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19

RESOLVED, the terms of Supreme Court justices should be limited to eighteen years

PRO: David Karol

CON: Ward Farnsworth

Among the "repeated injuries and usurpations" by King George III detailed in the Declaration of Independence was the complaint that "he has made Judges dependent on his Will alone, for the tenure of their offices." In doing so, the rebellious colonists believed, the king was violating a fundamental principle of English law and liberty, as laid down in the Act of Settlement of 1701. In previous centuries, judges served at the pleasure of the king, and when the king died the judges' terms ended. One of the achievements of the Glorious Revolution of 1688 was that judges now served during good behavior and could be removed only if they were convicted in regular judicial proceedings.

Many of the state constitutions drafted in the immediate aftermath of the Declaration included a provision that judges would, in the words of Virginia's constitution of 1776, "continue in office during good behavior." At the Constitutional Convention in 1787, there was much debate about who should appoint federal judges. Some thought they should be selected by the legislature, and others preferred that they be appointed by the executive, but everyone agreed that judges should serve "during good behavior." In *Federalist* No. 78, Alexander Hamilton stressed that the "good behavior" provision of Article III, Section 1 ("The Judges, both of supreme and inferior Courts, shall hold their Offices during good Behavior") was among the least objectionable and most important parts of the Constitution. Having judges serve during good behavior, Hamilton argued, was essential to preserve the independence and integrity of "the least dangerous" branch.

Legal scholars disagree, however, about what the framers meant by "good behavior." According to many scholars, the clause means that the only way that judges can be removed is through impeachment, which is authorized by Article II, Section 4: "The President, Vice President, and all other civil Officers of the United States shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other High Crimes and Misdemeanors." Of the seventeen federal officers who have been impeached by the House of Representatives (seven of whom were convicted by the Senate), ten were federal judges, including, in 1805, Supreme Court Justice Samuel Chase. A few scholars argue, in contrast, that the framers of the Constitution intended that judges could be removed without being impeached so long as due process was followed.

Whatever the framers' original intent, it is clear that today good behavior is widely construed to mean that federal judges may serve for life so long as they do not commit an impeachable offense. The most important question is not what the framers intended but rather whether the framers' handiwork meets the needs of the twenty-first century. David Karol answers this question in the negative. He argues that the framers were wrong to think that life terms—as opposed to fixed terms of a specified length—were essential to judicial independence and strength. Ward Farnsworth rejects that argument. The framers, he says, got it right: Life tenure makes not only for a more robust, independent judiciary but also for a more stable legal system.

PRO: David Karol

It is time for a constitutional amendment that would establish an eighteen-year nonrenewable term for Supreme Court justices. The Supreme Court today has far more power than the founders ever anticipated, and justices serve far longer than the founders ever could have imagined. In its first seven decades the Court struck down federal laws only twice; today the Court routinely strikes down federal statutes. Not only does the Court have a larger impact on society today, but also individual justices have much longer careers. From 1789 to 1970, the average length of service for a Supreme Court justice was about fifteen years. Since 1970, the average has been well over twenty-five years. Chief Justice William Rehnquist died in office in 2005 after having served more than thirty-three years on the Court. Justice Scalia served more than twenty-nine years before dying in office in 2016.¹

The Court's growing power and the increasing length of terms are two of the most commonly raised objections against life tenure. In this essay, I discuss four additional reasons why eighteen-year terms are superior to life tenure. First, eighteen-year terms fix the problem of the huge and random disparities in the number of appointments to the Supreme Court that presidents make. Second, they eliminate the possibility of "strategic retirement." Third, they reduce the risk that justices will continue to serve despite diminished capacities. Fourth, they check the tendency of justices to become out of touch with society. In addition, viewed from a comparative perspective, the eighteen-year term is not a radical or unconventional idea; indeed, it is life tenure for high court justices that is the outlier among the world's democracies as well as among state supreme courts in the United States.

HOW THE EIGHTEEN-YEAR TERM WOULD WORK

Under the proposed reform, each current justice would be assigned a term of from two to sixteen years in reverse order of seniority, so that the most senior justice's term would expire first, followed by the next most senior, and so on. At the expiration of these shortened terms each justice would be replaced by a new appointee serving an eighteen-year term. Under this new system, one justice would ordinarily retire every two years, creating two vacancies in each presidential term. If a justice were to leave office before his or her term expired, the next appointee would be appointed to a shortened term. In this way, deaths and midterm retirements would not permanently disrupt the schedule of regular turnover on the Court.

The amendment creating the eighteen-year term could be written to take effect some years after ratification to minimize the immediate political implications of the change.² The amendment could also stipulate that retired justices would be ineligible to hold federal or state office, so as to remove any possibility that sitting justices would seek to please elected officials or political parties as they looked toward life after the Court. Given the age of the retiring justices, however, this is unlikely to be a major concern.

REDUCING ARBITRARINESS IN THE APPOINTMENT PROCESS

Ensuring regular turnover among justices is important because under the current life-tenure system, presidents vary greatly in the impact they are able to have on the Supreme Court's composition. President Jimmy Carter did not have the chance to appoint a Supreme Court justice. President George W. Bush was unable to appoint a justice until his second term. President Bill Clinton named two justices in his first term and none in his second. By contrast, President Richard Nixon made four appointments during his first term. Nor is this variation a new phenomenon. William Howard Taft, a one-term president, appointed five justices to the Supreme Court. Abraham Lincoln also appointed five justices in four years.³

At issue is not fairness to individual presidents but rather ensuring that the Court does not overrepresent one president or party because of the randomness of mortality and retirement decisions. If one believed that the justices were simply technicians applying straightforward constitutional and statutory provisions to cases, such variation in the numbers of justices presidents appoint would not be problematic, and the very idea of the Court as a representative institution could be rejected. The view of justices as mere legal technicians is a myth, however. The Constitution and statutes are often ambiguous or contradictory, especially in the "hard cases" that reach the Supreme Court. Nor are the justices' political affiliations irrelevant. Studies show that party affiliation is a strong predictor of how justices vote.⁴ That makes it highly problematic that some presidents, through mere chance, make a disproportionate number of Supreme Court appointments.

STRATEGIC RETIREMENT

The absence of a mandatory retirement age or fixed-length terms means that the timing of a justice's departure is usually his or her own decision. This is objectionable because it means that public policy rests on the whims of an

unelected official whose only democratic legitimacy stems from having been appointed and confirmed in office decades earlier.

The extent to which justices decide to retire based on political considerations remains a matter of some controversy, since this is not a motivation justices typically are willing to discuss publicly. Still, there is evidence that departing justices take political factors into account, a process termed "strategic retirement."⁵ Justices cannot choose their successors, but life tenure allows a justice to retire at a time when the president can be expected to appoint a replacement who shares many of the retiring justice's views. In most cases, this means retiring during the administration of a president from the justice's party. In 1987, Justice Lewis Powell, then seventy-nine years old, received a long memo from his friend and former clerk outlining "the political reasons why Justice Powell would want to retire in the twilight of Republican Ronald Reagan's second term as President if he did not want to be forced to leave due to ill-health during a Democratic administration." Two days later, Powell announced his retirement.⁶

Similarly, Justice Byron White, while more conservative than many other Democratic justices, apparently retained some loyalty to the party of President John F. Kennedy, who appointed him. White reportedly told his former clerk, then a Clinton aide handling judicial nominations, that "despite everything he remained a Democrat, and he wanted a Democrat to name his successor."⁷ Although strategic retirement typically means leaving the bench so a president from the party that appointed the justice may choose the successor, there are exceptions. A minority of justices find themselves voting more with justices of the other party, whether because their own views have evolved or because the parties' principles have changed.⁸ For example, Justice Harry Blackmun, a Nixon appointee but also the author of the Court's decision in *Roe v. Wade*, "began to consider retirement" only after President Bill Clinton was elected in 1992.⁹ More recently, the retirements during the Obama administration of Justices David Souter and John Paul Stevens, Republican appointees who mostly took liberal positions, are examples of ideologically based strategic retirement.

Admittedly, some justices who seek to retire strategically may be stymied by failing health and unhelpful election results. Justice Thurgood Marshall was unhappy with the likely choice to replace him in the Carter administration and then tried to wait out Reagan and George H. W. Bush, whom he saw as hostile to his values, but he was forced to retire at eighty-three for health reasons. The first President Bush was still in office, and he appointed Justice Clarence Thomas, whose views were at odds with Marshall's. Most justices, however,

have been successful in retiring strategically so as to enable presidents of the same party or ideology to appoint their successors.¹⁰

LINGERING TOO LONG

Under the life-tenure system, justices may continue to serve long after their abilities are greatly diminished by age. In his last years, Marshall relied heavily on clerks, became befuddled during oral argument, and lost interest in many issues the Court faced.¹¹ Cancer-stricken Justice Rehnquist missed dozens of oral arguments in the year before his death in 2005.¹² Justice William O. Douglas's diminished capacity disturbed his colleagues so much that they quietly agreed to set aside his vote if they reached a 4-4 tie.¹³

The reasons that justices choose to remain in office when they have lost some of their abilities vary from justice to justice. Some simply cling to office for emotional reasons. Others may hope to retire strategically, while still others may not realize how much their faculties have dimmed. In any case, justices have the leeway to linger without the public being aware of such dereliction of duty. Unlike other top government officials, Supreme Court justices operate largely out of the spotlight and may delegate most of their duties to their clerks, who are typically in their twenties and neither elected nor appointed by anyone who was. In theory, incompetent justices can be impeached and removed from office by Congress, but in all of U.S. history, this has never happened.

OUT-OF-TOUCH JUSTICES

Another problem stemming from the life-tenure system is that justices can become increasingly out of touch with the society they purportedly serve. Again, this would not be a problem if the justices' duties were merely technical in nature, but the role of a justice is a complex one that requires value trade-offs and prudential judgments about the consequences of rulings that are invariably informed by justices' understanding of society and politics. For example, the Court's unanimous ruling in *Clinton v. Jones* (1997), requiring President Clinton to testify in a sexual harassment lawsuit against him while in office, was based on the dubious premise that such testimony would be "highly unlikely to occupy any substantial amount of petitioner's time."¹⁴ This miscalculation led to the impeachment controversy that preoccupied Clinton as well as the Congress in 1998 and early 1999. Another example of justices becoming out of touch with a changing society is offered by Justice Powell. Powell cast the key vote in the 1986 case *Bowers v. Hardwick*, in which the Supreme Court upheld a Georgia law banning sodomy—a decision that was explicitly overturned by the Court

seventeen years later in *Lawrence v. Texas*. Powell, then seventy-eight years old, told one of his clerks, who was—unbeknownst to Powell—gay, "I don't believe I've ever met a homosexual."¹⁵

COMPARING A FIXED TERM WITH A MANDATORY RETIREMENT REQUIREMENT

One alternative reform often suggested is a mandatory retirement age for justices. Such age limits for judges exist in many countries as well as in most American states. A mandatory retirement age might be an improvement on the status quo. An age limit would address some of the problems noted above, including the possibility that justices would continue to serve despite diminished capacity, the risk of strategic retirement, and the extent to which members of the high court become out of touch with society after many years in office.

A fixed term, however, can address all of these problems at least as well as a mandatory retirement age can, and a mandatory retirement age would not ensure that appointments be spread as evenly as possible across presidential terms. Instead of one justice's term expiring every two years, giving chief executives equal opportunities to affect the composition of the Court, the possibility of great variation in presidents' opportunities to appoint justices would remain.

A mandatory retirement age would also increase the incentive for presidents to find younger nominees, so as to maximize the number of years their appointees could serve on the Court. There is nothing wrong with having some young appointees, but a mandatory retirement age would encourage presidents to give this factor excessive weight at the expense of other considerations. In contrast, a fixed term would make nominees' ages less of a factor in presidents' decisions than it is now, since every justice, no matter how old at the time of appointment, would be eligible to serve only eighteen years.

WHY THE FOUNDERS' ARGUMENT FOR LIFE TENURE NO LONGER HOLDS

Admittedly, a rule that has been in place for centuries should not be reformed lightly. Before the Constitution is amended, some consideration of both the founders' views and the practices in other judicial systems at home and abroad is advisable. The provision of the Constitution that justices serve "during good behavior" was agreed upon at the Constitutional Convention on June 8, 1787.¹⁶ James Madison's notes suggest that there was no discussion of this

Table 19.1

Supreme Court Retirement and Reappointment Provisions in Advanced Democracies

Country	Retirement age	Term limit	Reappointment process
Australia	70	None	None
Austria	70	None	None
Belgium	70	None	None
Canada	75	None	None
Costa Rica	None	8 years	Congress
Denmark	68	None	None
Finland	67	None	None
France	None	9 years	None
Germany	68	12 years	None
Iceland	70	None	None
Ireland	70	None	None
Israel	70	None	None
Italy	None	9 years	None
Japan	70	10 years	Election
Luxembourg	68	None	None
Netherlands	70	None	None
New Zealand	70	None	None
Norway	70	None	None
Sweden	67	None	None
Switzerland	68	6 years	Parliament
United Kingdom	70	None	None
United States	None	None	None

Note: In some countries, multiple "high courts" have different jurisdictions. In those cases, this table reports the judicial tenure provision for the court charged with constitutional interpretation.

provision, which must have been uncontroversial among the delegates. Delegates to the Constitutional Convention were more concerned with how justices were to be appointed (should presidents or Congress make appointments?) than they were with how long they would serve. Yet by turning to *The Federalist Papers* we can get a sense of the founders' justification for the "good behavior" clause.

In *Federalist* No. 78, Hamilton argued for the "permanent tenure of judicial offices." Life tenure would, he asserted, protect judicial independence against "legislative encroachments." By contrast, a renewable appointment would reduce judicial independence vis-à-vis the legislative and executive branches. Of course, a nonrenewable eighteen-year term would alleviate this concern about judicial independence. However, Hamilton also argued that there would be few candidates who possessed both the legal knowledge and the requisite integrity to serve on the Court and that a term limit "would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench."¹⁷

Whatever the force of Hamilton's arguments in his day, they have little relevance in a country one hundred times more populous and containing a vast bar, a well-endowed legal academy, federal and state court systems employing thousands of judges, and a Supreme Court far more powerful and prestigious than it was in the founders' era. It is not plausible that there would be a shortage of qualified aspirants to the high court today simply because justices' terms would be limited.

LIFE TENURE IN COMPARATIVE PERSPECTIVE

If Hamilton's objections to limiting justices' terms are based on dubious and outdated assumptions, the question remains whether term limits are associated with successful governance in our own time. To answer that question, we can look to many examples both abroad and in U.S. state courts.

As Table 19.1 shows, the American system of life tenure is not used by any of the world's other stable democracies.¹⁸ Most common is a retirement age, usually set at around seventy. However, in several countries, high court judges are appointed for fixed terms. Of these, France, Germany, and Italy have non-renewable terms of nine, twelve, and nine years, respectively. High court judges' terms are renewable by the legislature after six years in Switzerland and after eight years in Costa Rica. In Japan, Supreme Court members face the voters every ten years, but retirement is mandatory at seventy. Justices in Japan are customarily of advanced age when they are appointed, so in practice they serve

at most one full term.¹⁹ The list of nations in Table 19.1 demonstrates that life tenure for high court justices is not necessary for the survival of democracy and civil liberties.

Cross-national studies also confirm that there is not a strong relationship between judicial independence and life tenure. In its 2011–2012 report, the World Economic Forum presents the results from a survey that asked executives from around the world, “To what extent is the judiciary in your country independent from influences of members of government, citizens, or firms?”²⁰ All the countries listed in Table 19.1 ranked relatively high in the survey, which covered 142 countries, many with weak democratic traditions. However, the United States did not do well compared with other stable democracies, finishing in thirty-sixth place, substantially ahead of only Italy (sixtieth) and just ahead of France (thirty-seventh) and Costa Rica (thirty-eighth). All the other nations listed in Table 19.1 ranked well above the United States.

We also have evidence closer to home of judicial systems that function without life tenure for the leading judges. Under the American federal system, every state has its own judiciary, with varying selection and retention mechanisms. Table 19.2 reveals the great variation in state judicial tenure provisions. Thirty states have a mandatory retirement age, most frequently seventy. All but three states also require review of supreme court justices at intervals of six to fourteen years. In most cases, this review is by voters, be it in retention elections or in potentially competitive nonpartisan or partisan elections. In nine states, justices must win reappointment and confirmation from elected officials or nominating commissions. Massachusetts and New Hampshire allow their high court judges to serve without any review once appointed but require retirement at seventy. Only in Rhode Island is the system of life tenure in use. Studies of the quality of state supreme courts based on various metrics, including surveys of lawyers and the extent to which the courts’ opinions are cited by other courts, do not find Rhode Island’s high court to be among the leading state supreme courts.²¹

In practice, state supreme court justices are rarely rejected or replaced by voters or officials, but these judges are at least modestly accountable and often are also subject to mandatory retirement ages. The great discrepancy between the life terms U.S. Supreme Court justices enjoy and the provisions governing tenure of state supreme court judges reflects the fact that most state constitutions are newer and easier to amend than the U.S. Constitution. As such, they reflect more democratic values that became widespread in American society as far back as the first half of the nineteenth century.

In sum, the system of life tenure under which U.S. Supreme Court justices serve is not in use in any other long-standing democratic country. Even in the

Table 19.2

State Supreme Court Retirement and Review Procedures in the Fifty States

State	Retirement age	Term limit (years)	Review process
Alabama	70	6	Partisan election
Alaska	70	10	Retention election
Arizona	70	6	Retention election
Arkansas	None	8	Nonpartisan election
California	None	12	Retention election
Colorado	72	10	Retention election
Connecticut	70	8	Governor and legislature
Delaware	None	12	Governor, nominating commission, and senate
Florida	70	6	Retention election
Georgia	None	6	Nonpartisan election
Hawaii	70	10	Nominating commission
Idaho	None	6	Nonpartisan election
Illinois	None	10	Retention election
Indiana	75	10	Retention election
Iowa	72	8	Retention election
Kansas	None	6	Retention election
Kentucky	None	8	Nonpartisan election
Louisiana	70	10	Partisan election
Maine	None	7	Governor, confirm by senate
Maryland	70	10	Retention election
Massachusetts	70	None	None
Michigan	70	8	Nonpartisan election
Minnesota	70	6	Nonpartisan election
Mississippi	None	8	Nonpartisan election
Missouri	70	12	Retention election

(Continued)

(Continued)

State	Retirement age	Term limit (years)	Review process
Montana	None	8	Retention election
Nebraska	None	6	Retention election
Nevada	None	6	Nonpartisan election
New Hampshire	70	None	None
New Jersey	70	7	Governor, confirm by senate
New Mexico	None	8	Partisan election then retention re-election
New York	70	14	Governor, nominating commission, and senate
North Carolina	72	8	Nonpartisan election then retention for re-election.
North Dakota	None	10	Nonpartisan election
Ohio	70	6	Nonpartisan election
Oklahoma	None	6	Retention election
Oregon	75	6	Nonpartisan election
Pennsylvania	70	10	Retention election
Rhode Island	None	None	None
South Carolina	73	10	Re-election by legislature
South Dakota	70	8	Retention election
Tennessee	None	8	Retention election
Texas	75	6	Partisan election
Utah	75	10	Retention election
Vermont	70	6	Vote of general assembly
Virginia	70	12	Re-election by legislature
Washington	75	6	Nonpartisan election
West Virginia	None	12	Partisan election
Wisconsin	None	10	Nonpartisan election
Wyoming	70	8	Retention election

Source: "Judicial Selection in the States" American Judicature Society, <http://www.judicialselection.us>.

United States, it is rejected by forty-nine of the fifty states. In forty-seven states, high court judges are reviewed by voters or other officials every fourteen years or more frequently. Viewed in this comparative context, an eighteen-year non-renewable term for U.S. Supreme Court justices is a modest reform that preserves judicial independence while mitigating the ills that come from extended service and life tenure.

CONCLUSION

The time has come to institute fixed terms of office for U.S. Supreme Court justices. The public is ready for the change; a recent New York Times poll found that 60 percent of respondents agreed that "appointing Supreme Court justices for life is a bad thing because it gives them too much power."²² Fixed terms will end the arbitrariness of the current arrangement in which some presidents are able to reshape the Court while others have no impact on it. They will bring a regular stock of new ideas to a stuffy institution and reduce the likelihood that justices will become out of touch with society. Fixed terms will reduce both the risk of strategic retirements and the possibility that justices will linger in office when they are no longer capable of doing the job. They will also make age less of a factor in presidents' appointment decisions. We can implement fixed terms without significantly reducing the independence that justices must enjoy in order to do their jobs. Evidence from other judicial systems around the world and in the fifty U.S. states suggests that limited terms for justices are compatible with stable democracy and well-functioning court systems.

Fixed terms will not solve all problems or yield all the benefits that some reform advocates suggest. Given the great power that even term-limited justices will have, claims that this reform will reduce the partisan bitterness of confirmation fights, for example, seem questionable. Still, if it is not a panacea, limiting justices' terms is a very worthwhile and overdue reform. Supreme Court justices play a valuable role, but they are human beings and their positions are a public trust, not their private property.

CON: Ward Farnsworth

I defend life tenure for U.S. Supreme Court justices on two main grounds. First, by slowing down the rate of turnover on the Court, life tenure puts a useful brake on political majorities who want to change fundamental legal

doctrines by filling the Court with justices who will do their bidding. Fixed terms of eighteen years, by contrast, would guarantee every two-term president the power to remake the Court dramatically—a result that would destabilize the law and place too much trust in the judgment of short-term majorities. Second, term limits would add to the political character of the Court's work; they would turn Supreme Court nominations into an explicit spoil of every presidential election and might well increase the justices' sense of obligation to carry out the views of the presidents who have nominated them. Some of these arguments have a speculative quality, but then so do the arguments in favor of fixed terms, and this counsels in favor of leaving well enough alone. Later I also comment on specific arguments that Professor Karol offers; some of them are plausible, but they nevertheless have limited force.

FASTER AND SLOWER LAW

It is natural to think of life tenure mostly 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 also 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 of the whims of short-term majorities is salutary.

The gradual rate of turnover on the Supreme Court causes Americans to live under two types of law: fast moving and slow. The faster law is made by members of Congress, state legislators, and other political actors who face elections every few years. The slower law mostly is made by a committee of officials known as Supreme Court justices. Since the justices keep their jobs for a long time, it takes a long time to replace them if the public doesn't like what they do. The Supreme Court is thus conservative—not in the modern sense of being "right-wing," but in the traditional sense of being slow to change. The most fundamental decisions in our legal life are put on a track that requires a sustained expression of public will before they can be reversed.

The Supreme Court's case law on federalism provides a good example. A sea change in that area of law took place in the 1990s; the Court made small but important steps to enhance the rights of the states and limit the powers of the federal government. That shift was not caused by any quick or transitory

change in public mood. It was the result of twelve consecutive years of Republican control over the White House (and resulting appointments to the Court), plus the presence of a holdover from the Nixon years (William Rehnquist). The Court's work thus came to reflect, in a slightly delayed fashion, certain national preferences that were durably expressed through the political process. Major shifts in the Court's jurisprudence tend to be of this character, sometimes changing from generation to generation but rarely from year to year.

The value of the Court as a slow lawmaker is that it resists short-term or even medium-term majoritarian judgments so that long-term majorities can prevail. Changing the slower law takes a long time, and this frustrates many people. Fixed shorter terms for the justices would reduce that frustration; it would make it easier, for example, to get *Roe v. Wade* reversed. Maybe that is a good thing, and maybe it isn't, but everyone should have a clear sense of the stakes in this debate. Every generation has its unpopular Supreme Court decisions. The question is whether we should take structural steps to make those decisions easier to undo.

Partisans on both sides would like to see all sorts of decisions by the Supreme Court reversed. On the right there are those who want to limit gun control or to limit the right to privacy, and on the left there are those who want to limit Court-imposed restrictions on affirmative action or gun control. Both left and right are dismayed by the Supreme Court's frustration of their projects, and some in both camps clamor for more public control over the law the Court makes. But most people are more cautious than that, and rightly so—and this is one reason the movement for fixed terms has not picked up steam. Speeding up the rate of change at the Supreme Court 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. They might fairly conclude that any institution capable of bringing so much exasperation to both conservatives and liberals must be doing something right.

Here is a last way to put the point. Having justices serve for eighteen years would guarantee every two-term president at least four appointments to the Court. That would give every two-term president the ability to create a near majority on the Court, 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 prior to the beginning of the president's term. This can happen already, but it usually does not. The question is whether we should ensure that it always does. I am skeptical. A two-term president may reflect a single national mood, and there is value in a Court that cannot be remade by one

such gust. We should be slow to assume that the country would be better off if the same ideological fads that can elect a two-term president were to regularly produce decisive changes in the Court's membership as well.

THE SUPREME COURT AS A POLITICAL SPOIL

Apart from slowing the pace of fundamental legal change, life tenure also makes the process of appointment to the Court less explicitly political than it would be with fixed terms of eighteen years. First, fixed terms 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 and keep promises about how they would use their two nominations if elected. Fixed terms also would make it easier to coordinate pressures further in advance. Everyone would know years 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. Depriving pressure groups of a clear target, as life tenure does, makes it harder for them to organize their efforts and concentrate their energies.

A second and related drawback of fixed terms is that they might well increase the justices' sense of obligation to carry out the wishes of whoever appointed them. If everyone knows that two seats on the Court are a spoil the president won fair and square, those seats may be regarded as the president's to fill in a stronger sense than we currently see, and the nominees may feel more pressure to carry out the president's agenda. The justices will be Republican appointees or Democratic appointees in a more explicit sense than they now are. Some may therefore view their own roles in a manner a little more political and less lawlike.

Finally, 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 officeholders in a more traditional way than they now do. Indeed, some of the proposals for fixed terms are pitched expressly as efforts to make the Court more responsive to the 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 don't want them thinking about their jobs when it comes time to decide cases. The justices negotiate all the time between their own preferences and the pressure exerted, sometimes weakly, by the legal materials in front of them. We should hesitate before taking any measure that would increase even a little the justices' sense that their charge is political.

THE ALLOCATION OF NOMINATING CHANCES TO PRESIDENTS

Professor Karol rightly points out that fixed terms would spread nominations to the Court evenly among presidents. The argument has some merit but nevertheless is not as strong as it seems. First, there are countervailing influences on the appointment process that help smooth out misallocations of chances to the two parties. Most importantly, the Senate helps compensate for the lumpy way in which nominations are distributed to presidents. The Republican presidents who appointed Justices John Paul Stevens and David Souter wanted to avoid trouble in the Senate and so deliberately chose nominees who carried more ideological risk than the alternatives. The risk paid out badly; both of those justices ended up joining the Court's "liberal" wing. 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. The Senate works as a hedge against the vicissitudes of election cycles and retirements from the Court.

Note that, for this hedge to work, the Senate must reject the idea that it should not second-guess Supreme Court nominations on ideological grounds. Deference of that sort magnifies the effects of the uneven distribution of nominating chances between presidents. Life tenure therefore presupposes a robust political role for the Senate in the Supreme Court appointment process.

Notice, too, that presidential elections are themselves lumpy, winner-take-all events. There is no guarantee that a political minority representing a certain percentage of the population will carry the same percentage of elections. Even a large minority may never win any presidential elections and so may not see its views represented at all on the Court. In addition, the narrow winner of a presidential election gets no fewer nominating chances than a candidate who wins by a landslide. If one wants ideological control over the Court tied in a satisfying way to the ideological composition of the polity, using institutional checks is therefore 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: again, the Senate. True, the Senate has great shortcomings as a representative

institution, but at least both parties always are represented there at the same time and so create possibilities for debate and compromise that are 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, whereas if the Senate's role is strong, the distribution of appointments to presidents will become less important.

If a strong role for the Senate is salutary, notice that it is likely to be reduced by giving the justices fixed terms. The two appointments presidents would make during their terms would likely be claimed as their own to spend as they see fit. They earned them. No doubt many in the Senate and elsewhere would resist this way of thinking, but the case for deference to a president's choices undoubtedly would be strengthened relative to where it currently stands because at present the Senate justly can resist a president's nominations on the grounds that the chance to make them was delivered 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.

MENTAL DECREPITUDE

Professor Karol makes another argument that has plausibility but again is less forceful than at first appears: Fixed terms would reduce the risk of justices who remain in office when they become mentally decrepit. The first point to appreciate in response is that the problem of decrepitude is less serious than it sounds. According to David Garrow's study, justices have become mentally decrepit eleven times since 1900, and in no case did the problem last more than a year or two.¹ Thus, of the roughly nine hundred man-years of service provided by Supreme Court justices since the start of the twentieth century, perhaps ten or twenty of those years—between 1 and 2 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; a decrepit justice may serve as a swing vote but otherwise cannot do anything significant unless four colleagues go along with it. Second, the onset of mental infirmity causes the justice's responsibilities to devolve to law clerks, who generally can keep a chamber 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 in fact the devolution can help control—it undoubtedly has helped control—the consequences of decrepitude until the justice leaves the Court. We should pause before trading away the advantages of life tenure to address a problem that sounds bad but has been minor as a practical matter.

STRATEGIC RETIREMENT

An undeniably 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. As in the case of mental decrepitude, however, it is not clear that the problem of strategic retirement is very serious. The plausible window of retirement for a justice tends to be small enough to make such decisions hard to carry out. Some have speculated that William Douglas, Thurgood Marshall, and William Brennan tried to hold out in the hope of being replaced by a Democrat; if so, all three 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. The most prominent counterexample is the seat now held by Justice Sonia Sotomayor, which from 1914 until 1956 was held by a series of four justices named by Democrats, but three of them (James F. Byrnes, Wiley Blount Rutledge, and Sherman Minton) served brief terms. Democrats likewise filled the seat now occupied by Justice Clarence Thomas three times in a row from 1940 until 1991. If we reach back to the nineteenth century we find a few other such examples, 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.

CONCLUSION: THE CLAIMS OF THE STATUS QUO

Life tenure for Supreme Court justices has practical consequences. As just shown, however, a recurring problem in debates about life tenure is that most claims about the details of those consequences (and the consequences of any alternatives) are speculative. Terms of eighteen years would cause more frequent turnover than we now see; this may or may not have good or even noticeable effects on the Court's output. Fixed terms might decrease the intensity of the politics that surround 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, a bad thing. They would reduce the risks of strategic retirement and mental decrepitude but then so would the simpler solution of age limits—and in any event, it is far from clear that either of those problems is great as a practical matter.

There is much to be said for leaving the Constitution alone unless it is clear that revising it would create net benefits. Our current arrangements, which

most would say have served the country tolerably well for around 230 years, are entitled to some respect on that ground alone. The costs of adjusting to a new order and taking the risk that it will be worse than the old are worth incurring only if it is clear that the expected gains are large. Those who wish to end life tenure for Supreme Court justices have a high standard of proof to satisfy, and in my judgment they have thus far come up short.

NOTES

PRO

1. "Members of the Supreme Court of the United States," Supreme Court of the United States website, http://www.supremecourt.gov/about/members_text.aspx.
2. For more discussion of this proposal, see James E. DiTullio and John B. Schochet, "Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms," *Virginia Law Review* 90 (2004): 1093–1149.
3. See Daniel J. Meador, "Thinking about Age and Supreme Court Tenure," in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger C. Cramton and Paul D. Carrington (Durham, NC: Carolina Academic Press, 2006).
4. See Stuart S. Nagel, "Political Party Affiliation and Judges' Decisions," *American Political Science Review* 55 (1961): 843–50; and C. Neal Tate, "Personal Attribute Models of the Voting Behavior of U.S. Supreme Court Justices: Liberalism in Civil Liberties and Economics Decisions, 1946–1978," *American Political Science Review* 75 (1981): 355–67.
5. See Timothy M. Hagle, "Strategic Retirements: A Political Model of Turnover on the United States Supreme Court," *Political Behavior* 15 (1993): 25–48; and Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* (Albany: State University of New York Press, 2003).
6. See DiTullio and Schochet, "Saving This Honorable Court," 1102–3.
7. See Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York, NY: Anchor Books, 2007), 73.
8. For discussion of the latter phenomenon, see David Karol, *Party Position Change in American Politics: Coalition Management* (New York, NY: Cambridge University Press, 2009).
9. See DiTullio and Schochet, "Saving This Honorable Court," 1104–41.
10. See Juan Williams, *Thurgood Marshall: American Revolutionary* (New York, NY: Times Books, 1998).
11. David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review* 67 (2000): 1073.
12. Lawrence S. Wrightsman, *Oral Arguments before the Supreme Court: An Empirical Approach* (New York, NY: Oxford University Press, 2008), 8.
13. Garrow, "Mental Decrepitude on the U.S. Supreme Court," 1052–56.

14. *Clinton v. Jones* (95–1853), 520 U.S. 681 (1997), <http://www.law.cornell.edu/supct/html/95-1853.ZO.html>.
15. Quoted in John Calvin Jeffries, *Justice Lewis F. Powell, Jr.* (New York, NY: Fordham University Press, 2001), 521.
16. "Madison Debates, June 5," Avalon Project, Yale Law School, http://avalon.law.yale.edu/18th_century/debates_605.asp.
17. Alexander Hamilton, *Federalist* No. 78, <http://www.constitution.org/fed/federa78.htm>.
18. I draw my comparison set of countries from Robert Dahl's list of twenty-one nations aside from the United States that have been stable democracies since 1950. See Robert A. Dahl, *How Democratic Is the American Constitution?* (New Haven, CT: Yale University Press, 2001).
19. On Japan, see Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (New York, NY: Cambridge University Press, 2003), 46.
20. Klaus Schwab, ed., *Global Competitiveness Report, 2011–2012* (Geneva: World Economic Forum, 2011). Also see Lars P. Feld and Stefan Voigt, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators" (CESifo Working Paper No. 906, Center for Economic Studies, Ludwig-Maximilians-Universität Munich, 2003).
21. Stephen J. Choi, G. Mitu Gulati, and Eric A. Posner, "Which States Have the Best (and Worst) High Courts?" (John M. Olin Law & Economics Working Paper No. 405, University of Chicago Law School, 2008).
22. Adam Liptak and Allison Kopicki, "Approval Rating for Justices Hits Just 44% in New Poll," *New York Times*, June 7, 2012, <http://www.nytimes.com/2012/06/08/us/politics/44-percent-of-americans-approve-of-supreme-court-in-new-poll.html>.

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1. See David J. Garrow, "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review* 67 (2000): 995–1087.