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to
Presidential Commission on the Supreme Court of the United States
July 16, 2021

The U.S. stands virtually alone, among constitutional democracies with well-established judicial review by independent courts, in providing neither for a retirement age nor for a limited term in office for its high court justices. Had one looked at this issue in 1921, the United States would have had company: At that time, Australia and Canada, countries that, like the United States, were influenced by the British tradition, provided judges with indefinite tenure during good behavior.[1] However, each of these countries amended their constitutions and adopted mandatory retirement ages for their federal judges later in the 20th century – 70 in Australia, 75 in Canada. All but one of the U.S. states now have term limits, or a mandatory retirement age, or both, for their high court judges.[2] During the New Deal period, and again in the 1950s, serious proposals were made (though not acted upon) for a constitutional amendment creating a retirement age for federal judges. Recently, norms about Senate confirmation have broken, increasing the risks of a confirmation process perceived as systematically skewing the Court and diminishing its legitimacy.

Against this background, I suggest that the time has come to seriously take up proposals to limit the indefinite tenures of Supreme Court justices. Fifteen years ago I was disinclined to support proposed changes to tenure "during good behavior," a provision that had so well secured

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* Affiliation given for identification purposes only. With thanks to Jonathan Gould, Tom Daly, Judith Resnik, Bob Taylor, and Mark Tushnet, for helpful exchanges and to Kaylee Ding, Victoria Li, Valentina Liu, Hannah Makowske, Catherine Walker-Jacks, and Sam Weinstock for excellent research assistance. Any errors are mine; the tight time frame did not allow for full Blue Booking; additional citation information is available on request.
[1] Const. Act 1867 § 99(1) (Canada) (superior court judges to hold "Office during good Behaviour," removable only "on Address of the Senate and House of Commons"); Austr. Const. § 72 (Australia 1901) (judges removable only on "address" from both houses of the parliament in the same session and only for "proved misbehavior or incapacity"). Canada amended its constitution in 1960 to provide for mandatory retirement for all superior court judges at age 75, Const. Act 1960, 9 Eliz. II, c.2 (U.K.), an age that had by statute applied to Supreme Court Justices since 1927; under the 1982 Constitution Act, the structure and independence of the Supreme Court are protected. *See* Reference re Supreme Court Act, ss 5, 6, [2014] 1 SCR 433 (Can.). Australia amended its constitution in 1977 to require that its High Court justices retire by age 70. Austrl. Const. § 72, ¶ 2, amended in Constitution Alteration (Retirement of Judges), 1977 (Austrl.).
[2] As of 2014, the one exception is Rhode Island. See https://ballotpedia.org/Judicial_selection_in_Rhode_Island (citing an American Judicature Society publication of 2014).

an independent federal judiciary.[3] Today I urge the Commission to take very seriously the benefits of some reform and to try to seize the moment to build a consensus in favor of change towards a more sensible system of appointment and tenure for Supreme Court Justices.

In Part I below, I discuss advantages and disadvantages of two approaches – staggered, 18-year term limits and a mandatory retirement age – each of which might require constitutional amendment. I also discuss other *statutory* alternatives that I believe would be constitutional, including pension-based incentives for retirement and allowing the Court's size to fluctuate to accommodate at least one new appointment in each four-year presidential term. Because the independence of judges results from interdependent "packages" of provisions,[4] I also suggest that mandatory retirement might call for establishing a minimum age of appointment, and 18-year staggered terms may require new mechanisms to promote timely confirmation. Further, adopting a retirement age and especially 18-year terms, might require the regulation of post-judicial service employment to reduce threats to judicial independence.

Finally, the growing effects of the Senate's counter-majoritarian character, together with recent breaches of political norms and conventions about Supreme Court appointments, are deeply concerning. Although recent abuses of the confirmation process—against the backdrop of the countermajoritarian effects of the Senate—provide temptations to "Court-packing," Part II suggests that such a move bears high risks of further delegitimation, polarization and instability. At least for now, less partisan efforts to spread out appointments, like those discussed in Part I, should be pursued.

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[3] *See* Vicki C. Jackson, *Packages of Independence: The Selection and Tenure of Article III Judges*, 95 Geo L. J. 965, 1007-08 (2007) (suggesting that any changes life tenure could be detrimental to the overall system of adjudication in the United States given the dependence of many state court systems on popular elections of judges and thus urging "great caution" before departing from existing structures securing judicial independence).

[4] *See generally* Jackson, *supra* note 3; Vicki C. Jackson, *Judicial Independence: Structure, Context, Attitude,* in JUDICIAL INDEPENDENCE IN TRANSITION (Anja-Sibert Fohr ed., 2012). A high court's role and degree of independence is determined by many interdependent factors including, e.g., jurisdiction; conceptions of constitutional law; appointment mechanisms; tenure duration and protection; salary protection; retirement ages and benefits; physical security; and cultural attitudes towards law and courts held by lawyers, judges, and the general public. For example, mandatory retirement ages may be unnecessary if a system already imposes short terms for judges. To extend the point about interdependent contexts: appointment mechanisms that require concurrent approvals of two entities controlled by different parties will function differently than systems in which competing political parties each are allowed to fill some seats, or in which a nonpartisan merit based process is used, or in which different constitutional actors – the chief executive, the upper house, the lower house and/or the judiciary – each make appointments. The significance of who sits on a Court deciding constitutional issues is greater with a very difficult to amend constitutional text than in systems (like that of Germany) where the Constitution is (for the most part) less difficult to amend. And there is a significant difference in the role of our state supreme courts and that of the Supreme Court which can review their decisions. Examples from other systems, domestic and foreign, must be considered with caution, and proposed changes evaluated for their likely systemic effects.

I. Indefinite tenure: Of mandatory retirement and nonrenewable term limits

The independence of the federal judiciary is valuable and should be preserved; but doing so does not require indefinite tenure "during good bebavior." Provisions for permanent, life tenure made a good deal of sense in the late 18th century. As Alexander Hamilton argued in Federalist No 78, "permanency in office" would help secure the "complete independence" of the courts, an independence that was especially essential in a constitution designed to limit government power. Tenure during good behavior is an "excellent barrier to the encroachments and oppressions of the representative body," that is, it restrains the temptations to elected officials to interfere with the court's adjudications. Moreover, he argued, "it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." Because "nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and, in a great measure, as the citadel of the public justice and the public security." Elaborating, Hamilton argued: "If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty."

This independence, Hamilton insisted, served several purposes, enabling the judges 1) to "guard the Constitution," 2) to perform the "arduous …duty" of resisting "dangerous innovations" or "serious oppressions of the minority party in the community," 3) to protect "individual rights" from the "ill humors" that may seize a majority at any given moment; 4) to do impartial justice between disputants and 5) even in non-constitutional cases, to "mitigate[e] the severity and confin[e] the operation" of "unjust and partial laws." As he explained, it would "require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community." The fortitude needed for these tasks, he wrote, "can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however

regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence."

Hamilton also argued that judicial tenure during good behavior was "conformable to the most approved of the State constitutions,"[5] and had benefitted those states, as well as Great Britain. Moreover, he argued, considerable expertise and familiarity with accumulating precedent were required to be a good judge; and there were few of good skill who would be willing to leave a lucrative law practice for a temporary appointment.[6]

In Federalist No. 79, Hamilton rejected a fixed retirement age (like that which the constitution of New York then provided), explaining that many over age 60 retain their "deliberating and comparing faculties" and that very "few … outlive the season of intellectual vigor." A fixed retirement age, moreover, would be unfair to those who "in a republic, where fortunes are not affluent, and pensions are not expedient," have labored at public service but find themselves dismissed at an age when it would be difficult for them to find other employment.[7]

The world has changed, however, since Article III was drafted and approved. Some of the concerns expressed by Hamilton no longer carry the same weight as in 1787-88. The financial risks of leaving a law practice, and concerns for those who lack fortunes or pensions, are now mitigated by the existence of generous pensions for federal judges. The prestige of the federal judiciary (and especially of the Supreme Court) has vastly increased since the 1790s;[8] that prestige is very likely to endure. The risks that Federalist 79 referred to as "the imaginary danger of a superannuated bench" have, on perhaps too many occasions, presented embarrassment to the

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[5] FEDERALIST PAPER NO. 78 (Aelxander Hamilton).
[6] *See id.* ("a temporary duration in office, which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity").
[7] Brutus attacked the proposal, arguing that although it is true judges in Great Britain served during good behavior, "their determinations are subject to correction by the house of lords" and they would not have power to invalidate a statute. Brutus agreed that judges should be independent and should not be popularly elected but argued that there needed to be a mechanism for the judges to be held accountable for their decisions, which the Constitution did not sufficiently provide. See Letters of Brutus XV, *reproduced in part in* Bruce Ragsdale, FED. JUD. CTR., JUDICIAL INDEPENDENCE AND THE FEDERAL COURTS 11-12 (2006) [hereafter Ragsdale, FJC].
[8] *See e.g.* Supreme Court of the United States, https://www.supremecourt.gov/about/institution.aspx (describing how Chief Justice John Jay resigned from the Court in 1795 to become Governor of New York, and refused to accept reappointment when the position became vacant in 1800).

Court. Comparative experience with nonrenewable long terms suggests that the nonrenewability of a definite term – if coupled with other measures, formal or informal, toassure that the judgeship is a capstone to a legal career, rather than a way station – can secure high degrees of judicial independence. Periodic appointments that must be regularly renewed do pose a threat to judicial independence; but experience in other countries suggests that a considerable degree of independence can be achieved by appointing judges for long, definite, and nonrenewable terms, avoiding the risk that judges would act with an eye to their own future reappointment.

Moreover, contemporary practice – both in the United States and in other constitutional democracies – has changed. Most states in the U.S. now require either a retirement age, a term limit, or both. Some 33 states have a mandatory age for retirement, generally between 70 and 75 (with Vermont's age 90 an outlier); and 47 of the states have limited terms for their highest state court judges, ranging from 6 to 14 years.[9] As noted, only Rhode Island has neither. Among other constitutional democracies in the world, the U.S. is increasingly isolated in providing for what is effectively life tenure, without any mandatory retirement age.[10] In many countries, there is both a limited term *and* a retirement age; thus, in Germany, Constitutional Court judges are appointed for twelve-year nonrenewable terms and are also subject to mandatory retirement at age 68. The increasingly democratic sensibility of the U.S. Constitution, whose amendments have expanded suffrage on terms of greater equality, rests uneasily with any office holder viewing their office as one, of right, for life.[11]

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[9] See *State Supreme Courts*, Ballotpedia.org, https://ballotpedia.org/State_supreme_courts. Whether "mandatory-retirement" states number 32 or 33 depends on how Arkansas is treated. *See infra* note 35.

[10] The U.K. has for several decades, since the late 1950s, imposed by statute a mandatory retirement age on its judges. The current mandatoy retirement age for judges on the UK Supreme Court is 70; a proposal is pending to extend the age of judicial retirement to 75. See https://publications.parliament.uk/pa/ld201012/ldselect/ldconst/272/27210.htm. Almost all other constitutional democracies with well-functioning court systems impose some form of limits on the tenure of their constitutional judges. *See, e.g.* Alec Stone Sweet, *Constitutional Courts*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW (Rosenfeld and Sajo eds. 2012) ("members of [constitutional courts] do not enjoy lifetime tenure"); J. van Zyl Smit, BINGHAM CENTRE FOR THE RULE OF LAW, THE APPOINTMENT, TENURE AND REMOVAL OF JUDGES UNDER COMMONWEALTH PRINCIPLES 60-63 (2015) (notwithstanding influence of 1701 British law in providing judges tenure during their good behavior, there are "no longer any Commonwealth jurisdictions in which judges are automatically appointed for life"); MAARTJE DE VISSER, CONSTITUTIONAL REVIEW IN EUROPE (2015); CONSTITUTIONAL COURTS IN ASIA (Albert H.Y.Chen & Andrew Harding eds., 2018). On the lack of secure tenure for Supreme Court justices in Argentina, notwithstanding constitutional guarantees of tenure and compensation modelled on those of the U.S. Constitution, see GRETCHEN HELMKE, COURTS UNDER CONSTRAINTS 15, 62 (2005).

[11] *See* U.S. Const. Amends XIV, XV, XIX, XXIII, XXIV, XXVI. *Cf.* Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice,* in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 181, 200 (Roger C. Cramton & Paul Carrington eds., 2006) ("Not only would shorter terms enable a more diverse set of

At the same time, some of the disadvantages of indefinite tenure – of judges remaining in office even though their health is failing, and for very long periods of time, blocking new appointees – may be becoming more likely to occur. Although scholars have disagreed sharply over the degree to which average tenure in office on the Supreme Court has changed,[12] I think the evidence reasonably clearly indicates that in recent decades justices are serving somewhat longer,[13] and there is reason to believe that this trend will continue, given what the highest quality medical care, which justices have access to, can do to prolong life.

A Supreme Court bench with many older members who have served for long periods of time can easily come to be seen as out of touch with the lived realities of people's experiences of the constitutional rights the courts sit to secure.[14] Long removal from everyday governance, while offering benefits of distance and impartiality, may over time leave justices unfamiliar with important developments; as Robert Jackson famously wrote, "while the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government."[15] Judges who are not aware of how practices have helped make government workable may err in their interpretation. Further, very long periods of service can make it impossible for more recently elected Presidents to make appointments and can block

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individuals to serve but renewed sensitivity to longstanding democratic premises about the concentration of power in individuals requires cabining the length of service of jurists.").

[12] *Compare*, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J. L & PUB POL'Y 769, 778-81 (2006) *with* 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). Whether a significant increase is found depends in part on what periods are compared. *See* Vicki C. Jackson, *Packages of Independence: Implications for reform proposals on the selection and tenure of article III judges,* 2008 DAEDALUS 48, 58 n. 38 (2008) (collecting different estimates). For example, Calabresi & Lindgren, at 778-79, report average tenure by period leaving the Court between 1821-1850 as 20.8 years, and for 1971-2006, 26.1 years; Stras & Scott, at 803-, report average tenure (by 10-year increments) of 29.3 years from 1830 to 1840 compared with 28.3 or 29 years for their most recent periods (1990s and 2000s); *see also id*. at Chart 4 p. 802 (showing average time served by 15-year increments and showing a more clear rising trend); *see also, e.g.*, Kevin T. McGuire, *Are the Justices Serving Too Long*?, 89 Judicature 8 (2005) (finding no consistent trend towards longer service); David Fishbaum, *The Supreme Court has a longeveity problem, but Term Limits on Justices Won't Solve It,* HARV. BUS. REV. (July 13, 2018) (predicting average tenures likely to increase to over 30 years compared to an average of 17 years in prior century).

[13] *See supra* note 12; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure,* 26 CARDOZO L. REV. 579, 618 (2005) (showing 20-year average tenure for Justices whose service terminated between 1833 and 1853, and 24-year average tenure for those whose service terminated between 1983 and 2003).

[14] *Cf.* Franklin D. Roosevelt, 1937 Address to Congress, *reproduced in* Ragsdale, FJC, *supra* note 7 ("new facts become blurred through old glasses").

[15] Youngstown Sheet & Tube Co v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

entry by judges whose generational experiences are different, and more recent. Unlimited tenure can also lead to unseemly speculation about retirement plans and a justice's health. Moreover, it is not democratically healthy for people to perceive that major constitutional issues turn on the health of a single individual long in office. Yet concerns of this sort – which are to some extent unavoidable in a system that rests on singular one-at-a-time appointments – appear to be becoming a more endemic feature of our system.

However, one major advantage of indefinite tenure endures. Not having to be concerned about their next job gives federal judges a very strong form of independence in deciding "what the law is."[16] And that independence of judgment is a highly valuable characteristic of a judicial system.[17] Indefinite terms during good behavior is only one approach to securing independence, along with the prohibition on diminution in salaries, but it is a powerful one. It is, moreover, a helpful counter-weight to the relatively more 'populist' methods for selecting judges that prevail in some of our state courts. A majority of the states require judges on their highest court to stand for election, or for retention in a popular election;[18] Texas requires its supreme court judges to stand for election every six years.[19] This means that the state court benches are more subject to temptations to decide particular cases based on legally irrelevant factors (e.g. popular hostility to a party), an anathema to the rule of law. Hamilton's concerns that judges not be influenced in their rulings by hopes for their post-judicial service employment thus remain especially salient.[20]

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[16] Marbury v. Madison, 5 U.S. 137 (1803).

[17] *See* United States v. Hatter, 532 U.S. 557, 568 (2001) ("[T]hese guarantees of compensation and life tenure exist, 'not to benefit the judges' but 'as a limitation in the public interest.' They 'promote the public weal,' … by helping to secure an independence of mind and spirit necessary if judges are 'to maintain that nice adjustment between individual right and governmental powers which constitutes political liberty') (quoting Evans v. Gore, 253 U.S. 245, 253, 248 (1920) and W.Wilson) (citations omitted).

[18] *See Judicial Selection: Significant Figures*, Brennan Center for Justice, https://www.brennancenter.org/our-work/research-reports/judicial-selection-significant-figures.

[19] TEX. CONST. art. V, § 2(c).

[20] For these reasons in the past I urged great caution in evaluating proposals to adopt term limits for our justices or otherwise to change the constitutional features securing judicial independence. *See supra* note 3. A further argument in favor of the present tenure provision is the degree of *trust* it shows in the federal judiciary, trust that has been for the most part shown to be justified; levels of corruption in the federal judiciary are low, levels of competence and professionalism are high. When law conveys an attitude of trust in officials, it may promote more virtuous behavior than when it seeks to constrain against bad behavior with detailed rules. On this general idea, see Bruno Frey, *A Constitution for Knaves Drives Out Civic Virtue*, 107 Economic Journal 1043 (1997); Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, 102 Mich. L. Rev. 71, 75-78 (2003).

However, the costs to the Court's legitimacy of the current system have risen significantly, as the Senate's composition has had more countermajoritarian effects as the norms governing judicial confirmations have become more partisan. Experience elsewhere suggests that risks to independence of adopting a retirement age or even long but definite and nonrenewable terms are not likely to be high, provided appropriate other measures or conventions exist. The time to consider some modest reforms has arrived.

Proposals on term limits, and on retirement age, each has distinctive advantages and disadvantages, which I review below, while urging serious consideration of both. The notion that any federal official holds office for life fits uneasily with contemporary ideas of merit and democratic participation in governance.

A. 18-year staggered term proposal. Since the 1980s, several different proposals have been made that share a common basic idea: that nonrenewable terms of 18 years be provided for the justices on the Supreme Court; and that the terms be staggered to provide for two appointments during each four year presidential term.[21]

The proposal has a number of attractive features, the most important of which is that it would smooth out the appointment process, providing more certain means for each President (or presidential term) to appoint some members. The legitimacy of the Court rests on many factors, among them that the Justices are appointed through popularly elected branches of the federal government and thus, indirectly, receive some degree of democratic legitimacy in this way. In recent decades there have been four 4-year presidential terms in which no appointments were made: Jimmy Carter's; Bill Clinton's second term; George W. Bush's first term; and Barack Obama's second term. To the extent that the Court's legitimacy rests, in part, on its members being appointed by those who are democratically chosen by the people, gaps and inconsistencies in how many justices each President (elected for the same period of time) can appoint are difficult to justify. A dramatic contrast exists between President Carter's term, in which he made

[21] For helpful analysis of important details that would affect the operation of the various approaches to the basic 18-year term limit idea, see Adam Chilton et al, Designing Supreme Court Term Limits (mss of Feb. 25, 2021) (identifying transition period, vacancies, refusals of the Senate to act, and other issues).

no appointments, and President Trump's term, in which he made three. Smoothing out the appointment process means that the voices of the people in elections will carry somewhat more influence, albeit indirect, over who is appointed to the Court.[22]

A second advantage is that smoothing out the process will mean that newer generations of lawyers will more reliably and regularly bring different perspectives to bear on the problems of life that the Court must address. Having new perspectives brought by these members is valuable in and of itself to the Court's deliberative process.

Finally, the 18 year period is not out of line with a historical practice. Over its entire existence, the Court reports, the average tenure in office is 16 years.[23] An eighteen-year period is not dramatically different and would thus be unlikely to introduce feared effects concerning inconsistency in law.

Whether more regular appointments will increase or lower the stakes of confirmation battles is uncertain; it might guarantee nasty confirmation fights on a regular basis, or it might diminish the intensity of each battle. This is too hard to predict so I count it as *neither* a benefit nor a disadvantage of the proposal.

Potential disadvantages of having more regular turnover and new members include first, the possibility that the Court's caselaw will have less stability than it currently does, and that it will not be a stabilizing source of "slower law."[24] But the 18-year term would be a somewhat longer term than the average served over the Court's entire history (16 years), and for justices appointed between 1937 and 1950 (15.7 years); it would be shorter than the average served by justices appointed since 1990 who had since left the bench (about 26 years),[25] but there has been

[22] This will not necessarily make the law more "populist," as Stras and Scott worry; it will not make the law conform to popular views of the moment. But what it will do is provide more regular, and in some ways less abrupt (see, e.g., Trump's presidency with one third of the Court changing) opportunities for democratic input into the Court's membership.
[23] U.S. Supreme Court, Frequently Asked Questions, https://www.supremecourt.gov/about/faq_justices.aspx.
[24] Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 Univ Ill L Rev 407, 411 (2005).
[25] Chilton et al, *supra* note 21, at 13; *see supra* 23.

intense criticism in recent years of the Court's failures to adhere to stare decisis.[26] I suspect that whatever stability does exist in the Court's caselaw (stability that has not prevented the Court from overruling itself, invalidating many statutes enacted by Congress, and significantly departing from prior precedents, even when they are not overruled) derives as much from its members' awareness of the degree to which the institutional legitimacy of the court and of their own position depends on its behaving like a court in the common law tradition, that is, of giving respect to prior decisions as part of a continuous institution.[27] Given the well-regarded constitutional courts in the world whose membership changes quite regularly (as in the highly respected Constitutional Court of Germany), I do not place much weight on this concern.

A second disadvantage is that more regularity of the timing of departures (whether through term limits or mandatory retirement ages) will result in more strategic behavior by litigants, or judges, with respect to the timing of when issues are brought to the Court or when the Court decides to decide an issue.[28] There may be some increase, although I suspect that these forms of strategic behavior are also present now, whenever the votes of older members begin to look more critical to salient controversies.

A third disadvantage is that it may weaken the *felt* independence of the Court – in the sense that no longer would a justice be sure this was her last job. This is a serious concern, that calls for considering some form of post-judicial service employment restriction, should a justice

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[26] *See, e.g.,* Michael Gentithes, *Janus-Faced Judging: How the Supreme Court is Radically Weakening Stare Decisis,* 62 WM & MARY L REV 83 (2020). For discussion of empirical evidence about stare decisis in the Supreme Court, see Frederick Schauer, *Stare Decisis–Rhetoric and Reality in the Supreme Court*, 2018 SUP. CT REV. 121, 129-39.

[27] Even on courts in civil law countries, and with justices serving terms of 9 – 12 years, one sees efforts to establish continuities between current decisions and past caselaw by, e.g., invoking core vocabulary and concepts from earlier decisions. On Germany, see, e.g., Gerald S. Neuman, *Casey in the Mirror: Abortions, Abuse, and the Right to Protection in the United States and Germany*, 43 Am J Comp L 273, 280 (1995) (observing that the German Constitutional Court majority in a 1993 decision "viewed the underlying constitutional standards for abortion as identical to [those] described in [its] 1975 decision"); on France, see Laurent Cohen-Tanugi, *Case Law in a Legal System Without Binding Precedent: The French Example*, Stanford Law School China Guiding Cases Project, Feb. 29, 2016, http://cgc.law.stanford.edu/commentaries/17-Laurent-Cohen-Tanugi (exploring the role of "case law," called "jurisprudence," "in the modern French legal system in an attempt to show how it fosters predictability and acts in a manner akin to precedent in the Anglo-American system").

[28] *But cf.* Daniel Hemel, *Can Structural Changes Fix the Supreme Court*?, 35 J. ECON. PERSP. 119, 127 (2021) (suggesting that such strategic retirement decisions as occur do not have serious entrenching effects).

choose to leave the judiciary rather than to work as a "senior" justice, sitting on lower federal courts. (See *Post-judicial service Regulation* below.)

Finally, a considerable problem with 18-year staggered term limits arises out of recent norm changes in the Senate. In 2016, the Senate refused to consider President Obama's nominee to the Court, asserting that it was doing so because he was in the last year of a two-term presidency. This was a novel claim and decried as illegitimate by many at the time. More recently, the head of the Republicans in the Senate announced that if Republicans regained a majority in the 2022 elections, no nominees of the President -- in the last two years of his first term -- would be confirmed.[29] The 18-year, two-justices per presidential term approaches (or similar approaches designed to smooth out the appointment process) can be defeated in their goal of providing more regular democratic input if political actors do not act in good faith. Thus the proposal, at least in the current environment, may require some sort of backup mechanism in the event that the Senate refuses to consider a nominee. Details need careful consideration.[30]

B. Mandatory Retirement Age. Hamilton's rejection of a mandatory retirement age in Federalist No. 79 was based on concerns that are no longer persuasive. Pensions were not available then; now they have significantly changed the financial context.[31] While we have many examples of elderly justices retaining full cognitive capacities into their later years, there are also too many examples where it appears that justices stayed on the bench long after signs of

[29] Jon Skolnik, "McConnell suggests Senate will not consider any Biden Supreme Court nominee if GOP wins in 2022," Salon (June 14, 2021), https://www.salon.com/2021/06/14/mcconnell-suggests-senate-will-not-consider-any-biden-supreme-court-nominee-if-gop-wins-in-2022/.

[30] Possibilities might include providing a backup confirmation role (under specified conditions) to designated members of the Article III judiciary (e.g., chief judges of the federal circuits), or alternatively, to some sort of supermajority vote in the House of Representatives. If the Commission wants more broadly to reconceptualize the appointment process to give some role to the courts (the most independent branch), or the House (the most representative organ of the national government), comparative practice may be relevant. In Germany, for example, the two houses of parliament each select half of the Constitutional Court justices; in France, one-third of the appointments are made by the President of the Republic, one third by the head of the National Assembly (the lower house) and one third by the head of the Senate; in Italy, one third by the President; one third by the parliament on a two-thirds vote; and one-third by the Senior Judiciary. Spain has four appointing sources: the government (executive branch) nominates two; the general council of the judiciary nominates 2; and four each (total of 8) by a 3/5 vote of each of two houses of the parliament. *See* VICKI C JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 538-39 (3d ed 2014).

[31] *See* Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 Harv L Rev 1202, 1211 (1988) (treating Hamilton's reasoning against mandatory retirement ages as "unpersuasive" "[g]iven the current prevalence of pensions").

cognitive decline became apparent to their colleagues.[32] Hamilton had also noted that the Article III tenure provisions were similar to those of leading states. Today, notwithstanding the federal statutory ban on age discrimination,[33] most states have adopted mandatory retirement ages (as they are allowed to do, under the Court's interpretation of the statute[34]) for their state court benches. Depending on how to count Arkansas, either 32 or 33 states have mandatory retirement ages for their judges.[35] Among foreign constitutional courts in democracies, a number have both term limits and age limits on service.[36]

The potential advantages of a mandatory retirement age are modest but clear. Having such a limit would significantly constrain problems of what David Garrow called "decrepitude" in office and thereby avoid "predictable pain and embarrassment" for the Court.[37] It might help promote somewhat more turnover at the Court and provide somewhat more opportunities to recently elected Presidents and Senators to impact the membership of the Court, though it would not do so on as regular a basis as the 18 year limit. It would reduce worries over strategic timing of retirements, though these would still be possible, but might help set a norm of retiring at the age specified. An age somewhere between 75 and 80 would allow the Court to benefit from the wisdom and life experiences of "elders." And an appropriate retirement age might also cut down worries about post-judicial service employment.

Worries that a mandatory retirement age would adversely affect the operation or reputation of the Court may be allayed by experience elsewhere: Mandatory retirement ages were adopted by two countries whose judicial systems have significant similarities to the U.S.

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[32] *See* David Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000).
[33] Age Discrimination in Employment Act, 29 U.S.C. §§621 et seq., 630 (excluding certain state employees on the "policymaking level" from protections against age discrimination).
[34] *See* Gregory v. Ashcroft, 501 U.S. 452 (1991).
[35] *See* Mandatory Retirement, Ballotpedia, https://ballotpedia.org/Mandatory_retirement (including Arkansas); William E. Raferty, "Increasing or Repealing Mandatory Judicial Retirement Ages", Library e-Collection, National Center for State Courts https://ncsc.contentdm.oclc.org/digital/collection/judicial/id/440 (excluding Arkansas because a judge may continue to serve past the state's retirement age but loses retirement benefits).
[36] These include Germany, South Africa, Israel and Colombia. *See* JACKSON & TUSHNET, COMPARATIVE CONSTITUTIONAL LAW, *supra* note 30, at 537-40.
[37] Garrow, *supra* note 32, at 1087. For a helpful discussion of age limits, see Farnsworth, *supra* note 24, at 443-51.

and whose highest courts continue to be held in good regard—Australia and Canada.[38] Australia and Canada are both federal nations, with written constitutions, whose highest courts (like the U.S. Supreme Court) have long exercised the power of judicial review of statutes and also have jurisdiction to decide a range of issues (not only those that are constitutional).

Moreover, setting a retirement age for federal judges has roots in U.S. constitutional history. During the New Deal, serious proposals for a constitutional amendment to establish a retirement age were discussed, both in the Administration and in at least one congressional hearing in 1937 at which the Columbia Law School Dean spoke.[39] In 1954, another serious effort occurred to establish a retirement age of 75 for federal judges (among other changes to Article III), with the Senate passing a resolution proposing the amendment by more than a two-thirds vote.[40] As David Garrow describes, this was in part the culmination of an intense "constitutional reform campaign aimed at imposing mandatory retirement for Supreme Court justices at age seventy-five that the elite leadership of the American bar mounted between 1946 and 1955."[41] In the 1920s, future Chief Justice Charles Evans Hughes argued for a mandatory retirement age, warning that "the importance in the Supreme Court of avoiding the risk of having judges who are unable properly to do their work and yet insist on remaining on the bench, is too great to permit chances to be taken."[42]

A second worry is whether a mandatory retirement age would increase what some feel is a trend pushing towards naming younger people as justices so that the appointing President can

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[38] *Cf., e.g.*, World Economic Forum, Executive Opinion Survey https://reports.weforum.org/pdf/gci-2017-2018-scorecard/WEF_GCI_2017_2018_Scorecard_EOSQ144.pdf (reporting results of surveys of business executives on how independent their country's judicial system is from influences by governments, individuals or companies; ranking from highest to lowest; Australia and Canada are 8th and 9th, respectively; the U.S. is 25th). This survey is, of course, just one data point, reflecting one particular group's evaluation of the overall judicial system--not just the highest courts. It is nonetheless suggestive that one can have a highly independent judiciary even if mandatory retirement ages replace life tenure provisions.

[39] Garrow, *supra* note 32, at 1024, 1018-2; WILLIAM E. LEUCHTENBURG, THE SUPREME COURT REBORN 100-01, 118, 120 (1995).

[40] According to Russell Berman, *Why the U.S. Doesn't Have a Retirement Age for Judges*, THE ATLANTIC (Sept. 25, 2020), in 1954 "a large Senate majority approved a constitutional amendment that would have forced all federal judges to retire at 75. Days later, however, the Supreme Court handed down its ruling in Brown v. Board of Education, and the nation's attention shifted to the fight over desegregation." Garrow argues that the loss of enthusiasm had more to do with the Court's invalidation of measures excluding or penalizing members of the Communist Party. Garrow, *supra* note 32 at 1042, 1086.

[41] Garrow, supra note 32, at 1028-43 (discussing efforts of various Bar leaders, ALI President).

[42] Id. at 997 & n.3 (quoting Hughes' 1928 book).

get more "justice years" for each appointment. That incentive already exists, however, and I am not sure how much this would increase it. But a response to that worry would be minimum age requirements, which exist in some foreign systems.[43] Plausible minimum age requirements in U.S. culture, however, might not constrain very much the prospects for very long terms of service that could be permitted by a mandatory retirement age of 75.[44] Thus, one must acknowledge some risk that a mandatory retirement age would increase incentives to appoint younger persons, and thus diminish any expected decreases in average tenure. Nonetheless, adopting a retirement age would seem on the whole to be a benign measure, diminishing risks of "decrepitude" in office, and in use in many other good judicial systems.[45]

C. Statutory Changes: While I admire the legal creativity of those who argue that tenure "during good behavior" can be respected (and thus avert the need for amendment) by a statutory approach for 18-year staggered terms that provides for time-limited Justices to remain Article III judges sitting in the lower courts,[46] I find myself somewhat doubtful, given that this would be a significant change from how the tenure of Supreme Court justices has been understood.[47]

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[43] See Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits, and Term Limits for Judges,* 35 OXFORD J LEG. STUDIES 627, 660 (2015). In Germany, for example, a minimum requirement is to be at least 40 years old. In Japan, it is said, by custom persons are not usually nominated to the Court until they are 60 (with mandatory retirement at age 70). See Tokiyasu Fujita, *The Supreme Court of Japan: Commentary on the Recent Work of Scholars in the United States*, 88 Wash. U. L. Q. 1507, 1510 (2011).l

[44] Most state courts have retirement ages between 70 and 75; the UK currently requires judges to retire at age 70; Canada's retirement age is 75; Australia's is 70.

[45] If a constitutional amendment to add a retirement age were proposed, drafters would need to decide whether to make it apply only to justices appointed thereafter, or to apply to those presently sitting at well. Canada and Australia, when they amended their constitutions to add a mandatory retirement provision, took different positions. In Canada, the amendment to provide a retirement age was made applicable to sitting justices. Const. Act 1867 § 99(2) (Can.) ("A judge of a superior court, *whether appointed before or after the coming into force of this section,* shall cease to hold office upon attaining the age of seventy-five years, or upon the coming into force of this section if at that time he has already attained that age.") (emphasis added). Australia, by contrast, decided not to apply its new constitutional retirement age to already sitting judges. Australia Const. § 72 ("Nothing in the provisions added to this section by the Constitution Alteration (Retirement of Judges) 1977 affects the continuance of a person in office as a Justice of a court under an appointment made before the commencement of those provisions.").

[46] *See, e.g.,* Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT, *supra* note 11, 467; Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in *id.,* 345.

[47] I have similar doubts about proposals that contemplate the Court sitting in panels. The Constitution's reference to "one Supreme Court" at a minimum would require a mechanism for en banc resolution of conflicts among panels. *Cf.* Tracy George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts of Appeals Image*, 58 Duke L. J. 1439 (2009) (proposing expansion of Court to 15, sitting in three panels, but hearing en banc major cases involving constitutionality of statutes, overturning precedent, or serious political disputes). These proposals have received less attention, and thus less vetting, than the 18-year term limit proposal. Panels might also have hard-to-foresee ripple effects on the functinng and perception of the Court, as might 'lottery' and 'partisan balance in

Although scholars have also argued that a retirement age could be prospectively adopted by statute,[48] given Hamilton's rather emphatic rejection of a mandatory retirement age in Federalist 79, serious constitutional objections can surely be anticipated to a statutory mandate for a retirement age under the current Constitution. Thus, I am even more doubtful that it is sensible to put political energy into trying to achieve these measures (especially the more complex term limits proposal) by statute – first, because of the risks of it being struck down, and second, because comparative experience suggests that *statutory* authority to change terms and retirement ages is at some risk of being abused, should a tyrannical party gain the Presidency and the Congress.[49] I therefore urge the Commission's attention to the following statutory approaches.

1. ***Statutory proposal: Incentivizing Retirement Through Pensions:*** Incentivizing retirements through upward adjustments to pensions could be made by statute, and, while doing so may not be as effective as a mandatory retirement age (especially for wealthy Justices, and as compared to lower court judges), it might be more achievable. The State of Arkansas uses its pension system to incentivize judges to retire by a fixed age.[50] Scholars have long suggested the possibility of financial incentives through the pension system as a way to incentivize federal judges to retire. Kevin McGuire, for example, suggested a financial incentive (a significant boost in the pension), with a higher pension for justices who retire by a certain age or at a certain number of years of service.[51] David Stras and Ryan Scott also argued for what they called a

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appointments' proposals, see Daniel Epps & Ganesh Sitaraman*, How to Save the Supreme Court,* 129 YALE L. J. 148 (2019).

[48] *See, e.g.*, Robert Kramer & Jerome A. Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures forf the Federal Judiciary: The Meaning of During Good Behavior*, 35 GEO. WASH. L.REV. 455, 470 (1967).

[49] Thus, in Hungary, Prime Minister Viktor Orban and his party enacted legislation dramatically lowering the retirement ages of sitting Constitutional Court justices and applied it to sitting judges. It took time for courts to definitively rule this to be unlawful, by which time considerable damage had been done. *See* Kim Lane Scheppele, Testimony before U.N. Commission on Security and Cooperation in Europe (March 19, 2013), https://lapa.princeton.edu/hosteddocs/hungary/Scheppele%20Testimony%20Helsinki%20Commission%2019March13.pdf ("In 2011, the Fidesz government suddenly lowered the judicial retirement age from 70 to 62, thus removing the most senior 10% of the judiciary, including 20% of the Supreme Court judges and more than half of the appeals court presidents. Both the Hungarian Constitutional Court and the European Court of Justice found that the sudden change in the judicial retirement age was illegal. The government's first reaction was to defy both courts'judgments, before finally agreeing at the end of 2012 to reinstate fired judges who wanted to return to their jobs. In the meantime, however, all of the court leadership positions were filled with new judges, so the old judges who wanted to be reinstated were returned to much less important positions. Through this move, the government was able to replace much of the top leadership of the judiciary in a single year.").

[50] Ark. Code Ann. §§ 24-8-215(c)(2)(B), (c)(3)(A).

[51] Kevin T. McGuire, *An Assessment of Tenure on the US Supreme Court*, 89 JUDICATURE 8, 15 (2005).

"golden parachute" to incentivize retirement (doubling pension benefits for retirement at a fixed age and enhancing the office of "Senior Justice").[52]

As long as an incentive, rather than a penalty, were used, Congress could constitutionally enact pension measures and put them in place immediately. If an effective financial boost were identified, this would be a considerable advantage – that Congress could enact it now, without raising constitutional questions.[53]

2. A statutory proposal: Smoothing Out Appointments Though Conditional Changes in Court Size: One of the most compelling arguments for change in Supreme Court tenure derives from the very uneven distribution of opportunities for Presidents, elected at different times and from different parties, to make appointments. As the Constitution has become more oriented to the value of equal voting and equal representation over time, the importance of having the democratic legitimacy of inputs to the Court has increased. Yet the current system makes vacancies depend on contingent, random events, and has the potential, however much it may or may not be used, for sitting justices to decide which president chooses their replacement.

Given Congress's power to change the numbers of justices on the Court, other possibilities (apart from the 18-year staggered terms idea) could be considered that are less of a departure from the present system. I urge the Commission to consider proposals to provide for

[52] David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a 'Golden Parachute*," 83 Wash. U.L.Q. 1397 (2005); *see also* Judith Resnik, *So Long -- Changing the Judicial Pension System*, LEGAL AFFAIRS (July-August 2005).

[53] It might be sensible to have some delayed implementation date or other transitional provisions to aid justices in planning and to be fair to those already past the age chosen. Justice Breyer is currently 82; Justice Thomas is currently 73.

fluctuating Court membership,[54] or a "decoupling" of appointments from vacancies,[55] by guaranteeing one, or two, presidential appointments each term, while letting the overall numbers on the Court fluctuate. Such approaches would spread out opportunities for appointment, albeit not as rigorously as the 18-year term limit proposal. A modest variation, similar to Terri Peretti's,[56] would reflect the desirability that, in each four-year Presidential term, at least one appointment to the Court be made.[57] In the last 45 years, there have been four 4-year presidential terms that had no appointments to the Court. A statute could authorize the conditional establishment of an additional seat on the Court (up to a limited total) in order to try to allow each four-year presidency to choose at least one justice. So, for example, it might provide that if by year two or three of a four-year term no vacancy in the 9-member Court had occurred, a tenth seat would be created to be filled by that Presidency. If the 10th seat were filled and a further vacancy occurred, say, during the 4th year of the same presidency, the number of authorized seats would revert to 9. If, however, no such vacancy occurred, and a new president was elected (or the sitting president was reelected), and by some specified year of that presidency no vacancy had occurred, an 11th seat would be authorized to be filled. Seats could revert down to the norm of 9 if vacancies occur, provided that the presidency at the time had had an opportunity to make one appointment. Such a mechanism could be capped (e.g. at 11) to keep the Court to a workable number.

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[54] *See especially* Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT, *supra* note 11, at 435 (guaranteeing one seat to be filled and limiting each presidential term to filling two seats); *see also* Philip D. Oliver, *Increasing the Size of the Court as a Partial but Clearly Constitutional Alternative*, in *id.* at 405 (guaranteeing two seats to be filled each presidential term). My proposal bears some resemblance to theirs; they both envision a combination of a certain number of guaranteed appointments per presidential term, coupled with a fluctuation up or down in the number of authorized seats. Oliver's proposal is more ambitious and might lead to a much larger Court, which he argued was beneficial because a larger Court would diminish a sense of entitlement to a particular seat and the outsize (in his view) reputations of the existing nine. Oliver, at 410-11, I worry that increasing the Court's size by too much would make its work much more difficult. Oliver's suggestion that the Court could simply sit in panels, *id.* at 412, while supported by some comparative experience, might require a constitutional amendment, thereby undermining its value as a statutory proposal. Another proposal, for a gradual increase in the Court's membership (to 17 or 19), Jonathan Turley, *Unpacking the Court*, 33 PERSP. ON POL. SCI. 3 (2004); see also Jonathan Turley, *Destroying the Court to Save It*, https/jonathanturley.org, would also allow expansion beyond what I think workable in the U.S. context.

[55] *See* Hemel, *supra* note 28, at 121, 136-38 (arguing for scheme in which each President makes two appointments at beginning of their term--but Justices do not take their seats until after the presidential term, to diminish the "loyalty effect"). My suggestion above is a more modest departure from current practice than Hemel's.

[56] *See* note 54, *supra*.

[57] *See also* Cramton, *supra* note 46, at 348 (stating that before 1970, "almost every president serving a four-year term received at least one appointment to the Court").

The advantages of such proposals are, first, that they could be enacted by statute. Second, they would improve on democratic inputs to the membership of the Courts (without requiring a constitutional amendment to depart from life tenure). Fluctuating proposals that do not allow the Court to grow too large could not guarantee as much regularity of democratic input as the staggered 18-year terms, but would be an improvement over the status quo (assuming the Senate behaved more cooperatively, which is a problem across proposals).[58]

D. Post-judicial service regulation of employment: Both the 18-year limit and requiring (or incentivizing) retirements would make it prudent to provide by statute for ethical limitations on former justices' activities. Time does not permit a more comprehensive treatment, but I note one model provided by article III of the German Code of Conduct for Constitutional Court Justices, concerning "Conduct after ceasing to hold office." The German Code prohibits a former Justice from becoming "involved in legal matters that were the subject of proceedings before the Federal Constitutional Court during their term of office or are closely related to such proceedings," and states that they must also "refrain from submitting expert opinions, taking on responsibilities as lawyer or counsel, and appearing in court" in relation to those matters. For a one year period, moreover, former justices are barred "from undertaking advisory activities that relate to the subject areas of their cabinet, submitting expert opinions and appearing in court." And even after the one year period, they must "still refrain from representing anyone before the Federal Constitutional Court."[59]

Some such prohibition would be an important aspect of preventing adverse influences on justices, thereby impairing their ability to act with independence while they are in office. If they are prohibited from practicing law before the Court, this would diminish incentives to try to get business through their conduct and rulings on the Bench.

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[58] I have limited my comments mostly to issues around tenure, opportunities for appointment, and length of service. The negative effects of life tenure may be accentuated by a confirmation process that is seen to operate in a markedly countermajoritarian manner. (See below Part II). As the Commission considers its recommendations, the relationships between diagnosed problems, proposed reforms, and the entire appointment process warrant attention.

[59] *See* Federal Constitutional Court, Code of Conduct for the Justices of the Federal Constitutional Court (Ger.), https://www.bundesverfassungsgericht.de/EN/Richter/Verhaltensleitlinie/Verhaltensleitlinie.html (also establishing a general norm that after ceasing to hold office, Justices will "continue to exercise restraint and confidentiality with regard to statements and conduct relating to matters of the Court").

II. Responding to Abuses of the Confirmation Process?

Part I addressed longstanding structural aspects of the selection and tenure process for Supreme Court justices that warrant attention now, with a view towards a long-term fix. Other calls for reform arise more from a felt need to respond to what are seen as abuses of the confirmation process in very recent years.[60]

As noted above, the Senate refused even to consider President Obama's nomination of Merrick Garland in March 2016, shortly after the death of Justice Scalia in February, on the ground that it was within 8 months of a presidential election and the Senate should wait and "give the people a voice" in the selection of a new member of the Court.[61] However, in the Fall of 2020, when Justice Ruth Bader Ginsburg died, the Senate rushed to confirm the President's nominee just weeks before the presidential election. The proffer of a quite novel reason not to consider the Garland nomination, combined with a complete failure to apply the reasoning to a situation in which logically it would apply a fortiori, has created widespread concern that the confirmation process was abused. Moreover, as noted above, President Trump – who won the presidency with fewer popular votes than his opponent and who lost the November 2020 election in both the popular and Electoral College vote – was able to make three appointments to the Court; President Jimmy Carter, who won a substantial popular majority in 1976, was able to make no appointments to the Court.

These results reflect the randomness of when Supreme Court vacancies arise under our current system, and the countermajoritarian aspects of the Senate as presently constituted (and operating now under quite broken norms of conduct), as well as the effects of the two-Senators

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[60] These concerns are reinforced by jurisprudential trends that seem to undermine the representative quality of our democratic institutions, as in the invalidation of Section Four of the Voting Rights Act, *Shelby County v. Holder,* 570 U.S. 529 (2013), at a time when the Republican party is pushing for legislation to suppress voting, or *Rucho v Common Cause,* 588 U.S. ___ (2019), which precluded the possibility of federal courts' addressing excessively partisan districting, and *Citizens United v. FEC*, 558 U.S. 310 (2010), limiting legislative efforts to control the role of wealth in elections. These decisions threaten the democratic institutions citizens ordinarily rely on to redress unresponsive governance. Yet structural changes designed to override particular judicial decisions also pose risks to democratic constitutionalism.

[61] https://www.kentucky.com/news/politics-government/article66499647.html.

per state rule on the Electoral College. Some of the reforms discussed in Part I could help mitigate, or overcome, the randomness problem (as well as other problems with unusually long periods of service).

Despite frustrations of the current moment, applying adverse changes (whether mandatory age limits or finite terms) to currently sitting justices would raise concerns for judicial independence and thus for the rule of law; this is especially so if done by statute, which in the United States is much easier to enact than constitutional amendment. In countries where judges learn that they are subject to relatively easy removal on account of their jurisprudence, it is much harder to sustain judicial independence and the rule of law. Both, as Justice Breyer has recently emphasized, are precious and important.[62] Expanding the Court, without removing any existing justices, might thus be considered less of a threat to judicial independence and some scholars have called for such expansion.[63] But expanding the Court simply to give one specific President the power to fill seats bears considerable risks, even when in response to abuses by the other party; it invites those in the other party to engage in similar action when they return to power; and risks turning the Court into even more of a perceived political football. While retaining life tenure (or long tenure) and salary protections help insulate individual justices from intrusions on their independence, expanding membership to benefit one party risks adverse consequences to the status of the Court itself as an institution.

Simply expanding the Court right now – which Congress has undoubted legal power to do – would itself be viewed as an attack on the institutional independence of the Court and possibly make more likely further statutory changes in the future. A strong norm has developed that the political branches do not threaten or change the Court's membership because of unhappiness with its decisions. Whether rationalizing a decision to expand the membership on the grounds of redressing an abuse of the confirmation process would serve to contain future responses is at best uncertain; whether, regardless of rationale, it would elicit "tit for tat" action

[62] *See, e.g.,* Stephen G. Breyer, Scalia Lecture, The Authority of the Court and the Perils of Politics, Harvard Law School (April 7, 2021).
[63] *See, e.g.* Michael Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 250-51 (2020) (raising the possibility of Democrats in 2021 expanding the Court by four members to "unpack" the Court in response to Republican abuse of the confirmation process and describing "reciprocal hardball" as "the only adequate remedy for Republican court packing").

further threatening the perceived independence of the court are political questions on which reasonable minds might disagree. Experience in some other countries, however, raises concern about whether, once such a process gets started, it can be contained or would spread to create conditions in which further intrusions on the Court's independence could result.[64]

The broader context and the democratic deficit of the Senate: While I think it imprudent to simply expand the Court for the purpose of enabling a single President to make several appointments (however this may appear to be a justified response to past abuse), the broader context in which Supreme Court justices are selected reinforces my inclination to support some modest changes now.

The Senate is designedly not a population-based entity. But the degree to which its structure creates the risk of countermajoritarianism has increased over time. Indeed, some scholars think it possible that, given demographic change and the composition of the Senate, it might be that no Democratic president will be able to appoint a nominee to the Supreme Court again in the future.[65] At the founding, the greatest disproportion between the largest state and the smallest state was about 12.65 to 1 (Virginia being the largest by population, Delaware being the smallest).[66] Today, according to the 2020 census, the most populous state of California had something like 68 times the population of the least populous state, Wyoming.[67] Moreover, at the founding Virginia was the only state with more than ten times the population of any other state; today, by contrast, there are ten states with populations over 10 million, and six states with

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[64] *See* Tom Gerald Daly, "'Good' Court-Packing?," paper presented at the Centre for Comparative Constitutional Studies (CCCS), Melbourne Law School (8 June 2021) (discussing experience in Argentina and Turkey and arguing that even well motivated court packing can have adverse consequences); *see also* Joshua Braver, *Court packing: An American Tradition?*, 61 B.C. L. Rev. 2747 (2020) (arguing that past changes in the size of the Court had plausible bases in factors, like need for additional circuit judges, distinct from efforts to influence the Court's decisions by controlling its membership and/or were less likely to have tit-for-tat responses than would proposals to add multiple seats all at once).

[65] *See* Klarman, *supra* note 63, at 236 ("If sparsely populated states continue to vote mostly Republican, then the thirty percent of Americans who pick seventy percent of the senators would virtually guarantee Republican control [of the Senate], which would be a legitimacy crisis of massive proportions. For example, such a Senate might never again confirm a Democratic President's nominee to the Supreme Court.").

[66] *See* https://www2.census.gov/library/publications/decennial/1790/number_of_persons/1790a-02.pdf; *see also* Vicki C. Jackson, *The Democratic Deficit of United States Federalism: Red State, Blue State, Purple?,* 46 Fed. L. Rev. 645, 650 n. 20 (2018). With special thanks to Jonathan Gould for the references and information in this and the next two footnotes.

[67] *See* https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table01.pdf.

populations under 1 million.[68] Scholars writing in the 1990s found that the minimum percentage of the population that could elect a Senate majority has been getting smaller since the 1860s;[69] 2020 Census data suggests that today, the 26 smallest states, with 17.5% of the population, could in theory elect a Senate majority.[70] And although the Senate need not have any particular partisan skew, in the last several decades it has become skewed in a Republican direction.[71]

It is an unstable situation for a party supported by a minority of the population to be able to control the Senate, frequently the Presidency, and the Supreme Court. The constitutional amending process may also be blocked by the combination of the voting rules and the partisan skew to the national demography by state. If citizens cannot look to elections, nor to the Courts, nor to the amending process, to achieve a federal government that is in broad terms responsive to democratic views, what remains are methods that should trouble all who believe in the rule of law. Thus, even if reforms will only help at the margins, I do think the time has come for trying to adjust the Supreme Court so that it may bear somewhat more of an imprint of recently elected presidents and has some greater finitude to the terms in office, while at the same time preserving the judicial independence that it has achieved. Other changes may also be needed to the ways in which the Court exercises its jurisdiction, but it will be for the best if the Court itself re-develops modes of judicial restraint suitable to its position in our constitutional democracy.

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[68] See sources cited supra notes 66 and 67.

[69] *See* FRANCES E. LEE & BRUCE I. OPPENHEIMER, SIZING UP THE SENATE THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION 11 (1999); *see also* Jackson, *Democratic Deficit*, *supra* note 66, at 650 (arguing that the composition of the Senate created a democratic deficit; based on 2016 Census Bureau projections, "the 52 Republican Senators sitting in early 2017 could be said to represent states including roughly 144 million Americans, while the 48 Democratic-caucusing Senators could, on the same basis, be said to represent a substantial majority of about 178 million").

[70] *See* U.S. Census Bureau, Table 2. Resident Population for the 50 States, The District of Columbia, and Puerto Rico: 2020 Census (2021), https://www2.census.gov/programs-surveys/decennial/2020/data/apportionment/apportionment-2020-table02.pdf. With thanks to Sam Weinstock for his help on this note.

[71] *See* Lee Drutman, *The Senate Has Always Favored Smaller States,. It just Didn't Help Republicans Until Now,* Five-Thirty Eight (July 29, 2020), https://fivethirtyeight.com/features/the-senate-has-always-favored-smaller-states-it-just-didnt-help-republicans-until-now/ (explaining how over recent decades of demographic and political change it has come to be the case – and may be the case in the future -- that "Republicans now hold a majority of Senate seats while only representing a minority of Americans"); *see also supra* note 69 (reporting Jackson's finding about the Senate in 2017).

For all these reasons, I urge the Commission to focus on modest changes that would impose some limits on Supreme Court service and that would provide somewhat more regular opportunities for Presidents to make appointments. Given the time constraints on the Commission's work, I also urge that as the Commission narrows in on particular recommendations, ample time be allowed to consider the possible need for adjustments elsewhere in the system. Finally, care should be taken to maintain the independence of the federal judiciary, especially in view of the relative lack of independence of many of our state court systems.