
DESIGNING SUPREME COURT TERM LIMITS

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ABSTRACT

Since the Founding, Supreme Court Justices have enjoyed life tenure. This helps insulate the Justices from political pressures, but it also results in unpredictable deaths and strategic retirements determining the timing of Court vacancies. In order to regularize the appointments process, a number of academics and policymakers have put forward detailed term-limits proposals. However, many of these proposals have been silent on several key design decisions, and there has been almost no empirical work assessing the impact that term limits would have on the composition of the Supreme Court.

This Article provides a framework for designing a complete term-limits proposal and develops an empirical strategy to assess the effects of instituting term limits. The framework we introduce outlines the key design features that any term-limits proposal must make, including frequently overlooked decisions like what the default would be if there is Senate inaction on a president's nominee. The empirical strategy we develop uses simulations to assess how term-limits proposals would have shaped the Court if they had been in place over the last eighty years of American history. These simulations enable comparative assessments of term-limits proposals relative to each other and to the historical status quo of life tenure.

Using these simulations, we are able to isolate the design features of

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existing proposals that produce significant differences in the composition of the Supreme Court. For instance, proposals that commence appointing term-limited Justices immediately could complete the transition in just sixteen years, but proposals that wait until after the sitting Justices leave the Court to appoint term-limited Justices would take an average of fifty-two years to complete the transition. Our results also reveal that term limits are likely to produce dramatic changes in the ideological composition of the Court. Most significantly, the Supreme Court had extreme ideological imbalance for sixty percent of the time since President Franklin Roosevelt's effort to pack the Court, but any of the major term-limits proposals would have reduced the amount of time with extreme imbalance by almost half.

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INTRODUCTION

Since the Founding, Supreme Court Justices have enjoyed life tenure.¹ Although a system of life tenure helps insulate the Justices from political pressures, it also comes with costs. It can lead to Justices serving into very old age, sometimes when they are no longer able to serve effectively.² And as Justices live longer and remain on the Court, it makes appointments infrequent. This reduces the democratic check on the Court provided by the appointments process,³ and it raises the political stakes for appointments that do occur. Perhaps most importantly, life tenure and the fact that Congress has not changed the Court's size in more than a century⁴ means that unpredictable deaths and strategic retirements determine the timing of Court vacancies. This results in an unequal influence that presidential elections have on the composition of the Court, which in turn has created disparities in the influence of political parties on the Court. As an example of differences in the influence of presidential elections, no Justices were

1. See *infra* Section I.A.

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

3. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 771 (2006).

4. The size of the Court is not fixed in the Constitution, making it possible for Congress to expand or contract it, though it has remained at nine Justices for more than 150 years. See U.S. CONST. art. III, § 1; Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 269–74 (2017) (discussing the Constitution's silence on the size of the Court and early historical practice); Joshua Braver, *Court-Packing: An American Tradition?*, 61 B.C. L. REV. 2747, 2781–88 (2020) (analyzing historical examples of Court expansion).

appointed during President Jimmy Carter's single term, but three Justices were appointed during President Donald Trump's single term.⁵ In terms of the disparities across political parties, Republican presidents held the White House for thirty-two out of the fifty-two years from 1969 to 2021, over which time they made fifteen out of nineteen appointments to the Supreme Court.⁶

Due to the costs associated with life tenure, at least a half dozen distinct proposals have been put forward to institute term limits for Supreme Court Justices. These proposals differ in important ways, such as how the transition to the new system would work, but the most prominent proposals all would have Justices serve for eighteen years with their tenures staggered so that two appointments would be made each presidential term.⁷ In addition to equalizing the influence presidents have on the Court, proponents argue that term limits and regularized appointments would have additional advantages such as discouraging presidents from choosing particularly young nominees and making the appointments process less contentious. Many have found the case for term limits persuasive: commentators,⁸ politicians across the political spectrum,⁹ and even the American public¹⁰ have all expressed support for term limits.

Despite this growing support for adopting term limits, there are at least three shortcomings with prior advocacy for their adoption. First, the proposals reformers have put forward have often been silent on many key design decisions. For instance, many proposals have not specified what would occur if the Senate simply refused to hold hearings on a president's

5. *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/EL4S-QW9Q>].

6. *Id.*

7. Various versions of this proposal have appeared in, among other places, Calabresi & Lindgren, *supra* note 3; James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); 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); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2014).

8. See, e.g., Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020, 4:00 AM), <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits> [<https://perma.cc/B8L5-AYU3>]; John Fund, *It's Time for Term Limits on the Supreme Court*, NAT'L REV. (Nov. 24, 2019, 6:33 PM), <https://www.nationalreview.com/2019/11/supreme-court-term-limits-have-bipartisan-support> [<https://perma.cc/4L8T-B5Z8>].

9. See, e.g., David Jackson, *Perry Likes the Idea of Supreme Court Term Limits*, USA TODAY (Aug. 7, 2015, 12:27 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2015/08/07/perry-likes-idea-of-supreme-court-term-limits/81580084> [<https://perma.cc/LDL9-HK45>] (Republican presidential candidate Rick Perry endorsing term limits); *infra* Section II.B.6 (term-limits bill sponsored by Democratic member of Congress).

10. See *infra* note 47 (citing surveys).

nominee to the Court, perhaps because that outcome seemed unthinkable prior to the Senate's failure to act on President Barack Obama's nomination of Merrick Garland. Second, there has been little effort to comparatively assess how the design decisions made by different proposals would affect the composition of the Supreme Court. Third, there has been almost no effort to document whether the empirical claims made by advocates of term limits would actually be realized. Instead, as Professor Stephen Burbank put it, "the work of many engaged in the debate [over term limits] is quite relentlessly normative and replete with unsupported causal assertions."¹¹

This Article provides a framework outlining the features of a complete term-limits proposal and develops an empirical strategy to assess the effects of instituting term limits.¹² The design framework we introduce specifically outlines the key design features that any term-limits proposal must make. These include decisions made in all past term-limits proposals like how long each term should be, when appointments will be made, and whether "legacy" Justices already serving at the time of a reform's enactment would be subject to the term limit. But we show that a complete term-limits proposal would also need to address the rules governing a hold-out scenario of Senate inaction on a president's nominee and how to designate a Chief Justice. By outlining all the features that must be included in a complete reform plan, we provide a blueprint for the design of any future term-limits proposal.

The empirical strategy we develop uses simulations to assess how term-limits proposals would have shaped the Court if they had been in place over the last eighty years of American history.¹³ The simulations use data on the

11. Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1513 (2006).

12. Our research is most related to two recent articles. First, Christopher Sundby and Suzanna Sherry estimate what the support would be for upholding *Roe v. Wade* if eighteen-year term limits had been in place since 1973. See generally Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade's Whiplash*, 98 TEX. L. REV. 121 (2019). After conducting a series of simulations, they conclude that the impact of term limits on upholding *Roe* largely depends on whether the Justices appointed under this system would care more about ideological alignment with their appointing president than commitment to the existing president. *Id.* at 156–60. Second, Michael Bailey and Albert Yoon use a theoretical model to assess the effect of politically motivated retirements on the responsiveness of the Supreme Court. See generally Michael A. Bailey & Albert Yoon, 'While There's a Breath in My Body': *The Systemic Effects of Politically Motivated Retirement from the Supreme Court*, 23 J. THEORETICAL POLS. 293 (2011). In a series of simulations, they find that strategic retirements have limited influence on the responsiveness of the Supreme Court largely because they are symmetrical: for every liberal Justice that retires early for political reasons, on average there is a conservative Justice that does so as well. They also use simulations to compare the way strategic retirements occur under the status quo of life tenure to what would occur with eighteen-year term limits, and they find that term limits would increase the responsiveness of the Court to electoral outcomes, decrease the age of the Justices on the Court, and increase the turnover of Justices. *Id.*

13. Our simulations specifically assess would have happened if these proposals had been in place between 1937 and 2020. For an explanation of why we begin our simulations in 1937, see *infra* Section I.B.

lifespans of federal judges and the historical occupants of the White House, the Supreme Court, and the Senate. We simulate how existing proposals would have shaped the Court's membership while varying when the plan was adopted and when unexpected vacancies occur. These simulations enable us to make comparative assessments of the drawbacks and upsides of term-limits proposals relative to each other and to the historical status quo of life tenure.

We use this empirical strategy to assess how five prominent term-limits proposals would have shaped the composition of the Supreme Court. Although all these plans would help to regularize the appointments of Justices to the Supreme Court, our simulations reveal that there are two important design features that result in significantly different outcomes. The first of these design features is how the proposals would handle the transition to term limits. Proposals that commence appointing term-limited Justices immediately could complete the transition to each of nine active Justices serving an eighteen-year term in an average of just sixteen years. In contrast, proposals that delay appointing term-limited Justices until after the sitting Justices leave the Court take an average of fifty-two years (and as long as sixty-nine years) for the transition to be complete. The plans that delay transition continue to allow for unequal influence on the Court across presidential terms during the transition period, which is one of the key issues term limits are intended to address. These results highlight why the details of the transition process should not be viewed as minor; instead, they will shape the composition of the Court for a generation and therefore should be at the forefront of discussions of any proposal.

The second design feature that produces considerable differences across proposals is how the plans respond to unexpected vacancies. Some proposals would fill unexpected vacancies with senior Justices until the regularly scheduled appointment of a new Justice. In contrast, other proposals would require the appointment of a new Justice to fill the remainder of the unexpectedly vacant term. We find evidence that a nontrivial share of temporary appointments would require confirmations that may be politically difficult. In some of the proposals, for instance, eleven percent of such appointments would occur in exactly the conditions that resulted in Merrick Garland's ignored nomination to the Supreme Court (when it is both the last year of a presidential term and the Senate is controlled by the opposite party).

Beyond the effects of these two important design features, our results show that any of the major term-limits proposals are likely to produce similar, dramatic changes in the ideological composition of the Supreme Court. Most significantly, the Supreme Court had extreme ideological imbalance—which we define as seventy-five percent or more of the Justices

appointed by presidents of the same party—for sixty percent of the time since President Franklin Roosevelt’s effort to pack the Court. Although there are notable differences between each of the major term-limits proposals, they all would have reduced extreme imbalance over the same time period by almost half. This finding is explained by the fact that term limits prevent Justices from using strategic retirement to maintain their party’s ideological advantages on the Court.

Although term limits would ensure that the Court is more ideologically balanced, having a Supreme Court that is more likely to be ideologically balanced does have associated costs. Notably, term limits meaningfully increase the number of appointments where the confirmation of the new member would determine the ideological balance of the Court. In fact, our simulations suggest that roughly sixty percent of new Justices would be appointed to the Court when there had been a 5-4 partisan split on the Court. Given how divisive the confirmation process was to replace Justice Scalia (which was the most recent confirmation with the potential to flip the ideological balance of the Court), this result underlines the need to design plans that include procedures that directly address what would occur when the Senate refuses to vote on nominees from a president of the opposite party. And, as a corollary, this means that the correspondingly high share of Justices could be pivotal voters during the final two-year period of their term. This illustrates the importance of seriously considering the “final period” problem, which is the incentive for Justices whose terms are about to expire to engage in untoward or otherwise strategic signaling behavior. Taken together, these results highlight the need for reform proposals to seriously consider how creating a more evenly balanced Court could affect the behavior of politicians and Justices.

Before continuing, we stress two caveats about our project. First, there are a number of ways to reform the Supreme Court other than term limits that have recently been proposed (such as increasing the number of Justices¹⁴ or limiting the power of the Court¹⁵), but we do not attempt to offer evidence relevant to the choice between term limits and these alternative reforms. Second, implementing Supreme Court term limits would be a profound change to an institution that has evolved slowly over time. It could thus change the American political and legal landscape in ways that go beyond the direct changes to the composition of the Court that we explore in this

14. See, e.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. 1, 246–53 (2020) (arguing that Democrats should add seats to the Court to retaliate for norm-breaking behavior by Republicans and to entrench democracy).

15. See, e.g., Ryan D. Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, 109 CALIF. L. REV. 1703, 1725–28 (2021) (discussing various “disempowering” reforms to the Supreme Court).

project.

The Article proceeds as follows. Part I provides necessary background. It explains the history of life tenure for Supreme Court Justices, discusses why a number of commentators and advocacy organizations from across the political spectrum have urged the adoption of term limits, and reports descriptive statistics on the tenure of Supreme Court Justices over time.

Part II introduces our framework for how to design term-limits proposals. It first documents nine design decisions that any reform proposal must make. It next summarizes several different term-limits proposals and discusses how they address a number of these design decisions. It then outlines six dimensions along which these design decisions could impact the composition of the Supreme Court.

Part III sets out the empirical strategy we developed for assessing term-limits proposals. It first describes the value of simulations, the way we structure them, and the assumptions we make to conduct them. After explaining our methods, we present results documenting how the different proposals fare along the six key tradeoffs we identify in Part II.

Part IV then offers implications from our analyses for designers of Supreme Court term-limits policies. Our primary findings concern four key design decisions of a potential reform: how it handles the transition period, how it addresses unexpected vacancies, whether it includes provisions dealing with a Senate's refusal to act on a president's nominees, and whether it addresses any problems caused by Justices' potential incentives to change their votes near the end of their terms.

Finally, we conclude by noting several considerations that are outside the scope of our analysis—such as the political viability of any particular plan, legal considerations relevant to the choice between plans, and goals such as depoliticization of confirmations that are not subject to empirical simulations. Given these constraints, our goal is not to offer a definitive conclusion as to which proposal is best, all things considered. Instead, our goal is to explain the concrete design choices that should be made, illustrate ways those can be assessed, and assess them. Our findings should inform future reform proposals, and any future plan can be assessed using our framework.

I. THE CASE FOR TERM LIMITS

We begin by explaining the current system of life tenure for Supreme Court Justices and describing the calls that have emerged for the adoption of term limits. After providing this background, we present descriptive statistics on the appointment and tenure of Justices on the Supreme Court that have

motivated the push for adopting term limits.

A. ARGUMENTS SUPPORTING TERM LIMITS

The Constitution never uses the phrase “life tenure.” Instead, it provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”¹⁶ Nonetheless, this provision has been read as meaning that judges and Justices serve for life unless they are impeached by the House of Representatives and convicted by a two-thirds vote in favor of removal by the Senate.¹⁷ This reading is not beyond debate,¹⁸ but it has been consistently followed since the founding of the United States.¹⁹

Why grant judges life tenure—especially given that holders of all other federal constitutional offices serve for fixed and limited terms?²⁰ The basic argument in favor of life tenure is that it will guarantee judicial independence. One complaint that led to the American Revolution was that colonial judges, unlike judges in England, were not sufficiently independent because they served at the pleasure of the Crown.²¹ As the Declaration of Independence states, King George had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their

16. U.S. CONST. art. III, § 1.

17. See, e.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L.J. 965, 987 (2007) (describing the “traditional understanding” under which “an Article III judge can be involuntarily removed from office only by the constitutionally specified mechanisms of impeachment”).

18. The leading argument that “good Behaviour” does not mean “life tenure” is found in Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006). Even those who are not persuaded by this argument acknowledge that the meaning of the Good Behavior Clause is not crystal clear. Martin Redish, in his response to Prakash and Smith, in which he defends the traditional view, suggests that this clause “could well be the most mysterious provision in the United States Constitution.” Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 139 (2006).

19. See, e.g., Calabresi & Lindgren, *supra* note 3, at 777 (“Life tenure for Supreme Court Justices has been a part of our Constitution since 1789, when the Framers created one Supreme Court and provided that its members ‘shall hold their Offices during good Behaviour.’”); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 69 (1989) (“The good behavior clause meant to guarantee that federal judges receive life tenure”); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute,”* 83 WASH. U. L.Q. 1397, 1405 (2005) (“Records from the founding era in America confirm that Article III, Section 1 granted life tenure for well-behaved judges.”).

20. The President and Vice President serve for terms of four years. U.S. CONST. art. II, § 1. After the Twenty-Second Amendment, no President may serve for more than two terms. *Id.* amend. XXII, § 1. Senators serve for terms of six years, *id.* art. I, § 3, and Representatives serve for two years, *id.* art. I, § 2. The Constitution imposes no term limits (here, used to mean limits on the number of terms that someone can serve) on federal legislative offices, and the Supreme Court has struck down state efforts to impose term limits on those offices. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

21. See Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L.J. 1061, 1064 (2007) (noting that “colonial judges still served at the pleasure of the crown, not during good behavior” a fact “that led Americans to believe that they were being treated as second-class subjects”).

salaries.”²²

The Constitution’s solution was to guarantee independence by granting tenure during “good Behaviour,” as well as to provide that judicial compensation could not be reduced during a judge’s “Continuance in Office.”²³ Defending the newly drafted Constitution, Alexander Hamilton wrote that good-behavior tenure was “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”²⁴ In Hamilton’s view, “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office,” making that guarantee “an indispensable ingredient in its constitution.”²⁵

Even before the Constitution became law, critics of life tenure emerged. Anti-Federalists attacked the Good Behavior Clause on the ground that it made the judiciary *too* independent.²⁶ The author known as Brutus, for example, stressed that judges would be “rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries,” which would provide no sanction for “erroneous adjudications.”²⁷ The skepticism did not end with constitutional ratification. Proposals to replace life tenure for federal judges with term limits have been introduced in Congress at various points in American history starting in the early nineteenth century.²⁸

Supreme Court term limits attracted renewed interest in the mid-2000s, when a number of proposals for staggered eighteen-year terms emerged.²⁹ Although such a reform had first been proposed in the 1980s by Philip Oliver,³⁰ it may have become particularly attractive given the circumstances two decades later: between 1994 and 2005, there were no vacancies on the Supreme Court, the second longest period of continuous membership in

22. THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

23. U.S. CONST. art. III, § 1.

24. THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

25. *Id.* at 570.

26. See, e.g., Nelson Lund, *Judicial Independence, Judicial Virtue, and the Political Economy of the Constitution*, 35 HARV. J.L. & PUB. POL’Y 47, 48 (2012) (“Some Anti-Federalists objected that the power of judicial review, together with life tenure, could lead to profound judicial usurpations of power.”).

27. Brutus XI, N.Y. J., Jan. 31, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 417 (Herbert J. Storing ed., 1981).

28. See Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 142–45 (2003).

29. See generally Calabresi & Lindgren, *supra* note 3; Carrington & Cramton, *supra* note 7; DiTullio & Schochet, *supra* note 7.

30. See Oliver, *supra* note 7, at 800–01.

American history.³¹ Reformers also stressed that Supreme Court Justices in recent decades had been staying on the Court longer as U.S. life expectancies had increased.³² As Calabresi and Lindgren argued, “[t]his trend has led to significantly less frequent vacancies on the Court, which reduces the efficacy of the democratic check that the appointment process provides on the Court’s membership.”³³

Moreover, the timing of Justices’ deaths and retirements can lead to a Court in which one party or the other’s nominees are disproportionately represented in light of their electoral success. For instance, critics of the current system of life tenure such as Erwin Chemerinsky have observed that “a president’s ability to select Justices is based on the fortuity of when vacancies occur.”³⁴ The problem with this state of affairs “is not one of fairness to presidential administrations or political parties” but rather “lies in its unfairness to the voters who elect a given president to a given term.”³⁵ This might be less of a problem if Supreme Court Justices’ ideologies did not closely track the partisan affiliation of the appointing president, but there is overwhelming evidence that they do.³⁶ This means in practice that the ideological composition of the Court bears only an indirect relationship to the outcomes of national elections. Term limits alone would not solve this problem. But terms of the appropriate length appropriately staggered to equalize each presidential term’s impact on the Supreme Court could alleviate this problem.

In addition to these primary arguments, reformers have raised a number of other concerns about life tenure. First, reformers argue that life tenure has led to Justices staying on the Court well into old age when the possibility of mental deterioration increases.³⁷ Second, reformers argue that life tenure incentivizes presidents to choose younger appointees to maximize their impact on the Court.³⁸ For appointing presidents, this raises concerns that Justices drift ideologically or shift their decision-making in unpredictable

31. See Michael Comiskey, *The Supreme Court Appointment Process: Lessons from Filling the Rehnquist and O'Connor Vacancies*, 41 PS: POL. SCI. & POLS. 355, 355 (2008).

32. See, e.g., CHEMERINSKY, *supra* note 7, at 310; Calabresi & Lindgren, *supra* note 3, at 770–71; Stephen L. Carter, *The Supreme Court Needs Term Limits*, BLOOMBERG (Oct. 6, 2018, 5:00 AM), <https://www.bloomberg.com/opinion/articles/2018-10-06/kavanaugh-confirmation-supreme-court-needs-term-limits> [<https://perma.cc/2VM5-SGVQ>].

33. Calabresi & Lindgren, *supra* note 3, at 771.

34. CHEMERINSKY, *supra* note 7, at 311.

35. DiTullio & Schochet, *supra* note 7, at 1117.

36. See, e.g., LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* 5 (2007).

37. See Calabresi & Lindgren, *supra* note 3, at 815–18; Carrington & Cramton, *supra* note 7, at 468; see also Garrow, *supra* note 2; Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?*, NEW REPUBLIC, Aug. 19 & 26, 1991, at 17, 18.

38. See DiTullio & Schochet, *supra* note 7, at 1110–16.

and often, from a political perspective, undesirable ways.³⁹ Third, reformers argue that life tenure encourages strategic behavior by Justices seeking to time their retirements so as to enable an ideologically friendly president to pick their replacement.⁴⁰ Fourth, reformers argue that life tenure makes the composition of the Court's membership turn on random and unpredictable events, such as deaths and health-related retirements.⁴¹ Fifth, reformers argue that life tenure leads to longer terms and therefore fewer vacancies, which means that political battles over the vacancies that do arise are particularly contentious.⁴² Finally, some reformers have even argued that life tenure and the resulting long tenures make Supreme Court Justices more arrogant and self-regarding,⁴³ which may in turn alter their decision-making.

Given these concerns with life tenure, reformers have put forward a number of term-limits proposals that they argue would address these concerns. The most common version of these term-limits proposals calls for staggered eighteen-year terms. Under these plans, each president would be entitled to two appointments per term, regularizing the appointments process and reducing the role of random events. Eighteen-year terms would prevent Justices from sitting until very old age and remove most advantages for presidents to appoint extremely young—and, thus, less experienced—nominees. And because each president would be entitled to two appointments per term, the political stakes over each appointment would be reduced. Eighteen-year terms would also encourage more regular turnover, bringing fresh perspectives to the Court⁴⁴ and increasing the connection between the U.S. electorate and the Court composition.

Life tenure does have some significant defenders.⁴⁵ Some others argue that there are problems with the current system but favor different reforms.⁴⁶ But many—including large cross-sections of the public—seem to find the arguments in favor of term limits persuasive. Recent surveys have found between sixty and seventy-eight percent of Americans agree with the notion that Supreme Court Justices should serve for fixed or limited terms instead

39. See generally Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important*, 101 NW. U. L. REV. 1483 (2007).

40. See DiTullio & Schochet, *supra* note 7, at 1101–10.

41. See *id.* at 1116–19.

42. See, e.g., Buchanan, *supra* note 8; Carrington & Cramton, *supra* note 7, at 468.

43. See, e.g., Carrington & Cramton, *supra* note 7, at 468–69.

44. See CHEMERINSKY, *supra* note 7, at 311.

45. See generally Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407; Stras & Scott, *supra* note 19; David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791 (2007).

46. See Doerfler & Moyn, *supra* note 15; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 173–74 (2019).

of life.⁴⁷ Term limits are also the only major reform that has attracted support across the political spectrum, and prominent conservative legal thinkers recently have endorsed them or at least expressed some openness to them.⁴⁸ Even if it is hard to imagine any Supreme Court reform being implemented in the near term given the current partisan configuration, term limits seem like the only reform that might be possible.

B. TRENDS SUPPORTING TERM LIMITS

The case for adopting term limits is motivated in part by trends in the appointment and length of service of Justices on the Supreme Court. To illustrate these trends and to set the stage for our simulations reported in Part III, we use the Federal Judicial Center for all biographical data on judges, including the terms served by Justices, their ages, and their lifespans.⁴⁹ We also use data from Wikipedia on the political party controlling the White House and the Senate in each year.

For both this exercise and our simulations, we use 1937 as the starting point of our analysis. This is to account for the reality that patterns of service on the Supreme Court have evolved dramatically over time. For instance, one of the inaugural Justices on the Supreme Court, John Rutledge, left the Supreme Court after just a year to serve as Chief Justice of the South Carolina Court of Common Pleas and Sessions.⁵⁰ In another example, in

47. See *New Nationwide Marquette Law School Poll Finds Confidence in U.S. Supreme Court Overall, Though More Pronounced Among Conservatives*, MARQUETTE UNIV. (Oct. 21, 2019), <https://www.marquette.edu/news-center/2019/new-nationwide-mu-law-school-poll-finds-confidence-in-us-supreme-court-overall.php> [https://perma.cc/7AKJ-R2EU] (noting that thirty-four percent of respondents strongly favored and thirty-eight percent favored requiring Supreme Court Justices to “serve a fixed term on the court rather than serving life terms”); ROBERT GREEN & ADAM ROSENBLATT, *FIX THE COURT*, AGENDA OF KEY FINDINGS 3 (2018), <https://fixthecourt.com/wp-content/uploads/2018/10/October-2018-TL-poll-results.pdf> [https://perma.cc/38AT-L7AD] (finding that seventy-eight percent of respondents supported “restrictions on length of service for U.S. Supreme Court Justices, for example, setting a retirement age or capping total years of service”); Lee Epstein, James L. Gibson & Michael J. Nelson, *Public Response to Proposals to Reform the Supreme Court 2–3* (Oct. 2020) (unpublished report prepared for the *New York Times*) (available at <https://perma.cc/9ES2-8NRY>) (finding sixty percent support among survey respondents for “[h]av[ing] justices serve a fixed term on the Supreme Court—like six or eight years—rather than serving life terms”).

48. Will Baude, *One Cheer for Supreme Court Term Limits*, VOLOKH CONSPIRACY (Oct. 26, 2020, 6:30 AM), <https://reason.com/volokh/2020/10/26/one-cheer-for-supreme-court-term-limits> [https://perma.cc/QX4V-D8ZU]; Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sept. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html> [https://perma.cc/LL8C-MTL4]; see also Ilya Shapiro, *Term Limits Won't Fix the Court*, ATLANTIC (Sept. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/term-limits-wont-fix-court/616402> [https://perma.cc/NAS2-F5HW].

49. *Biographical Directory of Article III Federal Judges, 1789–Present*, FED. JUD. CTR., <https://www.fjc.gov/history/judges> [https://perma.cc/R5JB-LJSX].

50. Rutledge later returned to the Supreme Court to serve as Chief Justice for a mere 138 days under a recess appointment before being rejected by the Senate. See *Rutledge, John*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/rutledge-john> [https://perma.cc/U9GB-9KA6].

1812, Joseph Story was appointed to the Court at just thirty-two years old—a record unlikely to ever be broken in modern times.⁵¹ We thus elected to focus on more recent patterns in service on the Court. We decided to specifically start our analysis in 1937 since that was the year President Roosevelt advanced his ultimately unsuccessful court-packing plan,⁵² and it is the year that many legal experts consider the beginning of the modern era of the Supreme Court.⁵³ That said, we recognize that this starting point is admittedly arbitrary.

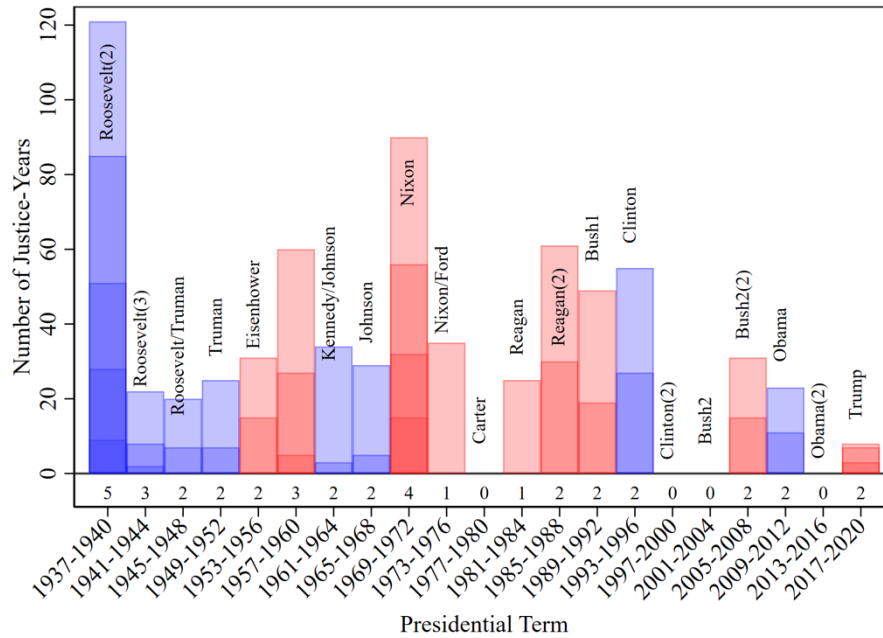
To begin, we examine how the number of Justices appointed to the Supreme Court varies by presidential term. To do so, Figure 1 reports the number of Justices appointed during each four-year presidential term from 1937 through 2020. For this Figure, the x-axis breaks terms into four-year periods, even if two presidents held office during that term. For example, although Lyndon Johnson served as president for the latter part of the term for which John F. Kennedy was elected in 1960, we group 1961 to 1964 as a single term. The numbers directly above the x-axis list the total number of Justices appointed in each term. The bars are colored blue for Democratic presidents and red for Republican presidents. (Throughout, we use red to refer to Republican-appointed Justices and blue to refer to Democratic-appointed Justices.) For a given president, the different shadings of the bars indicate the different Justices that the president appointed. For example, there is one colored bar for Reagan's first term because he appointed one Justice in the term, but there are two colored bars for Reagan's second term because he appointed two Justices in that term.

51. See *Story, Joseph*, FED. JUD. CTR., <https://www.fjc.gov/history/judges/story-joseph> [<https://perma.cc/HCN3-ANTU>].

52. For detailed examinations of this episode, see JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010) and BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (2009).

53. The year 1937 has been previously described as the beginning of the “modern era” of the Supreme Court because it was then that the Supreme Court seemed to acquiesce to the constitutionality of President Roosevelt’s New Deal initiatives, thus ushering in today’s regulatory state. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (“All of us live in the modern era that begins with the Supreme Court’s ‘switch in time’ in 1937, in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality.”).

FIGURE 1. Number of Justices and Justice-Years Appointed by Presidential Term, 1937 to 2020



During the twenty-one four-year presidential terms between 1937 and 2020, a total of thirty-nine Justices were appointed to the Supreme Court. (On average, one Justice was appointed every twenty-six months, which translates to an average of 1.8 Justices appointed each four-year presidential term.) However, there is considerable variation in the number of Justices appointed by presidential terms, from zero appointments being made in four terms—Carter’s only term, Clinton’s second term, George W. Bush’s first term, and Obama’s second term—to five appointments made in Roosevelt’s second term and three appointments made in Donald Trump’s single term.

Comparing the simple number of appointments from each presidential term is one way to gauge the influence of different presidents on the Court’s composition, but it ignores differences in the length of time that the appointed Justices serve. Thus, another measure of representation is *Justice-years*. This measure counts the total number of years served by Justices for each president. This measurement accounts for the fact that not all appointments are equal in terms of influence. Because a Justice who serves for a long period can influence the law for much longer after the president who appointed her leaves office, an appointing president might consider that appointee more valuable than one who serves for only a short period.

Figure 1 also reports the number of Justice-years appointed by each presidential term. In total, the forty Justices appointed during these twenty-one presidential terms have served for a combined 718 Justice-years. On average, each presidential term has made appointments lasting thirty-four Justice-years. As with appointments generally, however, there is also considerable variation in the Justice-years by presidential term. For example, the four Justices appointed in Roosevelt's second term served for a combined 121 years.

Although there are only small differences by party since 1937, it is possible that the relative shares of Justice-years over eighteen years by party have changed over time. Across the twenty-one presidential terms since 1937, Republican presidents have appointed twenty out of forty Justices and those Justices have served fifty-four percent of Justice-years. In recent decades, however, a disparity has emerged. For instance, of the Justices appointed since Richard Nixon took office in 1969, fifteen out of nineteen Justices were appointed by Republicans and those Justices have served seventy-seven percent of Justice-years.

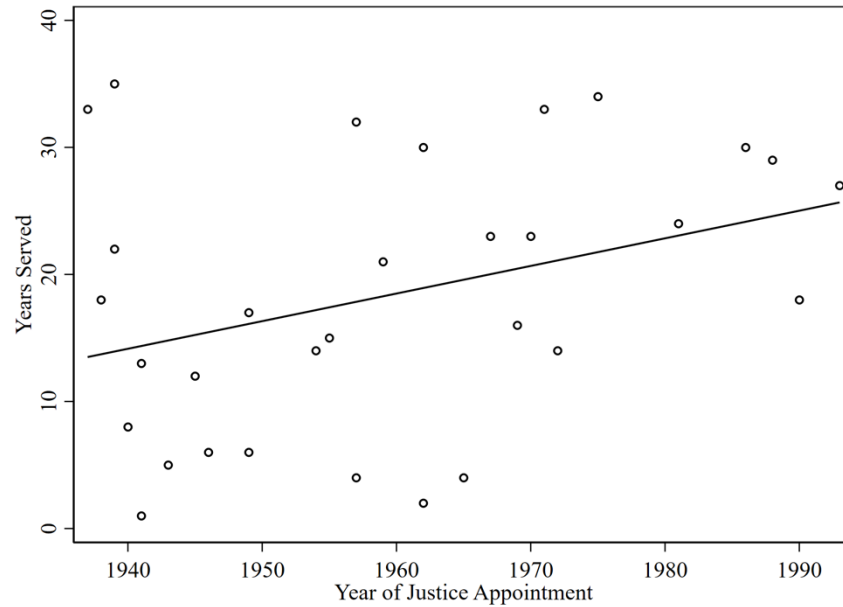
In addition to concern over equity in the appointment of Justices across presidential terms, another factor that has been cited to justify term limits is the increasing number of years that individual Justices serve.⁵⁴ To illustrate these trends, Figure 2 graphs the years of service for Justices based on their appointment year.⁵⁵ To make the patterns more clear, Figure 2 includes points for each Justice and a line capturing the overall relationship between year of appointment and number of years served. The results in Figure 2 reveal a clear increase in the average number of years of service over time. For instance, the Justices appointed between 1937 and 1950 served an average of 15.7 years, but the Justices appointed since 1990 who have since left the bench served an average of 26.3 years.⁵⁶ In addition, across all Justices who retired since 1937, the average length of time on the bench is 19.1 years and the median length of time is 18.5 years. Given that the median length is more than eighteen years, an eighteen-year term limit would have cut short over half of all appointments.

54. See Calabresi & Lindgren, *supra* note 3, at 815–18. See generally Garrow, *supra* note 2.

55. We made two choices about how to report currently sitting Justices to ensure that the fact that the sitting Justices have not yet served a full term does not bias our results: (1) we exclude all Justices appointed after Justice Breyer's confirmation in 1994 and (2) we assume that Justice Breyer and Justice Thomas serve until 2020.

56. This number will increase as Justices Breyer and Thomas continue to serve on the Court.

FIGURE 2. Years of Service of Supreme Court Justices Appointed Between 1937 and 1994

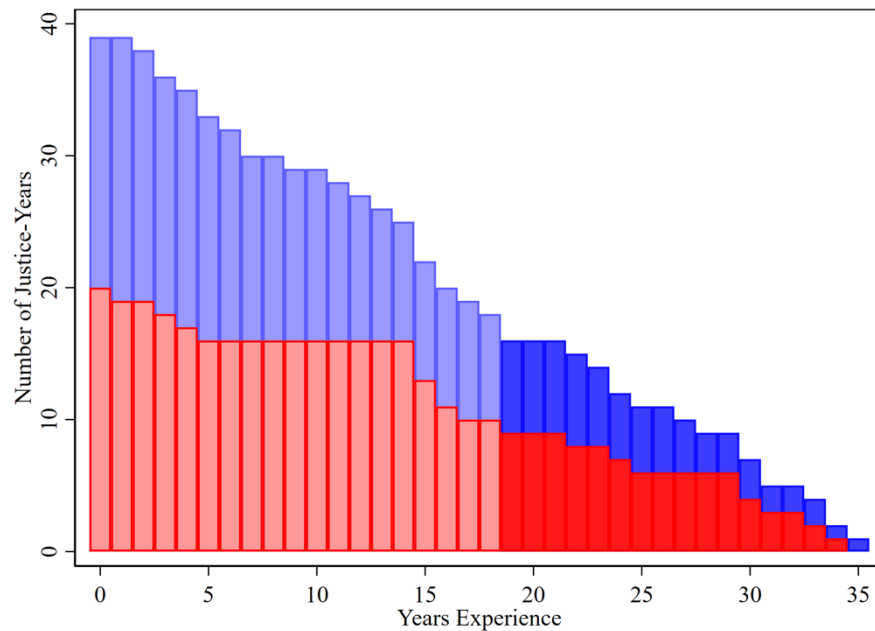


As a more direct assessment of how often term limits would potentially limit the tenure of Justices, Figure 3 shows the distribution of years of experience at the Justice-year level from 1937 to 2020. In the Figure, an individual Supreme Court Justice would be counted for each year they served. For example, the first year that a given Justice served on the Court (for example, Justice Ginsburg in 1993) would be included in the bar for zero years of experience, the second year that a given Justice served on the Court (for example, Justice Ginsburg in 1994) would be included in the bar for one year of experience, and so on. The y-axis represents the number of Justice-years at each corresponding level of year of experience. To break out the results by political party of the appointing president, the bars are colored blue for Democratic presidents and red for Republican presidents. Because we are interested here in how often Justices are serving past eighteen years, the bars have darker shading after the eighteen-year mark.

The results in Figure 3 reveal that twenty-three percent of the Justice-years served on the Supreme Court occur after a given Justice has already served for eighteen years. An eighteen-year term limit would thus have impacted roughly a quarter of the Justice-years served on the Supreme Court. Or, to state the effect in a different way, the Justices who would have been

affected by eighteen-year term limits (those who served longer than eighteen years) would have had their tenures cut short by 6.0 years on average.

FIGURE 3. Years of Experience at the Justice-Year Level by Political Party of Appointing President, 1937 to 2020

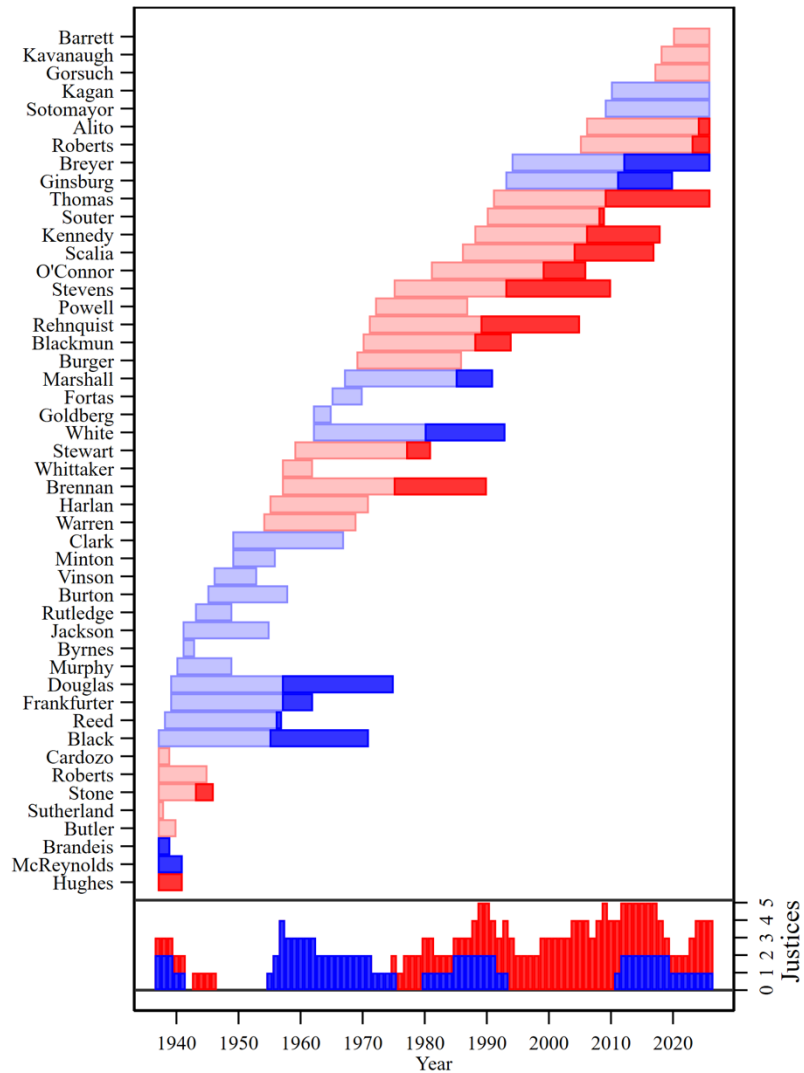


A related inquiry is whether term limits would affect Justices appointed by one political party more than the other. If, for example, term limits would disproportionately have limited the tenures of Republican-appointed Justices, we might expect Republicans to be less willing to support term limits in the future. Figure 3 assesses this possibility by breaking out results by the political party of the appointing president. These results show that the share of Justice-years by party is similar before and after the eighteen-year mark. More specifically, forty-six percent of all Justice-years were served by Justices appointed by Democratic presidents, and forty-three percent of Justice-years after a given Justice had been on the Court eighteen years were served by Justices appointed by Democratic presidents.

To assess the variation in Justices serving more than eighteen years by party over time, Figure 4 reports the years served for each Justice. The bars are colored by the party of the appointing president with the darker area indicating the years after which a Justice has served eighteen years. At the

bottom of the figure is a distribution of the number of Justices that have been serving for more than eighteen years over time, organized by year.⁵⁷

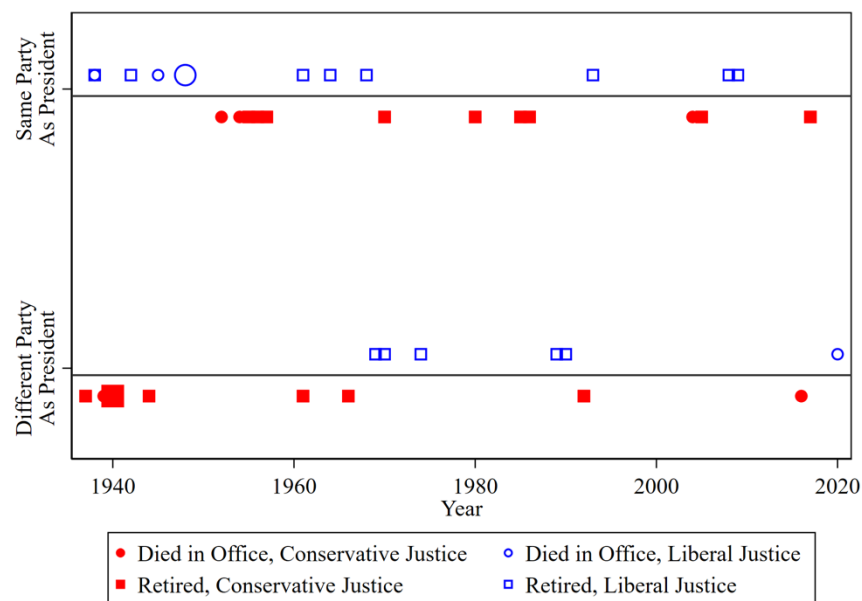
FIGURE 4. Length of Supreme Court Tenure by Justice, 1937 to 2020



57. This distribution is created by simply adding up the number of Justices in the given year in the top part of Figure 4.

Figure 4 reveals that there are considerable differences in the relative shares of Justice-years over eighteen years of service by party over time. Between 1950 and 1970, only Justices appointed by Democratic presidents served past eighteen years; from the early 1990s through 2010, only Justices appointed by Republican presidents served past eighteen years; and since 2010, Justices appointed by presidents from both parties have served longer than eighteen years.

FIGURE 5. Retirements and Deaths by Shared Justice and President Ideology, 1937 to 2020



Finally, because preventing strategic retirements is one argument for term limits, we examine the role that strategic departures play in vacancies to the Supreme Court.⁵⁸ To do so, Figure 5 reports the number of Justices that left the Court when the president was of the same party as the Justice's

58. It is worth noting that, just like some of the Justices that retire, some of the Justices that die while serving on the Supreme Court still may be engaging in a strategic calculation. For instance, a Justice may elect to not retire early in the term of a president with whom she shares an ideology because she knows that, if she dies prematurely, she will be replaced by a Justice that shares her ideology. Similarly, a Justice may stay on the Court despite serious health consequences that counsel in favor of retirement if she would prefer that the sitting president not nominate her replacement.

appointing president, separately by whether the Justice died in office or retired. The size of the marker in any given year corresponds to the number of Justices. For this analysis, we consider all Republican presidents conservative and all Democratic presidents liberal; and we consider Justices liberal or conservative based on their Martin-Quinn score at the time of their retirement. Justices with a negative (and thus liberal) Martin-Quinn score are assumed to share ideological leanings with Democratic presidents, and Justices with a positive (and thus conservative) Martin-Quinn score are assumed to share ideological leanings with Republican presidents. We use ideology at the time of a Justice's retirement instead of at the time of the Justice's appointment to account for the fact that a Justice's ideology may evolve over time. For example, even though Justice David Souter was appointed by George H.W. Bush, he consistently voted with the Court's liberal bloc by the end of his tenure. His decision to retire at the beginning of the Obama presidency thus should be seen as a likely strategic retirement.

The results in Figure 5 reveal that ten Justices have died while still serving on the Supreme Court between 1937 and 2020. Of the Justices that died, six (or sixty percent) were appointed by a president of the same party as the sitting president. During that same period, twenty-nine Justices retired from the Court. Of the Justices who retired, seventeen (or fifty-nine percent) were appointed by a president of the same party as the sitting president.⁵⁹

II. DESIGNING PROPOSALS

Given the concerns outlined above about the current system of life tenure for Supreme Court Justices, several proposals have been put forward by academics and reform advocates to impose limits on the length of their terms. This Part documents the nine key design decisions that any proposal should confront, summarizes prominent existing proposals, and outlines several dimensions along which it is possible to evaluate the impact that proposals have on the composition of the Supreme Court.

59. One study concluded that strategic retirement had increased over American history. Artemus Ward's 2003 study of Supreme Court retirement concluded that after Congress expanded the Justices' retirement benefits in 1955, "partisanship became the dominant recurrent factor in the departure process." ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 19 (2003). That pattern appears to have continued since Ward published his study. Every Justice who voluntarily retired since 2003 has done so under conditions that enabled the appointment of an ideologically similar replacement (though not necessarily one of the same political party). Conservative Justices O'Connor and Kennedy retired under Republican presidents; liberal Justices Stevens and Souter retired under a Democratic president.

A. DESIGN DECISIONS

Term-limits proposals must solve several predictable problems. More specifically, we identify nine key design decisions that define and distinguish different term-limits proposals. In laying out these design decisions, we provide a framework that can be used to analyze any potential term-limits reform.

1. Term Length

The most salient design decision a proposal must make is how long the Justices' terms will last. There are a number of tradeoffs associated with different term lengths. For instance, shorter terms—such as twelve years—would create greater turnover on the Court, and by doing so, may ensure that the Court's membership is more reflective of the current political mood of the country. In contrast, longer terms—such as twenty-seven years—would create more continuity on the Court, and by doing so, may help ensure greater doctrinal consistency and alleviate concerns that Justices' interest in future employment or prospects for higher office would distort their decision-making. Moreover, only certain term lengths, combined with appropriate staggering, will ensure that each president gets the opportunity to appoint the same number of Justices.⁶⁰ Although the case could, and has, been made for a number of different term lengths, most recent commentators have converged on staggered eighteen-year terms as the preferred reform.⁶¹

2. Appointment Timing

Another decision is to determine when appointments will be made. One option is to have presidents make a new appointment every two years, typically in the first and third year of a presidential term. Another option is to limit Justices' terms to eighteen years but not take any steps to regularize when the new appointments occur, leaving vacancies to arise naturally when term limits expire. Yet another option is to allow presidents to nominate two Justices per term but allow those nominations to occur at any time—or even stipulate that those appointments do not go into effect until the start of the subsequent presidential administration.

60. With a nine-Justice court, staggered nine-year, twelve-year, eighteen-year, and thirty-six-year terms lead to four, three, two, and one appointment per term, respectively, assuming no unexpected deaths or retirements.

61. See *infra* Section II.B.

3. Transition Timing

Proposals must also specify when the process of transitioning to term-limits appointments should commence. One option is to have the plan go into effect immediately upon passage of a term-limits statute or constitutional amendment (which, as we discuss below, are both ways that reformers have suggested that such a proposal may be enacted). Another option is to have the proposal go into effect at some later date, such as at the start of the next presidential term or after the Justices on the Court at the time of passage have all served some amount of time (for example, after they have all completed eighteen years of service or after all the Justices on the Court at the time of passage have retired).

4. Legacy Justices

In addition to specifying the timing of the transition, a related design decision is how to handle the terms of the “legacy” Justices that are serving on the Court when the proposal is enacted. As noted above, one option is to specify that term-limits appointments do not go into effect until all the current Justices leave the Court. Another option is to allow the legacy Justices to retain life tenure and only begin adding new Justices that will serve staggered eighteen-year terms (this would likely result in a Court with more than nine Justices during a transition period). Yet another option is to have legacy Justices transition off the Court in order of seniority as new Justices are appointed. Importantly, given that the Justices currently on the Court were appointed under a system of life tenure, this design choice may have implications for the constitutionality of any reform passed by statute even if one believes such reform is permissible as a general matter.

5. Unexpected Vacancies

Another important design decision is how a proposal addresses unexpected vacancies. That is, what happens under the proposal when a Justice leaves the Court—either due to death, voluntary retirement, or removal through impeachment—before the end of the specified term? One option is simply to have fewer members on the Court for the remainder of the departing Justices’ term. That is, if a term-limited Justice appointed in 2021 would be expected to leave the Court in 2039, that Justice’s unexpected death in 2037 would lead to an eight-Justice Court for two years. Another option, though, is to allow for a Justice to be appointed to fill the remainder of the term. This appointment could be made by the current president, or one could imagine some requirement that the replacement Justice be approved by the party that initially appointed the Justice in order to minimize the role of random events on the Court’s jurisprudence. For example, if a Justice was

appointed by a Republican president and the current president is a Democrat, the plan could require the appointment to be approved by the Republican leader in the Senate. Other options include allowing senior Justices whose terms have finished to return to active service on the Court until the next appointment is made on the specified schedule.

6. Senior Justices

A term-limits reform should also address the role of senior Justices after the end of their term. One option is to make these Justices permanent members of a circuit court. Another option is to give these Justices the same status of the Justices that retire under the current system (that is, they may be allowed to retain office space, hire a clerk, and sit by designation on federal courts around the country). Yet another option is to permit these Justices to rejoin the Court for a limited period of time when an unexpected vacancy arises. Another possibility is for the plan to include provisions that restrict the activities of Justices after they are no longer active members of the Court—restrictions that would be designed to avoid any appearance of corruption (for example, a provision barring later employment for entities with business before the Court).⁶² Importantly, however, any reform not passed through a constitutional amendment must find a role for the term-limited Justices that does not run afoul of the Constitution's current requirement that Justices serve for a period of good behavior.⁶³

7. Senate Impasses

Even if a term-limits reform specifies when Supreme Court seats become vacant and when the president may nominate a new Justice, it does not follow that the Senate will automatically confirm the president's nominee. If the Senate is controlled by a different party than the president, the majority leader may instead elect to not schedule a confirmation vote—just as Republican Majority Leader Mitch McConnell did when President Obama nominated Judge Merrick Garland to fill the seat created when Justice Antonin Scalia died in 2016. Without some solution to this problem, “instituting staggered term limits could spectacularly backfire.”⁶⁴

62. Cf. Stras & Scott, *supra* note 19, at 1425 (arguing that “fixed, nonrenewable terms . . . would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary”).

63. Cramton has argued that his and Carrington's proposal is consistent with the Constitution because Justices would have commissions for life but would spend the first part of their tenure serving on the Supreme Court and the remainder serving on lower courts. See Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345, 359 (Roger C. Cramton & Paul D. Carrington eds., 2006).

64. Shapiro, *supra* note 48.

Reformers may hope that changing term limits may also change the norms of confirmation votes. That is, by establishing that each presidential term is “entitled” to two Court vacancies, it may lessen the incentives for the Senate to refuse to consider one of the president’s nominees. But one option is to place less faith in norms and instead provide for some other policy in the event the Senate does not confirm a nominee in a set amount of time. This could include allowing the president to directly appoint the candidate of their choosing, or it could involve giving that power to a third party of some kind. One particularly mischievous (though quite possibly effective) attempt to address these problems is to require the president and the Senate to be “confined together until a nominee has been approved” while imposing a “salary and benefits freeze” on all of them.⁶⁵

8. Chief Justices

Proposals should also decide how the Chief Justice will be designated. One possibility is to have the Justice appointed to fill the vacancy created by the departing Chief Justice assume the role. Under this system, as with the status quo, whether a president is able to appoint the Chief Justice will depend on the happenstance of when the vacancy becomes available. Alternatively, the plans could instead provide that the most senior of the active Justices will serve as the Chief Justice, or the most senior member of the party that has appointed the most Justices to the Court. One could also imagine a system similar to that used by the courts of appeals, in which the most senior judge below the age of sixty-five becomes the chief judge for a seven-year term.⁶⁶ Or the plan could simply allow the Justices to elect their own chief.⁶⁷

9. Enactment Method

A final important design decision is whether a plan will be implemented by passing a statute or through the adoption of a constitutional amendment. The majority of proposals rest on the assumption that term limits are inconsistent with Article III’s guarantee of tenure during “good Behaviour,” making a constitutional amendment necessary. But some scholars argue that there are ways to effectively create term limits through a statute alone.⁶⁸ While this choice is quite significant, how to resolve it rests on constitutional considerations that are beyond the scope of this Article. Our focus, instead,

65. Calabresi, *supra* note 48.

66. See 28 U.S.C. § 45 (providing procedures for selection of chief judges for circuit courts).

67. For a discussion of the constitutional issues involved in changing the way the Chief Justice is designated, see generally Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).

68. See generally, e.g., Carrington & Cramton, *supra* note 7.

is on the practical effect each proposal would have if successfully implemented.

B. EXISTING PROPOSALS

Over the last several decades, several major term-limits proposals have been put forward. These proposals each make concrete choices for at least some of the nine design decisions we outlined above, but they also typically leave some of these decisions either ambiguous or unaddressed. We outline several of the most prominent proposals below.

1. Oliver's Proposal

The first scholar to lay out the basic framework of the dominant term-limits proposals was Philip Oliver. In a 1986 article, Oliver offered a draft constitutional amendment that would “replace life tenure for Supreme Court Justices with a system of fixed, staggered terms.”⁶⁹ As he put it, “[t]he primary features of the proposal are that Justices should serve for staggered eighteen-year terms, and that if a Justice did not serve his full term, a successor would be appointed only to fill out the remainder of the term.”⁷⁰ Vacancies would be staggered such that one seat would open up each odd-numbered year.

Oliver's proposal has a number of key features. Notably, it would limit the tenure of Justices already appointed at the time of enactment—that is, it would not accommodate the legacy Justices. The proposal does, however, include a lag of approximately five years before it becomes effective: the most senior Justice on the Court would be required to leave on the third odd-numbered year after enactment.⁷¹ So, for example, if the plan were enacted in 2021 or 2022 and no current Justices retired or died, Justice Thomas would vacate his seat in August of 2027, to be replaced by a new Justice who would serve an eighteen-year term.

Another important detail is how the proposal handles unexpected vacancies. If a Justice dies or retires outside of the normal schedule, Oliver's proposal provides that a replacement Justice will be appointed who serves out the rest of the predecessor's term. So, if the plan were enacted in 2021 and Justice Breyer retired in 2022, his replacement would serve only until 2029, when a new Justice would be appointed for a full eighteen-year term. If that Justice were to leave the Court after ten years, she would be replaced by a temporary Justice who would serve for eight years. Temporary Justices

69. Oliver, *supra* note 7, at 800.

70. *Id.* (footnote omitted).

71. *See id.* at 801.

may not be reappointed for full eighteen-year terms. The only exception to these rules is that, where a replacement Justice is being appointed to a seat that would become vacant during the same presidential term, the new appointee would serve for somewhat longer than eighteen years. If, say, Justice Thomas were to leave the Court in 2025 before his seat expired in 2027, the president elected in 2024 would replace him with a Justice who would serve until 2045.

2. The UVA Plan

Oliver's proposal was revived two decades later by two University of Virginia law students, James DiTullio and John Schochet, in a *Virginia Law Review* student note.⁷² Their proposed constitutional amendment (which we refer to as the "UVA Plan") has much in common with Oliver's, but with a couple of key differences.

One relates to the timing of the transition. Although their plan would, like Oliver's, limit the tenure of existing Justices, the mechanics are slightly different. The plan would take effect on the first odd-numbered year following ratification, and then the most senior Justice's tenure would end "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."⁷³ At that point, each remaining Justice would leave every two years, from most to least senior. In other words, so long as the most senior Justice had already served for eighteen years upon the amendment's ratification, the UVA Plan would become operative more quickly than Oliver's.

Another important difference is that the UVA Plan makes no allowances for short-term appointments that would expire during the appointing president's term. Whereas Oliver's plan simply allows those Justices to serve for somewhat longer than eighteen years, the UVA Plan would require an interim appointment who would serve for a short period and who could not be reappointed to a full term.⁷⁴ This could lead to differences for the ideology of Justices in some scenarios. Under Oliver's plan, if a vacancy opened up on the Court in the second year of a presidential term, the president would be able to fill it with an appointee who would serve for nineteen years. Under the UVA Plan, the president would pick a short-term appointee and then would make a new appointment the following year. Given that the president's party often (though not always) loses seats in the

72. See generally DiTullio & Schochet, *supra* note 7.

73. *Id.* at 1147.

74. See *id.* at 1146.

Senate in midterm elections,⁷⁵ the UVA Plan might lead to nominees who are more ideologically moderate in such scenarios but also might have a greater chance of producing Senate impasses.

3. The Northwestern Plan

Another proposal comes from Northwestern University School of Law professors Stephen Calabresi and James Lindgren. Like the Oliver and Virginia proposals, this one (the “Northwestern Plan”) is also a constitutional amendment that calls for eighteen-year terms. But the proposal has some key differences from other proposals. Most importantly, it would not apply to legacy Justices on the ground that “retroactive application . . . would be both unfair and unnecessary.”⁷⁶ All Justices currently serving at the time the proposal was enacted would retain life tenure.

This choice has consequences for the plan’s transition because it takes much longer to establish a schedule of staggered eighteen-year terms. The authors propose that each new appointment after the amendment would occupy the “next open slot” in order to make the eighteen-year cycle work.⁷⁷ Imagine that the plan became operative in 2021. If the first retirement occurred in 2022, the new Justice would be appointed to the eighteen-year slot that begins in 2023—meaning that Justice would serve for nineteen years. If the next vacancy arose in 2023, the new Justice would be appointed for the slot that began in 2025. And so on.

Under the Northwestern Plan, term-limited Justices would receive their salary for life and would be permitted to sit as judges on the lower courts for life.⁷⁸ In the event of unexpected vacancies, an interim Justice would be appointed to fill out the rest of the term, and that appointee would be ineligible for reappointment for a full term.⁷⁹

4. The Renewal Act

Roger Cramton and Paul Carrington have proposed their own eighteen-year term-limit plan (which we refer to as the “Renewal Act,” the name they gave their draft statute).⁸⁰ The proposal has a significant difference from those described thus far: it is an ordinary statute, not a constitutional

75. See, e.g., Bernard Grofman, Thomas L. Brunell & William Koetzle, *Why Gain in the Senate but Midterm Loss in the House? Evidence from a Natural Experiment*, 23 LEGIS. STUD. Q. 79, 79 (1998) (noting that “[m]idterm loss in the Senate is very likely, but it is not as consistent a phenomenon as in the House”).

76. Calabresi & Lindgren, *supra* note 3, at 826.

77. *Id.* at 826–27.

78. *Id.* at 775.

79. *Id.* at 827.

80. See Carrington & Cramton, *supra* note 7, at 471.

amendment. Despite the common view that life tenure is constitutionally required, Cramton and Carrington argue that features of their reform mean it could be implemented through statutory means consistent with the Constitution.⁸¹ Their proposal would work as follows. First, all legacy Justices would retain life tenure. Vacancies would be filled as per usual once those Justices died or retired until the *last* grandfathered Justice left the Court. At that point, the system of regularized appointments every odd-numbered year would begin.

Interestingly, no Justice would be “term-limited” from the Court; all Justices would keep their titles and judicial roles for life. But the system would effectively create an eighteen-year term. This is because if at any point there were more than nine Justices on the Court, only the nine most *junior* would participate in the ordinary work of hearing merits cases. In practice, after eighteen years of service, any given Justice would be bumped out of the nine most junior Justices, as nine appointments would have been made since that Justice’s appointment. Senior Justices would still be permitted to sit on the Court in cases of recusal or temporary disability by the active Justices, and would be called up in reverse order of seniority. They also would sit as circuit judges and participate in other work of the Supreme Court, such as approving amendments to the Federal Rules. In the event of an unexpected death or retirement that left the Court with fewer than nine Justices, the president would be permitted to make an extra appointment that would take the place of the next regularly scheduled appointment.⁸²

5. Justices on Deck

The advocacy organization Fix the Court has proposed a reform that looks quite similar to the Renewal Act proposal but which has a couple of key differences. Under this proposal, the cycle of appointments every two years would begin immediately upon enactment.⁸³ The term limits would apply to new Justices, but not the legacy Justices. Once an eighteen-year term expires, a Justice would become senior and serve on the lower courts. During their eighteen-year terms, however, they would sit on the Court only once they were among the nine most *senior* Justices on the bench.⁸⁴ In practice, this would mean that some of the early new appointments would have short tenures on the Supreme Court. Depending on how long it took for legacy Justices to retire, an early appointee could spend a sizable chunk of

81. See generally Cramton, *supra* note 63.

82. Carrington & Cramton, *supra* note 7.

83. See *One Way Our Term Limits Bill Could Be Implemented*, FIX THE CT. (Sept. 20, 2020), <https://fixthecourt.com/2020/09/term-limits> [<https://perma.cc/2SL4-XZ9Q>].

84. Carrington & Cramton, *supra* note 7.

her eighteen-year term waiting “on deck” to become one of the nine most senior Justices.

6. The Khanna Bill

Fix the Court has also developed a different proposal, a version of which has now been introduced into Congress by Representative Ro Khanna (the “Khanna Bill”).⁸⁵ As with the prior proposal, appointments would begin immediately and legacy Justices would not be subject to term limits. Unlike the previous proposal, however, there would be no requirement that only the nine most senior Justices sit and decide cases during the transition period. What this means is that, unlike the other proposals discussed thus far, the Supreme Court could have more than nine actively participating Justices during the transition period—in theory as many as eighteen, if every Justice on the Court upon the bill’s enactment remained on the Court for eighteen more years. After the transition, senior Justices could return to the Court temporarily to fill unexpected vacancies.⁸⁶ The proposal also has one interesting feature designed to prevent obstruction of nominees in the Senate. It provides that, if the Senate fails to act within 120 days of the president’s nomination, the nominee will be automatically seated.⁸⁷ This provision would address a situation like the one that arose in 2016 with President Obama’s nomination of Judge Garland, although importantly it would not prevent the Senate from simply holding a vote and voting down any nominees by the president.

7. Other Proposals

Most proposals for term limits have converged on eighteen-year limits, and we expect that policymakers would be most likely to select that length of term if they do adopt term limits. A number of commentators have proposed terms of different lengths, however, and we will briefly catalogue them here.

Henry Paul Monaghan has suggested “some fixed and unrenewable term, such as fifteen or twenty years” for Supreme Court Justices.⁸⁸ The problem with a fifteen- or twenty-year term limit, however, is that, with a

85. Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2020). Fix the Court endorses this proposal. See *First-Ever Measure to End Life Tenure on the Supreme Court Via Statute, Not Amendment, to Be Introduced*, FIX THE CT. (Sept. 29, 2020), <https://fixthecourt.com/2020/09/first-ever-measure-end-life-tenure-supreme-court-via-statute-not-amendment-introduced> [https://perma.cc/9PEV-HTNC].

86. H.R. 8424, § 3.

87. *Id.*

88. Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1212 (1988).

nine-member Supreme Court, it would not distribute appointments evenly among presidents—which is one common goal shared by many term-limits advocates. This is presumably why the eighteen-year limit has far more support than either fifteen- or twenty-year terms.

But some think eighteen years is too long. Conservative commentator Mark Levin has proposed staggered twelve-year term limits, with three appointments made each presidential term rather than two under the eighteen-year plan.⁸⁹ Stephen Carter has proposed staggered nine-year terms, which would translate into one appointment each year and four each presidential term.⁹⁰

And an even shorter term-limits proposal comes from D.C. Circuit Judge Laurence Silberman. He argues that in order to “make justices think of themselves as judges,” Supreme Court appointees should serve for only five years, after which they could sit on the lower courts for life.⁹¹ With a five-year limit, every two-term president would get to replace the entire membership of the Supreme Court—an outcome we suspect would strike many observers as undesirable.

C. COMPARING PROPOSALS

There are a number of tradeoffs associated with the design decisions underpinning different term-limits proposals. In this Section, we will lay out a framework of possible tradeoffs that will help guide our comparison of the different proposals. In particular, we are interested in how the different proposals might affect the composition of the Court in various ways. That said, we limit our analysis to differences that are possible to assess empirically through simulations.

We see six distinct ways in which the design choices made by these proposals may affect the composition of the Court: (1) the *Transition Process* for implementing the reform; (2) the *Appointment and Tenure* of Justices; (3) the *Ideological Composition* of the Supreme Court; (4) the *Confirmation Incentives* for new Justices; (5) the *Profile of Nominees* to the Supreme Court; and (6) the *Final Period Problems* that could be created.

1. Transition Process

An initial way to assess the tradeoffs associated with different term-limits proposals is how they would handle the transition from the current

89. MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* 49–50 (2013).

90. Carter, *supra* note 32.

91. Symposium, *Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997).

system of life tenure to a system of term limits. Assuming that staggered vacancies are the goal, moving to such a system would always take some time. Proposals have different procedures for how quickly to make the move to that system, with some waiting a set period of years and others waiting for an intervening president to be elected. Given these differences, an important question is how long the full transition is likely to take.

2. Appointments and Tenure

A primary goal of term-limits plans is to regularize appointments across presidential terms. That said, although this is a primary goal of the various term-limits proposals, there are tradeoffs that may influence the relationship between presidential elections and the appointment of Justices. For instance, plans that would go fully into effect immediately would regularize appointments more quickly than plans that would not go fully into effect until after the legacy Justices have died or voluntarily retired. Similarly, the different approaches that term-limits proposals adopt for addressing unexpected vacancies through deaths or retirements (or, less likely but still possible, removal of Justices after impeachment) also influence the regularity of appointments. One key margin to evaluate different proposals' design features is the extent to which they ensure that presidents have similar influence on the composition of the membership of the Court. Moreover, if a proposal allows presidents at the time of enactment to make more selections to the Court—or to nominate Justices to the Court that are allowed to serve life terms—there may be windfalls in terms of the number of Justice-years that are appointed by a particular president. The transition itself may result in windfalls to the president in office at the time of enactment.

3. Ideological Composition

Another way to assess the tradeoffs associated with different term-limits proposals is the impact that they may have on the ideological composition of the Supreme Court. We have discussed how reform could be designed to make the Court's membership, and thus presumably its ideological composition, more closely track the results of presidential elections. But plans that increase the short-term responsiveness of judicial appointments to electoral outcomes could also create more swings in ideology of the Court. These swings between liberal and conservative Courts could lead to doctrinal instability that might undermine the Court's legitimacy over time.⁹² Those who favor shorter-term democratic control

92. Defenders of life tenure justify the practice using this argument. See Stras & Scott, *supra* note 19, at 1424 ("Swift legal change and the rapid-fire reversal of controlling precedent undermine the Court's legitimacy by creating the appearance that its decisions turn on nothing more than the personnel on the

would have to consider this potential cost. Relatedly, these changes to the appointment process may also result in more instances of one party having large majorities on the Court, which could lead to more extreme swings in legal doctrine as personnel changed. Moreover, the precise details of the term-limits plan might result in a Court that is more (or less) ideologically polarized.

4. Confirmation Incentives

Another important concern is how features of term-limits proposals may influence confirmation incentives. Although at some points in history the Senate may have been deferential to the nominees selected by the president, the political clashes over efforts to confirm replacements for Justices Scalia and Ginsburg illustrate how the members of the Senate may be unwilling to acquiesce to any appointments by the opposite party. One way to evaluate proposals is how likely it is that a proposal will result in vacancies arising at times that are more likely to produce deadlocks during the confirmation process that prevent new Justices from being seated on the Supreme Court.

5. Profile of Nominees

A distinct set of concerns relates to how term limits could affect the kinds of nominees presidents might select. It is possible that different features of various plans will impact which individuals are offered, and accept, nominations to the Supreme Court. For example, the shorter the term length, the more people will need to be appointed to the Court over time. If there were a very small supply of the most qualified potential nominees (which seems quite unlikely), the overall quality of appointees would go down. Term limits might also affect whether someone is willing to accept a nomination to the Court because an indefinite term is more desirable. Term limits may also affect the age of nominees. Shorter terms might make presidents more willing to select older candidates, while at the same time could make much younger candidates more palatable to senators.

6. Final Period Problems

A final consideration is whether the existence of term limits that require a Justice to step down at a specific date would cause them to change their behavior toward the end of their term. For instance, there is evidence suggesting that legislators and congressional staffers change their behavior at the end of their time working on Capitol Hill in ways that will appeal to

future employers in the lobbying industry.⁹³ Following this logic, one concern that has been raised with term limits is that the Justices may change their votes at the end of the term in order to make them more appealing for future work in industries in private practice, politics, or academia.⁹⁴ The concern is thus that having an end date on their tenure could lead Justices to have less commitment to impartiality or to their responsibility as judges.

III. EVALUATING PROPOSALS

We now turn to evaluating term-limits proposals based on how their design decisions impact the tradeoffs outlined above. To do so, we run counterfactual historical simulations that allow us to directly compare the proposals along key dimensions and, by doing so, identify the features of the proposals that drive key differences in the composition of the Supreme Court.

A. METHODS

We use simulations to evaluate the tradeoffs associated with five of the Supreme Court term-limit proposals we introduced in Section II.B.⁹⁵ Simulations are a research method used widely in the social sciences.⁹⁶ They are used in situations where uncertainty about some event occurring makes it difficult to assess the likelihood of an outcome.

At the most basic level, these simulations require explicitly stipulating a set of assumptions, identifying the key variables for which there is uncertainty, using a computer to randomly generate values for those variables for which there is uncertainty, calculating the outcome of interest given the realizations of the random variables, and then repeating that process many times.⁹⁷ Through this process, simulations are able to generate a distribution of possible outcomes given the initial set of assumptions. As a

93. See, e.g., Michael E. Shepherd & Hye Young You, *Exit Strategy: Career Concerns and Revolving Doors in Congress*, 114 AM. POL. SCI. REV. 270, 279–82 (2020). See generally ADOLFO SANTOS, DO MEMBERS OF CONGRESS REWARD THEIR FUTURE EMPLOYERS?: EVALUATING THE REVOLVING DOOR SYNDROME (2006).

94. See, e.g., Baude, *supra* note 48.

95. We exclude the Oliver Proposal from this analysis because the UVA Plan made policy choices along the dimensions relevant to these simulations that mean they produces the same results.

96. See generally THOMAS M. CARSEY & JEFFREY J. HARDEN, MONTE CARLO SIMULATION AND RESAMPLING METHODS FOR SOCIAL SCIENCE (2014).

97. For a more technical explanation of the process, see *id.* at 6–7 (“[T]he typical Monte Carlo simulation involves drawing multiple random samples of data from an assumed [Data Generation Process (DGP)] that describes the unobserved process in the larger population of how a phenomenon of interest is produced. It is the true or real DGP that scholars are ultimately interested in evaluating. Of course, we rarely know what the true DGP is in the real world—we just see the sample data it produces. Most of our research is about trying to uncover the underlying DGP or test predictions that emerge from different theories about what the DGP looks like.”).

result, if the initial assumptions are credible, simulations make it possible to estimate the most likely outcomes and range of possible outcomes for complex political and social phenomena.

Given these strengths, simulations have been used for a variety of applications in the empirical legal studies literature. For example, simulations have been used to study the relative economic importance of contract terms;⁹⁸ whether judicial assignments to cases are random;⁹⁹ the extent of publication bias in empirical legal scholarship;¹⁰⁰ and whether law schools could improve their academic impact by imposing stricter tenure standards.¹⁰¹

In the case of Supreme Court term limits, there are two primary sources of uncertainty that must be accounted for when assessing the tradeoffs of different proposals. First, even though most variants of term-limits proposals try to increase the predictability of when vacancies on the Court will occur, there is still uncertainty because unexpected vacancies—due to death, incapacitation, resignation, or even removal—will inevitably occur. Second, there is also uncertainty about which political party (or parties) will control the executive and legislative branches of government when these vacancies—whether expected or unexpected—do in fact occur. Simulating how various term-limits proposals would compare thus requires developing a way to model these two sources of uncertainty.

Our method for modeling these two sources of uncertainty is to compare the results that the different term-limits proposals would have produced if they had been in effect during the post-1937 period. More specifically, we begin by imagining that each of the different reform proposals had been adopted in 1937. We then assume that the control of the presidency and the Senate evolved in exactly the way that it actually did. For instance, we assume that Dwight D. Eisenhower is always president from January 1953 to January 1961, that the Republican Party always controlled the Senate from 1953 to 1955, and that Democrats always controlled the Senate from 1955 through 1961. To assess whether the choice of “starting” in 1937 changes things, we then further simulate what would have happened if the term-limits proposals had been adopted in 1938, 1939, and so on, to 1970. We then allow

98. See Kate Litvak, *Monte Carlo Simulation of Contractual Provisions: An Application to Default Provisions in Venture Capital Limited Partnership Agreements*, 98 CORNELL L. REV. 1495 (2013).

99. See Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015); see also David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012).

100. See Daniel E. Ho, *Foreword: Conference Bias*, 10 J. EMPIRICAL LEGAL STUD. 603 (2013).

101. Adam Chilton, Jonathan Masur & Kyle Rozema, *Rethinking Law School Tenure Standards*, 50 J. LEGAL STUD. 1 (2021).

each simulation to run for fifty years. This is to ensure that each simulation runs for the same number of years. As a result, we simulate the start year of term limits beginning in every year between 1937 and 1970, and our simulations thus include every year between 1937 and 2020. Through this approach, our results are not driven entirely by the specific events in the historical record that would be associated with using a single start date.

For each simulation, we assume that vacancies that emerge on the Supreme Court would be filled in the way stipulated by the express terms of a given plan. This includes taking a plan's rollout process on its own terms. For instance, for the UVA Plan, this means that, starting in the first year of enactment, all appointments to the Supreme Court are for eighteen years. In contrast, for the Renewal Act, this means that new appointments could serve for longer than eighteen-year terms until the last remaining Justice that was active at the time of the plan's enactment leaves the Court.

For these simulations, we assume that all the actual Justices that were on the Court in the year the plan was hypothetically enacted either served until they actually left the Court or until the specific requirements of a given term-limits plan would have required them to be removed. For example, Justice Felix Frankfurter served on the Supreme Court from 1939 to 1962. For our simulations that start in 1937, Justice Frankfurter would not be a member of the Court. But for a simulation that starts in 1940, Justice Frankfurter would be a legacy member of the Supreme Court until the specific terms of a given plan required him to be replaced. But if the specifics of a given term-limits plan allowed legacy Justices to serve until they either voluntarily left the Court or died, our simulations would assume that Justice Frankfurter served until 1962. In other words, our simulations take the initial Justices at the time a plan is started as a given based on the actual Justices that served on the Supreme Court; for those actual Justices, when applicable, we use the actual date they left the Court.

For the hypothetical Justices that we simulate joining the Court, however, we must model the uncertainty in how long they would serve on the Court. This is because it is unrealistic to assume that all the Justices would serve full eighteen-year terms. We do this also to investigate a key point of difference among the various term-limit proposals: how they fill unexpected vacancies.

Simulating this uncertainty, however, requires making assumptions about the rate that Justices would be likely to leave the Court. One approach to estimate unexpected vacancies would be to use actuarial tables to assess the probability that a Justice would die in a given year, conditional on their

age.¹⁰² Although this approach offers the best way to estimate the probability that an average American would die in a given year conditional on their age, the people appointed to the Supreme Court are presumably not average along a range of relevant dimensions. Importantly, the Justices are extremely highly educated, wealthier than the general population, and have access to excellent medical care. Moreover, a president is unlikely to appoint anyone to the Supreme Court when there is evidence that they are not of sound health at the time of their appointment. As a result, the probability that a sixty-year-old Supreme Court Justice will live to see their seventieth birthday is probably higher than it is for the average sixty-year-old American.

Given this concern, instead of relying on actuarial tables, we generate estimates of the probability that the Justices would die in a given year conditional on their age based on the actual mortality rates of a similar population: the universe of federal judges. Using data from the Federal Judicial Center, we calculate the probability that a Justice of a given age in a given decade would die each year.¹⁰³ Figure 6 plots these probabilities by decade and shows that federal judges from any decade who are between fifty-five and seventy-five years old have roughly the same chance of dying in that year as an average American of the same age in 2017. Because life expectancies have increased over time, this suggests that judges have been less likely to die overall than average Americans. Moreover, a considerable difference opens up between roughly age eighty and ninety-five, in which federal judges are noticeably less likely to die than an average American of comparable age.

We simulate unexpected vacancies for the Supreme Court using the probabilities reported in Figure 6. Specifically, we assume that Justices are fifty-five years old when they are appointed to the Supreme Court. We make this assumption because it is similar to the actual average age of Justices appointed across history of roughly 53.2,¹⁰⁴ and because it is consistent with assumptions made in the term-limits literature, such as the assumption made by Bailey and Yoon that Justices would be fifty-five years old at the time of appointment.¹⁰⁵ We also think it is reasonable to assume that, if anything, the average age of appointment would go up slightly under a term-limits plan since there would be nothing gained by appointing a younger candidate.

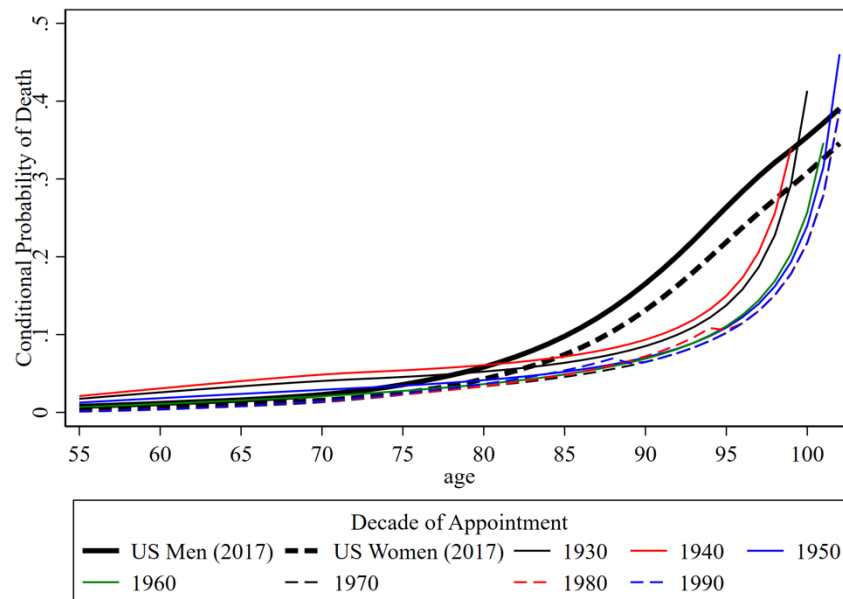
102. See, e.g., Bailey & Yoon, *supra* note 12, at 302 (“We base the probability of dying from the 2005 US life tables . . .”).

103. To do so, we estimate a spline and interact the spline with the decade that the judge was first appointed. After regressing whether a judge has died in a given year after being appointed, we recover the conditional probabilities of death from the predicted values from the regression coefficients.

104. See Calabresi & Lindgren, *supra* note 3, at 800.

105. Bailey & Yoon, *supra* note 12, at 302.

FIGURE 6. Mortality Rates of Federal Judges by Decade



To simulate unexpected vacancies for each Justice-year we randomly generate a number between zero and one. If that random number is less than the probability of death we generated based on the life expectancy of federal judges, we assume that the hypothetical Justice has unexpectedly left the Court and thus needs to be replaced. We then replaced the Justice using the terms stipulated by a given proposal. In this way, our simulations are able to account for the uncertainty of when unexpected vacancies are likely to emerge at the Supreme Court. It is worth noting that this approach in some ways undercounts vacancies and in other ways may overcount unexpected vacancies. It may undercount them because we do not attempt to estimate the possibility of impeachment or resignations, and it may overcount them because Supreme Court Justices may be less likely to die during an eighteen-year period than an average federal judge because their medical records likely face greater scrutiny prior to appointment. Our hope is that these two forces balance out and produce a reasonable estimate of the number of unexpected vacancies before the end of term limits.

There are three advantages to assessing the impact of term-limits proposals in this way—that is, by evaluating how they would have performed historically if implemented in different years while also

introducing random vacancies. First, simulating how the proposals would perform historically reduces the need to make strong assumptions about what will happen in the future. As previously noted, it takes decades for various term-limits proposals to go fully into effect. As a result, any attempt to empirically evaluate them needs to adopt a strategy that estimates their effect over a long period. We thus believe that it is more defensible to base our assessments on how they would have performed historically instead of trying to adopt a strategy to model what the outcomes of presidential elections are likely to be from 2020 to 2100. Second, simulating how the proposals would perform historically makes it possible to compare each proposal against a clear and observable counterfactual: what actually happened with the membership of the Supreme Court in the absence of term limits. Without this historical comparison, we would not only need to make assumptions about what would happen with elections in the future, but we would also have to make assumptions about what would happen to the composition of the Supreme Court over time in the absence of term-limit reform. Third, simulating these proposals being enacted in many different years makes it possible to assess how robust the plans are to various possible political scenarios. For instance, some simulations begin during large periods of rule by a single party, but other simulations begin during periods of divided government or frequent transitions of power. Varying the year of adoption allows for us to account for various political scenarios.

Of course, our approach does not entirely eliminate the need to make strong assumptions. Most notably, by assuming that political control remains the same as is observed historically, we are implicitly assuming that changes to the rules governing confirmation and tenure on the Supreme Court would not produce changes in electoral outcomes to the presidency and Senate. This is, of course, unlikely to be strictly true. To find an example of how differences in the composition of the Supreme Court could change political outcomes, we have to look no further than *Bush v. Gore*, where the Justices directly intervened in a disputed election.¹⁰⁶ Even outside such examples, the Court can be an issue in presidential elections. Some argue that the vacancy created by Justice Scalia's death is partly responsible for Donald Trump's victory in 2016.¹⁰⁷ Whether term limits would produce the same election dynamics is unknown.

An alternative to comparing how various plans would have behaved

106. *Bush v. Gore*, 531 U.S. 98 (2000).

107. Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks — and It Paid Off*, WASH. POST (June 26, 2018, 12:23 PM), <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off> [https://perma.cc/3YF7-LBKV].

given the historical record would be to fully simulate the entire political process for a period of time going into the future. For example, Bailey and Yoon estimate the impact of strategic retirements and potential term limits on the composition of the Supreme Court by simulating elections into the future.¹⁰⁸ Specifically, they assume that elections happen every four years going forward for sixty years into the future and that each party has an equal chance of winning the presidency.¹⁰⁹ Each of their simulations thus creates a different potential future of electoral outcomes. Although this is a perfectly defensible way to simulate the effect of term-limits proposals, we elected to not use it for our application. This is because our goal is to compare multiple different term-limits proposals against each other and against the status quo of not having term limits. Comparing the performance of plans against the historical record gives us a clear counterfactual: the actual membership of the Supreme Court from 1937 to 2020.

B. RESULTS

1. Transition Process

We begin by examining the possible transition process from the current system of life tenure to one of term-limited tenure. We specifically assess the average length of the enactment period across different proposals.

Proposals vary significantly in terms of how they handle the rollout of term limits. Those that do not allow the Justices serving on the Supreme Court at the time of enactment to retain their life tenure allow for a fairly quick transition, whereas those that allow the legacy Justices to retain life tenure can take longer to become fully effective (that is, have a full slate of Justices serving staggered eighteen-year terms). The result is that there can be considerable differences in how long it would take for the effects of a plan to be fully realized.

More specifically, for proposals that would not allow the current Justices to serve for life—for instance, the UVA Plan—the length of enactment has a definite end: sixteen years following the initial year that the first Justice is appointed under the new system.¹¹⁰ This is because these proposals immediately begin to replace existing Justices on a predictable schedule. It is possible that this process may take less than sixteen years—for instance, if some of the sitting Justices die while this transition process is

108. See Bailey & Yoon, *supra* note 12, at 303.

109. *Id.*

110. For example, if the first Justice was appointed in 2001, the ninth Justice would be appointed in 2017 (the schedule would specifically be: second in 2003, third in 2005, fourth in 2007, fifth in 2009, sixth in 2011, seventh in 2013, eighth in 2016, and ninth in 2017).

underway—but it would not take longer. For proposals that allow for some continued role for the legacy Justices, however, the enactment will not be complete until all the current Justices leave the Court either through death, retirement, or removal.

To assess the enactment period for these proposals, we estimate the number of years that it takes for the term-limits proposals to become fully in effect by simulating how long it would take until all Justices on the Court were appointed to a term-limited term. These simulations follow the approach described in Section III.A above, which allows for the possibility of unexpected deaths using the federal-judge-based estimates from Figure 6.

FIGURE 7. Simulated Number of Years from Enactment Until Every Sitting Justice Is Serving an Eighteen-Year Term by Proposal

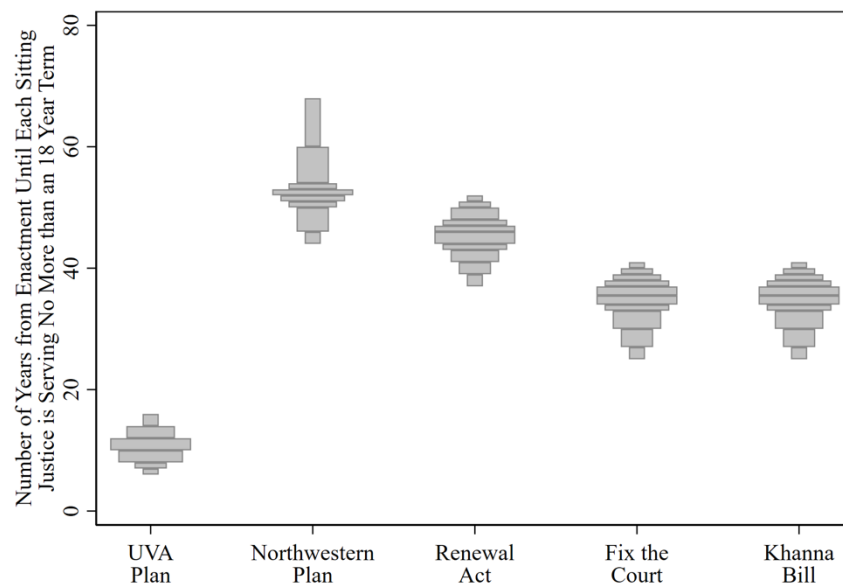


Figure 7 reports the results of these simulations. The figure is a letter-value plot, which reports the distributions of results across the simulations for each proposal. The distributions are broken down by decile, but the top decile (the ninetieth to ninety-fifth percentile and the ninety-fifth to ninety-ninth percentile) and bottom decile (the tenth to fifth percentile and the fifth to first percentile) are broken into two groups. Deciles with the same values—for instance, if the fortieth, fiftieth, and sixtieth percentiles have the

same value of fourteen years—appear as a single area representing the middle-most decile.

The simulation results reported in Figure 7 reveal that the UVA Plan is always fully in effect within sixteen years after the first Justice is appointed, but on average it would be fully enacted within 10.6 years (this is due to deaths by legacy Justices that would accelerate appointments of new Justices that are term-limited).

The Khanna Bill and the Justices on Deck proposal both produce the same distribution of results. This is because they immediately call for the appointment of Justices that are term-limited while also allowing for legacy Justices to remain until they finish their life tenure. As a result, the effects of these plans would not be fully realized until the final legacy Justice leaves the Court—which, on average across our simulations, is a period of 34.6 years.

The longest enactment period is the Northwestern Plan. The complete enactment of this plan would take 52.4 years on average and, in some simulations, takes as long as sixty-nine years. This lengthy enactment time is due to the fact that some of the appointments on the initial schedule are skipped depending on how long the legacy Justices serve. This also causes the distribution of the number of years of the initial appointments during the transition to vary considerably.

The second longest enactment period is the Renewal Act, which has an average transition period of 45.4 years. This lengthy enactment time is due to the fact that the eighteen-year rollout period does not start until all of the Justices who still enjoy life tenure leave the Court. This means that the enactment period is simply the average number of years that a Justice sitting in a given year will remain on the bench plus sixteen years. For example, if the plan was enacted in 2020, the eighteen-year appointments would not start until the last current Justice leaves the Court, and the rollout period would then take sixteen additional years.

2. Appointments and Tenure

A significant appeal of term limits is that they would regularize the timing of appointments, thus guaranteeing that the composition of the Court would bear a closer relationship to how long the two major political parties controlled the presidency and, to a lesser extent, the Senate. Indeed, all term-limits proposals that design the term length so that the same number of appointments are made each presidential term should accomplish this goal similarly well. Differences between such proposals emerge in two areas. First, the length of the transition and exactly how it is implemented can delay

the reform's ability to regularize appointments, which can result in one party having disproportionate control over the Court for a longer period. Second, how the system handles unexpected vacancies can also distinguish proposals because these shocks could further distort one party's representational advantage.

We assess how well each proposal would do at regularizing appointments in two ways. First, we examine the average number of Justice-years that the proposals would produce per presidential term. Second, we explore whether any of the proposals would create "enactment windfalls" in which the presidents at the time of the transition to term limits are able to appoint Justices to the Supreme Court that serve for more Justice-years.

Average Justice-Years. We first estimate the number of Justice-years per presidential term for all presidencies starting in the enactment year. Like with the results in Figure 7, these simulations vary the year of implementation and introduce random vacancies based on the probability of a federal judge's death using the data in Figure 6. Across all presidential terms and all simulations, we then count the number of Justice-years per presidential term and plot the distribution for each of the proposals.

FIGURE 8. Number of Justice-Years by Presidential Term by Proposal

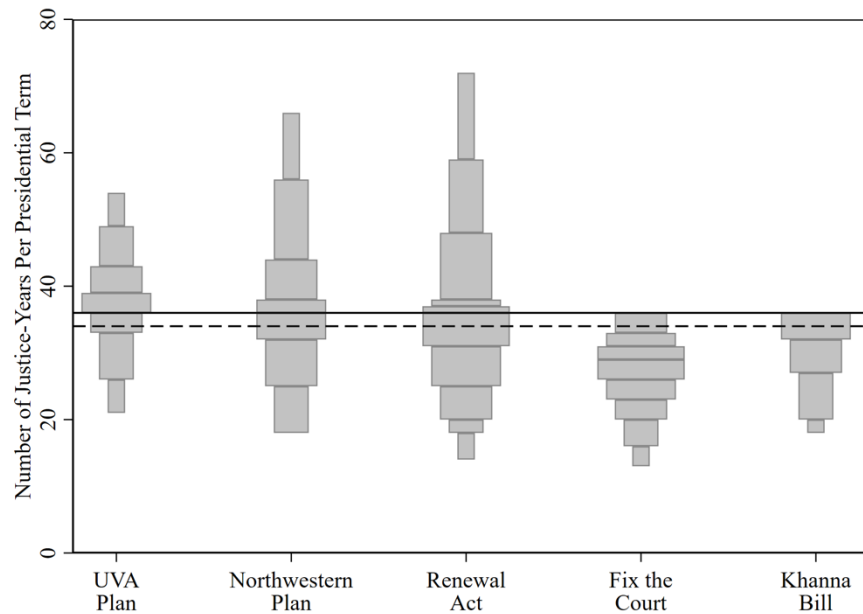


Figure 8 reports the results of these simulations. The black line in Figure 8 is at thirty-six Justice-years, which is the number each president would be entitled to appoint per term if she were able to appoint two Justices that served for eighteen years.¹¹¹ The dashed line at thirty-four years is the historical status quo: the average number of Justice-years that were actually appointed per presidential term from 1937 to 2020.¹¹²

The results in Figure 8 reveal that four of the plans—the UVA Plan, Northwestern Plan, Renewal Act, and the Khanna Bill—result in a median of thirty-six Justice-years per presidential term. The Justices on Deck proposal has a median of twenty-nine Justice-years per presidential term. This is due to the fact that the Justices on Deck plan requires judges to wait “on deck” during the implementation period until legacy Justices who were active when the plan was enacted leave the Court. The result is that many Justices in the first several decades of the plan serve less than full eighteen-year terms (which, in turn, translates into fewer than thirty-six Justice-years per president).¹¹³

The results in Figure 8 also reveal considerable variation in the number of Justice-years that each president is likely to appoint. The Khanna Bill and the Justices on Deck proposal never result in more than forty Justice-years per presidential term. In contrast, the UVA Plan, Northwestern Plan, and Renewal Act proposals all result in considerably more variation. Most notably, the ninety-fifth percentile for the Renewal Act is an average of seventy-two Justice-years per president. This result is driven by the fact that the Renewal Act not only allows the Justices who are serving at the time of enactment to complete their term, but also allows any Justice appointed between enactment and the departure of the last legacy Justice to serve for longer terms.

The results in Figure 8 thus reveal that the design choices associated with different term-limits proposals are likely to produce considerable variance in the expected number of Justice-years per presidential term. However, it is important to acknowledge that, because one of the primary differences between the proposals driving these results is how they handle the transition from the current system of life tenure to one of term limits, the differences across proposals would naturally decrease over enough time as they become fully implemented.

111. With a nine-Justice Court, and assuming vacancies are filled in the same year as they arise, the *average* number of Justice-years should always be thirty-six, regardless of whether the system uses term limits of any length or life tenure. What matters is not the average but the variance—do all presidents get close to thirty-six Justice-years, or do some get many more while others get far fewer?

112. See *supra* Figure 1 and accompanying discussion.

113. See *infra* Figure 9 for another discussion of this issue.

Enactment Windfalls. As explained above, one of the explicit goals of most term-limits proposals is to ensure a more consistent relationship between electoral outcomes and influence over the composition at the Supreme Court. But as the results in Figure 8 reveal, even plans designed to accomplish that goal can still produce inequalities in the number of Justice-years appointed by presidential term. However, the analysis in Figure 8 looked at the inequality in Justice-years across all presidential terms. By averaging across terms, that analysis obscured the possibility that the transition to a system of term limits may result in a windfall of influence for the presidents elected closer to the time of enactment. Or, put another way, there may be more (or less) seats to fill during the early years when the plan is transitioning in the new term-limited Justices.

To assess this empirically, we calculate the number of Justice-years by the presidential terms after the enactment period. Specifically, we indexed our results from Figure 8 by event time, where event time 1 is the first full presidential term after we simulate the beginning of the plan, and so on. We then calculate the average number of Justice-years for each event time for a given proposal.

FIGURE 9. Average Number of Justice-Years by Presidential Terms from Enactment by Proposal

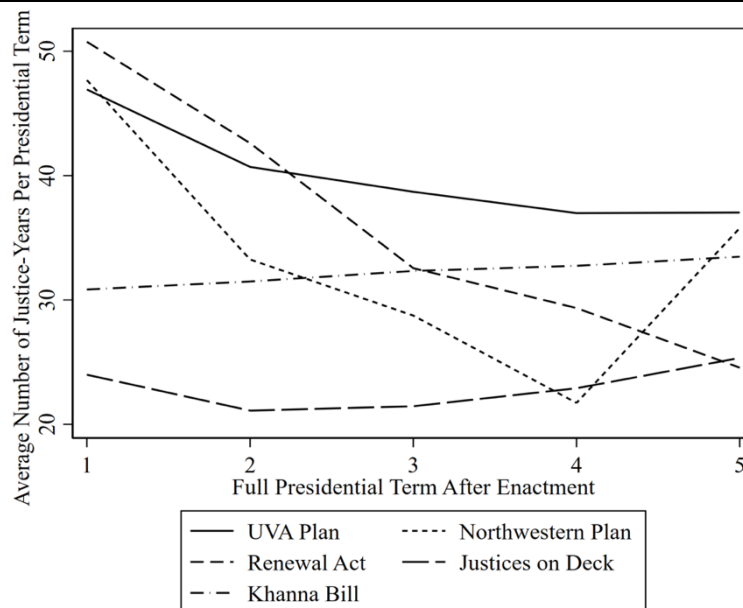


Figure 9 reports the results of this analysis. The results suggest that several of the plans are designed in a way that creates a windfall for the president at the time of enactment. Under the Renewal Act, Justices appointed at the time of enactment would serve an average of 50.8 Justice-years, and Justices appointed during the following presidential term would serve an average of 42.6 Justice-years. Similarly, the UVA Plan would allow Justices appointed at the time of enactment to serve an average of 46.9 Justice-years, and the Northwestern Plan would allow them to serve an average of 47.8 Justice-years. For all three plans, this number of Justice-years is noticeably larger than for the next several presidents. The Khanna Bill, in contrast, produces near identical averages across these initial presidential terms: roughly thirty-three Justice-years per president. The Justices on Deck proposal, however, produces an average of roughly twenty-three Justice-years per president across these presidential terms. This is because the Justices on Deck plan requires Justices appointed after the plan is passed to wait “on deck” until spots open up as the legacy Justices leave the Court. If it takes eight years for a spot to open up for a newly appointed Justice to join the voting members of the Court, that Justice would only serve for ten years (the remainder of their eighteen years). As a result, the initial presidents would get fewer than the expected thirty-six Justice-years (that is, two eighteen-year terms) from their appointments.

3. Ideological Composition

We next assess the impact that term limits proposals are likely to have on the ideological balance of the Supreme Court. We do so in four ways. First, we examine how many times these plans would lead to changes in the identity of the Justice who is the ideological median of the Court. Second, we assess the extent to which different plans may lead to extreme ideological imbalance on the Court. Third, we explore whether these ideological changes would translate into more years in which one party controls a majority of the Supreme Court as well as both of the political branches. Fourth, we estimate the impact that term-limits proposals would have on ideological polarization on the Court.

Ideological Stability. One possible drawback of moving to a system of term limits is that life tenure may encourage ideological stability. This is for several reasons. First, we might expect the Court to be more ideologically stable when Justices serve for longer periods resulting in less turnover. Second, life tenure creates incentives for strategic retirements, which help maintain ideological stability. As a result, the ideological makeup of the Court is only likely to change either when a Justice’s ideology drifts substantially or when deaths occur and the White House is controlled by the

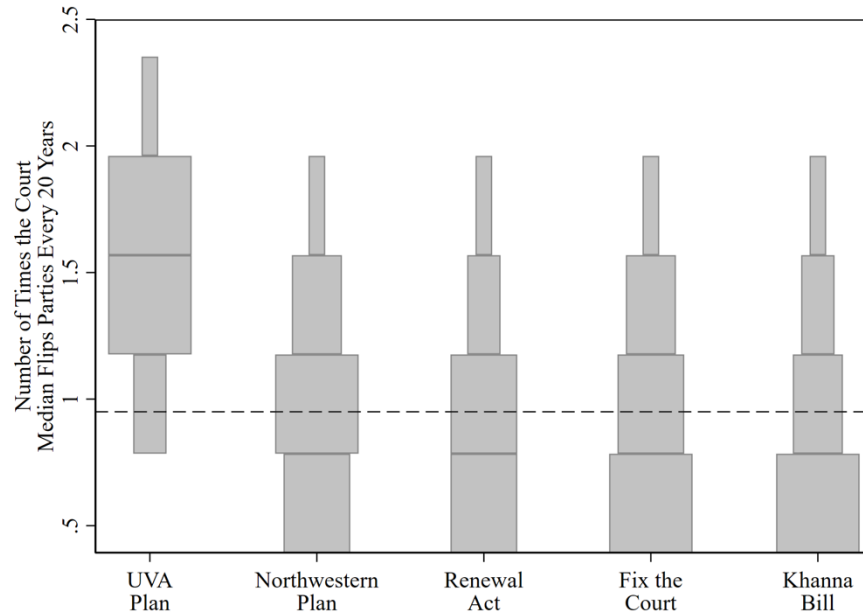
opposite party.

We measure the impact of term-limits reforms on how often the Court “flips” between conservative and liberal majorities. If the Court flips more frequently under a term-limits proposal than under the current system, such flipping may be desirable—as discussed already, we might want the Court to better reflect the actual results of presidential elections. At the same time, however, if the Court flips frequently under a term-limits proposal, it could be undesirable, as it could lead to significant legal uncertainty.

To simulate how ideologically stable the Court would be under different term-limits plans, we assume that Supreme Court Justices share the ideological leanings of the president that appointed them. That is, we assume that Justices appointed by Democrats are liberal and Justices appointed by Republicans are conservative and, thus, the appointments by each party contribute to the number of Justices in the conservative or liberal voting blocs for purposes of identifying the median Justice.¹¹⁴ Under this assumption, Figure 10 assesses how often the Court would flip from having a liberal majority to having a conservative majority, or vice versa. For each twenty-year period, we count the average number of times that the identity of the Court’s median would have flipped. The dotted line in Figure 10 reports the actual number of times the Court median flipped every twenty years between 1937 and 2020: 0.9.

114. Although we adopt this assumption because it has been true on average, it is important to acknowledge that there have, of course, been exceptions. For instance, Justices Souter and Stevens were both appointed by Republican presidents but ended their careers as reliable members of the Court’s liberal wing. That said, assuming that presidents will typically appoint Justices that share their ideological leanings is standard in the academic literature.

FIGURE 10. Number of Times the Court Median Flips Every Twenty Years by Proposal



The results in Figure 10 reveal that, of the five proposals we evaluate, four of the proposals tend to produce fewer flips in ideology than what actually occurred from 1937 to 2020. Specifically, the Northwestern Plan, Renewal Act, the Justices on Deck proposal, and the Khanna Bill all had median flips less than 0.9. The UVA Plan, on the other hand, produced 1.6 flips per twenty years on average—which is a result of that plan having a much shorter transition period than the others. This suggests that many plans may produce Supreme Courts that are more ideologically stable than the status-quo, but that this is not necessarily the case for all possible plans.

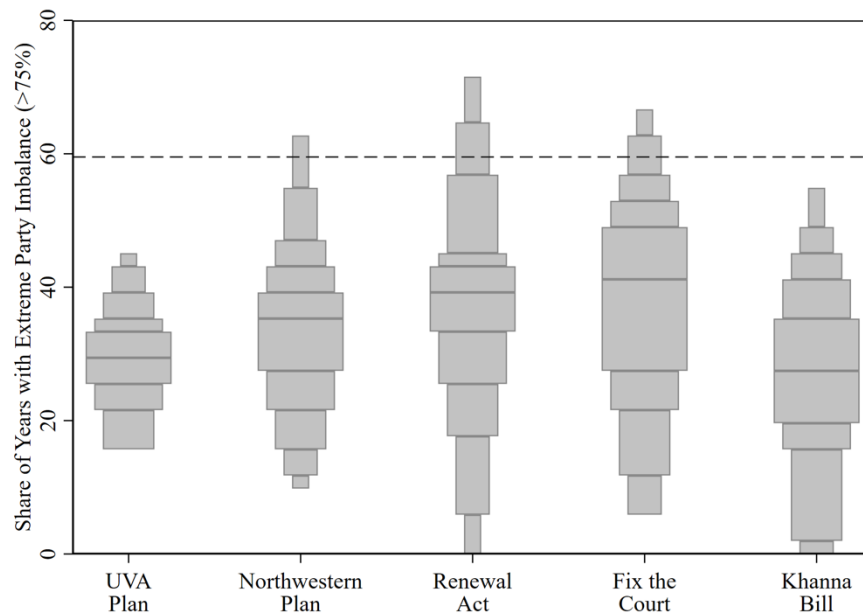
Extreme Imbalance. A separate consideration is whether term-limits proposals are likely to produce extreme ideological imbalance. For this exercise, we define extreme imbalance as Justices appointed by presidents of the same party occupying seventy-five percent or more of seats on the Court.¹¹⁵ Extreme imbalance may be a concern because periods with

115. We use this seventy-five percent threshold, instead of simply counting periods of seven or more seats, because it is possible that there may not be exactly nine Justices on the Court at certain times. For instance, the Supreme Court only had eight members for more than a year following Justice Scalia's death in 2016.

ideological imbalance may be more likely to produce judicial decisions out of step with the preferences of the public, which, in turn, may weaken the legitimacy of the Court.

To assess this possibility, Figure 11 reports results counting the share of years with extreme ideological imbalance from our simulations. In periods where there are nine Justices serving on the Court, this would mean that one party controlled seven or more seats. To provide a comparison, the dotted line in Figure 11 reports the relevant historical benchmark: the share of years that actually had extreme party imbalance using this definition in the eighty-four years from 1937 to 2020, which was 59.5%.

FIGURE 11. Share of Years with Extreme Party Imbalance by Proposal



The results in Figure 11 reveal that all five plans result in less party imbalance than what actually occurred from 1937 to 2020. The reason is simply that all plans decrease the possibility of extreme swings in the appointment of Justices by presidential term by reducing, if not removing, the roles of unexpected vacancies and strategic retirement in shaping the Supreme Court. Instead, the median share of years with extreme party imbalance ranged from 27.5% under the Khanna Bill to 41.2% under the Justices on Deck proposal.

Years of Divided Government. The Constitution was designed to separate governmental power along functional lines among distinct branches of government while also giving each branch some power to serve as a check on actions by other branches. The president participates in legislation using the veto, and so on. In the words of Madison, with these institutional designs, “ambition” will “be made to counteract ambition.”¹¹⁶

In recent years, however, scholars have increasingly recognized that this Madisonian separation of powers may function in a manner similar to how it was intended only where different branches of government are controlled by different political parties—an insight summarized as the “separation of parties.”¹¹⁷ This is because when Congress and the Presidency share common interests—such as when both are controlled by the same political party—separating power along functional lines may not create much institutional oversight. But such oversight may be more likely to occur where government is divided—that is, where different parties control the branches of government.

For this reason, we might want to know how often a majority of the Court will be appointments by a political party that also controls the corresponding political branches. Compared to the current system of life tenure, there are reasons to think that term limits might increase the prevalence of undivided control of government. This is because the shorter tenures and more regular appointments may increase the connection between the composition of the Court and current political trends. By so doing, it may result in a higher share of years in which the branches of the federal government are controlled by the same party.

To assess this, we calculate the share of years with an undivided federal government for each simulated enactment year and recover a distribution of shares for the proposal across all enactment years. We define undivided government as when Congress, the presidency, and the majority of the Supreme Court are all controlled by the same political party. For example, for proposal x being enacted in year t , we calculate the share of years from t to 2020 with an undivided government. In Figure 12, we again included a dotted line to show the relevant historical benchmark, in this case, the actual share of years with undivided government from 1937 to 2020, which is 32.1 years.

116. THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 1961).

117. See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2312 (2006).

FIGURE 12. Share of Years with Undivided Control of All Three Branches of the Federal Government by Proposal

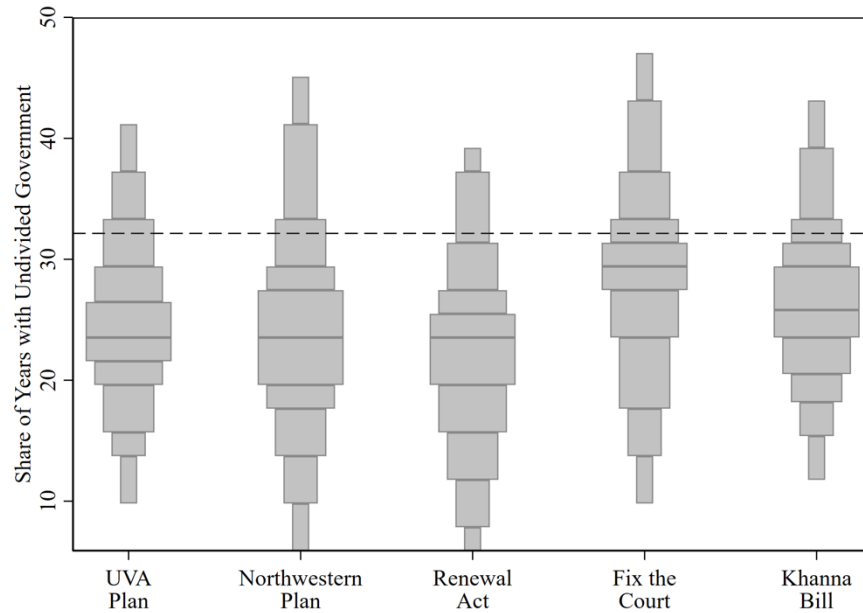


Figure 12 reports the share of years of undivided government. For all five plans, the median share of years with undivided government is lower than the actual share of years with undivided government during our sample (32.1 years). For these simulations, the median share of years when the same party controlled Congress, the presidency, and the Supreme Court majority was roughly 25.2 years. This ranged from 23.5 years under the UVA Plan, Northwestern Plan, and Renewal Act, to 29.4 years under the Justices on Deck proposal. In other words, imposing term limits would likely reduce the share of years with a single party controlling all three branches of the federal government.

Ideological Polarization. A separate consideration is whether a given plan is more likely to result in the appointment of Justices who are ideologically extreme. Under the current system, Supreme Court vacancies can occur at random times due to deaths and health-related retirements and at nonrandom times due to strategic retirements. The current system enables Justices to behave strategically by retiring when both the Presidency and the Senate are controlled by the party with whom they identify. In fact, eight of the last nine Justices confirmed to the Court—that is, every Justice except

for Justice Amy Coney Barrett—was nominated and confirmed during the first two years of a presidential term, when both the presidency and the Senate were controlled by the same party.¹¹⁸ The term-limits reforms, however, are typically designed to distribute Supreme Court appointments evenly between the first and second halves of each presidential term—such as by providing one appointment each odd-numbered year.

This matters because of the Senate's role in the confirmation process. The party holding the presidency usually loses ground in the Senate in midterm elections.¹¹⁹ For that reason, we might expect Justices selected during presidents' first two years in office to be, on average, more ideologically extreme than those selected during the second half of any given presidential term. Thus, we might expect a term-limits proposal that staggers vacancies in two-year intervals to produce a less ideologically polarized Court than the current system, in which vacancies may occur more frequently during the first half of a presidential term.

One way to assess this kind of polarization is by the number of Justices who were confirmed when the Senate majority and the president are of the same party. The benefit of using this approach to measure polarization is that it only requires a simple assumption that presidents will appoint more extreme candidates when their party controls the Senate. We believe this is a reasonable assumption because within any of the four combinations of president and Senate party-control—Republican president and Republican majority Senate, Republican president and Democratic majority Senate, Democratic president and Republican majority Senate, and Democratic president and Democratic majority Senate—the expected ideology of a judge is likely to differ. For example, a Republican president with a Republican majority Senate is likely to result in a Justice that is to the ideological right of a Justice appointed by a Republican president and confirmed by a Democratic majority Senate.

One drawback, however, is that this binary way of assessing the ideological polarization of Justices may oversimplify how the relationship between the president and Senate translates into the actual ideology of Justices that would be appointed.¹²⁰ There have been many theoretical

118. Justices Ginsburg and Breyer were confirmed during President Bill Clinton's first two years, when the Senate was controlled by Democrats. Chief Justice Roberts and Justice Alito were confirmed during the first two years of President George W. Bush's second term, when the Senate was controlled by Republicans. Justices Sotomayor and Kagan were confirmed during the first two years of President Obama's first term, when the Senate was controlled by Democrats. And Justices Gorsuch and Kavanaugh were confirmed during the first two years of President Donald Trump's presidency, when the Senate was controlled by Republicans.

119. See Grofman et al., *supra* note 75.

120. For example, although it is likely that Justices appointed under a unified presidency and Senate

models proposed to explain this exact dynamic, most of which are known as move-the-median models.¹²¹ These models try to produce more exact estimates of what kind of Justice would be appointed by a president of a given ideology and Senate of a given ideology. However, the best evidence suggests that there is little empirical support for these more complex models.¹²² As a result, we follow prior research and simply assume that Justices are more likely to be ideologically extreme if they were appointed by presidents and Senates of the same party.¹²³

Based on the assumption that Justices confirmed when the same party controls the Senate and presidency are more likely to be ideologically extreme, Figure 13 assesses polarization across the proposals by reporting the distribution of Justices on the Court in a given year who were confirmed when the Senate majority and the president are of the same party. The idea is that for a given year—say 1980—we count whether the Justices that were on the Supreme Court in that simulation had been appointed when the president and Senate majority were either both Democrats or both Republicans. For instance, if five of the nine Justices had been appointed in those years, the share would be fifty-five percent. If the same nine Justices were still on the Court in 1981, the share would still be fifty-five percent for the year. The distribution shown in Figure 13 is that share across all years and all simulations.¹²⁴ For Figure 13, the dotted line reports the historical benchmark, which is the share of Justices that were actually confirmed between 1937 and 2020 when the Senate was controlled by same party as the president, which was 62.7% of Justices.

will tend to be more ideologically extreme than Justices appointed when the presidency and the Senate are controlled by different parties, this is not guaranteed.

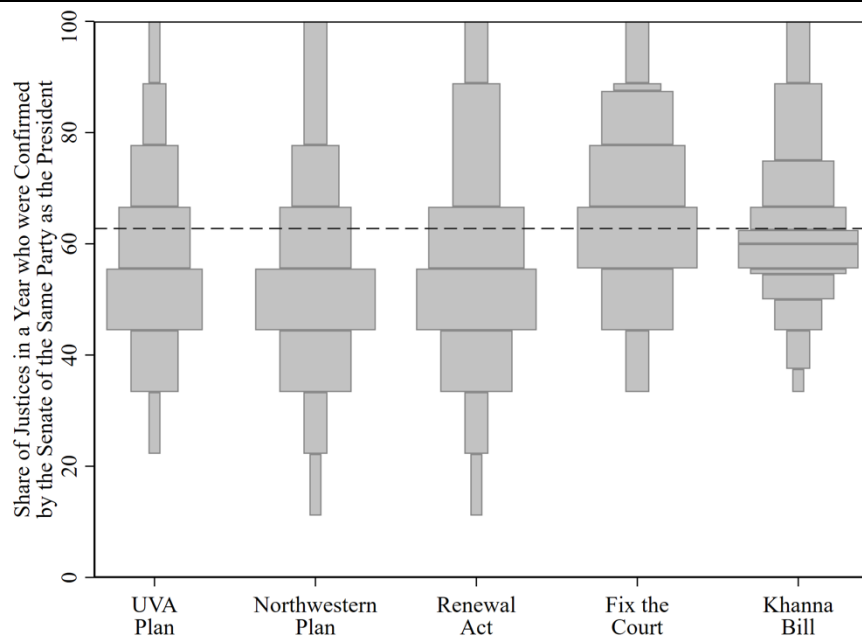
121. See generally Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231 (2007); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999); David Cottrell, Charles R. Shipan & Richard J. Anderson, *The Power to Appoint: Presidential Nominations and Change on the Supreme Court*, 81 J. POL. 1057 (2019); Jonathan P. Kstellec, Jeffrey R. Lax, Michael Malecki & Justin H. Phillips, *Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics*, 77 J. POL. 787 (2015); Charles M. Cameron & Jonathan P. Kstellec, *Are Supreme Court Nominations a Move-the-Median Game?*, 110 AM. POL. SCI. REV. 778 (2016).

122. See generally Cameron & Kstellec, *supra* note 121.

123. See, e.g., Bailey & Yoon, *supra* note 12.

124. As noted above in Section III.A, we simulated each year multiple times.

FIGURE 13. Share of Justices on the Court in a Given Year Appointed When the Senate and Presidency Were Controlled by the Same Party by Proposal



The results in Figure 13 show that the median share of Justices appointed in a year when the Senate and presidency were controlled by the same party would be forty-four percent (which translates to four out of nine Justices) for the Northwestern Plan, fifty-five percent for the UVA Plan and the Renewal Act, sixty percent for the Khanna Bill, and sixty-six percent for the Justices on Deck plan. These results suggest that, on average, adopting term limits could reduce the share of years in which Justices were appointed when the Senate and presidency were controlled by the same party (perhaps by reducing the role of strategic retirement), but that such circumstances would still occur for a large share of appointments.

4. Confirmation Incentives

Because vacancies can interfere with the Court's decision-making,¹²⁵ it would be preferable if term-limits reforms could avoid creating situations that are likely to leave seats on the Court open for a significant length of time. Although there may be several factors that increase the likelihood of lengthy vacancies, the recent process of replacing Justice Scalia highlights two factors that may be particularly relevant. First, whether the Senate is controlled by the opposing party to the president is likely a decisive factor in whether there will be a lengthy vacancy. If the Senate is controlled by the same party as the president, it is unlikely that the president and Senate majority would be unable to reach a compromise. But if the Senate is controlled by the opposing party, prolonged vacancies are far more likely. Second, the year of the presidential term when a Supreme Court seat becomes vacant may influence whether the seat is promptly filled. As the Garland affair illustrates, the Senate may become more able, or more willing, to block nominees to vacancies arising later in a presidential term.

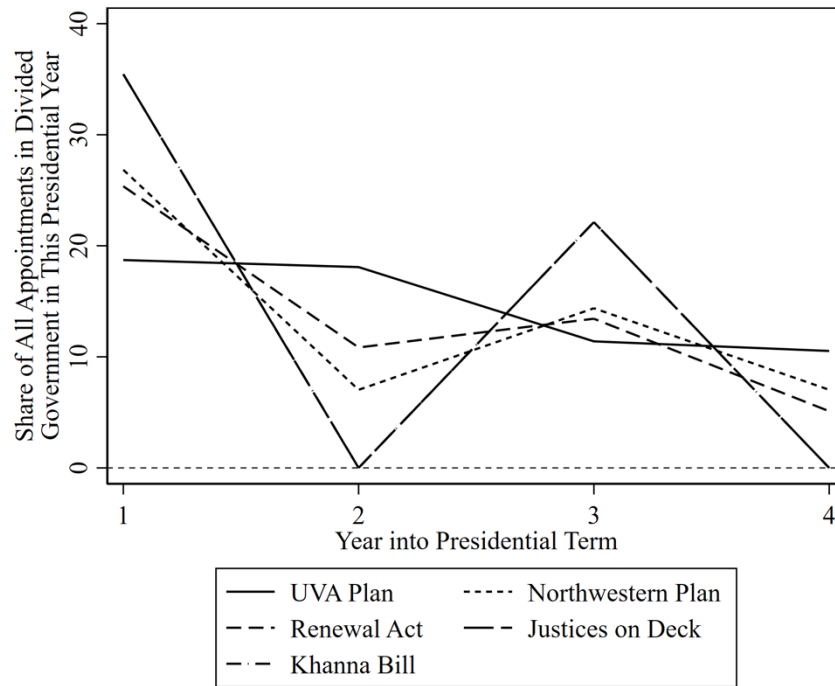
To assess whether these conditions are more likely to emerge with some term-limits plans than others, we break out the results of our simulations by when vacancies occurred based on the year of the presidential term (that is, the first, second, third, or fourth year) and whether the opposing party controlled the Senate. To do so, we take the total number of appointments that occur for a given plan and report the share of the total vacancies that occurred during divided government by year.

Figure 14 reports the results of this analysis. For all five plans, the largest share of vacancies in divided government occurred in the first year of presidential terms. Two of the plans—the Justices on Deck plan and the Khanna Bill—only produce vacancies during the first and third years of presidential terms. This is because these plans fill unexpected vacancies by allowing Justices that have served longer than their eighteen-year terms to return to active service. By doing so, they avoid scenarios in which a Justice would have to be confirmed during the final year of a presidency. These periods, if the Senate is controlled by the opposing party, are arguably the

125. For example, if the Court has only eight Justices, as it did for more than a year after Justice Scalia's death in 2016, it may be unable to reach decisions in cases in which the Justices are evenly divided. During the vacancy left by Justice Scalia, the Court was unable to resolve several important disputes due to the inability to break ties on the Court. The highest profile case in which this occurred was *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam), which affirmed—by an evenly divided court—a lower court ruling enjoining President Obama's Deferred Action for the Parents of Americans immigration program. That said, it is worth noting that one scholar has argued that a Court with an even number of members may be preferable. See generally Eric J. Segall, *Eight Justices Are Enough: A Proposal to Improve the United States Supreme Court*, 45 PEPP. L. REV. 547 (2018) (arguing in favor of an eight-member Court evenly divided on ideological grounds).

time where the Senate may be most likely to block a confirmation.

FIGURE 14. Share of Appointments During Divided Government by Year of Presidential Term



Three of the plans, however, did produce a considerable number of vacancies when the Senate is controlled by the opposing party in the final year of presidential terms. Notably, the UVA Plan produced 10.5% of vacancies in the fourth year of presidential terms when the Senate is controlled by the opposing party, the Renewal Act produced 5.1%, and the Northwestern Plan produced 7.0%.

5. Profile of Nominees

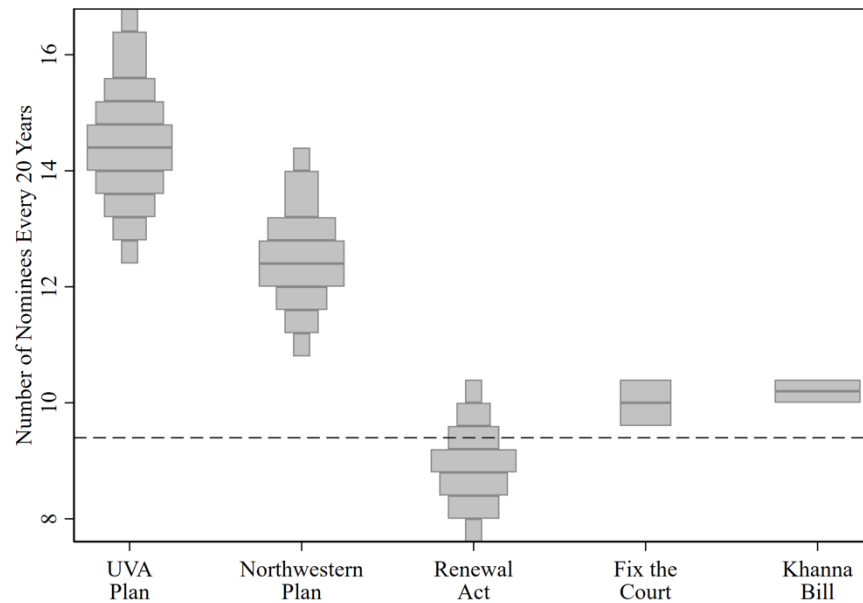
There are several ways that term-limits proposals may alter the profile of the Justices nominated to the Supreme Court.¹²⁶ This Section evaluates two ways this may occur: (1) diluting the quality of Justices by increasing the number of Justices appointed to the Court over time and (2) changing the age profile of Justices appointed to the Court.

Diluting the Quality of Nominees. It is possible that a term-limits system could affect the quality of Supreme Court nominees. One reason this may occur is that a term-limits system would require more frequent appointments—and thus more appointments total. This might suggest that the quality of nominees could decrease, depending on the depth of the pool of lawyers that satisfy the relevant criteria.

Of course, for any viable term-limits plan, there are undoubtedly many more lawyers across the country who are qualified nominees than would be realistically required. However, the pool of available nominees may be much smaller if the president is fixed on appointing Justices that: (1) are already serving in high-level legal positions (for example, federal district or circuit courts, state supreme courts, or the Office of Solicitor General); (2) are within a narrow age band; and (3) fit the ideological and demographic preferences the president has for the appointment. The pool of potential Justices that satisfy these criteria may be relatively small. As a result, term-limits plans that increase the number of nominees that are required over time could reduce the number of viable Supreme Court nominees and thus could cause presidents to compromise on some of their preferred criteria.

126. In Section III.B.2 above, we considered how term limits proposals may alter the ideological profile of the Justices appointed to the Supreme Court.

FIGURE 15. Distribution of the Number of Nominees Required for Every Twenty-Year Period By Proposal



To assess this possibility, we calculated the number of nominees that would be required by each plan across our simulations. Figure 15 specifically reports the distribution of nominees that would be required in a twenty-year period by plan. Figure 15 also plots, via a dotted line, the pertinent historical benchmark, or the number of nominees every twenty years from 1937 to 2020, which was 9.4 nominees every twenty years on average.

The results in Figure 15 reveal noticeable differences across proposals in the number of nominees that would be required for every twenty-year period. For instance, the UVA Plan would require roughly eleven Justices every twenty years. This is because, when unexpected vacancies occur, the UVA Plan does not allow for senior Justices to rejoin the Court. Instead, it provides for interim appointments of justices who would serve the remainder of the term but would not be eligible for reappointment. The Justices on Deck and Khanna Bill proposals require ten Justices on average every twenty years due to the fact that unexpected vacancies are typically filled by adding a senior Justice back to the Court. In contrast, the Renewal Act and Northwestern Plan provide for considerably more variation in the number of Justices that would be required. This is because they provide for new appointments when existing Justices die or voluntarily leave the Court,

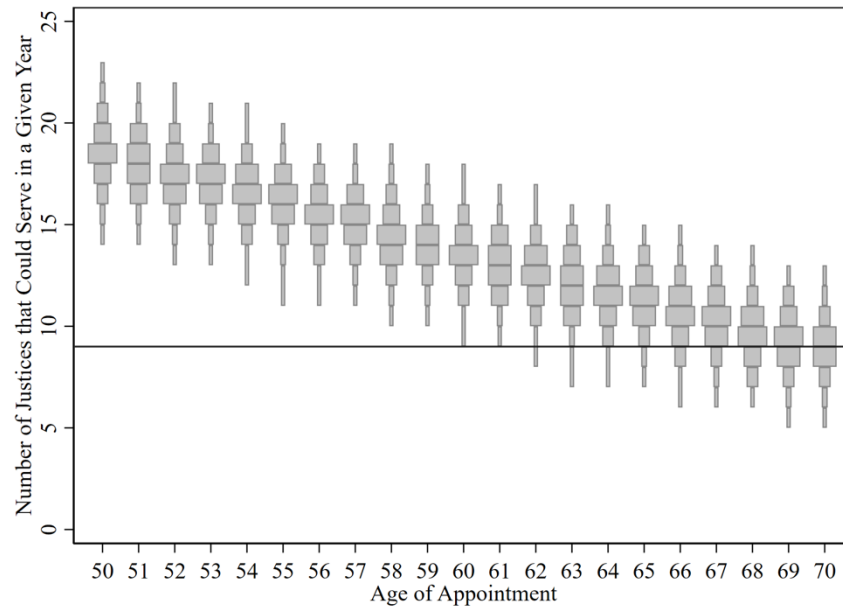
implying that random deaths result in greater variability. However, all of the plans would require a number of nominees that most would agree would not exhaust the pool of qualified individuals—for example, there are currently 179 judgeships on the U.S. courts of appeals (the most common source for Supreme Court nominees).

Age of Nominees. It is also possible that term limits may alter the age profile of nominees. For instance, term limits may lead to older nominees on average by decreasing the value of appointing someone with the highest possible longevity (and, therefore, the incentive to appoint someone young). Alternatively, term limits may lead to younger nominees on average by decreasing objections to young nominees because Senators would not worry that they would stay on the Court for decades.¹²⁷ Given that either of these dynamics could play out, we do not make strong predictions about how term-limits proposals could change the age profile of nominees. It is possible, however, to assess the maximum age nominees could be while still maintaining a high probability that they would complete a full eighteen-year term.

To explore how term limits may influence the age of nominees, Figure 16 reports the results of simulations that estimate how many Justices would be eligible to serve on the Supreme Court assuming that a term-limits proposal had been fully implemented and all Justices had been appointed at the same age. For example, if an eighteen-year term-limits proposal were fully implemented and every president had appointed Justices at fifty years old, our simulations suggest that in equilibrium the first and ninety-ninth percentiles for the number of Justices alive in any given year are fourteen and twenty-three. Moreover, the simulations suggest that there would be more than nine eligible Justices in at least ninety-nine percent of years for Justices who are sixty-two years old or younger. If the age of appointments were greater than sixty-two, however, our simulations suggest that two percent of the time there would be fewer than nine Justices able to serve on the Court.

127. These dynamics could also potentially expand the pool of potential Justices that presidents would consider nominating. For instance, presidents may now only consider nominees that are within five years of fifty years old, but these changes in incentives may expand the pool of potential nominees to allow for candidates between, say, forty and sixty years old. If this occurred, it could potentially offset the concerns raised in previous Sections.

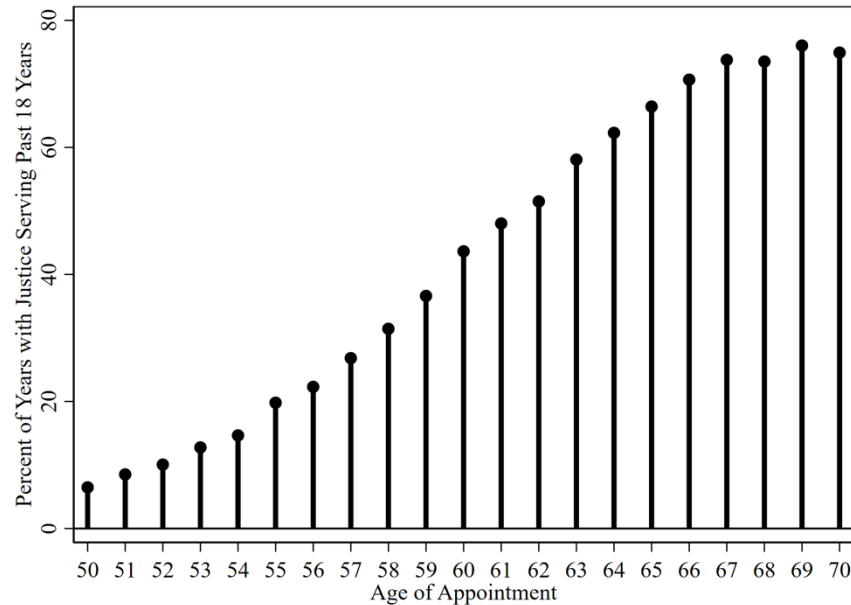
FIGURE 16. Estimated Number of Justices Available to Serve Conditional on Age of Appointment for All Justices



In a related analysis, for plans that have senior Justices rejoin the Court when there is an unexpected vacancy among the nine most junior members, we can also assess the probability that there would be a senior Justice pulled back on to the Court in any given year.

Figure 17 reports the results of these simulations. The estimates suggest that if the age of nominees was fifty years old, a Justice would be pulled back to serve on the Court after their eighteen-year term in six percent of years; if the age of nominees was sixty years old, there would be a Justice pulled back to serve on the Court after their eighteen-year term in forty-two percent of years; and if the age of nominees was seventy years old, there would be a Justice pulled back to serve on the Court after their eighteen-year term in seventy-six percent of years.

FIGURE 17. Percent of Years with a Justice Serving Beyond Eighteen-Year Term Based on Age of Appointment



6. Final Period Problems

One concern with term-limits proposals is that the Justices may behave differently closer to the end of their term because they are looking toward future professional opportunities. In the same way that elected politicians may behave differently once they know they are going to retire and no longer have to face voters, Supreme Court Justices may behave differently when they know they are about to seek new opportunities in fields like politics, private practice, or academia.

This behavior is only likely to dramatically alter the functioning of the Supreme Court, however, if the Justices who are changing their behavior are marginal voters. For instance, if the Supreme Court has a 7-2 conservative/liberal split, it would be unlikely to sway many cases if either a conservative or liberal Justice decided to vote differently because of their upcoming professional goals. As a result, to assess this, we calculated the share of times when a Justice's term expires when there is a 5-4 breakdown between Democratic-appointees and Republican-appointees (or vice versa) on the Supreme Court under term limits. We then further calculated the share of years where one of the Justices who is part of the five-Justice majority—

and thus a pivotal voter—would be in the final two years of their eighteen-year term. Because these results are consistent across all five plans, we simply report one set of results using a density distribution.

FIGURE 18. Share of Years with a 5-4 Court and a Justice in Majority in Their Final Period

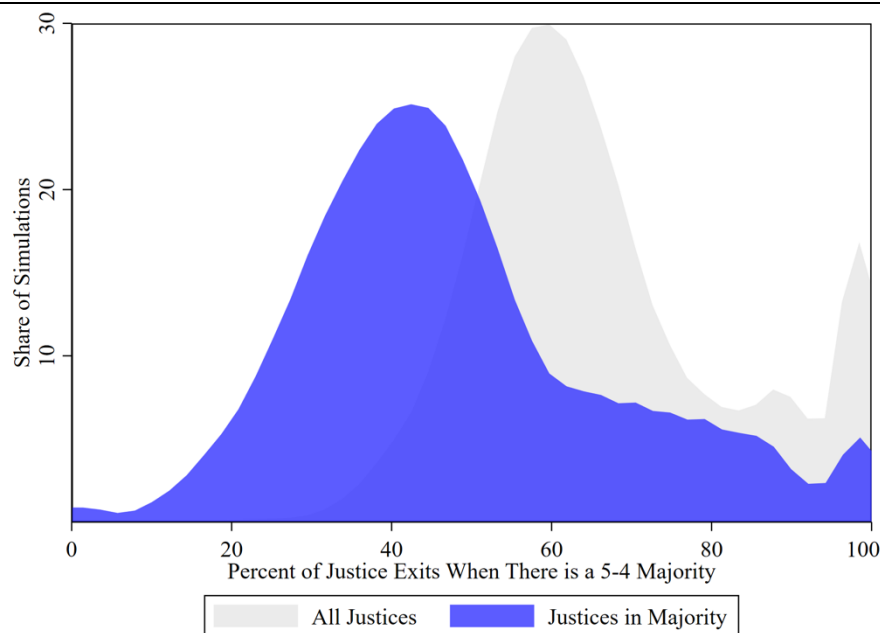


Figure 18 reports these results. The lighter (gray) distribution plots the results from our simulations of the share of years in which a Justice exits the Court when there is a 5-4 split on the Court. These results reveal that, on average, exits would occur during a 5-4 split sixty-two percent of the time. The darker (blue) distribution plots the results from our simulations of the share of years that a Justice exits the Court when there is a 5-4 split on the Court *and* the departing Justice is part of the five-member majority. These results reveal that, on average, exits would happen by a Justice part of a five-member majority forty-two percent of the time. (The blue curve peaks around forty-two on the x-axis.) These results are explained by the fact that term limits are more likely to keep the membership of the Supreme Court balanced. As a result, there would regularly be Justices in their final period who are pivotal voters in a Court that is split 5-4.

IV. DISCUSSION

Our simulations produced several noteworthy findings. Several of these simulations concern how term limits in general could improve the status quo. We find that they do, as expected, regularize appointments across presidential terms, decreasing variance in how many Justices each president is able to appoint. This effect should make the Court's membership somewhat more reflective of election results, given that it would reduce the role of random chance.

More significant is our finding that regularizing appointments through term limits would tend to reduce extreme ideological balance on the Court. This provides a strong argument in favor of term limits. Given that, *ex ante*, members of neither party would know whether the randomness of the life-tenure system would benefit their party (by leading to extreme imbalance in their party's favor) or harm their party (by leading to extreme imbalance in the other direction), we think this should make the stability and predictability of term limits more attractive.

Our findings also illuminate significant differences among term-limits plans that require more extensive discussion. In particular, they reveal what we believe are four design choices that are important to address for any policymaker hoping to implement an eighteen-year term-limits plan.¹²⁸ First, how a plan handles the transition from the old system to the new can have significant consequences. Second, how the plan deals with unexpected vacancies due to deaths or early retirements can undermine or advance some of the goals of reform. Third, plans should include some provision for dealing with Senate impasse, given that obstinance by the Senate could unravel a reform designed to equalize appointments across presidencies. Fourth, policymakers should consider whether a proposal should include provisions meant to address the final period problem.

A. TRANSITION TIMING

Perhaps our most important takeaway is that the biggest difference between proposals involving terms of the same length is how long they take to become effective. The first choice the designer must face is how to handle legacy Justices. A reform such as the UVA Plan that would go into effect immediately would take an average of thirteen years and a maximum of sixteen years to complete a full transition. Reforms that permit legacy Justices to retain life tenure will take much longer. The Northwestern Plan,

128. As noted above, most reformers have converged on eighteen-year terms as the best solution, and our analysis is focused on optimizing such plans. However, these prescriptions would likely be applicable to term-limits proposals that involve different term lengths.

for example, takes an average of fifty-two years to become fully effective—and in some cases significantly longer, depending on how long the legacy Justices live and when they leave the Court in relation to the others.

Minimizing the length of the transition would not, presumably, be the primary concern driving the choice of whether to allow legacy Justices to retain life tenure—since, definitionally, plans that allow legacy Justices to retain life tenure will take longer to transition than plans that take effect immediately. The choice might turn on legal considerations. As noted, even if one believes that term-limits reform is constitutionally permissible via ordinary statute, there may be additional constitutional problems raised by stripping sitting Justices of life tenure after the fact. A plan might also permit legacy Justices to retain life tenure in order to make the proposal more politically viable, as the reform would thus not change the present balance of power. For example, Republicans currently enjoy a 6-3 conservative majority on the Court, including the Court's three youngest Justices (Justices Gorsuch, Kavanaugh, and Barrett) who each could plausibly serve for several decades. Many Republican politicians would thus likely be unwilling to support any reform that would impose term limits on current Justices.

Other normative considerations may also play a role. Calabresi and Lindgren argue that “[s]ince the current Justices were appointed to the Court on the assumption that they would have life tenure, it would be unfair to them, as well as to the appointing parties (both the president and the Senate), to alter the arrangement struck in the appointment.”¹²⁹ These concerns are not obviously determinative. Fairness to political actors seems at best a second- or third-order concern when discussing policy changes designed to make a governmental institution's membership better correspond to the results of elections. But in any event, if policymakers choose to retain life tenure for legacy Justices, it is important for them to understand the implications of the choice, as it affects the composition of the Court for decades.

But even once this choice is made, there are still meaningful differences among plans in terms of how long they take to transition. Among plans that permit legacy Justices to retain life tenure, there is a significant difference between the Justices on Deck and Khanna Bill proposals on the one hand (which take an average of 35.5 years to transition fully) and the Northwestern Plan and Renewal Act on the other hand (which take an average of fifty-two and forty-four years, respectively). The difference appears to be explained by the fact that the former two plans begin the cycle of eighteen-year appointments *immediately*, whereas the latter two plans have more complex

129. Calabresi & Lindgren, *supra* note 3, at 826.

procedures. The Renewal Act does not begin the cycle of regular appointments until all legacy Justices leave the Court, whereas the way the Northwestern Plan assigns the early appointees to designated terms prolongs the transition. Absent some other advantages of the Renewal Act or Northwestern Plan, we think our findings demonstrate that the transition mechanisms used by the Khanna Bill and the Justices on Deck plan are superior and should be incorporated into any future reform that permits legacy Justices to retain life tenure.

The UVA Plan was the only one we simulated that applied term limits to the legacy Justices. Accordingly, we do not have any results that offer comparative findings on such plans. But there is unlikely to be significant variation in such plans, and all such plans will take at least sixteen years to ensure that all Justices on the Court are serving full eighteen-year terms (rather than temporary, shorter appointments) unless the plan abandons a commitment to staggering the terms.

B. UNEXPECTED VACANCIES

A second takeaway is that how plans handle unexpected vacancies can have significant consequences. For this, we consider Figure 7, which shows the distribution of Justice-years relative to the average of thirty-six by presidential term in the simulations. The plan with the highest variance is the Renewal Act, which has one of the longer transition periods. But the high variance is also explained in part by how this plan handles unexpected vacancies: under the Renewal Act, when an unexpected vacancy occurs, the president appoints a Justice that takes the place of an appointment that would have been made by the next president.¹³⁰ This provision can provide significant windfalls to whoever happens to be president when a Justice expectedly dies or retires.

One way to reduce this kind of variance is to provide for interim appointments by the sitting president. The UVA Plan and Northwestern Plan do this. But another path, which the Justices on Deck plan and Khanna Bill follow, is to provide no special provision allowing additional appointments in the case of unexpected retirements. Either option seems acceptable, though only a plan with interim appointments is able to provide a satisfactory solution if some black swan event—such as the death of multiple Justices within a short period—occurs.

There are other modifications that might regularize appointments further. One applies only to plans that do not permit legacy Justices to retain

130. See Carrington & Cramton, *supra* note 7.

life tenure; we call this procedure the “dynamic rollout.” It would provide an improved way of addressing early deaths or retirements of legacy Justices during the transition period that would minimize the need for interim appointments. The best way to explain how it would work is by using a concrete example.

Imagine that a reform were enacted in 2021. Justice Barrett, the most junior Justice, would be scheduled to have her term expire in January 2038. Under the UVA Plan, if she were to leave the Court unexpectedly in 2030, the president would make a temporary appointment to serve for eight years until a new eighteen-year appointment could be made. Under the dynamic rollout procedure, if the president had not yet made two appointments during that presidential term, the president would appoint a replacement Justice to serve for a full eighteen-year term. The remaining legacy Justices would then be “reshuffled” in order to keep the schedule on track—the second-most junior Justice, Justice Kavanaugh, who was originally slated to leave the Court in 2036, would leave the Court in 2038 instead. Only if a president had already made two appointments in the current presidential term would an interim appointment be made. The dynamic rollout procedure would not shorten the transition. But it would minimize the role of random events by reducing the likelihood that any one president would make more than two appointments (including temporary appointments).

Other modifications to the plan may reduce variance among presidential terms. One option involves permitting senior Justices to return to the Court in the event of an unexpected departure; if there were multiple available senior Justices, the system could give priority to the senior Justice whose appointing president was responsible for the least Justice-years—thus enabling the senior Justice to level the playing field somewhat through additional years of service.

But a more creative possibility would be to permit a president, at the time of the initial appointment, to designate additional lower-court judges as “backups” for the Justice appointed to the Court.¹³¹ That would mean that, in the event of the appointed Justice’s early departure from the Court, one of the backups could fill the departing Justice’s seat for the remainder of the term. Perhaps these backups would be formally nominated and confirmed at the time of the initial appointment, which might best preserve the Senate’s role in the process.¹³² Assuming the president were permitted to designate a

131. This procedure would almost certainly only work if reform were accomplished through a constitutional amendment rather than a statute.

132. Cf. Nina A. Mendelson, *The Permissibility of Acting Officials: May the President Work Around Senate Confirmation?*, 72 ADMIN. L. REV. 533, 606 & n.369 (2020) (discussing the possibility of a

sufficient number of backups, this system would guarantee equal impact on the Court among presidents and would greatly reduce the role of random events in shaping the composition of the Court.¹³³

C. SENATE IMPASSE

Another takeaway is that term-limits plans should address the possibility that a Senate controlled by members of the party that does not control the presidency will refuse to vote on a president's nominee, thus potentially derailing the goal of equalizing appointments across presidential terms. This possibility seems particularly likely in the wake of the Republican-controlled Senate's refusal to hold hearings or a vote for President Obama's nominee, Judge Garland, in 2016. We could hope that a successfully implemented term-limits plan might cause a "reset" of norms governing the appointments process, though that is certainly not guaranteed, and in any event, norms once restored could nonetheless break down once more in the future. It thus seems prudent to include a provision handling this possibility.

Our findings show that this situation could arise with some regularity. For the Renewal Act, the proposal where this scenario arose most frequently, seventy-five percent of vacancies on the Court arose during periods when the Senate and presidency were controlled by different parties. Even under the Khanna Bill and Justices on Deck Plan, at the other end of the spectrum, sixty-two percent of vacancies arose during divided government. If refusal to act on the other party's nominees becomes the norm, these scenarios could quickly derail any meaningful reform.

One possibility would be to provide that presidents get both appointments in the first year of their term, a period when divided government is less likely. But even so, our simulations found that many first-year appointments still arose during divided government. For this reason, we think a more targeted solution is warranted, such as a set of provisions that would reduce the Senate's incentives to refuse to approve any of the president's nominees. One possibility, discussed briefly above, is Calabresi's suggestion that the president and Senate be forced to reach agreement before

"shadow cabinet" confirmed by the Senate that could step in to fill acting roles in the event of an executive branch vacancy).

133. Random events that required backups to be called into active service would still play some role in shaping the Court's jurisprudence, as one president's nominees do not vote in lockstep. President Clinton's nominees, Justices Ginsburg and Breyer, did not always agree, nor did President Bush's nominees, Chief Justice Roberts and Justice Alito. Nonetheless, a system that limited the role of random events to causing the swap of one president's nominee with a different nominee by the same president would almost certainly give less of a role to random chance in producing a significant ideological shift than would a system that permits unexpected departures.

they could perform any other government business and while holding their salaries hostage.¹³⁴

But we can imagine other less aggressive possibilities. One option would be, in the event of the Senate's refusal to confirm a nominee within some period of time, to automatically appoint one of a number of backups previously designated if the president in question had made earlier appointments during her presidency. That is, a president could designate backup appointments when making an appointment in Year 1 of her presidency so that, if party control of the Senate changes hands later, an obstructive Senate in Year 3 of the president's term would lead to the automatic appointment of a backup. Such a provision would deprive the Senate of the ability to hold out indefinitely to keep a seat open for the next president.

This option would not work, however, if the deadlock arose during the president's first appointment to the Court, and thus some other mechanism is needed to address the problem of deadlock entirely. Perhaps there could be a penalty for the party in control of the Senate. One possibility would be to penalize the Senate majority's party by depriving the next president from that party of nominations to which she would normally be entitled. Such a provision would thus deprive a further president of the very advantage which the Senate was attempting to seize.¹³⁵

These solutions are only a couple of possibilities; no doubt there are others.¹³⁶ But, in any event, some method for handling Senate impasse is necessary if term-limits reform is to accomplish its goals.

D. THE FINAL PERIOD PROBLEM

One prominent criticism of term-limits reforms is that they could "introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary."¹³⁷ In particular, critics of term limits worry that term-limited Justices might be

134. See Calabresi, *supra* note 48.

135. A more outlandish solution would be to impose a penalty on the terms of currently serving Justices. If, for example, the Senate failed to act on a president's nominee, Justices currently on the Court who had been appointed by presidents of the party currently controlling the Senate could have their terms reduced by a set amount (such as 18 years collectively). This procedure is not ideal, however, as it would reduce the influence of a prior president who was not responsible for the deadlock.

136. For those who believe the Senate should have the categorical right to reject any nominees as part of its "advise and consent" role, a less significant reform would be one that simply required the Senate to actually vote on a nominee to make their inaction more visible and thus force political accountability. Such a reform, however, would likely be insufficient to prevent a term limits plan from unraveling.

137. Stras & Scott, *supra* note 19, at 1425.

drawn to “the remunerative lure of affiliation with firms” or “the chance to pursue interesting positions in public service: cabinet posts, ambassadorships, and so on.”¹³⁸ Indeed, there is evidence that such incentives distort the behavior of elected officials and their staffers in the period immediately before they pursue other employment.¹³⁹

For those concerned about this possibility, our results provide reason to think it could be a problem. We would expect this phenomenon to be most pronounced, if it exists, at the end of a Justice’s term, immediately before the Justice might seek further employment. Our results suggest that in forty-two percent of years, there would be Justices in the majority of a court divided 5–4 along party lines who were also in their final year on the bench. If Justices’ concerns about future employment change Justices’ votes in cases that normally track ideological divisions on the Court, these results suggest that those voting changes could affect the actual outcomes in those cases with some frequency.

Our results do not, however, speak to how likely it is that concerns about future employment would actually influence Justices’ voting patterns. There are some grounds for skepticism. Oliver argues that “[g]iven the age of most Justices when they enter the Court, and the fact that [term limits] might be expected to cause Presidents to name even older Justices, it is unlikely that many Justices will have future professional or political ambitions after completing eighteen years on the Court.”¹⁴⁰ Some Justices would likely be content to spend the remainder of their careers sitting as judges on the lower federal courts, as Justice Souter has since he retired from the Supreme Court at age sixty-nine.¹⁴¹

Moreover, it is not at all clear that Justices would feel any need to change their votes even if they were interested in going on to lucrative private employment. Given that there are very few Justices and many potential employers among large law firms, law schools, major corporations, and so forth that would presumably be interested in hiring a former Justice, a term-limited Justice would almost certainly have no shortage of high-paying employment opportunities regardless of how she voted. There may, however, be a slightly more realistic concern about retiring Justices interested in serving in government in some capacity, as those opportunities “would depend on the Justice’s ability to stay well-liked by the party in

138. Farnsworth, *supra* note 45, at 447.

139. See Shepherd & You, *supra* note 93; SANTOS, *supra* note 93.

140. Oliver, *supra* note 7, at 818 (footnotes omitted).

141. See Stephen Wermiel, *SCOTUS for law students: Retired Justices*, SCOTUSBLOG (May 26, 2016), <https://www.scotusblog.com/2016/05/scotus-for-law-students-retired-justices> [<https://perma.cc/2NX8-ZHHR>].

power.”¹⁴²

In any event, a term-limits reform could include provisions designed to mitigate this concern. Vicki Jackson suggests “minimum age requirements for service or post employment prohibitions” as potential solutions.¹⁴³ Age minimums would reduce the risk that Justices left office with many working years ahead of them, but they would also increase the risk that Justices die or have to retire before the end of their term. A statute barring certain kinds of future employment—such as law firms who have business before the Court or companies who have been parties before the Court, as well as high-level government positions—would seem to solve the problem.¹⁴⁴

Will Baude also raises a separate, but related objection—that “the sitting Justices will lose some of their current incentives to invest in their own judicial reputation *as judges*.”¹⁴⁵ Neither a minimum-age requirement nor a bar on post-judicial employment is responsive to this concern. Yet, it is hard to see why this prediction is likely. For any given Justice, her service on the Court will almost certainly be the high point of her career and the role for which she will be remembered by history. However much a desire to maintain one’s reputation shapes a Justice’s behavior, we do not see how term limits would make the problem worse. If anything, they might increase the disciplining effect of reputational concerns because any individual instance of behavior that harms the Justice’s reputation might be seen as *more* damaging in comparison to the Justice’s shorter tenure on the bench.

In summary, although we are uncertain about the degree to which incentive distortion related to future employment would occur, any term-limits reforms should probably include a post-judicial employment prohibition to avoid the problem. To the extent that such a bar would be seen as unfair or overly restrictive, Justices could be persuaded not to take further employment through a pension system that rewarded them for remaining on the bench as senior Justices.¹⁴⁶

We also note that almost every U.S. state¹⁴⁷ and many other countries¹⁴⁸

142. Farnsworth, *supra* note 45, at 447.

143. Jackson, *supra* note 17, at 1002 n.156.

144. For a proposal for such a bar on employment for all federal judges, see generally Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATHOLIC U. L. REV. 841 (2011). Clark proposes barring judges “from returning to practice, including work as lawyers or lawyer-consultants in the public or private sectors, but not as neutral arbitrators or mediators.” *Id.* at 895.

145. Baude, *supra* note 48.

146. *Cf.* Stras & Scott, *supra* note 19 (arguing for financial incentives to encourage judges with life tenure to retire).

147. See Calabresi & Lindgren, *supra* note 3, at 821 (“Of the fifty U.S. states, only one—Rhode Island—provides for a system of life tenure for its Supreme Court justices.”).

148. Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM.

have courts of last resort that use term limits or age limits for Justices. To the extent that the final period problem is real and significant, we could expect to see it emerge in these other judicial systems. Yet, there is little if any evidence from these judicial systems supporting the claim that term limits negatively affect judicial behavior.¹⁴⁹

CONCLUSION

If policymakers do decide to implement term limits, our research offers concrete guidance on how to design such a regime. Of course, there are a number of other considerations relevant to choosing between possible term-limits proposals that we did not consider here. For instance, one important question is whether some of the design choices outlined above may make a given plan more politically viable and thus more likely to be enacted.¹⁵⁰ Given this complexity and given that we lack any comparative expertise in political viability, we tend to agree with Adrian Vermeule's suggestion that academic discussions of reform should "deliberately ignore political feasibility," leaving it to politics itself to determine which proposals, if any, are viable.¹⁵¹

Another important consideration involves the question of legal constraints on Supreme Court reform. Is a statutory term-limits proposal constitutionally permissible if properly constructed or would it inevitably run afoul of Article III's guarantee of tenure during good behavior? And even if statutory term-limits reform of some kind is possible, do other specific design choices—such as whether to impose term limits on legacy Justices—raise additional constitutional problems? Although these are questions on

& MARY BILL RTS. J. 7, 23 (2001) (noting, in a study of twenty-seven countries' judicial systems, that "the United States, lacking either a mandatory retirement age or limited terms for members of its highest constitutional court, is something of an anomaly").

149. One study of the Italian Constitutional Court, on which judges serve for nine-year terms, concluded that "careerism" among such judges causes them to invest more time and effort on cases that are likely to improve the judges' reputations among relevant political and legal audiences. See Alessandro Melcarne, *Careerism and Judicial Behavior*, 44 EUR J. L. & ECON. 241 (2017). This study did not, however, demonstrate how much term limits actually contributed to this problem (given that judges may have incentives to maximize reputation even in a system of life tenure) and did not seek to determine whether this effect is more pronounced at the end of a judge's term.

150. For example, proposals that push off changes further into the future (such as by not imposing term limits on legacy Justices) might be either more politically viable because they do not look like power grabs or less politically viable because they produce immediate benefits such that they are more likely to find political champions. Yet, which path is most likely seems difficult to know. Indeed, as Adrian Vermeule has noted, this "trade-off between impartiality and motivation" may make Supreme Court term limits systematically unlikely to occur: a proposal that takes effect later "makes reform possible by creating an appearance of impartiality and buying off current opposition, but the tactic also makes the reform less likely to be proposed and pursued" precisely because there are no short-term gains from enacting it. Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1169 (2006).

151. *Id.* at 1172.

which legal scholars have offered their expertise,¹⁵² they are beyond the scope of our inquiry. The constitutional issues appear sufficiently nuanced and complex that we could not give them adequate consideration while also engaging in the comparative inquiry that is our main goal here.

Finally, there are a number of specific goals that term-limits reformers could have that we have not built into our framework. Some reformers may choose a reform with the goal of depoliticizing the appointments process or increasing the Court's legitimacy. Other reformers might pursue term limits with the aim of shaping the law in one direction or another. While such considerations may be important motivators for reformers, they too are beyond the scope of our analysis. How term limits might change the law, for example, is a question that would turn on many contingent facts about the specific area of the law in question, the precise time when reform was enacted, and predictions about the results of future elections. Such questions do not strike us as likely subjects of empirical comparisons among proposals, and we thus did not consider them.

But even though we do not address all these subjects, if either party were to push for term limits for the Supreme Court Justices, our research gives important guidance into how to design such a plan. We not only provide a framework that guides analysis of any potential proposal, but also show how the choices that are made lead to substantial differences across a range of key outcomes. In short, our research reveals that term limits in general and the details of any term-limits reform in particular would both have profound implications for the functioning of the Court.

152. See, e.g., Prakash & Smith, *supra* note 18; Saikrishna Prakash & Steven D. Smith, *Reply: (Mis)Understanding Good-Behavior Tenure*, 116 YALE L.J. 159 (2006); Redish, *supra* note 18; Cramton, *supra* note 63.