allowing for a privileged motion to discharge from committee if a measure is not reported out after a fixed period, granting the measure privileged access on the floor of the House or Senate, setting limits on time for debate, and prohibiting legislators from proposing floor amendments.⁸⁰ Congress has a long history of passing such procedures to speed up recurring must-pass legislation, such as trade agreements, budgets, and military base closures.⁸¹ Supreme Court confirmations, particularly under a regularized appointment system, fit this mold.

Such a statute could provide that, upon the nomination of a candidate by the president to fill a vacancy on the

Court, the nomination must be received by the Senate and referred to the Senate Judiciary Committee within a stipulated period. The Senate Judiciary Committee would have a fixed number of days to act on the nomination. Failure to act would lead to an automatic discharge from the committee, with the nomination placed on the Senate calendar and a floor vote required within a set period.⁸² These elements would ensure that every nominee receives at least a full vote by the Senate — a marked improvement over the status quo.⁸³

To avoid potential constitutional objections, fast-track procedures typically include a provision that they can be changed “at any time, in the same manner and to the same extent” as a chamber’s internal rules.⁸⁴ Thus, the Senate could override this fast-track system by changing its rules. Nevertheless, fast-track legislation has often established procedural norms that are hard in practice to override, serving as a bulwark against inaction.⁸⁵

Additional Design Features

Term limits reform also presents an opportunity to improve current practices on the Court related to recusal and conflicts of interest. The implementing statute, for example, should provide that in the event a justice steps aside from hearing a case due to a conflict of interest, the most recently elevated senior justice would step in. This would address current disincentives for justices to recuse themselves from cases because of concerns that their recusal will leave the Court with fewer than nine members.⁸⁶ Being able to tap into a pool of senior justices to hear cases would also help to ensure that recusals do not cause the Court to drop below quorum, leaving it unable to hear a case.⁸⁷

The implementing statute could also be structured to alleviate concerns about conflicts of interest stemming from justices’ postretirement activities. Under a term limits system, some justices may decline senior status and look to pursue activities related to law or politics after leaving active service.⁸⁸ The Constitution grants Congress broad authority to regulate the ethical conduct of justices in order to mitigate concerns posed by such activities,⁸⁹ including by imposing a bar on political fundraising or on pursuing outside employment during justices’ tenure and for a set period after leaving public service.⁹⁰

Congress could set these rules directly by statute or require the Court to adopt a code of conduct — something the Court has declined thus far to do voluntarily despite broad support for binding ethics rules among both the public and other judges.⁹¹ The code of conduct that applies to lower court federal judges imposes a variety of ethical constraints, including limits on judges’ charitable, financial, and fiduciary activities. Most of these constraints apply explicitly to senior judges.⁹² Applying similar rules to the Supreme Court would substantially alleviate the risks of conflicts of interest.⁹³

Benefits of Reform

On their own, either 18-year term limits or regularized appointments would help address much of the structural dysfunction that is damaging the Supreme Court’s public legitimacy — and the implementing statute should have a strong severability provision so that each reform can stand on its own.⁹⁴ But the two are mutually reinforcing. Working together, they would be transformative.

Term limits combined with regularized appointments would enhance the democratic link between the Court and the public. Under this system, every presidential term would carry equal opportunity to shape the Court’s direction. No individual president would have the chance to install a majority on the Court, nor would a political party be able to lock in a particular ideology for generations over a short period. In addition, adopting these reforms would remove current incentives to appoint increasingly younger justices so as to secure power for a longer period.⁹⁵ It would also eliminate opportunities for justices to strategically retire, returning power over the trajectory of the Court to the public via their representatives, as the Constitution envisions.

These reforms would put the United States in the company of every other major democracy in the world. They would also bring the Court closer to its historical norms with respect to both the length of justices’ tenure and the number of appointments per presidential term: since the founding, justices have served on average for 16 years, and the mean, median, and modal number of Supreme Court vacancies has been approximately two per presidential term.⁹⁶

More frequent turnover on the Court would also be likely to improve judicial decision-making. Social science research shows that organizations greatly benefit from fresh voices and changes in interpersonal dynamics and that entrenched leadership in organizations, especially small ones in which a few individuals wield great power, often leads to poorer decision-making.⁹⁷ This concern is especially pronounced for Supreme Court justices, who hold one of the most elite and powerful positions in the world and whose decisions regularly affect the daily lives of ordinary Americans, often in profound ways. While working as a White House attorney, Chief Justice Roberts expressed similar concerns, writing that “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.”⁹⁸

Regular turnover would also create more opportunities to bring diverse life experiences to the Court. By many measures, the Supreme Court is deeply unrepresentative of both the American public and the legal profession. For example, there has never been an Asian American or

Native American justice nor an openly LGBTQ+ justice.⁹⁹ Among the sitting justices, all but one attended Harvard or Yale Law School, and only one is from the western United States. Justice Jackson is the only justice in history to have worked as a public defender.¹⁰⁰ With more frequent appointments, presidents can bring greater diversity to the Court so that it better embodies the values of the American public. Courts that reflect the diversity of the communities they serve inspire public confidence, enhance deliberations among judges, produce a richer jurisprudence, and create role models for underrepresented groups.¹⁰¹

One critical question is whether imposing an 18-year term of active service would undermine the Court's judicial independence. Alexander Hamilton famously defended life tenure as necessary to protect the Court from the political branches of government.¹⁰² But, as borne out by the experience of every other major democracy in the world, there is no evidence that long, nonrenewable terms pose a threat to judicial independence.¹⁰³

The power to decide cases until death or retirement is not the only, or even the primary, basis for the Court's independence. The Court's independence relies on a range of factors, including public perceptions of its legitimacy, other branches' respect for its role and decisions, and its own stewardship of its constitutionally assigned powers. Inasmuch as the details of a justice's term of service impact the Court's overall independence, what is most critical is that justices' tenure on the Court and lifetime of financial compensation do not depend on winning the ongoing approval of the political branches of government.¹⁰⁴ Under the active/senior justice model, justices would retain their job security and salaries regardless of how they might rule in cases. There would be no greater opportunity for pressure or political retaliation than under the existing system.¹⁰⁵

In fact, there is good reason to believe that the current system actually threatens judicial independence: strategic retirements and raw power politics during the confirmation process invite attacks on the Court's legitimacy and contribute to public perceptions that the Court is a partisan institution.¹⁰⁶ The judicial branch has neither an army nor the power of the purse; it relies on public legitimacy to underwrite its power and independence. Dysfunction in the existing system can therefore threaten the Court's functional independence.¹⁰⁷

Some critics also contend that regularized appointments would add to the politicization of the Court by making Supreme Court picks a more prominent issue on the presidential campaign trail.¹⁰⁸ Of course, candidates already do campaign about Supreme Court nominations. As a candidate, Trump released a list of potential Supreme Court picks, and both he and Hillary Clinton promised to appoint justices with specific positions on *Roe v. Wade*.¹⁰⁹ Biden promised to appoint a Black woman to the Court.¹¹⁰

Indeed, regularized appointments are likely to reduce the electoral salience of potential nominations because such a system ensures that no single president can lock in power for multiple generations.¹¹¹ Even a two-term president whose party controls the Senate for all eight years (a situation that is unprecedented in the modern era)¹¹² could appoint at most four ideologically aligned justices, which is not enough on its own to command a majority on the Court.

For similar reasons, the concern that term limits would destabilize the law due to justices more regularly cycling on and off the Court is also unpersuasive. Under the current system, there is no limit on the number of vacancies a president may fill, and there are strong incentives to use brief periods of unified party control to reconfigure the Court. By contrast, regularized appointments limit the imprint that any one president will have on the Court and encourage compromise during periods of divided government.

The Constitutionality of Implementation by Statute

The reforms described in this paper can be implemented by statute. Doing so is consistent with the Constitution's text and structure; with the ways in which Congress has long regulated the Court, including the existing system of senior judges; and with the values of judicial independence that animate Article III and its Good Behavior Clause.

Article III, which structures the judicial branch, is sparsely detailed. Section 1 provides that "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" and that "the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Section 2 enumerates the types of cases and controversies to which "the judicial Power shall extend," identifies the types of cases under the Supreme Court's original jurisdiction, and establishes that "the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." Section 3 discusses punishment for treason.

The value of judicial independence is embedded in this constitutional design. By providing that judges hold their offices during good behavior, the Constitution prevents Congress from ousting judges from office other than

through the high bar of impeachment and removal. And by prohibiting the diminution of judicial salaries, the Constitution guards against retaliation by the political branches for unpopular decisions.¹¹³

At the same time, while Article III mandates that there be a Supreme Court vested with “the judicial Power of the United States,” it says remarkably little about how the Supreme Court should operate. Rather, it leaves it to Congress to make significant determinations regarding the Court’s structure and powers pursuant to Article III and its authority to “make all Laws which shall be necessary and proper.”¹¹⁴

Congress has repeatedly exercised this authority. For example, it has changed the number of justices on the Court six times, with sizes ranging from 5 to 10 justices.¹¹⁵ It also has substantially changed the Court’s jurisdiction.¹¹⁶ It was not until 1891, for example, that Congress granted the Court the power of discretionary appellate review.¹¹⁷ Congress has also altered the duties of justices. For instance, when Congress created circuit courts through the Judiciary Act of 1789, it did not create corresponding circuit judges. Instead, Congress mandated that Supreme Court justices sit alongside local district judges to hear cases in a practice known as circuit riding.¹¹⁸ In 1803, in *Stuart v. Laird*, the Supreme Court upheld circuit riding as constitutional, against an objection that the justices had never been separately appointed as circuit judges.¹¹⁹ Congress maintained this practice for more than 100 years until it became untenable for the justices to fulfill their duties on both circuit courts and the Supreme Court.¹²⁰

With respect to the implementation of regularized appointments, Congress would be acting well within the bounds of its authority under Article III and the Necessary and Proper Clause. Regularizing appointments simply sets a schedule for filling vacancies on the Supreme Court. It creates new judicial seats in the first and third years of a president’s term that a president may then fill, with the advice and consent of the Senate, pursuant to the president’s ordinary authority under the Constitution’s Appointments Clause. And when a justice dies or retires from the Court, the seat is eliminated. Since Congress can create new seats on the Court and eliminate seats not currently occupied, it can also set a schedule for doing so.

One potential question is whether an early departure from the Court poses issues with respect to the president’s appointment power, because under most versions of this proposal the president would not have an immediate opportunity to appoint a replacement.¹²¹ Critically, however, under this circumstance no vacancy would exist for the president to fill: the existing seat would be eliminated upon the justice’s departure and a new seat would be created only according to the schedule set by Congress.

Likewise, Congress has the power to establish 18-year terms for justices so long as the justices continue to “hold

their Offices during good Behaviour” after leaving active service, as required by Article III. The active/senior justice model comports with the Good Behavior Clause by providing that after 18 years, justices retain their judicial offices as senior justices with modified responsibilities.

The active/senior justice model is similar to a long-standing system of senior judges that is more than a century old and that has applied to Supreme Court justices since 1937. The main difference is that under the reform, justices take senior status pursuant to a fixed schedule rather than at a time of their choosing. This distinction has constitutional relevance, however, only if being required to take senior status is akin to being forced from office, such that the justices would no longer “hold their Offices during good Behaviour.”¹²²

But the Supreme Court ruled nearly 90 years ago that senior judges continue to hold their judicial offices. In 1934, in *Booth v. United States*, the Court considered a predecessor of the senior judge statute that applied to lower court judges. The Court held that assuming senior status does not constitute a removal from office. Considering a challenge by a senior judge to a reduction in salary, the Court concluded that senior judges could not have their salaries reduced because a senior judge “does not surrender his commission, but continues to act under it.”¹²³ In other words, senior judges remain judges within the meaning of Article III. The Court explained that “Congress may lighten judicial duties, though it is without power to abolish the office or to diminish the compensation appertaining to it.”¹²⁴

Although *Booth* concerned lower court judges, its reasoning applies with equal force to Supreme Court justices because Article III’s Good Behavior Clause applies to “Judges, both of the supreme and inferior Courts.”¹²⁵ While imposing a schedule for when justices take senior status leaves them with less discretion over the content of their dockets, it is Congress, not the justices themselves, that holds the power to define the contours of the justices’ dockets and duties.

While the Supreme Court has not squarely addressed the constitutionality of senior judges since *Booth*, it has affirmed its underlying rationale. In *Nguyen v. United States*, a 2003 case challenging the constitutionality of an appellate panel consisting of an active circuit judge, a senior circuit judge, and an Article IV territorial judge from the Mariana Islands, the Supreme Court held that the panel lacked the authority to hear the appeal due to the presence of the Article IV judge. But in doing so, the Court confirmed that both the active and senior judge were, “of course, life-tenured Article III judges who serve during ‘good behavior’ for compensation that may not be diminished while in office.”¹²⁶ Lower courts have also entertained challenges to the constitutionality of the senior judge system since *Booth*, including several in recent years. They have consistently held that the senior judge system is constitutional and that

arguments to the contrary are without merit.¹²⁷

Moreover, there is a long-standing tradition of justices who have retired from active service sitting by designation on lower federal courts, including Justices Potter Stewart, Lewis F. Powell Jr., and Byron White and, in recent years, Justices O'Connor and Souter.¹²⁸ Since 1937, retired justices have heard more than 1,300 cases while sitting as judges on the courts of appeal and district courts.¹²⁹ If it were the case that justices surrender their judicial office when they retire from active service on the Court, then the practice of justices sitting by designation would itself be unconstitutional. As the Court noted in *Booth*, “It is scarcely necessary to say that a retired judge’s judicial acts would be illegal unless he who performed them held the office of judge.”¹³⁰

Some critics have objected to senior justices by suggesting that the Constitution creates a separate “office” of Supreme Court justice that is distinct from the office of lower court judge.¹³¹ According to this argument, in order to retain their office within the meaning of the Good Behavior Clause, justices must perform duties related to their Supreme Court office. But Congress has broad power to define the content of the office of a justice, including, as *Booth* recognized, to “lighten judicial duties” over the course of a judge’s tenure and, as *Stuart* recognized, to require justices to serve on lower courts. Indeed, under the current system, justices who have retired from active service can sit by designation on lower courts but are barred from sitting on the Supreme Court.¹³² Notably, the active/senior justice model contemplates a much more significant role for senior justices: They would continue to hear Supreme Court cases when the Court is shorthanded due to a justice’s recusal or in the event of a premature departure from the bench. They would potentially also hear cases falling under the Court’s original jurisdiction.

To be sure, Congress could not “lighten” justices’ duties out of existence altogether such that they held office in name only. Nor could Congress single out an individual justice for lightened duties or target justices appointed by a president of a particular political party. But these actions are forbidden because they are assaults on the values of judicial independence enshrined in the Constitution’s structure. By contrast, the active/senior justice model targets no justice individually and does not impinge on the justices’ decisional independence.

Separately, some critics have objected to senior justice models on the theory that elevating an active justice to senior justice without a separate appointment violates the Constitution’s Appointments Clause.¹³³ However, under Supreme Court precedent, a change in duties does not require a new appointment so long as the new duties are sufficiently germane to those of the original position. This “germaneness” requirement under the Appointments Clause is quite broad. For example, in *Weiss v. United*

States, the Court held that a commissioned military officer could be designated as a military judge without a separate appointment.¹³⁴ It is far from clear that prospectively changing justices’ duties implicates the Appointments Clause. Regardless, because federal law already authorizes retired justices to engage in the duties with which senior justices would be tasked under the active/senior justice model, it appears clear that a separate appointment is not required.¹³⁵

Finally, some critics point to historical practice in objecting to the active/senior justice model. But while it is true that justices have been able to sit in active service until they choose to step down, the fact that earlier generations did not see a need to restructure “good behavior” tenure into active service and senior service does not mean that Congress lacks the authority to do so today. The Constitution leaves Congress with wide latitude to define the Court’s structure and the justices’ duties as required by the needs of the day, constrained by structural protections that preserve judicial independence. As recognized by dozens of prominent constitutional scholars, the active/senior justice model is fully consistent with the Constitution’s text and structure, as well as with long-standing precedent about the operation of senior judges.¹³⁶

Transitioning from the Existing System

There are various ways that Congress could implement the transition from the current system to an active/senior justice model with regularized appointments.¹³⁷

One option would be to implement the reforms prospectively, applying the active/senior justice model only to justices appointed after the reform takes effect.¹³⁸ To set the transition in motion, Congress would impose 18-year active terms for all new justices and establish a system of regularized vacancies, creating openings in the first and third years of each president’s term going forward, regardless of when any of the current justices retire. This would effectively decouple vacancies from appointments until all of the current justices have retired from office or taken senior status, at which point a full transition would have taken place.¹³⁹

There are strong arguments for this prospective approach. Applying term limits to current justices risks weakening broad public support for the reform. A prospective approach also avoids any potential objections to changing sitting justices’ duties after their appointment.

One significant impact of this transition option would be on the Court’s size. It is hard to predict whether and how the adoption of a regularized cycle of new appointments would influence the justices who took office prior

to the reform. It could motivate some justices to retire earlier than they might otherwise to maintain the Court's size at nine members. However, it is likely that during the transition the Court would exceed nine members, and there could be times when there is an even number of justices. Assuming that the reform took effect with the next presidential term, in 2025, and assuming that the current justices stayed on the Court until they turned 85 — the outer bounds of what is likely — the Court would reach 14 active justices for brief periods and have a long interval in which the number of active justices ranged from 10 to 13. Under these assumptions, a full transition would take up to 35 years, at which point the Court would return to nine seats.¹⁴⁰

Importantly, this increase in size would not offer a windfall to either political party: going forward, every president would have two, and only two, Supreme Court seats to fill in a four-year term. Moreover, the experiences of the 13 U.S. federal circuit courts as well as high courts in other democracies suggest that the Supreme Court would function effectively throughout the transition period.¹⁴¹ All but one of the circuit courts have at least 11 active judges.¹⁴² Although circuit courts decide most cases in panels, they also meet on occasion as a full court (“en banc”).¹⁴³ Among the world's most populous democracies, the United States is one of only a few countries with a high court of general jurisdiction composed of fewer than 11 justices.¹⁴⁴ The high court in France has 11 members, South Africa has 11, Belgium 12, Ireland 12, Spain 12, the United Kingdom 12, Austria 14, South Korea 14, Italy 15, Japan 15, Germany 16, Sweden 16, and Denmark 18.¹⁴⁵ Some of these courts use a panel system, which the U.S. Supreme Court could adopt to accommodate a temporary expansion and potentially as a permanent reform.¹⁴⁶

Likewise, courts with an even number of judges are common in other countries, and the U.S. Supreme Court itself has functioned with an even number of justices in the past, including for 14 months after Justice Scalia's death.¹⁴⁷ During this period, the justices publicly acknowledged that having an even number of justices forced them to work harder to find common ground in order to avoid leaving an issue or case undecided.¹⁴⁸ Greater incentives to moderate would be a positive development during a moment of institutional change.

Alternatively, Congress could consider other transition options that prioritize different values. For example, Congress could choose to implement 18-year terms retroactively. Under this proposal, Congress would establish a schedule for future appointments to the Court. But rather than allowing the current justices to retire or take senior status when they choose, the statute would provide that the longest-serving current justice must either retire or take senior status at the time of the next scheduled appointment.¹⁴⁹ The process would repeat until all current

justices had cycled off active service.¹⁵⁰ This approach offers the shortest path to a full transition.¹⁵¹

Another option, a phase-in proposal, is prospective but would have the president appoint new justices only when current ones retire or take senior status. This would maintain the Court's size at nine seats by delaying the introduction of regularized appointments.¹⁵² As a result, during the transition period, the number of appointments per presidential term would vary. Current justices would continue to have an incentive to engage in strategic retirements, and presidents would continue to have differing imprints on the Court until the transition is complete. A similar option would implement regularized appointments during the transition period but deem only the nine longest-serving justices on the Court as active justices in order to maintain the Court's size at nine seats.¹⁵³

A Long-Term Campaign for a Constitutional Amendment

A question frequently raised about term limits and regularized appointments is whether it would be preferable to adopt such a reform by constitutional amendment. This presents a false choice. The best course of action is to pursue both an immediate statutory fix and a long-term campaign for a constitutional amendment.

A constitutional amendment has several advantages. Most significantly, it would ensure the long-term stability of reform. Statutes can be undone by future congresses, creating opportunities for partisan gamesmanship. The Supreme Court, either now or in a future form, could buck precedent and undo all or part of the reform. By contrast, an amendment would institutionalize Supreme Court reform so that it would not be subject to congressional or judicial whim.

An amendment would also present opportunities to implement a broader range of reforms to the confirmation process. There is a wide set of options worthy of consideration. For example, to address the risk of obstruction in the advice-and-consent process, an amendment could provide that a nominee is deemed confirmed if the Senate does not vote within a specified period. It could also change the number of Senate votes required for confirmation, or specify that if one nominee is rejected, the number of Senate votes required to confirm a subsequent nominee is reduced, or it could create a backup institution to consider nominees in the event of an impasse.¹⁵⁴ An amendment could also address the nomination process — for example, establishing a commission to vet potential candidates and generate a short list for the president, similar to systems that have worked well in several states and other countries.¹⁵⁵

A statutory solution, however, is not only consistent with a constitutional amendment campaign but complementary to it. Passing reform by statute presents an opportunity to build public support for a substantial institutional redesign that could later be codified in the Constitution.

Equally important is the urgency of the current moment. The Court is facing a crisis of public confidence — and of democratic legitimacy. It would be a mistake to delay an opportunity to reset and rebuild the Supreme Court.

Conclusion

Unbounded Supreme Court tenure is an outdated relic.

It gives individual justices the power to shape the direction of the law for generations and has warped the incentives of political actors and justices alike. The result is a Court with an increasingly tenuous link to the American public.

Implementing 18-year active terms and regularized appointments offers a path forward. Every president would

have the same opportunity to shape the trajectory of the Court during a four-year term in office. Justices would no longer be able to tap their own successors through strategic retirements. The constitutional crises that are generated by unexpected vacancies late in a president's term would be a thing of the past. A predictable appointment schedule would lower the temperature on judicial confirmation battles.

To be clear, there are a number of important areas warranting Supreme Court reform. Congress should, for example, directly address the justices' recent ethical lapses.¹⁵⁶ But term limits reform addresses long-standing dysfunctions on the Court while squarely responding to its current deficit in democratic legitimacy. And it is one of the rare policies that consistently garner broad bipartisan support.

A majority of Americans believe that U.S. democracy is “in crisis and at risk of failing.”¹⁵⁷ The Supreme Court should be a stabilizing force and a democratic bulwark. Instead, it is facing its own crisis of public trust.¹⁵⁸

It is time to reform the Supreme Court.

Appendix

Public Support for Supreme Court Term Limits

POLL	DATE	TOTAL	DEMOCRATS	INDEPENDENTS	REPUBLICANS
NPR/PBS NewsHour/Marist	April 2023	68%	78%	66%	57%
Insider/Morning Consult	September 2022	75%	85%	70%	68%
Monmouth University	September 2022	66%	86%	63%	51%
The Associated Press-NORC Center for Public Affairs Research	July 2022	67%	82%	51%	57%
Fox News/Beacon Research/Shaw & Company Research*	July 2022	66%	81%	66%	51%
Quinnipiac University	May 2022	69%	77%	69%	61%
UMass Lowell Center for Public Opinion	March 2022	71%	84%	70%	56%
C-SPAN/Pierrepoint Consulting & Analytics/Mercury Analytics*	March 2022	69%	75%	67%	65%
Marquette University Law School	November 2021	72%	85%	73%	58%
Grinnell College/Selzer & Company†	October 2021	62%	71%	67%	53%
Marquette University Law School	September 2021	72%	85%	70%	60%
Reuters/Ipsos‡	April 2021	63%	71%	64%	60%
UMass Lowell Center for Public Opinion	October 2020	72%	82%	69%	64%
Fix the Court/PSB‡	May 2020	77%	78%	75%	79%
Marquette University Law School	September 2020	75%	78%	67%	75%
Marquette University Law School	September 2019	71%	75%	72%	69%
Fix the Court/PSB‡	June 2019	77%	84%	76%	73%
Fix the Court/PSB‡	October 2018	78%	81%	76%	76%
UVA Center for Politics	July 2018	70%	70%	73%	66%
Reuters/Ipsos§	July 2015	66%	66%	68%	74%
Greenberg Quinlan Rosner Research*	May 2014	74%	80%	73%	72%

*Specified 18-year terms.

†Specified 15-year terms.

‡Asked about term limits or mandatory retirement ages.

§Specified 10-year terms.

Endnotes

- 1** Professor Jamal Greene captured this development succinctly in testimony to the Presidential Commission on the Supreme Court: “A starkly different political and legal landscape in a nation of 330 million has the potential to turn on the views of a single person. That single person is unelected, is one of only nine, can be confirmed by a bare and strictly partisan majority of the U.S. Senate, plays a major role in deciding what cases they hear, can potentially remain in office for 40 or 50 years, and can, in effect, choose the ideology of their replacement, who may in turn hold office for another 40 or 50 years under like conditions. In constitutional cases, the decisions the Court reaches are effectively unreviewable except by the Court itself, amendment of the federal Constitution having become effectively defunct. . . . The Founders did not gift us this constellation of features.” Presidential Commission on the Supreme Court of the United States, *Closing Reflections on the Supreme Court and Constitutional Governance*, July 20, 2021 (statement of Jamal Greene, Dwight Professor of Law, Columbia Law School), 6, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Greene-Testimony.pdf>.
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- 3** Stephen Jessee, Neil Malhotra, and Maya Sen, “A Decade-Long Longitudinal Survey Shows That the Supreme Court Is Now Much More Conservative Than the Public,” *Proceedings of the National Academy of Sciences* 119, no. 24 (June 6, 2022), <https://www.pnas.org/doi/10.1073/pnas.2120284119>; and Mark A. Lemley, “The Imperial Supreme Court,” *Harvard Law Review* 136, no. 1 (November 2022): 97–118, <https://harvardlawreview.org/2022/11/the-imperial-supreme-court/>.
- 4** Alan I. Abramowitz and Steven Webster, “The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century,” *Electoral Studies* 41 (2016): 12, <https://www.sciencedirect.com/science/article/abs/pii/S0261379415001857>; Neal Devins and Lawrence Baum, “Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court,” *Supreme Court Review* 2016 (January 30, 2017): 301–65, <https://doi.org/10.1086/691096>; and Amelia Thomson-DeVeaux and Laura Bronner, “The Supreme Court Divide Hasn’t Been This Sharp in Generations,” *FiveThirtyEight*, July 5, 2022, <https://fivethirtyeight.com/features/the-supreme-courts-partisan-divide-hasnt-been-this-sharp-in-generations/>.
- 5** Jeffrey M. Jones, “Supreme Court Trust, Job Approval at Historical Lows,” Gallup, October 6, 2022, <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx>.
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- 8** Calabresi and Lindgren, “Term Limits,” 819; Presidential Commission, *Closing Reflections* (statement, Greene), 23; and Presidential Commission on the Supreme Court of the United States, *Term Limits and Turnover on the U.S. Supreme Court: A Comparative View*, July 20, 2021 (written testimony of Tom Ginsburg, Leo Spitz Professor of Law, University of Chicago Law School, and research fellow, American Bar Foundation), 3, <https://www.whitehouse.gov/wp-content/uploads/2021/07/Ginsburg-Testimony.pdf>.
- 9** Michael J. Gerhardt and Richard W. Painter, “Majority Rule and the Future of Judicial Selection,” *Wisconsin Law Review* 2017, no. 2 (May 2017): 270–75, <https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2017/05/Gerhardt-Painter-Final.pdf>.
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- 12** Presidential Commission on the Supreme Court of the United States, *Final Report*, December 2021, 111, <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf>.
- 13** Alexander Hamilton, *Federalist* No. 78, National Archives: Founders Online, May 28, 1788, <https://founders.archives.gov/documents/Hamilton/01-04-02-0241#AHN-01-04-02-0241-fn-0001>.
- 14** William Rehnquist, “Remarks of the Chief Justice,” lecture, My Life in the Law series, Duke University School of Law, April 13, 2002, https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_04-13-02.
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- 16** Frederick A. O. Schwarz Jr., “Saving the Supreme Court,” *Democracy*, no. 54 (Fall 2019), <https://democracyjournal.org/magazine/54/saving-the-supreme-court>.
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- 27** Schwarz, “Saving the Supreme Court.”
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- 33** David Lauter, “Essential Politics: Supreme Court Nomination Hearings — Long Awful — Have Gotten Worse. Here’s Why,” *Los Angeles Times*, March 25, 2022, <https://www.latimes.com/politics/newsletter/2022-03-25/ketanji-brown-jackson-hearings-essential-politics>. In 1994 Justice Stephen Breyer received 87 votes during his confirmation, including 79 percent of those cast by Republicans. This was consistent with the experience of approximately three-quarters of all Supreme Court nominees up to that point (including those confirmed by voice vote). Since then, no nominee has had this level of support. Geoffrey Skelley, “It’s Harder Than Ever to Confirm a Supreme Court Justice,” *FiveThirtyEight*, February 2, 2022, <https://fivethirtyeight.com/features/its-harder-than-ever-to-confirm-a-supreme-court-justice/>.
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- 35** Sen. Sheldon D. Whitehouse with Jennifer Mueller, *The Scheme: How the Right Wing Used Dark Money to Capture the Supreme Court* (New York: The New Press, 2023); Brennan Center for Justice, “Follow the Money: Tracking TV Spending on the Kavanaugh Nomination,” July 26, 2018, <https://www.brennancenter.org/our-work/research-reports/follow-money-tracking-tv-spending-kavanaugh-nomination>; Douglas Keith, “What We Know About the Money Behind Brett Kavanaugh’s Confirmation Fight,” *HuffPost*, September 3, 2018, https://www.huffpost.com/entry/opinion-kavanaugh-dark-money_n_5b8984b8e4b0162f47230bc6?1q3; Anna Massoglia, “Trump Judicial Adviser’s ‘Dark Money’ Network Hides Supreme Court Spending,” *Open Secrets*, January 2, 2020, <https://www.opensecrets.org/news/2020/01/supreme-court-wellspring-committee-stry-2020/>; Madison Alder, “GOP Dark Money Criticisms in Supreme Court Fight Mirror Democrats,” *Bloomberg Law*, March 18, 2022, <https://news.bloomberglaw.com/us-law-week/gop-dark-money-criticisms-in-supreme-court-fight-mirror-democrats-1>; and Lachlan Markay, “Progressives Prep Big Spending for SCOTUS Confirmation,” *Axios*, March 6, 2022, <https://www.axios.com/2022/03/06/progressives-scotus-confirmation-spending>.
- 36** Alicia Bannon, “The Rise of Dark Money Is a Threat to Judicial Independence,” Brennan Center for Justice, July 6, 2018, <https://www.brennancenter.org/our-work/analysis-opinion/rise-dark-money-threat-judicial-independence>.
- 37** Gerhardt and Painter, “Majority Rule and the Future of Judicial Selection,” 270–75; Daniel Epps and Ganesh Sitaraman, “How to Save the Supreme Court,” *Yale Law Journal* 129, no. 1 (October 2019): 169, <https://www.yalelawjournal.org/feature/how-to-save-the-supreme-court>; Steven Calabresi, “End the Poisonous Process of Picking Supreme Court Justices,” *New York Times*, September 22, 2020,

- <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html>; and Bob Bauer, “Six Ways to Fix the Supreme Court Confirmation Process,” *Atlantic*, October 16, 2018, <https://www.theatlantic.com/ideas/archive/2018/10/how-fix-confirmation-process/573085/>.
- 38** Gerhardt and Painter, “Majority Rule and the Future of Judicial Selection,” 271.
- 39** Eric T. Kasper, “Theory and Practice: James Madison and the Constitutional Power to Appoint Supreme Court Justices,” *Quinnipiac Law Review* 38, no. 4 (2020): 654–55, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/qlr38&div=20&id=&page=>.
- 40** Several prominent Republicans went so far as to publicly commit to holding open the seat indefinitely in the event that a Democrat won the 2016 presidential election. See Sabrina Siddiqui, “Republican Senators Vow to Block Any Clinton Supreme Court Nominee Forever,” *Guardian*, November 2, 2016, <https://www.theguardian.com/law/2016/nov/01/republican-senators-oppose-clinton-supreme-court-nominee>.
- 41** Alicia Bannon, “Justice Ginsburg Should Not Be Replaced Until After the Election,” Brennan Center for Justice, September 19, 2020, <https://www.brennancenter.org/our-work/analysis-opinion/justice-ginsburg-should-not-be-replaced-until-after-election>.
- 42** Nina Totenberg, “Many Firsts at Confirmation Hearings for Judge Amy Coney Barrett,” NPR, October 12, 2020, <https://www.npr.org/2020/10/12/922482941/many-firsts-at-confirmation-hearings-for-judge-amy-coney-barrett>.
- 43** Peniel E. Joseph, “The Racist, Sexist Mudslinging at Ketanji Brown Jackson Is Disgraceful,” CNN, March 23, 2022, <https://www.cnn.com/2022/03/23/opinions/ketanji-brown-jackson-hearing-racism-joseph/index.html>; Carl Hulse, “McConnell Suggests He Would Block a Biden Nominee for the Supreme Court in 2024,” *New York Times*, June 14, 2021, <https://www.nytimes.com/2021/06/14/us/politics/mcconnell-biden-supreme-court.html>; and Leigh Ann Caldwell, “Neil Gorsuch Confirmed to Supreme Court After Senate Uses ‘Nuclear Option,’” NBC News, April 7, 2017, <https://www.nbcnews.com/politics/congress/neil-gorsuch-confirmed-supreme-court-aftersenate-uses-nuclear-option-n743766>.
- 44** “A foundational norm, which may come clearly into view only when it is violated, may thus underlie the legitimacy of the judiciary: an approximate proportionality principle, according to which the long-term ideological balance of the Court should roughly reflect the long-term ideological preferences of the people. The Constitution provides a partial assurance of that proportionality by vesting the authority to appoint Supreme Court Justices in the President with the advice and consent of the Senate.” Matthew A. Seligman, “Court Packing, Senate Stonewalling, and the Constitutional Politics of Judicial Appointments Reform,” *Arizona State Law Journal* 54, no. 2 (December 2022): 593, https://arizonastatelawjournal.org/wp-content/uploads/2022/12/Seligman_Publication.pdf.
- 45** Kansas Sen. Joseph Bristow, for instance, specifically attributed “the rapid growth of the sentiment for a change in the method of electing Senators” to concerns about the corporate capture of the federal courts. Joshua P. Zoffer and David Singh Grewal, “The Counter-Majoritarian Difficulty of a Minoritarian Judiciary,” *California Law Review Online* 11 (October 2020): 446, <https://lawcat.berkeley.edu/record/1210021?ln=en>.
- 46** Schwarz, “Saving the Supreme Court.”
- 47** U.S. Supreme Court, “Justices 1789 to Present,” accessed March 27, 2023, https://www.supremecourt.gov/about/members_text.aspx; and Presidential Commission, *Final Report*, 115.
- 48** “The lack of proportionality between the public’s political preferences and appointments to the Court is compounded by perceived procedural irregularities in the appointment of Justices over the last five years.” Seligman, “Court Packing,” 594.
- 49** Jessee, Malhotra, and Sen, “A Decade-Long Longitudinal Survey,” 119.
- 50** Jones, “Supreme Court Trust.”
- 51** Calabresi and Lindgren, “Term Limits,” 819–22; and Presidential Commission, *Closing Reflections* (statement, Greene), 5. The only other countries that grant high constitutional court judges life tenure without limitation are Estonia, Luxembourg, Oman, and, arguably, Haiti. Kevin Costello, “Supreme Court Politics and Life Tenure: A Comparative Inquiry,” *Hastings Law Journal* 71, no. 4 (2020): 1153–54, https://repository.uchastings.edu/hastings_law_journal/vol71/iss4/9/.
- 52** Presidential Commission, *Term Limits and Turnover* (written testimony, Ginsburg), 3.
- 53** Presidential Commission on the Supreme Court of the United States, Panel 2 hearing, July 20, 2021 (written testimony of Vicki C. Jackson, Laurence H. Tribe Professor of Constitutional Law, Harvard Law School), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Jackson-Testimony.pdf>. Since 1787 the global trend has been decidedly against unbounded life tenure. Among the 800-plus constitutions adopted since 1787, fewer than 20 percent have granted high court judges life tenure. In those cases, there is virtually always a limitation on tenure, such as an age limit. Presidential Commission, *Term Limits and Turnover* (written testimony, Ginsburg), 3.
- 54** Presidential Commission, *Term Limits and Turnover* (written testimony, Ginsburg), 3–4.
- 55** Brennan Center for Justice, “Judicial Selection: Significant Figures,” October 11, 2022, <https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures>.
- 56** 28 U.S.C. § 152; and 28 U.S.C. § 631.
- 57** “States with Gubernatorial Term Limits,” *Ballotpedia*, accessed March 26, 2023, https://ballotpedia.org/States_with_gubernatorial_term_limits; National Conference of State Legislatures, “The Term Limited States,” accessed March 26, 2023, <https://www.ncsl.org/about-state-legislatures/the-term-limited-states>; and Richard G. Niemi and Kristin K. Rulison, “The Effects of Term Limits on State Legislatures and Their Applicability to the Executive Branch,” *Albany Government Law Review* 4, no. 3 (August 2011): 661, <https://www.albanygovernmentlawreview.org/article/23849-the-effects-of-term-limits-on-state-legislatures-and-their-applicability-to-the-executive-branch>.
- 58** “Medication Abortions and the U.S. Supreme Court,” NPR/PBS NewsHour/Marist National Poll, April 24, 2023, <https://maristpoll.marist.edu/polls/medication-abortions-and-the-u-s-supreme-court>. See also appendix.
- 59** For a variety of proposed reforms on term limits, see Chilton et al., “Designing Supreme Court Term Limits”; Kermit Roosevelt III, “Court Reform and the Biden Commission,” *Harvard Journal of Law and Public Policy per Curiam*, no. 5 (Spring 2022): 1–8, <https://www.harvard-jlpp.com/court-reform-and-the-biden-commission-kermit-roosevelt-iii>; Roger C. Cramton, “Reforming the Supreme Court,” *California Law Review* 95 (Fall 2007), <https://scholarship.law.cornell.edu/facpub/1211>; Calabresi and Lindgren, “Term Limits”; and Presidential Commission on the Supreme Court of the United States, *In Support of a Congressional Statute Establishing an Eighteen-Year Limit on Active Supreme Court Service, with Emeritus Status Thereafter and a Purely Prospective Phase-In*, July 20, 2021 (written testimony of Akhil Amar, Sterling Professor of Law and Political Science, Yale University), <https://www.whitehouse.gov/wp-content/uploads/2021/07/Amar-Testimony.pdf>.
- 60** U.S. Const., art. III, § 1.
- 61** Proposals similar to the active/senior justice model are sometimes referred to as the junior/senior justice model. The active/senior justice model is similar to the term limits bill first introduced by Rep. Ro Khanna in 2020 and reintroduced in 2021. Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140, 117th Congress (2021), <https://www.congress.gov/bill/117th-congress/house-bill/5140>. Rep. Hank Johnson and Sen. Sheldon Whitehouse introduced similar bills in 2022. See Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, S. 4706, 117th Congress (2022), <https://www.congress.gov/bill/117th-congress/senate-bill/4706>; and Supreme

Court Tenure Establishment and Retirement Modernization Act of 2022, H. 8500, 117th Congress (2022), <https://www.congress.gov/bill/117th-congress/house-bill/8500>. Two other prominent models also feature 18-year term limits and a regularized appointment process under which two new justices would be appointed to the Court every presidential term. Under the original/appellate jurisdiction model, the Court would be divided into two panels. One panel would consist of all justices and would hear cases falling within the Court's original jurisdiction. A second panel would hear cases falling within the Court's appellate jurisdiction but would consist of only the nine most junior justices. Justices serving for more than 18 years would sit only on the original jurisdiction panel, barring a recusal or unexpected vacancy on the appellate jurisdiction panel. Such justices would also sit by designation on the lower federal courts. This distinction is rooted in Article III's proviso that the Court's appellate jurisdiction is subject to "such Exceptions, and under such Regulations as the Congress shall make." Under the designated Supreme Court justice model, presidents would no longer appoint anyone to the office of judge of the Supreme Court. Instead, when a vacancy occurs, the president would elevate a sitting federal judge from a lower court to sit by designation on the Supreme Court for 18 years, after which this judge would return to service in the lower federal courts and be replaced by a different sitting federal judge. For more on each of these models, see Presidential Commission, *Final Report*, 136–40.

62 The position of chief justice is referenced in the Constitution in connection with presiding over a president's impeachment trial (Art. I, §3, cl. 6), but the Constitution is silent as to the selection process as well as any other duties of the office. The active/senior justice model maintains the current practice under which the chief justice is appointed by the president and confirmed by the Senate. Supreme Court of the United States, "FAQs — General Information," accessed May 18, 2023, https://www.supremecourt.gov/about/faq_general.aspx. Some term limits models propose having the longest-serving active justice on the Court serve as chief justice, with the position rotating every two years. See Presidential Commission, *In Support of a Congressional Statute* (written testimony, Amar). This is similar to chief judge selection in the lower federal courts, where chief judges assume the position based on seniority, 28 U.S.C. § 45; 28 U.S.C. § 136. On state supreme courts, practices vary. In some states the chief justice is selected by the other justices, while in other states the chief justice is selected in the same manner as the associate justices are selected. See, e.g., Amanda Powers and Douglas Keith, "Key 2022 State Supreme Court Election Results and What They Mean," Brennan Center for Justice, November 9, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/key-2022-state-supreme-court-election-results-and-what-they-mean>; and "Kentucky Supreme Court Elects New Chief Justice," WYMT, November 15, 2022, <https://www.wymt.com/2022/11/15/kentucky-supreme-court-elects-new-chief-justice>.

63 See Jack Balkin, "Don't Pack the Court. Regularize Appointments," *Balkinization*, October 5, 2020, <https://balkin.blogspot.com/2020/10/dont-pack-court-regularize-appointments.html>.

64 Frederic Block, "Senior Status: An Active Senior Judge Corrects Some Common Misunderstandings," *Cornell Law Review* 92, no. 3 (March 2007): 545, <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=3058&context=clr>.

65 Under the "Rule of 80," judges become eligible for retirement or senior status when they reach age 65 and the sum of their age and years of service as an Article III judge equals 80. See 28 U.S.C. § 371(c); 28 U.S.C. § 371(b); and Block, "Senior Status," 536.

66 28 U.S.C. § 371(a); Block, "Senior Status," 536.

67 28 U.S.C. § 371(b); Block, "Senior Status," 536.

68 28 U.S.C. § 371(e)(1).

69 28 U.S.C. § 294.

70 Jessica Gresko, "Supreme Court Justice Breyer Has Options as a Retiree," Associated Press, July 7, 2022, <https://apnews.com/article/ketanjibrown-jackson-covid-us-supreme-court-entertainment-health-697d7a86ed921ff50a32e049b7ba057c>; and

Jessica Gresko, "Sandra Day O'Connor Withdraws from Public Life," Associated Press, October 18, 2018, <https://apnews.com/article/north-america-ap-top-news-anthony-kennedy-courts-supreme-courts-d568a18d769c439bb22de75ab210d4da>.

71 See, e.g., Rory K. Little, "Clerking for a Retired Supreme Court Justice — My Experience of Being 'Shared' Among Five Justices in One Term," *George Washington Law Review* 88, no. 7 (July 2020): 83–114, <https://www.gwlr.org/wp-content/uploads/2020/08/88-Geo.-Wash.-L.-Rev.-Arguendo-83.pdf>.

72 Under the active/senior justice model, justices who are younger than 47 at their swearing in would be elevated to senior status before turning 65. Because the model creates this possibility, adjustments to existing retirement schemes would be required. But current law sets the threshold for judges to take senior status at 65 for prudential reasons, not because the Constitution requires it. Congress has previously set different thresholds for the retirement of federal judges. For instance, in the predecessor to current law, the retirement age was 70. See Block, "Senior Status," 535.

73 See Chilton et al., "Designing Supreme Court Term Limits," 30–31.

74 As new justices become eligible for senior status, they would functionally serve as an active justice for an additional two years until another active justice assumes senior status. This cycle would continue until the uncompleted term was scheduled to expire, at which point the seat would be filled according to the regular process. While this would result in one or more justices serving for 20 years, it would return the Court to nine active members as quickly as possible, without giving any president an extra appointment. But Congress could also address this unusual situation in at least two other ways. It could authorize the president to appoint an interim justice to serve the remainder of the departing justice's term. See Calabresi and Lindgren, "Term Limits," 827. Alternatively, it could authorize the president to make an additional appointment at the time of the next scheduled appointment. See Paul D. Carrington and Roger C. Cramton, "The Supreme Court Renewal Act: A Return to Basic Principles," in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Paul D. Carrington and Roger C. Cramton (Durham, NC: Carolina Academic Press, 2006), 471.

75 Hulse, "McConnell Suggests He Would Block"; and Seligman, "Court Packing," 600–601.

76 Should a vacancy not be filled during a presidential term, it would carry over to the next four-year term but with the 18-year clock ticking. For example, a carried-over seat that opened in the first year of a president's term would be associated with 14 years of active service if filled in year 1 of the subsequent presidential term.

77 Mike DeBonis and Paul Kane, "John McCain Backs Off Promise Republicans Would Block Clinton Supreme Court Nominees," *Chicago Tribune*, October 17, 2016, <https://www.chicagotribune.com/nation-world/ct-john-mccain-hillary-clinton-supreme-court-20161017-story.html>; Siddiqui, "Republican Senators Vow"; and Hulse, "McConnell Suggests He Would Block."

78 Daniel Hemel, "Can Structural Changes Fix the Supreme Court?," *Journal of Economic Perspectives* 35, no. 1 (Winter 2021): 137, <https://doi.org/10.1257/jep.35.1.119>.

79 In 2023, Sen. Jeff Merkley introduced a bill to institute various fast-track mechanisms that would virtually guarantee that every Supreme Court nominee receives consideration and a floor vote. See Every Supreme Court Nominee Deserves Timely Consideration Act, S. 859, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/859/text>.

80 Christopher M. Davis, "Expedited or 'Fast-Track' Legislative Procedures," Congressional Research Service, August 31, 2015, <https://sgp.fas.org/crs/misc/RS20234.pdf>.

81 See Aaron-Andrew P. Bruhl, "If the Judicial Confirmation Process Is Broken, Can a Statute Fix It?," *Nebraska Law Review* 85 (2007): 971, 980, <https://digitalcommons.unl.edu/cgi/viewcontent>.

[cgi?article=1132&context=nlr](#); and Molly Reynolds, *Exceptions to the Rule: The Politics of Filibuster Limitations in the U.S. Senate* (Washington, DC: Brookings Institution, 2017), 14–37.

82 While fast-track procedures could result in a nominee being confirmed without a hearing by the Judiciary Committee, for most of American history, Supreme Court justices were confirmed without confirmation hearings. As Sen. John Cornyn has noted, hearings are not constitutionally required and are a modern invention by Congress. See John Cornyn, “Our Broken Judicial Confirmation Process and the Need for Filibuster Reform,” *Harvard Journal of Law and Public Policy* 27, no. 1 (Fall 2003): 227n29, <https://law-journals-books.vlex.com/vid/our-broken-confirmation-filibuster-56589236>.

83 See Michael W. McConnell, “What Are the Judiciary’s Politics?,” *Pepperdine Law Review* 45, no. 3 (2018): 479–80, <https://digitalcommons.pepperdine.edu/plr/vol45/iss3/1/>.

84 See Reynolds, *Exceptions to the Rule*, 21. Article I, Section 5 provides that “each House may determine the Rules of its Proceedings.” While there are potential objections even to statutes that have this disclaimer, there are numerous similar statutes imposing fast-track frameworks that have been good law — and by which Congress has abided — for years. See Bruhl, “If the Judicial Confirmation Process Is Broken,” 973. If applying this fast-track procedure to Supreme Court confirmation is deemed unconstitutional, then a wide range of similar statutes would also be resting on constitutionally shaky ground. Regardless, if such arguments carry the day, the Senate could adopt fast-track procedures as a Senate rule. Separately, some may object to fast-tracking Supreme Court confirmations on the theory that such a statute would essentially permit the House and the president to bind the Senate to certain rules governing debate within the body against the body’s will. However, the Senate would need to pass any such legislation and would continue to have the power to change its rules. Moreover, Congress has previously passed statutes that provide fast-track limitations that apply to only one chamber of Congress. See Reynolds, *Exceptions to the Rule*, 26.

85 See Bruhl, “If the Judicial Confirmation Process Is Broken,” 1012–13.

86 Louis J. Virelli III, “Supreme Court Recusal and the Appearance of Politics,” *Denver Law Review*, March 29, 2021, <https://www.denverlawreview.org/dlr-online-article/supremecourtrecusal>.

87 28 U.S.C. § 1. In 2008, for example, four members of the Court recused themselves due to financial and personal conflicts of interest in a case concerning companies that did business in apartheid-era South Africa. Three justices owned stock in one of the companies, and the son of a fourth justice worked for one of the firms involved in the case. Linda Greenhouse, “Justices’ Conflicts Halt Apartheid Appeal,” *New York Times*, May 13, 2008, <https://www.nytimes.com/2008/05/13/washington/13scotus.html>; and New York Times Editorial Board, “Court Without a Quorum,” *New York Times*, May 18, 2008, <https://www.nytimes.com/2008/05/18/opinion/18sun3.html>.

88 Historically, justices have sometimes taken political posts after serving on the Supreme Court, notwithstanding life tenure. Joshua Zeitz, “The Supreme Court Has Never Been Apolitical,” *Politico*, April 3, 2022, <https://www.politico.com/news/magazine/2022/04/03/the-supreme-court-has-never-been-apolitical-00022482>.

89 Amanda Frost, “Judicial Ethics and Supreme Court Exceptionalism,” *Georgetown Journal of Legal Ethics* 26, no. 3 (Summer 2013): 478, https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=2389&context=facsch_lawrev.

90 See United States Courts, “Code of Conduct for United States Judges,” March 12, 2019, <https://www.uscourts.gov/file/25752>; and Frost, “Judicial Ethics.”

91 Alison Durkee, “Trust in Supreme Court Drops to New Low, Poll Finds as Ethics Bill Moves Forward in House,” *Forbes*, May 13, 2022, <https://www.forbes.com/sites/alisondurkee/2022/05/12/trust-in-supreme-court-drops-to-new-low-poll-finds-as-ethics-bill-moves-forward-in-house/?sh=76526c5847b7>; and Nate Raymond, “Most Judges in Survey Support U.S. Supreme Court Having an Ethics

Code,” Reuters, June 22, 2022, <https://www.reuters.com/legal/government/most-judges-survey-support-us-supreme-court-having-ethics-code-2022-06-22>.

92 United States Courts, “Code of Conduct for United States Judges.”

93 Johanna Kalb and Alicia Bannon, “Supreme Court Ethics Reform,” Brennan Center for Justice, September 24, 2019, www.brennancenter.org/sites/default/files/2019-09/Report_2019_09_SCOTUS_Ethics_FINAL.pdf.

94 Alicia Bannon, “An Overlooked Idea for Fixing the Supreme Court,” Brennan Center for Justice, March 12, 2021, <https://www.brennancenter.org/our-work/analysis-opinion/overlooked-idea-fixing-supreme-court>.

95 Micah Schwartzman and David Fontana, “Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden,” *Washington Post*, February 21, 2021, <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age>.

96 Supreme Court of the United States, “FAQs — Supreme Court Justices,” accessed June 6, 2023, https://www.supremecourt.gov/about/faq_justices.aspx; and Presidential Commission, *Final Report*, 114–15.

97 Jason P. Davis and Kathleen M. Eisenhardt, “Rotating Leadership and Collaborative Innovation: Recombination Processes in Symbiotic Relationships,” *Administrative Science Quarterly* 56, no. 2 (2011): 194; and Amir Erez, Jeffrey A. Lepine, and Heather Elms, “Effects of Rotated Leadership and Peer Evaluation on the Functioning and Effectiveness of Self-Managed Teams: A Quasi-Experiment,” *Personnel Psychology* 55, no. 4 (December 2006): 929, <https://doi.org/10.1111/j.1744-6570.2002.tb00135.x>. See also Presidential Commission, *Final Report*, 136–40.

98 Roberts to Fielding, Re: DOJ Proposed Report on S.J. 93.

99 Jessica Campisi and Brandon Griggs, “Of the 115 Supreme Court Justices in US History, All but 7 Have Been White Men,” CNN, March 24, 2022, <https://www.cnn.com/2022/03/24/politics/supreme-court-justices-minorities-cec/index.html>; and Jesse Wegman, “What If the Supreme Court Had an L.G.B.T. Justice?,” *New York Times*, October 12, 2019, <https://www.nytimes.com/2019/10/12/opinion/sunday/what-if-the-supreme-court-had-an-lgbt-justice.html>.

100 Alicia Bannon, “A Public Defender on the High Court,” Brennan Center for Justice, March 1, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/public-defender-high-court>. See also Jay Schweikert, “Professional Diversity Is Essential for the Supreme Court to Enforce the Constitution,” *Cato Institute*, March 21, 2022, <https://www.cato.org/blog/professional-diversity-essential-supreme-court-enforce-constitution>.

101 Alicia Bannon and Douglas Keith, “What Research Shows About the Importance of Supreme Court Diversity,” Brennan Center for Justice, February 1, 2022, <https://www.brennancenter.org/our-work/analysis-opinion/what-research-shows-about-importance-supreme-court-diversity>.

102 Hamilton, *Federalist* No. 78.

103 Presidential Commission, *Closing Reflections* (statement, Greene), 6; and Presidential Commission, *Term Limits and Turnover* (written testimony, Ginsburg), 6. While studies of state courts have shown that fears about job security impact judicial independence, they have also shown that state court judges facing a mandatory retirement age without a future election demonstrate greater independence from political pressure. See Alicia Bannon, “Choosing State Judges: A Plan for Reform,” Brennan Center for Justice, October 10, 2018, <https://www.brennancenter.org/our-work/policy-solutions/choosing-state-judges-plan-reform>.

104 “Presumably, what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches. Independence, therefore, could be

achieved by mandating fixed, nonrenewable terms of service.” Henry Paul Monaghan, “The Confirmation Process: Law or Politics?,” *Harvard Law Review* 101 (1988): 1211, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1776&context=faculty_scholarship.

105 In fact, the multi-decade terms enabled by life tenure may actually be detrimental to judicial independence on the lower courts. Because of the high stakes that come with life tenure, justices are increasingly nominated and confirmed on the basis, at least in part, of a demonstrable showing of a particular judicial ideology. See David R. Dow and Sanat Mehta, “Does Eliminating Life Tenure for Article III Judges Require a Constitutional Amendment?,” *Duke Journal of Constitutional Law and Public Policy* 16 (2021): 108, <https://scholarship.law.duke.edu/djclpp/vol16/iss1/4/>. If a seat on the Court no longer came with the power to oversee the law for multiple generations, lower court judges might be less incentivized to use opinion-writing to stake out political positions. See Sen. Sheldon Whitehouse, “The Scheme 13: Auditioning,” March 15, 2022, <https://www.whitehouse.senate.gov/news/speeches/the-scheme-13-auditioning->.

106 Gary Langer, “More Say Politics, Not the Law, Drive Supreme Court Decisions: POLL,” ABC News, May 9, 2023, <https://abcnews.go.com/Politics/politics-law-drive-supreme-court-decisions-poll/story?id=99168846>.

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131 Under this argument, Article III’s statement that “the Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour” is read to imply that they will hold their respective offices during good behavior. Proponents of this argument further point to the Appointments Clause, which identifies “Judges of the supreme Court” as a category, and to a provision in Article I providing that the Chief Justice shall preside over impeachment trials. See Calabresi and Lindgren, “Term Limits,” 859–68; and Scott Bloomberg, “Reform Through Resignation: Why Chief Justice Roberts Should Resign (in 2023),” *Iowa Law Review Online* 106 (July 7, 2021): 30, <https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2022-11/Reform%20Through%20Resignation-%20Why%20Chief%20Justice%20Roberts%20Should%20Resign%20%28in%202023%29%20.pdf>.

132 28 U.S.C. § 371(e); 28 U.S.C. § 294(d).

- 133** U.S. Const., art. II, § 2.
- 134** *Weiss v. United States*, 510 U.S. 163 (1994). See also Presidential Commission, *Final Report*, 131.
- 135** Presidential Commission, *Final Report*, 131–32. Prior to serving as a U.S. senator, Josh Hawley endorsed the adoption of Supreme Court term limits by statute because “Article III demands that judges be appointed for life, but it does not necessarily require that Supreme Court justices serve for life — provided they remain judges when not on the Court.” Joshua D. Hawley, “The Most Dangerous Branch,” *National Affairs*, July 2012, <https://www.nationalaffairs.com/publications/detail/the-most-dangerous-branch>.
- 136** In 2020, 29 professors signed an open letter supporting a similar statutory proposal. See Fix the Court, “Open Letter of Law Professors Supporting H.R. 8424,” October 23, 2020, <https://fixthecourt.com/wp-content/uploads/2020/10/Endorsers-of-H.R.-8424-10.23.20f.pdf>. In 2009, 31 scholars sent a letter to then vice president Biden, then attorney general Holder, and the Senate and House Judiciary Committees containing four proposals to include in a potential Judiciary Act of 2009. Among those proposals was one for 18-year terms and regularized appointments. See Eliza Presson, “Group’s Proposals for Supreme Court Reform,” *SCOTUSblog*, February 16, 2009, <https://www.scotusblog.com/2009/02/groups-proposals-for-supreme-court-reform>. And in 2005, 45 law professors “in principle” supported another, similar statutory proposal. See Paul D. Carrington and Roger C. Cramton, “The Supreme Court Renewal Act: A Return to Basic Principles,” July 5, 2005, <https://perma.cc/D5V3-EXKF>. See also Roosevelt, “Court Reform and the Biden Commission”; Michael C. Blumm, Kate Flanagan, and Annamarie White, “Right-Sizing the Supreme Court: A History of Congressional Changes,” *Case Western Reserve Law Review* 72, no. 1 (2021): 10n4, <https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=4942&context=caselrev>; Balkin, “Don’t Pack the Court”; Roger C. Cramton, “Constitutionality of Reforming the Supreme Court by Statute” in *Reforming the Court: Term Limits for Supreme Court Justices*, 359–60; Cramton, “Reforming the Supreme Court”; Paul D. Carrington, “Checks and Balances: Congress and the Federal Courts” in *Reforming the Court: Term Limits for Supreme Court Justices*, 138–39; Levinson, “Life Tenure and the Supreme Court; Judith Resnik, “Judicial Selection and Democratic Theory: Demand, Supply, and Life-Tenure,” *Cardozo Law Review* 26 (January 2005): 640–41, https://www.researchgate.net/publication/228177231_Judicial_Selection_and_Democratic_Theory_Demand_Supply_and_Life-Tenure; and Presidential Commission, *In Support of a Congressional Statute* (written testimony, Amar).
- 137** See Chilton et al., “Designing Supreme Court Term Limits.”
- 138** See Supreme Court Term Limits and Regular Appointments Act of 2021, H.R. 5140.
- 139** See Hemel, “Can Structural Changes Fix the Supreme Court?”
- 140** Chilton et al., “Designing Supreme Court Term Limits,” 42.
- 141** Hemel, “Can Structural Changes Fix the Supreme Court?,” 137; and Tracey E. George and Chris Guthrie, “Remaking the United States Supreme Court in the Courts’ of Appeals Image,” *Duke Law Journal* 58, no. 7 (2000): 1442, <https://scholarship.law.duke.edu/dlj/vol58/iss7/7>.
- 142** Ballotpedia, “United States Court of Appeals,” accessed March 23, 2023, https://ballotpedia.org/United_States_Court_of_Appeals.
- 143** 28 U.S.C. § 46(c).
- 144** Canada’s Supreme Court has nine justices, Australia’s seven, New Zealand’s six, and Argentina’s five, though unlike the U.S. Supreme Court, those high courts have limits on how long a judge can serve. Presidential Commission, *Closing Reflections* (statement, Greene), 23.
- 145** Presidential Commission, *Final Report*, 79.
- 146** Bannon, “An Overlooked Idea”; and George and Guthrie, “Remaking the United States Supreme Court,” 1458–65.
- 147** Eric J. Segall, “Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court,” *Pepperdine Law Review* 45, no. 3 (2018): 547, 557, <https://digitalcommons.pepperdine.edu/cgi/viewcontent.cgi?article=2475&context=plr>.
- 148** Todd Richmond, “Supreme Court’s Kagan Says Scalia Death Forced Compromises,” Associated Press, September 8, 2017, <https://apnews.com/article/1a8e18fe57f64ba8b468cdfa2a7e7c98>. Some scholars have argued that fixing the Court at an even number is a commendable policy in itself not only because it would moderate the Court, but also because it would reduce the Court’s power to decide close constitutional questions with a bare majority. See Michael Miller and Samuel A. Thumma, “It’s Not Heads or Tails: Should SCOTUS Have an Even or Odd Number of Justices?,” *Southern California Interdisciplinary Law Journal* 31, no. 1 (2021): 45–48, <https://gould.usc.edu/why/students/orgs/ilj/assets/docs/31-1-Thumma.pdf>. See also Adam Liptak, “A Supreme Court Not So Much Deadlocked as Diminished,” *New York Times*, May 17, 2016, https://www.nytimes.com/2016/05/18/us/politics/consensus-supreme-court-roberts.html?_r=0.
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- 150** See Chilton et al., “Designing Supreme Court Term Limits,” 40.
- 151** This process would take 16 years after the first currently serving justice retires or takes senior status. While the precise projected duration of a current justice’s term would vary depending on the date that Congress selects to trigger the vacancies, if implemented in January 2025 this would approximately result in all current justices serving a term of at least 18 years: Justice Thomas will have served for 33 years; Justice Roberts for 21 years; Justice Alito for 23 years; Justice Sotomayor for 21 years; Justice Kagan for 22 years; and Justices Gorsuch, Kavanaugh, Barrett, and Jackson for 18 years each.
- 152** To implement this transition, Congress would establish a schedule for future appointments, which would be integrated with retirements as they naturally occur by varying the term lengths of newly appointed justices to adjust to the nearest slot on the schedule. Chilton et al., “Designing Supreme Court Term Limits,” 28.
- 153** Chilton et al., “Designing Supreme Court Term Limits,” 29.
- 154** Presidential Commission, *Final Report*, 140–42.
- 155** See Bannon, “Choosing State Judges”; and Ian Millhiser, “Britain’s Brilliant Method of Picking Supreme Court Justices, Explained,” *Vox*, September 25, 2019, <https://www.vox.com/2019/9/25/20881843/supreme-court-britain-judicial-selection-brexite>.
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ACKNOWLEDGMENTS

The Brennan Center gratefully acknowledges The Joyce Foundation and Rockefeller Brothers Fund for their generous support of our Judiciary Program. We also extend our gratitude to Bainum Family Foundation, The Bauman Foundation, Bohemian Foundation, Jerome L. Greene Foundation, The Kaphan Foundation, Lakeshore Foundation, The Mai Family Foundation, The John and Wendy Neu Foundation, Craig Newmark Philanthropies, Solidarity Giving, and Zegar Family Foundation. This is an independent Brennan Center publication; the opinions expressed are those of the authors and do not necessarily reflect the views of our supporters.

The authors would like to express their gratitude to Jennifer Ahearn, Kirstin Dunham, Caroline Fredrickson, Jeremy Paris, David Pozen, Judith Resnik, Gabe Roth, Michael Waldman, Wendy Weiser, Tom Wolf, and Lena Zwarenstejn for providing generous feedback on this report. The authors also thank their many colleagues who contributed to this report. Chris Leaverton, Amanda Powers, and Shannon Hardy provided diligent and meticulous research support. Marcelo Agudo, Anna Christian, Zachary Laub, Elise Marton, Alexandra Ringe, Janet Romero-Bahari, Derek Rosenfeld, and Alden Wallace provided substantial editorial and design contributions and ensured the report’s successful launch.

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