

## SAVING THIS HONORABLE COURT:

A PROPOSAL TO REPLACE LIFE TENURE ON THE  
SUPREME COURT WITH STAGGERED,  
NONRENEWABLE EIGHTEEN-YEAR TERMS*James E. DiTullio\* and John B. Schochet\*\**

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#### INTRODUCTION

IN the fall of 1975, Justice William O. Douglas, despite suffering from the effects of a debilitating stroke, remained steadfast in his refusal to leave the Supreme Court of the United States. Ignoring the personal entreaties and attempts at collegial persuasion by his fellow justices, Justice Douglas was determined not to step down, making clear his desire to hold on to his seat long enough to see a Democratic president name his successor. Privately, Justice Douglas stated to friends that he would never allow then-President Gerald Ford, his old nemesis, to nominate his successor; he was reported to have once declared to a friend that, if he were to give up the fight and resign from his seat, “Ford will appoint some bastard.”<sup>1</sup> Douglas’s will was, at least in this case, not as strong as his rhetoric. After several months of public pressure, he finally retired.<sup>2</sup> Despite Justice Douglas’s eventual failure to leave at a time

<sup>1</sup> Bruce Allen Murphy, *Wild Bill: The Legend and Life of William O. Douglas* 493 (2003). Justice Douglas was particularly unhappy about the prospect of President Ford appointing his successor because, in 1970, then-House Minority Leader Ford had introduced a resolution calling for Justice Douglas’s impeachment. *Id.* at 433–34. Justice Douglas justified his obstinacy by arguing that, without him, “[t]here [would] be no one on the Court who cares for blacks, Chicanos, defendants, and the environment.” Justice Douglas also said: “Even if I’m half dead, maybe [my staying on the Court] will make a difference about someone getting an education.” Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* 463 (Avon Books 1981) (1979).

<sup>2</sup> It is not clear that Justice Douglas would have considered *anyone* a suitable replacement. According to Woodward and Armstrong, “It didn’t matter who was Presi-

of his own choosing, this particular episode sheds light on one of the major deficiencies of the present system of appointing justices to the Supreme Court—namely, the powerful role the justices have in determining the timing of their departures from the Court, and the ideological bent of their successors.

This phenomenon is exacerbated by the dynamics and role of the modern Supreme Court. The Court decides cases of great magnitude. It would have been unfathomable to the Framers that the Supreme Court would one day order the desegregation of public schools,<sup>3</sup> strike down almost every state electoral districting scheme in the nation,<sup>4</sup> and serve as the final arbiter in the election of the President of the United States.<sup>5</sup> The Supreme Court has also entered what Justice Frankfurter called the “political thicket”<sup>6</sup> with increasing frequency since the beginning of the twentieth century. Justice Frankfurter believed that it was a “mischievous assumption that our judges embody pure reason”<sup>7</sup> as opposed to being “molders of policy,” and that “the ‘Constitution’ which they ‘interpret’ is to a large measure the interpretation of *their own experience*, their ‘judgment about practical matters,’ their ‘ideal pictures of the social order.’”<sup>8</sup> In essence, Justice Frankfurter stated: “[T]he Supreme Court *is* the Constitution.”<sup>9</sup>

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dent, or from what party. . . . Whoever [the President appointed] would be someone who would not care.” Woodward & Armstrong, *supra* note 1, at 463. That being said, Justice Douglas almost certainly would have been more willing—if not entirely happy—to retire under a Democratic president.

<sup>3</sup> *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

<sup>4</sup> *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>5</sup> *Bush v. Gore*, 531 U.S. 98 (2000).

<sup>6</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

<sup>7</sup> Felix Frankfurter, *The American Judge*, *The New Republic*, Apr. 23, 1924 (book review) *reprinted in* Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution 149, 150 (Philip B. Kurland ed., 1970).

<sup>8</sup> Felix Frankfurter, *Twenty Years of Mr. Justices Holmes’ Constitutional Opinions*, 36 *Harv. L. Rev.* 909, 916 (1923), *reprinted in* Felix Frankfurter on the Supreme Court: Extrajudicial Essays on the Court and the Constitution, *supra* note 7, at 112, 119–20 (citations omitted).

<sup>9</sup> Frankfurter, *supra* note 7, at 216. Similarly, Macklin Fleming, a former California Supreme Court justice, notes, “The power is there and there to stay, for, rightly or wrongly, we have come to rely more and more on the Supreme Court as a political instrument to solve our most vexing political problems.” Macklin Fleming, *Is Life Tenure on the Supreme Court Good for the Country?*, 70 *Judicature* 322, 322 (1987).

The increased involvement of the Supreme Court in a broad array of political issues has created three primary problems. The first is strategic retirements. As the Court's place in the American political system has grown more influential, the justices have exercised more power than they did a century ago. As justices have become more personally invested in their decisions, they have become more and more loathe to allow a president with opposing viewpoints to name their successors. The result has been strategic retirements, carefully timed departures, that allow presidents to fill vacancies with a similarly like-minded judge. In particular, as the Court has entered the "culture wars" of the post-Vietnam War era, strategic retirement has become more blatant.

Second, the present system creates incentives that reward presidents who name young nominees to the Court. This Note does not intend to make any normative claim about the benefits or drawbacks of youth as a criterion for judging the quality of a Supreme Court justice. Few would disagree, however, that when youth becomes a determinative factor in choosing a nominee for the Supreme Court, a problem exists. The current system gives an improper incentive to a president to nominate a young candidate for the Court because a younger nominee generally ensures the perpetuation of the president's particular sociopolitical vision over a longer tenure.

Finally, an additional problem with the current system is the randomness of the distribution of those Supreme Court appointments among presidents. Putting aside the phenomenon of strategic retirement, something is amiss under the present system when one president can, by random chance, have three, four, or even nine opportunities to appoint a justice to the Court in one presidential term, while another president might not have a single nomination. The unequal distribution of presidential appointments to the Supreme Court is cause for concern, especially as the Court has increasingly entered the "political thicket." It is potentially troubling for one president to enjoy the fortuitous opportunity to pack the Court when his successor may not have the opportunity to nominate anyone.

The best way to address these three problems without sacrificing judicial independence is to replace life tenure on the Supreme Court with a system of staggered, nonrenewable eighteen-year

terms. Ending life tenure would require a constitutional amendment. This proposed amendment<sup>10</sup> would eliminate the justices' ability to strategically retire, temper the incentives for presidents to nominate young justices to the Court at the expense of older candidates, and guarantee each president two nominations per term. Because justices could not be reappointed, the proposed amendment would arguably leave them with as much independence as they have under the current system.<sup>11</sup>

A number of proposals through the years, particularly since President Franklin Roosevelt's ill-fated 1937 Court-packing plan, have sought to end life tenure on the Supreme Court. From proposals advocating a mandatory retirement age to others that recommend expanding the Court's membership or appointing justices to fixed terms, the scholarship has laid down a well-beaten path of legal analysis upon which this Note treads.<sup>12</sup> Most notably, Professor Philip D. Oliver wrote an article in 1986 advocating a constitu-

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<sup>10</sup> See *infra* Appendix.

<sup>11</sup> This proposal, however, need not and should not apply to the lower federal courts, for two reasons. First, creating a system of fixed, staggered terms for circuit and district judges would be far more complicated and difficult to implement than creating fixed, staggered terms for the nine Supreme Court justices. Second, while considerably powerful and influential, neither circuit nor district court judges exercise the level of unreviewable political power enjoyed by Supreme Court justices.

<sup>12</sup> See Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 Ala. L. Rev. 397, 453–57 (1999) (proposing that justices be appointed to renewable terms or that the Court have minimum and maximum ages, and noting that Senator Orrin Hatch and President Thomas Jefferson have both expressed opposition to life tenure); Charles S. Collier, *The Supreme Court and the Principle of Rotation in Office*, 6 Geo. Wash. L. Rev. 401, 418–19 (1938) (proposing a twelve-member Supreme Court with staggered, nonrenewable twelve-year terms for the justices); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 Ohio St. L.J. 799 (1986) (proposing staggered, nonrenewable eighteen-year terms for Supreme Court justices); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, Wash. Post, Aug. 9, 2002, at A23 (proposing nonconstitutional methods for implementing term limits on the Supreme Court); Wyeth Ruthven, *DICTA: Life Tenure, Judicial Confirmation*, Va. L. Weekly, Feb. 27, 2004, at 1, available at <http://www.lawweekly.org/index.html> (surveying proposed reforms to the doctrine of life tenure) (on file with the Virginia Law Review Association); Edward Lazarus, *Why We Should Consider Abolishing Life Tenure for Supreme Court Justices: The Need to Eliminate Politically Motivated Justice Retirements*, at <http://writ.news.findlaw.com/lazarus/20010206.html> (Feb. 6, 2001) (proposing a constitutional amendment limiting Supreme Court justices to eighteen-year terms) (on file with the Virginia Law Review Association).

tional amendment similar to the one this Note will propose.<sup>13</sup> Notwithstanding similarities between the two proposals, this Note explores in detail the necessity for such an amendment, an argument the validity of which Professor Oliver simply assumed. Professor Oliver's article examines only a limited number of alternatives to a constitutional amendment; this Note will examine proposals since offered by commentators. Moreover, Professor Oliver's proposal is worth reexamining in light of the fact that arguably five justices have strategically retired from the Court since he wrote. Finally, Professor Oliver's proposal was written prior to the failed nomination of Judge Robert Bork. Since that time the nomination and confirmation landscape has changed and the process has become increasingly contentious.

This Note will proceed in four parts. Part I will suggest reasons to doubt the popular notion that life tenure is inviolable and cannot be eliminated without fundamentally impacting the Supreme Court's independence. Part II will lay out the present system's principal shortcomings: the prevalence of strategic retirements, the perverse incentives for presidents to appoint young justices, and the random distribution of Court nominations among presidential terms. Part III will outline the proposed amendment and explains how it would ameliorate the ills of the current system. Finally, Part IV will show how this Note's proposed solution addresses the problems with life tenure more effectively—and with less collateral damage to the Court's independence—than do other proposed solutions.

#### I. LIFE TENURE: AN ESSENTIAL FEATURE OF THE CONSTITUTION?

Article III of the United States Constitution states that "Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."<sup>14</sup> Among the Founding Fathers, Alexander Hamilton was the principal proponent of this provision, famously writing in support of judicial life tenure in Federalist No.

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<sup>13</sup> Oliver, *supra* note 12.

<sup>14</sup> U.S. Const. art. III, § 1. This somewhat ambiguous line has been interpreted by the Supreme Court to mean that Article III federal judges may hold their judicial offices for life unless removed from office by impeachment and conviction. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15–16 (1955).

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78.<sup>15</sup> For Hamilton, life tenure was essential to assuring the absolute independence of the judiciary from the influence of the “political” branches.<sup>16</sup>

Certainly, Hamilton’s goal was, and remains, an important one. It does not, however, require life tenure. As Professor Henry Monaghan observes, “[p]resumably, what relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches.”<sup>17</sup> Following Professor Monaghan’s reasoning, judicial independence—including the independence from the influence of the political branches that so concerned Hamilton—is not necessarily sacrificed by mandating fixed, nonrenewable terms of service for Supreme Court justices.

In addition to Professor Monaghan’s claim that judicial independence does not demand life tenure, there are other functional reasons to dislike life tenure as well. Professor L.A. Powe, Jr., identifies three substantial problems with the present system of life tenure for Supreme Court justices.<sup>18</sup> First, justices can stay on the Court long after their faculties have faded. Second, the political order that put a justice on the Court may “be receding into history”<sup>19</sup> while that justice remains on the Court writing opinions emblematic of that order. Finally, Professor Powe argues that life tenure creates “incentives for a current governing coalition to appoint youthful justices such that those appointees will have at least thirty probable years of service on the Court,” thereby “virtually guarantee[ing] that the first and second problems will occur later.”<sup>20</sup> According to Professor Powe, a long term short of life tenure (such as eighteen years) will generally avoid these problems, while still maintaining sufficient independence and expertise.<sup>21</sup>

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<sup>15</sup> The Federalist No. 78 (Alexander Hamilton).

<sup>16</sup> Id.

<sup>17</sup> Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv. L. Rev. 1202, 1211 (1988).

<sup>18</sup> L.A. Powe, Jr., *Old People and Good Behavior*, 12 Const. Comment. 195, 197 (1995).

<sup>19</sup> Id.

<sup>20</sup> Id.

<sup>21</sup> Id.

In addition to the aforementioned arguments against life tenure, the Twenty-Second Amendment, which limits presidents to two terms in office, may suggest that term limits are no longer a “third rail” of American constitutional debate. Justice Fleming observes:

The Twenty-second Amendment carries the strong implication that limitation of the term of office of a President serves to combat the corrosive effect of power on the person who holds the office. Would not the same beneficent result flow from an amendment limiting the term of office of members of the Supreme Court to a specified number of years?<sup>22</sup>

Justice Fleming’s critics certainly might argue that Supreme Court justices do not wield the same unilateral power as the chief executive of the United States, but the justices do wield enough power collectively to be seen as a powerful oligarchy of American government. Viewed in that context, there is an argument that this branch’s power should be similarly limited.<sup>23</sup> Critics also argue that ending life tenure on the Court would prevent the nation from benefiting from the full careers of justices of the caliber of John Marshall, Oliver Wendell Holmes, or Louis Brandeis.<sup>24</sup> As Justice Fleming rejoins, “Losing a Holmes is offset by the advantage of retiring a James C. McReynolds and a Willis Van Devanter.”<sup>25</sup> Injecting a fresh point of view into a judicial body from time to time may

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<sup>22</sup> Fleming, *supra* note 9, at 374.

<sup>23</sup> It is also worth noting that, while only one president ever exceeded what, until 1951, was an informal two-term limit, many justices have served for more than eighteen years.

<sup>24</sup> See generally John Gruhl, *The Impact of Term Limits for Supreme Court Justices*, 81 *Judicature* 66, 69 (1997) (arguing that terms limits are likely to eliminate the “best” justices).

<sup>25</sup> Fleming, *supra* note 9, at 375. Justice Fleming continues:

Even the loss of a Holmes might not be a loss to the country, for we can conceive of a retired Holmes, freed from the daily adjudication of cases, creating a definitive theory of constitutional law or formulating a philosophy of law to influence legal thought for generations. Such was the experience of Chancellor James Kent, whose mandatory retirement from the New York bench led to the writing of *Commentaries*, the first great treatise on American law.

*Id.* Professor Artemus Ward takes another approach: “Holmes was one thing. The Court would have lost a great legal mind if he had left at 74. But now, would we be losing great legal minds, when justices now are really technocrats and they don’t write their own opinions? I don’t think so.” Tony Mauro, *Courtside: When to Retire?*, *Legal Times*, June 2, 2003, at 10 (quoting Professor Artemus Ward).

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be a good thing, and, on balance, what might be lost by retirement may also be more than offset by gaining increased vitality and fresh perspectives.<sup>26</sup>

This deconstruction of life tenure is not meant to advocate eliminating life tenure merely for the sake of eliminating life tenure. It is meant, rather, to demonstrate that Article III's judicial life tenure need not be treated as sacrosanct. To properly address the problems raised in this Note, all options—including abolishing life tenure—must be on the table.<sup>27</sup>

## II. THE PROBLEM

### A. *Strategic Retirements*

As long ago as the early years of the Republic, some Supreme Court justices undoubtedly timed their retirements based on which president would nominate their successors. These “strategic” retirements have become far more commonplace since World War II, and practically universal since 1968. This Section traces the development of this pattern, from Chief Justices Earl Warren and Warren Burger to Justices Lewis Powell and Thurgood Marshall, and members of the current Court.

In June of 1968, Chief Justice Earl Warren approached President Lyndon Johnson and declared his intention to retire from the Court. Public statements to the contrary,<sup>28</sup> Chief Justice Warren's commonly understood reason for retiring in 1968 was his expecta-

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<sup>26</sup> See Fleming, *supra* note 9, at 375.

<sup>27</sup> It is also important to note that the proposed constitutional amendment would not end *judicial* life tenure for Supreme Court justices. Under this proposal, justices whose terms have expired after eighteen years are required to step down from the Court but remain free to sit on lower federal courts. See *infra* note 185 and accompanying text. This is not a far-fetched idea; indeed, several justices in recent years have occasionally served as visiting circuit judges after they retired from the Supreme Court. See, e.g., Chief Probation Officers of Cal. v. Shalala, 118 F.3d 1327, 1328 (9th Cir. 1997) (Justice White); Trans Sport, Inc. v. Starter Sportswear, Inc. 964 F.2d 186, 187 (2d Cir. 1992) (Justice Marshall); Alexander v. Mayor of Cheverly, 953 F.2d 160, 161 (4th Cir. 1992) (Justice Powell); Tenngasco Exch. Corp. v. Fed. Energy Regulatory Comm'n, 952 F.2d 535, 536 (D.C. Cir. 1992) (Justice Brennan); Brine v. Paine Webber, Jackson & Curtis, 745 F.2d 100, 101 (1st Cir. 1984) (Justice Stewart).

<sup>28</sup> Chief Justice Warren's stated reason for retirement was “not because of reasons of health or on account of any personal or associational problems, but solely because of age.” Bernard Schwartz, *Super Chief: Earl Warren and His Supreme Court—A Judicial Biography* 681 (1983).

tion that, in the aftermath of Robert Kennedy's assassination, the Democrats would lose the White House. Chief Justice Warren did not want to see Richard Nixon, his old archnemesis from California politics, name a successor who would work to undermine the Warren Court's judicial legacy.<sup>29</sup> As it happened, Associate Justice Abe Fortas, President Johnson's nominee to replace Chief Justice Warren, was stymied by opposition in the Senate. The 1968 election intervened, and President Nixon nominated then-Judge Warren Burger as Chief Justice Warren's replacement. Chief Justice Warren's attempt to retire under a "friendly" president, although a failure, set a precedent that future justices would follow more and more frequently.

In a surprising move in the summer of 1986, Chief Justice Burger abruptly announced his decision to retire from the Supreme Court. Although the Chief Justice was then nearly eighty, he was in relatively good health, and many observers had expected him to put off retirement for at least a few more years in an effort to create a lasting conservative legacy for the Burger Court.<sup>30</sup> Some Court watchers, noting that he was a Republican appointee, saw other concerns at play in Chief Justice Burger's decision. The *Wall Street Journal* stated, "In addition to feeling overburdened, sources familiar with the process say, [Chief] Justice Burger was concerned about the coming Senate elections and the possibility that Republicans could lose their majority. A Democratic-controlled Senate would be far less amenable to confirming conservative Reagan-appointed jurists."<sup>31</sup>

By 1987, Justice Lewis Powell had been on the Court four years longer than he had anticipated having been nominated by President Nixon in 1971. At age seventy-nine, Justice Powell felt that he might be slipping (albeit only slightly) in his Court duties.<sup>32</sup> His former law clerk and longtime friend, Dean John C. Jeffries, Jr., wrote Justice Powell a memo as the Court neared the end of its 1986-87 Term. In the memo, Dean Jeffries outlined the political reasons why Justice Powell would want to retire in the twilight of Republican Ronald

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<sup>29</sup> Ed Cray, *Chief Justice: A Biography of Earl Warren 496-97* (1997).

<sup>30</sup> Stephen Wermiel, *Judicial Shakeup: Changes on High Court are Likely to Increase Conservatives' Clout*, *Wall St. J.*, June 18, 1986, at 23.

<sup>31</sup> *Id.*

<sup>32</sup> John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* 543-44 (1994).

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Reagan's second term as President if he did not want to be forced to leave due to ill health during a Democratic administration.<sup>33</sup> Two days after receiving the memo, Justice Powell told Chief Justice William Rehnquist of his plans to retire.<sup>34</sup>

By the late 1980s, Justice Thurgood Marshall had suffered through two decades of chronic health problems, ranging from minor heart attacks and weight gain to loss of mental ability.<sup>35</sup> At the same time, after three consecutive Republican presidential victories, Justice Marshall had become increasingly marginalized in dissent. Moreover, his goal of ensuring that his successor share his liberal ideology seemed a more distant possibility with the Democrats' repeated failure to recapture the White House.<sup>36</sup> So dire did his circumstances seem in the late 1980s and early 1990s that Justice Marshall jokingly instructed his clerks that, should he die on the bench, they should "prop [him] up and keep on voting."<sup>37</sup> Although his rapidly declining health ultimately forced Justice Marshall to retire while President George H. W. Bush was still in office, he nevertheless remained on the Court longer than he otherwise would have in the hope that a Democrat would appoint his successor.<sup>38</sup>

Shortly after Bill Clinton's election in 1992, speculation was rampant that a retirement from the Court was imminent. Two of the most likely candidates for retirement were Justices Byron White and Harry Blackmun.<sup>39</sup> Both men had previously made clear their desire to retire, and both had subtly let it be known that they wished to leave the Court during a Democratic administration. Justice White had expressed a preference to retire under a Democratic president because President John F. Kennedy had appointed

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<sup>33</sup> Id. at 542–43.

<sup>34</sup> Id. at 542, 544.

<sup>35</sup> David Atkinson, *Leaving the Bench: Supreme Court Justices at the End*, 156–59 (1999); see also Juan Williams, *Thurgood Marshall: American Revolutionary* 390 (1998) (noting that, after Justice Marshall publicly disparaged the nomination of Justice Souter, "[q]uestions about [Justice Marshall's] physical health now extended to questions about his mental health").

<sup>36</sup> Edward Lazarus, *Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court* 446–47, 449 (1998).

<sup>37</sup> Id. at 278.

<sup>38</sup> Williams, *supra* note 35, at 390–91.

<sup>39</sup> Alexander Wohl, *Guessing Game: Who Would Clinton Nominate to the Supreme Court?*, 79 A.B.A. J., Feb. 1993, at 46, 46.

him.<sup>40</sup> In Justice Blackmun's case, although nominated by President Richard Nixon, the Justice had grown considerably more liberal over the course of his tenure on the Court, and he wanted to ensure that his seat remained in the hands of someone ideologically like-minded.<sup>41</sup> In the end, Justice White announced his retirement in March 1993, and Justice Blackmun followed suit in April 1994. At his own retirement announcement, Justice Blackmun quipped that Justice White "beat [him] to the punch."<sup>42</sup>

Justice Sandra Day O'Connor, an important swing vote on the Court at the time, watched the results of the 2000 presidential election returns with friends at an election night party. Shortly before 8:00 p.m., CBS anchorman Dan Rather declared that Vice President Al Gore, a Democrat, had won the important battleground state of Florida, seemingly assuring him victory in the presidential election. Shortly after the announcement, Justice O'Connor, surrounded by friends and acquaintances, called the result "terrible."<sup>43</sup> Justice O'Connor's husband explained that he and his wife were planning on retiring to Arizona but that Justice O'Connor did not want to step down under a Democratic president, so a Gore presi-

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<sup>40</sup> See Joan Biskupic, Justice White Said to Be Considering Stepping Down From Supreme Court, Wash. Post, Mar. 7, 1993, at A14 ("White, 75, has said that since he came in with a Democratic administration, it would be fitting to retire under a Democratic administration."); Linda Greenhouse, White Announces He'll Step Down From High Court, N.Y. Times, Mar. 20, 1993, at A1 ("There were rumors for several years that Justice White was bored at the Court and would like to retire if a Democrat was elected President."). But see Dennis J. Hutchinson, The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White 436 (1998) (noting that the Biskupic article "[c]it[ed] no sources" when it reported that Justice White wished to retire under a Democratic president). Justice White was the Court's only Democratic appointee at the time he retired.

<sup>41</sup> See Linda Greenhouse, Justice Blackmun, Author of Abortion Right, Dies, N.Y. Times, Mar. 5, 1999, at A1 (observing that "[b]y the time Justice Blackmun announced, on April 6, 1994, that he would retire at the end of Court's 1993-94 Term, a Democrat was in the White House" and that, because President Clinton chose Justice Blackmun's successor, Blackmun was assured a pro-*Roe v. Wade* successor); Greenhouse, supra note 40, at A1 (noting that Justice Blackmun was "expected to retire soon" after President Clinton's election); Ruth Marcus, Blackmun Set to Leave High Court, Wash. Post, Apr. 6, 1994, at A1.

<sup>42</sup> Marcus, supra note 41, at A1. The *Washington Post* reported at the time of Justice Blackmun's retirement: "[W]ith the election of Clinton, the first Democrat since Lyndon B. Johnson in 1967 to have the chance to select a justice, Blackmun began to consider retirement." Id.

<sup>43</sup> Evan Thomas & Michael Isikoff, The Truth Behind the Pillars, Newsweek, Dec. 25, 2000, at 46, 46.

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dency meant they would have to postpone retirement for at least another four years.<sup>44</sup>

These six anecdotes, coupled with Justice Douglas's retirement saga, illustrate what has become the norm in Supreme Court retirements over the last three decades.<sup>45</sup> The specter of strategic retirements from the Court has existed since the early years of the Republic, but the 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.

That strategic retirements happen is an unavoidable fact. While it may be true that discerning the justices' actual motivations at retirement is difficult,<sup>46</sup> as the aforementioned examples attest, justices have made known through public or private channels—often unintentionally—their partisan reasons for retiring from the Court at a specific time and during a particular administration. Moreover, it seems very difficult to believe that even those justices who have not made any public comments as to the partisan motivations behind their departure decisions did not at least consider these issues in their personal deliberations. In 1999, journalist Charlie Rose asked Chief Justice William Rehnquist if justices are strategic “policy-maximizers,” making their departure decisions based on which

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<sup>44</sup> Id. Some might argue that the fact that Justice O'Connor, despite her well-publicized comments, has not retired from the Court during Republican George W. Bush's first term belies the notion that strategic retirements are a prevalent phenomenon. One could just as easily argue, however, that it was precisely because Justice O'Connor's private remarks were widely publicized (to her immense embarrassment) that she felt the need to refute the conventional wisdom and wait on a retirement decision until at least a second George W. Bush term.

<sup>45</sup> Indeed, Professor Artemus Ward argues that *every* justice since Chief Justice Earl Warren has either strategically retired, attempted to strategically retire, or been forced off the Court for health reasons. See Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United States Supreme Court* 154, 156, 209–210 (2003); see also *infra* notes 47–49, 50–54 and accompanying text (explaining the recent trends and motivations for justices' departures from the Supreme Court, including the influence of increased retirement benefits and partisanship).

<sup>46</sup> See Oliver, *supra* note 12, at 805 (“Due to the fact that such influence may be regarded as improper, or at best questionable, on-the-record statements by Justices are not to be expected.”).

party occupies the White House.<sup>47</sup> Chief Justice Rehnquist responded: “That’s not one hundred percent true, but it certainly is true in more cases than not, I would think.”<sup>48</sup> Professor Artemus Ward, author of the newly published *Deciding to Leave: The Politics of Retirement from the United States Supreme Court*, observes that:

[H]istorically, partisan departures have been the exception rather than the rule. Institutional factors, such as not being a burden to their colleagues, and personal concerns, like the enjoyment of their work and the fear of death have played a much more significant role. This does not mean, however, that partisanship is absent from the decision-making process. Indeed . . . when examined over time partisan concerns have recently begun to play a much more significant role in the thought processes of the justices.<sup>49</sup>

Now that justices can generally retire with full salary, they have greater flexibility to choose when they retire and, therefore, to strategically retire.<sup>50</sup> Professor Ward argues that the Court’s decreasing workload has made it easier for older justices to stay on the bench until they choose to retire.<sup>51</sup> Since the increased retirement benefits and decreased workload have given justices more flexibility to choose the time of their retirement. As Professor Ward concludes, these factors “have reduced the departure process to partisan maneuvering.”<sup>52</sup>

While the best-known attempts at strategic retirements are those of Chief Justice Warren and Justice Douglas, other justices’ re-

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<sup>47</sup> Interview by Charlie Rose with William H. Rehnquist, Chief Justice, United States Supreme Court (PBS television broadcast Jan. 13, 1999), *quoted in* Ward, *supra* note 45, at 7, 218.

<sup>48</sup> *Id.* at 218.

<sup>49</sup> Ward, *supra* note 45, at 7–8.

<sup>50</sup> See *id.* at 16. Professor Ward’s main thesis is that, as retirement pension benefits have been established and expanded for the justices of the Supreme Court, the number of justices leaving the Court at a time of their own choosing has increased substantially. *Id.* at 12. Before retirement benefits existed, Professor Ward argues, justices who wanted to retain their salary for life had to stay on the Court even if they would have otherwise chosen to strategically retire under a “friendly” president. *Id.* at 16.

<sup>51</sup> *Id.* at 12.

<sup>52</sup> *Id.*

tirements, though they have received less attention, were no less strategic.<sup>53</sup> More to the point, instances of strategic partisan departures from the Court have risen sharply in the last fifty years.<sup>54</sup> Of the nineteen justices who have left the Court since 1954, nine departed under presidents who shared their party affiliation or general ideological outlook.<sup>55</sup> Nine of the remaining ten expressed—either implicitly or explicitly—a desire to leave under a president who would appoint a “friendly” successor, but were unable to do so.<sup>56</sup> In addition, Professor Ward points to the Johnson presidency, with the induced retirements of Justices Arthur Goldberg and Tom Clark, as well as Chief Justice Warren’s departure, as the inaugural moment of a new, more intense era of strategic partisan retire-

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<sup>53</sup> For example, Chief Justice Taft concluded that despite being “older and slower and less acute and more confused,” he “must stay on the court in order to prevent the Bolsheviki from getting control.” 2 Henry F. Pringle, *The Life and Times of William Howard Taft* 967 (1939). This statement is not an example of Chief Justice Taft’s senility; rather, it illustrates the fact that he stayed on the Court for political reasons despite being aware of his mental decline.

<sup>54</sup> See Ward, *supra* note 45, at 154. Professor Ward demonstrates that the justices who departed in the latter half of the twentieth century exhibited an unusually high degree of partisanship, which he largely attributes to the extension of retirement benefits. See *id.* at 154, 156 tbl.7.2.

<sup>55</sup> *Id.* at 154.

<sup>56</sup> See *id.* at 156 tbl.7.2. By Professor Ward’s count, Justices Minton, Burton, Whittaker, Black, Douglas, Brennan and Marshall all left under presidents of the opposite partisan or ideological outlook. *Id.* These departures were occasioned by health reasons. *The Supreme Court Compendium: Data, Decisions, and Developments* 393 tbl.5-7 (Lee Epstein et al. eds., 3d ed. 2003). Although Justice Burton was a Republican, he was appointed by President Truman. Professor Ward, rightly or wrongly, treats Justice Burton’s retirement under President Eisenhower as an “opposite party/ideology” retirement. See Ward, *supra* note 45, at 156 tbl.7.2. Justice Fortas was forced to resign under President Nixon for ethical reasons, *The Supreme Court Compendium: Data, Decisions, and Developments*, *supra*, at 393 tbl.5-7, and Chief Justice Warren (a Republican, but one of the Court’s leading liberals by the 1960s) failed in his attempt to retire under a Democratic president. See *supra* note 29 and accompanying text. Of the ten justices who left under an opposite-party or opposite-ideology president since 1954, only Justice Reed’s departure is unexplained. See *Supreme Court Justices: Stanley Reed* (1884–1980), at <http://www.michaelariens.com/ConLaw/justices/reed.htm> (Feb. 16, 2004) (“Reed retired from the Court in February 1957. Why he did so at that time is not satisfactorily resolved.”) (on file with the Virginia Law Review Association); see also Atkinson, *supra* note 35, at 125 (noting that Justice Reed left the Court in “good health”). But see *The Supreme Court Compendium: Data, Decisions, and Developments*, *supra*, at 393 tbl.5-7 (noting that “[h]ealth reasons required [Justice Reed to] reduce[] [his] workload”).

ments.<sup>57</sup> According to Professor Ward, “[t]he presidency of Lyndon Johnson not only reflected . . . [a] new partisan climate, but it also demonstrated the lengths to which some presidents will go to induce departure and pack the Court with their own appointments.”<sup>58</sup> Professor Ward notes that “[i]n one form or another, nearly every justice who has departed since Lyndon Johnson took office has engaged in succession politics,” and he observes that the disputed presidential election of 2000 has worked to create an even more intensely partisan climate for Supreme Court retirements.<sup>59</sup>

The descriptive account outlined above has been challenged by some scholars. Most notably, Professor William G. Ross argues that the concern about strategic retirements is overstated.<sup>60</sup> Professor Ross points specifically to Chief Justice Warren and Justice Douglas as examples of how the political system prevented the two men from engaging in strategic partisan retirement. In Chief Justice Warren’s case, public opinion and a Senate filibuster against his successor forced his hand, while in Justice Douglas’s case, his own health deteriorated to a point where he simply could no longer hold out until the next election in the hope of a Democrat being elected president.<sup>61</sup> Professor Ross also points to the example of Justice Brennan, who, like Justice Douglas, was forced by poor health to give up his personal battle to see a Democrat name his successor.<sup>62</sup> Professor Ross mentions the departures of Chief Justice Burger and Justice Powell at the end of the Reagan Administration as examples of departures that were portrayed in the press as partisan but were not partisan in his view, mainly due to the fact that, had they waited a few more years, a Republican President, George H. W. Bush, would still have named their successors.<sup>63</sup>

Although Professor Ross raises some interesting examples, he ultimately misreads each of the instances he cites. To begin, while Professor Ross arguably is correct when he states that the Warren

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<sup>57</sup> Ward, *supra* note 45, at 156.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 156, 158.

<sup>60</sup> 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, 1086 (1990).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 1087.

<sup>63</sup> *Id.*

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and Douglas episodes demonstrate the inefficacy of justices' attempts to exercise control over the character of their successors, both episodes created much judicial unrest and political outcry at the time of their unraveling.<sup>64</sup> Though both men were ultimately prevented from strategically retiring, the very fact that they attempted and thought they could succeed in strategically departing demonstrates the weaknesses of the current system of appointments to the Court. Moreover, simply because, in Professor Ross's view, the system "worked" in both those episodes does not mean that most Americans thought those episodes should serve as models for dealing with justices who have partisan motivations behind their departure decisions.

With respect to Justice Brennan, for example, the former Justice made no secret in his years after leaving the Court that he regretted having retired under a Republican president.<sup>65</sup> Justice Brennan felt that he should have remained on the Court longer and waited, despite his failing health, for a Democrat to take back the White House.<sup>66</sup> As for the Chief Justice Burger and Justice Powell examples, it is naïve to say that their departures were not strategic because, had they stayed through the next election, they still would have had the opportunity to leave under a Republican president. In 1986 and 1987 it was by no means clear to Chief Justice Burger and Justice Powell that a Republican would win the White House again in 1988.<sup>67</sup> In 1987, as Justice Powell considered when to leave the Court, Dean Jeffries' memo, describing why this was the Justice's last opportunity to leave the Court if he wanted to ensure that a Republican president would name his successor, quite possibly led to his retirement.<sup>68</sup> In addition, all three retirements from the Court since Professor Ross published his article in 1990—Justices Marshall, Blackmun, and White—have been stamped by some level of partisan considerations.<sup>69</sup>

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<sup>64</sup> See generally Ward, *supra* note 45, at 171–75, 182–92 (describing the Warren and Douglas episodes).

<sup>65</sup> See *id.* at 202–03.

<sup>66</sup> *Id.*

<sup>67</sup> See *supra* note 30.

<sup>68</sup> See Jeffries, *supra* note 32, at 543; see also discussion *supra* notes 30–32.

<sup>69</sup> See Ward, *supra* note 45, at 203–09.

This critique of Professor Ross's argument suggests that most of the justices who have retired since 1968 have behaved strategically. This is cause for concern because such strategic behavior represents a potential misuse of a justice's power. The original purpose of granting Supreme Court justices life tenure was to ensure judicial independence,<sup>70</sup> not to grant to each justice the power to influence who succeeds him after he retires. The current system gives justices a great deal of power to determine the identities of their successors; indeed, past justices have timed their departures to wield an unmistakable influence on the Supreme Court's current composition, just as current justices have the power to help determine the Court's future composition.<sup>71</sup> Following Chief Justice Warren's departure, even *The New Republic*, then a liberal publication, felt that the Chief Justice had overstepped the ethical bounds of his constitutional office, stating: "Life tenure, specified in the Constitution and undoubtedly essential, is one thing; life tenure with a right to influence confirmation of a successor is rather another."<sup>72</sup> Strategic retirement is a problem in need of an immediate solution, then, because it presents far-ranging implications for the composition of the Court that extend beyond the tenures of the individual justices.

### *B. Incentives for Young Nominees*

In June 1993, in a Rose Garden press conference, President Bill Clinton introduced his first nominee to the Supreme Court, Judge Ruth Bader Ginsburg of the United States Court of Appeals for the District of Columbia Circuit. This was a noteworthy moment, as no Democrat had named a justice to the Supreme Court since

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<sup>70</sup> See Hamilton, *supra* note 15 ("If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.").

<sup>71</sup> See Oliver, *supra* note 12, at 805 ("It is submitted that this influence on the selection process by retiring Justices is wholly inappropriate. The justification of life tenure relates to the independence of the Justice while he is on the Court. Allowing the outgoing Justice a measure of control over the naming of his successor allows him an unchecked power entirely unnecessary to protect his independence of action while on the bench, and . . . cannot be justified.").

<sup>72</sup> The Chief Justice, *The New Republic*, July 20, 1968, at 12.

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President Lyndon Johnson nominated Thurgood Marshall in 1967. Justice Ginsburg had compiled an exemplary record as a lawyer and a judge, and many legal scholars commended President Clinton on the high intellectual caliber and esteemed legal and judicial reputation of his nominee.<sup>73</sup> Nevertheless, there was some grumbling about President Clinton's choice throughout the Washington political community, almost all of it directly attributable to one factor: then-Judge Ginsburg's age. Despite her impressive credentials, many Democratic politicians criticized President Clinton's choice of the sixty-year-old Ginsburg, and they continue to do so today.<sup>74</sup> Coming less than two years after President George H. W. Bush had put the forty-three-year-old Clarence Thomas on the Supreme Court, Democrats felt that President Clinton had foolishly undercut their attempt to challenge the GOP's long-term dominance of the Court.

In the eighteenth and nineteenth centuries, the average age of nominees at the time of their appointment to the Supreme Court was 51.1 years.<sup>75</sup> Four justices took the bench in their thirties, including two at thirty-two, and sixteen more took the bench in their

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<sup>73</sup> See Press Release, The White House, Office of the Press Secretary, Ruth Bader Ginsburg (June 14, 1993), <http://www.ibiblio.org/pub/archives/whitehouse-papers/1993/Jun/Ruth-Bader-Ginsburg-Release-61493> (on file with the Virginia Law Review Association) (containing statements of support from Dean Judith Areen and Professor Gerald Gunther, among others).

<sup>74</sup> See, e.g., David Halperin, Remarks to the University of Virginia School of Law Chapter of the American Constitution Society for Law and Policy (March 27, 2003); see also Howard Bashman, 20 Questions for Senior Circuit Judge Richard S. Arnold of the U.S. Court of Appeals for the Eighth Circuit, at [http://20q-appellateblog.blogspot.com/2003\\_11\\_01\\_20q-appellateblog\\_archive.html](http://20q-appellateblog.blogspot.com/2003_11_01_20q-appellateblog_archive.html) (Nov. 3, 2003) (addressing rumors that he was a finalist for the Court vacancy ultimately filled by Justice Stephen Breyer, Judge Arnold observed that “[t]he problem was doubts about longevity. No physician acceptable to the White House was willing to give sufficient assurances on that score” and that “an expectation of longevity has been, for a long time, a practical political consideration in appointing judges, especially justices of the Supreme Court. The factor has received more weight, in my opinion, than it deserves, but it is an aspect of political life.”) (on file with the Virginia Law Review Association); Jerry Long, Supreme Court Appointments? I Still Need A Reason Not To Vote For Ralph Nader, *Phila. Inquirer*, June 11, 2000, <http://www.commondreams.org/views/061100-104htm> (“My apologies to Ruth Ginsberg [sic] and Steven [sic] Breyer, but if I’m going to . . . vote Democratic based on the makeup of the Supreme Court, then I want 35-year-old appointees . . . with the life expectancy of a giant tortoise.”) (on file with the Virginia Law Review Association).

<sup>75</sup> Gruhl, *supra* note 24, at 66.

forties (38% of the total in these years).<sup>76</sup> In the twentieth century, the average age at appointment was 54.7 years, and just nine (20%) were in their forties.<sup>77</sup> Although these averages might appear to contradict the recent trend toward younger nominees to the Court, the younger average age in the eighteenth and nineteenth centuries is attributable to lower life expectancy in those centuries.<sup>78</sup> In addition, many of the youngest nominees to the Court were appointed in the very early years of the Republic.<sup>79</sup> Furthermore, the average age at which the justices on the current Court took office is approximately 51.8,<sup>80</sup> a figure much closer to the eighteenth and nineteenth century average than to the twentieth century average of 54.7. In particular, there seems to be a trend toward younger nominees by recent Republican administrations.<sup>81</sup> President Reagan named fifty-one-year-old Sandra Day O'Connor, fifty-year-old Antonin Scalia, and fifty-one-year-old Anthony Kennedy to the Court. Reagan also nominated (but failed to get confirmed) forty-one-year-old Douglas Ginsburg. Following President Reagan, President George H. W. Bush nominated fifty-one-year-old David Souter and forty-three-year-old Clarence Thomas to the Court. In comparison, President Clinton nominated the sixty-year-old Ginsburg and fifty-five-year-old Stephen Breyer to the Court. Today, many Democratic partisans view Justices Ginsburg and Breyer as poor choices on President Clinton's part because of their ages.<sup>82</sup> The key to understanding why many liberals regret President Clinton's appointment of two well-regarded, left-of-center justices lies in the stakes of the modern Supreme Court nomination process.

Presidents understand the importance of the Supreme Court in American life, and they appreciate that the legacy of their presi-

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> See Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices Be Term-Limited?: A Dialogue*, at <http://writ.news.findlaw.com/amar/20020823.html> (Aug. 23, 2002) (noting that "Justices are living—and thus serving—much longer" today than for most of the Court's history) (on file with the Virginia Law Review Association).

<sup>79</sup> Joseph Story was thirty-two at the time of appointment; William Johnson was thirty-three. See *The Supreme Court Compendium: Data, Decisions, and Developments*, *supra* note 56, at 335 tbl.4-12.

<sup>80</sup> The average is based on the Authors' own calculations.

<sup>81</sup> Gruhl, *supra* note 24, at 68.

<sup>82</sup> See, e.g., Halperin, *supra* note 74; Long, *supra* note 74.

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dencies can endure for decades after they have left office through their appointees to the Court.<sup>83</sup> Knowing how important their choice of nominees can be in framing their presidential legacies, presidents seek to make the very most of these decisions. It would be rare for a president, especially in this day and age, to nominate a person based on qualifications alone. Few informed observers would argue that ideology and the possibility of longevity play no role in a president's nomination decision.<sup>84</sup>

Based on these considerations, it is relatively easy to grasp why presidents seeking to exert the greatest possible influence on the Court have an incentive to nominate a younger candidate. The problem with the current nomination system is that youth has been elevated from one factor among many to one of the most important considerations. Certainly, it would be cynical to suspect that any president would look *solely* to age in choosing a nominee. It would be quite realistic, however, to imagine that a president, when choosing between two well-qualified nominees, one who is forty-two years old and the other sixty-two, would choose the younger candidate, even if the sixty-two-year-old were otherwise a better candidate.

The problem with the current system is not young justices *per se*; rather, the problem lies in the incentives the system creates to appoint young justices to the exclusion of older candidates.<sup>85</sup> Profes-

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<sup>83</sup> At his nomination of Chief Justice Warren Burger, President Nixon stated:

When we consider what a Chief Justice has in the way of influence on his age and the ages after him, I think it could fairly be said that our history tells us that our Chief Justices have probably had more profound lasting influence on their times and on the direction of the Nation than most Presidents have had. You can see, therefore, why I consider this decision to be so important.

Remarks Announcing the Nomination of Judge Warren Earl Burger to be Chief Justice of the United States, Pub. Papers 388 (May 21, 1969).

<sup>84</sup> An *American Bar Association Journal* article in August 1985 noted: "To expect a president not to try to pack the Supreme Court with appointees who share his philosophy is like expecting water to run uphill. From George Washington to Ronald Reagan, no president has behaved so unnaturally." Herman Schwartz, *The Senate Can Play Too*, 71 A.B.A.J. 1985, at 36, 36 (1985).

<sup>85</sup> Although youth should not be a disqualifying factor, some commentators have argued that there are disadvantages to joining the Court at an early age. For instance, former acting Solicitor General Walter Dellinger suggests that youth might be a handicap because "for some young appointees, the problem is not that they lack sufficient experience, but that they will cease to grow further because of the constant spe-

sor Sanford Levinson argues that life tenure, coupled with explicitly ideological appointments, results in a perverse incentive to appoint a young justice instead of an older justice when, were age not a consideration, the nominating president would prefer the older candidate.<sup>86</sup> Speaking at a 1992 symposium on the career of Justice Powell, Professor Levinson observed that Justice Powell was appointed to the Court when he was sixty-three and served for sixteen years. Professor Levinson stated that it would be unthinkable for a president to appoint a sixty-three-year-old two decades after Justice Powell's nomination, because sixteen years was (and is) viewed as much too short a tenure.<sup>87</sup> Unless immediate changes were made to the life tenure provision for Supreme Court justices, Professor Levinson concluded, nominations like that of the forty-three-year-old Clarence Thomas would become the rule and no longer the exception.<sup>88</sup>

Critics argue that scholars like Professor Levinson are alerting the public to dangers that do not exist.<sup>89</sup> No Republican president since Gerald Ford, however, has nominated a justice older than

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cial treatment that Supreme Court [justices] receive." Monaghan, *supra* note 17, at 1211 n.37.

<sup>86</sup> Sanford Levinson, *Contempt of Court: The Most Important "Contemporary Challenge to Judging,"* 49 Wash. & Lee L. Rev. 339, 341 (1992).

<sup>87</sup> *Id.* Indeed, Justice Powell himself allowed that he had been too old to join the Court two years before he was nominated and only agreed to accept a nomination when President Nixon, desperately in need of an easily-confirmable Southerner to replace Justice Hugo Black, refused to take no for an answer. Woodward & Armstrong, *supra* note 1, at 188.

<sup>88</sup> Levinson, *supra* note 86, at 341. Levinson continued: "[O]ne of the ostensible attractions, at least to the appointment presidents, of Antonin Scalia, Anthony Kennedy, and David Souter as well as their relative youth and, thus, prospects for three decades of service to conservative political ideals, regardless of future developments in the wider political culture." *Id.*; see also Oliver, *supra* note 12, at 804 n.33 ("It is not suggested that the increased physical vigor normally associated with relative youth is an insignificant asset in considering an individual's fitness for the extremely demanding position of Justice. That factor could still be given whatever weight the President thought appropriate. The significant difference is that unlike the present system, if the President concluded that the older candidate was better qualified for service for a considerable number of years, he would not be tempted to choose a somewhat less qualified candidate whose youth would allow even longer service . . . . To the degree factors other than the qualifications of those under consideration are reduced—and it is submitted that the proposal [to replace life tenure with eighteen-year, nonrenewable terms] would reduce the importance of one such extraneous factor—it becomes likely that relative qualification will become the dominant factor in the selection.").

<sup>89</sup> See, e.g., Ross, *supra* note 60, at 1086.

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fifty-one, and President Clinton's fifty-five and sixty-year-old nominees were widely perceived as strategic errors that future Democratic presidents are unlikely to repeat. We have come to a point in the history of nominations to the Supreme Court where a president will be reluctant to consider seriously a nominee much older than fifty-five. At present, for example, of eight individuals among the most frequently mentioned as prospective nominees of President George W. Bush for the next Court vacancy, six are under fifty-five, three are under fifty, and none is over sixty.<sup>90</sup> The consequence of this trend towards younger nominees could very well be a judicial "arms race" in which presidents of both parties feel obliged to name young justices at every opportunity, in order to counter nominations of young justices by presidents of the other party. Even a president whose preferred nominees are older will feel intense pressure to take advantage of his rare Supreme Court vacancies by naming young justices who will serve for as long as possible, so as to maximize his party's long-term influence on the Court.<sup>91</sup>

Other critics have argued that, if there is a trend toward younger Supreme Court nominees, there is no reason for alarm because youth is a positive attribute in a nominee. In support of this view, Bruce Fein notes: "[J]udging is not an assembly-line job. It is an art

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<sup>90</sup> See Ana Radelat, *Bush Likely to Opt for Court Nominee With Federalist Ties*, *Detroit News*, Mar. 28, 2004, available at <http://www.detroitnews.com/2004/politics/040328/a07-105331.htm> (on file with the Virginia Law Review Association) (listing Justice Janice Rogers Brown (California Supreme Court, age fifty-four), Alberto R. Gonzales (White House Counsel, age forty-seven), Judge J. Michael Luttig (Fourth Circuit, age forty-eight), Judge Jeffrey Sutton (Sixth Circuit, age forty-three), and Judge J. Harvie Wilkinson III (Fourth Circuit, age fifty-nine) on "Bush's likely list"); Robin Toner & Neil A. Lewis, *Lobbying Starts as Groups Foresee Vacancy on Court*, *N.Y. Times*, June 8, 2003, at A1 (listing Gonzales, Justice Brown, Judge Luttig, and Judge Wilkinson, as well as Judge Samuel A. Alito, Jr. (Third Circuit, age fifty-three), Judge Edith H. Jones (Fifth Circuit, age fifty-four), Larry D. Thompson (former Deputy Attorney General, age fifty-seven) as likely Bush nominees). The ages are accurate as of the articles' publication dates.

<sup>91</sup> The same can be said of the likely effect this "arms race" has on the justices themselves. Even justices who are unhappy about the frequency of strategic retirements on the modern Court, see generally *supra* Section II.A, and who would prefer not to strategically retire, still probably feel compelled to retire under a "friendly" president to offset the effects of strategic retirements by justices on the opposite end of the Court's ideological spectrum.

in which longevity is advantageous.”<sup>92</sup> Fein argues that many of the greatest justices were appointed to the Court at a young age and attributes much of their greatness to their longevity.<sup>93</sup> Young justices benefit from having greater vigor while older justices come to the Court with more life and professional experience. At the end of the day, this particular debate seems irrelevant. There clearly are advantages and disadvantages to appointment of a young justice, but they are too subjective and varied to merit further discussion in this Note. Although a justice’s age upon joining the Court probably has no bearing on his potential as a justice, presidents nevertheless consider age as a key factor in choosing a nominee. For this reason alone, the system needs fixing.

### *C. Random Distribution of Appointments*

Assume, *arguendo*, that the phenomenon of strategic retirements does not exist and that justices leave the Court only for personal reasons, in unpredictable, random fashion, regardless of length of service. Even if this assumption were true, the status quo would still be less than ideal because a president who wins the White House might be justified in expecting that his electoral victory will translate into at least a somewhat proportionate influence on the Court.<sup>94</sup>

Given the enormous power of the justices on the modern Court and the Court’s involvement in highly political areas, it is difficult to argue in favor of the randomness with which an electoral majority that puts one president in the White House often sees its success at the ballot box translate into many more Supreme Court appointments than does an equivalently large majority that elects a

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<sup>92</sup> Bruce Fein, *A Circumscribed Senate Confirmation Role*, 102 *Harv. L. Rev.* 672, 679 (1989).

<sup>93</sup> *Id.* at 680. See also discussion *supra* Part I and *infra* Section IV.B.

<sup>94</sup> See, e.g., Oliver, *supra* note 12, at 810 (“When voters select a President, they select the person who, in addition to many other important duties, will name Justices to the Supreme Court. As voters have historically changed the occupants of the White House, they have, indirectly but inexorably, changed the makeup of the Court. But it is (at best) random chance that determines *which* presidential elections will be important in affecting the Court, and which will have little or no effect.”). Professor Oliver also notes that “the present system makes the composition of the apex of the pyramid of one of the federal government’s three coequal branches depend, in large part, on chance.” *Id.* at 811.

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different president. While as a practical matter this issue boils down to how many justices a particular president has the opportunity to appoint, the problem with the randomness of the current system is not one of fairness to presidential administrations or political parties. Rather, the status quo's true inequity lies in its unfairness to the voters who elect a given president to a given term. The Supreme Court is a legitimate body in a democratic government because its justices, while appointed, are appointed by presidents who are themselves elected. As such, there should be some relationship between the voters' choice of a president and the relative influence that president has on the Court. The current system may fail in this regard.

There is a certain expectation that a Democratic presidential candidate will appoint more liberal jurists to the Court and that a Republican candidate will appoint more conservative jurists.<sup>95</sup> The problem with the current system is that an uneven distribution of appointment opportunities is embedded in the existing constitutional structure, allowing some presidents to appoint—and, by extension, some electoral majorities to influence—an unusually large number of justices, while leaving others with disproportionately

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<sup>95</sup> This expectation has not always been the case. In the 1910s, 1920s, 1930s, and even into the 1940s, it was not unusual for conservative Republicans like Presidents Calvin Coolidge or Herbert Hoover to name progressives like Harlan Fiske Stone and Benjamin Cardozo to the Court, nor was it unusual for Democrats like Presidents Woodrow Wilson or Franklin Roosevelt to name conservatives like James McReynolds or James Byrnes to the Court. See Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 115–16 (2004). See generally Christopher E. Smith & Kimberly A. Beuger, *Clouds In The Crystal Ball: Presidential Expectations And The Unpredictable Behavior Of Supreme Court Appointees*, 27 *Akron L. Rev.* 115 (1993) (analyzing the dangers presidents face in hoping that their nominees' performances on the bench will follow presidential expectations). Presidents today seem increasingly likely to choose nominees based on ideological considerations. Notwithstanding increased attention to ideology, "mistakes" can still be made, as the recent example of Justice Souter aptly demonstrates. Although ideology played a role in Justice Souter's nomination, less than a thorough inquiry was made into Justice Souter's beliefs because White House Chief of Staff John H. Sununu vouched for Souter's conservative credentials. See Ethan Bronner, *Sununu Likened Souter Choice to Home Run*, *Boston Globe*, Aug. 22, 1990, at 23. The disappointment among conservatives over Justice Souter's Supreme Court jurisprudence suggests that in the future exhaustive inquiries into ideology will feature prominently in the nomination process. And there is no reason to believe that this heightened attention will be unique to conservative nominees.

few appointments during their time in office.<sup>96</sup> In his sole term in office, President William Howard Taft made five appointments to the Court, while President Warren Harding made four appointments during his three years in office (the greatest frequency of appointments in the modern history of the presidency). On the other hand, President Franklin Roosevelt did not make a single appointment during his first term, and, more recently, President Jimmy Carter went through his entire presidency without a single opportunity to nominate someone to the Court. President Bill Clinton's second term saw no vacancies on the Court, and, barring any surprises, it seems increasingly likely that President George W. Bush's first term also will yield no appointments to the Court.<sup>97</sup>

The Court was intended by the Framers to be a counter-majoritarian institution,<sup>98</sup> but when a president goes a full four or eight years without a single appointment to the Court, the system may have a tendency to become counter-majoritarian in a way that may seem undesirable. Add to this the fact that strategic retirements is a very real phenomenon, and a party could literally see its nominees kept off the Court for decades even if that party wins several presidential elections—as was the case when twelve years of Democratic administrations (Presidents Carter and Clinton) ap-

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<sup>96</sup> Since Supreme Court vacancies are relatively rare (even putting aside the present nine year drought), their random distribution among presidential terms is not likely to even out over time, as might be the case for much more frequent federal circuit and district court vacancies.

<sup>97</sup> In addition to the examples already mentioned, Presidents William Henry Harrison, Zachary Taylor, and Andrew Johnson also made no appointments during their terms in office (although Harrison and Taylor died early in their terms and the Senate refused to confirm any of Johnson's nominees). Nine presidents made only one appointment. In contrast, Franklin Roosevelt made nine appointments in his twelve years (although none during his first term).

<sup>98</sup> Hamilton, writing of the Court and the judiciary, noted in *Federalist* 78:

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humours, which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. . . . [T]he independence of the judges may be an essential safeguard against the effects of occasional ill humours in the society.

Hamilton, *supra* note 15.

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pointed a total of only two justices.<sup>99</sup> This creates a situation in which, with a bit of good luck and shrewd strategy, political majorities can retain control of the Supreme Court long after they lose control of the political branches.<sup>100</sup>

### III. THE SOLUTION AND WHY IT SOLVES THE PROBLEM

#### *A. Outline of the Proposed Constitutional Amendment*

In order to address the problems delineated in Part II, this Note proposes a constitutional amendment which would limit Supreme Court justices to eighteen-year, nonrenewable terms, with one term expiring every two years.<sup>101</sup> Under the proposed amendment, each justice would be appointed to a particular term, and one term would expire every two years, on January 3 of each even-numbered year.<sup>102</sup> The Court's entire membership would be replaced over an eighteen-year cycle. If a justice left the Court prior to the expiration of his term, the President would nominate (and the Senate would confirm) a "replacement" justice who would serve only for the remainder of the departing justice's term. Under no circumstances could a justice—even a "replacement" justice who only served for a short period of time—be reappointed to the Court.

The proposed amendment would allow the president to name a nominee to fill an expiring term up to six months prior to that

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<sup>99</sup> See Jed Handelsman Shugerman, *A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court*, 37 Ga. L. Rev. 893, 936 n.281 (2003).

<sup>100</sup> The Court, of course, frequently gives some degree of influence to past political majorities because of its counter-majoritarian nature. Electoral majorities can affect the membership of Congress every two years and the occupancy of the White House every four years, but it often takes many more years to create a majority on the Court. The problem, therefore, is not that the Court is counter-majoritarian, but rather that, under the current system, it may be too counter-majoritarian, and that this counter-majoritarianism is based on luck rather than reason.

<sup>101</sup> For the full text and a more detailed explanation of the proposed constitutional amendment, see *infra* Appendix.

<sup>102</sup> The January date for changing justices falls in the middle of a Supreme Court term. This date, however, represents the lesser of two evils because having justices' terms expire in the summer would place confirmation battles either at the very beginning of a president's term in office (if in an odd-numbered year) or on the cusp of a general election (if in an even-numbered year). The specific choice of January 3 for the expiration of justices' terms tracks its use in the Twentieth Amendment, which dictates that Congress assemble at noon on the third day of January in order to hold its first session of the year. See U.S. Const. amend. XX, § 2.

term's scheduled January 3 expiration.<sup>103</sup> The chief justice would be appointed from among the associate justices whenever the office became vacant, and the new chief justice would serve until the term for which he was appointed as an associate justice expired.<sup>104</sup> Once his term on the Court expired, each former justice would be permitted to serve for life on the lower federal court of his choice.<sup>105</sup> The proposed amendment also includes a mechanism for transitioning the Court from the current system to the new system.

*B. The Proposed Constitutional Amendment Removes Incentives for Strategic Retirements*

The proposed amendment essentially eliminates the justices' power to strategically retire under presidents of their choosing and consequently affect the identity—and ideology—of their successors. A fixed, nonrenewable term of eighteen years arguably ensures that each justice has as much independence as under a system of life tenure, while removing the justice's power to determine who

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<sup>103</sup> This provision allows the nomination and confirmation process to take place prior to the vacancy occurring. Because terms would expire in the middle of the Court's term, this provision reduces the likelihood of a seat on the Court ever being vacant. Also, because terms would expire on January 3 of even-numbered years, presidents could nominate justices on July 3 of odd-numbered years. Consequently, the confirmation process—and potential battles in the Senate—would occur in the second half of each odd-numbered year. This timing would give newly elected presidents and senators six months' experience in their new jobs before the confirmation process began and would leave more than a full year between (potentially) contentious confirmations and general elections.

<sup>104</sup> This provision has the effect of changing the role of the chief justice. Presidents would no longer be able to appoint chief justices from outside the Court. Because the office of chief justice carries few additional substantive powers when compared to the other eight seats on the Court, there is no need to complicate the proposed amendment by imposing a term limit specifically upon the chief justice.

<sup>105</sup> See discussion *supra* note 27 and *infra* note 185. Although it is difficult to imagine anyone turning down a seat on the Court, most federal appellate judges likely look forward to the prospect of continuing to serve in senior status with a reduced caseload because the job is quite prestigious and, with senior status, relatively conducive to a semi-retired lifestyle. Viewed in this light, an eighteen-year term might not seem as attractive as would life tenure on the Court to a circuit judge who already has (and expects to take full advantage of) life tenure in his current job. The proposed Amendment accounts for this potential problem by enabling Congress to grant retired justices life tenure on a lower federal court. It presumes Congress would statutorily grant any former Supreme Court justice (other than those impeached and convicted) the right to take active or senior status with life tenure on a Court of Appeals.

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succeeds him beyond the expiration of his eighteen-year term. Each justice would be required to retire at the end of his term—a date that would be public knowledge even prior to his nomination<sup>106</sup>—and would have no power to alter that retirement date in order to increase the chances of a like-minded successor’s appointment beyond his term.

The practical effect of denying the justices the ability to help choose their successors would be to confer more power to the voters, through their choice for president. For every term to which the people elect a president, that president would have the power to nominate two justices. Presidents can be expected to nominate justices who share their sociopolitical vision of the Constitution and the law, and, similarly, the people can be expected to elect presidents who share their views of the Constitution and the law. Under the current system, justices generally determine when they retire and, therefore, have considerable influence over the ideology of their successors. Under the proposed amendment, justices would essentially have no say in when they retire, leaving it to the sitting president, elected by the people, to determine the ideology of a retiring justice’s successor.

A fixed, nonrenewable eighteen-year term on the Supreme Court limits a justice’s tenure, but justices would still have the option of retiring (or, possibly, the unfortunate fate of falling ill or dying) prior to the normal expiration of their terms. The ability to leave the Court early, however, does not give any justice the power to affect the occupant of his seat beyond the expiration of that justice’s term. A successor justice would merely serve the remainder of the term that would otherwise belong to the justice taking early retirement. Consequently, by choosing to leave the Court early under a “friendly” president, a retiring justice would only be ensuring that the remainder of the term to which he is already entitled to serve would be filled by a like-minded successor—considerably less

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<sup>106</sup> Justices on the Court at the time of the proposed amendment’s effective date would not know their mandatory retirement dates until the amendment’s effective date. While this might strike the current justices as somewhat unfair, they would each still be able to serve at least eighteen years on the Supreme Court, and following their terms’ expiration they would continue to receive their salaries and have the option of serving as lower federal judges.

power than the current justices, who have the ability to affect the identity of their life-tenured successors.

A key to the proposed amendment is that it ensures that the justices maintain the power and autonomy that they must have in order to remain an independent judiciary while eliminating the power that the justices should not (but currently do) have to influence the decision of who succeeds them.

*C. The Proposed Constitutional Amendment Removes Incentives for Young Nominees*

Under the proposed amendment, presidents would have little incentive to nominate justices of any particular age. The proposed amendment provides that each president nominate exactly two justices to eighteen-year terms for each full term the president serves. This system removes, to the greatest extent possible, any incentive for a president to consider age as a determinative factor when selecting a Supreme Court nominee.<sup>107</sup>

When choosing a nominee for an eighteen-year term, a president will presumably look for someone likely to be able to serve the full eighteen years. Given current life expectancy, presidents could reasonably choose nominees in good health up to their early sixties.<sup>108</sup> The proposed amendment does nothing to *discourage* young nominees, but it also does nothing to *encourage* young nominees at the expense of older nominees. In that sense, it is age-neutral.

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<sup>107</sup> Making terms on the Court shorter than eighteen years would give presidents the practical option of nominating older justices than they are likely to nominate to eighteen-year terms. Reasonably long terms, however, are critical to preserving the Court's independence and continuity within desirable bounds of counter-majoritarianism and to ensuring that the justices have ample time to gain experience and serve as productive members of the Court. See *infra* Section IV.A.2. The eighteen-year term represents a balance between having justices serve long terms on the Court and removing disincentives from naming older nominees.

<sup>108</sup> The proposed amendment would allow presidents to nominate an even older justice to the Court while running only a minimal risk of losing influence on the Court. A justice who began a term at age sixty-five would finish his term at age eighty-three. A president who nominated a sixty-five-year-old would run a risk that the justice would not be able to serve his full term. Even if that justice were not able to complete his entire term, he would still likely complete most of it. Therefore, even if a president of the opposing party were able to appoint that justice's short-term successor, that special appointment would be for much less than eighteen years and would not influence the Court nearly as much as a lifetime (or even an eighteen-year) appointment.

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*D. The Proposed Constitutional Amendment Fairly Distributes Appointments*

The proposed amendment also addresses the disproportionate role that luck plays in determining the number of justices each president nominates. Under the proposed amendment, each president would have two Supreme Court appointments per term. Guaranteeing each president a specific and equitable number of Supreme Court appointments ties the ideology of the justices to the political choices the voters make in each presidential election.<sup>109</sup>

By guaranteeing each president two eighteen-year appointments per term, the proposed amendment not only eliminates the “luck” factor from Supreme Court appointments, it also creates a relationship between the voters’ choices and who sits on the Court. To illustrate, consider the years 1980–2000, when the people elected a Republican to the presidency three times and then elected and re-elected a Democratic president. Under the current system, the voters’ choices for president over that period of time had little bearing on who actually sat on the Supreme Court in 2000<sup>110</sup> because there is no coincidence between electoral victories and Court appointments. If the proposed amendment had been in place in 1980, however, in 2000 the Court would have had four Democratic appointees and five Republican appointees, accurately reflecting who the people had elected president during the eighteen-year cycle of

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<sup>109</sup> To a lesser degree, the proposed amendment ties the ideology of the justices to the political choices the voters make in each senatorial election. In addition to giving each president two appointments per term, it gives the Senate one confirmation per election cycle. Although the realities of the modern presidency, practically speaking, give the president relatively more power than the Senate in the nomination and confirmation process, the Senate still has a significant say in who is ultimately appointed to the Supreme Court. See generally Monaghan, *supra* note 17 (arguing that the Senate is under no affirmative constitutional compulsion to confirm any presidential nominee and that the political nature of the Senate’s role, like that of the President, helps ameliorate the “countermajoritarian difficulty” by increasing the likelihood that Supreme Court justices will hold views not too different from those of the people’s representatives). Consequently, the proposed amendment not only addresses the unfair distribution of Supreme Court nomination opportunities among presidential terms, it also addresses the unfair distribution of Supreme Court confirmation opportunities among senatorial election cycles.

<sup>110</sup> In 2000, the Court had two Democratic appointees and seven Republican appointees, although two of the Republican appointees generally voted with the Democratic appointees. See *supra* note 95.

1982–2000.<sup>111</sup> If Al Gore had won the 2000 election, the Court would have had a Democrat-appointed majority in 2002, after “President” Gore’s first Court appointment that year. Under the proposed amendment, a party that wins three consecutive presidential elections—a relatively rare occurrence accomplished only once in the past fifty years—would be able to appoint a majority of the justices.<sup>112</sup> No party would be able to appoint all nine members of the Court without winning five consecutive presidential elections, something which has only happened three times in American history—and only once in the past century.<sup>113</sup>

The proposed amendment creates a system in which a political party or ideological movement can eventually dominate the Supreme Court, but only after demonstrating stamina and sustained popularity by winning a series of elections over a prolonged period of time. This system preserves the Court’s role as a counter-majoritarian body with a membership at least somewhat immune from political whims, while also ensuring a connection between the justices and the preferences of the people whose laws and Constitution they interpret.

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<sup>111</sup> While today’s Court does in fact have four left-of-center justices, Justices Ginsburg and Breyer are the only two Democratic appointees. As such, the only reason there is not a 7–2 Republican majority today is that Justices Stevens and Souter, both appointed by Republican presidents, typically vote with the Court’s liberal wing. Since these shifts may be less likely to occur in the future, see *supra* note 95, for purposes of this example, it is best to treat “hypothetical” justices as if they remain ideologically in line with the presidents who nominate them.

<sup>112</sup> This occurred from 1980–1988. *The World Almanac and Book of Facts 2004*, at 608 (2004).

<sup>113</sup> This occurred from 1800–1820, 1860–1880, and 1932–1948. *Id.* While Republicans won six consecutive elections from 1860 through 1880, Andrew Johnson, a Democrat, served as president from 1865 until 1869. Had the proposed amendment been in place at that time, Johnson would have been president for both the 1866 and 1868 appointments to the Supreme Court. President Johnson’s 1868 appointee still would have been on the Court when President Grover Cleveland was elected in 1884, so there would have been at least one Democratic justice during that entire period. As it happened, the Republican Senate refused to let President Johnson appoint anyone to the Court, but this hypothetical merely illustrates what *would* have happened had the proposed amendment been in place in the 1860s. The Republicans again won four consecutive elections from 1896 through 1908, which would have given them eight appointments to the Court. When Woodrow Wilson became president in 1913, however, President Cleveland’s 1896 appointee still would have been on the Court, never leaving it without a Democratic appointee.

Critics might argue that, had the proposed amendment been in effect during the 1930s, President Roosevelt would not have been able to appoint a majority of the justices until 1942,<sup>114</sup> so the 1937 Court-packing crisis might not have been averted by Justice Owen Roberts's "switch in time that saved nine."<sup>115</sup> In reality, the New Deal Court illustrates why this proposal operates as a salutary balancing mechanism. As it happened, President Roosevelt had appointed no one to the court at the time of the Court-packing controversy in 1937. Three Republican appointees, Chief Justice Charles Evans Hughes and Justices Harlan Fiske Stone and Benjamin Cardozo, along with Justice Louis Brandeis, a Democrat, had always (or, in Hughes's case, frequently) been consistent supporters of the New Deal.<sup>116</sup> The New Deal majority formed on the Court that year without Roosevelt making a single appointment when Republican-appointed Justice Roberts, the Court's swing vote at the time, decided to side with those justices who deemed Congressional New Deal legislation constitutional.<sup>117</sup> Many of the pre-1937 decisions overturning New Deal legislation were 5-4 votes.<sup>118</sup> Consequently, had Roosevelt been able to replace even

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<sup>114</sup> Roosevelt actually appointed his fifth justice in 1940. The Supreme Court Compendium: Data, Decisions, and Developments, *supra* note 56, at 335 tbl.4-12.

<sup>115</sup> After the Supreme Court had repeatedly struck down several prongs of the New Deal, President Roosevelt proposed a "Court-packing" plan that would have expanded the size of the Court so that he could appoint new justices. See Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution*, 3-32 (1998). In 1937, however, Justice Roberts, who had previously voted against the New Deal, voted to uphold a portion of the New Deal, and the Court-packing plan was withdrawn, saving the nine-member Supreme Court. *Id.* at 45-46; Hutchinson, *supra* note 40, at 149-50.

<sup>116</sup> Cushman, *supra* note 115, at 18.

<sup>117</sup> *Id.* at 45-46. The fact that three (and later four) Republican-appointed justices were supportive of the New Deal relates to the the political alignment of the 1920s and 1930s. Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* 146-55 (1999). While even today two of the four justices commonly regarded as liberal are Republican appointees, it is less likely that justices will ideologically stray from the presidents who appoint them in the future. See *supra* notes 95, 111.

<sup>118</sup> See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 617 (1936) (invalidating state minimum wage law for women as violating due process); *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936) (invalidating the Bituminous Coal Conservation Act of 1935); *R.R. Ret. Bd. v. Alton R.R. Co.*, 295 U.S. 330, 391-92 (1935) (invalidating the Railroad Retirement Act of 1934).

one anti-New Deal justice during his first term, the Court-packing crisis never would have occurred.

Critics might also argue that the proposed amendment does not entirely eliminate the role of luck in determining the number of justices each president appoints. If a justice dies or leaves the Court before his eighteen-year term has expired, whomever happens to be president at the time of the vacancy would be able to appoint a “bonus” justice.<sup>119</sup> This scenario does not present a significant problem for two reasons. First, it is simply not possible to fashion an appointment blueprint that entirely removes luck from the equation. The proposed amendment, however, operates to minimize luck’s role in “bonus” appointments by reducing it to a mechanism for filling early or unexpected vacancies on the Court. In contrast, under the current system, luck plays an enormous role in the timing of vacancies.

Second, and more importantly, the impact of a particular president making an extra “replacement” appointment to the Court would be mitigated because the replacement justice would serve for something less than eighteen years—in all likelihood, much less than eighteen years. The most likely cause for a justice not serving his entire eighteen-year term would be death or health problems.<sup>120</sup> The chance of a justice dying or becoming incapacitated due to health problems is much higher when that justice is older, at the end of his term, than earlier in his term. As such, to the extent that luck plays a role under the proposed amendment, it would be significantly more modest than under our present system.

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<sup>119</sup> See Section 3 of the proposed amendment, *infra* Appendix.

<sup>120</sup> Since 1950, only eight justices have left the Court after substantially fewer than eighteen years, and none of them left for the purpose of enjoying a healthy retirement. Justice Robert Jackson and Chief Justice Fred Vinson died on the bench, Justices Harold Burton, Sherman Minton, and Charles Whittaker retired due to ill health, Justice Arthur Goldberg resigned to become ambassador to the United Nations, and Justice Abe Fortas was forced to resign for ethical reasons. The Supreme Court Compendium: Data, Decisions, and Developments, *supra* note 56, at 393 tbl.5-7.

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#### IV. WHY THE PROPOSED CONSTITUTIONAL AMENDMENT IS THE BEST SOLUTION

##### *A. The Proposed Constitutional Amendment Preserves the Court's Independence*

Unlike proposals for shorter, renewable terms,<sup>121</sup> the proposed amendment would preserve the Court's independence. By granting justices a relatively long tenure on the Court but prohibiting the possibility of reappointment, the amendment creates few incentives for justices to be swayed by political pressure that do not already exist in the current system.

##### *1. The Importance of Nonrenewable Terms*

The most important feature of the proposed amendment is that the justices' terms would be nonrenewable. Some critics of life tenure have proposed replacing this feature with renewable terms.<sup>122</sup> Appointing justices to renewable terms, however, would move the Court in the direction of a legislative body and undermine judicial independence.

Life tenure acts to insulate justices from political pressure because, short of the drastic and difficult step of impeachment, justices cannot be removed from the Court for making unpopular decisions.<sup>123</sup> Nonrenewable terms insulate justices in the same way. Although the proposed amendment requires justices to leave the Court after eighteen years (or sooner, if they are appointed to fill an uncompleted term), only impeachment and conviction could force a justice off the Court prior to the scheduled expiration of his term.

More importantly, without any possibility of serving on the Court beyond their terms' expiration, justices would not be tempted to decide cases based on the prevailing political wind in order to be reappointed. Life tenure immunizes justices from political pressure by eliminating the need to make popular decisions in order to continue or maximize their tenure on the Court.<sup>124</sup> As-

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<sup>121</sup> See, e.g., Doug Bandow, End Life Tenure for Judges, N.Y. Times, Sept. 6, 1986, at 27 (proposing that justices be appointed to ten-year terms).

<sup>122</sup> See, e.g., Carrington, *supra* note 12, at 453–57.

<sup>123</sup> See *supra* note 70.

<sup>124</sup> See *supra* note 70.

suming that most justices, if provided the choice, would want to serve until voluntary retirement, allowing reappointment would raise the specter that justices might decide cases in a way, consciously or subconsciously, that would increase their chances of being reappointed.<sup>125</sup> Forbidding reappointment might force justices off the Court sooner than they would prefer, but it guarantees that the politics of reappointment will not influence—or be seen as influencing—their judicial behavior.

## 2. *The Importance of Long Terms*

While less indispensable than nonrenewable terms, another important feature of the proposed amendment is the relatively long length of the terms. Appointing justices to eighteen-year terms would ensure that, in most cases, they will be at or near a typical judicial retirement age at the end of their tenure on the Court. Furthermore, a number of scholars demonstrate that justices tend to do their most effective work after having served several years on the Court.<sup>126</sup> Long terms also would ensure a moderate, regulated turnover on the Court that insulates its membership, taken as a whole, from short-term political trends.

Implementing shorter nonrenewable terms (six years, for instance) would likewise not substantially influence the justices' be-

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<sup>125</sup> Granted, many states allow judges and justices to stand for reelection, and their courts have not devolved into mere “legislatures with robes.” See James C. Foster, *The Interplay of Legitimacy, Elections, and Crocodiles in the Bathtub: Making Sense of Politicization of Oregon’s Public Courts*, 39 *Willamette L. Rev.* 1313, 1346 (2003). Such state courts, however, are unquestionably less independent and more sensitive to popular opinion than is the federal judiciary because of the powerful political check renewable terms place on judicial behavior. See Richard A. Posner, *The Problems of Jurisprudence* 14 (1990) (stating that many states made their judiciaries elective, “[b]ut this experiment merely undermined judicial independence and encouraged the perception (at times self-perception) of judges as nothing more than legislators in robes . . . [and] [d]espite its persistence, the concept of an elective judiciary is generally and correctly regarded as a failure”); B. Michael Dann & Randall M. Hansen, *Judicial Retention Elections*, 34 *Loy. L.A. L. Rev.* 1429, 1431–36 (2001) (discussing some of the notable politicized judicial retention elections of recent years in California, Tennessee, and Nebraska); Traci V. Reid, *The Politicization of Retention Elections: Lessons from the Defeat of Justices Lanphier and White*, 83 *Judicature* 68 (1999); Peter D. Webster, *Who Needs an Independent Judiciary?*, 78 *Fla. B.J.* 24 (2004).

<sup>126</sup> See, e.g., Powe, *supra* note 18, at 197 (“Eighteen years is long enough to learn the job and then do it well.”).

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havior on the Court. Such a proposal, however, would increase the risk of justices seeking to curry favor with potential post-Court employers. Historically, most justices are appointed while in their fifties.<sup>127</sup> A justice appointed to an eighteen-year term at age fifty would remain on the Court until he was sixty-eight, and a justice appointed at age fifty-nine would serve until age seventy-seven. Even in the unlikely event that a president appointed someone as young as forty to the Court, that justice's term would not expire until he was fifty-eight, an age at which many private practice attorneys begin to wind down their careers. At any rate, the length of an eighteen-year-term makes it unlikely that justices' concerns with post-Court employment would affect their judicial behavior. In contrast, under six-year, nonrenewable terms, any justice appointed before age sixty would probably not choose to retire at the expiration of his term. Consequently, shorter terms would run the risk that justices might tailor their judicial behavior, even if only slightly, to maximize post-Court employment opportunities.<sup>128</sup>

The proposed term length also guarantees a slow, regular turnover of the Court's membership over an eighteen-year cycle. Since the average tenure of Supreme Court justices appointed since 1900 is 15.65 years (17.52 among those appointed since 1950),<sup>129</sup> and the historical average turnover on the Court is one retirement every 2.2 years,<sup>130</sup> this cycle is consistent with historical trends and will not radically alter the rhythm of the Court. Limiting justices to short, nonrenewable terms (six years, for instance) would lead to a much more rapid turnover than has historically occurred. Changing the entire membership of the Supreme Court every six years would radically alter the way the Court operates. It would also make the Court considerably more susceptible to short-term political trends

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<sup>127</sup> See The Supreme Court Compendium: Data, Decisions, and Developments, *supra* note 56, at 335 tbl.4-12.

<sup>128</sup> See *infra* Section IV.A.3 (arguing that even though some political posturing would be possible under the new Amendment, it creates no new opportunities for strategic behavior).

<sup>129</sup> The average is based on the Authors' own calculations. See The Supreme Court Compendium: Data, Decisions, and Developments, *supra* note 56, at 250 tbl.4-1, 368 tbl.5-1.

<sup>130</sup> Powe, *supra* note 18, at 197. It should be noted that the average turnover since 1975 is only one vacancy every 3.5 years. This decrease in the turnover ratio is largely due to the fact that there has been no turnover during the past nine years.

and destabilize the application of federal and constitutional law. While individual justices would be unable to “campaign” for reappointment, a two-term president would still be able to appoint the Court’s entire membership, making it ideologically more monolithic. In contrast, changing the Court’s membership over an eighteen-year cycle will maintain the Court’s ideological diversity except in the rare instances when one party wins four consecutive presidential elections.<sup>131</sup>

Although the proposed amendment will occasionally have the effect of putting a replacement justice on the Court for only a few years,<sup>132</sup> this is not problematic for two reasons. First, the past half-century of Court history demonstrates that most justices are likely to serve their full eighteen-year terms.<sup>133</sup> Moreover, it is unlikely that a president will nominate a justice to the Court if substantial doubt exists that the nominee will serve out his term. Barring an unusual turn of events, it is exceedingly unlikely that there would be more than one or two short-term replacement justices on the Supreme Court at any given time. Consequently, justices serving short terms would likely be the exception and not the rule. Second, when presidents are faced with the need to appoint replacement justices to shortened terms, they will probably use the opportunity to nominate someone who would be too old to serve a full eighteen-year term. If a president appointed a seventy-year-old appellate judge to fill the last five years of an unexpired term on the Court, the seventy-year-old would likely join the Court with more experience than would a fifty-five-year-old full-term nominee and would have little reason to worry about post-Court employment.

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<sup>131</sup> See *supra* notes 109–113 and accompanying text. Although winning four consecutive presidential elections would leave one opposition party justice on the Court, an 8–1 ideological balance stretches the definition of “diverse.” In contrast, one party winning three consecutive elections would give that party only six seats on the Court, which, while a clear majority, allows for a reasonable degree of ideological diversity.

<sup>132</sup> See Section 3 of the proposed Amendment, *infra* Appendix.

<sup>133</sup> See *The Supreme Court Compendium: Data, Decisions, and Developments*, *supra* note 56, at 250 tbl.4-1, 368 tbl.5-1. Of the justices who have been appointed since 1950, only Justices Goldberg, Whittaker, and Fortas have left the Court after substantially fewer than eighteen years. See *supra* note 120. Moreover, although the average tenure for justices appointed since 1950 is slightly less than eighteen years, the prospect of a term limited to eighteen years may encourage those justices who might otherwise resign after serving a bit less than eighteen years under a life-tenure system to complete their full term.

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*3. The Futility of Eliminating All Political Posturing on the Court*

The proposed amendment will not entirely prevent political behavior by justices. It would, however, be a significant improvement upon the status quo and, unlike alternative proposals for shorter or renewable terms, would not create new problems not present in the current system.

Even with life tenure, there are two instances in which justices and other federal judges appear to be susceptible to making popular or politically expedient judicial decisions. First, a life-tenured lower federal court judge aspiring to an appointment to the Supreme Court has an incentive to tailor his decisions—and judicial behavior in general—to please the president who might nominate him and the senators who would have to confirm him.<sup>134</sup> Second, a Supreme Court associate justice who wants to be chief justice has the same incentives as the lower court judge to seek favor among those who would nominate and confirm him.

Although the proposed amendment will not solve these problems, neither will it make them any worse. The proposed amendment would not change these scenarios at all—lower federal judges seeking a seat on the Court and associate justices interested in promotion to chief would still have an incentive to seek favor among the politicians who have the power to promote them.<sup>135</sup>

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<sup>134</sup> See, e.g., Sanford Levinson, Letter to the Editor, For 14-Year, Nonrenewable Federal Judgeships, N.Y. Times, Oct. 15, 1986, at A26 (highlighting the problem of lower federal court judges actively seeking promotion within the federal judiciary and to the Supreme Court).

<sup>135</sup> It is also possible that some justices might be interested in post-Court salaries considerably higher than those offered either to active or retired justices, notwithstanding the fact that a justice generally is entitled to his salary for life. See 28 U.S.C. § 371 (2000). In such cases a justice has an incentive to market himself, through judicial behavior, to private employers who would pay high post-Court salaries. The proposed constitutional amendment again neither lessens nor exacerbates this potential problem. A justice who wants to earn more money than either his Court salary or pension provides would have the same incentives to seek high-paying private sector employment under either life tenure or the proposed amendment's eighteen-year term with salary for life.

*B. Ending Life Tenure Will Not Deprive the Court of Its Greatest Justices*

Critics of eighteen-year, nonrenewable terms might argue that forcing justices off the Court would cost the country years of service from some of its greatest jurists. In *The Impact of Term Limits for Supreme Court Justices*, Professor John Gruhl cites a study rating justices from “great” to “failure”<sup>136</sup> and observes that the “great” justices tended to serve relatively long terms while the “failure” justices tended to serve relatively short terms.<sup>137</sup> Professor Gruhl argues that judicial “term limits . . . are more likely to eliminate the best justices” and concludes that life tenure on the Court should be preserved.<sup>138</sup>

This argument is both historically and normatively unsupported. The Constitution as it stands today already supports the general principle that limits may be placed on the terms of important offices. The Twenty-Second Amendment, limiting presidents to two terms, was born in the wake of President Roosevelt’s four term presidency.<sup>139</sup> That a presidential term limit amendment was enacted demonstrates a judgment that no president—even a popular and, arguably, great one—should be able to remain in office indefinitely.<sup>140</sup> This amendment supports careful consideration of an amendment that might likewise deny the country a third decade of service from even the greatest of Supreme Court justices. While the comparison is not perfectly symmetrical, any justice likely to make his mark upon the Court should be able to leave a lasting legacy during a tenure more than twice as long as a president is now allowed to serve.<sup>141</sup>

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<sup>136</sup> Gruhl, *supra* note 24, at 69 n.10, 70 (citing Blaustein & Mersky, *The First One Hundred Justices* 32–51 (1978)).

<sup>137</sup> *Id.* at 70.

<sup>138</sup> *Id.* at 72; see also Ross, *supra* note 60, at 1091–92 (noting that Chief Justice Marshall, Justice Holmes, and Justice Black were productive even in their old age).

<sup>139</sup> See *Encyclopedia of the American Constitution* 2741–42 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

<sup>140</sup> But see *Congressional Quarterly’s Guide to U.S. Elections* 139 (John L. Moore et al. eds., 4th ed. 2001) (arguing that the Twenty-Second Amendment was little more than a slap at President Roosevelt’s four terms).

<sup>141</sup> See Lazarus, *supra* note 12 (“Eighteen years is a good long run. It would give justices more than enough time to find their footing at the Court and make a mark on the law.”).

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Furthermore, it is instructive to consider that judicial term limits may actually allow more “great men” (and great women) to serve on the Court. Limiting presidents to two terms opens that office to fresh faces. On today’s Supreme Court, there has not been a vacancy in nine years, a modern record. Had some of the older justices, many of whom made their impacts on the Court long ago, retired, other great legal minds who have not had the opportunity to serve on the Court might also have been able to make their marks. Instead, because Chief Justice Rehnquist and Justice Stevens have both chosen to remain on the Court for more than a quarter century, the Court has been denied the services of exceptional circuit judges. In short, what might be lost in continued service from “great” justices serving more than eighteen years is apt to be balanced by the benefit of opening the way for new “great” justices.

### *C. The Inefficacy of a Mandatory Retirement Age*

Several legal scholars who have articulated a need for reform of the current system have come to the conclusion that a constitutional amendment establishing a mandatory retirement age would effectively address the problem.<sup>142</sup> Not only would a mandatory retirement age be largely ineffectual in dealing with the problematic symptoms of life tenure, in some cases that particular cure would be worse than the disease.

The idea of a mandatory retirement age for Supreme Court justices is not original. Thirty-six states impose mandatory retirement ages upon their own judges,<sup>143</sup> and the United States Supreme Court has endorsed the constitutionality of various retirement statutes.<sup>144</sup> Moreover, a recent article comparing the judicial selection systems of different countries found that, of the twenty-seven European nations in the sample, nearly half had a compulsory retirement age for judges, with a mean of almost sixty-nine years for those that had one.<sup>145</sup> In addition, such notable figures as Chief Jus-

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<sup>142</sup> See, e.g., Ward, *supra* note 45, at 23–24, 240–47; David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 *U. Chi. L. Rev.* 995, 1086–87 (2000).

<sup>143</sup> Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 *Wm. & Mary Bill Rts. J.* 7, 23 n.58 (2001).

<sup>144</sup> See *Gregory v. Ashcroft*, 501 U.S. 452, 470–73 (1991).

<sup>145</sup> Epstein et al., *supra* note 143, at 23.

tices Charles Evans Hughes and Earl Warren, Justices Owen Roberts, Byron White, and Lewis Powell, as well as Presidents William Howard Taft, John F. Kennedy, Lyndon Johnson, and George H. W. Bush have, at various points in their careers, advocated a mandatory judicial retirement age.<sup>146</sup> Despite such wide-ranging support for the idea, a constitutional amendment setting a mandatory retirement age for Supreme Court justices is, at best, only a half-solution, and, at worst, a step in the wrong direction.

In *Deciding to Leave*, Professor Artemus Ward advocates a mandatory retirement age. Professor Ward argues:

[J]udicial independence would be strengthened by mandatory retirement. . . . A mandatory retirement age would largely insulate the justices from accusations that either they are too old to keep up with the workload, or that they are hanging on to their seats for partisan reasons. Only if justices choose to depart earlier than the mandated age, would they have to answer such questions. As a result, a mandatory departure age provides justices with a strong disincentive from acting strategically when they depart, and promotes judicial independence.<sup>147</sup>

In contrast to Professor Ward's concern with partisan departures and judicial independence, the bulk of support for a mandatory retirement age has come from legal scholars and politicians concerned with what Professor Sanford Levinson has termed the problem of justices who "have stayed too long at the fair."<sup>148</sup> According to Professor David Garrow's calculations, during the twentieth century, eleven justices suffering from mental decrepitude or mentally infirm judgment should have left the bench before they actually retired.<sup>149</sup>

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<sup>146</sup> Garrow, *supra* note 142, at 1086.

<sup>147</sup> Ward, *supra* note 45, at 247.

<sup>148</sup> Levinson, *supra* note 86, at 341.

<sup>149</sup> Garrow, *supra* note 142, at 1085. Professor Garrow's list of pre-World War II justices includes Chief Justices Fuller and Taft and Associate Justices McKenna and Holmes. The postwar justices who Professor Garrow believes should have retired sooner than they actually did are Justices Murphy, Whittaker, Minton, Black, Douglas, Powell, and Marshall. *Id.* Garrow's inclusion of Justice Powell on the list of justices who suffered from mental decrepitude on the Court is somewhat questionable but, when properly qualified, probably reasonable. Justice Powell was, throughout much of his tenure on the Court, concerned that he might be slipping mentally because of his age. See Jeffries, *supra* note 32, at 541-44. As a result, it is probable that

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While mental decrepitude and disabling illness have indeed proven to be recurring problems for the Court, a mandatory retirement age for justices would not eliminate the problem of senile or ill justices refusing to retire. Most proposals for a mandatory retirement age would set that age at seventy-five years.<sup>150</sup> While a retirement age of seventy-five would have affected seven of Professor Garrow's subjects, it would not have addressed the remaining four because the justices who, according to Professor Garrow, should have retired earlier were not yet seventy-five when their health problems arose.<sup>151</sup> In effect, a mandatory retirement age would only partially address the problem of mental decrepitude. Furthermore, while a mandatory retirement age would have no particular aggregate effect on how many justices each president appoints, its most dangerous effect would be to provide a much greater incentive for presidents to nominate very young jurists to the Court.<sup>152</sup>

A mandatory retirement age would also do little to solve the problem of strategic partisan departures.<sup>153</sup> Consider, for example, the case of a justice who is seventy-three years old. Assume he would turn seventy-five just after the next presidential election and that the current president shares his sociopolitical ideology. Unsure which party will win the next election—and intent on protecting and perpetuating his legacy—the justice would probably choose to retire while his party still controlled the presidency. A mandatory retirement age would do nothing to prevent this hypothetical jus-

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his own perception of only a slight degree of mental decline by 1987 led in part to his decision to retire. Therefore, while it can fairly be said that Justice Powell felt that he was declining mentally near the end of his tenure on the Court, it would not be fair to compare his decline to, for example, that of Justice Douglas after his stroke.

<sup>150</sup> See Charles Evans Hughes, *The Supreme Court of the United States* 76 (1928); Garrow, *supra* note 142, at 1085; Ward, *supra* note 45, at 244.

<sup>151</sup> Justice Murphy was younger than sixty and Justices Minton and Whittaker were sixty-five “when their abilities to contribute adequately to the work of the Court came to an end.” Garrow, *supra* note 142, at 1085. Additionally, Chief Justice Taft was only seventy-two when his faculties declined. *Id.*

<sup>152</sup> See *supra* Section II.B (discussing the problem of incentivizing the appointment of young jurists).

<sup>153</sup> Indeed, a mandatory retirement age may create a panoply of administrative difficulties, ranging from the nearly simultaneous retirements of several justices to the prospect of the forced retirement of a justice whose seventy-fifth birthday falls in the middle of a presidential election year.

tice from effectuating his partisan and ideological goals. In fact, in some circumstances, a mandatory retirement age actually has the potential to exacerbate the problem of strategic partisan departures because a justice, knowing the exact date at which he must retire, has the ability—and a greater incentive—to plan the right moment for his departure.<sup>154</sup>

Although a mandatory retirement age would have forced some justices off the Court before their declines, it would likely have kept a number of other notable jurists from ever serving on the Court. Benjamin Cardozo was nominated at age sixty-one, Earl Warren at sixty-two, Harry Blackmun at sixty-one, Lewis Powell at sixty-four, and Ruth Bader Ginsburg at sixty.<sup>155</sup> Many of these respected and admired justices might never have had the opportunity to serve on the Court had a mandatory retirement age been in place, because a mandatory retirement age—even if that age were as high as seventy-five—would incentivize presidents to place even younger nominees on the Court than under the present system. Any president who wanted to extend his ideological influence over the Court for three decades would have little choice but to succumb to the expedience of appointing a nominee in his forties, regardless of other better qualified candidates. As such, a mandatory retirement age would only replace one problem with another.

Crafted mainly as a remedy to the problem of creeping mental incapacity among older justices, a mandatory retirement age would do virtually nothing to address the problems with the current nominating system and would exacerbate the problem of perverse incentives to nominate young justices.

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<sup>154</sup> For instance, if in 1980 Justice William Brennan or Justice Thurgood Marshall had expected President Carter to lose his bid for reelection and had known that they would be forced to retire under President Reagan (Justice Brennan turned seventy-five in 1981 and Justice Marshall in 1983), there is little doubt that they would have arranged their preemptive retirements during President Carter's first (and only) term. On the other hand, a mandatory retirement age would have prevented Justice Byron White from strategically retiring under President Clinton because he turned seventy-five in 1992, before President Clinton took office.

<sup>155</sup> The Supreme Court Compendium: Data, Decisions, and Developments, *supra* note 56, at 335 tbl.4-12.

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*D. Tinkering with Institutional Norms Will Not Adequately Address the Court's Problems*

In *Deciding to Leave*, Professor Artemus Ward proposes a series of non-constitutional measures to encourage mentally declining justices to retire.<sup>156</sup> Although Professor Ward ultimately supports a constitutional solution (a mandatory retirement age), he believes that the chances of successfully ratifying an amendment are minimal, so he considers some additional remedies that would not require an amendment. Professor Ward's non-constitutional proposals include increasing the retirement age necessary for full pension benefits and increasing the workload of the Court by decreasing the number of clerks.<sup>157</sup> Although Professor Ward's proposals might address the problem of justices remaining on the Court with diminished capacities, they will not address the three more significant problems raised in this Note.

The palliative effect of Professor Ward's proposal to increase the age at which justices can retire with full benefits seems largely negligible. The current Court pension system operates on a "Rule of Eighty," meaning that a justice can retire at full pay at, for example, age seventy with ten years of federal judicial service or age sixty-five with fifteen years of federal judicial service.<sup>158</sup> Professor Ward proposes that Congress revise the Rule of Eighty upward to 100—meaning that justices could retire at full pay only after their age plus years of judicial service total 100.<sup>159</sup> Professor Ward reasons that the new rule would significantly shrink the window in which the justices could time their retirements for partisan reasons.<sup>160</sup> There are a number of problems with Professor Ward's proposal. Several of the current justices (and very likely many future justices) are independently wealthy and the remainder are at least reasonably well-off, so it is unlikely that a minor change in the

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<sup>156</sup> See Ward, *supra* note 45, at 229–39.

<sup>157</sup> *Id.* at 23, 239.

<sup>158</sup> See 28 U.S.C. § 371 (2000).

<sup>159</sup> Ward, *supra* note 45, at 233.

<sup>160</sup> *Id.* at 233–35.

Court's pension formula would dramatically influence their retirement plans.<sup>161</sup>

Professor Ward's other non-constitutional proposal also does not effectively address the problems this Note identifies. Professor Ward suggests increasing the workload of the Court and reducing the number of clerks assigned to each justice, theorizing that this might encourage older justices who are unable to work (or uninterested in working) long hours to retire.<sup>162</sup> Today, the Supreme Court hears oral argument only three days a week, and justices usually hire four law clerks who do much of their writing.<sup>163</sup> Although increasing the justices' workload might warrant consideration, forcing the justices to make their lives more difficult by taking on more work would likely prove quite difficult. While Congress, not the justices, controls the Court's budget, most commentators have generally discounted the effectiveness of budgetary control as an instrument of political power over the Court, deeming it "an instrument too blunt to be of any real control potential."<sup>164</sup> Furthermore, since the Court has the power to determine its own caseload,

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<sup>161</sup> See Washington in Brief, Wash. Post, June 1, 2002, at A5. As of June 2002, at least five of the nine members of the Rehnquist Court were millionaires: Justices Ginsburg, Breyer, O'Connor, Stevens, and Souter. *Id.*

<sup>162</sup> See Ward, *supra* note 45, at 239. Ward states, "Aging justices who were forced to actually review endless stacks of cert. petitions and write their own opinions might subordinate partisan concerns for workload when deciding to leave." *Id.*

<sup>163</sup> *Id.* at 238, 239. For example, in 1972 Justice William O. Douglas wrote to Chief Justice Warren Burger, "I think the Court is overstaffed and underworked. . . . We were much, much busier 25 or 30 years ago than we are today. I really think that today the job does not add up to more than about four days a week." Letter from William O. Douglas to Warren Burger (July 13, 1972), *in* *The Douglas Letters: Selections From the Private Papers of Justice William O. Douglas* 141 (Melvin I. Urofsky ed., 1987).

<sup>164</sup> John Hart Ely, *Democracy and Distrust* 46 (1980). Professor Stephen Carter notes that even if Congress were to starve the Court of funding, the Justices "can continue to issue their opinions, even if they must scribble them on cardboard found in the street." Stephen Carter, *The Political Aspects of Judicial Power: Some Notes on the Presidential Immunity Decision*, 131 U. Pa. L. Rev. 1341, 1380 n.157 (1982). Professor Jesse Choper writes that Congressional control over the Court's budget is "[o]f minor significance, because [it is] used more in pique than with seriousness of purpose." Jesse Choper, *The Supreme Court and the Political Branches: Democratic Theory and Practice*, 122 U. Pa. L. Rev. 810, 849 (1974). Congress, however, for all its budgetary control, may not reduce funds constituting "compensation" to the Justices. U.S. Const. art. III, § 1.

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it could weather a decreased clerk budget simply by granting fewer certiorari petitions and considering fewer cases each year.

These non-constitutional remedies do not address the more serious problem of strategic partisan retirements. Addressing this problem would produce a positive spillover effect by (at least partially) addressing the issue of judicial incapacity, which is frequently a side effect of attempts at strategic retirement. The two most recent examples of justices having remained on the Court past the point where they could adequately do their jobs, Justices William O. Douglas and Thurgood Marshall, both involved men whose obstinacy in refusing to retire stemmed directly from their desire to prevent Republican presidents from appointing their successors.<sup>165</sup> The proposed amendment would effectively kill two birds with one stone because eliminating a justice's ability to strategically retire would take away his primary incentive to stay on the Court with diminished faculties.

*E. The Proposed Constitutional Amendment's Effect on Partisan Acrimony in the Senate*

A final advantage of the proposed amendment is its potential to mitigate or temper the acrimony that has arisen in the Senate surrounding the Supreme Court confirmation process, particularly since the controversy surrounding Judge Robert Bork's nomination in 1987.<sup>166</sup> By slightly lowering the stakes of any given nomina-

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<sup>165</sup> See supra notes 1, 2, 35–37 and accompanying text.

<sup>166</sup> See generally Lazarus, supra note 36, at 221–50 (describing Judge Bork's nomination and his confirmation hearings). Although the Robert Bork, Douglas Ginsburg, and Clarence Thomas confirmation processes were widely regarded as political and public relations disasters, the confirmation processes of Justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer were models of relative "peace, love and understanding." See id. at 221–55, 437–42, 449–58; Elena Kagan, Review: Confirmation Messes, Old and New, 62 U. Chi. L. Rev. 919, 919–20 (noting that "President Clinton's nominees, then-Judges Ruth Bader Ginsburg and Stephen Breyer, confronted no unfair or nasty opposition; to the contrary, their confirmation hearings became official lovefests"). Some of this may have had to do with the fact that there was far more presidential consultation with opposition senators with the latter nominations than with the former. Given that the confirmation process for federal appellate judges has grown more partisan in recent years, however, it is likely that there will be increased strife surrounding the next several Supreme Court nominations. See, e.g., Neil A. Lewis, Bitter Senators Divided Anew on Judgeships, N.Y. Times, Nov. 15, 2003, at A1 (noting that, in response to Democratic efforts to filibuster

tion and by eliminating a lucky president's ability to pack a Court with a large number of vacancies during his term,<sup>167</sup> the proposed amendment may take at least a modicum of the "politics of personal destruction"<sup>168</sup> out of the Senate confirmation process.

The Senate confirmation process for Supreme Court nominees has become more contentious over the course of the last several decades.<sup>169</sup> Beginning with Chief Justice Warren's retirement fiasco, the filibuster and ultimate resignation of Justice Abe Fortas, and the Haynsworth/Carswell debacles,<sup>170</sup> and continuing through to the failed Bork nomination and the sexual harassment controversy surrounding Clarence Thomas's nomination, the confirma-

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ter controversial Bush appellate court nominees, Republican Senator Rick Santorum stated, "[W]e'll have our opportunity someday, and we'll make sure there's not another liberal judge, ever!"

<sup>167</sup> Although, under the proposed amendment, a president might still have more than two vacancies on the Court to fill during one term, any vacancies beyond the ordinary two would likely be for short terms and would not have nearly the political impact that a life appointment has under the status quo or that an eighteen-year appointment would have under the proposed amendment. See *supra* Section III.D.

<sup>168</sup> See Nathan Newman, *Partisanship vs. The Politics of Personal Destruction*, *Progressive Populist* (July 1, 2001), at <http://www.nathannewman.org/archives/000059.shtml> (arguing that progressives need to highlight the fact that the much bemoaned "politics of personal destruction" derives from the bizarre allergy to honest partisanship in many media and elite circles, and that if senators could legitimately vote against nominees on ideological and not personal grounds, then we would not have confirmation hearings characterized by low-handed attacks) (on file with the Virginia Law Review Association).

<sup>169</sup> Professor John Gruhl observes that:

In recent decades a more pressing problem has been the contentiousness of the appointment process. The mean-spiritedness of nomination and, especially, confirmation of Supreme Court candidates is due primarily to the realization, in the aftermath of the Warren Court, that the justices do have considerable power. Another reason is the prevalence, also after the Warren Court, of divided government. . . . [From] 1968 [through 1997] Democrats and Republicans . . . shared control of the other two branches of the federal government in all but six years. Both parties have sought control of the federal judiciary to tip the balance.

Gruhl, *supra* note 24, at 72.

<sup>170</sup> In 1969 President Nixon nominated Fourth Circuit Judge Clement Haynsworth as Justice Fortas's replacement on the Court. Senate Democrats, angry over Fortas's forced resignation, rejected Judge Haynsworth's nomination. President Nixon then nominated Judge G. Harrold Carswell of the Fifth Circuit. Judge Carswell was also rejected by the Senate. Stung by two consecutive defeats in the Senate, President Nixon finally nominated then-Eighth Circuit Judge Harry A. Blackmun, who was confirmed easily. Jeffries, *supra* note 32, at 222-28.

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tion battles in the Senate have become more pitched and shrill in recent years. The explanation for this strife lies in the combination of problems with the current system that inspired this Note: the enormous power of life tenure, the potential to extend that power through strategic departures, and presidential incentives to nominate young justices.

Certainly, life tenure raises the stakes of any Supreme Court confirmation battle beyond what they would be for a fixed-term appointment. Because filling a Supreme Court vacancy has the potential to substantially impact the country for decades, when a vacancy arises both political parties dust off their armor and gear up for confrontation, not knowing when the next vacancy will occur. That there has not been a Supreme Court vacancy in over nine years has led many observers to surmise that the next vacancy will produce the most heated partisan warfare yet seen in the Senate.<sup>171</sup> For this reason alone, there is no better time than now to reform the process.

To begin, the proposed amendment ensures that, at a minimum, a Court vacancy will occur every two years. Consequently, at least once every two years, the Senate will be called upon to act on a nomination to the Supreme Court. This regularity in the Supreme Court nomination process should greatly reduce, if not prevent, the intense desire on the part of interest groups and partisans to use what are now infrequent and unpredictable Court vacancies as opportunities to flex their ideological muscles and create new controversies and grudges to feature in their fundraising appeals. With regularity comes routine, and with routine comes less impassioned and more deliberative consideration of nominees.

Critics argue that it is naïve to think that, if the process became more regularized and predictable, the “slash and burn” politics of the Senate confirmation process would suddenly evaporate. Professor Gruhl argues that reforms like those offered in the proposed amendment would actually increase the intense partisanship and dirty politics now associated with the Court confirmation process.<sup>172</sup> Professor Gruhl believes that the political parties and interest groups would continue to fight over an eighteen-year appointment

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<sup>171</sup> See Lewis, *supra* note 166, at A1.

<sup>172</sup> Gruhl, *supra* note 24, at 72.

just as much as an unlimited life term and contends that these groups would perhaps “even fight harder if the term limits were in place, because they would be able to gear up in advance for the scheduled retirements.”<sup>173</sup> This is a valid point on the surface, but one that is ultimately shortsighted. In fact, Professor Gruhl’s argument leads to the second principal advantage of the proposed amendment: It should temper Senate acrimony because it prevents any opposition group from accusing the president and his party of attempting to “pack the Court.”

At present, one of the most significant sources of the acrimony surrounding the Senate confirmation process is the opposition party’s perpetual view that the president, through his choice of nominees, is attempting to pack the federal courts with jurists who are ideologically similar to him in an attempt to imprint his current political vision on the judiciary for the next several decades. Life tenure and the recent presidential trend of selecting young nominees for the Supreme Court (and the lower federal courts) contribute to this impression. Although the proposed amendment does not totally eliminate politics from the confirmation process, at the very least it regulates it and takes one of the most explosive reasons for Senate opposition—life tenure—off the table. Under the proposed amendment, every party that wins a presidential election would be able to see that victory translated into a minimum of two nominations to the Supreme Court. Moreover, whether a forty-year-old or a sixty-year-old is appointed to the Court, the opposition party knows that, no matter how controversial that nominee’s views may be, at most that nominee will sit on the Court for eighteen years, not for the thirty or forty years possible under the current system. Every senator would know that, no matter what happens, his party could ultimately win back the White House and have an opportunity to put its own favored justices on the Court to serve an identical term.

Many current political observers have suggested that the recent Democratic filibusters of several Bush federal appellate nominees stem from a feeling within the Democratic Party that, due to strategic departures and Republican intransigence in the Senate during the Clinton presidency, the party has seen its efforts to keep parti-

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<sup>173</sup> Id.

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san parity on the Supreme Court and the lower federal courts stymied by the Republicans.<sup>174</sup> The 2000 presidential election defeat, effectively determined by the very Supreme Court on which the Democrats have failed to build a majority, created a bitter aftertaste in the mouths of loyal partisans and Democratic senators.<sup>175</sup> If anything, that aftertaste grows more sour as Democrats watch a president make his mark on the federal judiciary that Democrats contend paved the way—in what some say was a suspect fashion—for his presidency. The proposed amendment would calm the fears of Democrats and give them assurance that sooner or later they, too, will have their chance to impact the Court's membership. The same logic would carry over to the Republicans when they ultimately lose the presidency. Viewed objectively, there is little doubt that the uncertainty of expectations has clouded the current process and created a climate of fear and anxiety that has bred contempt and partisan sniping in the judicial confirmation process.

The proposed amendment cannot promise to eliminate altogether the bitter partisanship that has become all too common in recent Supreme Court confirmation battles. Even under the proposed amendment, presidents would probably continue to nominate controversial candidates for Court vacancies, and those nominees will probably spark the ire of opposition senators and interest groups who worry about the direction in which the nominee will take the Court if he or she is confirmed. This proposal, however, will change the dynamic of the opposition because the opposition party will no longer have to fear that the nominee will spend three or four decades on the Court reaching decisions antithetical to its beliefs. Furthermore, no matter how hard any president tries, he will not be able to pack the Court as a result of strategic departures and with young nominees. The incentive to do both, which underlies the current “scorched earth” partisan confirmation battles, will be eliminated by the proposed amendment, and, at a minimum, the

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<sup>174</sup> See John Podesta & Beth Nolan, *Judgeships on Ice*, Wash. Post, July 11, 2001, at A19.

<sup>175</sup> In fact, shortly after *Bush v. Gore*, 192 U.S. 98 (2000), was decided, Yale Law School Professor Bruce Ackerman went so far as to argue that, due to that decision, the next time a vacancy on the Court occurred, the Senate should refuse to confirm any nominations offered by President Bush. See Bruce Ackerman, *The Court Packs Itself*, *The Am. Prospect* (Feb. 12, 2001), <http://www.prospect.org/print/V12/3/ackerman-b.html> (on file with the Virginia Law Review Association).

degree of acrimony in the Senate confirmation process will likely lessen.

#### CONCLUSION

Constitutional amendments are difficult to ratify and are therefore rarely enacted. It would be foolish to expect that amending the Constitution to replace life tenure on the Supreme Court with eighteen-year nonrenewable terms would not be an uphill battle. That said, the proposed amendment should not be as controversial as most of the more ideological proposals for constitutional amendments made in recent years.<sup>176</sup> Any benefit that ending life tenure on the Supreme Court might give to one party or ideological persuasion is impossible to predict and depends entirely on who wins presidential elections after the proposed amendment takes effect. While the proposed amendment might have an identifiable partisan effect on some individual Court appointments, its long term effect will be party and ideology neutral.<sup>177</sup>

Linking a political party's ability to benefit from the proposed amendment to its ability to win elections in the future makes it difficult for a party to oppose the amendment based on partisan self-interest. Partisans (in Congress and the state legislatures—the forums which would have to ratify the proposed amendment) should believe that their party is capable of long-term electoral success. Arguing that the proposed amendment would hurt one's party would be tantamount to predicting the party's inability to win

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<sup>176</sup> For example, many on the left would like to amend the Constitution to forbid discrimination on the basis of gender or sexual orientation or to allow limits on political campaign expenditures, whereas many on the right tend to support amendments to explicitly ban gay marriage, flag burning or abortion. None of these amendments is likely to come even close to ratification in the foreseeable future because their support is highly partisan and ideological and because they would advance the goals of only one segment of the political spectrum. See John Harrison, Remarks, Symposium: 50 Years of *Brown v. Board of Education* (Feb. 21, 2004) (observing that “substantive” constitutional amendments are difficult to enact because they often foster strong opposition, while structural amendments are easier to enact once they gather a base of support because they do not tend to draw fierce opposition).

<sup>177</sup> An example of an ideologically neutral “structural” amendment would be an amendment abolishing the Electoral College and electing presidents by nationwide popular vote. While such a change might benefit a particular party in a particular election, in the aggregate, it is impossible to accurately predict which party would stand to gain most from popular election of the president.

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presidential elections in the long-term, an unlikely argument for any partisan to make.

There are two significant obstacles to the proposed amendment's ratification. First, any fundamental structural change to the Constitution necessarily will draw opposition from many constitutional purists and textualists. Second, only on three occasions has an amendment substantially altered the structure of the federal government: the Twelfth and Twenty-Fifth Amendments revised the process for selecting vice presidents, and the Seventeenth Amendment changed the method of electing senators. The proposed amendment stands a reasonable chance of overcoming both obstacles. While there might be some committed opposition to ending life tenure, there is no particular political constituency that has reason to adamantly oppose it. Furthermore, while structural amendments are rare, they are not unprecedented. Ending life tenure on the Supreme Court may not be much more of a departure from the Constitutional Convention's original document than is requiring that senators be directly elected by the people.

With the increased political power the Supreme Court exercises and the growing partisan and ideological nature and impact of Court appointments, the negative effects of strategic retirements, the distorted incentives for young nominees, and the random relationship between vacancies and presidential terms are problems that are on the verge of growing substantially more pronounced. The amendment proposed in this Note addresses and arguably could cure each of these ills without conferring too much of an overall benefit on either party, while leaving in place the judicial independence on which life tenure was originally based.

## APPENDIX

## A Proposed Amendment to the United States Constitution

## Section 1

The Supreme Court of the United States shall consist of nine Justices. One Justice shall be the Chief Justice, and the remaining eight Justices shall be Associate Justices.<sup>178</sup> If the office of Chief Justice shall be vacant or the Chief Justice shall be absent, the senior Associate Justice shall serve as Acting Chief Justice.

## Section 2

Each Justice shall serve on the Supreme Court for a fixed term upon nomination by the President and confirmation by the Senate. Each term shall last for exactly eighteen years. One term shall expire at noon on the third day of January of each even-numbered year.<sup>179</sup> A Justice who has served previously on the Supreme Court may not be re-appointed to the Supreme Court, either to a successive term or after an interruption in service.

## Section 3

If a Justice shall leave the Supreme Court prior to the expiration of his term for any reason, a new Justice shall be appointed to fill the remainder of the unexpired term upon nomination by the President and confirmation by the Senate. A Justice appointed to fill an unexpired term may serve only for the remainder of that term and may not be re-appointed to the Supreme Court, either to a successive term or after an interruption in service.

## Section 4

The Chief Justice shall be appointed from among the Associate Justices upon nomination by the President and confirmation by the Senate. The Chief Justice shall serve until the expiration of the term for which he was appointed as an Associate Justice but may,

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<sup>178</sup> This section constitutionalizes current Court practice. It is necessary to fix the Court's membership at nine (something Article III does not do) because the proposed amendment does not work properly if the Court does not have exactly nine seats.

<sup>179</sup> See *supra* Section III.A.

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at his discretion, resign as Chief Justice and continue to serve as an Associate Justice until the expiration of the term for which he was appointed.<sup>180</sup>

## Section 5

Up to six months prior to the scheduled expiration of a Justice's term, the President may nominate and the Senate may confirm a Justice to begin serving a new term at noon on the third day of January.<sup>181</sup>

## Section 6

This Amendment shall become effective at noon on the third day of July in the first odd-numbered year following this Amendment's ratification. Each Justice serving on the Supreme Court upon the effective date of this Amendment shall be assigned to a fixed term. The Justice with the longest tenure on the Supreme Court upon the effective date of this Amendment, whether an Associate Justice or the Chief Justice, shall be assigned to a term expiring on the third day of January of the first even-numbered year following the effective date of this Amendment and commencing after that Justice has served for at least eighteen years on the Supreme Court. The Justice with the shortest tenure on the Supreme Court upon the effective date of this Amendment shall be assigned to a term expiring on the third day of January exactly sixteen years following the scheduled expiration of the term to which the longest-tenured Justice is assigned upon the effective date of this Amendment. The remaining Justices shall be assigned to terms expiring on the third day of January of each even-numbered year between the expiration of the terms of the most senior and most junior Justices, with the longer-tenured Justices' terms expiring before the terms of the shorter-tenured Justices.<sup>182</sup> If a vacancy shall exist on the Supreme

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<sup>180</sup> See supra note 104.

<sup>181</sup> See supra note 103.

<sup>182</sup> The effect of the amendment's implementation scheme would be to assign justices to terms based on their seniority at the time the amendment becomes effective. If the amendment were ratified in 2004 and became effective on July 3, 2005, and there were no retirements on the Court, the current justices' terms would expire in the following order: Rehnquist, 2006; Stevens, 2008; O'Connor, 2010; Scalia, 2012; Kennedy, 2014; Souter, 2016; Thomas, 2018; Ginsburg, 2020; and Breyer, 2022. Since the current justices would all be able to serve for well over eighteen years, it is likely

Court upon the effective date of this Amendment, that vacancy shall be treated as the longest-tenured Justice and assigned to a term expiring on the third day of January of the first even-numbered year following the effective date of this Amendment. If more than one vacancy shall exist on the Supreme Court upon the effective date of this Amendment, the vacancies shall be treated as the longest-tenured Justices and assigned to terms expiring before the terms to which the Justices on the Supreme Court upon the effective date of this Amendment are assigned.<sup>183</sup>

#### Section 7

Prior to the expiration of their terms, Justices may be removed from the Supreme Court only if impeached by the House of Representatives and convicted by the Senate.<sup>184</sup>

#### Section 8

Any Former Justice shall be entitled to receive his salary for life. Any Former Justice shall be entitled to sit on any inferior court of the United States for life if Congress so provides.<sup>185</sup> This Section shall not apply to a Former Justice whose tenure on the Supreme Court is terminated pursuant to Section 7.

#### Section 9

Congress may establish a system for the temporary designation of Former Justices or judges on inferior courts of the United States to serve as Acting Justices on the Supreme Court in the event that the Supreme Court shall have more than two vacancies at one time. Acting Justices may serve until Justices can be duly appointed as

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that many of them would leave the Court before their terms expire, a phenomenon unique to the implementation stage of the new system.

<sup>183</sup> This addendum to Section 6 deals with the unlikely contingency that a seat on the Court would be vacant at the time the amendment is enacted.

<sup>184</sup> Although Article III does not specifically identify impeachment and conviction as the only method for removing a justice from office, it has been interpreted to mean as much. This section thus constitutionalizes what is already the case. See *supra* note 14.

<sup>185</sup> See *supra* note 27 and accompanying text, note 105. The reason this section does not explicitly grant former justices the right to sit on lower federal courts is that doing so would require constitutionalizing the lower federal courts, a task that would be complicated and unnecessary. This proposal presumes that Congress will statutorily provide that former justices may take a life-tenured active or senior judgeship on the United States Court of Appeals for the circuit of the former justice's choosing.

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provided in this Amendment. In any event, no Acting Justice may serve for more than six months as an Acting Justice on the Supreme Court, and no one who has previously served as an Acting Justice may serve again as an Acting Justice.<sup>186</sup>

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<sup>186</sup> This section is not integral to the amendment, but it is a housekeeping measure that would allow the Court to function in a national emergency. Congress would presumably establish a scheme through which the chief judges of the thirteen federal circuits would be temporarily elevated to the Supreme Court in the event of a national disaster affecting the Court's membership. For example, the circuits might rotate on a thirteen-year cycle so that the chief judge of the First Circuit would be first in line to serve as an acting justice one year and second in line the next year, when the chief judge of the Second Circuit would be first in line, and so forth. This section is not meant to craft a formula for appointing acting justices; rather, it is meant to give Congress the power to craft a formula along these lines.