



Debate Brief · Supreme Court May 2021

***Resolved: Supreme Court justices shall serve terms
of no more than 18 years.***

“When the legislative and executive powers are united in the same person there can be no liberty; because apprehensions may arise that tyrannical laws may be enacted, or executed in a tyrannical manner. Again, there is no liberty if the power of judging is not separated from the legislative and executive powers.”

— Montesquieu (“MONT-uh-skew”) The Spirit of the Laws (1748)

“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....”

—Alexander Hamilton, The Federalist Papers No. 78 (1788)

“The Federal courts hold a high position in the administration of justice in the world. While individual judicial officers have sometimes been subjected to just criticism, the courts as a whole have maintained an exceedingly high standard.”

—President Calvin Coolidge, December 7, 1926, “Fourth Annual Message”

ABOUT THE COOLIDGE FOUNDATION

The Calvin Coolidge Presidential Foundation is the official foundation dedicated to preserving and promoting the legacy of America's 30th president, Calvin Coolidge, who served in office from August 1923 to March 1929. These values include civility, bipartisanship, and restraint in government, including wise budgeting. The Foundation was formed in 1960 by a group of Coolidge enthusiasts, including John Coolidge, the president's son. It maintains offices at the president's birthplace in Plymouth Notch, Vermont, and in Washington, D.C. The Foundation seeks to increase Americans' understanding of President Coolidge and the values he promoted.

BACKGROUND

Should we be able to change the structure of our judiciary from time to time? And what if the restructuring proposed advantages one party or one philosophy over the other? What if changing the structure has no effect, or the opposite intended? And which structure truly offers more justice to citizens?

That question has been under lively discussion in America since the country was founded. President Franklin Roosevelt, for example, was a progressive. When Roosevelt became president in 1933, the majority of the Justices on the Supreme Court bench—nine served at a time, then as today-- were more conservative. After the Supreme Court declared the centerpiece of his New Deal program unconstitutional, Roosevelt proposed a reform of the institution that had rejected his ideas. Roosevelt's plan allowed the president to appoint a new Supreme Court justice for every current justice over the age of 70. Under the Roosevelt proposal there could be up to 15 justices, instead of nine. Publicly, Roosevelt argued that the reform was necessary to increase court productivity. But of course there was another outcome of such a change: in cases where sitting justices were over age 70, Roosevelt's plan would have the effect of diluting individual justices' authority.

In 1936, a number of the justices on the Supreme Court bench were indeed over 70. Journalists on Roosevelt's side eagerly joined FDR's campaign, slamming the sitting justices as "Nine Old Men." Roosevelt's opponents said the reform bill was "court packing," an assault on American tradition and overly political: the new justices that Roosevelt appointed would likely be friendlier to progressive ideas and Roosevelt's political program, the New Deal. The plan in any case terrified the justices, several of whom desperately tried to make public display of their productivity to show that age did not impede them. Chief Justice Charles Evans Hughes, then in his mid-seventies, went public with the contention that more justices would even *damage* Court productivity. "There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide." Around the same time as Roosevelt's "court packing" effort the Supreme Court became somewhat friendlier to progressive laws, convenient to Roosevelt. Congress in the end rejected FDR's plan. But Roosevelt may have succeeded in his goals, for the justices' tolerance of progressive legislation increased. Some accused the justices of cowardice and spoke of the "Switch in Time that Saved Nine."¹

Today, America is once again debating the Supreme Court's structure. This time the emphasis is not on the number of justices but rather on the tenure (length of service) of our Supreme Court justices. The effect of either Roosevelt's reform or the one proposed today is likely to be the same: not only a change in structure but faster shifts in philosophy on the Bench.

¹ Leuchtenburg, William. "[When Franklin Roosevelt Clashed With the Supreme Court—and Lost](#)" Smithsonian Magazine, May 2005.

When debating this issue, it helps to go back even farther than Roosevelt, to America's beginning.

Strictly speaking, the Constitution says relatively little about the structure of the judiciary. The Constitution does NOT set the number of judges at nine. Article III, Section I of the Constitution provides the following guidance:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

Over the years, the phrase “during good behavior” has been interpreted to mean life tenure. Justices, of course, may retire, and they may be removed from the court for violating “good behavior.”² But otherwise they may serve as long as they wish. The reason for this, as founding father Alexander Hamilton argued, is to keep judicial powers as independent from political forces as possible.³ In Federalist No. 78, Hamilton wrote that “the judiciary is beyond comparison the weakest of the three departments of power” and that it must be able to “defend itself against their attacks.” Long service was in keeping with English Common Law: judges who serve longer remember more.

Lifetime appointments for Supreme Court justices, however, makes the U.S. unlike every other democracy in the world.⁴ (Among the states, only Rhode Island has life appointments for its highest court.⁵) Could it be that life tenure is not as critical a check on power as the framers thought?

In recent years, the idea of term limits has gained popularity with voters and—perhaps surprisingly—with members of both sides of the political establishment. The most commonly discussed proposal would set an 18-year limit for all new justices (i.e., it would not retroactively apply to existing justices). After a phase-in period, the net effect would be that every two years, one justice would leave and another would be appointed. As proponents put it, “Appointments would become predictable exercises, not embarrassing partisan spectacles.”⁶

Most observers agree that such a change would be Constitutional. Some argue that it would either be necessary or at least desirable to pass a Constitutional Amendment in order to

² Golde, Kalvis. “[Experts tout proposals for Supreme Court term limits](#)” SCOTUSblog.com. August 4, 2020.

³ Roosevelt, Kermit. “[Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments](#)” American Constitution Society. June 29, 2017.

⁴ Drutman, Lee. “[It's time for term limits for Supreme Court justices](#)” Vox. June 27, 2018.

⁵ Golde, Kalvis. “[Experts tout proposals for Supreme Court term limits](#)” SCOTUSblog.com. August 4, 2020.

⁶ “[Term Limits](#)” Fix the Court. Accessed April 19, 2021.

institute term limits.^{7,8} Other scholars argue that a Constitutional Amendment would not be necessary.^{9,10,11}

Today's push for judicial term limits resembles a few other topics that you will likely debate in your career. One is the debate over the Electoral College; another is whether the District of Columbia should become a 51st state and send senators to Capitol Hill like the states. In all three cases, there are objective, legitimate arguments for structural change. But all three changes also will have political impact – senators from the District of Columbia are likely to belong to the Democratic Party. That could tip the balance in Congress. When you debate, you can ask yourself: why do people want this change?

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“The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.”

—Brutus, *Anti-Federalist Papers*, March 20, 1788, “No. XV”

“A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves,” the president observed. “This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.” He acknowledged that “in exceptional cases,” some judges “retain to an advanced age full mental and physical vigor,” but quickly added, “Those not so fortunate are often unable to perceive their own infirmities.” Life tenure, he asserted, “was not intended to create a static judiciary. A constant and systematic addition of younger blood will vitalize the courts.”

—New York Times report on Franklin Delano Roosevelt
Press Conference, February 5th, 1937

⁷ Shapiro, Ilya. [“Term Limits Won’t Fix the Court: But they could help restore confidence...”](#) The Atlantic. September 22, 2020.

⁸ Marcum, Anthony. [“Supreme Court term limits would increase political tensions around justices, not ease them”](#) LegBranch.com. October 15, 2020.

⁹ [“Term Limits”](#) Fix the Court. Accessed April 19, 2021.

¹⁰ Roosevelt, Kermit. [“Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments”](#) American Constitution Society. June 29, 2017.

¹¹ Adler, Jonathan. [“An Argument Against Supreme Court Term-Limits”](#) *The Volokh Conspiracy*. October 14, 2020.

COOLIDGE CONNECTION

No formal proposal on Supreme Court term limits was ever presented to President Coolidge, so we do not know for sure what his opinion would have been—either with respect to his own time of the 1920s or with respect to today’s world of the 2020s. However, we do know that Coolidge, himself a lawyer, held a very high opinion of the importance of federal courts and of the justices who serve on them. For instance, in a 1926 address, he spoke about the “high position” that federal courts held in the “administration of justice in the world.”¹² He noted that although individual members of these courts sometimes deserved the criticism that they received, he believed that the courts overall “have maintained an exceedingly high standard.”

Coolidge believed that professional judges were likeliest to do a good job. He appointed a fellow alumnus of his college, Amherst, Harlan Fiske Stone, to the bench. Some have argued that the Stone appointment was naïve. Stone turned out to support progressive notions Coolidge himself rejected. We know for example that Coolidge believed that the Constitution did not imagine, and did not sanction, a big welfare state. To respect the framers, politicians should make sure it was the private sector or state governments that provided pensions for senior citizens. Yet it was Justice Stone, Coolidge’s old buddy, who in the 1930s told Roosevelt’s Labor Secretary Frances Perkins how to craft a government pension plan, Social Security, so that the Supreme Court would accept it as constitutional. (“The taxing power,” Stone is said to have told Perkins, was all the legislation’s authors needed to invoke). The High Court in Stone’s time did uphold Social Security as constitutional, laying the ground for the modern American welfare state.

¹² Coolidge, Calvin. “[Fourth Annual Message](#)” December 7, 1926.

KEY TERMS

United States Supreme Court – The Supreme Court of the United States (sometimes abbreviated as SCOTUS) is the highest court in the hierarchy of the United States federal judiciary. The Supreme Court has the final word on the interpretation of all laws, including the Constitution. The Supreme Court only has original jurisdiction in a handful of areas; cases mostly rise up through lower courts, such as state and district courts. Only the most important cases then make it to the Supreme Court.

Justice (*noun, as in a person*) – The Supreme Court is composed of nine justices, or judges. There is a chief justice and eight associate justices, all of whom are appointed by the president and confirmed by the Senate. They serve on the Court as long as they choose, subject only to impeachment. The number nine is not stipulated by the Constitution. The number has fluctuated over the nation's history, but it has remained nine since 1869.

Judicial Review – Deciding on cases requires that justices have to interpret what laws mean and decide how laws should be applied. The Supreme Court holds the power of judicial review. This is the power to invalidate a state or federal statute (law) for violating the Constitution.

Life Tenure or **Lifetime Appointment** – Each justice may remain on the Court until they resign, retire, die, or are removed from office.

Term limit – A legal restriction that limits the number of terms (or years) a person may serve.

Vacancy – An “open seat” that is created whenever fewer than nine justices are serving on the U.S. Supreme Court. Vacancies occur, for instance, when justices retire from service or die. When a vacancy occurs, the president appoints a new justice, and the new justice is either confirmed or rejected by the Senate.

Censure, Impeachment, Removal – The Constitution states that Justices "shall hold their Offices during good Behavior." Censure is a formal, public, condemnation of a justice for a bad behavior. A Supreme Court justice who is censured can remain on the court. Impeachment and removal are rare, and are reserved for the most serious breaches of conduct. A justice can be removed if the House of Representatives votes to impeach (with a simple majority) and the Senate holds a trial and also votes to impeach (with a two-thirds majority).

Court Packing – The practice of changing the number or composition of judges on a court in order to make the court more favorable to particular political goals. The term is most closely associated with the "court-packing plan" proposed by President Franklin D. Roosevelt (FDR) in 1937, which would have added more justices to the U.S. Supreme Court in an attempt to obtain favorable rulings on challenges that had been brought against FDR's New Deal legislation. It's important to remember that Roosevelt argued his plan was not political, but rather merely recognized the reality of the limits of age.

AFFIRMATIVE ARGUMENTS

1. Term limits would improve stability of the court by reducing the likelihood of unexpected vacancies.

Today America follows the health reports on justices with the same attention they give to say, the health of star athletes. That's because health and the life decisions of individual justices determine who stays on the bench. Under the status quo system of life tenure for Supreme Court justices, vacancies are completely unpredictable. Since there is no requirement to depart from the bench at any particular age or after any particular duration of service, some justices serve for a number of years and then retire relatively early into private life. When Justice David Souter retired from the court in 2009, he was a mere 69 years old, and was actually one of the *youngest* justices on the court. Other justices serve well into their 80s, either retiring very late in life or serving right up until they die. Justice Oliver Wendell Holmes, Jr., who served from 1902-1932, did not retire from the court until he was 90 years old! Chief Justice Stone, Coolidge's pick, was stricken at age 73 while the Court was in session—it is reported that he was reading a dissent in the case *Girouard v. United States*. Stone died shortly after in hospital.

“Although the average tenure of a Supreme Court Justice from 1789 through 1970 was **14.9 years**, for those Justices who have retired since 1970, the average tenure has jumped to **26.1 years**.

“Because of the long tenure of recent members of the Court, **there were no vacancies on the high Court from 1994 to the middle of 2005.**”

Source: Calabresi and Lindgren. “[Term Limits for the Supreme Court: Life Tenure Reconsidered](#)” *Harvard Journal of Law and Public Policy*, Vol. 29, No. 3 (2006)

The problem with relying on surprise retirements and unpredictable deaths to determine when vacancies occur is that it leads to some Presidents getting to appoint multiple justices, whereas other Presidents get to appoint few or no justices. President Harding served as president from 1921-1923 and got to appoint four justices (Taft, Sutherland, Butler, and Sanford). Coolidge served as president from 1923-1929 yet only got to appoint one justice (Harlan Stone). President Jimmy Carter served a full four-year term as president from 1977-1981 and did not get to appoint a single justice.

Term limits improve stability by making new appointments happen on a more predictable schedule. This is good for stability because it ensures that the same number of new justices must be appointed for each Presidential term. No longer would justices be able to “game the system” by delaying their retirement until a President from their preferred party is in power and able to nominate a favorable replacement.¹³

Term limits are a fair and centrist solution that could stave off less-desirable manipulations, such as court-packing (i.e., one party increasing the size of the court in a way that is favorable

¹³ Drutman, Lee. “[It's time for term limits for Supreme Court justices](#)” *Vox*. June 27, 2018.

to them). As political scientist Lee Drutman argued in 2018, when President Trump was still in office and the balance of power was in favor of Republicans:

*At a time when American institutions seem increasingly fragile, a compromise like term limits for Supreme Court justices would be a much-needed vote for long-term stability. If not, the politics of Supreme Court appointments will only get worse. If Democrats ever get back unified control of government, they might be tempted to expand the number of justices to 15, as payback for the “stolen” Merrick Garland seat. Republicans should strategically de-escalate while they can.*¹⁴

In summary, term limits would add much-needed predictability to new appointments, which would allow the judicial-nomination process to become less divisive and disruptive.¹⁵ Even if term limits does not guarantee a perfectly fair distribution of justices, it is a better system than what we have now.

2. Term limits would improve the quality of candidates we appoint to the Supreme Court.

Under the status quo, there is a strong incentive to nominate very young justices so that they can serve for many decades to come. While it is certainly possible for young justices to be extremely skilled and accomplished, it would be better if age were not a consideration at all. Term limits drastically reduce the importance of the age variable, making it more likely that the best *overall* candidate is chosen, instead of the best *young* candidate.

Legal scholar Kermit Roosevelt of the University of Pennsylvania writes about how under the life tenure system, age can get in the way of choosing the best justice:

*With respect to the Justices themselves, the current system gives presidents incentives to pick a young nominee, rather than the best qualified, to maximize the length of their influence on the Court. Older candidates, no matter their status or abilities, may be eliminated for reasons of age alone. Franklin D. Roosevelt, for example, ignored advice to appoint 70-year-old Learned Hand [a very eminent judge] in 1942, deciding instead to use his eighth nomination on 48-year-old Wiley Rutledge.*¹⁶

A system of term limits gives all justices the same amount of time to serve—18 years—thus all but eliminating distractions about age from the nomination and appointment process.

¹⁴ Drutman, Lee. [“It’s time for term limits for Supreme Court justices”](#) Vox. June 27, 2018.

¹⁵ Shapiro, Ilya. [“Term Limits Won’t Fix the Court: But they could help restore confidence...”](#) The Atlantic. September 22, 2020.

¹⁶ Roosevelt, Kermit. [“Coming to Terms with Term Limits: Fixing the Downward Spiral of Supreme Court Appointments”](#) American Constitution Society. June 29, 2017.

3. Term limits would keep the justices in touch with real life.

As the highest court in the land—which gives it the final word on some of the most important issues in society—it is critical for the justices who comprise the court to remain in touch with the people. These legal minds should not be allowed to cloister themselves in Washington DC, cut off from the real world, detached from reality. As Chief Justice Roberts said years before he joined the court, “Setting a term of, say, 15 years would ensure that federal judges would not lose all touch with reality through decades of ivory tower existence.”¹⁷ (The precise number of years that Roberts gave in his example is not as important as his underlying point, which was about the sense of connection that justices should have to American citizens.)

“Nobody should be in an unelected position for life. If the president who appoints them can only serve eight years, the person they appoint should never serve 40. That has never made sense to me; it defies that sense of public service.”

Source: Huckabee, Mike. “[Huckabee calls for term limits on U.S. Supreme Court justices](#)” *Los Angeles Times*. March 28, 2015.

As life expectancy continues to increase with medical and technological advances, the likely trend will be for justices to serve longer and longer terms. Each year that a justice spends in Washington DC carries him or her further away from the experiences of ordinary people, not closer. This is not what the framers of the constitution had in mind when they instituted life tenure.¹⁸

Under the status quo, there is also the worry about mental deterioration. Life tenure does not provide any protection against a justice working well into his or her 80s. Indeed, there is nothing to stop a justice working beyond age 90, which most people agree is a stage that invites problems due to mental decrepitude and loss of stamina. The older justices become, the more of their work is done by younger clerks and assistants. Term limits is a fix to this problem.

4. Term limits take the pressure off of Presidents and Supreme Court candidates by lowering the stakes associated with filling a vacancy.

Under the status quo, sudden vacancies create an inordinate amount of pressure on the entire system, including the President, Congress, and the candidate himself or herself. Presidents never know if or when they will get another opportunity to appoint a justice. As law scholars from Northwestern University write about the status quo, “[T]he combination of less frequent

¹⁷ Broder and Marshall. “[White House Memos Offer Opinions on Supreme Court](#)” *New York Times*. July 30, 2005.

¹⁸ Shapiro, Ilya. “[Term Limits Won’t Fix the Court: But they could help restore confidence...](#)” *The Atlantic*. September 22, 2020.

vacancies and longer tenures of office means that when vacancies do arise, there is so much at stake that confirmation battles have become much more intense.”¹⁹

Supreme Court appointments do not need to be this way. As Representative Ro Khanna said while introducing the Supreme Court Term Limits Act:

*We can't face a national crisis every time a vacancy occurs on the Supreme Court. No justice should feel the weight of an entire country on their shoulders. No president should be able to shift the ideology of our highest judicial body by mere chance.*²⁰

Term limits would be a step in the right direction. They would likely diminish the often-destructive partisan spectacles that accompany the nomination process.²¹ They would de-escalate the political fight by reducing the consequence of each confirmation.

As legal scholar Jonathan Adler puts it, “Partisans would no longer fear that a justice could serve for 30 or more years, and all would be assured that winning the White House would lead to the opportunity to make two nominations, and that a two-term President's influence on the Supreme Court would mirror that which two-term Presidents tend to have on the lower courts.”²²

“Over the last 44 years, Republicans have held the presidency for 24 years and appointed 15 justices. In contrast, Democrats have held the presidency for 20 years and appointed only 4 justices.”

Source: “[House Democrats Propose Supreme Court Term Limits](#)” The Office of Rep. Don Beyer (VA-8). September 25, 2020.

5. Term limits are supported by ordinary Americans and across both parties.

Multiple polls over the years have shown that the idea of term limits for the Supreme Court is popular among Americans. For example:

- According to a 2021 poll by Reuters, 63 percent of adults supported term or age limits for Supreme Court justices. (About 22 percent said they opposed limits.)²³
- According to a 2020 poll by Rasmussen Reports, 52 percent of likely U.S. voters believe that Supreme Court justices should be subject to term limits. (About 36 percent said they oppose term limits.)²⁴

¹⁹ Calabresi and Lindgren. “[Term Limits for the Supreme Court: Life Tenure Reconsidered](#)” Harvard Journal of Law and Public Policy, Vol. 29, No. 3 (2006)

²⁰ “[House Democrats Propose Supreme Court Term Limits, Appointments Schedule, Without Constitutional Amendment](#)” The Office of Rep. Don Beyer (VA-8). September 25, 2020.

²¹ Shapiro, Ilya. “[Term Limits Won't Fix the Court: But they could help restore confidence....](#)” The Atlantic. September 22, 2020.

²² Adler, Jonathan. “[An Argument Against Supreme Court Term-Limits](#)” *The Volokh Conspiracy*. October 14, 2020.

²³ Kahn, Chris. “[Most Americans want to end lifetime Supreme Court appointments](#)” April 18, 2021.

²⁴ “[Most Oppose 'Packing' Supreme Court But Favor Term Limits for Justices](#)” *Rasmussen Reports*. October 1, 2020.

Importantly, term limits are one of the few policy ideas in all of public discourse that enjoy bipartisan support. Roughly 66 percent of Democrats and 74 percent of Republicans support the idea of term limits for justices.²⁵ These data suggest that ordinary voters want balance on the court, and do not want to leave the composition of the court up to the chance occurrences of retirements, deaths, and political elections. Out of respect for democracy, we should take into consideration what regular citizens say they want on this issue.

²⁵ Hurley, Lawrence. [“Americans favor Supreme Court term limits: Reuters/Ipsos poll”](#) *Reuters*. July 20, 2015.

NEGATIVE ARGUMENTS

1. The judiciary is supposed to be insulated from political power, influence, and special interests. Life tenure helps to protect the court against politics.

Under a system of term limits every Presidential cycle would get to choose two Supreme Court justices. A President who wins reelection and serves two terms would get to choose a total of *four* justices. The Supreme Court would inevitably figure much more heavily into electoral politics, as parties would see elections as a new way to create ideological shifts in the court.²⁶ Far from making the court *less* political, term limits likely would make the court *more* political.²⁷

This is exactly the opposite of what the framers of the Constitution had in mind. They wisely sought to design a judiciary branch that was distanced from the legislative and executive branches. They knew that it would not be desirable for the Supreme Court to decide cases politically, “with one eye on the merits and the other eye on who may be leaving and joining the court in the next term.”²⁸

As founding father Alexander Hamilton wrote in Federalist No. 78:

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.

As Hamilton argues, life tenure is a protection against the composition of the court being changed at the whim of politicians serving in the other branches of government. By having the court turn over (i.e., change) much more slowly than the other branches of government, the court would be insulated from politics.²⁹

Under the most common term limits proposal in which one justice is replaced every two years, **“A single two-term president could pick 44% of the court.”**

Furthermore, think about how much political influence could be exercised if a party had multiple Presidents in a row. **“If two presidents of the same party served three or four consecutive terms, an overwhelming majority of the court would quickly be ideologically one-sided.”**

Source: Marcum, Anthony. [“Supreme Court term limits would increase political tensions around justices, not ease them”](#)
LegBranch.com. October 15, 2020.

²⁶ Marcum, Anthony. [“Supreme Court term limits would increase political tensions around justices, not ease them”](#)
LegBranch.com. October 15, 2020.

²⁷ Ibid.

²⁸ Cooper, Horace. [“Pro/Con: Term limits would make the Supreme Court even more political”](#) *Duluth News Tribune*. October 26, 2020.

²⁹ Ibid.

“Slowness” and independence are virtues, not vices, when it comes to the judiciary, which is uniquely tasked with preventing violations of rights and of the Constitution. It must be able to hold powerful political interests in check, or else the minority is not safe from the majority. As law professor Suzanna Sherry writes, “Our Constitution would be a useless parchment if political majorities could safely ignore it because the judiciary always shared the majority’s views.”³⁰

2. Life tenure helps to outfit the court with the most qualified people possible.

Being a Supreme Court justice is intellectually demanding. It takes years of experience with the law to become expert enough to be a good justice. Proposals that limit service to a certain number of years (e.g., 18 years) fail to appreciate how rare the talent and skill is to be a good justice. The term of 18 years may seem like a long time—especially to young people—but it is actually not very long in the context of a long, full career in the law.

By the time a person completes law school and has gained at least 20 years of experience practicing in different parts of the law and in different roles, he or she is probably approaching the age of 50 years old.

To have this person serve from the of age 50 to 68, and then be required to retire from the court is to discard a justice who in many ways is in the “prime” of his or her career.

Yes, term limits could prevent a justice from hanging on “too long,” such as into age 90 or beyond, but term limits also can get rid of judges too early. For this reason, term limits are not as good an idea as some claim.

Today Americans don’t mind old leaders and improvements in health care means senior citizens are more able. The fact that Americans recently elected President Donald Trump (age 70 at inauguration) and Joseph Biden (age 78) suggests they think old people can serve, and might therefore not object to longer service. The average life expectancy in Roosevelt’s time was around 60; now life expectancy is closer to 80.

Founding Father Alexander Hamilton believed that few people would have the knowledge, wisdom, and integrity to serve on the Supreme Court of the land. This is why he argued that those wise individuals who society has deemed up to the intellectual and moral task should be retained rather than replaced on a predetermined schedule.

Source: Cooper, Horace. “[Pro/Con: Term limits would make the Supreme Court even more political](#)” *Duluth News Tribune*. October 26, 2020.

³⁰ Suzanna Sherry, “[Should Supreme Court justices have term limits?](#)” *The Philadelphia Inquirer*. September 24, 2020.

3. Replacing a justice on the court every two years could seriously threaten doctrinal stability.

It would be difficult to go about our lives if major laws were constantly shifting and changing. It is one thing for an area of the law to experience a gradual shift that follows a slowly evolving change in public sentiment on an issue. It is an entirely different thing for the law of the land to swing back and forth every few years as different political parties are voted in and out of office. Because term limits would guarantee that each President be able to appoint a new justice every two years, they are likely to be bad for doctrinal stability.

Under a system of term limits, not only will Presidents frequently be able to appoint justices that agree with them politically, they will have a greater incentive to appoint the most extreme judges because they know that their appointees will only be able to serve for a limited amount of time. This could make the entire nomination and confirmation process more divisive, not less divisive.³¹

The legal doctrine of *stare decisis* requires judges to treat like cases alike. Over time, it ensures fairness and clarity in the law.

Chief Justice John Roberts has explained that *stare decisis* “is necessary to avoid an arbitrary discretion in the courts.” It is something that distinguishes judicial decision-making from the “political and legislative process.” However, under term limits, adherence to *stare decisis* could erode.

Source: Marcum, Anthony. “[Supreme Court term limits would increase political tensions around justices, not ease them](#)” LegBranch.com. October 15, 2020.

As Vanderbilt law professors Suzanna Sherry and Christopher Sundby explain,

*Under the current constitutionally mandated system of life tenure, the court changes slowly. Most justices serve at least 20 years and many serve 30 years or more; no new justices joined the court at all between 1994 and 2005. This longevity and stability means that doctrine changes slowly and incrementally. A constantly changing court, on the other hand, might make sudden and radical changes in doctrine.*³²

The law is like a big slow moving ship. If it turns to sharply, it capsizes. If a change in public sentiment is broad-based and lasts long enough, then the law can be changed—carefully and slowly. But the law should not be shifting constantly, reflecting every fad and fashion. Sherry and Sundby assert that “Sudden shifts based on changes in personnel disrupt settled expectations and create difficult problems of enforcement, fairness, and retroactivity.”³³ The law should be a lagging indicator—stable and predictable. It should change slowly and incrementally, not rapidly and drastically. Life terms provide this stability.

³¹ Suzanna Sherry, “[Should Supreme Court justices have term limits?](#)” The Philadelphia Inquirer. September 24, 2020.

³² Sherry, Suzanna and Christopher Sundby. “[The Risks of Supreme Court Term Limits](#)” SCOTUSblog. (2019)

³³ Suzanna Sherry, “[Should Supreme Court justices have term limits?](#)” The Philadelphia Inquirer. September 24, 2020.

4. Life tenure is in our Common Law tradition.

America has maintained the Anglo-American common law tradition, the slow ship tradition, since the founding. Under Common Law, new cases are judged by old precedent and tradition. With our laws dependent on custom and judicial precedent, the integrity of the law as a whole in America would be undermined by replacing a Supreme Court justice every two years. Such rapid turnover would no doubt produce far more turnover in the Supreme Court's judicial philosophy. If the ship of law turns too fast, it capsizes.

The internal effects of a mutable policy are still more calamitous. It poisons the blessings of liberty itself. It will be of little avail to the people, that the laws are made by men of their own choice, if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood: if they be repealed or revised before they are promulg[at]ed, or undergo such incessant changes, that no man who knows what the law is to-day, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed.

—Publius, Federalist No. 62

5. Making court turnover happen more predictably would encourage individuals to act inappropriately at the beginning and end of their tenure.

Under the status quo system of lifetime tenure, openings and departures come essentially at random. As a result, there is little to no “campaigning” to get onto the court, and nor do we generally see Supreme Court justices positioning themselves to gain professionally or financially from life after services. Under a system of term limits, however, things could very well be different.

Under term limits, we might see ambitious young lawyers and judges actively campaigning for a seat on the Supreme Court. The predictable nature of the vacancy would mean that these people could plan their self-promotion in advance. This could lead to fundraising and advertising aimed at raising their profile in the public eye. Candidates would be able to plan ahead and design logos, launch websites, and print and distribute yard signs. These campaigns could start months in advance and become like miniature Presidential elections, with stump speeches, television appearances, and the other accoutrements of electoral politics.³⁴ Such campaigning would cheapen the Supreme Court.

³⁴ Cooper, Horace. “[Pro/Con: Term limits would make the Supreme Court even more political](#)” *Duluth News Tribune*. October 26, 2020.

That is what might happen among young candidates looking to get onto the Supreme Court. Among Supreme Court justices scheduled to roll off the court, the downsides are real, too.

Under term limits, Supreme Court justices could likewise use their final months on the court as a time to set themselves up comfortably for life after public service. Justices would feel a new type of pressure to cast votes to rule favorably for industries and corporations that they would like to work with later on. With years of professional life left to give, they might seek to set up lucrative lobbying or consulting arrangements, secure seats on boards of directors, or arrange other positions of influence and power.³⁵ It is not unusual for public officials from other parts of the government who leave service to make these types of arrangements. As the website OpenSecrets.org puts it, “Dozens of former members of Congress now receive handsome compensation from corporations and special interests as they attempt to influence the very federal government in which they used to serve.”³⁶ Under term limits, the risk that these types of activities become the norm in the judiciary is simply a risk that we cannot afford to take.

“Justices who know that they will likely need another job after they retire from the court may well tailor their rulings to curry favor from potential employers.”

Source: Suzanna Sherry, “[Should Supreme Court justices have term limits?](#)” The Philadelphia Inquirer. September 24, 2020.

6. Changing structure to serve a political intention is a fool’s game. That’s because the justices that presidents pick, and the Senate confirms, don’t always turn out to rule as expected.

Coolidge is a prime example. Coolidge presumably expected Harlan Stone would be moderate and professional. In fact, Stone proved downright progressive. Those who regarded Roosevelt’s pension for seniors, Social Security, as the beginning of a giant welfare state note that it was Stone who told Roosevelt’s Labor Secretary, Frances Perkins, how to craft Social Security so that the Supreme Court would have to rate Social Security constitutional (“the taxing power,” would work, Stone told Perkins). Justice Harry A. Blackmun, nominated by Republican President Dwight Eisenhower, proved more progressive or liberal than his backers predicted.

³⁵ Cooper, Horace. “[Pro/Con: Term limits would make the Supreme Court even more political](#)” *Duluth News Tribune*. October 26, 2020.

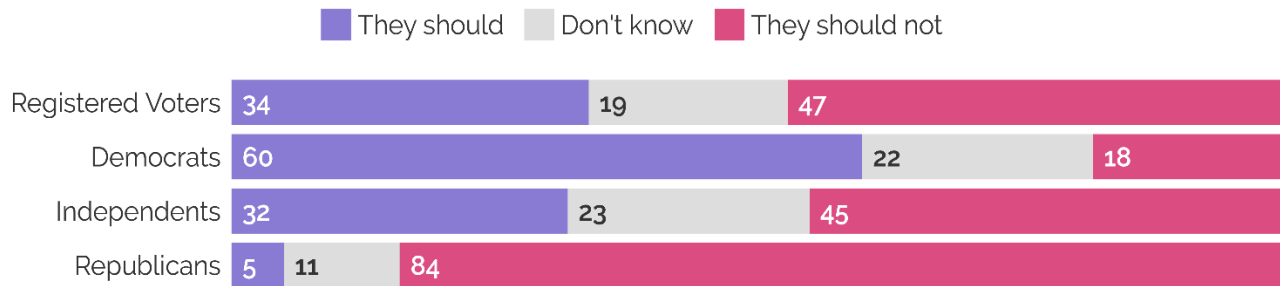
³⁶ [Former Members](#). OpenSecrets.org. Accessed April 18, 2021.

APPENDIX A. Most Americans Are Suspicious of Changes in Supreme Court Rules

The question of “court-packing” is separate from, but related to, the question of term limits. Court packing refers to the practice of increasing the number (or composition) of judges in order to make the court more favorable to particular political goals. **A political party that wishes to see its laws judged more favorably might consider having its President pack the court with sympathetic judges or introduce term limits.**

Most Voters Disagree with Increasing the Number of Supreme Court Justices

Below: Responses to the October 2020 polling question,
“If Amy Coney Barrett is confirmed before the election and Democrats go on to win the presidency and Senate, should they expand the court to include more than nine justices?”



Source: [“Poll: By 47% to 34% voters oppose court packing”](#)

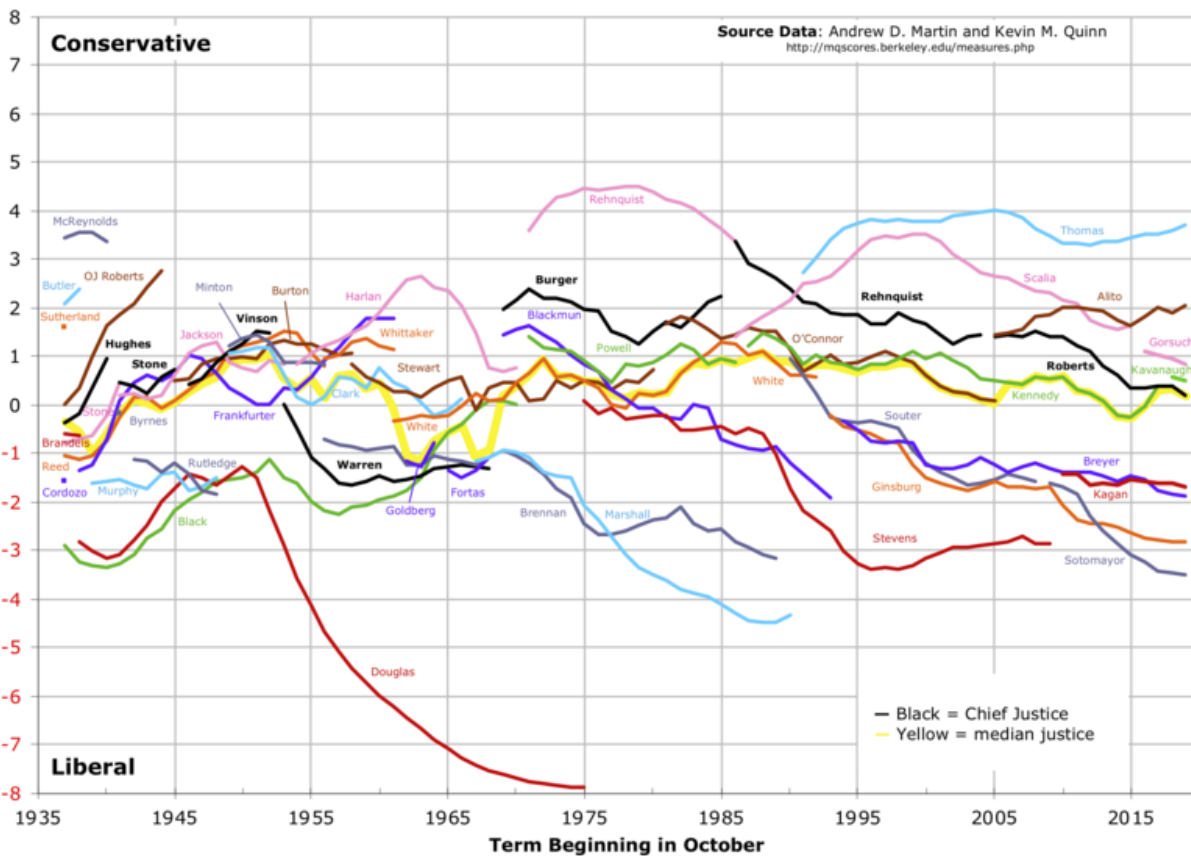
Washington Examiner / YouGov. October 4, 2020.

APPENDIX B. Ideological Leanings of the Supreme Court

Over the years, scholars have attempted to measure the ideological preferences of Supreme Court justices. By analyzing the votes and written opinions of the justices, as well as other sources of data, it is possible to construct a very rough picture of the court along a simple scale with “conservative” on one end of the vertical axis and “liberal” on the other end. This illustration can help show fluctuations in the composition of the court over time.

The black lines represent the leanings of the Chief Justices. The yellow line represents the estimated location of the median justice at any given time. The “median voter theorem” predicts that the median justice represents the important swing vote.

Estimate of Ideological Leanings of Supreme Court Justices, 1937-2020



Source: Andrew Martin and Kevin Quinn.

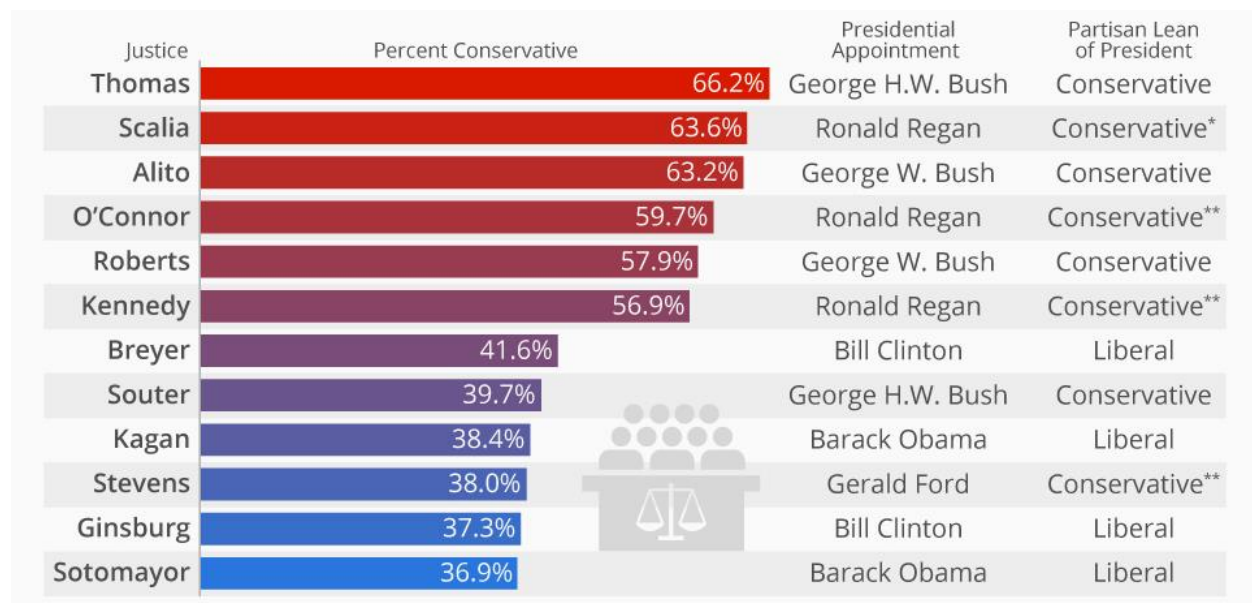
[“Ideological leanings of United States Supreme Court justices”](#) UC Berkeley (2020)

APPENDIX C. Agreement with One’s Appointing President

According to researchers, most Supreme Court justices tend to make decisions that are roughly in line with the preferences of the President who appointed them, but eventually stray to more moderate positions over time. This phenomenon has been called the “loyalty effect.” It is present on both sides of the aisle, yet is believed to be slightly stronger among justices appointed by Democratic Presidents.³⁷

How Supreme Court Justices Align With their Appointer

(Percentage of votes coded as “conservative” in each justice’s Supreme Court career, through the 2016 term)



Source: Feldman, Sarah. “[How Supreme Court Justices Align With Their Appointer](#)” Statista. July 11, 2018.

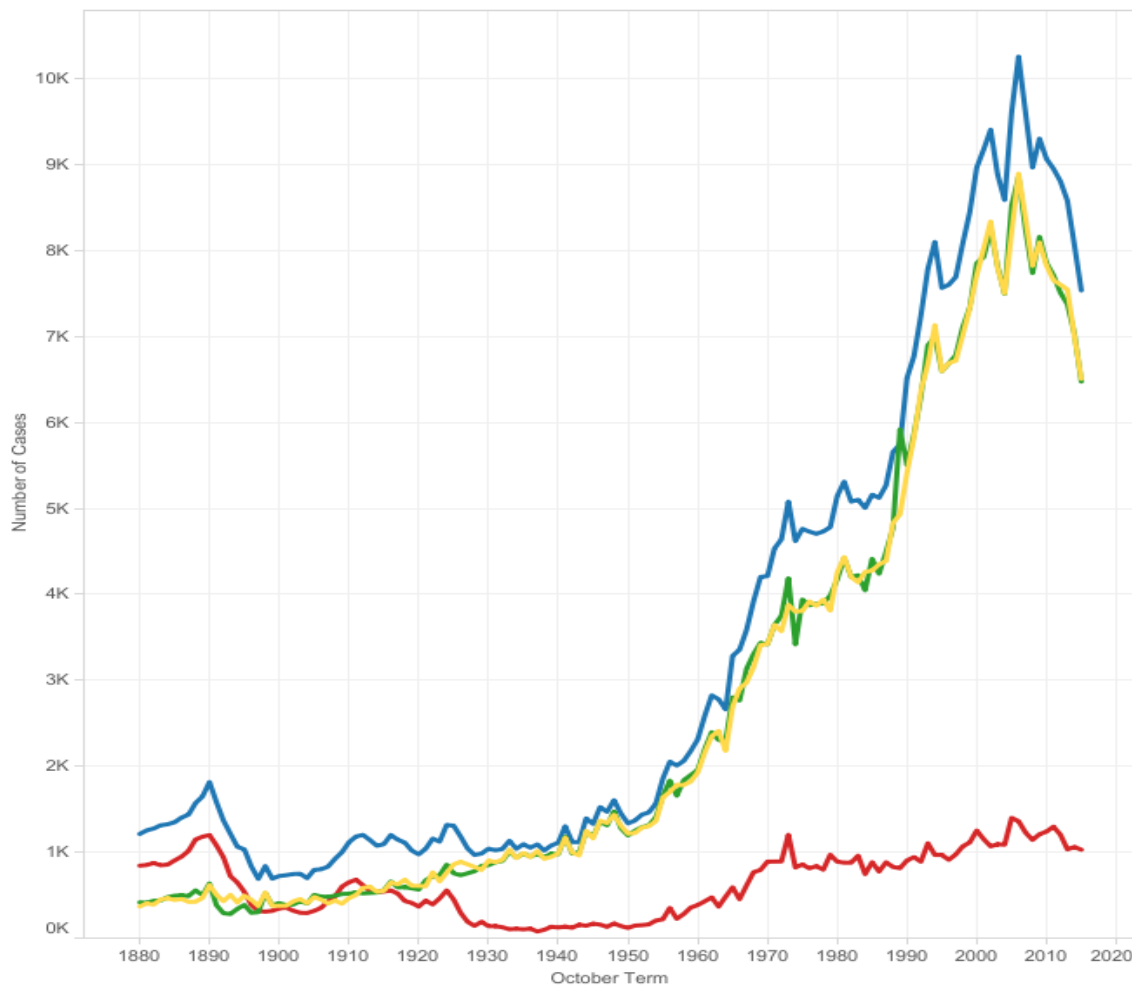
* Died, ** Retired

³⁷ Posner, Eric. “[Are Supreme Court Justices Loyal to the President Who Appoints Them?](#)” December 14, 2015.

APPENDIX D. Supreme Court Caseloads

Serving as a justice on the U.S. Supreme Court is a demanding job. The number of “applications for review” received by the court has doubled since the late 1950s. Not all of these are cases that get heard, but still, some observers worry about justices becoming overworked and overburdened. In addition to more requests, cases have also become more complex in recent decades, requiring extensive research and deep knowledge of technical areas of the law. The graph below shows how the caseload faced by the court has increased over time.

Supreme Court Caseloads, 1880-2015



Yellow: Cases Disposed, Green: Cases Filed
Red: Cases Remaining, Blue: Total Cases on Docket

Source: “[Supreme Court Caseloads, 1880-2015](#)” Federal Judicial Center (fjc.gov). Accessed April 16, 2021

APPENDIX E. Judgeship Appointments by President, 1901-2021

Since vacancies occur at unpredictable intervals, some Presidents get to appoint more judges than other presidents. Below shows the data for all President-directed judgeship appointments, including Supreme Court appointments, since 1901. (Note: The U.S. Court of Appeals for the Federal Circuit is abbreviated as USCAFC. The U.S. Court of Federal Claims, previously known as the U.S. Court of Claims, is abbreviated USCFC.)

President	Supreme Court	Regional Court of Appeals	USCAFC	USCFC	District Courts	Territorial Courts	Court of Int'l Trade	Total
T. Roosevelt	3	19	0	0	49	0	0	71
Taft	3	13	0	0	33	0	0	49
Wilson	3	20	0	0	52	0	0	75
Harding	4	6	0	0	39	0	0	49
Coolidge	1	14	0	0	51	0	2	68
Hoover	3	16	0	0	42	0	3	64
F. Roosevelt	9	52	0	0	136	3	7	207
Truman	4	27	0	0	102	3	4	140
Eisenhower	5	45	0	0	127	2	3	182
Kennedy	2	20	0	0	102	1	0	125
Johnson	2	41	0	0	125	0	8	176
Nixon	4	45	0	0	182	3	1	235
Ford	1	12	0	0	50	0	0	63
Carter	0	56	0	0	203	3	0	262
Reagan	3	78	5	18	290	2	6	402
H.W. Bush	2	37	5	2	148	2	1	197
Clinton	2	62	4	7	305	2	5	387
W. Bush	2	61	2	9	261	3	2	340
Obama	2	49	6	3	268	2	4	334
Trump	3	54	0	10	174	1	3	245

Source: "[Federal judicial appointments by president](#)" Ballotpedia. Accessed April 21, 2021.