

# THE REGULATION OF TURNOVER ON THE SUPREME COURT

Ward Farnsworth\*

*There have been several recent proposals to abolish life tenure for Supreme Court Justices in favor of fixed terms. Professor Farnsworth offers the first substantial defense of the constitutional system of life tenure. Professor Farnsworth contends that most of the suggested benefits of fixed terms are speculative, illusory, or would cause additional, perhaps greater, problems than those they are intended to resolve. While the author admits that the current system is far from perfect, he suggests that life tenure serves many useful purposes, some of which are not obvious on initial inspection. The author also argues for a serious consideration of various reforms to the current system that are less drastic than eliminating life tenure altogether. Professor Farnsworth concludes by suggesting that we more fully consider the consequences and implications of life tenure so that we might find ways to improve the system without resorting to constitutional amendment.*

## I. INTRODUCTION

In recent years at least ten distinguished scholars<sup>1</sup> (as well as two distinguished judges<sup>2</sup> and a distinguished journalist<sup>3</sup>) have proposed abol-

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\* Professor of Law, Boston University. Thanks to Jack Beermann, Robert Bone, Ronald Cass, Steven Calabresi, Gary Lawson, Sandy Levinson, Stephen Marks, William Marshall, Nancy Moore, Richard Posner, and Geof Stone for helpful comments and suggestions.

1. See Steven G. Calabresi & James Lindgren, *Life Tenure Reconsidered: Term Limits for the Supreme Court* (forthcoming, Duke Law Journal); L.H. LaRue, *Neither Force Nor Will*, 12 CONST. COMMENT. 179, 179 (1995); Sanford Levinson, *Contempt of Court: The Most Important 'Contemporary Challenge' to Judging*, 49 WASH. & LEE L. REV. 339, 341-42 (1992); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT 541, 543 (1999); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211-12 (1988); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 800 (1986); L.A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 LAW & SOC. INQUIRY 1227, 1236 (2000) [hereinafter Powe, *Go Geezers Go*]; L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 196 (1995) [hereinafter Powe, *Old People*]; Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 568-85 (1999); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23; cf. Judith Resnick, *Judicial Selection, Independent Jurists, and Life-Tenure?*, Jurist Online Symposium (Apr. 15, 2004), at <http://jurist.law.pitt.edu/forum/symposium-jc/resnick.php>.

ishing life tenure for Supreme Court Justices and replacing it with fixed terms of years in office. As yet this literature has gone almost entirely unanswered; the last sustained argument for life tenure was given in *Federalist 78*, and the absence of a more recent defense has caused advocates of fixed terms to suggest that life tenure survives by mere force of inertia<sup>4</sup> and is a relic of prerealist views of the Court's role.<sup>5</sup> This article picks up the slack in the debate by defending life tenure on largely realist grounds. The defense is only partial; while I will argue for keeping many features of life tenure that fixed terms would eliminate, I grant that an age limit for the Justices might make sense. Meanwhile the debate over life tenure also serves as a good occasion to consider a range of issues bearing on the regulation of turnover on the Court. No one expects life tenure to be abolished anytime soon, and at first this may seem to give the debate an academic air; but investigation of the idea turns out to shed useful light on our current practices and suggest more plausible lines of reform.

This discussion will be organized around a series of consequences of life tenure and alternative rules. It is natural to think of life tenure as a feature of the Justices' working conditions—a measure meant to improve their performance by insulating them from worries about what they will do after they leave the bench. But the length of their terms has another significance: it dictates how often openings on the Court arise and thus how quickly electoral majorities can remake the Court and so produce tectonic shifts in the law. From this perspective the optimal length of judicial terms depends on how much we trust judgments made by majorities over shorter time periods. Life tenure reflects a high level of distrust, as it makes the Justices' terms as long as possible and so makes the rate of public influence on the Court's work as slow as possible. The distrust seems salutary; and if it is not, life tenure allows the public to gain quicker turnover by insisting on older nominees. This flexibility would be lost in a regime of fixed terms.

Life tenure can be viewed as a regulatory regime with a long list of other implied components as well: (a) Justices can serve into very old age; (b) Justices can serve for long periods of time—up to about forty years under current conditions, though no one has yet served for more than thirty-six; (c) complete turnover on the Court has the corresponding potential to take a long time to achieve; (d) Justices serve terms of vary-

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2. See Macklin Fleming, *Is Life Tenure on the Supreme Court Good for the Country?*, 70 JUDICATURE 322, 322 (1987); Laurence H. Silberman, *Federalist Society Symposium: Term Limits for Judges?*, 13 J.L. & POL. 669, 683–87 (1997).

3. See Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?*, THE NEW REPUBLIC, Aug. 19, 1991, at 18.

4. A modest set of objections to fixed terms—three pages worth—is registered in William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1089–92 (1990).

5. See Levinson, *supra* note 1, at 342.

ing lengths; (e) opportunities to appoint Justices to the Court arise unpredictably; (f) opportunities to appoint Justices to the Court arise irregularly; and (g) Justices themselves decide when to leave the Court and thus who will pick their replacements. Not all apparent attacks on life tenure are attacks on all these features of it. Age limits would target mostly (a), would have no effect on (d) or (f), and would work only partial or uncertain changes in the other respects just listed. Fixed terms would eliminate all of them. Splitting life tenure into these parts will permit us to analyze them separately and think more clearly about their implications.

The article concludes that most of the benefits claimed for fixed terms are illusory or likely would be offset by new problems they would cause; that age limits would produce some of the same benefits as fixed terms but with fewer drawbacks; that the costs and benefits created by both proposals are speculative and uncertain, undercutting the case for a constitutional amendment of either sort; and that by paying closer attention to the workings of life tenure we can improve our methods of staffing the Court in important ways without resorting to the constitutional experiments now being urged.

## II. THE MOVEMENT FOR FIXED TERMS

Article III of the Constitution provides that federal judges “shall hold their Offices during good Behaviour.”<sup>6</sup> The provision is understood to mean that unless judges are impeached they can hold their jobs until they die, deceased judges being conclusively presumed incapable of “good Behaviour.” Concerns about life tenure have been raised in the past,<sup>7</sup> most prominently by the anti-federalists at the founding.<sup>8</sup> But the scholarly movement for fixed terms is more recent. In 1986, Professor Oliver proposed a constitutional amendment that would establish fixed terms of eighteen years for the Justices.<sup>9</sup> His rationale was regularity. He claimed that fixed terms would discourage strategic retirement by the Justices,<sup>10</sup> even out the number of appointments each president makes,<sup>11</sup> and discourage presidents from trying to extend their influence over the Court by picking the youngest nominees they could find.<sup>12</sup> Professor Levinson soon took a similar view, saying that “[o]nce one accepts the

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6. U.S. CONST. art. III, § 1.

7. See, e.g., ARTHUR T. VANDERBILT, *JUDGES AND JURORS: THEIR FUNCTIONS, QUALIFICATIONS, AND SELECTION* 21–26 (1956); Harry F. Byrd, Jr., *Has Life Tenure Outlived Its Time?*, 59 *JUDICATURE* 266, 266 (1976); Charles Fairman, *The Retirement of Federal Judges*, 51 *HARV. L. REV.* 397, 398 (1938). For further sources and discussion, see Oliver, *supra* note 1, at nn.72–74.

8. See ROBERT YATES, *BRUTUS NO. XV* (1788), reprinted in *THE ANTI-FEDERALISTS* 350, 352 (Cecilia M. Kenyon ed., 1966).

9. See Oliver, *supra* note 1, at 800–01.

10. *Id.* at 805–09.

11. *Id.* at 809–12.

12. *Id.* at 802–04.

basic insight of legal realism, it simply makes no sense to appoint justices for a lifetime.”<sup>13</sup> Professor Powe likewise supported eighteen-year terms in a pair of short articles published more recently, stating his opposition to the current rule in plain fashion: “Quite simply, life tenure for judges is the stupidest provision of the 1787 Constitution that has any impact today.”<sup>14</sup> Professor LaRue has concurred, adding that “I simply can’t imagine why anyone would argue that a judge should have life tenure on the Supreme Court. My imagination is not that good.”<sup>15</sup> Most recently, Professor Calabresi also has endorsed the replacement of life tenure with eighteen-year terms, first in a short piece written with Professor Amar<sup>16</sup> and then in a new paper written with two other colleagues.<sup>17</sup>

Some of the most recent clamor for term limits has a slightly different cast, being advanced by conservatives and founded in dissatisfaction with the Court’s performance rather than in considerations of political equity. Judge Silberman has suggested that Justices should serve five years and then be moved to the appellate bench;<sup>18</sup> he hopes this would cause the Justices to “think of themselves more as judges and less as platonic guardians,” which in turn would “reduce the extent of the corruption [on the Court] which exists today.”<sup>19</sup> Professor McGinnis has relied on similar grounds in advocating term limits of less than two years.<sup>20</sup> The Justices in Professor McGinnis’s system would be federal district and appellate judges who serve temporarily on the Court and then return to their former work; the short terms would, he suggests, cause the Justices to behave more humbly because their lawyerly habits would not have been corroded away by the possession of too much power for too long.<sup>21</sup> Professor Prakash recently has published further arguments in the same vein, saying that “[e]liminating life tenure and substituting fixed terms of office would make federal judges less haughty and more accountable.”<sup>22</sup>

The criticisms of life tenure are overstated, but perhaps overstatement is to be expected when arguments roll forward without resistance as they have so far with respect to fixed terms. All the scholarship favors them; none opposes them, at least with much vigor.<sup>23</sup> Thus Professor Calabresi and his colleagues are able to say that life tenure has been defended mostly by inertia; and Prakash likewise says that “[a]t the very

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13. Levinson, *supra* note 1, at 342.

14. Powe, *Go Geezers Go*, *supra* note 1, at 1234.

15. LaRue, *supra* note 1, at 182.

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

17. Calabresi et al., *supra* note 1.

18. See Silberman, *supra* note 2, at 687.

19. *Id.*

20. See McGinnis, *supra* note 1, at 542.

21. *Id.* at 543–44.

22. Prakash, *supra* note 1, at 571.

23. As noted in note 4, *supra*, Professor Ross has offered a bit of opposition; his brief treatment evidently did not make an impression on the advocates of fixed terms, as none of them has cited or mentioned it.

least, those who support life tenure should no longer assume the superiority of a liberating life tenure but should instead defend the aristocratic status quo.”<sup>24</sup> On this count the authors are quite right. Life tenure is due for a fresh defense.

### III. A PRAGMATIC ACCOUNT OF THE FUNCTION OF LIFE TENURE

#### A. *The Faster and the Slower Law Generally*

The most familiar defense of life tenure is Hamilton’s in Federalist No. 78: it secures the independence of the judiciary from the other branches, attracts talented people to the bench, and promotes judges’ ability to defend the Constitution without being unduly influenced by public opinion.<sup>25</sup> The critics of life tenure are fair in saying those purposes might be served about as well by giving the Justices long fixed terms followed by assignment to a court of appeals.<sup>26</sup> But life tenure and fixed terms differ more in their effects on the speed with which political majorities can convert their will into influence over the Court by replacing its members.

A simple model for seeing the point can be built from the observation that Americans live under two types of law, fast-moving and slow-moving. The faster law is made by Congress, state legislators, and other actors subject to replacement every few years through normal political channels. The slower law is mostly made by a committee of officials called Justices. (Subordinate officials known as judges make contributions as well, but my focus will be on the Supreme Court.) This is a primitive way to think about the Court’s work, as it strips away all considerations other than speed that distinguish judging from legislating. It nevertheless is revealing if our goal is to understand the significance of the rate at which Justices are replaced. The fast and slow labels arise from several features of legislation and adjudication. Legislation can be made or changed promptly in response to pressure from the public; no customs restrain the reversal of earlier decisions, and their makers can be quickly replaced if the public is unhappy with them—typically every two to six years. The legislative process *can*, of course, move slowly or not at all; the point is just that it is also capable of greater responsiveness. Two principal design features of the Supreme Court cause it to function more slowly. First, the questions the Court decides have to arise in cases; the Court decides whether to hear them, and there are no consequences if they decline. Custom requires the Justices to state their decisions as acts of interpretation, and not every preference can be plausibly expressed in that language. The norms governing plausibility change, but only slowly.

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24. Prakash, *supra* note 1, at 583.

25. THE FEDERALIST No. 78 (Alexander Hamilton).

26. For reservations, however, see *infra* text accompanying notes 121–24.

The second feature of the Court that causes it to move slowly, and our focus here, involves turnover. Since the Justices keep their jobs for a long time, it takes a long time to replace them if the public does not like what they do. It may be that if a majority of the populace wants something, a majority of the Justices will want it, too; for they may be *of* the majority. But not necessarily. Most Justices at any moment were selected for the Court by majorities that no longer exist, and since they tend to be drawn from one part of the population—a highly educated class—their ideas and values tend to differ from the public average anyway. Achieving anything by repopulating the Court is made still harder because the will of the majority on the point is filtered through a president elected for four years and senators elected for six—whose desires are in turn blunted by the difficulty of predicting the behavior of nominees,<sup>27</sup> since they say less and may in fact know less about their intentions than usual political candidates.

A crucial feature of the two types of law, the faster and slower, is that the slower trumps the faster wherever they conflict. But the size of the field of conflict between them is another moving part subject to slow public control. The Court has been made to serve as a receptacle for that which the people want to subject to less responsive lawmaking, and the issues in that category change over time. For about the past sixty years various sorts of economic regulations have been treated as subject to revision only through the faster law.<sup>28</sup> During the prior sixty years they were thought to be a proper subject of the slower law as well as the faster.<sup>29</sup> During a period of about sixty years that ended only recently, questions about Congress's power to pass legislation under the commerce clause were treated mostly as an improper subject for regulation by the slower law.<sup>30</sup> Since 1995 that position has been relaxed<sup>31</sup>—as it was before 1937.<sup>32</sup> The ebb and flow of the slower law's reach is itself a subject of the slower law, declared by the Court and thus dictated on an ongoing basis, finally but slowly, by the people as their representatives populate the Court with officials expected to contribute to agreeable rulings about the slower law's jurisdiction as well as its substantive content.

We could have used other terms for these types of law, of course, calling the faster “statutory” and the slower “constitutional”; thus the

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27. For more discussion of the implications of this point, see *infra* Part IV.

28. See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488–89 (1955); *W. Coast Hotel v. Parish*, 300 U.S. 379, 400 (1937).

29. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525, 561 (1923); *Coppage v. Kansas*, 236 U.S. 1, 24–26 (1915); *Lochner v. New York*, 198 U.S. 45, 74 (1905).

30. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937).

31. See *United States v. Morrison*, 529 U.S. 598, 627 (2000); *United States v. Lopez*, 514 U.S. 549, 568 (1995).

32. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 317 (1936); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Hammer v. Dagenhart*, 247 U.S. 251, 277 (1918); *Adair v. United States*, 208 U.S. 161, 180 (1908).

familiar saying that questions become constitutionalized when the Court assumes the power to decide them. That locution nevertheless is deceptive. When Congress passes statutes it may be engaging in constitutional interpretation in a straightforward sense; but since statutes are made by legislatures, they are part of the faster law and are trumped by the slower regardless of whether they were constitutional in nature.<sup>33</sup> Meanwhile decisions the Court labels “constitutional” may have only a vague or imperceptible relationship to anything in the document called the Constitution. In other cases there are many plausible ways to read the document and the Justices pick the reading that advances goals that seem sensible to them. The preferences of the Court’s members are then trumping the contrary views of the legislature regardless of whether the exercise is labeled constitutional interpretation or something else. In still other cases, a Justice may cast a vote that seems dictated by his preferred theory of interpretation, not by his preferences; but he may have been put onto the Court precisely because of the outcomes he was expected to reach, and the fact that he gets there by using a theory of interpretation is neither here nor there so far as those who appointed him are concerned. Calling his output constitutional law is less revealing for our purposes than identifying it by the speed at which the public can enforce its preferences and objections.

The deeper problem with speaking of law made by the Court as slower is that in certain ways it can move very quickly. This model would work better if the Court’s output always stayed the same until someone new was added. It can, however, change anytime five of the Court’s members decide to do something new, and sometimes this means the Court will get out in front of the rest of society on a question. In this sense the Court’s lawmaking may be faster than that of a legislature: it has less need to wait for the public to like an idea before going ahead with it, though of course the efficacy of its rulings in those circumstances is another question.<sup>34</sup> The law the Court makes thus is slower only in a limited sense: the public’s ability to force it to make changes is sluggish, sometimes maddeningly so.

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33. I refer to the present conventional understanding. For discussion of well-known challenges to it, see MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) [hereinafter *TAKING THE CONSTITUTION*]; Edwin Meese III, *The Law of the Constitution*, 61 *TUL. L. REV.* 979, 985 (1987); Mark V. Tushnet, *The Supreme Court, The Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 *TUL. L. REV.* 1017, 1017–18 (1987) [hereinafter Tushnet, *The Supreme Court*]. On the question of deference by the Court to “constitutional” determinations by other branches, see generally Larry D. Kramer, *The Supreme Court 2000 Term—Foreword: We the Court*, 115 *HARV. L. REV.* 4 (2001).

34. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1993) (surveying the Court’s role in initiating political and social change throughout the twentieth century).

B. *The Function of the Slower Law*

The need for the faster type of law is obvious. Problems often require prompt responses, and the default rule in a democracy is that majorities should have their way about them. The needfulness of a slower-moving law that trumps the faster is not so obvious. One way to think about its value is that legal change can be obtained from the Court only at high cost. These high costs are part of what make the resulting law slow; they also are what *justify* the sluggishness, because they suggest that changes finally there made are important: important enough, evidently, to have justified the lavish and sustained outlays of resources needed to secure them. A law so consisting of two tracks, more and less costly, allows us to insulate hard-won changes from the processes that normally make change easy: a way to protect expensive gains against cheap reversal.

But these notions only help justify constitutionalism generally, not necessarily slower law, since amendment is expensive but can occur quickly. The special value of the Court as a slow lawmaker has to be based on distrust of short-term or even medium-term majoritarian judgments relative to long-term ones. Putting issues on a slower track helps protect them from swifter currents of opinion more likely to produce bad law, perhaps because the swift currents are more likely to have disproportionate force of the kind discussed by public choice theorists,<sup>35</sup> or because they represent views that seem appealing for a while but whose deficiencies become clear with time. A constitutional document may not serve much of a slowing function if the act of interpreting it is made too politically responsive. When people want things done, they will find lawyers who think the Constitution allows their preferred results and fit them with robes. The slowing function arises when the authority to declare the trumping law is assigned to an institution whose members are replaced infrequently, and still more when the replacements are made through a means that provides some insulation from the public will.

Rare but steady turnover thus may be a superior mechanism to constitution-plus-amendment if the goal is to test the durability of an idea before adding it to a slow-moving corpus of law. There is a parallel to some of the trade-offs between the common law and legislation as methods of producing legal evolution, and in fact all four methods of change can be put into a hierarchy. First is the common law itself. It can be trumped by statutes; and the statutes can in turn be trumped by the slower law judges make in common-law fashion but in the name of the Constitution. Those judicial decisions can in turn be trumped by nonjudicial amendment. We thus have a fairly elaborate set of lawmaking tracks, each with its own speed, advantages, and place in the pecking or-

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35. For helpful discussion and suggestions to the contrary, see generally Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31 (1991).

der. Notice, though, the possibility of interaction between them—and, especially interesting for our purposes, the interaction between amendment and turnover. The insertion of the broad language of the Fourteenth Amendment into the Constitution was a milestone from a pragmatic standpoint precisely because it so enlarged the number of things that plausibly could be said to violate the document's terms. The language thus created the potential for large and ongoing delegations of lawmaking power to the judiciary without need of further formal amendment. It enlarged the power of turnover to produce changes.<sup>36</sup>

The current point also can be restated as a multiple-selves problem faced by the populace as a whole.<sup>37</sup> The national will at any given moment may be at odds with judgments that seemed right at other times; and with respect to some questions we might prefer to hold off on changes until they seem satisfactory from both perspectives—the present and the past. We arrange this by creating a Court, staffing it slowly, and then charging its members with reviewing current political judgments. Major legal changes have to be appealing both to a current majority and to representatives chosen by majorities five or ten or twenty years ago.<sup>38</sup> In this way judicial supremacy makes it harder to leave behind conventional understandings of the past. During the 1970s the last word was had by people appointed in the 1950s and 1960s. In the 1990s the last word was had by people appointed in the 1970s and 1980s. The practical result is that the Court sometimes serves as a bulwark of convention. The mechanism is crude, for again there is a joker in the pack: the Justices may not behave as expected; they might change their minds and stray far from the consensus that produced their appointments. And the changes of mind may be caused by fads at large from which they are insulated very imperfectly. Still, whatever they end up thinking and saying, it takes time for a new electoral majority to replace them with judges who will say things they prefer.

The normative question is whether these mechanisms of braking and entrenchment have value. Sometimes the Court makes it harder to overthrow good and bad legal conventions alike. The attractiveness of the package depends on one's satisfaction with current legal conditions and fear of the alternatives. The Court is set up to reflect a strong sense of satisfaction with the outlines of the slower law and a corresponding interest in decelerating changes in them. Speeding up the rate of change

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36. For an unfavorable normative account of this consequence, see generally RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (2d ed. 1997).

37. On multiple-selves problems generally, see *THE MULTIPLE SELF* (Jon Elster & Gudmund Heclles eds., 1986); RICHARD A. POSNER, *AGING AND OLD AGE* (1995).

38. A kindred idea is familiar from Herodotus, who described the Persians' custom of voting on every question twice: once while sober, then again while drunk; an idea had to seem sound from both perspectives before going forward with it. 1 HERODOTUS, *THE HISTORIES* 61 (Robin Wakefield trans., Oxford University Press 1998).

would create winners and losers, but it is hard to be sure who they would be, and in the meantime most Americans enjoy a combination of expansive liberties and social stability that makes them understandably risk-averse. If they interested themselves in the debate over the Court's role they would find Robert Bork on the right<sup>39</sup> and Mark Tushnet on the left,<sup>40</sup> both dismayed by the Court's frustration of their projects; possibly our hypothetical onlookers would conclude that any institution capable of providing so much discouragement to both men must be doing something right.

These points can be made more concrete. A main consequence of the most common proposals for fixed terms—the proposals to have Justices serve for eighteen years apiece—is that they would guarantee every two-term president at least four appointments to the Court: the ability to create a near-majority, which easily could become a majority with the addition of an interim appointment or the presence on the Court of a like-minded Justice appointed fifteen years before. This can happen already, but it usually does not. The question is whether we should ensure that it always does. A two-term president may reflect a single national mood, and there may be value in a Court that cannot be remade by one such gust. And as the lengths of the proposed terms get shorter, the risks become greater that a burst of political sentiment will take the slower law along with it as well as the faster—or rather that the slower law would not be much slower after all. It would depend on how well the methodological brakes on the Court held up once the other brake was relaxed—the brake based on the pace at which the Court can be repopulated. If a majority of the Justices were replaced every four years, the rate of change in the law made by the Court—and more particularly the rate at which the public could turn its views into forced changes in the Court's output—probably would be much accelerated. The same fads that can elect a president would produce the Court's membership. Life tenure puts us as far as possible at the other end of this spectrum.

At this point it no doubt would help to cite instances when the slow rate of change at the Court has produced good results or where a faster rate of change clearly would have been worse. This is hard to do—though for the same reason it also is hard to point to cases where the Court's sluggishness plainly has caused trouble. The rate of turnover at the Court establishes a procedure for decision, not a guarantee of outcomes, so the consequences of adjusting the procedure are hard to dis-

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39. See ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 117, 140–53 (1996) (advocating a relaxation of judicial supremacy to facilitate, among other things, more aggressive governmental censorship of offensive books and films).

40. Tushnet famously declared that if he were a judge, he would do what he could to advance the cause of socialism. See Mark V. Tushnet, *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981). He now seeks to end judicial supremacy, in part because “progressives and liberals are losing more from judicial review than they are getting.” *TAKING THE CONSTITUTION*, *supra* note 33, at 172.

cern and evaluate. The Court's treatment of federalism during the twentieth century provides good examples. Maybe short terms for the Justices would have enabled President Roosevelt to push through more of his programs more quickly in the 1930s, since he made no appointments to the Court during his first four years in office.<sup>41</sup> Or maybe not, since the most aggressive of his programs was invalidated nine to zero anyway.<sup>42</sup> Had fixed terms been in place during the later part of the century, the Court's turn toward federalism might have been accelerated. Then again, maybe not; short terms might have prevented the push entirely because President Carter would have made one or two appointments, and President Clinton would have had more than two. Perhaps both times the Court usefully slowed the satisfaction of the public's appetites, forcing more moderation.<sup>43</sup> It is hard to say without a normative theory of those events separate from the question of their speed; it would be similarly hard to say what difference it would make to the output of the Senate if its members served terms of four years instead of six. Arguments about adjustments of this kind have to be based on the general appeal of forcing a little more or a little less (or a lot less) sluggishness on the Court's part. Talk of the urgency of such marginal proposals, or the urgency of avoiding them, probably is misplaced. Other countries give fixed terms to the judges on their highest courts and seem to get along well enough;<sup>44</sup> we also have gotten along well enough without them. It is a question of whether we value the tendencies in the law that longer tenure creates.

Indeed, turnover currently may not take long enough. Suppose one thought the ideal length of time for creating a fresh majority on the Court was twenty years. We might then want to see one Justice replaced every four years (thus achieving five replacements in a twenty-year period), and the way to achieve this result would be to have nine Justices who each serve for thirty-six years. But perhaps thirty-six year terms were not considered feasible when the Constitution was written because

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41. See HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF THE U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO CLINTON* 380 (1999).

42. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935).

43. This view partly resembles that of Professor Ackerman. See generally 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). He is thankful for the Court's resistance to Roosevelt in the early 1930s because it forced the country to reflect on the constitutional questions at stake. *Id.* at 280–81. That sort of forced deliberation may be a welcome side effect of the changes the Court makes in the slower law, though it is by no means inevitable; it seems largely absent, for example, from the more recent shift away from federal power. The majority forcing this shift was not assembled through one of Ackerman's "constitutional moments" (the Democratic Party held the Senate when all of the relevant appointments were made) and has not been accompanied by comparable national soul searching about the proper role of the federal government (the Court's federalism decisions were not a significant issue in the presidential campaign of 2000). The judicial will to make these changes has accumulated more slowly and quietly. For discussion of another alternative perspective to Ackerman's that is closer to mine, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001) (offering a theory of "partisan entrenchment" to explain constitutional change).

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

life expectancies were too short. Now they are increasingly feasible, though still not often reached. (Only William O. Douglas has served as long as thirty-six years, and he should not have done so.<sup>45</sup>) So life tenure merely is the best we can do; it is a corner solution. If life expectancies become significantly longer than they currently are, and the typical Justice ends up serving for fifty years, it will be time to shorten terms on the Supreme Court. But not yet. The same logic applies, of course, if one thinks that the Justices get better at their jobs the more years they spend at the Court: the longer the terms the better. But one of the goals of this exercise is to develop a way of thinking about the Court and turnover of its personnel that has some purchase regardless of whether one holds such views.

The details of the analysis just sketched are conjectural. The optimal length of time for turning over a majority on the Court is a hard question. The important point, though, is that when advocates of term limits claim that the Court has become too distant from the public, they are taking a position on how much to trust the conclusions majorities reach over shorter and longer periods of time. The idea that the Justices should be replaced more often needs a defense on these terms, and has not yet received it.

#### IV. SENSES OF ACCOUNTABILITY

Professor Prakash, as well as Professor Calabresi and his coauthors, believes that life tenure has made the Supreme Court insufficiently accountable: we need a more “populist public law” that “must hold the agents who make constitutional decisions accountable for those decisions to the people.”<sup>46</sup> Before evaluating whether these claims are true we should be precise about what they mean, for the critics of life tenure sometimes are vague in their appeals to accountability. The term usually refers to consequences an agent suffers for misbehavior, but most proponents of fixed terms do not suggest that individual Justices should be accountable in any sense;<sup>47</sup> on the contrary, they want to protect the Justices’ unaccountability—their independence, as it usually is called—by giving them life tenure elsewhere on the bench after they leave the Court.<sup>48</sup> What they do say is that the Court as an institution has become insufficiently accountable to the public.<sup>49</sup> Let us consider some possible meanings of the claim.

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

46. Prakash, *supra* note 1, at 569.

47. An exception is Prakash, who would like to see the Justices more easily removed. For discussion, see *infra* at Part VI.A.

48. See *supra* text accompanying notes 18–21.

49. See, e.g., James E. DiTullo & John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA.

### A. Results

A first kind of accountability involves outcomes of specific cases. The Court might make decisions the public hates; the sooner the Justices are forced to retire, the sooner they can be replaced with nominees the president thinks will reverse the disliked decisions. This often is what people have in mind when they speak of holding the Court accountable. They want *Roe v. Wade*<sup>50</sup> reversed or want to prevent its reversal. But this position would require a better and more explicit argument than has yet been made, for there are good reasons to avoid tampering with the Court's turnover mechanisms to make particular decisions easier to change.

First, one of the valuable things courts do is make unpopular decisions that stick: decisions protecting the rights of minorities or preserving structural features of the Constitution that frustrate the majority's will but have long-run benefits. The public naturally may feel outrage when decisions of that sort are made, yet might rather endure the outrage than make it easier to convert it into reversal. It is a question of how much we distrust outrage. At present we put a large share of trust in a body we know will let us down often instead of taking chances on a more responsive system that would allow good and bad outrage alike to carry the day and let us down in other ways. Forcing the reversal of a disliked decision by replacing the Justices who made it is kept a possibility only in the very long run.

If one wants to strike a different balance, tampering with the terms the Justices serve is an unwieldy means to the end; there are simpler ways to allow the Court's decisions to be overridden without the collateral costs. One of those costs is that a Court structured to let the public change disliked decisions would probably become dominated by efforts to do so. One of the strongest defenses of the majority's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*<sup>51</sup> is precisely that it declined to permit reversal of a significant case through the expedient of appointing new Justices who would have decided the abortion question differently in the first instance. Had *Roe v. Wade* been reversed, the decision would have invited the use of future appointments to produce similarly targeted results, including the rehabilitation of *Roe*. But Justices picked because they are sure to produce a desired outcome are more likely to be ideologues not as good at deciding the hundreds of other cases that come before them. Confirmation hearings would be focused even more intently on the future of particular holdings, and the

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L. REV. 1093, 1104 (2004) (“[T]he political power of the Court and the more frequent occurrence of strategic retirements demonstrate that this is a problem that increasingly cannot be ignored and one that is likely to become more acute in coming years.”).

50. 410 U.S. 113 (1973).

51. 505 U.S. 833 (1992).

Court's functioning would come to seem less law-like than it already does.

A different but related kind of accountability involves more amorphous preferences. Presidents, senators, and interested members of the public take an interest in what *sorts* of decisions the Justices will make; they do not know quite what questions will arise but are anxious that they not be disappointed by the Court's answers to them. So they settle for (or object to) the appointment of types to the Court—a conservative or liberal type, a hawk or a dove. The types refer to clusters of values and preferences that a holder of them is expected to bring to bear when confronted with whatever problems arise later. Thus in the twelve years leading up to 1992, the country elected Republican presidents friendly toward notions of states' rights and skeptical of the value of a large federal government. Those presidents made five appointments to the Court. In 1995 those appointees began issuing decisions limiting congressional power and enhancing the power of the states in various ways.<sup>52</sup> The decisions in these cases often owed nothing to conservative judicial philosophy,<sup>53</sup> and in their details they probably were not foreseen by those involved in the appointment of the Justices who made them. The decisions nevertheless were congenial to conservatives as matters of policy and can be heard as echoes of the elections that indirectly produced those Justices' appointments.

Those federalism cases illustrate that the Court may be responsive to the public will in a general and delayed fashion. They might also seem to show that there is no need to improve the Court's accountability in this sense, but in fact that is not so clear. The Democratic party held the White House for eight years during the 1990s but did not make a commensurate impact on the Court because only two vacancies arose during that period. Disparities of this sort in the distribution of appointments are a separate argument for fixed terms which we will discuss later. For now, though, it seems unlikely that a shortage of this type of accountability is what troubles the critics of life tenure, for many of them are originalists who decry the Court's tendency to reflect the recent political past. In another of his writings Professor Calabresi puts the point this way:

[F]or better or worse, the U.S. Supreme Court has always, at least to some degree, faithfully reflected American politics of ten to fif-

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52. See, e.g., *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that the federal government cannot compel state and local officials to perform federally specified administrative tasks); *United States v. Lopez*, 514 U.S. 549, 561–62 (1995) (holding, for the first time in sixty years, a statute invalid for exceeding the commerce power).

53. See Charles Fried, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 195 (2002) (noting “the willingness of the ‘conservative’ or ‘strict constructionist’ Justices to stretch the text of the Eleventh Amendment to cover suits in state court and proceedings before executive branch agencies on the explicit ground that, although the Amendment does not require such a result, the spirit and presuppositions of the text entail it”).

teen years before. Sadly (for those of us who believe in the Rule of Law), Mr. Dooley's dictum about the Supreme Court's tendency to follow the election returns seems no less apt today than when it was first printed almost a century ago. Accordingly, it is hard to see how anyone could conclude that the American judiciary is predictably conservative or progressive. At most, our courts are an anchor to windward that slows down the pace of *all* changes, revolutionary and reactionary alike.<sup>54</sup>

From these remarks we can conclude that this probably is not the sort of responsiveness Calabresi and other advocates of fixed terms have in mind when they speak of the need to improve the Court's accountability. It is true that not all of them are originalists, but the originalists are the ones most likely to argue that we need more accountability.

### B. Method

Perhaps what critics of life tenure mean when they worry about accountability is that it should be easier for the public to rein in the Court when it makes bad decisions as a matter of method rather than outcome. There should be a faster way to bring the Court into line, in other words, not if its decisions are unpopular but if the Justices forget their proper role and foist their policy preferences on the country without taking seriously the legal materials bearing on their cases.

The trouble with trying to make the Court more accountable to the public as a matter of method is that there is no evidence that the public understands these issues or is interested in them, nor is there much evidence that the presidents are interested when they pick their nominees. There are no known cases where a president nominated a Justice because he liked the nominee's theory of interpretation despite thinking he would produce disagreeable results. Meanwhile the opposite pattern is common: a president picks someone expected to produce pleasing results even though the nominee's views about interpretation, if any, are hard to discern. These practices sometimes create the illusion that theories of interpretation make an important difference: originalists fantasize that their theory is making headway on the Court when it is just the felt desirability of the outcomes produced by originalism that is making headway; when those outcomes lose their appeal, originalism loses appeal or adapts to produce other outcomes.<sup>55</sup> There is no evidence to support the notion that anyone involved in the selection process is interested in interpretive theory per se.

Consider as an example the case of Professor Akhil Amar. Calabresi is a great admirer of Amar's skills as a constitutional lawyer; in

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54. Steven G. Calabresi, *Thayer's Clear Mistake*, 88 NW. U. L. REV. 269, 272 (1993).

55. See Ward Farnsworth, *Women Under Reconstruction: The Congressional Understanding*, 94 NW. U. L. REV. 1229, 1294-95 (2000).

his review of Amar's book on the bill of rights,<sup>56</sup> Calabresi says that it "sets a new standard for excellence in constitutional scholarship"<sup>57</sup> and goes on as follows:

Professor Amar knows that it is possible and desirable to read the constitutional text as it was originally understood rather than letting every twist and turn in the culture become an excuse for discarding its potentially transformative original meaning. *The Bill of Rights* mixes arguments from text and history with a degree of sophistication and subtlety that has hitherto been totally lacking in academic books about constitutional law. It is refreshing almost twenty years after I entered law school to finally be able to read a book by a constitutional law professor about that subject that is actually methodologically correct . . . .

This book represents constitutional law at its very best, and it makes the incompetence and inadequacy of such prominent political scholars as Laurence Tribe all the more glaring and unacceptable.<sup>58</sup>

It is hard to imagine a warmer endorsement, and no doubt Professor Calabresi would be delighted if Amar were appointed to the Supreme Court—by a Democratic president. If a Republican president were to squander a nomination on Amar it seems likely that Calabresi would be dismayed, but he need not worry about that prospect. Amar would not be on any Republican president's short list or on an authentic long list. The reason is that regardless of his methodological strengths Amar could not be expected to produce outcomes that would please Republican constituencies. Amar agreed with the result in *Romer v. Evans*<sup>59</sup> and praised the majority opinion in the case.<sup>60</sup> He has endorsed affirmative action along the lines permitted by the *Bakke* decision<sup>61</sup> and has suggested that a constitutional right to abortion might plausibly be derived from the Equal Protection Clause.<sup>62</sup> Hence Calabresi's conclusion that Amar is the "leading liberal constitutional law professor of his generation."<sup>63</sup> The "liberal" label cannot refer to Amar's methodology; evidently it refers to the outcomes he reaches, to his policy preferences, or both. Either way,

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56. AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* (1998).

57. Steven G. Calabresi, *We Are All Federalists, We Are All Republicans: Holism, Synthesis, and the Fourteenth Amendment*, 87 GEO. L.J. 2273, 2276 (1999) (book review).

58. *Id.* at 2283, 2286.

59. 517 U.S. 620 (1996).

60. See Akhil Reed Amar, *Attainder and Amendment 2: Romer's Rightness*, 95 MICH. L. REV. 203, 203 (1996); Akhil Reed Amar, *Justice Kennedy and the Ideal of Equality*, 28 PAC. L.J. 515, 530 (1997) [hereinafter Amar, *Justice Kennedy*] (describing the majority opinion in *Romer* as "an elegant blending of legal formalism and legal realism at their best").

61. See Akhil Reed Amar & Neil Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1779–80 (1996); Amar, *Justice Kennedy*, *supra* note 60, at 531.

62. See Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 75–76, 111 (2000); Jeffrey Rosen, *Naturally Right*, THE NEW REPUBLIC, Sept. 24, 1990, at 20, 23 (quoting Amar).

63. Calabresi, *supra* note 57, at 2273.

Calabresi probably is correct to call Amar liberal, and either way Amar is not destined for the Supreme Court on any Republican's watch. Interpretive method is not the issue.

This is not to say that claims about interpretive theory receive no attention. They are used as signals. During his first presidential campaign, George W. Bush announced his intention to appoint "strict constructionists" to the Court and cited Justices Thomas and Scalia as models.<sup>64</sup> Nobody took this appeal to interpretive theory too seriously, however, and for good reason. Justice Scalia himself ridicules the notion of "strict constructionism" and wonders aloud whether the expression has any real meaning.<sup>65</sup> For President Bush's part, he elaborated that he liked Justice Scalia because "I got to know him here in Austin when he came down. He's witty, he's interesting, he's firm."<sup>66</sup> "Strict construction" is a slogan, a signaling device to denote types of judges who will produce certain outcomes.<sup>67</sup> If the term did have real substance it might fit Amar as well as anyone. Nor, of course, is the point limited to any particular candidate or party. Vice-President Gore replied to President Bush's position by asserting that he believes "there is a right to privacy in the Fourth Amendment."<sup>68</sup> Nobody disputes that notions of privacy play a role in Fourth Amendment claims; perhaps Gore meant to speak about the Fourteenth Amendment. Doctrinal particulars to one side, he made clear the results his nominees would produce: "I would appoint people who have a philosophy that I think would make it quite likely that they would uphold *Roe v. Wade*."<sup>69</sup> Ah—*that* philosophy.

Now of course one could argue that all this is accurate but unfortunate. Yes, the public has long understood that the Court gets the last word on most of the questions it answers and has responded by using the Court to make large changes in policy without worrying much about the explanations the Justices intone for the outcomes they reach. But this is a vice. We need a new commitment to appointing Justices for their ideas about interpretation in some purer sense, not the results they would produce. The crucial point for our purposes, though, is that whether the current tendencies are good or bad, jiggering the length of the Justices' terms would not be likely to change them. Indeed, life tenure and the

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64. Neil A. Lewis, *The 2000 Campaign: The Judiciary; Presidential Candidates Differ Sharply on Judges They Would Appoint to Top Courts*, N.Y. TIMES, Oct. 8, 2000, at A28.

65. ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 23 (1997). The term "strict constructionism" was popularized during the Nixon administration.

66. *Meet the Press* (NBC television broadcast, Nov. 21, 1999). Bush's reference to Scalia as "Anthony" argues a certain lack of intimacy with the Justice and his work. *Id.*

67. See Stephen L. Carter, *Bork Redux, or How the Tempting of America Led the People to Rise and Battle for Justice*, 69 TEX. L. REV. 759, 776 ("[W]hen most politicians refer to an original understanding, or a living Constitution, or anything else, they have in mind not the hermeneutical problems inherent in trying to make sense of any text, but particular results that they like.").

68. *The 2000 Campaign: Transcript of Debate Between Vice President Gore and Governor Bush*, N.Y. TIMES, Oct. 4, 2000, at A30.

69. *Id.*

long terms it creates is the regime most consistent with a vision of the Justices as impersonal appliers of interpretive theories. Fixed terms would give us more often what we already get; they would cause the public's appetites to be satisfied more regularly, but there is no reason to think they would change the content of the appetites or the relationship between the appetites and judicial behavior—no reason to think it would have any general effect on the judicial philosophies, if any, held by the Justices.

### C. *Life Tenure and Flexible Accountability*

So it is not clear what sort of accountability the critics of life tenure have in mind and why limited terms would promote it. Complaints that the Court is too undemocratic are unimpressive on their face; the Court is supposed to be undemocratic, at least in part. The question is how large a part. An advantage of life tenure is that it does not require a clear and general settlement of those points to be attractive. Life tenure provides varying degrees of responsiveness in the Court depending on the ages at which Justices are appointed. It allows the extent of the Court's accountability to be set differently at different times. It preserves the option of keeping the rate of change slow, and that is how it presently tends to be used; the usage is a byproduct of the desire of presidents to extend their influence by selecting young nominees. But those choices about age are not inevitable. In practice it seems sure that we never will see very old nominees meant to serve very short terms, but there remains room for variation between terms of medium and long lengths. There are large differences between sixty and forty-three as ages of nomination, in their consequences both for the rate of change on the Court and for a particular Justice's impact. This is the actual range of ages at which Justices recently have been nominated, so it is reasonable to think that we could see a trend toward one of those poles if shorter or longer terms were wanted. Rather than saying precisely how much accountability we need and fixing a term of years to promote it, the defender of life tenure can say the answers may change over time and can be dealt with on a rolling basis.

## V. THE SIGNIFICANCE OF A NOMINEE'S AGE

### A. *The Effect of Age upon Impact*

Some critics of life tenure say that it causes the age of a nominee to receive too much attention. I claim age does not receive *enough* attention. The age of a nominee determines how long a seat on the Court is likely to be taken out of circulation and thus affects the rate of change in the slower law; every confirmation vote is a decision not only about the nominee but also about how far the public should push control over the

slower law out of its own reach. Then there is an additional reason, less exotic but also underexamined, why a nominee's age should receive closer attention: its effect on a Justice's expected impact. Most Justices these days leave the Court within a few years on either side of their eightieth birthdays, and from this we can deduce the de facto terms for which Justices recently have been appointed. Ruth Bader Ginsburg was appointed to an expected term of about twenty years, which at this writing is more than halfway complete. John Stevens was appointed to an expected twenty-five-year term (and now is in year twenty-nine); Clarence Thomas was appointed to an expected term of about thirty-seven years. So we not only have flexibility but have used it: while the average expected term of appointment to the Court lately has been a little less than thirty years, we have widely varying terms tailored to each Justice.

Yet the age of a Supreme Court nominee rarely plays a prominent role in the confirmation process despite being the most important fact distinguishing many nominees from their likely alternatives. Consider the case of Justice Ginsburg. She was sixty when nominated to the Court. Another candidate for her slot was Mary Schroeder, a federal appellate judge who was fifty-two. Both were considered fairly liberal and probably would have voted the same way on most closely contested cases of their times. Perhaps there would have been a little variation in their views, but then compare that to the other source of variation: the identity of the person who will occupy Justice Ginsburg's seat from 2013 until about 2025. Most of those years probably will not be filled by Justice Ginsburg, who will turn eighty in 2013. If a Republican is in office when she retires, those years might instead be filled by, say, Miguel Estrada, a distinguished conservative who will then be fifty-two years old. Handing eight years of votes from Justice Ginsburg to Estrada would have considerable significance—probably much more predictable significance than any difference between Justice Ginsburg and Schroeder during the twenty years from 1993–2013. By recent standards President Clinton appointed Justice Ginsburg to two-thirds of a term, with the remaining third perhaps to be filled in by a mystery Justice—the lady or the tiger, as it were.

Thurgood Marshall's case shows how such gambles can play out. Justice Marshall was appointed to the Court in 1967 at the age of fifty-nine. He served twenty-four years. His replacement by Clarence Thomas created a large swing; the left-most member of the Court was replaced by a new right-most member. Justice Thomas has provided decisive support for conservative outcomes in countless cases. When Justice Marshall was nominated it was obvious, or would have been to anyone who thought it out, that he probably would not serve on the Court during most of the 1990s. Of course Justice Marshall might have been the best possible Democratic appointment anyway. He was one of the most distinguished legal figures of his generation and the first black member of

the Supreme Court. But President Johnson briefly did consider Shirley Hufstедler, then of the California Supreme Court, for the seat that became Justice Marshall's.<sup>70</sup> She would have been the first woman to serve on the Court and so would have provided unique demographic value in her own right. More to our point, she was forty-three years old and remains in private practice at this writing. If President Johnson had chosen Hufstедler she probably would still be on the Court, Clarence Thomas would not be, and large numbers of important decisions over the past ten years would have come out differently. These include decisions on the scope of federal power, the reach of the Equal Protection and Due Process Clauses, the role of religion in public education, dozens of questions of criminal procedure, *Bush v. Gore*,<sup>71</sup> and so forth.<sup>72</sup> By appointing Marshall rather than someone ten years younger, President Johnson gave away more than a decade's worth of votes that turned out to matter quite a bit.

The point can be generalized into consequences for the Court as a whole. If one political party consistently picks older Justices than the other, the party that picks the younger Justices will end up with majorities even if the parties take regular turns making nominations. We can model the issue by imagining that party X always nominates Justices to expected terms twice as long as party Y does, and that each party has a fifty-percent chance of making any given nomination. If we run this game with respect to any seat, the result is a set of Fibonacci sequences in which each seat ends up sixty-two percent likely to be held by nominees from party X at any moment. Stretched over nine seats the result is that party X has a seventy-seven-percent chance of having at least a five-to-four majority at any given time despite having no more nominating chances than party Y. Obviously there are limits on the model. No party consistently follows a practice of making older or younger nominations, and the expected terms of the youngest nominees are not (quite) twice as long as those of the oldest. But the numbers still illustrate a real trend, and one that anyway is obvious: choosing older rather than younger Justices makes the nominees of a president's party more likely to end up in a minority on the court.

Of course the examples considered here elide the uncertainties in particular cases. Maybe Justice Ginsburg will serve until she is ninety; maybe she will be replaced by a Democrat; maybe Schroeder would have retired early. No matter: the important point is probabilistic. Holding the likelihood of random events equal, Schroeder's expected term would have been about eight years longer than Justice Ginsburg's. There is

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70. See MICHAEL R. DAVIS & HUNTER R. CLARK, THURGOOD MARSHALL: WARRIOR AT THE BAR, REBEL ON THE BENCH 264 (1992).

71. 531 U.S. 98 (2000).

72. For more discussion and examples, see Geoffrey R. Stone, *Judicial Activism and Ideology*, 6 GREEN BAG 281, 282-83 (2003).

about a fifty-percent chance that those years will be filled by a hostile replacement. A fifty-percent chance to change eight expected years' worth of votes has great ideological value. The value is not much diminished by the difficulty of saying now what issues will concern the Court twenty-five years hence. The details of the questions that divided the Court in the 1990s were not visible in the 1960s but were along predictable margins; the Democrats delighted with Justice Marshall's nomination in 1967 were the same ones appalled by the work of his replacement in the 1990s, even where the questions had changed. And not all of them did change; one of the Rehnquist Court's projects turned out to be the limiting of some Warren Court precedents.<sup>73</sup>

Given the large share of a nominee's value impounded in his age, the length of the expected term should be a major feature of the negotiation that results in the selection of a Justice—as it sometimes is for presidents<sup>74</sup> but sometimes is not,<sup>75</sup> and as it rather rarely is for the public, the Senate, or the pressure groups that prod the Senate. This seems strange; everyone would take careful notice if presidents or legislators ran for terms of varying lengths. The Thomas nomination again is a case study. In the debates on his confirmation, senators occasionally referred to his age but never discussed it at length. Everyone was aware of it, of course, but it generally was not discussed as a basis for objection in itself; it was given as a reason to worry more about his views.<sup>76</sup> Perhaps some thought the Senate's role was only to examine whether Justice Thomas was

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73. See Stephen F. Smith, *The Rehnquist Court and Criminal Procedure*, 73 U. COLO. L. REV. 1337, 1358–60 (2002); Carol Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466, 2469 (1996).

74. A good example is furnished by the Nixon administration's nominations to the Court in 1971. There were two seats to fill. Nixon settled on Lewis Powell for one of them; Justice Powell was sixty-four years old. In a recorded conversation with Richard Moore, his special counsel, Nixon made the case for Justice Powell: he was "past President of the American Bar, a great scholar, writes for everything, and so forth and so on. He's everybody's first choice. He's from the South. And he's a hell of a guy, you know. We're only buying ten years from him." Said Moore: "I'd like to see you have more position than that." Nixon: "I know, but we buy that in order to get something else, [a young man like] Howard Baker." Baker was forty-five years old. He ended up being passed over in favor of Chief Justice Rehnquist, who was about the same age (he had just turned forty-seven). Dean made the case for Rehnquist to Nixon's attorney general, John Mitchell, by noting that "he gives the president [a] conservative who can sit on the Court for thirty years." JOHN DEAN, *THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT* 226–27 (2001).

75. A good example here is President Clinton's nomination of Justice Ginsburg. Her expected term was only about half as long as the expected term of the last Justice appointed before her, and she was three years older than Antonin Scalia, who had already spent seven years making his mark at the Court. All this went largely unremarked, at least publicly, at the time of her nomination, though a press account at the time suggested the decision to appoint a sixty-year-old nominee was a "silent message" that Clinton "was not seeking to use this nomination to control the Court well into the next century." See Linda Greenhouse, *The Ginsburg Hearings: An Absence of Suspense Is Welcomed*, N.Y. TIMES, July 25, 1993, § 4, at 3. So perhaps this was a case of Clinton showing the sort of restraint that Calabresi and his coauthors would admire.

76. See, e.g., *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the Senate Comm. on the Judiciary*, 102d Cong. 233 (1991) (statement of Erwin W. Griswold); *id.* at 874 (statement of the Alliance for Justice).

“within the mainstream,” with his age a personal detail left to the president’s discretion. Yet the expected term Justice Thomas was given was outside the mainstream in its length; an average term these days is roughly thirty years, so President Bush nominated Justice Thomas for about a term and a half. A reasonable objection could have taken two forms: the first to committing to this Justice for so long, the second to tying up a seat on the Court for so long and thus to setting a rate of institutional responsiveness that is too slow. Naturally the objections might have fallen flat. Sometimes all may be able to agree to a long term for a Justice with a clear ideology: a commitment of a seat on the Court to one point of view for two generations. But this should be a more considered and negotiated commitment than it was in Justice Thomas’s case. His age should have been considered a reasonable ground for strenuous objection regardless of his views.

This discussion bears on the question of life tenure because fixed terms would eliminate the issues just sketched: every Justice would be appointed for the same length of time. (But notice that the same questions still would arise if an age limit were imposed.) It might seem convenient to get rid of these variables, but my claim is that they are useful—or at least potentially useful, since they have yet to receive the attention they should. The point again is flexibility. Age limits allow negotiation over the lengths of Justices’ terms and trade-offs between that length and other qualities a nominee may bring to the job.

### *B. Pressure to Appoint the Young*

It sometimes has been suggested that life tenure creates too strong an incentive for presidents to choose young nominees.<sup>77</sup> Although the complaint has intuitive appeal at first, its logic and empirical basis need a closer look. It is easy to understand the claim that life terms *can* create an incentive for presidents to pick the youngest plausible nominees to the Court, at least compared to fixed terms. Presidents from different parties take turns making appointments, creating a natural prisoner’s dilemma: if I appoint older Justices while presidents from the other party appoint younger ones, I enlarge the influence of those other presidents at my expense; indeed, no matter what the next president of the other party does, I am better off appointing younger Justices—though we both would be better off appointing older, better ones if we could bind ourselves through limits on their terms.

A first point to grasp about this account, however, is that the incentive to make young appointments does not become greater as Justices

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77. Calabresi et al. say that “[g]iven the promise of life tenure for Supreme Court Justices, and the historical trend of an increase in the average length of life tenure, Presidents have tremendous incentives to consider younger, less-experienced candidates for Supreme Court vacancies.” Calabresi et al. *supra* note 1.

live longer. If all Justices die at the age of fifty, the value of appointing a Justice who is forty years old rather than forty-seven is great; if they all serve until eighty, the marginal importance of the choice is less important because the seven-year difference is a smaller fraction of their expected time on the Court. But apart from whether the incentives to make young appointments are growing or shrinking as the Justices live longer, it is true that whatever pressure does exist would be decreased by limited terms. Yet we still should ask how much pressure to pick young nominees now exists in fact. The average age of appointment over the past thirty years is the same as it had been during the previous 180 years: about fifty-three years old.<sup>78</sup> The only recent Justices younger than fifty when appointed were (now) Chief Justice Rehnquist, who was forty-six, and Justice Thomas, who was forty-three. Thomas's appointment might have been expected to provoke retaliatory nominations of young Justices next time a Democrat got the chance. It did not happen. The next appointment was made by President Clinton: Justice Ginsburg, who was sixty. Clinton's next appointment was Stephen Breyer, who was almost fifty-six.

Why have we not seen a race to the bottom? One reason is that presidents make decisions in the shadow of the confirmation process; repeated efforts to appoint forty-three-year-olds to the Supreme Court are likely to be met with public hostility because most people of that age have not accomplished enough to inspire confidence in their judgment. But probably the more important reason why presidents do not usually appoint the youngest plausible candidates they can find is that they lack incentives to do so. The prisoner's dilemma just sketched assumed that a president's goal is to maximize his long-run influence on the Court, but a president's actual goal may be to maximize his more immediate fortunes. Those fortunes will depend largely on the influence he is perceived to have on the fortunes of his constituencies; the insights of public choice theory have their application to the selection of judges as well as to the creation of legislation.<sup>79</sup> Both the president and the constituencies he worries about satisfying may have limited time horizons, applying a discount rate that makes the present value of changes on the Court twenty-five years away too small to matter. Thus Lyndon Johnson and his supporters felt they had better things to worry about than the shape of the Supreme Court in the 1990s; likewise Bill Clinton and the 2020s. The Republicans in power before Clinton—and, evidently, their constituencies—had a somewhat different view; they seemed to value youth more

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78. See Calabresi et al., *supra* note 1; Oliver, *supra* note 1, at 813. Since life expectancies are longer now than they were two hundred years ago, it is arguable that the average age of appointment has gotten lower in real terms: a fifty-three-year-old today is not as close to death as he used to be. In another sense, of course, there has been no change: a fifty-three-year-old has just as much experience now as he ever did.

79. See generally Elhauge, *supra* note 35 (discussing interest group theory and whether heightened judicial review should be used to check interest group driven legislation).

highly. This may be because they were galvanized by the abortion question and realized that if *Roe v. Wade* is to be overturned it will be a laborious process that requires a long-term strategy and great patience.

It might seem to follow from these arguments that presidents *should* race to the bottom, picking the youngest plausible nominees they can find. But then it equally follows that the president's opponents in the Senate should resist those attempts. The real implication simply is that we should see more attention to the matter. Whether nominees ought to be young or old, and thus have expected terms of twenty years or twice that, is a matter of fair debate, but there is no case for treating a question of such consequence as a side issue. It has more practical importance than most of the differences between nominees commonly discussed in the debates over them.

## VI. POLITICIZATION

### A. *The Tension Between Populism and Interpretive Theory*

It often is said that the process of confirming Justices has become too politicized. The hard part is figuring out what this claim means. Sometimes nominations provoke bitter combat—but only sometimes: the two most recent ones, those of Justices Ginsburg and Breyer, did not give rise to any savagery. Granted, the Democrats held a majority of seats in the Senate at the time, but both were confirmed without much protest from the Republicans in the minority,<sup>80</sup> and it seems unlikely that their hearings would have been much different if the Senate had been in Republican control. Nor did either lack a paper trail; both had been judges on the courts of appeals for well over a decade. The Democrats controlled the Senate during the confirmations of David Souter in 1991 and Anthony Kennedy in 1987, both of which were largely free from rancor, though of course the views of both nominees were probed skeptically during their hearings. So life tenure does not necessarily cause brutal contests over nominations.

What is true, of course, is that some other recent nominations have been hotly contested and that fear of such contests helped produce the tamer nominations just mentioned.<sup>81</sup> This is the heart of the matter: the proceedings turn ugly when presidents put forth nominees believed to have strong ideologies.<sup>82</sup> They probably would take such a turn if a Democrat made a very liberal appointment; it is hard to imagine Stephen Reinhardt trying to clear the U.S. Senate. But the recent hearings that in

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80. See Linda Greenhouse, *Plaudits Drown Out Critics as Senate Confirms Breyer*, N.Y. TIMES, July 30, 1994, § 1, at 6; Greenhouse, *supra* note 75.

81. See Greenhouse, *supra* note 75.

82. For discussion along similar lines, see generally David A. Strauss, *Whose Confirmation Mess?*, THE AM. PROSPECT 91, 96 (1994) (reviewing STEPHEN L. CARTER, *THE CONFIRMATION MESS* (1994)).

fact turned vicious involved Republican presidents trying to make very conservative appointments. The most conspicuous example is Robert Bork. Bork's difficulty, however, was not that he would be serving for life rather than for eighteen years; he was sixty years old, so he probably could not have been expected to stay on the Court for much more than eighteen years anyway. The trouble was that he held controversial views.<sup>83</sup> One can complain about the result if one thinks Bork would have made a good Justice, but it is hard to see why his defeat represents a failure of the nomination process if one believes (as opponents of life tenure generally do) that nominations provide an important chance for the public to have something to say about how the Court makes its decisions.

The challenge in complaining of politicization is to draw a line between legitimate opposition to nominees and illegitimate political attacks on them. The difficulty is grave for those advocates of fixed terms who are frustrated originalists. They think the Justices repeatedly have taken away policy-making authority that rightfully belongs to the people. From this they infer that the solution is to increase popular control over the Court, but the goals may not be compatible. Thus Professor Prakash tells us that his ideal Justice is Clarence Thomas, and he hopes to improve the Court's conformity with that ideal by making it more populist. But it is not at all clear that Justice Thomas could not have been confirmed if it had been known what sort of Justice he would become. Prakash wants to go further still, making Justices more easily removable for making bad decisions and also making it possible to reappoint them if they are evaluated favorably.<sup>84</sup> Again, he does not consider the possibility that the Justices he likes best might be among the first to go.

The difficulty faced by these authors is that, as noted earlier, the popular demand for originalism is weak.<sup>85</sup> But the problem runs deeper than a lack of demand. Anyone who proposes fixed terms while subscribing to originalism or some other interpretive theory has to decide what should give way when the value of public control over the Court conflicts with the value of their preferred philosophy. If one is committed first to the public's role in deciding how the Court should decide its cases, then one is disabled from making some favorite conservative criticisms of the Court—that it acts in a manner fundamentally illegitimate, undemocratic, tyrannical, etc., when it wanders away from the original understanding of the Constitution. If the public deliberately picks Justices who act this way they may be choosing regrettably, just as they may make regrettable choices in their presidents or congressmen, but the

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83. See ROBERT H. BORK, *THE TEMPTING OF AMERICA* 9–11 (1989); Elena Kagan, *Confirmation Messes, Old and New*, 62 U. CHI. L. REV. 919, 940–41 (1995).

84. Prakash, *supra* note 1, at 571–72 (subjecting Justices to the rigors of a reappointment process would make it “easier for the President or the Senate to repudiate those judges who might pursue political or ideological agendas”).

85. See RICHARD A. POSNER, *OVERCOMING LAW* 253–55 (1995).

deep criticisms of the Court as illegitimate do not work anymore. Of course it is possible to take a different view and say that originalism or any other theory is the important thing and that different ways of picking Justices are just a means of promoting that end. This order of operations permits its maker to offer those deep criticisms of the Court, but it limits the appeal of fixed terms if they are presented as ways of making the Court more responsive to the public.

*B. Politicization and Fixed Terms*

Let us look harder at why some nominations produce bitter debate. The stakes are high when a president puts forward a nominee likely to try to change the slower law in a way that much of the country does not want. It becomes worthwhile for those who do not like the nominee to inflict costs on him, on their opponents, and even on themselves to prevent him from being confirmed. If one wants to lower the heat associated with nominations, one can pick nominees who seem moderate and will not provoke aggressive efforts to derail them. Or one can be more unyielding and stand the heat. As an example of the latter approach we cannot do better than Professor Calabresi's advice to a conservative president:

How do we make sure that the Court is filled with Rehnquists, Scalias, and Thomases who follow the law rather than with Souters and Kennedys who either make it up or who waffle at critical junctures? . . .

The first thing the Reagan-Bush experience teaches us . . . is that a conservative President must at all costs keep nominating one pro-Rule of Law Justice or judge after another. If the Left has a majority in the Senate or if the Senate is closely divided or if nominees are smeared, we will have, and should expect, losses. The only solution is to keep coming back with more good nominees. As Reagan was once forced grimly to say, the Senate cannot defeat them all. And, that is true. In fact, many senators hate judicial confirmation fights and they may tend, having voted against a President, to be with him the next time even if the two nominees are not all that different.<sup>86</sup>

Very well, but no one who urges such a strategy should be heard to complain when its opponents resist with the same ferocity. The resulting process will be a negotiation, and negotiations of such a high-stakes character usually are unenjoyable for the participants and do not put them in an attractive light. Things are said that one regrets; relationships

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86. Steven G. Calabresi, *Advice to the Next Conservative President of the United States*, 24 HARV. J.L. & PUB. POL'Y 369, 377-78 (2001). Note an additional irony: Calabresi worries that life tenure gives presidents an incentive to worry too much about the youth of a nominee at the expense of other qualifications; yet the three Justices he offers as his model adherents to the "Rule of Law" also were the three youngest appointments of the modern era. *Id.*

are injured and reputations soiled; the impression that the process has become undignified and unpleasant—politicized—naturally takes hold. The unpleasantness becomes especially likely when either or both sides are committed to playing hardball, as Calabresi evidently is—an insistence on having one’s way, as he says it, “at all costs.”<sup>87</sup> This advice bears a resemblance to Boulwarism, the negotiating strategy in which one’s first offer also is the last offer and is not open to compromise.<sup>88</sup> It may be effective in some circumstances, but it is not known as a formula for pleasant bargaining and good feelings afterwards. Nor can it be surprising if the strategy is reciprocated by one’s opponents in the bottom half of the inning.

While we have not yet had a president who quite follows the plan Calabresi recommends, the spirit of his advice seems a more parsimonious explanation than life tenure for the bad feelings sometimes associated with nominations. I say this in a spirit of observation, not criticism, for Calabresi’s thinking is common to players of all sympathies and is easy to understand. Many of the contests over the slower law are zero-sum games of great importance. It is natural for everyone to respond by regarding their own positions as reasonable (identifying them with the rule of law, etc.) and badly in need of defense against the grasping partisans on the other side. Of course it is possible that this account complements rather than contradicts the case for limited terms; it may be that life tenure inflames the perceptions that lead to the hard results and that fixed terms would put both sides into a more giving humor. Yet it is hard to see why. There would be no evident reason for the advice we just saw Calabresi offer to change if the Justices served for eighteen years, nor any reason to think the best reply to such tactics would be different. There has been no shortage of polarizing debate over controversial recent nominees to other positions where they are expected to serve for no more than a few years.

Meanwhile there is reason to worry that fixed terms would make the unappealing features of the confirmation process worse. By attaching nominating chances to presidencies they would create more natural cycles of revenge of the kind suggested a moment ago. The effect *could* work the other way: knowing that more nominations will be coming in the near future, everyone would show restraint in the present; knowledge that the other player will have chances for revenge can help deter bad

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87. *See id.* at 377.

88. On Boulwarism generally, see ROBERT H. MNOOKIN ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 215 (2000); cf. Jonathan R. Cohen, *When People Are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 763 (2001) (“[O]ne problem with Boulwarism from an ethical viewpoint is the lack of voice it allows the other party in the bargaining process. Beginning the bargaining process by insisting upon and committing to a ‘take-it-or-leave-it’ offer allows the other party virtually no role in the dialogue.”).

behavior.<sup>89</sup> But games of this kind can go badly if distrust runs high and best play for each side depends on error-prone judgments about the good faith of the other. Each comes to think the other misbehaved first and needs a lesson; neither wants to seem a sucker who cooperates while the other side cheats; the players thus take turns outdoing one another in obstructionism.<sup>90</sup> We see this pattern now in nominations to the courts of appeals, and it could be that one reason we have not seen cycles quite like it in Supreme Court nominations, despite the occasional rancorous case, is that they do not arise frequently and predictably enough to provoke this structured sort of turn-taking.

A related objection to fixed terms is that they would facilitate the work of interest groups trying to influence the composition of the Court. If Justices served terms of eighteen years, one no longer would speak of the *possibility* that the winner of a presidential election might make appointments to the Court. Every winner would be guaranteed two of them. The stakes for the Court in every campaign thus would be higher than they currently are. Interest groups would see larger expected returns from pressuring candidates to make promises about how they would use their two nominations if elected, from condemning candidates who fail to do so or who say the wrong things, from putting pressure on those who say the right things to keep their promises, and so forth. As the expected returns on political pressure rise, so will investments in creating them. Fixed terms also would make it easier to coordinate pressures farther in advance. Today vacancies on the Court arise unpredictably. Suddenly a retirement is announced; there is an outburst of political jostling; usually a nominee is named a few weeks later and confirmed within a month or two. But with fixed terms everyone would know far ahead of time when the next vacancy will arrive and what seat will be involved. Campaigns to have it filled would begin far in advance, just as a new political campaign begins as soon as the prior one ends. Of course many groups already try to build reserves of pressure in advance of retirements on the chance they might pay off, but their labors often end up wasted when nobody retires. Fixed terms would eliminate that risk. Depriving pressure groups of a fixed target, as life tenure does, makes it a little harder for them to organize their efforts and concentrate their energies too pointedly.

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89. See generally ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984); ROBERT H. FRANK, *PASSIONS WITHIN REASON, THE STRATEGIC ROLE OF THE EMOTIONS* (1988); Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 222–27 (2002).

90. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 270–75 (1991) (discussing cycles of revenge provoked by misunderstood signals); Farnsworth, *supra* note 91, at 229.

## VII. THE DISTRIBUTION OF APPOINTMENTS AMONG PRESIDENTS

A. *Uneven Allocation and Its Consequences*

Probably the best argument for fixed terms is the one pressed hardest by Professor Oliver: they would spread nominations to the Court evenly among presidents. Reflect on the Rehnquist Court of the late 1990s and the consequences of the arbitrary way in which the selection of its members was distributed between Democratic and Republican presidents. From 1976–2000, the country spent twelve years under Republican presidents and twelve under Democrats. Yet in 2000, the Supreme Court consisted of seven Justices appointed by Republicans and two by Democrats.<sup>91</sup> Not all the Republican appointees were very conservative, but all those who turned out to be very conservative were Republican appointees, including the five who gave the later Rehnquist Court the victories for which it will be most remembered. If the appointments to that Court had been distributed more evenly—e.g., if four rather than two of them had been appointed by Democrats—hundreds of its cases might have come out differently. So the conservative outcomes reached by the Court in the 1990s were matters of luck: the fact that no Justices died or retired during the Carter presidency and that only two did during the Clinton years.<sup>92</sup> Whether the luck was good or bad will depend on one's priors, but either way it might be bothersome if one values a link between the orientations of the Justices and the views of the public expressed through their elected leadership. The root of the problem is that views about the slower law are accounted for sequentially: the major political parties take turns, however irregularly. Missing a turn or getting an extra one skews the Court toward whatever faction is favored by the glitch and so magnifies its power over the slower law out of proportion to its political desert. Fixed terms of eighteen years would address this by ensuring that every president makes two appointments.

The argument nevertheless is weaker than it seems. First, there are countervailing influences on the appointment process that help smooth out misallocations of chances to the two parties. There are more Republican appointees on the Court than there “should” be (measured by reference to Republican success in presidential elections), but perhaps

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91. During their twelve years in office, Presidents Reagan and Bush (the first) made five appointments. The Democratic presidents of the era, Carter and Clinton, also had a total of twelve years in office, but this resulted in only two appointments (none by Carter). The remaining two Justices were appointed before 1976 by Richard Nixon and Gerald Ford. See Oliver, *supra* note 1, at 810.

92. The appearance of distortion depends partly on the size of the time-slice considered. If one starts counting in 1968 and stops in 2004, the country turns out to have spent twenty-four years under Republican presidents and twelve under Democrats, making a 7-2 ratio on the Supreme Court at the end of the period less startling—off by one from the 6-3 ratio that the elections might have seemed to justify. But while distortions may be diluted with the passage of time, it can take a while. During the twentieth century, the United States spent fifty-two years under Republican presidents and forty-eight years under Democratic presidents; however, Republican presidents made thirty-three nominations, while Democrats made twenty-two.

fewer conservative Justices than there should be when measured by the same criterion. David Souter and John Stevens, both appointed by Republicans, often have cast the votes normally expected of Justices named by Democrats. It often is hard to predict with much precision how someone will behave on the Court; there is noise in the process that prevents appointments from being very accurate registers of political consensus. One implication is that the disparities created when one president makes more appointments than another are just another source of noise. But the more important point is that the Senate helps compensate for the lumpy way in which nominations are distributed to presidents. The presidents who appointed Justices Stevens and Souter wanted to avoid trouble in the Senate and so deliberately chose nominees who carried more ideological risk than the alternatives. The risks paid out badly. Pressure from the Senate thus helped prevent flukes in the timing of the Justices' retirements from causing a comparable shift in the balance of ideologies on the Court. Nobody in either Senate needed to have been thinking this way at the time. They served a useful purpose simply by providing friction against the president's preferences; it works as a hedge against the vicissitudes of election cycles and retirements from the Court. To make the practical point explicit, the idea that the Senate should not second-guess Supreme Court nominations on ideological grounds is not compatible with life tenure. Deference of that sort magnifies the effects of the uneven distribution of nominating chances between presidents.

*B. The Marginal Contribution of Fixed Terms to Political Equity*

Another question is how helpful fixed terms really would be in giving the Court a better political pedigree. This part of the argument for fixed terms supposes that the distribution of Supreme Court nominations ought to correspond in an intelligent way to the distribution of political will in the society at large. The premise makes enough sense, but promising two appointments to every president hardly would assure any such correspondence. Presidential elections are themselves lumpy, winner-take-all events. There is no guarantee that a political minority representing X percent of the population will carry X percent of elections. They may win none, and a large minority that repeatedly fails to win any presidential elections may not see its views represented at all on the Court. Meanwhile the narrow winner of a presidential election gets no fewer nominating chances than a winner by a landslide.

These sorts of anomalies are common features of our political system; there are various ways that fifty-one percent of some set of voters can wind up with 100% of the power. But there also are mechanisms in place to check and dilute those effects. If one wants ideological control over the Court tied in a satisfying way to the ideological composition of the polity, using checks is a sounder strategy than trying to make sure every president gets the same number of appointments. The obvious

check would be to shift more power in the nominating process to an institution that reflects a wider range of inputs: the Senate. We have seen that a strong role for the Senate helps mitigate the arbitrary assignment of nominations to presidents. Now we also can see that it helps tie the Court's membership to a source of political authority more satisfying than the presidency even if every president gets two appointments. The Senate has great shortcomings as a representative institution, of course, but at least both parties always are represented there at the same time and so create possibilities for debate and compromise missing if the choice is given to the president alone. Giving two appointments to every president will make only a small contribution to political equity if the Senate has a weak role; and if the Senate's role is strong, the distribution of appointments to presidents becomes less important in any event.

If a strong role for the Senate is salutary in this way, notice that it is likely to be reduced by giving the Justices fixed terms. The two appointments given to a president would likely be claimed as his own to spend as he sees fit. He earned them. No doubt many in the Senate and elsewhere would resist this way of thinking, but the case for deference to the president's choices undoubtedly would be strengthened relative to where it currently stands; for at present the Senate justly can resist a president's aggressive nominations on the ground that the chance to make them was delivered to him by luck. By weakening this argument fixed terms would enlarge the president's powers and worsen the distortions created by putting nominations into a single person's hands.

*C. Costs of Fixed Terms: Enlarging the Power of Two-Term Presidents; Dynamic Effects*

Another likely drawback of precisely allocating appointments to presidents would be the dynamic consequences: they might increase the Justices' sense of obligation to carry out the wishes of whoever appointed them. We find a danger here parallel to the one concerning the Senate. If everyone knows that two seats on the Court are a spoil the president won fair and square, those seats may be regarded as his to fill in a stronger sense than we currently see,<sup>93</sup> and his nominees may feel more pressure to carry out his agenda. They will know they owe their membership on the Court to a decision by the leader of a political party about how to spend his turn and that turns are given to the other party in regular fashion, not by luck. They will be Republican appointees or Democratic appointees in a more explicit sense than they are now. Some may

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93. See *supra* text accompanying note 55.

therefore view their own roles in a manner a little more political and a little less law-like.<sup>94</sup>

There are other reasons to think fixed terms would increase the political character of the Justices' work. Fixed terms resemble the arrangements in the legislative and executive branches of the government and so may cause Justices to think of themselves as political office-holders in a more traditional way than they now do. Moreover, some of the proposals for fixed terms are pitched expressly as efforts to make the Court more responsive to popular will. New Justices will be familiar with the rationale of such a plan if it is enacted; they will understand that they are serving fixed, limited terms precisely in order to keep the Court accountable to current political values. The implication is that the Justices are supposed to give effect to those values and to popular sentiment when they make their decisions—but this is just how we do not want them thinking about their jobs. Maybe it will be possible to drown out those messages by saying the opposite to nominees during their confirmation hearings, but maybe not. In this sense switching to fixed terms is worse than would have been their adoption in the first instance.

Against this it might be said that the Justices do function in a largely political capacity; why not acknowledge this side of their work frankly? Or instead it might be said that any enlargement of the Justices' sense of their political roles would probably be small and not worth fretting over. The reply to either claim is that the political element in the Court's work is not total and not fixed. The Justices negotiate all the time between their own preferences and the pressure exerted, sometimes weakly, by the legal materials in front of them. Often they do give effect to their policy preferences, but sometimes they seem to vote contrary to them; sometimes they appear to vote unanimously for results that a majority of them—perhaps all of them—dislike. These are fragile victories for law. We should hesitate before taking any measure that would increase even a little the Justices' sense that their charge is political.

The point can be generalized. The push for fixed terms is a classic case where efforts at careful distribution have unwanted effects on the size of the thing being distributed; in this case attempts to more fairly divide the influence over the political portion of the Court's work threaten to make the portion larger. The problem arises because the right way for the public to think about what the Court does often is the wrong way for the Justices to think about it. Many rules and customs governing the Court, including life tenure, are accommodations between those perspectives. Life tenure prevents anyone from knowing precisely how long a Justice will serve or how many nominations a president will make. The indeterminacies signal to the Justices that they are expected to act like

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94. Cf. Patricia M. Wald, *A Response to Tiller and Cross*, 99 COLUM. L. REV. 235, 253–58 (1999) (offering some related reservations about proposals to take account of appellate judges' party affiliations in assigning them to panels).

judges rather than politicians. They are the procedures one would expect if judging had nothing to do with politics; they are ostentatious displays of faith in nominees that we hope may have some self-fulfilling force. The faith often is betrayed, but it likely would be betrayed a little more often if the Justices regarded themselves more like conventional office-holders.

The difficulty is pervasive in debates over how the Court should be filled. Nobody directly asks nominees about their policy preferences despite the great usefulness the information would have in forecasting what they will do. Focusing on the nominee's own preferences would encourage him and others to think they are relevant and increase the influence he feels entitled to give to them in his work. So instead we ask about things we wish were important—interpretive philosophy and so forth. Privately the answers are treated as signals about a nominee's preferences for certain types of outcomes, but this all is *sotto voce*. We have to balance the wish to control the political dimension of the Court's work and the wish to minimize it; fixed terms would make progress toward the first goal, but probably at the expense of the second. Some of the recommendations in this article admittedly would affect the balance as well: arguing more about the age of a nominee, or licensing the Senate to take a larger role in the debates, might thicken the political atmosphere surrounding the Court. But these are informal strategies that can be tried and withdrawn by degrees. Amending the Constitution to create fixed terms would involve a far more dramatic commitment, the effects of which might well be worse and much harder to undo.

#### VIII. OTHER DYNAMIC EFFECTS: LIMITED TERMS AND HUMILITY

Professors McGinnis and Prakash, along with Judge Silberman, want limited terms for the sake of other dynamic effects they hope such terms will produce. Their theory is that once judges become Justices they gradually stop thinking of their job as being to decide cases; they style themselves more as statesmen and soon cannot resist declaring their policy preferences as constitutional law.<sup>95</sup> McGinnis thinks that the cure is to randomly rotate federal district and appellate judges onto the Supreme Court for perhaps a year apiece, not long enough for their good habits to be eroded by temptation.<sup>96</sup> Silberman would use terms of five years;<sup>97</sup> Prakash is less specific but also would like to see short terms of years, possibly followed by chances for reappointment.<sup>98</sup>

The first point to grasp in reply is that most of the hubris in Supreme Court opinions probably is attributable to sources other than life

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95. See McGinnis, *supra* note 1, at 542; Prakash, *supra* note 1, at 579.

96. See McGinnis, *supra* note 1, at 544.

97. See Silberman, *supra* note 2, at 687.

98. See Prakash, *supra* note 1, at 568.

tenure. It may be true, as McGinnis suggests, that leaving Justices on the Court for a long time increases their incentive to make rulings that enlarge the Court's power because they know they will be around to enjoy it.<sup>99</sup> Yet if this were quite how it worked one might expect young Justices to be the most aggressive and older ones to become more deferential as they have less prospect of using any powers they accumulate for themselves. No such pattern appears to exist. A more plausible conjecture—also unsubstantiated, though McGinnis claims it as his impression<sup>100</sup>—is that as some Justices spend years at the Court they start to enjoy a sense that the world revolves around their decisions and then make rulings that perpetuate the feeling. A more generous reading of the emboldening phenomenon, if it exists, is that only after handling several years' worth of cases does a Justice develop a strong sense of an area and feel comfortable suggesting something different—or that it takes a long time for Justices to really understand their role in the country's system of liberty. At any rate, an empirical case has yet to be made for the claim that the Justices lose their humility as years go by.<sup>101</sup>

Meanwhile there are reasons more conventional than life tenure why the Court's work differs from that produced by other courts. First, circuit judges write humbler opinions because they are bound by the Supreme Court's case law in a way that the Justices are not. Some regret this, wishing the Justices would treat their past cases as binding in the same way lower courts do. But some of the Court's best decisions have been those overturning prior cases seen to have been mistaken,<sup>102</sup> and on

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99. The general point was suggested by Yates in Brutus, ROBERT YATES, BRUTUS NO. XI (1788), in THE ANTI-FEDERALISTS, *supra* note 8, at 334–42; see also McGinnis, *supra* note 1, at 542.

100. See McGinnis, *supra* note 1, at 544 (“New Justices have typically behaved for their first few years much as they did as lower court judges. It seems to take a while to make the transition from a servant of the law to its master.”).

101. The anecdotes everyone tells seem heavily influenced by availability heuristics and confirmation biases. Some who worry about hubris think first of Justice Blackmun's opinion in *Callins v. Collins*, 510 U.S. 1141 (1994) (Blackmun, J., dissenting from the denial of certiorari), where he said that after many years of involvement in capital cases he no longer would “tinker with the machinery of death” and so would vote to reverse all future death sentences. *Id.* at 1145. It seems a classic case of a Justice doing in year twenty what he would not have done in year one. But the example may just be salient because Justice Blackmun came out and described himself as thinking in a way that conservatives detest. Meanwhile in *Dickerson v. United States*, 530 U.S. 428 (2000), Chief Justice Rehnquist wrote a majority opinion reaffirming *Miranda v. Arizona*, 384 U.S. 436 (1966), holding that no legislature can overrule it. *Dickerson*, 530 U.S. at 432. The case was decided in 2000, and perhaps Justice Rehnquist would not have said the same thing earlier in his tenure—in 1974, say, when he wrote an opinion in *Michigan v. Tucker*, 417 U.S. 433 (1974), saying that the “procedural safeguards” of *Miranda* “were not themselves rights protected by the Constitution . . .” *Id.* at 444. Maybe spending thirty years on the Court has caused Justice Rehnquist to be more diffident about reversing precedents. Of course there are other possible explanations of his vote (and counterexamples, too), but then there are other explanations of Justice Blackmun's behavior as well. And at the same time the Justice most disposed to aggressively overrule old decisions is Justice Thomas, who arrived not long ago. Yet maybe this is a result of his philosophy rather than his youth. It is all difficult to say. We just do not have enough systematic knowledge about whether additional years on the Court tend to make Justices more or less likely to show reverence to legal materials.

102. See, e.g., *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954) (in effect overturning the “separate but equal” doctrine in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

a more regular basis the Court adjusts its precedents to reflect the Justices' current sense of whether earlier cases were well-decided. It is useful for a court whose decisions bind all others to have these mechanisms to revise its own work rather than forever saddling the country with every idea that once attracted five votes.

Second, the Supreme Court's docket does not resemble the docket of a court of appeals, which in most situations must decide every case brought to it. Many are easy in the sense that judges with different ideologies quickly agree on how they should be resolved. The Supreme Court hears about one percent of the cases in which review is sought,<sup>103</sup> and they tend to involve questions to which the legal materials furnish no conclusive answer (that is *why* they are taken for review; they provoked disagreement below). So it should not be surprising that Supreme Court opinions are less likely than ordinary appellate opinions to confine themselves humbly to the legal materials involved. By assumption the materials are inconclusive. To put the point concretely, there is no way to resolve the legal questions about affirmative action or federalism or vouchers by just being a lawyer about it, pushing around the legal materials until an answer appears that commands a consensus among judges with different priors—and the Court hears a disproportionate number of cases of that sort. None of this would change if the Justices served shorter terms.

Turning to the likely effects of short terms on the Justices' behavior, some of them probably would find their new responsibilities disorienting. Under McGinnis's proposal a majority of the Court often would consist of trial judges taking breaks from their usual diet of discovery disputes, pretrial orders, motions in limine and the like. They might respond by nudging the case law forward in minimalist fashion, anxious to avoid embarrassing themselves and lacking the confidence to try more adventurous styles. Others might see their year on the Court as their big chance to make a lasting mark on the law and might therefore worry more about squandering it with meager rulings. The temptation to think this way might be increased, too, by the new dynamics within the institution. Judges with different politics would be thrown together randomly. Some who had not started out planning to make a mark might start to worry—maybe correctly—that their collegial adversaries for the year are not showing the same restraint and must be countered.

One reason McGinnis may be right that short terms would produce humble decisions is a point he does not mention: the cognitive environment created by long runs of years in which Justices serve together. There is some evidence that when judges serve alongside like-minded

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103. See Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 133 n.11 (2004).

colleagues, they tend toward more extreme views.<sup>104</sup> A related possibility is that once a bloc of Justices works together for some length of time, its members get emboldened by the encouragement and reassurances they draw from each other and end up more willing to make course-changing rulings in their fifth year than they were in their first. This conjecture—the momentum hypothesis—seems consistent with the turn toward federalism decisively launched by the Rehnquist Court only after its conservative core had been in place for four years, but of course one example is not a proof. This question, too, awaits empirical exploration. If the hypothesis is correct, then life tenure, by slowing the rate of turnover, makes it more likely that such blocs will form into engines of revolution. Maybe the way to keep the slower law slowest is to rotate Justices on and off the Court *quickly* so that they never develop enough familiarity with the place and with each other to feel too comfortable changing anything.

We have wandered into utterly speculative territory, and this helps explain the ambivalence that proposals like McGinnis's should cause. It is not possible to know which of these scenarios, or what others, would be the most frequent consequences of brief terms. McGinnis's proposal would staff the Court with ninety different Justices over a ten-year period, and so many people cannot be expected to react the same way when given vast temporary powers. One must also consider not only the most likely outcomes but the consequences of variation among them. McGinnis says that "the variation in legal ability that now exists within the federal judiciary is relatively small, perhaps smaller than what exists within the Supreme Court itself."<sup>105</sup> Not so. Every Supreme Court Justice has some fans, while there are many appellate and district judges nobody would want on the Court even for a little while. McGinnis's proposal would cause a majority of the Court to consist half the time of Justices who are below-average members of the federal judiciary. Fourteen percent of the time we would expect a majority to consist of Justices from the bottom third of the judiciary, or from any other given third—the left-most or right-most third, the least judicious third, the most ambitious third.

This is alarming in itself, and also because it would increase uncertainty about the Court's decisions. What the Court is going to say next year about affirmative action, abortion, federalism, capital punishment, or anything else would be harder to guess, since it would depend in part on how the ping pong balls drop when the next Justices are picked. It is useful for actors throughout the legal system, as well as the citizenry, to have a reasonably confident sense of what the Court's position on various subjects will be in the near future. Slow turnover creates that confidence. Rapid turnover would undercut it. A related bad result of the

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104. See generally Cass R. Sunstein et al., *Ideological Voting on Federal Courts of Appeals: A Preliminary Investigation*, 90 VA. L. REV. 301, 337 (2004).

105. See McGinnis, *supra* note 1, at 545.

proposals for rotation is that they would put even more pressure on the selection of lower court judges. They all might have the chance to spend a year on the Supreme Court. Their initial appointments to the bench would be the only chance to screen them and minimize the variation just described.<sup>106</sup>

### IX. THE QUESTION OF AGE LIMITS

We saw at the start of the article that life tenure can be broken down into the more specific consequences it produces: terms of varying length, terms of uncertain length, control by the Justices over their time of departure, and so on.<sup>107</sup> Limited terms would change most of those consequences; age limits would change just a few of them. The issues considered so far in this article—politicization of the appointments process, for example, or the distribution of nominating chances among presidents—seem unlikely to be much affected by putting age limits on the Justices, though it is true that age limits would have the drawback of making retirements predictable and thus making business easier for pressure groups. But we have postponed until now consideration of some other matters that would be affected by both age limits and limited terms: the problems of mental decrepitude and strategic retirement.

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106. McGinnis's most refreshing claim is that life tenure causes the Justices to live out their days in Washington, D.C., "one of the world's most artificial cities—a locale where the principal business is minding other people's business." *Id.* at 543. Residency in Washington, D.C. tends to infect the Justices with "nationalizing tendencies," he says, and to reduce their respect for decentralized ordering in general and the rights of the states in particular. *Id.* The accuracy of the latter claim is hard to verify; there are plenty of Justices whose ardor for decentralization seems unimpaired by their years on the Court. But long years in Washington, D.C. may well have other bad consequences. It is an insular place where status is distributed according to power, and people are identified by their ideologies. Maybe the resulting atmosphere does subtly encourage the Justices to make decisions that enlarge their role in the nation's affairs.

But even if this description of the city's effects is true and unappealing, there may be simpler ways to fix it than by eliminating life tenure. The site of the Court is not fixed in the Constitution and thus can be changed by statute. See Steven G. Calabresi, *Relimiting Federal Judicial Congressional Power: Should Congress Play a Role?*, 13 J.L. & POL. REV. 627, 636 (1997) (suggesting that the Supreme Court be moved out of Washington, D.C.). Perhaps it might be moved to Buffalo or Cleveland or rotated between other similar cities every few years to better expose the Justices to the country's cultural diversity and immerse them in environments where the citizenry is not so preoccupied with the accumulation of power. Yet this could make matters worse, for Justices assigned to dull towns might be still more inclined to make noisy rulings as a protest against their forced obscurity. The whole idea of geographic manipulation of the Court, though interesting and unjustly neglected, runs aground on these kinds of uncertainties. It is too hard to say what the effects would be. Such moves also would open the door to geographical assignments with a punitive character, as indeed those just described might be regarded, raising nice questions under Article III's prohibition on decreases in judicial compensation. The Justices should not have to worry that if they make rulings Congress dislikes, they risk banishment to remote and disagreeable outposts.

107. See *supra* Part I.

*A. Mental Decrepitude*

Life tenure creates a risk that Justices will stay on the job after their powers of judgment have deserted them. Professor Garrow's fine study found eleven such cases during the twentieth century and five since 1970;<sup>108</sup> he makes convincing claims that some Justices have stayed on the Court despite slipping below any reasonable threshold of competence one might propose for them.<sup>109</sup> Garrow makes an impressive prima facie case for age limits, but there are some arguments against them, bad and good. Let us consider the bad first.

When asked about the possibility of limited terms upon his retirement in 1981, Justice Potter Stewart said that he "would not be against consideration of such an amendment—if it applied across the board to the other branches, too."<sup>110</sup> Stewart's position has superficial appeal. Voters have shown themselves comfortable electing presidents and senators who have shown signs of decrepitude or were at risk of it, perhaps because those men were thought to have attractive values and ideas that could be carried out by younger and more energetic aides. The same might be said for old Justices, who likewise may have valuable ideas and law clerks to help with the details. But whereas presidents and legislators are subject to periodic public evaluation and reelection, the near total invisibility of the Justices' professional lives makes their decline far less visible to the public, and infirm Justices cannot be removed except through an impeachment process too cumbersome to be practically useful. The checks against the risk of decrepitude in the executive and legislative branches thus are not present in the judiciary, and attempts like Stewart's to link the cases are not well taken.

Another argument sometimes heard against age limits is that experience is valuable in a judge; an age limit would have deprived us of more than ten years of Justice Holmes's career on the Court, many good years from Justice Stevens, and so forth.<sup>111</sup> To evaluate this claim requires us to balance the benefits of those years of service against the costs of carrying the occasional Justice who has slipped. From this perspective life tenure seems a bad bargain. It is difficult to name a Justice who did his most distinguished work in his eighties or afterwards.<sup>112</sup> True, an age limit would cause great Justices to have shorter careers, but by itself this is a red herring. When a Justice leaves the Court with good years remaining he does not leave behind an empty seat. He is replaced

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108. See generally Garrow, *supra* note 45 (examining the history of Supreme Court Justices who sat on the bench while others had doubts of their mental capacity).

109. See *id.* at 1052–56, 1072–80 (discussing Justices Douglas and Marshall).

110. Linda Greenhouse, *Justice Stewart on His Retirement: 'Better to Go Too Soon,'* N.Y. TIMES, June 20, 1981, at 9.

111. For a representative illustration of this claim, see Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672, 679–80 (1989).

112. For more discussion, see Powe, *Go Geezers Go*, *supra* note 1, at 1235–36.

by another Justice. The replacement may be less able or less ideologically attractive than the departing Justice, but it is equally likely that he will be *more* able or ideological attractive. If you force someone out at seventy-five, it may be Holmes; or it may be your least favorite Justice (assuming that is not Holmes), with Holmes waiting to replace him and losing valuable potential years of service in the meantime while he waits his turn. So it seems unlikely that the Court suffers even a *prima facie* loss of quality when a replacement occurs. But it is undeniable that the Court suffers an expected loss in quality (a loss on average, though not in every case) when it allows Justices to stay for as long as they like, since some of them will become decrepit.

Judges have no moral entitlement to hold their jobs without age restrictions. No one, regardless of desert, can serve in Congress before the age of twenty-five; no one younger than thirty-five can become president.<sup>113</sup> There should be no ethical objection to a limit at the old end of the spectrum if we conclude that the expected cost to the public of retaining a Justice too long is higher than the cost of getting rid of one too early. Where feasible, it would be better to make individual measurements of ability rather than relying on generalizations of that sort; this is the point of the federal age discrimination law.<sup>114</sup> Such a policy may make sense in settings where performance readily can be assessed; it makes no sense on the Court because, again, the public is in no position to monitor the decline of the Justices' abilities. Justices could not be subjected to annual mental examinations to assess their competence without discomfort and humiliation, particularly when the results are negative. In this sense an impersonal rule setting an age limit is a favor to old Justices, as it ushers them off the stage with dignity and without implied commentary on their fitness to continue. And in any event inspections would have to be limited to the most minimal questions of competence, which sets the bar too low.

There remain some respectable arguments against age limits. The first is that the problem of decrepitude is less serious than it sounds. Garrow believes that Justices have become mentally decrepit eleven times since 1900, and in no case did the problem last more than a year or two.<sup>115</sup> Thus, of the 900 man-years of service provided by Supreme Court Justices since the start of the twentieth century, perhaps ten or twenty of those years—between one and two percent of them—were tainted by serious mental deterioration. When it did occur, it was mitigated in two ways. First, its impact was diluted by the presence of the eight other Justices; while a decrepit Justice may serve as a swing vote, he generally cannot do anything significant unless four of his colleagues go along with

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113. U.S. CONST. art. I, § 2, cl. 2, § 3, cl. 3; U.S. CONST. art. II, § 1, cl. 5.

114. 29 U.S.C. § 621 (2000) ("It is therefore the purpose of this [Act] to promote employment of older persons based on their ability rather than age . . .").

115. See Garrow, *supra* note 45, at 1085.

him. Second, the onset of mental infirmity causes the Justice's responsibilities to devolve to his law clerks, who generally can keep a chambers running without a drop-off in quality remotely commensurate with the Justice's drop-off in functionality. This may sound appalling, and of course there are good reasons not to want it to occur, but as a practical matter the devolution can help control—it undoubtedly *has* helped control—the consequences of decrepitude until the Justice leaves the Court. Thurgood Marshall may have stayed on the Court for a period of time when he was not fully engaged in the work of his chambers,<sup>116</sup> yet it is difficult for outsiders to detect much difference (I myself am not aware of any difference) between the opinions bearing his name from this period and the ones that issued from his chambers ten or twenty years earlier. The implications of this seamlessness may be troubling in their own right, but that is a question for another day.<sup>117</sup> The point for now is that we should pause before trading away the advantages of life tenure to address a problem that sounds bad but seems to have been minor as a practical matter.

Another difficulty in departing from life tenure involves the question of outplacement. Most members of the Supreme Court are content to make the job of Justice the last one they hold—so long as they can hold it for as long as they like.<sup>118</sup> But any regime other than life tenure will push some Justices out of office while they are still lucid and thus create a risk that they will use their time at the Court to angle for attractive situations afterwards. It need not be a question of bad faith; the greater hazard is a subtle bias reminding its holder that letting down one's friends now can have disappointing professional consequences later. The problem is especially important for proposals to give the Justices fixed terms, since the result often may be to produce ex-Justices still in the prime of their careers.

Some critics of life tenure believe the outplacement problem can be solved by making service on the Supreme Court a temporary form of work followed by life service on a court of appeals.<sup>119</sup> But the critics err in taking for granted that a Justice would accept such a designation. Life tenure is an offer, not a sentence, and perhaps not all Justices will want to become circuit judges any more than former presidents want to become vice-presidents. Those who do become judges would find that they are served a duller diet of cases than they are accustomed to seeing, that

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116. See *id.* at 1071–80.

117. Professors Atkinson and Powe suggest limiting the role of law clerks or limiting each Justice to two law clerks apiece, which they think would tend to force them off the bench if their capabilities decline. See DAVID N. ATKINSON, *LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 178–79* (1999); Powe, *Go Geezers Go*, *supra* note 1, at 1238–40. The idea has much to recommend it, but it involves some considerable risk: it makes the costs greater if a Justice ought to leave on account of decline but will not do so.

118. The last significant exception was Arthur Goldberg, who left the Court in 1965 to become ambassador to the United Nations. See Oliver, *supra* note 1, at 818–19.

119. See Calabresi et al., *supra* note 1; Oliver, *supra* note 1, at 831–32.

they are more constrained in what they can say about them, and that the world is less interested in their pronouncements.<sup>120</sup> Some might be comfortable with this; others may find more intriguing opportunities elsewhere. Apart from the remunerative lure of affiliation with firms,<sup>121</sup> there would be the chance to pursue interesting positions in public service: cabinet posts, ambassadorships, and so on, the prospects for which would depend on the Justice's ability to stay well-liked by the party in power.<sup>122</sup> (The advocates of these proposals also overlook a nagging implication of them: a Justice would be limited to eighteen years partly out of fear of mental decrepitude, but then would be assigned to a court of appeals as if mental decrepitude there were more tolerable. In fact it is more tolerable in a circuit judge, but this is not a message the legal system should want to send.)

The average Justice may be affected by none of these possibilities, succumbing neither to dementia nor to the temptations of career planning regardless of whether any new proposals are enacted. Both risks would exist at the margin, like most of the others discussed in this article. Whatever the severity of the risks, however, notice that they are stronger objections to limited terms than to age limits. A Justice at the end of an eighteen-year term may still be in his sixties and thus have significant professional prospects—better prospects, at any rate, than would tempt a Justice who knows he will be forced out at seventy-five. At the same time, another Justice appointed later in life to an eighteen-year term may well serve *past* age seventy-five, making limited terms also less reliable than age limits as measures to reduce the risk of decrepitude.

### B. Strategic Retirement

A most bothersome feature of life tenure is that the Justices—or at least those who retire before death, which includes most of them—decide for themselves when to leave the Court and thus determine who will choose their replacements. Everyone suspects that some Justices have taken advantage of this by trying to retire when they can be replaced by a president of their preferred party. Most of the suspicions are founded in

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120. Retired Supreme Court Justices have the option of sitting by designation on courts of appeals; they do so only rarely. See 28 U.S.C. § 294(a) (2000).

121. There remains the question of the income the Justice would be paid upon demotion. Currently, when a Supreme Court Justice retires he receives an annuity, payable for rest of his life, equal to the salary he was earning when he stepped down. See 28 U.S.C. § 371 (2000). His designation to the court of appeals presumably could not result in a diminished salary without violating the Compensation Clause of Article III. Presumably he would continue to draw down a Justice's salary, though whether he would be eligible for raises is a detail Calabresi et al. do not reach. Perhaps this problem is avoided if he first is appointed to the court of appeals and *then* designated to the Supreme Court, where he could continue to earn the salary of an appellate judge.

122. As noted a moment ago, Arthur Goldberg left the Court to become an ambassador; one of the arguments President Johnson made to entice Goldberg to do so was that Goldberg might improve his chances of becoming the first Jewish vice-president. See REACHING FOR GLORY: LYNDON JOHNSON'S SECRET WHITE HOUSE TAPES 1964–1965, at 395 (Michael R. Beschloss ed., 2002).

conjecture, but in some cases the worries seem supported by fairly reliable reporting,<sup>123</sup> and Chief Justice Rehnquist has said publicly that Justices have a “slight preference” for leaving under a president of their own party.<sup>124</sup> There also is some statistical evidence suggesting that strategic retirements occur.<sup>125</sup>

All this seems a scandal. The main check on the Court is retirement and replacement. A Justice tampers with the separation of powers in a profound sense by deliberately manipulating this mechanism. Suppose Smithers is appointed to the Court by a Republican president at the age of fifty-four, and then at seventy-four he starts contemplating retirement on account of health problems. He accelerates his retirement because a Republican president is in office, and he is replaced on the Court by an ideological twin who serves for thirty more years. Smithers thus has kept his seat in his party’s hands for fifty years when the original commitment of the seat to him was made for an expected period of about half that length. If this is not enough to support the objection to strategic retirement, imagine it occurring explicitly: a Justice announces his retirement and says he is leaving now to ensure that the current president will have the chance to replace him. This would not go over well, and not only because it would be tactless. The Justices are not supposed to pick their successors and should not do silently what they rightly would be condemned for doing publicly. Yet life tenure invites this sort of strategic behavior, and it no doubt sometimes occurs.

All one can say in defense of this result is that if everyone knows that Justices retire strategically, the point then gets built into the confirmation apparatus. It is just a kicker attached to every appointment: a Justice may double his party’s control over his seat by retiring carefully, and everyone can take this into account when considering a nomination in the first place. Yet even if strategic retirement is expected, it still is objectionable because it magnifies the effects of political luck. If three Justices die or are forced to retire for health reasons in the same three-year span, a single president serving one term may replace them all. That is a stroke of good fortune for his party, but the luck will have a chance to wash out when those Justices leave the Court if they are about as likely to be replaced by a president of the other party as they are to be replaced by one of their own. Strategic retirement prevents this corrective mechanism from working, turning a party’s happenstance thirty-year claim to a seat at the Court—a life interest—into a sixty- or ninety-year lease on it.

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123. See Calabresi et al., *supra* note 1; Oliver, *supra* note 1, at 805–06.

124. Tony Mauro, *Speculation Swirls About Rehnquist Retirement*, law.com, at <http://www.law.com/jsp/article.jsp?id=1032128677939> (Oct. 7, 2002).

125. See Timothy M. Hagel, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25, 30–39 (1993).

Here as in the case of mental decrepitude, however, it is not clear that the problem of strategic retirement is in fact very serious. The plausible window of retirement for a Justice tends to be short enough to make such decisions hard to carry out. Some have supposed that William Douglas, Thurgood Marshall, or William Brennan tried to hold out in hopes of being replaced by a Democrat;<sup>126</sup> if so, they failed. Meanwhile other Justices seem to enjoy their positions enough to make strategic retirement a low priority. They leave no sooner than they must. The net result during the twentieth century was that a seat on the Court rarely stayed in the hands of the same party more than twice in a row.<sup>127</sup> The most prominent counterexample is the seat now held by Justice Souter, which from 1914 until 1956 was held by a series of four Justices named by Democrats; but three of them (Byrnes, Rutledge, and Minton) served brief terms.<sup>128</sup> Democrats likewise filled the seat now occupied by Justice Thomas three times in a row from 1940 until 1991.<sup>129</sup> If we reach back to the nineteenth century we find a few other such examples,<sup>130</sup> but on the whole it does not appear that monopolization of a seat by a party, whether by strategic retirement or by chance, has yet been a significant practical problem. It may become more frequent as terms are extended by the Justices' increased longevity.

It seems likely in any event that most problems of strategic retirement can be met with age limits without need for fixed terms. Notice that there are two kinds of strategic retirement: Justices who hang on longer than they otherwise would while waiting for a friendly president to take office, and Justices who step down earlier than they otherwise would to make sure the current president names their replacements. But against the latter possibility there is a natural check. Justices do not want to leave their jobs too early; they like their positions, and the cost to them of giving up their power and prestige while they still are vigorous helps offset the benefit of knowing their replacements will share their ideologies. Thus the problem of strategic retirement more often appears to take the other form: Justices waiting rather than rushing to retire. In the case of the Justice who waits there is not much check on temptation; the costs to him are not very high if he decides to hang on in hopes that a like-minded president will arrive to rescue his seat. If the elderly Smithers goes this route, he can delegate most of his work to his law clerks while continuing to enjoy the pleasures of his rank. This analysis sug-

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126. DiTullo & Schochet, *supra* note 49, at 1108.

127. HENRY J. ABRAHAM, JUSTICES AND PRESIDENTS: A POLITICAL HISTORY OF APPOINTMENTS TO THE SUPREME COURT 418–19 (3d ed. 1992).

128. *Id.*

129. *Id.*

130. From 1870–1939, the seat now held by Justice Thomas was filled by Republican presidents (four appointments), as was the seat now held by Justice Stevens from 1862–1914 (three appointments), the seat now held by Justice Ginsburg from 1862–1916 (four appointments), the seat now held by Justice O'Connor from 1862–1945 (five appointments—one of them brief), and the seat now held by Justice Scalia from 1863–1941 (three appointments). *Id.*

gests that an age limit of seventy-five probably would cure most Justices of the temptation to retire strategically. It would force them out while the benefits they derive from their jobs are great enough to discourage them from leaving voluntarily any sooner.

An age limit would relieve the problem of strategic retirement in another way as well. There currently is no default assumption about when Justices should leave the Court; they are expected to retire when they feel like retiring, which could be at sixty-five, seventy-five, or eighty-five. But of course the Justices often may be unsure whether they quite feel like leaving. With the decision about when to go unguided by any external criteria, it no doubt is hard for them *not* to think about who their replacements will be when wondering whether to stay or go. They give their professional lives to lawmaking and fight for years over issues that naturally become important to them; the thought that retiring at the wrong moment could cause their work to be undone must be hard to avoid. Resistance would be easier if there were an objective benchmark suggesting the right time to leave. An age limit of seventy-five would provide such a marker—a focal point.<sup>131</sup> The natural thing would be for Justices to serve until seventy-five if they can; for a Justice in good health to voluntarily step aside at seventy-three under a friendly president would look bad, and the fear of tainting one's legacy by that hint of corruption would discourage strategic behavior. The legal academy can help enforce the norm by heaping opprobrium on whoever defies it.

At the same time it must be said that age limits probably would increase the tendency of presidents to put young judges on the Court. The easy point is that an age limit of seventy-five would give Justices shorter terms than they now are expected to serve (if appointed at the same age); making younger appointments thus creates larger marginal benefits for the president, since each year at the start of a term of service adds a greater share to the whole. But an age limit also might affect thinking about nominees' youth in other ways. At present older nominees still can be attractive because they *might* serve to a very old age and give their nominating president a good return on his decision. That possibility is eliminated if everyone knows a Justice is finished at seventy-five. Much of this likely change in appeal is the result of an illusion. Every Justice already has a life expectancy from which an expected term length can be deduced in the way discussed earlier.<sup>132</sup> The temptation to pick young nominees should not be affected by making their expected terms firm rather than probabilistic—but it probably would be, because deadlines are easier to appreciate than odds. In other words, an age limit of eighty likely would produce slightly younger nominations even in a regime where the average Justice already leaves the Court at eighty. But

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131. See THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 57 (1960).

132. See *supra* Part V.A.

even without the conjecture, it is clear that age limits would improve the payoff of making younger nominations and thus produce more of them.

#### X. CONCLUSION: THE STAKES OF THE DEBATE

This article has attempted a pragmatic evaluation of life tenure and proposals to change it. The difficulty is that most claims about the consequences of life tenure and fixed terms are speculative. Terms of eighteen years would cause more frequent turnover than we now see; this may or may not have perceptible effects on the Court's output. Fixed terms might decrease the intensity of the politics that characterize the confirmation process, or might make it worse. They would even out the chances for presidents to make nominations, a good thing, but they might cause Justices to feel more responsibility to the parties who chose them. They would reduce the risks of strategic retirement and mental decrepitude, but then so would age limits; and at the same time it is not clear that either problem is great as a practical matter. These all are empirical questions, and the discussion here has shown that there are two plausible sides to most of them. The resulting uncertainties make it hard to conclude that any of these approaches is likely to produce noticeably better results than the others.

The uncertainties have pragmatic implications of their own. There is much to be said for leaving the Constitution alone unless it is clear that revising it would create net benefits. The question is not whether life tenure would make sense for another country writing a new constitution. The question is whether it makes sense for this country to switch away from it. The two questions are different because amending the Constitution is costly. Our other institutions have accustomed themselves to the Court the way it is and have made compensations; the costs of readjusting to a new order, and the risk that it will be worse than the old, are worth incurring only if the expected gains are large. This is not at all obvious—in fact it is doubtful—in the case of fixed terms. And switching to fixed terms would have a different political meaning and so might have different consequences than adopting them from scratch, as considered earlier. In short, life tenure has costs that we have learned to live with, and we ought to hesitate long before switching to some other proposal that makes such conjectural claims for improvement and that is likely to be irrevocable as a practical matter.

One hears occasional suggestions that fixed terms might be adopted by statute, with appellate judges promoted for fixed tours of duty at the Supreme Court while keeping their life tenure on the courts below (and thus satisfying the strictures of Article III on one possible reading of it). It might seem that this approach would avoid the costs of amendment just mentioned and have the further advantage of being revocable, but it likely would create even greater trouble of its own. Once Congress can change the lengths of the Justices' terms (so long as they still have life

tenure on *some* federal court), the door is open for great mischief; a later Congress antagonized by the Court could reduce the Justices' terms by much more—or merely threaten to do so. Various arguments might be made to distinguish these last cases from the sturdy eighteen-year terms that no doubt would serve as the entering wedge for a statutory proposal, or the dangers just mentioned might simply be dismissed as unlikely to arise. The comfort furnished by such reassurances is weak. The separation and balance of federal powers is best preserved by clear rules that can be counted upon to hold fast under the heat of resentment. This isn't the place for a more extended discussion of the pros and cons of proceeding by statute; suffice it to say, however, that the dangers of moving to fixed terms in that fashion seem more likely to be worrisome than the costs of getting there by amendment.

At first this search for a clear preponderance of costs over benefits might seem to load the dice, since sometimes the proponents of fixed terms state their case more in terms of principle than of consequences. Thus Professor Prakash writes as follows, mixing metaphors with gusto:

Notwithstanding pragmatism's powerful pull, my view is that we should not tolerate an aristocratic life tenure. . . . Monarchy should not be endured merely because the king chooses to consult polls from time to time. Nor should we welcome a theocracy merely because its clerics seem especially solicitous of the public. Regardless of Americans' longstanding love affair with the courts, the principle that the people rule in America is too important to continue to compromise.<sup>133</sup>

But as this article has argued, it is not a case of aristocracy or monarchy or theocracy—it may just be self-skepticism—if the people assign a share of lawmaking authority to officials who can be replaced only slowly. Some assignment of this sort is indeed inevitable in a regime that permits judicial decisions to trump those of legislatures and that does not subject the judges who make those decisions to the sorts of political controls applied to ordinary lawmakers. The advocates of term limits accept these broad constraints; and so long as they do, the question of term lengths and the rate of turnover at the Court is a matter of degree that cannot be settled by general appeals to democracy. It is a question of consequences, and in those terms the case against life tenure is lukewarm.

Costly measures are worthwhile to address problems that are clear and serious. The benefits of an age limit are fairly clear and there are few costs on the other side. It is true that age limits would make it easy to predict the day of departure for most Justices many years in advance, thus facilitating the coordination of political pressures on the process. And an age limit probably would increase the temptation to appoint young Justices. But these costs may be worth incurring to discourage the risks of strategic retirement and mental decrepitude, such as they are.

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133. See Prakash, *supra* note 1, at 583–84.

Age limits also preserve some flexibility in fashioning the expected lengths of the Justices' terms while avoiding some of the drawbacks of fixed terms—the explicit assignment of appointments to presidents and other features that might increase the justices' sense that their duties are political. The case for age limits deserves serious consideration.

Meanwhile we already have mechanisms in place to permit a number of reforms without constitutional amendment if we want to make them. Life tenure amounts to an inexact term limit; it can be used to set approximate term lengths of whatever size the people care to demand. If they want to accelerate their rate of control over the Court, they can insist that Justices be appointed at older ages. If they are troubled by the uneven distribution of appointments to presidents, as probably they should be, they can call for a more active role for the Senate in the confirmation process. These suggestions, along with some others this article has made, would require us to think about the process of picking Justices in unfamiliar ways; making them more familiar has been a primary purpose of this exercise, and a more important and practical goal than throwing cold water on the arguments for fixed terms. For regardless of the strength of those arguments, an amendment to the Constitution to eliminate life tenure is unlikely to be made anytime soon, and in the meantime we have a Court to fill. We should consider more conscious uses of the modest but versatile tools at hand.

