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Depoliticizing the Supreme Court Through Term Limits: A Worthwhile Reform Effort

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**DEPOLITICIZING THE SUPREME COURT THROUGH TERM LIMITS:
A WORTHWHILE REFORM EFFORT**

*Kara King**

The United States Supreme Court is in a legitimacy crisis. Americans are losing faith in the Supreme Court as an independent branch of government. As a result, policymakers and academics have put forth several proposals to reform the Court. The concept of an eighteen-year term limit maintains some bipartisan support and stands out as the most likely reform. This Article argues that term limits could help depoliticize the nomination process, bring greater stability to the Court, and restore confidence in the Court.

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INTRODUCTION

In his confirmation hearing in 2005, Chief Justice John Roberts stated that the job of a U.S. Supreme Court Justice is to “call balls and strikes, [] not to pitch or bat.”¹ In this metaphor—that a judge is like a baseball umpire who simply calls balls and strikes—Chief Justice Roberts was alluding to the principle that the Framers

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¹ *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 56 (2005) (Statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States) (“Judges are like umpires. Umpires don’t make the rules, they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules . . .”).

intended the judiciary to be the apolitical branch of government that follows the rule of law.² As Supreme Court confirmation battles have grown increasingly contentious and partisan,³ however, so too has the public's dissatisfaction with the Court. For example, in 2000, approximately 62 percent of Americans approved the Court's performance.⁴ Today, that approval has dropped to 40 percent.⁵

The growing chorus of reform proposals calling for significant change in the Court highlights this notable decrease in approval of—and as a result, confidence in—the Court itself.⁶ Several candidates for the 2020 Democratic presidential nomination ran on platforms explicitly encouraging such reform—including expanding the Court, imposing term limits, and implementing age limits on Justices.⁷ Indeed, once elected, President Joseph R. Biden appointed a bipartisan commission, the Presidential Commission on

² See THE FEDERALIST NO. 49 (James Madison) (“The [Judiciary], by the mode of their appointment, as well as by the nature and permanency of it, are too far removed from the people to share much in their prepossessions.”). See also THE FEDERALIST NO. 78 (Alexander Hamilton) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . Limitations . . . can be preserved in . . . [the] courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.”).

³ The Senate's role in failing to consider President Barack Obama's nomination of Merrick Garland and its hurried confirmation of now-Justice Amy Coney Barrett has only exacerbated the public's discontent with the confirmation process. See Carl Hulse, *Cloud of Supreme Court Confirmation Bitterness Hangs over Coming Fight*, N.Y. TIMES (Jan. 29, 2022), <https://www.nytimes.com/2022/01/29/us/politics/supreme-court-confirmation-battles.html> [<https://perma.cc/4P5P-MRBA>]. See also Drew DeSilver, *Up Until the Postwar Era, U.S. Supreme Court Confirmations Usually Were Routine Business*, PEW RSCH. CTR. (Feb. 7, 2022), <https://www.pewresearch.org/fact-tank/2022/02/07/up-until-the-postwar-era-u-s-supreme-court-confirmations-usually-were-routine-business> [<https://perma.cc/EN28-YFJS0>].

⁴ Jeffrey M. Jones, *Supreme Court Trust, Job Approval at Historical Lows*, GALLUP (Sept. 29, 2022), <https://news.gallup.com/poll/402044/supreme-court-trust-job-approval-historical-lows.aspx> [<https://perma.cc/G3GT-26QD>].

⁵ *Id.*

⁶ See generally Jonathan Chart, *Democrats Must Reform the Supreme Court to Save It*, N.Y. MAG. (June 30, 2022), <https://nymag.com/intelligencer/article/democrats-reform-the-supreme-court-pack-roe-epa.html> [<https://perma.cc/4W4Y-688P>]; Mary Harris, *How the President Could Counter a Rogue Supreme Court*, SLATE (July 6, 2022, 1:44 PM), <https://slate.com/news-and-politics/2022/07/supreme-court-biden-pack-reform-conservatives-commission.html> [<https://perma.cc/DWP9-7ZL3>]; Ben Olinsky & Grace Oyenubi, *How Americans Can Fight Back Against a Radical Supreme Court Majority*, CTR. FOR AM. PROGRESS (June 30, 2022), <https://www.americanprogress.org/article/how-americans-can-fight-back-against-a-radical-supreme-court-majority> [<https://perma.cc/D5S3-3PWT>].

⁷ See Russell Wheeler, *Should We Restructure the Supreme Court?*, BROOKINGS INST. (Mar. 2, 2020), <https://www.brookings.edu/policy2020/votervital/should-we-restructure-the-supreme-court> [<https://perma.cc/TDR4-JLUQ>].

the Supreme Court of the United States, to evaluate these and other proposals.⁸

Despite a variety of reform proposals, the implementation of term limits for Justices is the only recommendation supported by both Republicans and Democrats on the Commission.⁹ In recent years, influential Republican lawmakers—including Senators Ted Cruz and Marco Rubio—have expressed openness to term limits.¹⁰ By contrast, other proposals—such as Court expansion—have generated vehement disagreement across party lines.¹¹ Thus, the bipartisan interest in implementing term limits is more likely than other reform proposals to be enacted.¹² Indeed, term limits could be a potential solution to the growing discontent with the Court’s perceived politicization in recent years.

How did the Highest Court in our country come to be so politicized, and what are effective measures to combat this growing tension? Part I begins to answer these questions by providing a brief background of “life tenure” under the U.S. Constitution. It then examines the rise of the Court’s polarization and the growing calls for reform. Next, Part II analyzes arguments for and against term limits for Justices. Lastly, Part III proposes that term limits would help alleviate several issues facing the Court and should receive serious consideration by Congress and the Biden Administration.

I. POLARIZATION IN THE COURT AND REFORM EFFORTS

First, Part I.A explains the current system of “life tenure” for Justices. After providing a brief background, Part I.B examines the polarization affecting the Court today.

⁸ Andrew Chung & Steve Holland, *Biden Forms Panel to Study Possible U.S. Supreme Court Expansion*, REUTERS (Apr. 9, 2021), <https://www.reuters.com/business/legal/biden-creates-commission-study-potential-supreme-court-expansion-2021-04-09> [https://perma.cc/WBP6-TCJ3].

⁹ See Ann E. Marimow, *Biden’s Supreme Court Commission Endorses Final Report Noting Bipartisan Public Support for Term Limits*, WASH. POST (Dec. 7, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-commission-term-limits/2021/12/07/eb0ef982-5767-11ec-9a18-a506cf3aa31d_story.html [https://perma.cc/R3VE-BYQS].

¹⁰ See *Conservative Thinkers Renew Their Support for SCOTUS Term Limits*, FIX THE COURT (Dec. 5, 2019), <https://fixthecourt.com/2019/12/conservative-thinkers-endorse-scotus-term-limits> [https://perma.cc/RZR2-2WYW].

¹¹ See Charlie Savage, *Biden’s Supreme Court Commission Shows Interest in Term Limits for Justices*, N.Y. TIMES (Nov. 18, 2021), <https://www.nytimes.com/2021/11/18/us/politics/supreme-court-term-limits-biden.html> [https://perma.cc/25LB-AZNE].

¹² See, e.g., PRESIDENTIAL COMMISSION ON THE SUPREME COURT OF THE UNITED STATES: FINAL REPORT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/12/SCOTUS-Report-Final-12.8.21-1.pdf> [hereinafter COMMISSION FINAL REPORT].

A. “Life Tenure” and the Constitution

Since the Founding, Justices have had life tenure on the Court.¹³ Under current practice, Justices typically remain on the Court for life unless they choose to retire.¹⁴ While the Constitution never explicitly uses the phrase “life tenure,” Article III provides that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”¹⁵ Although the Constitution does not define “good Behaviour,” this provision is understood to confer life tenure to federal judges.¹⁶ Of course, federal judges, including Justices, may be removed through impeachment.¹⁷

This reading of the Good Behavior Clause, however, is not beyond debate.¹⁸ Indeed, scholars across the ideological spectrum have proposed term limits for Justices, defining the outer boundary of judicial service by time rather than behavior.¹⁹ These proposals, as discussed in greater detail in Parts II and III, are increasingly timely given the heightened polarization surrounding the Court.

B. The Perceived Polarization Today

Despite efforts by Court institutionalists, the growing polarization of American politics has seeped into the fabric of the judiciary. In *Bush v. Gore*,²⁰ for example, the Court essentially decided the outcome of the 2000 presidential election.²¹ Dissenting Justice John Paul Stevens noted that the case created a loss in “the

¹³ See *id.* at 112.

¹⁴ KEVIN M. LEWIS, CONG. RSCH. SERV., R46731, PROPOSALS TO MODIFY SUPREME COURT JUSTICES’ TENURE: LEGAL CONSIDERATIONS 1 (2021).

¹⁵ U.S. CONST. art. III, § 1.

¹⁶ The Supreme Court has interpreted the Good Behavior Clause to mean that federal judges enjoy life tenure unless impeached. See, e.g., *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955) (explaining that Article III judges are appointed for life and subject to removal only via impeachment); *United States v. Hatter*, 532 U.S. 557, 567 (explaining that Article III, Section 1 grants federal judges “the practical equivalent of life tenure . . .”).

¹⁷ U.S. CONST. art. II, § 4 (granting Congress authority to impeach and remove federal “civil officers” for treason, bribery, or other high Crimes and Misdemeanors.”).

¹⁸ See Adam Chilton et al., *Designing Supreme Court Term Limits*, 95 S. CAL. L. REV. 1, 9 (2021).

¹⁹ See, e.g., Paul D. Carrington & Roger C. Cramton, *Introduction to Reforming the Court: A Return to Basic Principles*, in REFORMING THE COURT at 5-7 (Roger C. Cramton & Paul D. Carrington eds., 2006) (noting the ideological variety of legal scholars in favor of term limits for Justices).

²⁰ 531 U.S. 98 (2000) (per curiam).

²¹ On a seven-to-two split, the Court found that the Florida recount process violated the Equal Protection Clause. *Id.* at 108-10. On a five-to-four split, however, five Justices held that the matter not be remanded for remedial action by the state of Florida—thus ending the election in favor of George W. Bush. *Id.* at 110-11.

Nation's confidence in the judge as an impartial guardian of the rule of law."²² While the decision was bitterly criticized as steeped in partisanship,²³ the public dissatisfaction today appears even deeper.²⁴

Indeed, perceived politicization of the Court has become increasingly more pronounced as the new six-Justice majority has overturned longstanding precedents concerning abortion,²⁵ gun safety laws,²⁶ administrative regulatory power,²⁷ and religious issues.²⁸ For instance, the Court's decision to overturn *Roe v. Wade* in June 2022 sparked public outcry with the Court, including nationwide protests and calls for major Court reform.²⁹

Moreover, the Court's recent use of its "shadow docket"³⁰—a practice allowing Justices to grant or deny emergency relief to litigants from lower court rulings—has increased dramatically.³¹ From August 2021 to July 2022, for example, the Court issued more docket orders than opinions.³² These shadow docket cases have

²² *Id.* at 129 (Stevens, J., dissenting).

²³ See generally Mark S. Brodin, *Bush v. Gore: The Worst (Or at Least Second-to-the-Worst) Supreme Court Decision Ever*, 12 NEV. L.J. 563 (2012).

²⁴ See *supra* notes 3-8 and accompanying text; Savage, *supra* note 11.

²⁵ See *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

²⁶ See *N.Y. State Rifle & Pistol Ass'n Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

²⁷ See *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

²⁸ See *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022).

²⁹ See Holly Honderich, *Roe v. Wade: Thousands March to White House for Abortion Rights*, BBC (July 3, 2022), <https://www.bbc.com/news/world-us-canada-62109971> [<https://perma.cc/V98F-C5RW>]. Indeed, the decision also generated apprehension from several powerful conservative voices. See Mike DeBonis & Seung Min Kim, *Collins and Murkowski on the Defensive After Leaked Roe Draft Opinion*, WASH. POST (May 3, 2022, 6:28 PM), <https://www.washingtonpost.com/politics/2022/05/03/murkowski-collins-roe-abortion-opinion> [<https://perma.cc/4ZG2-AH3Y>].

³⁰ The term "shadow docket" was coined by law Professor William Baude and refers to the thousands of cases that the Court decides without full briefing and oral argument. See Samantha O'Connell, *Supreme Court Shadow Docket Under Review by U.S. House of Representatives*, A.B.A. (Apr. 14, 2021), https://www.americanbar.org/groups/committees/death_penalty_representation/publications/project_blog/scotus-shadow-docket-under-review-by-house-reps [<https://perma.cc/DC38-TSJ8>]. These decisions typically "lack such public deliberation and transparency" as they often do not contain how each Justice voted and the reasoning behind the majority's conclusion. *Id.*

³¹ See, e.g., *Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 4 (2021) (statement of Stephen I. Vladeck, Charles Alan Wright Chair in Federal Courts, University of Texas School of Law).

³² See Kimberley Strawbridge Robinson, *Supreme Court Conservatives Want More Robust 'Shadow Docket' (I)*, BLOOMBERG L. (July 8, 2022, 12:51 PM), <https://news.bloomberglaw.com/us-law-week/supreme-courts-conservatives-want-more-robust-shadow-docket> [<https://perma.cc/Q5PA-84PZ>] (finding that the Court issued 66 shadow docket orders and 60 opinions).

limited briefings and no oral arguments.³³ Such decisions are often issued without any written opinions.³⁴ And if a shadow docket ruling *does* produce an opinion, it is often unsigned and without any legal reasoning.³⁵

In a recent shadow docket dissent, Justice Elena Kagan stated that the Court's shadow docket decision-making has "become[] more unreasoned, inconsistent and impossible to defend."³⁶ Despite its lack of transparency, the shadow docket is also used in highly politicized cases. Indeed, while execution-related appeals are a common example of shadow docket cases, the Court's recent trend includes more unconventional topics—such as abortion, voting, and COVID-19 rules.³⁷ For example, in December 2021, the Court issued a shadow docket ruling that allowed the near-total abortion ban in Texas to stand.³⁸ Some legal experts contend that the shadow docket is too often used to temporarily circumvent full briefings—allowing Justices to avoid attaching their names to unpopular decisions.³⁹ With the Court's increased use of its shadow docket—and the controversial cases that continuously reach the Court—accusations of politicization in the judiciary have reached a boiling point.⁴⁰

To combat this politicization, some prominent politicians and scholars have called for reforms to the structure of the Court. During the 2020 presidential campaign, for example, Democratic presidential candidate Pete Buttigieg made headlines after suggesting that Democrats should expand the Court to fifteen seats.⁴¹ In addition, some scholars have proposed a framework allowing presidents the opportunity to choose two Justices during their four-year term to ensure that one political party does not have

³³ See O'Connell, *supra* note 30.

³⁴ See *id.*

³⁵ See *id.* See also David Leonhardt, *Rulings Without Explanations*, N.Y. TIMES (Sept. 3, 2021), <https://www.nytimes.com/2021/09/03/briefing/scotus-shadow-docket-texas-abortion-law.html> [<https://perma.cc/7P2E-YGTT>].

³⁶ *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting from the denial to vacate stays).

³⁷ See Robinson, *supra* note 32.

³⁸ See *Whole Woman's Health*, 141 S. Ct. at 2494 (2021).

³⁹ See, e.g., Spencer Bokot-Lindell, Opinion, *Is the Supreme Court Facing a Legitimacy Crisis?*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/opinion/supreme-court-legitimacy-crisis.html> [<https://perma.cc/SV33-NXPZ>].

⁴⁰ See *id.*

⁴¹ See Ian Millhiser, *Pete Buttigieg Longs for a Non-Political Supreme Court. That's Not Really Possible*, VOX (Oct. 30, 2019, 8:10 AM), <https://www.vox.com/2019/10/30/20930662/pete-buttigieg-court-packing-anthony-kennedy-citizens-united> [<https://perma.cc/D4DE-8RH6>] (explaining that Buttigieg's plan would include Justices choosing whom to appoint to five of the seats on the Court).

an outsized influence on the Court.⁴² Other scholars have floated the idea of a bipartisan selection process for Justices, or a rotating Court where federal appellate court judges would serve for certain periods before returning to their lower court positions.⁴³ Nonetheless, several of these proposals have significant constitutional limitations and do not enjoy the kind of bipartisan support that the term limits proposal does.⁴⁴

II. THE DEBATE OVER AN EIGHTEEN-YEAR TERM LIMIT FOR JUSTICES

The proposal of an eighteen-year term limit stands out as the one idea that has gained bipartisan traction.⁴⁵ There are two possible ways to implement term limits: an amendment to the U.S. Constitution or a congressional statute. Some legal scholars argue that a Justice's "life tenure" can only be ended by a constitutional amendment—an avenue that requires approval from two-thirds of both congressional chambers and three-fourths of states.⁴⁶ Other scholars disagree, however, and believe that a statutory solution is within Congress's power.⁴⁷

Section A briefly discusses the bipartisan support behind the two paths to implement term limits. Section B then discusses the arguments in favor of term limits—such as discouraging Justices from spending decades on the Court and allowing presidents to choose less ideologically extreme jurists. Finally, Section C analyzes the arguments against term limits—such as the potential constitutional issues raised and an increased instability in the rule of law.

A. *Bipartisan Support to Implement Term Limits*

The proposal to implement term limits on Justices finds support on both sides of the political aisle. Former Texas Governor

⁴² See Aaron Blake, *4 Ideas for Supreme Court Reform*, WASH. POST (Apr. 15, 2021, 11:59 AM), <https://www.washingtonpost.com/politics/2021/04/15/4-ideas-supreme-court-reform> [<https://perma.cc/5JMR-V6TN>].

⁴³ *Id.*

⁴⁴ For example, Pete Buttigieg's plan to have sitting Justices select new Justices would likely be declared unconstitutional. See Millhiser, *supra* note 41. The Constitution is clear: presidents must name federal judges and the Senate must confirm them. See U.S. CONST. art. II, § 2. And a system of rotating judges would likely go against Article III, which says that judges should be able to keep their positions so long as they continue to have good behavior. *Id.* art. III., § 1.

⁴⁵ See Ian Millhiser, *9 Ways to Reform the Supreme Court Besides Court-Packing*, VOX (Oct. 21, 2020), <https://www.vox.com/21514454/supreme-court-amy-coney-barrett-packing-voting-rights> [<https://perma.cc/4XLT-QVRC>].

⁴⁶ See COMMISSION FINAL REPORT, *supra* note 12, at 130.

⁴⁷ See *id.*

Rick Perry, for example, included term limits in his 2012 Republican presidential campaign platform.⁴⁸ Republican Senator Marco Rubio has also stated his support for this proposed reform, specifically through a constitutional amendment.⁴⁹ Additionally, some House Democrats introduced legislation in 2020 and 2022 imposing eighteen-year term limits on Justices.⁵⁰ Term limits also appear to be broadly popular with the public—indeed, a recent poll found that 72 percent of Americans support term limits for Justices.⁵¹ Accordingly, term limits are worthy of serious conversation, although a significant push for implementation does not appear to be on the immediate horizon.

In response to the vacancy left by the late Justice Ginsburg, a group of House Democrats introduced a plan to implement term limits.⁵² Specifically, the plan would allow Justices to serve on the Supreme Court for eighteen years.⁵³ At the end of their term, the Justices could retire or continue serving on a federal appellate court.⁵⁴ The plan would also allow the president to nominate a Justice during the “first and third years” of their presidency.⁵⁵ The Senate would then have “120 days” to act upon that nomination.⁵⁶

Other proposals address the common critique that this plan would allow the Court’s bench to exceed nine Justices. For example, one proposal suggests that the Court’s longest-serving member should automatically move to a “senior” position of

⁴⁸ See Todd Gillman, *Perry Has Plenty of Ideas on Supreme Court, Including Term Limits*, SALT LAKE TRIB. (Aug. 31, 2011), <https://archive.sltrib.com/article.php?id=52493936&itype=CMSID> [<https://perma.cc/F764-CCUT>].

⁴⁹ See *What Senators Have Said About Term Limits*, FIX THE COURTS (Aug. 2, 2022), <https://fixthecourt.com/2021/05/senatorsonscotustermlimits> [<https://perma.cc/B3EG-XHXA>].

⁵⁰ See Supreme Court Term Limits and Regular Appointment Act of 2020, H.R. 8424, 116th Cong. (2020). See generally Veronica Stracqualursi, *House Democrats to Introduce Bill Setting 18-Year Term Limit for Supreme Court Justices*, CNN (Sept. 25, 2020), <https://us.cnn.com/2020/09/25/politics/house-democrats-bill-supreme-court-term-limits/index.html> [<https://perma.cc/8BTC-A5L3>]. Notably, congressional Democrats released similar legislation in July 2022. See Supreme Court Tenure Establishment and Retirement Modernization Act of 2022, H.R. 8500, 117th Cong. (2022).

⁵¹ Seung Min Kim & Robert Barnes, *Supreme Court Term Limits Are Popular – and Appear to be Going Nowhere*, WASH. POST (Dec. 28, 2021), <https://www.washingtonpost.com/nation/2021/12/28/supreme-court-term-limits> [<https://perma.cc/K6LZ-PD9N>].

⁵² See H.R. 8424.

⁵³ *Id.* § 4.

⁵⁴ *Id.*

⁵⁵ *Id.* § 2.

⁵⁶ *Id.* If the Senate does not act, however, the bill deems the Senate as having “waived its advice and consent authority with respect to such nominee, and the nominee shall be seated as a Justice of the Supreme Court.” *Id.*

status.⁵⁷ Under this designation, the “senior” Justice would be limited to voting on cases the Court decides to hear, and serving in place of a recused Justice—but would otherwise not serve on the Court.⁵⁸ Another suggestion would keep the biennial nomination schedule as proposed, but prohibit new Justices from hearing cases until a vacancy actually opens on the Court.⁵⁹

Generally, scholars believe having a Court with ten or eleven Justices for a short period would produce more stability while term limits are implemented.⁶⁰ In any event, while some proposals recommend implementing term limits through a constitutional amendment, others suggest implementing the change by statute—as in the House Democrats’ plan.⁶¹

B. Arguments in Favor of Term Limits

Proponents contend that term limits are logically justifiable and may fix many current issues plaguing the Court. First, advocates argue that this reform would prevent Justices from staying on the Court for decades—perhaps past their intellectual prime or health capacity.⁶² Proponents contend that term limits would be consistent with the Founders’ expectations given the relatively short life span of Justices at the time the Constitution was adopted.⁶³ Presently, with progress in modern medicine, the average retirement age of Justices is eighty-one years old.⁶⁴ And the current length on the bench is twenty-eight years.⁶⁵

⁵⁷ Linda Myers, *Law Professor Proposes Term Limits for Supreme Court Justices*, CORNELL CHRON. (Jan. 27, 2005), <https://news.cornell.edu/stories/2005/01/law-professor-proposes-term-limits-supreme-court-justices> [https://perma.cc/QZ4J-KUHX].

⁵⁸ *Id.*

⁵⁹ See Tyler Cooper, *Supreme Court Term Limits—Here’s the Best Option*, BLOOMBERG L. (Feb. 23, 2021), <https://news.bloomberglaw.com/us-law-week/supreme-court-term-limits-heres-the-best-option> [https://perma.cc/WWH9-32UQ].

⁶⁰ See *id.* See also *Term Limits*, FIX THE COURTS, <https://fixthecourt.com/fix/term-limits> [https://perma.cc/5MXT-A6BP] (last visited Oct. 20, 2022); Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CTR. FOR AM. PROGRESS (Aug. 3, 2020), <https://www.americanprogress.org/article/need-supreme-court-term-limits> [https://perma.cc/6AEA-LU7F].

⁶¹ See, e.g., Adam Chilton et al., *Biden’s Commission Is Examining Supreme Court Term Limits. Those Could Have Unintended Consequences*, WASH. POST (Apr. 1, 2021, 6:00 AM), <https://www.washingtonpost.com/politics/2021/04/01/bidens-commission-is-examining-supreme-court-term-limits-those-could-have-unintended-consequences> [https://perma.cc/8PFE-X7AS].

⁶² See Phillip D. Oliver, *Assessing and Addressing the Problems Caused by Life Tenure*, 13 J. APP. PRAC. & PROCESS 11, 20-21 (2012).

⁶³ See *Term Limits*, *supra* note 60.

⁶⁴ *Id.*

⁶⁵ *Id.*

Notably, Justices Scalia and Ginsburg died while sitting on the Court at the ages of seventy-nine and eighty-seven, respectively.⁶⁶ Justice Scalia was privately suffering from several health issues, including coronary artery disease, diabetes, and chronic obstructive pulmonary disease.⁶⁷ Justice Ginsburg passed away from metastatic pancreatic cancer, and had gone through multiple hospitalizations for her illnesses in the few years preceding her death.⁶⁸ Despite these serious ailments, both stayed on the Court until their deaths.⁶⁹ Proponents of term limits argue that this reform would make vacancies less sporadic and allow Justices to retire when appropriate.⁷⁰

Advocates also suggest that both parties concentrate too much on finding young nominees, rather than simply finding those who are the most qualified.⁷¹ The last four nominees to the Court have been forty-nine, fifty-three, forty-eight, and fifty-one, respectively.⁷² At the same time, the average age of the federal judiciary is sixty-nine.⁷³ The recent prevalence of younger jurists is even more profound in the lower federal courts.⁷⁴ President

⁶⁶ See Robert Barnes & Michael A. Fletcher, *Ruth Bader Ginsburg, Supreme Court Justice and Legal Pioneer for Gender Equality, Dies at 87*, WASH. POST (Sept. 18, 2020), https://www.washingtonpost.com/local/obituaries/ruth-bader-ginsburg-dies/2020/09/18/3cedc314-fa08-11ea-a275-1a2c2d36e1f1_story.html [https://perma.cc/7C6X-X5X3].

⁶⁷ Andrew Cohen, *Americans Knew Little About Scalia's Health Problems. That Should Change*, BRENNAN CTR. FOR JUST. (Feb. 26, 2016), <https://www.brennancenter.org/our-work/analysis-opinion/americans-knew-little-about-scalias-health-problems-should-change> [https://perma.cc/HJ8T-C8ZA].

⁶⁸ Jamie Ducharme, *How Cancer Shaped Justice Ruth Bader Ginsburg's Life and Work*, TIME (Sept. 18, 2020, 8:17 PM), <https://time.com/5507530/ruth-bader-ginsburg-cancer-history> [https://perma.cc/79T5-CBVH].

⁶⁹ See, e.g., David Axelrod, *A Surprising Request from Justice Scalia*, CNN (Mar. 9, 2016), <https://www.cnn.com/2016/02/14/opinions/david-axelrod-surprise-request-from-justice-scalia/index.html> [https://perma.cc/SW8M-XQDQ].

⁷⁰ See Stracqualursi, *supra* note 50.

⁷¹ Indeed, the “average justice’s term is now longer than it has been at any other point in U.S. history.” Buchanan, *supra* note 60.

⁷² See Jessica Gresgo, *For High Court Nominees “When’s Your Birthday?” Matters*, ASSOC. PRESS (Feb. 16, 2022), <https://apnews.com/article/stephen-breyer-joe-biden-us-supreme-court-seniors-f70f8aeb467efc48863875fba4f2a151> [https://perma.cc/9MZC-47M3]. See also Russell Wheeler, *Changes in Supreme Court Appointments—Fewer Justices, Longer Terms, More Contentious Confirmations*, BROOKINGS INST. (Feb. 17, 2022), <https://www.brookings.edu/blog/fixgov/2022/02/17/changes-in-supreme-court-appointments-fewer-justices-longer-terms-more-contentious-confirmations> [https://perma.cc/UU2E-BFRR].

⁷³ See *Approaching Aging Federal Judges in America: Interview with Francis X. Shen*, SCHOLASTICA (Nov. 26, 2019), <https://blog.scholasticahq.com/post/aging-federal-judges-america> [https://perma.cc/TAE8-NX2Z].

⁷⁴ See Micah Schwartzman & David Fontana, *Trump Picked the Youngest Judges to Sit on the Federal Bench. Your Move, Biden*, WASH. POST (Feb. 16, 2021, 12:33

Trump's nominees for judicial vacancies were, on average, forty-seven years old, and in total, only five of his judicial nominees were older than fifty-five.⁷⁵ Similarly, during the first two years of President Biden's term, his judicial nominees were forty-eight years old, on average.⁷⁶ Accordingly, proponents of term limits argue that shortening tenure to eighteen years would eliminate the incentive to view age as a primary qualifier and subsequently allow presidents to focus on actual judicial qualifications.⁷⁷

Proponents suggest that shorter terms may reduce the focus of a judge's political leanings, as each Justice would have less of an impact on the Court's ideological leanings.⁷⁸ Likewise, they contend term limits would disincentivize Justices from staying on the Court until a president of their own political party is in office.⁷⁹ Indeed, because lifetime tenure can last decades, presidents tend to search for nominees with similar ideological views.⁸⁰ For example, President Trump's judicial appointments tended to be more vocally conservative—in both their academic writings and judicial opinions.⁸¹ Indeed, all of President Trump's Supreme Court appointees were members of the conservative legal group, the

PM), <https://www.washingtonpost.com/outlook/2021/02/16/court-appointments-age-biden-trump-judges-age> [<https://perma.cc/TAP2-U7U7>].

⁷⁵ *Id.*

⁷⁶ See David Lat, Opinion, *Biden's Flurry of Nominations Will Bring Generations of Diversity to Federal Courts*, L.A. TIMES (Dec. 22, 2021), <https://www.latimes.com/opinion/story/2021-12-22/bidens-judicial-nominations-diversity-federal-courts> [<https://perma.cc/M2RD-4JTZ>].

⁷⁷ See Stracqualursi, *supra* note 50.

⁷⁸ However, although Justices David Souter and Anthony Kennedy were appointed by Republican presidents, both were known to vote with their liberal leaning colleagues. See Adam Serwer, *The Lie About the Supreme Court Everyone Pretends to Believe*, ATLANTIC (Sept. 28, 2021), <https://www.theatlantic.com/ideas/archive/2021/09/lie-about-supreme-court-everyone-pretends-believe/620198> [<https://perma.cc/U6UZ-9QFX>]. Because some conservatives regretted the Justices Souter and Kennedy appointments, conservative legal advocates became more aggressive in demanding that Republican presidents nominate judges with genuine conservative bona fides. See *id.* (quoting a conservative activist who said that by saying “no more Kennedys” meant no more conservatives “who would occasionally side with Democratic appointees in big cases.”).

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CTR. (Jan. 13, 2021), <https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges> [<https://perma.cc/2DDJ-PSMB>].

Federalist Society.⁸² In response, however, Democrats too have organized around judicial nominations.⁸³

Finally, advocates argue that term limits may help bring fresh perspectives to the Court.⁸⁴ Some legal scholars suggest that Justices become “more distant” from the implications of their decisions on the public the longer they sit on the Court.⁸⁵ In 1983, Chief Justice Roberts, then a Harvard Law student, wrote that term limits would “ensure that federal judges would not lose all touch with reality after decades of ivory tower experience.”⁸⁶ Indeed, advocates contend that regular changes in the Court’s composition “can be especially important for bodies where a small number of people hold considerable power.”⁸⁷ By compelling more turnover, advocates for term limits reason that the Court will be more representative of the American public’s current viewpoints.

C. Arguments Against Term Limits

Although term limits are broadly popular among the American public, some scholars and politicians have highlighted drawbacks associated with imposing term limits on Justices.⁸⁸ For example, opponents contend that lifetime tenure creates an essential pillar of judicial independence.⁸⁹ If Justices did not have lifetime tenure, the argument goes, they may attempt to gain the favor of certain litigants to receive access to coveted job opportunities after their tenure expired.⁹⁰

Opponents also argue that the increased turnover of Justices could lead to doctrinal instability.⁹¹ As it stands, the ideological

⁸² See Serwer, *supra* note 78.

⁸³ See Emma Green, *How Democrats Lost the Courts*, ATLANTIC (July 8, 2021), <https://www.theatlantic.com/politics/archive/2021/07/liberal-judges-supreme-court-breyer/619333> [<https://perma.cc/V5D8-6EG6>]. Liberal lobbying groups like *Demand Justice* and the *American Constitution Society* have submitted judicial nominees to President Biden, contending that their picks would actively fight the conservative leanings of many in the federal judiciary. *See id.*

⁸⁴ For example, Justice Thomas has been on the Court for thirty-one years—and Justices Roberts and Alito have both been on the Court for nearly two decades. *About the Court*, U.S. SUP. CT., <https://www.supremecourt.gov/about/biographies.aspx> [<https://perma.cc/H5VZ-RR42>] (last visited Oct 20, 2022).

⁸⁵ See COMMISSION FINAL REPORT, *supra* note 12, at 116.

⁸⁶ Lee Drutman, *It’s Time for Term Limits for Supreme Court Justices*, VOX (June 27, 2018), <https://www.vox.com/polyarchy/2018/6/27/17511030/supreme-court-term-limits-retirement> [<https://perma.cc/4KDP-7MK9>].

⁸⁷ See COMMISSION FINAL REPORT, *supra* note 12, at 116.

⁸⁸ *See id.* at 112-17.

⁸⁹ *See* Drutman, *supra* note 86; COMMISSION FINAL REPORT, *supra* note 85 at 118-19.

⁹⁰ *See* COMMISSION FINAL REPORT, *supra* note 12, at 118-19.

⁹¹ *See* Christopher Sunby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 122 (2019).

makeup of the Court tends to change slowly over time.⁹² Eighteen-year terms, however, could lead to a more rapidly changing judicial philosophy.⁹³ Statistical modeling has shown that a rapidly changing Court could reverse itself multiple times over relatively short periods.⁹⁴ Thus, opponents contend that this inconsistency could delegitimize the judiciary in the eyes of both legal scholars and the American public—and even weaken the rule of law.⁹⁵

There are also concerns that term limits would do little to decrease the partisan nature of Court appointments.⁹⁶ For example, under the eighteen-year term limit proposal, a political party that controlled the Senate—with the opposite party in control of the White House—could hold up a nomination for four years.⁹⁷ If a president was subsequently elected from the same political party in control of the Senate, that president would be able to pick *four* Justices (the two previously blocked plus the two in the president’s term).⁹⁸

Term limits could also make Supreme Court nominations an even more salient issue in presidential campaigns.⁹⁹ Given that the current polarized climate is unlikely to subside in the near future, presidential nominees could run on platforms promising to nominate specific ideologues to the Court.¹⁰⁰ In fact, confirmation hearings in the Senate, already used for partisan showmanship, may devolve into even worse contentious hearings, causing further damage to the Court’s integrity.¹⁰¹

Finally, many scholars believe that lifetime tenure is enshrined in the Constitution.¹⁰² Some scholars interpret the Good Behavior Clause to mean that lifetime tenure is a protected right

⁹² *See id.*

⁹³ *See id.* at 130.

⁹⁴ *See id.*

⁹⁵ *See id.* at 160 (arguing that the court’s “reduced stability could fundamentally change the nature of jurisprudential evolution and change the focus of litigants, policy makers, and lower court judges from precedent to the Court’s composition”).

⁹⁶ *See* Drutman, *supra* note 86.

⁹⁷ *See* 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/PUS8-RQK4>].

⁹⁸ Specifically, a president would have the opportunity to appoint two Justices—with regular eighteen-year terms—and two Justices for the two empty seats—with fourteen and sixteen years left on their terms, respectively. *See id.*

⁹⁹ *See* Serwer, *supra* note 78.

¹⁰⁰ *See id.*

¹⁰¹ *See* David A. Graham, *Judge Jackson’s Confirmation Hearing Had Little to do with Judge Jackson*, ATLANTIC (Mar. 23, 2022), <https://www.theatlantic.com/ideas/archive/2022/03/ketanji-brown-jacksonconfirmation-hearing/627586> [<https://perma.cc/4BVM-WZUW>].

¹⁰² U.S. CONST. art. III, § 1.

guaranteed by the Constitution.¹⁰³ This interpretation is further supported by Federalist Paper No. 78, in which Alexander Hamilton wrote that “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office”¹⁰⁴

If term limits were enacted by statute—as in the House Democrats’ plan—there would likely be subsequent constitutional challenges.¹⁰⁵ Thus, given the arduous process of amending the Constitution,¹⁰⁶ this particular reform is perhaps not even viable.

III. TERM LIMITS SHOULD BE ENACTED

The Court is an essential part of America’s functioning democracy. Imposing term limits has the potential to help the Court improve its legitimacy in the public’s eyes. After the death of the late Justice Ginsburg in 2020, the Court moved to a six-to-three Republican-appointed majority. Although Chief Justice Roberts and Justice Kavanaugh have occasionally sided with the Democratic-appointed Justices, both ultimately joined the conservative majority in overturning *Roe v. Wade*.¹⁰⁷ Indeed, this decision, along with several other major political cases decided by the conservative majority in the 2021-22 Term,¹⁰⁸ indicates a conservative belief that the Court should revisit past decisions.¹⁰⁹ If significant legal rights continue to be decided by six-to-three or five-to-four “party line” votes, Americans will undoubtedly lose even more confidence in the Court.¹¹⁰ Of course, calls for structural

¹⁰³ See COMMISSION FINAL REPORT, *supra* note 12, at 122-30.

¹⁰⁴ THE FEDERALIST NO. 78 (Alexander Hamilton) (stating that that this permanency was “an indispensable ingredient . . .”).

¹⁰⁵ See Blake, *supra* note 42.

¹⁰⁶ See *supra* notes 45-47 and accompanying text.

¹⁰⁷ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

¹⁰⁸ See generally Adam Liptak & Jason Kao, N.Y. TIMES (June 30, 2022), <https://www.nytimes.com/interactive/2022/06/21/us/major-supreme-court-cases-2022.html> [<https://perma.cc/T7LV-94SY>].

¹⁰⁹ For example, in *Dobbs*, a concurring opinion penned by Justice Thomas, a member of the conservative majority, indicates that he believes the Court should revisit past decisions on gay marriage and contraception. See *Dobbs*, 142 S. Ct. at 2303 (Thomas, J., concurring). See also Daniel Epps & Ganesh Sitaraman, *The Future of Supreme Court Reform*, 134 HARV. L. REV. F. 398, 413-14 (noting that in a 2020 keynote address to a conservative group, Justice Alito suggested a willingness to pursue an aggressive conservative agenda).

¹¹⁰ Several legal commentators have already noted that it is difficult after recent confirmations to justify calling the Supreme Court an institution “above politics.” See, e.g., John F. Harris, *The Supreme Court is Begging for a Legitimacy Crisis*, POLITICO (Oct. 29, 2020), <https://www.politico.com/news/magazine/2020/10/29>

change like implementing term limits will depend on several factors such as public reaction and how much power the Democrats hold in Congress and in the White House.

With term limits, however, Americans who disagree with the Court's philosophies would be more hopeful that turnover would eventually balance out the Court's decisions.¹¹¹ Furthermore, term limits could also reduce some of the "luck" associated with the judicial selection process. For example, President Trump appointed three Justices in his four-year term—compared to Presidents Clinton and Obama, who each appointed two Justices over eight years.¹¹² As such, term limits would allow the Court to become a more representative body, as each president would have an equal chance to nominate candidates to the Court.

Support for term limits is also bolstered by the fact that our judiciary is one of the only systems in the world that does not require term limits or a mandatory retirement age.¹¹³ Moreover, even within the United States, the practice of lifetime tenure is unique: all of the highest courts in every U.S. state—except for Rhode Island—require term limits or mandatory retirement.¹¹⁴ Although some opponents of term limits argue that lifetime tenure is an essential bulwark against judicial corruption, the vast majority of judicial systems do not allow lifetime tenure—yet their governments continue to function.¹¹⁵ Abolishing lifetime tenure is not likely to lead to the type of corruption opponents fear and would align the United States with most judicial systems.¹¹⁶

Additionally, term limits are unlikely to create the type of doctrinal inconsistency opponents fear. An eighteen-year term limit is still a significant amount of time on the Court. And each president, on average, would have the opportunity to appoint two-

[/supreme-court-begging-for-legitimacy-crisis-433573](https://perma.cc/CCH5-RQXC) [<https://perma.cc/CCH5-RQXC>]; Steve Vladeck, *Why Many of the Supreme Court's Critics Are Trying to Save the Court from Itself*, SLATE (Oct. 4, 2021, 10:18 AM), <https://slate.com/news-and-politics/2021/10/the-supreme-court-is-nearing-a-legitimacy-crisis.html> [<https://perma.cc/3NT6-VXPL>].

¹¹¹ See *supra* notes 84-87 and accompanying text.

¹¹² *Supreme Court Nominations (1798-Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/2M66-PAHJ>] (last visited Oct. 20, 2022).

¹¹³ See COMMISSION FINAL REPORT, *supra* note 12, at 112; Russell Berman, *No Other Western Democracy Allows This*, ATLANTIC (Sept. 25, 2020), <https://www.theatlantic.com/politics/archive/2020/09/supreme-court-retirement-age/616458> [<https://perma.cc/NPM2-FKNG>]; Steven Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 819 (2006) (stating that "[e]very major democratic nation, without exception . . . provides for some sort of limited tenure of office for its constitutional court judges.").

¹¹⁴ See Berman, *supra* note 113.

¹¹⁵ See Calabresi & Lindgren, *supra* note 113.

¹¹⁶ See Berman, *supra* note 113.

to-four Justices.¹¹⁷ A slight increase in Justice turnover is unlikely to cause a serious threat to the rule of law.¹¹⁸ Moreover, the legal principle of *stare decisis* dictates that Justices follow the Court's prior rulings irrespective of the length of their term.¹¹⁹ Although the Court does not always follow this principle, it has, for the most part, stopped Justices from ruling against longstanding precedent in the past.¹²⁰ Thus, there appears to be little risk that a limited term would lead a Justice to ignore precedent.¹²¹

Lastly, the concern that term limits may not be imposed by statute is also misplaced. The proposal can be fashioned to allow Justices to continue to serve on a lower court after their eighteen-year term has expired.¹²² After all, the constitutional provision allowing Justices to serve as long as they exhibit “good [b]ehaviour” does not prevent them from serving on another, lower court.¹²³ In fact, many legal scholars have long considered Justices assuming a “senior” status position constitutional under Article III.¹²⁴ Thus, the language of Article III does not prohibit this reform.

CONCLUSION

Although term limits may likely be politically challenging to enact, political leaders should consider this proposal as a tool to combat the increasing polarization concerning the Court. There is a serious appetite for change: 67 percent of Americans favor term limits—including 57 percent of Republicans and 82 percent of Democrats.¹²⁵ Ultimately, term limits could help depoliticize the nomination process, bring greater stability to the Court, and restore confidence in the Court.

¹¹⁷ See Buchanan, *supra* note 60.

¹¹⁸ See Drutman, *supra* note 86. Cf. *supra* notes 91-95 and accompanying text.

¹¹⁹ See Charlie Savage, ‘*Stare Decisis*’ Is Likely to be Much Discussed in the Abortion Case. Here’s What It Means, N.Y. TIMES (Dec. 1, 2021), <https://www.nytimes.com/2021/12/01/us/politics/what-is-stare-decisis.html> [<https://perma.cc/ZE2W-6URF>].

¹²⁰ See *id.*

¹²¹ See Drutman, *supra* note 86.

¹²² See *id.*

¹²³ U.S. CONST. art. III., § 1.

¹²⁴ Indeed, Justices tend to take on “senior” status and continue to perform judicial duties—such as sitting on lower appellate courts when needed. See Norman Eisen & Sasha Matsuki, *Term Limits—A Way to Tackle the Supreme Court’s Crisis of Legitimacy*, BROOKINGS INST. (Sept. 26, 2022), <https://www.brookings.edu/blog/fixgov/2022/09/26/term-limits-a-way-to-tackle-the-supreme-courts-crisis-of-legitimacy> [<https://perma.cc/PS5N-44B6>] (citing 28 U.S.C. § 294 and arguing that Justices already can be designated to perform judicial duties at the circuit level). See also Cooper, *supra* note 59.

¹²⁵ *Americans Have Lost Confidence in the Supreme Court*, ASSOC. PRESS & NORC (July 25, 2022), <https://apnorc.org/projects/americans-have-lost-confidence-in-the-supreme-court> [<https://perma.cc/SH4L-9EBV>].