

Designing Supreme Court Term Limits

Adam Chilton,^{*} Daniel Epps,[†] Kyle Rozema,^{††} & Maya Sen[‡]

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Abstract: Since the Founding, Supreme Court justices have enjoyed life tenure. This helps insulate the justices from political pressures, but it also means that unpredictable deaths and strategic retirements determine when vacancies on the Court arise. In order to make the appointment of justices more predictable, a number of detailed term limits proposals have been put forward in recent years by academics and policy makers. But although there appears to be increasing support for term limits in the abstract, there does not appear to be consensus on the details of how term limits regimes should be designed.

This Article explains the decisions that must be made by any term limits proposal and then empirically investigates the trade-offs associated with those choices. We specifically lay out nine issues that term limits proposals must resolve and then explain how existing proposals have addressed them. After doing so, we use data on historical control of the political branches of government, the composition of the Supreme Court, and the lifespans of federal judges to simulate how the term limits proposals would have shaped the Court if they had been adopted any time during a roughly 70 year window in recent American history. These simulations reveal that differences in the design of term limits regimes would have produced profound changes in the composition of the Court.

Our results offer several insights for designers of Supreme Court term limits regimes. First, the length of time that it can take to implement term limits proposals can vary dramatically, so consideration should be given to how to roll out any proposal. Second, there are features of term limits proposals that can produce substantial differences in the number of justice-years appointed by presidential term, and care should thus be given to ensure that plans provide ways to fill unexpected vacancies that do not create windfalls for some presidents. Third, even with term limits in place, there are likely to be many vacancies that occur when the Senate is controlled by the opposite party of the president; a procedure is thus likely needed to compel the Senate to vote on nominees put forward under any new system.

^{*} Professor of Law, University of Chicago Law School.

[†] Associate Professor of Law, Washington University in St. Louis.

^{††} Associate Professor of Law, Washington University in St. Louis.

[‡] Professor of Public Policy, Harvard Kennedy School.

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INTRODUCTION

Since the Founding, Supreme Court justices have enjoyed life tenure.¹ And although the Constitution does not specify the size of the Court,² Congress has not changed the number of seats for more than a century and a half. Vacancies are accordingly driven by a combination of random events and strategic behavior by the justices themselves. This results in individual presidents having meaningfully different impacts on the composition of the Court. For example, President Carter did not appoint a single Justice during his term in office, but President Trump was able to appoint three in his one term. These differences in influence among presidents can lead to disparate outcomes across political parties. For example, over the past half century (from 1970 to 2010), Republican presidents held the White House for 30 years (60 percent), but they made 14 out of 18 appointments (78 percent) to the Supreme Court during that time. Additionally, life tenure and the unpredictability of vacancies also make each confirmation battle a high-stakes political struggle—particularly so in recent decades as the parties have grown more polarized and as justices have tended to serve for longer periods.

Many commentators have argued that replacing life tenure with term limits for the justices would ameliorate these problems. Proponents of term limits argue that they could regularize appointments and, by doing, equalize influence across presidential terms and minimize the role of strategic retirement and unpredictable deaths in shaping the composition of the Court. Term limits also might, the proponents argue, discourage presidents from choosing particularly young nominees and make the appointments process less contentious. Although major structural reform to the Supreme Court does not appear likely in the short term, term limits are more plausible than other reforms because

¹ See *infra* Section I.A.

² See U.S. CONST. art. III, § 1; see also, e.g., Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L. J. 255, 269–74 (2017) (discussing the Constitution’s silence on the size of the Court and early historical practice).

of their popularity. They have attracted support from commentators³ and politicians⁴ across the political spectrum. And they also appear to enjoy the support of many Americans.⁵

Yet even if many support term limits in the abstract, that does not mean there is consensus on the details of how a term limits regime should be designed. In the most prominent proposals, justices would serve for 18 years with their tenures staggered so that two appointments would be made each presidential term.⁶ But even among those who endorse this version of the reform, there at least half a dozen distinct proposals which differ in important ways, such as how the transition to the new system would work.⁷ If term limits are ever adopted, policymakers should understand the implications of the various design choices made by the different proposals. Unfortunately, however, there is essentially no evidence on how much difference these design choices would make in practice. As one commentator, Professor Stephen Burbank, put it, “the work of many engaged in the debate over term limits is quite relentlessly normative and replete with unsupported causal assertions.”⁸

³ See, e.g., Maggie Jo Buchanan, *The Need for Supreme Court Term Limits*, CENTER FOR AMERICAN PROGRESS, <https://www.americanprogress.org/issues/courts/reports/2020/08/03/488518/need-supreme-court-term-limits/> (last visited Aug. 28, 2020); John Fund, *It's Time for Term Limits on the Supreme Court*, NATIONAL REVIEW (Nov. 24, 2019), <https://www.nationalreview.com/2019/11/supreme-court-term-limits-have-bipartisan-support/>.

⁴ See, e.g., David Jackson, *Perry Likes the idea of Supreme Court Term Limits*, USA TODAY, Aug. 7, 2015, <https://www.usatoday.com/story/news/politics/onpolitics/2015/08/07/perry-likes-idea-of-supreme-court-term-limits/81580084/> (Republican presidential candidate Rick Perry endorsing term limits); *infra* Section II.B.6 (term limits bill sponsored by Democratic member of Congress).

⁵ See *infra* note 43 (citing surveys).

⁶ Various versions of this proposal have appeared in, among other places, Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006); James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093 (2004); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L. 799 (1986); Roger C. Cramton & Paul D. Carrington, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 467 (Roger C. Cramton & Paul D. Carrington eds., 2006); ERWIN CHEMERINSKY, *THE CASE AGAINST THE SUPREME COURT* (2015).

⁷ In addition to these structural details, there are important legal questions that need to be worked out, such as whether change would require a constitutional amendment or could be accomplished through an ordinary statute. We discuss this question briefly in Part I, but in this Article we largely focus on policy rather than legal considerations.

⁸ Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1513 (2006).

This Article explains the decisions that must be made by any term limits proposal and then empirically investigates the trade-offs associated with those choices. We specifically compare and analyze the various proposals to understand the implications of their distinct design choices. We are able to make that comparison by combining a detailed theoretical framework with a series of empirical simulations to understand how the proposals might play out in practice. The results of those simulations enable us to identify meaningful differences among proposals, offer concrete guidance to policymakers, and advance the academic discussion.

We begin by outlining the key design decisions that any term limits proposal must make. These include obvious choices like the length of the term, when appointments will be made, and whether “legacy” justices already serving at the time of a reform’s enactment would be subject to the term limit. But these decisions also include other choices such as whether to address the possibility of Senate inaction on a president’s nominee and the role justices would serve after their term expires. We then describe the design decisions that prominent existing proposals have made and how those proposals compare to each other. After doing so, we describe how these design decisions could affect the composition of the Supreme Court in five distinct ways: (1) changing who gets to appoint the justices and how long they serve; (2) impacting the ideological composition of the Court; (3) delaying or hasten the transition from the current system of life tenure to one of term limits; (4) altering the incentives of key actors in the appointments process; and (5) reshaping the profile of nominees.

To assess how existing proposals fare along these five dimensions, we simulate how the term limits proposals would have shaped the Court if they had been adopted any time during a roughly 70 year window in recent American history.⁹ The simulations use data on the historical occupants of the White House, the Supreme Court, the Senate, and the lifespans of federal judges. We then simulate how existing proposals would have created and filled seats on the Court while varying when the plan was adopted and when unexpected vacancies occur. These simulations enable us to make comparative assessments of the drawbacks and upsides of prominent existing proposals. By doing so, our results reveal that the design choices made by term limits proposals can produce profound differences in the composition of the Supreme Court.

There are several insights that emerge from our results that should inform any term limits reform, but there are three that are particularly worth high-

⁹ Our simulations specifically assess would have happened if these proposals had been in adopted in any year between 1937 and 2010. For an explanation of why we begin our simulations in 1937, see *infra* Section I.B.

lighting.. First, the length of time that it can take to implement term limits proposals can vary dramatically, so policies that speed up the transition process should be strongly considered. Second, there are features of term limits proposals that can produce substantial differences in the number of justice-years appointed by presidential term, and care should thus be given to ensure that plans provide ways to fill unexpected vacancies that do not create windfalls for some presidents. Third, even with term limits in place, there are likely to be many vacancies that occur when the Senate is controlled by the opposite party of the president; a procedure is thus likely needed to compel the Senate to vote on nominees put forward under any new system.

By exploring how the design of term limits proposals would affect the composition of the Supreme Court, our research contributes to a small empirical literature assessing how court reforms would affect the structure and functioning of the judiciary.¹⁰ This Article builds on existing research because, instead of treating the decision to adopt term limits as binary, we offer a comprehensive empirical account of how the features of term limit regimes could impact the composition of the Supreme Court. And in addition to our empirical analysis, we also provide a framework we develop a framework for comparing

¹⁰ Our research is most related to two recent articles. First, Christopher Sundby and Suzanna Sherry estimate what the support would be for upholding *Roe v. Wade* if 18-year term limits had been in place since 1973. Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade's Whiplash*, 98 TEX. L. REV. 121 (2019). After conducting a series of simulations, they conclude that the impact of term limits on upholding *Roe* largely depends on whether the justices appointed under this system would care more about ideological alignment with their appointing president than commitment to existing president. Second, Michael Bailey and Albert Yoon use a theoretical model to assess the effect of politically motivated retirements on the responsiveness of the Supreme Court. Michael A. Bailey & Albert Yoon, *'While There's a Breath in My Body': The Systemic Effects of Politically Motivated Retirement from the Supreme Court*, 23 J. THEORETICAL POLS. 293 (2011). In a series of simulations, they find that strategic retirements have limited influence on the responsiveness of the Supreme Court largely because they are symmetrical: for every liberal justice that retires early for political reasons, on average there is a conservative justice that does so as well. They also use simulations to compare the way strategic retirements occur under the status quo of life tenure to what would occur with 18-year term limits, and they find that term limits would increase the responsiveness of the Court to electoral outcomes, decrease the age of the justices on the Court, and increase the turnover of justices. In a series of simulations, they find that strategic retirements have limited influence on the responsiveness of the Supreme Court largely because they are symmetrical: for every liberal justice that retires early for political reasons, on average there is a conservative justice that does so as well. They also use simulations to compare the way strategic retirements occur under the status quo of life tenure to what would occur with 18-year term limits, and they find that term limits would increase the responsiveness of the Court to electoral outcomes, decrease the age of the justices on the Court, and increase the turnover of justices.

the design decisions that must be addressed by a term limits regime that should help to guide policymakers crafting their own proposals.

Before continuing, we stress three caveats about our project. First, our goal is not to make a comprehensive case for Supreme Court term limits in general or any specific term limits plan in particular. There are many arguments for and against term limits, and we do not attempt to fully resolve these competing claims. Instead, the goal of this project is to provide guidance on the impact that different term limits reforms would have if one were to be implemented. Second, there are a number ways to reform the Supreme Court other than term limits that have recently been proposed (such as adding additional justices¹¹ or limiting the power of the Court¹²), but we do not attempt to offer any evidence relevant to the choice between term limits and these alternative reforms. Finally, implementing Supreme Court term limits would be a profound change to an institution that has evolved slowly over time. It could thus change the American political and legal landscape in ways that go beyond the direct changes to the composition of the Court that we explore in this project.

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

Part II sets forth a framework that will enable comparisons between different term limits proposals. It first documents nine design decisions that any reform proposal must make. It then summarizes a number of different term limits proposals and discusses how they address a number of these design decisions. It then outlines five dimensions along which these design decisions could impact the composition of the Supreme Court.

Part III assesses how the design decisions made by these proposals would impact the composition of the Court. To do so, it first describes the simulations and the assumptions made in them. After explaining our methods, we present results documenting how different proposals fare along the five key trade-offs we identify in Part II.

Part IV then offers implications from our analyses for designers of Supreme Court term limits policies. Our key findings concern three key design decisions of a potential reform: how it handles the transition period, how it addresses unexpected vacancies, and whether it includes provisions dealing with a Senate's refusal to act on a president's nominees.

¹¹ See, e.g., Michael J. Klarman, *Foreword: The Degradation of American Democracy—And the Court*, 134 HARV. L. REV. 1, 246–53 (2020) (arguing that Democrats should add seats to the Court to retaliate for norm-breaking behavior by Republicans and to entrench democracy).

¹² See, e.g., Ryan Doerfler & Samuel Moyn, *Democratizing the Supreme Court*, __ CALIF. L. REV. __ (forthcoming 20__) (discussing various “disempowering” reforms to the Supreme Court).

Finally, we conclude by describing several considerations that are outside the scope of our analysis. We also note that any proposal is likely to create winners and losers at the time that it is implemented. As a result, no matter how well a term limits proposal is designed, it may face stiff political opposition that makes it difficult, if not impossible, to pass. That said, our results reveal that it is possible to design term limits systems in ways that ensure the composition of the Court will evolve in predictable and stable ways—which hopefully removes at least some objections to their adoption.

I. THE CASE FOR TERM LIMITS

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

A. *Arguments Supporting Term Limits*

The Constitution never uses the phrase “life tenure.” Instead, it provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”¹³ Nonetheless, this provision has been read as meaning that judges and justices serve for life unless they are impeached by the House of Representatives and convicted by a two-thirds vote in favor of removal by the Senate.¹⁴ This reading is not beyond debate,¹⁵ but it has been consistently followed since the founding of the United States.¹⁶

¹³ U.S. CONST. ART. III, § 1.

¹⁴ See, e.g., Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 GEO. L. J. 965, 988 (2007) (describing the “traditional understanding” under which “an Article III judge can be involuntarily removed from office only by the constitutionally specified mechanisms of impeachment”).

¹⁵ The leading argument that “good behaviour” does not mean “life tenure” is found in Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L.J. 72 (2006). Even those who are not persuaded acknowledge that the meaning of the Good Behavior Clause is not crystal clear. Martin Redish, in his response to Prakash and Smith in which he defends the traditional view, suggests that this clause “could well be the most mysterious provision in the United States Constitution.” Martin H. Redish, *Response: Good Behavior, Judicial Independence, and the Foundations of American Constitutionalism*, 116 YALE L.J. 139, 139 (2006).

¹⁶ See, e.g., Calabresi & Lindgren, *supra* note 6, at 777 (“Life tenure for Supreme Court Justices has been a part of our Constitution since 1789, when the Framers created one Supreme Court and provided that its members ‘shall hold their Offices during good Behaviour.’”); Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 69 (1989) (“The good behavior clause meant to guarantee that federal judges receive life

Why grant judges life tenure—especially given that holders of all other federal constitutional offices serve for fixed and limited terms?¹⁷ The basic argument in favor of life tenure is that it is supposed to guarantee judicial independence. One complaint that led to the American Revolution was that colonial judges, unlike judges in England, were not sufficiently independent because they served at the pleasure of the crown.¹⁸ As the Declaration of Independence states, King George had “made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.”¹⁹

The Constitution’s solution was to guarantee independence by granting tenure during “good behaviour,” as well as to provide that judicial compensation could not be reduced during a judge’s “Continuance in office.”²⁰ Defending the newly drafted Constitution, Alexander Hamilton wrote that good-behavior tenure was “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”²¹ In Hamilton’s view, “nothing can contribute so much to [the judiciary’s] firmness and independence as permanency in office,” making that guarantee “an indispensable ingredient in its constitution.”²²

Even before the Constitution became law, critics of life tenure emerged. Anti-Federalists attacked the Good Behavior Clause on the ground that it made the judiciary *too* independent.²³ Brutus, for example, stressed that judges

tenure”); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a Golden Parachute*, 83 WASH. U. L. Q. 1397, 1405 (2005) (“Records from the founding era in America confirm that Article III, Section 1 granted life tenure for well-behaved judges.”).

¹⁷ The President and Vice President serve for terms of four years. U.S. CONST. art. II, § 1. After the 22nd Amendment, no President may serve for more than two terms. *Id.* amend. XXII, § 1. Senators serve for terms of six years, *id.* art. I, § 3, and Representatives serve for two years, *id.* art. I, § 2. The Constitution imposes no term limits (here, used to mean limits on the number of terms that someone can serve) on federal legislative offices, and the Supreme Court has struck down state efforts to impose term limits on those offices. *See* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

¹⁸ *See* Jack N. Rakove, *The Original Justifications for Judicial Independence*, 95 GEO. L. J. 1061, 1064 (2006) (noting that “colonial judges still served at the pleasure of the crown, not during good behavior” a fact “that led Americans to believe that they were being treated as second-class subjects”).

¹⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁰ U.S. CONST. ART. III, § 1.

²¹ THE FEDERALIST NO. 78.

²² *Id.*

²³ *See, e.g.,* Nelson Lund, *Judicial Independence, Judicial Virtue, and the Political Economy of the Constitution*, 35 HARV. J.L. & PUB. POL’Y 47, 48 (2012) (“Some Anti-Federalists objected that the power of judicial review, together with life tenure, could lead to profound judicial usurpations of power.”).

would be “rendered totally independent, both of the people and the legislature, both with respect to their offices and salaries,” which would provide no sanction for “erroneous adjudications.”²⁴ The skepticism did not end when the Constitution was ratified. Proposals to replace life tenure for federal judges with term limits have been introduced in Congress at various points in American history starting in the early nineteenth century.²⁵

Supreme Court term limits attracted renewed interest in the mid-2000s, when a number of proposals for staggered 18-year terms emerged.²⁶ Although such a reform had first been proposed in the 1980s by Philip Oliver,²⁷ it may have become particularly attractive given the circumstances two decades later: between 1994 and 2005, there were no vacancies on the Supreme Court, the second longest period of continuous membership in American history.²⁸ Reformers noted that Supreme Court justices in recent decades had been staying on the Court longer as life expectancies had increased.²⁹ As Calabresi and Lindgren argued, “[t]his trend has led to significantly less frequent vacancies on the Court, which reduces the efficacy of the democratic check that the appointment process provides on the Court’s membership.”³⁰

Moreover, the timing of Justices’ deaths and retirements can lead to a Court in which one party or the other’s nominees are disproportionately represented in light of their electoral success. For instance, as critics of the current system of life tenure like Erwin Chemerinsky have observed, currently “a president’s ability to select justices is based on the fortuity of when vacancies occur.”³¹ The problem with this state of affairs “is not one of fairness to presidential administrations or political parties” but rather “lies in its unfairness to the voters who elect a given president to a given term.”³² This might be less of a

²⁴ Brutus XI, N.Y. J., Jan. 31, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 417 (Herbert J. Storing ed., 1981).

²⁵ See Michael J. Mazza, *A New Look at the Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 142–45 (2003).

²⁶ See Calabresi & Lindgren, *supra* note 6; Cramton & Carrington, *supra* note 6; DiTullio & Schochet, *supra* note 6.

²⁷ See Oliver, *supra* note 6.

²⁸ See Michael Comiskey, *The Supreme Court Appointment Process: Lessons from Filling the Rehnquist and O’Connor Vacancies*, 41 PS: POL. SCI. & POLS. 355, 355 (2008).

²⁹ See, e.g., CHEMERINSKY, *supra* note 6, at 310; Calabresi & Lindgren, *supra* note 6, at 770–71; Stephen L. Carter, *The Supreme Court Needs Term Limits*, BLOOMBERG.COM (Oct. 6, 2018), <https://www.bloomberg.com/opinion/articles/2018-10-06/kavanaugh-confirmation-supreme-court-needs-term-limits>.

³⁰ Calabresi & Lindgren, *supra* note 6, at 771.

³¹ CHEMERINSKY, *supra* note 6, at 311.

³² DiTullio & Schochet, *supra* note 6, at 1117.

problem if Supreme Court Justices' ideologies did not closely track the partisan affiliation of the appointing president, but there is overwhelming evidence that it does.³³ What this means in practice is that the ideological composition of the Court only bears an indirect relationship to the outcomes of national elections. Term limits alone would not solve this problem. But terms of the appropriate length combined with staggering designed to equalize each presidential term's impact on the Supreme Court could alleviate this problem.

In addition to these primary arguments, reformers have raised a number of other concerns about life tenure. First, reformers argue that life tenure has led to justices staying on the Court too long into old age, when they have started to become mentally incapacitated.³⁴ Second, reformers argue that life tenure incentivizes presidents to choose younger appointees to maximize their impact on the Court.³⁵ Third, reformers argue that life tenure encourages strategic behavior by justices seeking to time their retirements to enable an ideologically friendly president to pick their replacement.³⁶ Fourth, reformers argue that life tenure makes the composition of the Court's membership turn on random and unpredictable events, such as deaths and health-related retirements.³⁷ Fifth, reformers argue that life tenure leads to longer terms and therefore fewer vacancies, which means that political battles over the vacancies that do arise are particularly contentious.³⁸ Finally, some reformers have even argued that life tenure and the resulting long tenures make Supreme Court justices particularly hubristic,³⁹ which may in turn alter their decisionmaking.

Given these concerns with life tenure, reformers have put forward a number of term limits proposals that they argue would address these concerns. The most common version of these term limits call for staggered 18-year terms. Under these plans, each president would get two appointments per term, regularizing the appointments process and reducing the role of random events. Eighteen-year terms would prevent justices from sitting until very old age and remove most advantages for presidents to appoint young nominees. And because each president would be entitled to two appointments per term, the political stakes over each appointment might be reduced. Eighteen-year

³³ Citations to be added.

³⁴ See Calabresi & Lindgren, *supra* note 6, at 815–18; Cramton & Carrington, *supra* note 6, at 468; see also David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000). Gregg Easterbrook, *Geritol Justice: Is the Supreme Court Senile?*, THE NEW REPUBLIC (Aug. 19, 1991), at 18.

³⁵ See DiTullio & Schochet, *supra* note 6, at 1110–16.

³⁶ See *id.* at 1101–10.

³⁷ See *id.* at 1116–19.

³⁸ See, e.g., Buchanan, *supra* note 3; Cramton & Carrington, *supra* note 6, at 468.

³⁹ See, e.g., Cramton & Carrington, *supra* note 6, at 468–69.

terms would also encourage more regular turnover, bringing fresh perspectives to the Court.⁴⁰

It is worth noting, however, that life tenure does have defenders in the academy.⁴¹ Others argue that there are problems with the current system but favor different reforms.⁴² But many seem to find the arguments in favor of term limits persuasive. Moreover, recent surveys have found between 60 and 77 percent of Americans agreeing with the notion that Supreme Court justices should serve for fixed or limited terms instead of life.⁴³

The odds that term limits will be enacted in the short to medium term is difficult to assess. During the recent presidential election, Democrats warmed to the possibility of major Court reform as potential retaliation for what they perceived as norm-breaking by Republicans in the nominations process. In the leadup to the 2020 Democratic presidential primary, candidate Pete Buttigieg made Supreme Court reform his top priority,⁴⁴ and other candidates endorsed various significant reforms.⁴⁵ Although Joe Biden, the eventual Democratic

⁴⁰ See CHEMERINSKY, *supra* note 6, at 311.

⁴¹ See, e.g., Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407; Stras & Scott, *supra* note 16; 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).

⁴² See Doerfler & Moyn, *supra* note 12; Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 173–74 (2019).

⁴³ See *New Nationwide Marquette Law School Poll Finds Confidence in U.S. Supreme Court Overall, Though More Pronounced Among Conservatives*, MARQUETTE UNIVERSITY (Oct. 21, 2019), <https://www.marquette.edu/news-center/2019/new-nationwide-mu-law-school-poll-finds-confidence-in-us-supreme-court-overall.php> (noting that 34% of respondents strongly favor and 38 percent favor requiring Supreme Court justices to “serve a fixed term on the Court rather than serving life terms”); Adam Rosenblatt, *Agenda of Key Findings*, FIX THE COURT 3 (May 2020), <https://fixthecourt.com/wp-content/uploads/2020/06/PSB-May-2020-key-findings-TL.pdf> (finding that 77 percent of respondents supported “restrictions on length of service for U.S. Supreme Court justices (for example, setting a retirement age or capping total years of service)”); Lee Epstein et al., *Public Response to Proposals to Reform the Supreme Court* 2–3 (Oct. 2020) (finding 60% support among survey respondents for “[h]av[ing] justices serve a fixed term on the Supreme Court—like six or eight years—rather than serving life terms”).

⁴⁴ See Josh Lederman, *Inside Pete Buttigieg’s Plan to Overhaul the Supreme Court*, NBC NEWS (Jun. 3, 2019), <https://www.nbcnews.com/politics/2020-election/inside-pete-buttigieg-s-plan-overhaul-supreme-court-n1012491>. Buttigieg’s proposal was largely based on a proposal outlined in Epps & Sitaraman, *supra* note 42.

⁴⁵ Senator Bernie Sanders indicated support for “if not term limits, then rotating judges to the appeals court as well.” Gregory Krieg, *Bernie Sanders Floats Modified Term Limits for Supreme Court Justices*, CNN (Apr. 2, 2019), <https://www.cnn.com/2019/04/01/politics/bernie-sanders-supreme-court/index.html>. Beto O’Rourke endorsed 18-year term limits. See Caitlin Huey-Burns, *Beto O’Rourke Wants Term Limits for Supreme Court Justices*, CBS NEWS (Jun. 5, 2019), <https://www.cbsnews.com/news/beto-orourke-interview-orourke-talks->

nominee and now President-Elect, seemed initially unenthused about major changes,⁴⁶ the Democratic Party Platform ultimately included a call for “structural court reforms,”⁴⁷ and Biden promised to create a bipartisan commission that would propose Court reforms.⁴⁸ That Republicans appear poised to maintain control of the Senate,⁴⁹ however, seems to end the prospects of any serious reform. Nonetheless, term limits are perhaps the only major reform that has attracted support across the political spectrum, and recently prominent conservative legal thinkers have endorsed them or at least expressed some openness to them.⁵⁰ Even if it is hard to imagine any Supreme Court reform being implemented in the near term given the current partisan configuration, term limits seem like the only reform that might obtain bipartisan support.

B. Trends Supporting Term Limits

The case for adopting term limits is motivated in part by trends in the appointment and length of service of justices on the Supreme Court. To illustrate

with-cbsn-elaine-quijano-voting-rights-supreme-court-today-2019-06-05/. So did Andrew Yang. See Andrew Yang, *18-Year Term Limit for Supreme Court Justices*, YANG2020—ANDREW YANG FOR PRESIDENT, <https://www.yang2020.com/policies/scotustermLimits/> (last visited Aug. 28, 2020).

⁴⁶ See, e.g., Alex Swoyer, *Joe Biden Blasts Democrats Over Supreme Court Packing Plan at Debate*, THE WASHINGTON TIMES (Oct. 15, 2019), <https://www.washington-times.com/news/2019/oct/15/joe-biden-dismisses-supreme-court-packing-debate/>.

⁴⁷ 2020 Democratic Party Platform, DEMOCRATIC NATIONAL CONVENTION 58 (Jul. 27, 2020).

⁴⁸ See Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html.

⁴⁹ Control of the Senate will not be clear until early January, when two runoff elections in Georgia will occur. See Carl Hulse, *Democrats Work to Defy History in Georgia Runoffs That Have Favored G.O.P.*, N.Y. TIMES (Nov. 14, 2020), <https://www.nytimes.com/2020/11/14/us/politics/georgia-runoffs-senate-control.html>. Even if Democrats win both races, however, they would have only the narrowest of majorities: 50-50, with Vice President Kamala Harris casting the deciding vote. One Democratic Senator, Joe Manchin, has already said he opposes Court expansion—seemingly dooming that reform. Veronica Stracqualursi, *Centrist Democrat Says He Won't Back Expanding Supreme Court*, CNN (Nov. 10, 2020), <https://www.cnn.com/2020/11/10/politics/joe-manchin-supreme-court-packing-cnntv/index.html>.

⁵⁰ Will Baude, *One Cheer for Supreme Court Term Limits*, REASON.COM (Oct. 26, 2020), <https://reason.com/volokh/2020/10/26/one-cheer-for-supreme-court-term-limits/>; Steven G. Calabresi, *End the Poisonous Process of Picking Supreme Court Justices*, N.Y. TIMES (Sep. 22, 2020), <https://www.nytimes.com/2020/09/22/opinion/ginsburg-supreme-court-confirmation.html>. See also Ilya Shapiro, *Term Limits Won't Fix the Court*, THE ATLANTIC (Sep. 22, 2020), <https://www.theatlantic.com/ideas/archive/2020/09/term-limits-wont-fix-court/616402/>.

these trends, and for our the simulations reported in Part III, we use data from the Federal Judicial Center for all biographical data on judges, including the identifying terms served by justices and those justices age and lifespan.⁵¹ We also use data on the political party controlling the White House and the Senate in each year from Wikipedia.

For both this exercise and our simulations, we use 1937 as the starting point of our analysis. This is to account for the reality that patterns of service on the Supreme Court have evolved dramatically over time. For instance, one of the inaugural justices on the Supreme Court, John Rutledge, left the Supreme Court after just a year to serve as Chief Justice of the South Carolina Court of Common Pleas and Sessions.⁵² In another example, in 1812, Joseph Story was appointed to the Court at just 32 years old—a record that seems unlikely to ever be broken.⁵³ We thus elected to focus on more recent patterns in service on the Court. We decided to specifically start our analysis in 1937 as because it is when President Roosevelt pushed his ultimately unsuccessful court-packing plan,⁵⁴ and it is a year that many legal experts consider the beginning of the modern era at the Supreme Court.⁵⁵ That said, we recognize that this starting point is admittedly somewhat arbitrary.

To begin, we examine differences in the number of justices appointed to the Supreme Court across presidential terms. To do so, Figure 1 reports the number of justices appointed during each four-year presidential term from 1937 through 2020. For this figure, the x-axis breaks terms into four-year periods, even if two presidents held office during that term. For example, although Lyndon Johnson served as president for the latter part of the term for which John F. Kennedy was elected in 1960, we group 1961 to 1964 as a single

⁵¹ *Biographical Directory of Article III Federal Judges, 1789–Present*, FEDERAL JUDICIAL CENTER, <https://www.fjc.gov/history/judges> (last visited Nov. 9, 2020).

⁵² Rutledge later returned to the Supreme Court to serve as Chief Justice for a mere 138 days under a recess appointment before being rejected by the Senate. *See Rutledge, John*, FED. JUDICIAL CTR., HISTORY OF THE FEDERAL JUDICIARY, <https://www.fjc.gov/history/judges/rutledge-john> (last visited Nov. 9, 2020).

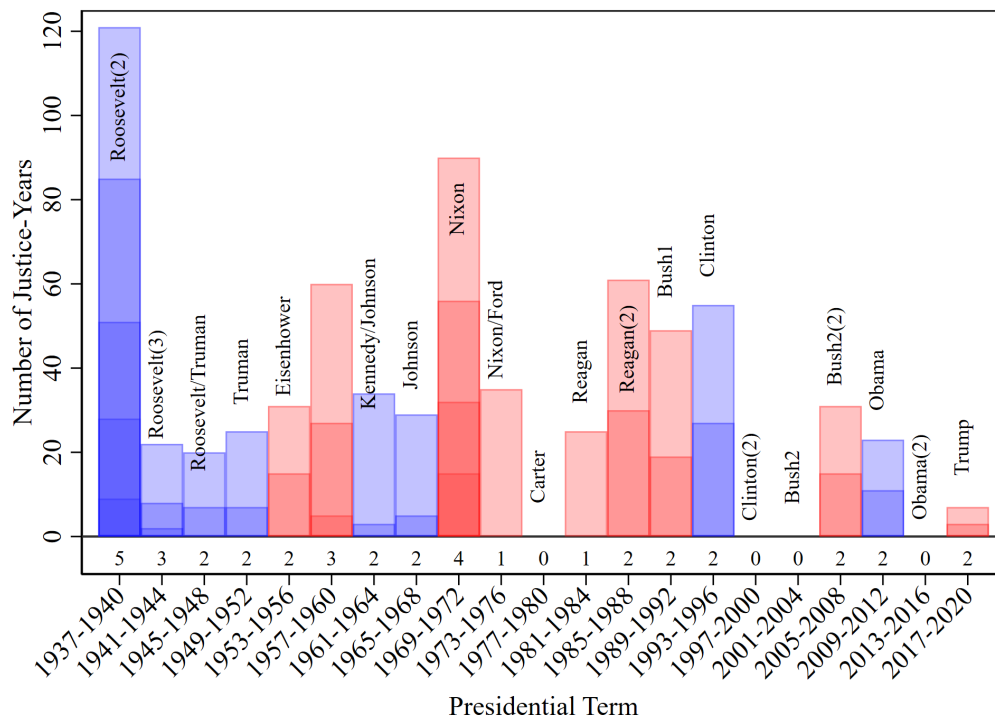
⁵³ *See Story, Joseph*, FED. JUDICIAL CTR., HISTORY OF THE FEDERAL JUDICIARY, <https://www.fjc.gov/history/judges/story-joseph> (last visited Nov. 9, 2020).

⁵⁴ For detailed examinations of this episode, see JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* (2010); BURT SOLOMON, *FDR V. THE CONSTITUTION: THE COURT-PACKING FIGHT AND THE TRIUMPH OF DEMOCRACY* (2008).

⁵⁵ The year 1937 has been previously described as the beginning of the “modern era” of the Supreme Court because it was then that the Supreme Court seemed to acquiesce to the constitutionality of President Roosevelt’s New Deal initiatives, thus ushering in today’s regulatory state. *See* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 40 (1991) (“All of us live in the modern era that begins with the Supreme Court’s ‘switch in time’ in 1937, in which an activist, regulatory state is finally accepted as an unchallengeable constitutional reality.”).

term. The numbers directly above the x-axis list the total number of justices appointed in each term.

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



During the 21 presidential terms between 1937 and 2020, a total of 39 justices were appointed to the Supreme Court. Or, on average, one justice was appointed every 26 months, which translates to an average of 1.8 justices appointed each four-year presidential term. However, there is considerable variation in the number of justices appointed by presidential terms, from 0 appointments being made in four terms—Carter’s only term, Clinton’s second term, George W. Bush’s first term, and Obama’s second term—to 5 appointments made in Roosevelt’s second term.

Comparing the number of appointments from each presidential term is one way to gauge the distribution of influence on the Court among different presidents, but it ignores differences in the length that justices serve. Another measure of representation is *justice-years*. This measure counts the total number of years served by justices for each president. This measurement accounts for the fact that not all appointments are equal in terms of influence. Because a Justice who serves for a particularly long period can influence the law for much longer after the president appointing them leaves office, an appointing

president might consider them more valuable than one who serves for only a short period.

Figure 1 also reports the number of justice-years appointed by each presidential term. In the figure, the different shading represents the justice-years by the different justices appointed. In total, the 39 justices appointed during these 21 presidential terms have served for a combined 718 justice-years. Or, on average, each presidential term has made appointments lasting 34 justice-years. As with appointments generally, however, there is also considerable variation in the justice-years by presidential term. For example, the four justices appointed in Roosevelt's second term served for a combined 121 years.

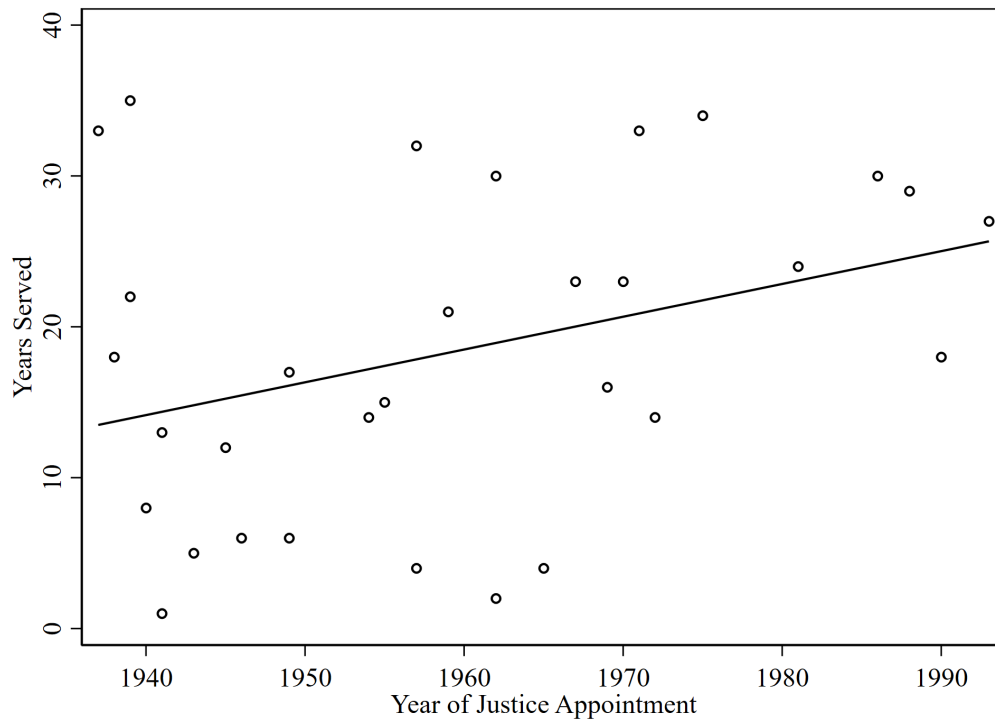
In addition to concern over equity in the appointment of justices across presidential terms, another factor that has been cited to justify term limits is the increasing number of years that justices serve.⁵⁶ To illustrate these trends, Figure 2 graphs the years of service for justices based on their appointment year.⁵⁷ Across all justices appointed and who retired, the average length of time on the bench is 19.1 and the median length of time is 18.5 years. Given that the median length is more than 18 years, an 18-year term limits would have cut short 50 percent of all appointments. The results in Figure 2 also reveal a clear increase the average number of years of service over time. For instance, the justice appointed between 1937 and 1950 served an average of 15.7 years, but the justices appointed since 1990 and who have left the bench served an average of 26.3 years.⁵⁸

⁵⁶ See Calabresi & Lindgren, *supra* note 6, at 815–18; see also Garrow, *supra* note 34.

⁵⁷ We made two choices about how to report currently sitting justices to ensure that the fact that the sitting justices have not yet served a full term does not bias our results: (1) we exclude all justices appointed after Justice Breyer's confirmation in 1994 and (2) we assume that Justice Breyer and Justice Thomas serve until 2020.

⁵⁸ This number will increase as Justices Breyer and Thomas continue to serve on the Court.

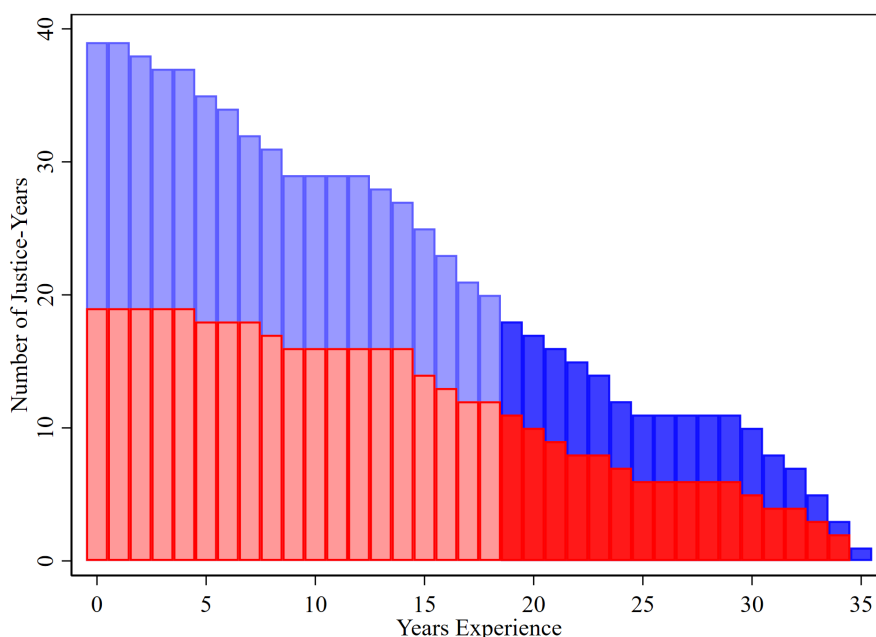
Figure 2: Years of Service of Supreme Court Justices by Appointment Year, 1937 to 2020



As a more direct assessment of how often term limits would potentially limit the tenure of justices, Figure 3 shows the distribution of years of experience at the justice-year level from 1937 to 2020. In the figure, an individual Supreme Court justice would be counted for each year they served. For example, the first year that a given justice served on the Court (i.e. Justice Ginsburg in 1993) would be included in the bar for 0 years of experience, the second year that a given justice served on the Court (i.e. Justice Ginsburg in 1994) would be included in the bar for 1 years of experience, and so on.

The results in Figure 3 reveal that 23 percent of the justice-years served on the Supreme Court occur after a given justice has already served for 18 years. An 18-year term limits would thus have affected roughly a quarter of the justice-years served on the Supreme Court. Or put another way, the Justices who would have been affected by 18-year term limits (those who served longer than 18 years) would have had their tenures cut short by 6.0 years on average.

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



A related inquiry is whether term limits would affect justices appointed by one political party more than the other. If, for example, term limits would disproportionately have limited the tenures of Republican-appointed justices, we might expect Republicans to be less willing to support term limits in the future. Figure 3 assesses this possibility by breaking out results by the political party of the appointing president. These results show that the share of justice-years by party is similar above and below the 18-year mark. More specifically, 46 percent of all justice-years were served by justices appointed by Democratic presidents, and 43 percent of justice-years after a given justice had been on the Court 18 years were served justices appointed by Democratic presidents.

Although there are only small differences by party since 1937, it's possible that the relative shares of justice-years over 18 years by party have changed over time. To assess the variation in justices serving more than 18 years by party over time, Figure 4 reports the years served for each justice. The bars are colored by the party of the justices appointing president, where the darker area indicates the years after a justice has served 18 years. At the bottom of the figure is a distribution of the number of justices that have been serving for more than 18 years over time.⁵⁹

⁵⁹ This distribution is created by simply adding up the number of justices in the given year in the top part of the figure.

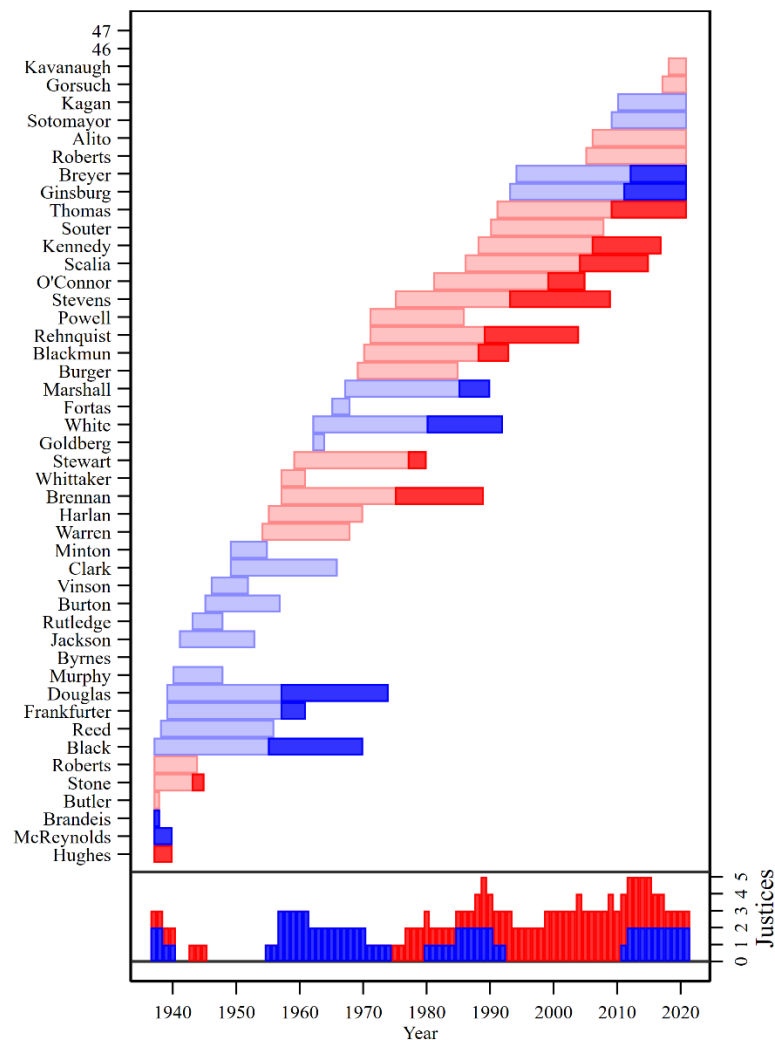
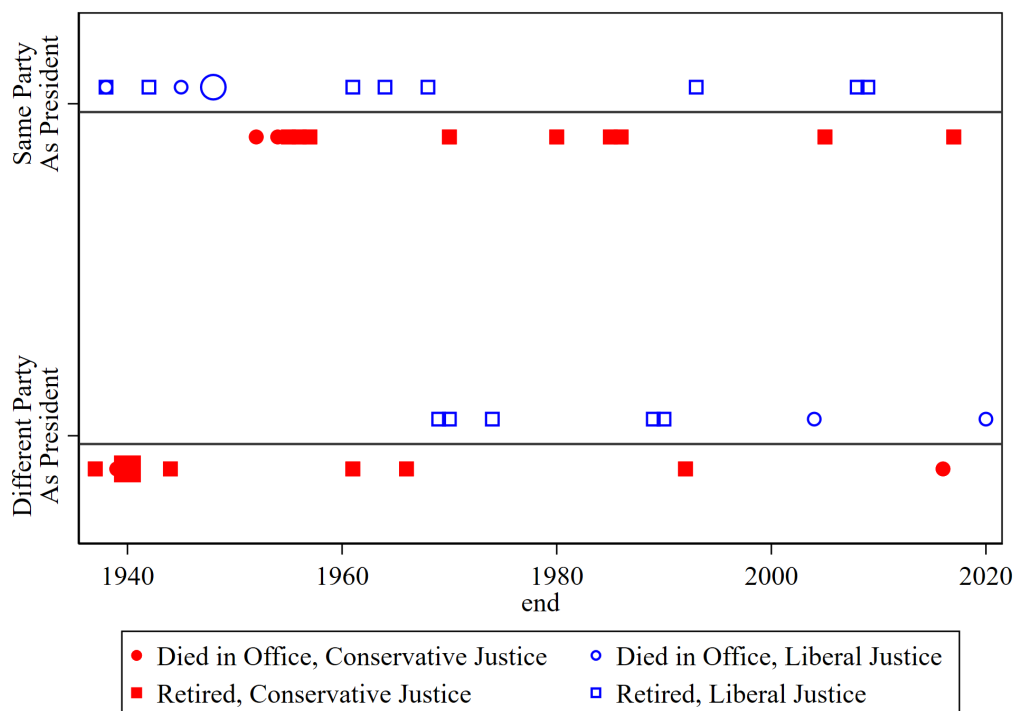
Figure 4: Length of Supreme Court Tenure by Justice, 1937 to 2020

Figure 4 reveals that there are considerable differences in the relative shares of justice-years over 18 years by party over time. In total across the 21 presidential terms since 1937, Republican presidents have appointed 19 out of 39 justices and those justices have served 54 percent of justice-years. In recent decades, however, a disparity has emerged. For instance, of the Justices appointed since Richard Nixon took office in 1969, 14 out of 18 justices were appointed by Republicans and those justices have served 77 percent of justice-years. Moreover, Figure 4 also reveals trends by party in the justices that would be effected by an 18 year term limit. Between 1950 and 1970, only justices appointed by Democratic presidents served past 18 year, from the early

1990s through 2010 this would only justices appointed by Republican presidents served past 18 years, and since 2010 there have been justices appointed by presidents from both parties serving longer than 18 years.

Figure 5: Retirements and Deaths by Shared Justice and President Ideology, 1937 to 2020



Finally, because preventing strategic retirements is one argument for term limits, we examine the role that strategic departures play in vacancies to the Supreme Court.⁶⁰ To do so, Figure 5 graphs the percent of justices that left the court when a president that shared their ideology controlled the presidency, separately by whether the justice died in office or retired. For this analysis, we consider all Republican presidents conservative and all Democratic presidents liberal; and we consider justices liberal or conservative based on their Martin-Quinn score. Justices with a negative (and thus liberal) Martin-Quinn score are

⁶⁰ It is worth noting that, just like some of the justices that retire, some of the justices that die while still serving on the Supreme Court still may be engaging in a strategic calculation. For instance, a justice may elect to not retire early in the term of a president with whom she shares an ideology because she knows that, if she dies prematurely, she will be replaced by a justice that shares their ideology. Similarly, a justice may stay on the Court despite serious health consequences that counsel in favor of retirement if she would prefer for the sitting president to not be able to nominate her replacement.

assumed to share ideological leanings with Democratic presidents, and justices with a positive (and thus conservative) Martin Quinn score are assumed to share ideological leanings with Republican presidents. We use ideology at the time of a justice's retirement instead of at the time of the justice's appointment to account for the fact that a justice's ideology may evolve over time. For example, even though Justice Souter was appointed by George H.W. Bush, he consistently voted with the liberal bloc of the Court by the end of his tenure on the Supreme Court. His decision to retire at the beginning of the Obama presidency thus should be seen as a likely strategic retirement.

The results in Figure 5 reveal that 10 justices have died while still serving on the Supreme Court between 1937 and 2020. Of the justices that died, 6 of them (or 60 percent) had shared ideology with the sitting president. During that same period, 29 justices retired from the Supreme Court. Of the justices who retired, 17 of them (or 59 percent) had shared ideology with the sitting president.⁶¹

II. DESIGNING PROPOSALS

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

A. *Design Decisions*

Term-limits proposals must solve several predictable problems. More specifically, there are nine design decisions that any term limits proposal should confront.

⁶¹ One study concluded that strategic retirement had increased over American history. Artemus Ward's 2003 study of Supreme Court retirement concluded that after Congress expanded the Justices' retirement benefits in 1955, "partisanship became the dominant recurrent factor in the departure process." ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 19 (2003). That pattern appears to have continued since Ward published his study. Every Justice who voluntarily retired since 2003 has done so under conditions that enabled the appointment of an ideologically similar replacement (though not necessarily one of the same political party). Conservative Justices O'Connor and Kennedy retired under Republican presidents; liberal Justices Stevens and Souter retired under a Democratic president.

1. *Term Length*

The most salient design decision a proposal must make is how long the justices' terms will last. There are a range of tradeoffs associated with different term lengths. For instance, shorter terms would create greater turnover on the Court, and by doing so, may ensure that the membership of the Court is more reflective of the current political mood of the country. In contrast, longer terms would create more continuity on the Court, and by doing so, may help ensure greater doctrinal consistency and alleviate concerns that justices' interest in future employment or prospects for higher office would distort their decisionmaking. Although the case could, and has, been made for a number of different term lengths, most recently commentators have converged on staggered, 18-year terms as the preferred reform.⁶²

2. *Appointment Timing*

Another decision is to determine when appointments will be made. One option is to have presidents make a new appointment every two years, typically in the first and third year of a presidential term. But this feature is not strictly required. Another option is to limit justices' terms to 18 years but not take any steps to regularize when the new appointments occur. Yet another option is to allow presidents to nominate two justices per term but allow those nominations to occur any time (or even stipulate that those appointments do not go into effect until the start of the subsequent presidential administration).

3. *Transition Timing*

Proposals must also specify when the process of transitioning to term limits appointments should commence. One option is to have the plan go into effect immediately upon passage of a term limits statute or constitutional amendment (which, as we discuss below, are both ways that reformers have suggested that proposal may be enacted). Another option is to have the proposal go into effect at some later date, such as at the start of the next presidential term or after the justices on the Court at the time of passage have all served some amount of time (e.g., after they have all completed 18 years of service or after all the justices on the Court at the time of passage have retired).

4. *Legacy Justices*

In addition to specifying the timing of the transition, a related design decision is how to handle the terms of the "legacy" justices that are serving on the Court when the proposal is enacted. As noted above, one option is to specify that term limits appointments do not go into effect until all the current justices

⁶² See *infra* Section II.B.

leave the Court. Another option is to allow the legacy justices to retain life tenure and only begin adding new justices that will serve staggered 18-year terms (this would likely result in a Court with more than nine justices during a transition period). Yet another option is to have legacy justices transition off the Court in order of seniority as new justices are appointed. Importantly, given that the justices currently on the Court were appointed under a system of life tenure, this design choice may have implications for the constitutionality of any reform passed by statute even if one believes such reform is permissible as a general matter.

5. *Unexpected Vacancies*

Another important design decision is how the proposal addresses unexpected vacancies. That is, what does the proposal call for when a Justice leaves the Court—either due to death, retirement, or removal—before the end of the specified term? One option is simply to have fewer members on the Court for the remainder of the departing justices' term. That is, if a term-limited justice appointed in 2021 would be expected to leave the Court in 2039, that justice's unexpected death in 2037 would lead to an 8-justice Court for two years. Another option, though, is to allow for a justice to be appointed to fill the remainder of the term. This appointment could be made by the current president, or one could imagine some requirement that the replacement justice be approved by the party that initially appointed the justice in order to minimize the role of random events on the Court's jurisprudence. For example, if a justice was appointed by a Republican president and the current president is a Democrat, the plan could require the appointment to be approved by the Republican leader in the Senate. Other options include allowing senior justices whose terms have finished to return to active service on the Court until the next appointment is made on the specified schedule.

6. *Senior Justices*

A term limits reform should also address the role of senior justices after the end of their term. One option is to make these justices permanent members of a circuit court. Another option is to give these justices the same status of the justices that retire under the current system (that is, they may be allowed to retain office space, hire a clerk, and sit by designation on federal courts around the country). Yet another option is to permit these justices to rejoin the Court for a limited period of time when an unexpected vacancy arises. Another possibility is for the plan to include provisions that restrict the activities of justices after they are no longer active members of the Court—restrictions that would

be designed to avoid any appearance of corruption.⁶³ Importantly, however, any reform not passed through a constitutional amendment must find a role for the term-limited justices that does not run afoul of the Constitution's current requirement that justices serve for a period of good behavior.⁶⁴

7. *Senate Impasses*

Even if a term limits reform specifies when Supreme Court seats become vacant and when the president may nominate a new justice, it does not follow that the Senate will automatically confirm the president's nominee. If the Senate is controlled by a different party than the president, the majority leader may instead elect to not schedule a confirmation vote—just as Republican Majority Leader Mitch McConnell did when President Obama nominated Judge Merrick Garland to fill the seat created when Justice Antonin Scalia died in 2016. Without some solution to this problem, “instituting staggered term limits could spectacularly backfire.”⁶⁵

Some reformers may hope that changing term limits may also change the norms of confirmation votes. That is, by making it clear each presidential term is “entitled” to two Court vacancies, it may make it politically untenable for the Senate to refuse to consider one of the president's nominees. But one option is to place less faith in norms and instead provide for some other policy if the Senate does not confirm a nominee in a set amount of time. This could include allowing the president to directly appoint the candidate of their choosing, or it could involve giving that power to a third party of some kind. One particularly mischievous (though quite possibly effective) attempt to address these problems is to require the president and the Senate to be “confined together until a nominee has been approved” while imposing a “salary and benefits freeze” on all of them.⁶⁶

8. *Chief Justices*

Proposals should also decide how the chief justice will be designated. One possibility is to have the justice appointed to fill the vacancy created when the

⁶³ Cf. Stras & Scott, *supra* note 16, at 1425 (arguing that “fixed, nonrenewable terms . . . would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary”)

⁶⁴ Cramton has argued that his and Carrington's proposal is consistent with the Constitution because justices would have commissions for life, but would spend the first part of their tenure serving on the Supreme Court and the remainder serving on lower courts. See Roger C. Cramton, *Constitutionality of Reforming the Supreme Court by Statute*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 345, 359 (Roger C. Cramton et al. eds., 2006).

⁶⁵ Shapiro, *supra* note 50.

⁶⁶ Calabresi, *supra* note 50.

current chief justice leaves the Court assume that role. Under this system, as with the status quo, whether a president is able to appoint the chief justice will depend on the happenstance of when the vacancy becomes available. Alternatively, the plans could instead provide that the most senior of the active justices will serve as the chief justice, or the most senior member of the party that has appointed the most justices to the Court. One could also imagine a system similar to that used by the courts of appeals, in which the most senior judge below the age of 65 becomes the chief judge for a 7-year term.⁶⁷ Or the plan could simply allow the justices to elect their own chief.⁶⁸

9. *Enactment Method*

A final important design decision that a term limits plan must make is whether it will be implemented by passing a statute or through the adoption of a constitutional amendment. The majority of proposals rest on the assumption that term limits are inconsistent with Article III's guarantee of tenure during "good behaviour," making a constitutional amendment necessary. But some scholars argue that there are ways to effectively create term limits through a statute alone.⁶⁹ While this choice is quite significant, how to resolve it rests on constitutional considerations that are beyond the scope of this Article. Our focus, instead, is on the practical effect each proposal would have if successfully implemented.

B. *Existing Proposals*

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

1. *Oliver's Proposal*

The first scholar to lay out the basic framework of the dominant term limits proposals was Philip Oliver. In a 1986 article, Oliver offered a draft constitutional amendment that would "replace life tenure for Supreme Court Justices with a system of fixed, staggered terms."⁷⁰ As he put it, "[t]he primary features of the proposal are that Justices should serve for staggered eighteen-year

⁶⁷ See 28 U.S.C. § 45 (providing procedures for selection of chief judges for circuit courts).

⁶⁸ For a discussion of the constitutional issues involved in changing the way the chief justice is designated, see Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575 (2006).

⁶⁹ See, e.g., Cramton & Carrington, *supra* note 6.

⁷⁰ Oliver, *supra* note 6, at 800.

terms, and that if a Justice did not serve his full term, a successor would be appointed only to fill out the remainder of the term.”⁷¹ Vacancies would be staggered such that one seat would open up each odd-numbered year.

Oliver’s proposal has a number of key features. Notably, it would limit the tenure of Justices already appointed at the time of enactment—that is, it would not accommodate the legacy justices. But it includes a lag time of approximately five years before it becomes effective: the most senior justice on the Court would be required to leave on the third odd-numbered year after enactment.⁷² So, for example, if the plan were enacted in 2021 or 2022 and no current Justices retired or died, Justice Thomas would vacate his seat in August of 2027, to be replaced by a new Justice who would serve an 18-year term.

Another important detail is how the proposal handles unexpected vacancies. If a Justice dies or retires outside of the normal schedule, Oliver’s proposal provides that a replacement Justice will be appointed who serves out the rest of the predecessor’s term. So, if the plan were enacted in 2021 and Justice Breyer retired in 2022, his replacement would serve only until 2029, when a new Justice would be appointed for a full 18-year term. If that Justice were to leave the Court after 10 years, she would be replaced by a temporary Justice who would serve for eight years. Temporary justices may not be reappointed for full 18-year terms. The only exception to these rules is that where a replacement Justice is being appointed to a seat that would become vacant during the same presidential term, allowing the new appointee to serve for somewhat longer than 18 years. If, say, Justice Thomas were to leave the Court in 2025 before his seat expired in 2027, the president elected in 2024 would replace him with a Justice who would serve until 2045.

2. *The Virginia Plan*

Oliver’s proposal was revived two decades later by two University of Virginia law students, James DiTullio and John Schochet, in a *Virginia Law Review* student note.⁷³ Their proposed constitutional amendment (which we’ll call the “Virginia Plan”) has much in common with Oliver’s.

One key difference relates to the timing of the transition. Although their plan would, like Oliver’s, limit the tenure of existing Justices, the mechanics are slightly different. The plan would take effect on the first odd-numbered year following ratification, and then the most senior justice’s tenure would end “on the third day of January of the first even-numbered year following the effective date of this Amendment and commencing after that justice has served for at

⁷¹ *Id.* (footnote omitted).

⁷² *See id.* at 801.

⁷³ DiTullio & Schochet, *supra* note 6.

least eighteen years on the Supreme Court.”⁷⁴ At that point, each remaining justice would leave every two years, from most to least senior. In other words, so long as the most senior justice had already served for 18 years upon the amendment’s ratification, the Virginia Plan would become operative more quickly than Oliver’s.

Another key difference is that the Virginia Plan makes no allowances for short-term appointments that would expire during the appointing president’s term. Whereas Oliver’s plan simply allows those justices to serve for somewhat longer than 18 years, the Virginia Plan would require an interim appointment who would serve for a short period and who could not be reappointed to a full term.⁷⁵ This could lead to differences for the ideology of justices in some scenarios. Under Oliver’s plan, if a vacancy opened up on the Court in the second year of a presidential term, the president would be able to fill it with an appointee who would serve for 19 years; under the Virginia Plan, the president would pick a short-term appointee, and then would make a new appointment the following year. Given that the president’s party often (though not always) loses seats in the Senate in midterm elections,⁷⁶ the Virginia Plan might lead to nominees who are more ideologically moderate in such scenarios but also might have a greater chance of producing Senate impasses.

3. *The Northwestern Plan*

Another proposal comes from Northwestern University School of Law professors Stephen Calabresi and James Lindgren. Like the Oliver and Virginia proposals, this one (which we’ll call the “Northwestern Plan”) is also a constitutional amendment that calls for 18-year terms. But the proposal has some key differences from other proposals. Most importantly, it would not apply to legacy justices on the ground that “retroactive application . . . would be both unfair and unnecessary.”⁷⁷ All justices currently serving at the time the proposal was enacted would retain life tenure.

This choice has consequences for the plan’s rollout because it complicates getting to new appointments appropriately synced on staggered 18-year terms. The authors propose that each new appointment after the amendment

⁷⁴ *Id.* at 1146.

⁷⁵ *See id.*

⁷⁶ *See, e.g.,* Bernard Grofman et al., *Why Gain in the Senate but Midterm Loss in the House? Evidence from a Natural Experiment*, 23 LEGISLATIVE STUD. Q. 79, 79 (1998) (noting that “[m]idterm loss in the House is very likely, but it is not as consistent a phenomenon as it is in the House”).

⁷⁷ Calabresi & Lindgren, *supra* note 6, at 826.

occupies the “next open slot” in order to make the 18-year cycle work.⁷⁸ Imagine that the plan became operative in 2021. If the first retirement occurred in 2022, the new justice would be appointed to the 18-year slot that begins in 2023—meaning that justice would serve for 19 years. If the next vacancy arose in 2023, the new justice would be appointed for the slot that began in 2025. And so on.

Under the Northwestern Plan, term-limited justices would receive their salary for life and would be permitted to sit as judges on the lower courts for life.⁷⁹ In the event of unexpected vacancies, an interim justice would be appointed to fill out the rest of the term, and that appointee would be ineligible for reappointment for a full term.⁸⁰

4. *The Renewal Act*

Roger Cramton and Paul Carrington have proposed their own 18-year limit (which we’ll call the “Renewal Act,” the name they gave their draft statute).⁸¹ The proposal has one with a significant difference from those described thus far: they argue that their reform could be implemented via an ordinary statute rather than a constitutional amendment.⁸² Their proposal would work as follows. First, all legacy Justices would retain life tenure. Vacancies would be filled as per usual once those Justices died or retired until the *last* grandfathered Justice left the Court. At that point, the system of regularized appointments every odd-numbered year would begin.

Interestingly, no Justice would be “term-limited” from the Court; all Justices would keep their titles and judicial roles for life. But the system would effectively create an 18-year term. This is because if at any point there were more than nine justices on the Court, only the nine most *junior* would participate in the ordinary work of hearing merits cases. In practice, after 18 years of service, any given Justice would be bumped out of the nine most junior justices, as nine appointments would have been made since that Justice’s appointment. Senior justices would still be permitted to sit on the Court in cases of recusal or temporary disability by the active justices; they would be called up in reverse order of seniority. They also would sit as circuit judges and participate in other work of the Supreme Court, such as approving amendments to the Federal Rules. In the event of an unexpected death or retirement that left the Court with fewer than nine Justices, the president would be permitted to

⁷⁸ *Id.* at 827.

⁷⁹ See Stras & Scott, *supra* note 41, at 775.

⁸⁰ See Calabresi & Lindgren, *supra* note 6, at 827.

⁸¹ See Cramton & Carrington, *supra* note 6, at 471.

⁸² See Cramton, *supra* note 64.

make an extra appointment that would take the place of the next regularly scheduled appointment.

5. *Fix the Court*

The advocacy organization Fix the Court has proposed a reform that looks quite similar to the Renewal Act proposal but with a couple of key differences. Under this proposal, the cycle of appointments every two years would begin immediately upon enactment.⁸³ The term limits would apply to new justices, but not the legacy justices. Once an 18-year term expires, a Justice would become senior and serve on the lower courts. During their 18-year terms, however, they would sit on the Court only once they were among the nine most *senior* Justices on the bench. In practice, this would mean that some of the early new appointments would have short tenures on the Supreme Court. Depending on how long it took for legacy justices to retire, an early appointee could spend a sizable chunk of her 18-year term waiting “on deck” to become one of the nine most senior Justices.

6. *The Khanna Bill*

Fix the Court has also developed a different proposal, a version of which has now been introduced into Congress by Representative Ro Khanna (we will refer to this proposal as the “Khanna Bill”).⁸⁴ As with the prior proposal, appointments would begin immediately and legacy justices would not be subject to term limits. Unlike the previous proposal, however, there would be no requirement that only the nine most senior justices sit and decide cases. What this means is that, unlike the other proposals discussed thus far, the Supreme Court could have more than nine actively participating justices during the transition period—in theory as many as 18, if every Justice on the Court upon the bill’s enactment remained on the Court for 18 more years. After the transition, senior Justices could return to the Court temporarily to fill unexpected vacancies. The proposal also has one interesting feature designed to prevent obstruction of nominees in the Senate. It provides that, if the Senate fails to act within 120 days of the president’s nomination, the nominee will be automatically seated. This provision would address a situation like the one that arose in 2016 with President Obama’s nomination of Judge Garland, although importantly it would not prevent the Senate from simply holding a vote and voting down any nominees by the president.

⁸³ See Memo from Tyler Cooper, Fix the Court, Nov. 6, 2019, <https://fixthecourt.com/wp-content/uploads/2020/11/JIW-age-88-retirement-11.6.19.pdf>.

⁸⁴ Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8423, 116th Cong. (2020).

7. *Other Proposals*

Most proposals for term limits have converged on 18-year limits, and we expect that policymakers would be most likely to select that length of term if they do adopt term limits. A number of commentators have proposed terms of different lengths, however, and we will briefly catalogue them here.

Henry Monaghan has suggested “some fixed and unrenewable term, such as fifteen or twenty years” for Supreme Court justices.⁸⁵ The problem with a 15- or 20-year term limit, however, is that, with a nine-member Supreme Court, it would not distribute appointments evenly among presidents—which is one common goal shared by many term limits advocates. This is presumably why the 18-year limit has far more support than either 15- or 20-year terms.

But some think 18 years is too long. Conservative commentator Mark Levin has proposed staggered 12-year term limits, with three appointments made each presidential term rather than two under the 18-year plan.⁸⁶ Stephen Carter has proposed staggered 9-year terms, which would translate into one appointment each year and four each presidential term.⁸⁷

And an even shorter term limits proposal comes from D.C. Circuit Judge Laurence Silberman. He argues that in order to “make justices think of themselves as judges,” Supreme Court appointees should serve for only five years, after which they could sit on the lower courts for life.⁸⁸ With a five-year limit, every two-term president would get to replace the entire membership of the Supreme Court—an outcome we suspect would strike many observers as undesirable.

C. *Comparing Proposals*

There are a number of tradeoffs associated with the design decisions that would go into any term limits proposals. In this Section, we will lay out a framework of possible tradeoffs that will help guide our comparison of the different proposals. In particular, we are interested in how the different proposals might affect the composition of the Court in various ways. That said, we limit our analysis to differences between proposals that are possible to empirically assess through simulations. Specifically, we focus on how different proposals would change the Court’s membership.

⁸⁵ Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1212 (1988).

⁸⁶ MARK R. LEVIN, *THE LIBERTY AMENDMENTS: RESTORING THE AMERICAN REPUBLIC* 49–50 (2013).

⁸⁷ Carter, *supra* note 29.

⁸⁸ *Term Limits for Judges Federalist Society Symposium: Panel Five*, 13 J.L. & POL. 669, 687 (1997).

We see five distinct ways in which the design choices made by these proposals may affect the composition of the Court: (1) the ***Appointment and Tenure*** of justices, that is, how a given term limits proposal would change who gets to appoint the justices and how long they serve; (2) the ***Ideological Composition*** of the Supreme Court, that is, how a given term limits proposal would change the ideological breakdown of the Court; (3) the ***Transition Process*** for implementing the reform, that is, when the proposal first becomes effective and how it phases in over time; (4) the ***Confirmation Incentives*** for new justices, that is, whether a given term limits proposal would alter the incentives for either strategic retirement of justices or intentional obfuscation by senators; and (5) the ***Profile of Nominees*** to the Supreme Court, that is, whether a given term limits proposal would lead to changes in the type of people confirmed to Court. Below, we elaborate on these five distinct considerations.

1. Appointments and Tenure

The most obvious and direct goal of term limits reform is changing the appointment of justices and how long they serve. By doing so, the goal is frequently to regularize appointments across presidential terms. That said, although this is a primary goal of the various term limits proposals, there are tradeoffs that the proposals must confront that may influence the relationship between presidential elections and the appointment of justices. For instance, plans that would go fully into effect immediately would regularize appointments more quickly than plans that would not go fully into effect until after the legacy justices have died or voluntarily retired. Similarly, the different approaches that term limits proposals adopt for addressing unexpected vacancies through deaths or retirements (or, less likely but still possible, removal of justices after impeachment) also influence the regularity of appointments. One key margin to evaluate different proposals design features is the extent to which they ensure that presidents have similar influence on the composition of the membership of the Court.

2. Ideological Composition

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

undermine the Court's legitimacy over time.⁸⁹ Those who favor shorter-term democratic control would have to consider this potential cost. Relatedly, these changes to the appointment process may also result in more instances of one party having large majorities on the Court, which could lead to more extreme changes in the doctrine. Moreover, judicial ideology is not binary, and the precise details of the term limits plan might result in a Court that is more or less ideologically polarized.

3. *Transition Process*

Another way to assess the trade-offs associated with different term limits proposals is how they would handle the transition from the current system of life tenure to a system of term limits. Assuming that staggered vacancies are the goal, moving to such a system would always take some time. Proposals have different procedures for how quickly to make the move to that system, with some waiting a set period of years and others waiting for an intervening president to be elected. Given these differences, an important question is how long the full transition is likely to take. Moreover, if a proposal allows presidents at the time of enactment to make more selections to the Court—or to nominate justices to the Court that are allowed to serve life terms—there may be windfalls in terms of the number of justice-years that are appointed by a particular president. The transition itself may result in windfalls to the president in office at the time of enactment.

4. *Confirmation Incentives*

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

5. *Profile of Nominees*

A final concern relates to what kinds of people will be selected as justices. It is possible that different features of various plans will impact the kind of

⁸⁹ Defenders of life tenure justify the practice using this argument. See Stras & Scott, *supra* note 16, at 1424 (“Swift legal change and the rapid-fire reversal of controlling precedent undermine the Court's legitimacy by creating the appearance that its decisions turn on nothing more than the personnel on the Court.”).

people that are offered, and accept, nominations to the Supreme Court. For example, the shorter the term length, the more people need to be appointed to the Court over time. If there is a very small supply of the most qualified potential nominees (which is far from obvious), the overall quality of appointees would go down. Term limits might also affect whether someone is willing to accept a nomination on the Court because an indefinite term is more desirable. Term limits can also affect the age of nominees; shorter terms might make presidents more willing to select older candidates, while at the same time could make much younger candidates more palatable to Senators.

III. EVALUATING PROPOSALS

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

A. *Methods*

We use Monte Carlo simulations to evaluate the trade-offs associated with five of the Supreme Court term limit proposals we introduced in Section II.B.⁹⁰ Monte Carlo simulations—which we’ll simply call simulations—are a research method used widely in the social sciences.⁹¹ Monte Carlo simulations are used in situations where uncertainty about some event occurring makes it difficult to assess the likelihood of an outcome.

At the most basic level, Monte Carlo simulations require explicitly stipulating a set of assumptions, identifying the key variables for which there is uncertainty, using a computer to randomly generate values for those variables for which there is uncertainty, calculating the outcome of interest given the realizations of the random variables, and then repeating that process many times.⁹²

⁹⁰ We exclude the Oliver plan from this analysis because the Virginia Plan made policy choices along the dimensions relevant to these simulations that mean they produces the same results.

⁹¹ See *generally* THOMAS M. CARSEY & JEFFREY J. HARDEN, *Monte Carlo Simulation and Resampling Methods for Social Science* (2013).

⁹² For a more technical explanation of the process, see *id.* at 6 (“[T]he typical Monte Carlo simulation involves drawing multiple random samples of data from an assumed [Data Generation Process (DGP)] that describes the unobserved process in the larger population of how a phenomenon of interest is produced. It is the true or real DGP that scholars are ultimately interested in evaluating. Of course, we rarely know what the true DGP is in the real world. Most of our research is about trying to uncover the underlying DGP or test predictions that emerge from different theories about what the DGP looks like.”).

Through this process, simulations are able to generate a distribution of possible outcomes given the initial set of assumptions. As a result, if the initial assumptions are credible, simulations make it possible to estimate the most likely outcomes and range of possible outcomes for complex political and social phenomena.

Given these strengths, simulations have been used for a variety of applications in the empirical legal studies literature. For example, simulations have been used to study: the relative economic importance of contract terms;⁹³ whether judicial assignments to cases are random;⁹⁴ the extent of publication bias in empirical legal scholarship;⁹⁵ and whether law schools could improve their academic impact by imposing stricter tenure standards.⁹⁶

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

Our method for modeling these two sources of uncertainty is to compare the results that the different term limits proposals would have produced if they had been in effect during the post-1937 period. More specifically, we begin by imagining that each of the different reform proposals had been adopted in 1937. We then assume that the control of Presidency and the Senate evolved in exactly the way that it actually did. For instance, we assume that Dwight D. Eisenhower is always president from January 1953 to January 1961, that the Republican Party always controlled the Senate from 1953 to 1955, and that Democrats always controlled the Senate from 1955 through 1961.

However, we do not only assume that the proposals had been adopted in 1937. We then further simulate what would have happened if the term limits proposals had been adopted in each year between 1937 and 2010. That is, we

⁹³ Kate Litvak, *Monte Carlo Simulation of Contractual Provisions: An Application to Default Provisions in Venture Capital Limited Partnership Agreements*, 98 CORNELL L. REV. 1495 (2013).

⁹⁴ Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1 (2015). See also David S. Abrams, Marianne Bertrand & Sendhil Mullainathan, *Do Judges Vary in their Treatment of Race?*, 41 J. LEGAL STUD. 347 (2012).

⁹⁵ Daniel E. Ho, *Foreword: Conference Bias*, 10 J. EMPIRICAL LEGAL STUD. 603 (2013).

⁹⁶ Adam Chilton, Jonathan Masur & Kyle Rozema, *Rethinking Law School Tenure Standards*, J. LEGAL STUD. _ (forthcoming).

run a series of simulations where the start year is 1937, we then run a series of simulations when the start year is 1938, and so on. Through this approach, our results are not driven entirely by the specific events in the historical record that would be associated with using a single start date.

For each simulation, we assume that vacancies that emerge on the Supreme Court would be filled in the way stipulated by the express terms of a given plan. This includes taking a plan's rollout process on its own terms. For instance, for the Virginia Plan, this means that starting in the first year of enactment all appointments to the Supreme Court are for 18 years. In contrast, for the Renewal Act, this means that appointments for the Supreme Court are not an 18-year term until the last remaining justice that was active at the time of the plan's enactment leaves the Court.

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

For the hypothetical justices that we simulate joining the Court, however, we must model the uncertainty in how long they would serve on the Court. This is because it is unrealistic to assume that all the justices would serve full 18-year terms. Simply assuming all the justices served a full 18-year term would also not put pressure on one of the key differences between proposals: how they fill unexpected vacancies.

Simulating this uncertainty, however, requires making assumptions about the rate that justices would be likely to leave the Court. One approach to estimate unexpected vacancies would be to use actuarial tables to assess the probability that a justice would die in a given year conditional on their age.⁹⁷ Although this approach offers the best way to estimate the probability that an average American would die in a given year conditional on their age, the people appointed to the Supreme Court are presumably not average along a range

⁹⁷ See, e.g., Bailey & Yoon, *supra* note 10, at 302 ("We base the probability of dying from the 2005 US life tables.").

of relevant dimensions. Importantly, the justices are extremely highly educated, wealthier than the general population, and have access to excellent medical care. Moreover, a president is unlikely to appoint anyone to the Supreme Court when there is evidence that they are not of sound health at the time of their appointment. As a result, the probability that a Supreme Court Justice is going to die in the year they are 65 may be lower than the probability that an average American would die in the same year.

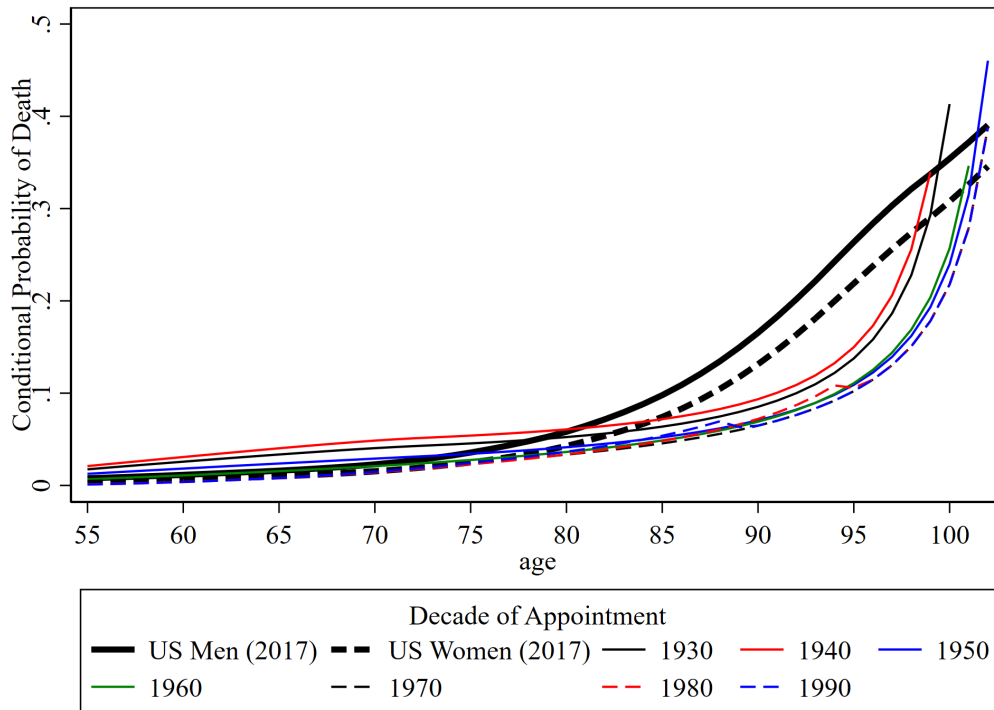
Given this concern, instead of relying on actuarial tables, we generate estimates of the probability that the justices would die in a given year conditional on their age based on the actual mortality rates of a similar population: the universe of federal judges. Using data from the Federal Judicial Center, we calculate the probability that a justice of a given age in a given decade would die each year.⁹⁸ Figure 6 plots these probabilities by decade and shows that federal judges from any decade that are between 55 and 75 years old have roughly the same chance of dying as an average American of the same age in 2017. Because life expectancies have increased over time, this suggests that judges have been less likely to die than average Americans. Moreover, a considerable difference opens up between roughly age 80 and 95, where federal judges are noticeably less likely to die than an average American.

We simulate unexpected vacancies for the Supreme Court using the probabilities reported in Figure 6. Specifically, we assume that Justices are 55 years old when they are appointed to the Supreme Court. We make this assumption because it is similar to the actual average age of justices appointed across history of 53.2,⁹⁹ and because it is consistent with the assumption made by Bailey and Yoon that justices would be 55 years old at the time of appointment.¹⁰⁰

⁹⁸ To do so, we estimate a spline and interact the spline with the decade that the judge was first appointed. After regressing whether a judge has died in a given year after being appointed, we recover the conditional probabilities of death from the predicted values from the regression coefficients.

⁹⁹ See Calabresi & Lindgren, *supra* note 6.

¹⁰⁰ See Bailey & Yoon, *supra* note 10, at 302.

Figure 6: Mortality Rates of Federal Judges by Decade

To simulate unexpected vacancies, for each justice-year, we randomly generate a number between 0 and 100. If that random number is less than the probability of death we generated based on the life expectancy of federal judges, we assume that the hypothetical justice has unexpectedly left the Court and thus needs to be replaced. We then replace the justice using the terms stipulated by a given proposal. In this way, our simulations are able to account for the uncertainty of when unexpected vacancies are likely to emerge at the Supreme Court. It is worth noting that this approach may both under and over count unexpected vacancies. It may under count them because we do not attempt to estimate the possibility of impeachment or resignations, and it may over count them because Supreme Court justices may be less likely to die during an 18 year period than an average federal judge because their medical records likely face greater scrutiny prior to appointment.

There are three advantages to assessing the impact of term limits proposals in this way—that is, by evaluating how they would have performed historically if implemented in different years while also introducing random vacancies. First, simulating how the proposals would perform historically reduces the need to make strong assumptions about what will happen into the future. As previously noted, it takes decades for various term limits proposals to go fully into effect. As a result, any attempt to empirically evaluate them needs to adopt a strategy that estimates their effect over a long period. We

thus believe that it is more defensible to base our assessments on how they would have performed historically instead of trying to adopt a strategy to model what the outcomes of presidential elections are likely to be from 2020 to 2100. Second, simulating how the proposals would perform historically makes it possible to compare each proposal against a clear counterfactual: what actually happened with the membership of the Supreme Court. Without this historical comparison, we would not only need to make assumptions about what would happen with elections in the future, but we would also have to make assumptions about what would happen to the composition of the Supreme Court over time in the absence of reform. Third, simulating these proposals being enacted in many different years makes it possible to assess how robust the plans are to various possible political scenarios. For instance, some simulations begin during large periods of rule by a single party, but other simulations begin during periods of frequent transitions of power. The result is that varying the year of adoption allows for us to account for various political scenarios.

Of course, our approach does not entirely eliminate the need to make strong assumptions. Most notably, by assuming that political control is fixed in this way, we are implicitly assuming that changes to the rules governing confirmation and tenure on the Supreme Court would not produce changes in electoral outcomes to the Presidency and Senate. This is, of course, unlikely to be strictly true. To find an example of how differences in the composition of the Supreme Court could change political outcomes, we have to look no further than *Bush v. Gore*,¹⁰¹ where the justices directly intervened in a disputed election. Even outside such examples, the Court can be an issue in presidential elections; some argue that the vacancy created by Justice Scalia's death is partly responsible for Donald Trump's victory in 2016.¹⁰² Whether term limits would produce the same election dynamics is unknown.

Moreover, it is also worth noting that this is not the only conceivable way to simulate the effects of term limits proposals. Most notably, an alternative to comparing how various plans would have behaved given the historical record would be to fully simulate the entire political process for a period of time going into the future. For example, Bailey and Yoon estimate the impact of strategic retirements and potential term limits on the composition of the Supreme Court by simulating elections into the future.¹⁰³ Specifically, they assume that elections happen every four years going forward for 60 years into the future

¹⁰¹ *Bush v. Gore*, 531 U.S. 98 (2000).

¹⁰² Philip Bump, *A Quarter of Republicans Voted for Trump to Get Supreme Court Picks — and It Paid Off*, WASH. POST, <https://www.washingtonpost.com/news/politics/wp/2018/06/26/a-quarter-of-republicans-voted-for-trump-to-get-supreme-court-picks-and-it-paid-off/>.

¹⁰³ See Bailey & Yoon, *supra* note 10.

and that each party has an equal chance of winning the presidency. Each of their simulations thus creates a different potential future of electoral outcomes. Although this is a perfectly defensible way to simulate the effect of term limits proposals, we elected to not use it for our application. This is because our goal is to compare multiple different term limits proposals against each other and against the status quo of not having term limits. Comparing the performance of plans against the historical record gives us a clear counterfactual: the actual membership of the Supreme Court from 1937 to 2020.

B. Results

1. Appointments and Tenure

One part of the appeal of term limits is that they would regularize appointments, thus guaranteeing that the composition of the Court would bear a closer relationship to how long the two major political parties controlled the Presidency. Indeed, all term limits proposals that design the length of the terms so that the same number of appointments are made each presidential term should accomplish this goal similarly well. Differences between such proposals emerge in two areas. First, the length of the transition and exactly how it is implemented can delay the reform's ability to regularize appointments, which can result in one party having disproportionate control over the Court for a longer period. Second, how the system handles unexpected vacancies can further distinguish proposals because these shocks could further distort one party's representation advantage.

To simulate how well each proposal would do at regularizing appointments, we estimate the number of justice-years per presidential term for all presidencies starting in the enactment year. These simulations vary the year of implementation between 1937 and 2010 and introduce random vacancies based on the probability that a federal judge would die using the data introduced in Figure 6. Across all presidential-terms and all simulations, we then count the number of justice-years per presidential-term and plot the distribution for each of the proposals.

Figure 7: Number of Absolute Justice-Years Relative to 36 by Presidential Term

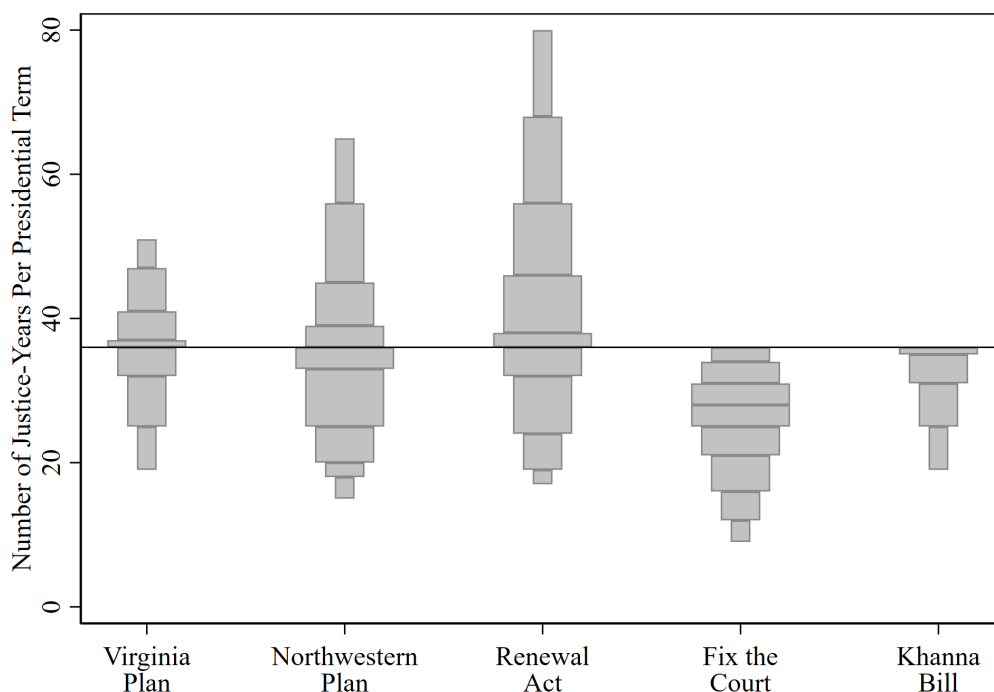


Figure 7 reports the results of these simulations. The figure is a letter value plot, which reports the distributions of results across the simulations for each proposal. The distributions are broken down by decile, but the top decile (the 90th to 95th percentile and the 95th to 99th percentile) and bottom decile (the 10th to 5th percentile and the 5th to 1st percentile) are broken into two groups. Deciles that share the same values—for instance, if the 40th, 50th, and 60th percentiles all produce a mean value of 36—appear as a single area representing the middle-most decile. The black line in Figure 7 is at 36 justice-years, which is the number each presidential term would appoint if it were able to appoint two justices that served for 18 years.

The results in Figure 7 reveal that three of the plans—the Virginia Plan, Northwestern Plan, and Khanna Bill—result in a median of 36 justice-years per presidential term. The Renewal Act is close, with a median of 38 justice-years per presidential term. The outlier on the low end is the Fix the Court proposal, which produces a median of 28 justice-years per presidential term. This is due to the fact that the Fix the Court proposal requires judges to wait “on deck” during the implementation period until legacy justices that were active when the plan was enacted leave the Court. The result is that many justices

in the first several decades of the plan serve less than full 18-year terms (which, in turn, translates into fewer than 36 justice-years per president).¹⁰⁴

The results in Figure 7 also reveal considerable variation in the number of justice-years that each president is likely to appoint. For the Khanna Bill, the 40th percentile through the 95th percentile of the presidential terms all result in an average of exactly 36 justice-years appointed per presidential-term. The 5th through 30th percentile of the presidential terms for the Khanna Bill do result in fewer than 36 justice-years but the lowest is 19 justice-years. In contrast, the Virginia Plan, Northwestern Plan, and Renewal Act proposals all result in considerably more variation. Most notably, the 95th percentile for the Renewal Act is an average of 80 justice-years per president. This result is driven by the fact that the Renewal Act not only allows the justices that are serving at the time of the Court to complete their term, but also allows any justice appointed between enactment and when the last of those legacy justices retire to be appointed for longer terms. Finally, the Fix the Court proposal results in fewer than 36 justice-years per presidential term for 95 percent of simulations (again, due to the fact that it allows for many appointments of less than 18 years per justice during the transition period).

The results in Figure 7 thus reveal that the design choices associated with different term limits proposals are likely to produce considerable variance in the expected number of justice-years per presidential term. However, it is important to acknowledge that, because one of the primary differences between proposals driving these results is how they handle the transition from the current system of life tenure to one of term limits, the differences across proposals would naturally decrease over enough time as they become fully implemented. That said, our simulations assume that these plans were rolled out between 1937 and 2010, so it would take decades before these plans achieved the kind of equal representation as the Khanna Bill.

2. *Ideological Composition*

We next assess the impact that term limits proposals are likely to have on the ideological balance of the Supreme Court. We do so in four ways. First, we examine how many times these plans would lead to changes in ideological median of the Court. Second, we assess the extent to which different plans may lead to extreme ideological imbalance on the Court. Third, we explore whether these ideological changes would translate into more years of divided control of the federal government. Fourth, we estimate the impact that term limits proposals would have on ideological polarization of the Court.

¹⁰⁴ See *infra* Figure 12 for another discussion of this issue.

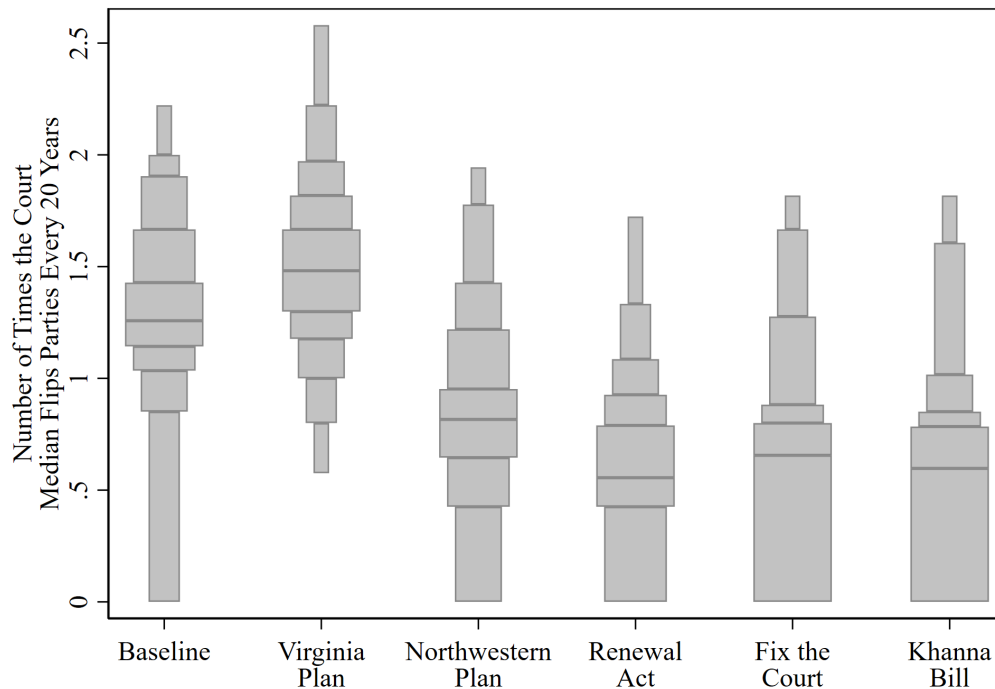
Ideological Stability. One possible drawback of moving to a system of term limits is that life tenure may encourage ideological stability. This is for several reasons. First, we might expect the Court to be more ideologically stable when Justices serve for longer periods resulting in less turnover. Second,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

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

To simulate how ideologically stable the Court would be under different term limits plans, we assume that Supreme Court justices share the ideological leanings of the president that appointed them. That is, we assume that justices appointed by Democrats are liberal and justices appointed by Republicans are conservative.¹⁰⁵ Under this assumption, Figure 8 assesses how often the Court would flip from Democratic to Republican control. For each 20 year period, we count the average number of times that the Court would have flipped its median ideology.

¹⁰⁵ Although we adopt this assumption because it has been true on average, but it is important to acknowledge that there have, of course, been exceptions. For instance, Justices Souter and Stevens were both appointed by Republican presidents, but ended their careers as reliable members of the Court’s liberal wing. That said, assuming that presidents will typically appoint justices that share their ideological leanings is standard in the literature. Citations to be added.

Figure 8: Number of Times the Court Median Flips Every 20 Years



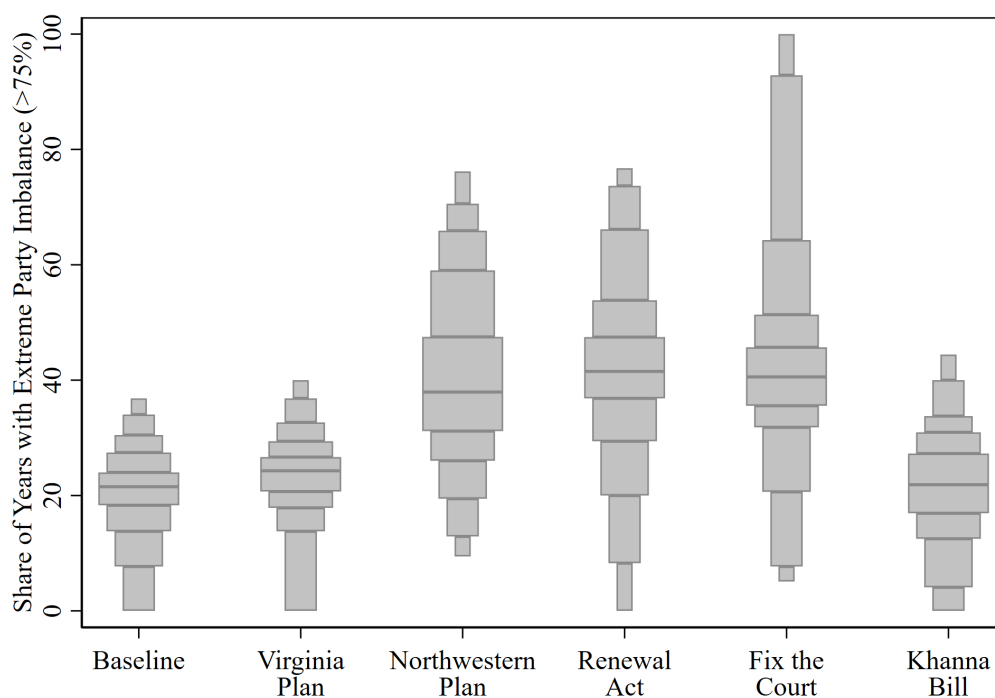
In Figure 8, the baseline estimate assumes that the plan is enacted immediately, that a new justice is appointed for two years, that the newly appointed justices serve for 18 years, and that the justices do not die or unexpectedly leave the Court before the end of the 18 year period. This provides a point of reference of the rough range of ideological flips to expect. For our baseline simulations, the median results suggest that the ideological control of the Court would have flipped roughly 1.3 times. The baseline simulations also suggest a range from 0 flips for the 5th percentile results to 2.2 flips for the 95th percentile of presidential terms.

Of the five proposals we evaluate, the proposal that produces the fewest flips in ideology is the Khanna Bill. For this proposal, the median outcome was 0.6 flips per 20 year period. This compares to 1.3 median flips for the Virginia Plan, 0.8 flips for the Northwestern Plan, 0.6 Flips for the Renewal Act, and 0.7 flips for the Fix the Court plan. The reason that the Khanna Bill produces more ideological stability is that it allows the legacy justices to remain on the Court with life tenure, which creates greater ideological stability in the first few decades after the plan is enacted. The Fix the Court proposal also produces few flips by forcing justices to wait on deck until legacy justices leave the Court.

Extreme Imbalance. A separate consideration is whether term limits proposals are likely to produce extreme ideological imbalance. That is, whether some proposals are more likely to produce periods when one party is likely to control a large number of seats on the Court. This may be a concern because periods with ideological imbalance may be more likely to produce extreme judicial decisions, which in turn may weaken the legitimacy of the Court.

To assess this possibility, Figure 9 reports results counting the share of years with extreme ideological imbalance from our simulations, which we defined as justices appointed by presidents of the same party controlling 75 percent or more of seats.¹⁰⁶ In periods where there are nine justices serving on the Court, this would mean that one party controlled 7 or more seats. Like with our simulations reported in Figure 8, we again included a baseline that assumed 18-year staggered terms, which does not include any unexpected vacancies.

Figure 9: Share of Years with Extreme Party Imbalance



¹⁰⁶ We use this 75 percent threshold, instead of simply counting periods of 7 or more seats, because it is possible that there may not be exactly nine justices on the Court for certain plans at certain times.

For the baseline, the median outcome is that 22 percent of years would be periods of extreme imbalance on the Supreme Court. The results for the Khanna Bill are again similar to the baseline results: the median outcome is also 22 percent of years with extreme imbalance on the Supreme Court. The results are slightly higher for the Virginia Plan, which produced extreme imbalance for 24 percent years on average. The other three plans all produced considerably more years of extreme imbalance. Notably, the median outcome is that 38 percent of years would be periods of extreme imbalance for the Northwestern Plan, 42 percent of years would be periods of extreme imbalance for the Renewal Act, and 41 percent of years would be periods of extreme imbalance for the Fix the Court Proposal. These results are likely due to the fact that these plans allow for a greater role for legacy justices, which in turn makes it possible that there would be extreme imbalance in cases when the plan was enacted during periods where the same party controls the presidency for multiple terms.

Years of Divided Government. The Constitution was designed to separate governmental power along functional lines among distinct branches of government while also giving each branch some power to serve as a check on actions by other branches. The president participates in legislation using the veto, and so on. Or in the words of Madison, with these institutional designs, “ambition” will “be made to counteract ambition.”¹⁰⁷ In recent years, however, scholars have come to recognize that this Madisonian separation of powers may function close to how it was intended only during periods where different branches of government are controlled by different political parties—an insight summarized as the “separation of parties.”¹⁰⁸ This is because when Congress and the Presidency share common interests—such as where both are controlled by the same political party—separating power along functional lines may not create much institutional checking. But such checking may be more likely to occur where government is divided—that is, where different parties each control part of government.

For this reason, we might want to know how often the Court will be controlled by a party that is *not* in power in the political branches. Compared to the current system of life tenure, there are reasons to think that term limits might change the rate at which there would be undivided control of government. This is because the shorter tenures and more regular appointments may increase the connection between the composition of the Court and current political trends. And, by so doing, it thus may result in a higher share of years

¹⁰⁷ THE FEDERALIST NO. 51.

¹⁰⁸ See generally Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

where the branches of the federal government are controlled by the same party.

To assess this, we calculate the share of years with an undivided government for each simulated enactment year and recover a distribution of shares for the proposal across all enactment years. For example, for proposal x being enacted in year t , we calculate the share of years from t to 2020 with a divided government. In Figure 10, we again included a baseline that assumed 18-year staggered terms, which does not include any unexpected vacancies.

Figure 10: Share of Years with Undivided Control of All Three Branches of the Federal Government

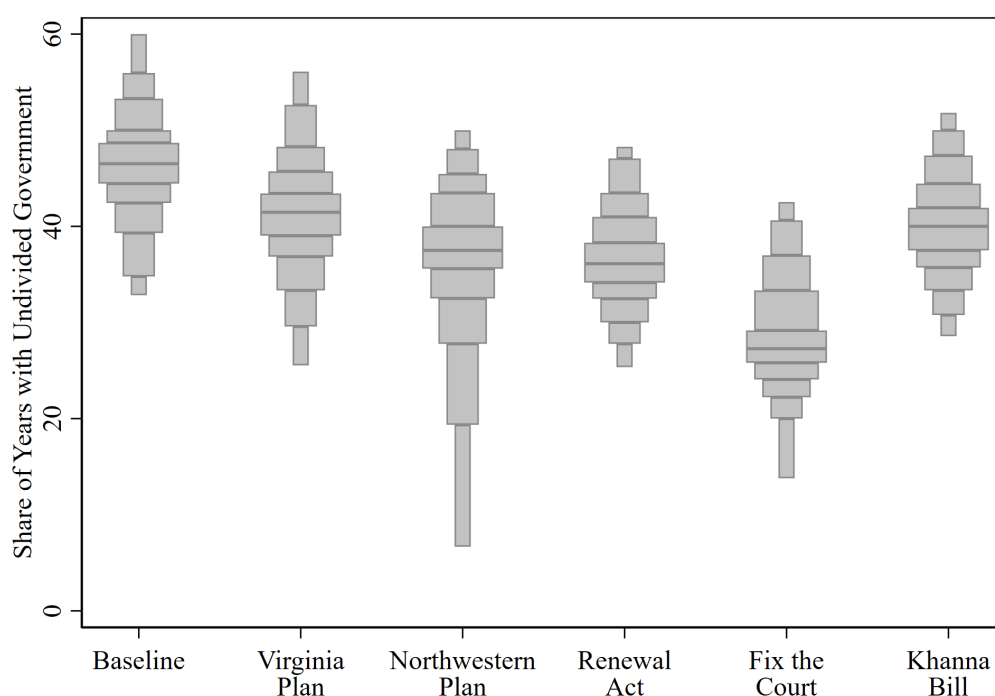


Figure 10 reports the share of years of undivided government. The baseline results suggest that the median outcome is undivided government for 46.5 percent of years. This ranges from 32.8 percent of years for the 5th percentile results to 66.6 percent of years for the 95 percentile results. For the other plans, the median ranges between 27.3 percent of years for the Fix the Court Plan and 41.5 percent of years for the Virginia Plan. The results suggest, however, that the results are fairly similar for all but the Fix the Court Plan, which was notable in that it required newly confirmed justices during the transition period to wait “on deck.”

Ideological Polarization. A separate consideration is whether a given plan is more likely to result in the appointment of justices that are ideologically extreme. Under the current system, Supreme Court vacancies can occur at random times due to deaths and health-related retirements and non-random times related to ideology due to strategic retirements. The current system enables Justices to behave strategically by retiring when both the Presidency and the Senate are controlled by the party with whom they identify. In fact, eight of the last nine justices confirmed to the Court—that is, every Justice except for Justice Barrett—was nominated and confirmed during the first two years of a presidential term, during a period when both the Presidency and the Senate were controlled by the same party.¹⁰⁹ The term limits reforms, however, are typically designed to distribute Supreme Court appointments evenly between the first and second halves of each presidential term—such as by providing one appointment each odd-numbered year.

This matters because of the Senate’s role in the confirmation process. The party holding the Presidency usually loses ground in the Senate in midterm elections.¹¹⁰ For that reason, we might expect justices selected during presidents’ first two years in office to be, on average, more ideologically extreme than those selected during the second half of any given presidential term.¹¹¹ Thus, we might expect a term limits proposal that staggers vacancies in two-year intervals to produce a less ideologically polarized Court than the current system in which vacancies may occur more frequently during the first half of a presidential term.

One way to assess polarization is by the number of justices who were confirmed when the Senate majority and the president are of the same party. The benefit of using this approach to measure polarization is that it only requires a simple assumption that presidents will appoint more extreme candidates when their party controls the Senate. We believe this is a reasonable assumption because within any of the four combinations of president and Senate ideology—Republican president and Republican majority Senate, Republican president and Democratic majority Senate, Democratic president and Repub-

¹⁰⁹ Justices Ginsburg and Breyer were confirmed during President Bill Clinton’s first two years, when the Senate was controlled by Democrats. Chief Justice Roberts and Justice Alito were confirmed during the first two years of President George W. Bush’s second term, when the Senate was controlled by Republicans. Justices Sotomayor and Kagan were confirmed during the first two years of President Obama’s first term, when the Senate was controlled by Democrats. And Justices Gorsuch and Kavanaugh were confirmed during the first two years of President Donald Trump’s presidency, when the Senate was controlled by Republicans.

¹¹⁰ See Grofman et al., *supra* note 76, at 79.

¹¹¹ Citations to be added.

lican majority Senate, and Democratic president and Democratic majority Senate—the expected ideology of a judge is likely to differ. For example, an extremely conservative president with an extremely conservative majority Senate is likely to result in a justice that is to the right of a justice appointed by a moderate conservative president and confined with a moderate conservative majority Senate.

One drawback, however, is that this binary way of assessing the ideological polarization of justices may oversimplify how the relationship between the ideology of the president and Senate translates into actually ideology of justices that would be appointed.¹¹² There have been many theoretical models proposed to explain this exact dynamic, most of which are known as move-the-median models.¹¹³ These models try to produce more exact estimates of what kind of justice would be appointed by a president of a given ideology and Senate of a given ideology. However, the best evidence suggests that there is little empirical support for these more complex models.¹¹⁴ As a result, we follow prior research and simply assume that justices are more likely to be ideologically extreme if they were appointed by presidents and Senates of the same party.¹¹⁵

Based on the assumption that justices confirmed when the same party controls the Senate and presidency are more likely to be extreme, Figure 11 assesses polarization across the proposals by reporting the distribution of justices on the Court in a given year who were confirmed when the Senate majority and the president are of the same party. The idea is that, for a given year—say 1980—we count whether the justices that were on the Supreme Court in that simulation had been appointed when the president and Senate majority were either both Democrats or both Republicans. For instance, if five of the nine justices had been appointed in those years, the share would be 55 percent. If the same nine justices were still on the Court in 1981, the share would

¹¹² For example, although it is likely that justices appointed when the president and Senate are controlled by the same party would be less likely to be ideologically moderate than justices appointed when the presidency and the Senate are controlled by different parties, this is not guaranteed.

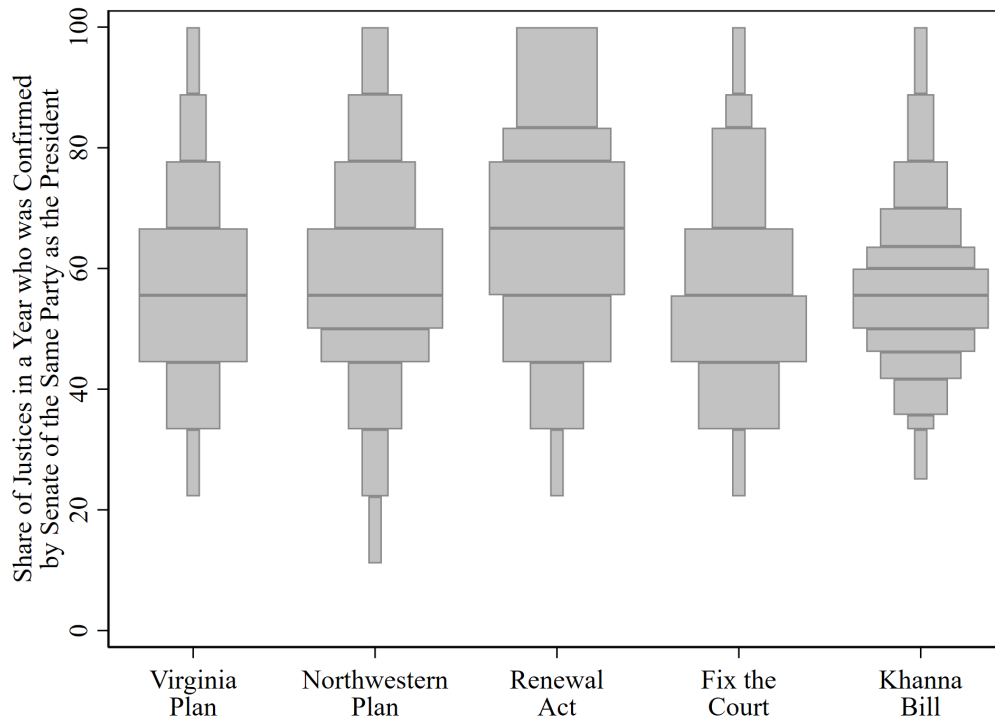
¹¹³ See Keith Krehbiel, *Supreme Court Appointments as a Move-the-Median Game*, 51 AM. J. POL. SCI. 231 (2007); Bryon J. Moraski & Charles R. Shipan, *The Politics of Supreme Court Nominations: A Theory of Institutional Constraints and Choices*, 43 AM. J. POL. SCI. 1069 (1999); David Cottrell et al., *The Power to Appoint: Presidential Nominations and Change on the Supreme Court*, 81 J. POLS. 1057 (2019); Jonathan P. Kastellec et al., *Polarizing the Electoral Connection: Partisan Representation in Supreme Court Confirmation Politics*, 77 J. POLS. 787 (2015); see also Charles M. Cameron & Jonathan P. Kastellec, *Are Supreme Court Nominations a Move-the-Median Game?*, 110 AM. POL. SCI. REV. 778 (2016).

¹¹⁴ See Cameron & Kastellec, *supra* note 116.

¹¹⁵ See, e.g., Bailey & Yoon, *supra* note 10.

still be 55 percent for the year. The distribution shown in Figure 11 is that share across all years and all simulations.¹¹⁶

Figure 11: Share of Justices on the Court in a Given Year Appointed When the Senate and Presidency Were Controlled by the Same Party



The results in Figure 11 suggest that the share of justices in a year appointed when the presidency and Senate were controlled by the same party would be fairly similar across four of the five plans. The median result is 55 percent (which translates to five out of nine justices) for all but the Renewal Act, which had a median result of 66 percent (which translates to six out of nine justices). Moreover, for the Renewal Act, the 80th percentile result is 100 percent; that is, all nine justices in a year having been when the presidency and Senate were controlled by the same party. The reason for this more extreme result is that, by allowing justices to be appointed under the old rule until the last legacy justice leaves the Court, the plan increases the influence of strategic retirements on the composition of the Court. By doing so, the plan thus increases the likelihood of an ideologically polarized Court.

¹¹⁶ As noted above in Section III.A., we simulated each year multiple times.

3. *Transition Process*

We next compare how the proposals would handle the transition process from the current system of life tenure to one of term-limited tenure. We specifically focus on two aspects of this transition process. First, we assess whether the transition process is likely to result in windfalls for the president in office in the years around its enactment. Second, we assess the average length of the enactment period across different proposals

Enactment Windfalls. As explained above, one of the explicit goals of most term limits proposals is to ensure a more consistent relationship between electoral outcomes and influence over the composition at the Supreme Court. But as the results in Section III.B.1. revealed, even plans designed to accomplish that goal can still produce inequalities in the number of justice-years appointed by presidential term. However, the analysis in Section III.B.1. looked at the inequality in justice-years across all presidential terms. By averaging across terms, that analysis obscured the possibility that the transition to a system of term limits may result in a windfall of influence for the presidents closer to the time of enactment. Or, put another way, there may be more seats to fill during the early years when the plan is transitioning in the new term-limited justices.

To assess this empirically, we calculate the number of justice-years by the presidential terms after the enactment period. Specifically, we indexed our results from Figure 7 above by event time, where event time 0 is the presidential term when the simulation starts, event time 1 is the first full presidential term after we simulate the beginning of the plan, and so on. We then calculate the average number of justice-years for each event time for a given proposal.

For these results, we only simulate enactment dates before 2000. This is because this exercise creates a clear data trade-off: the more event times we assess after enactment, the fewer simulated enactment dates we can look at. For example, an enactment date of 2002 means that the first full presidential term we assess is the one that began in 2005. For this enactment date, it would thus be impossible to assess more than four presidential terms (those beginning in 2005, 2009, 2013, and 2017). We thus limit results to simulations before the year 2000 to ensure that we can examine the results for five presidential terms.

Figure 12: Average Number of Justice-Years by Presidential Terms from Enactment

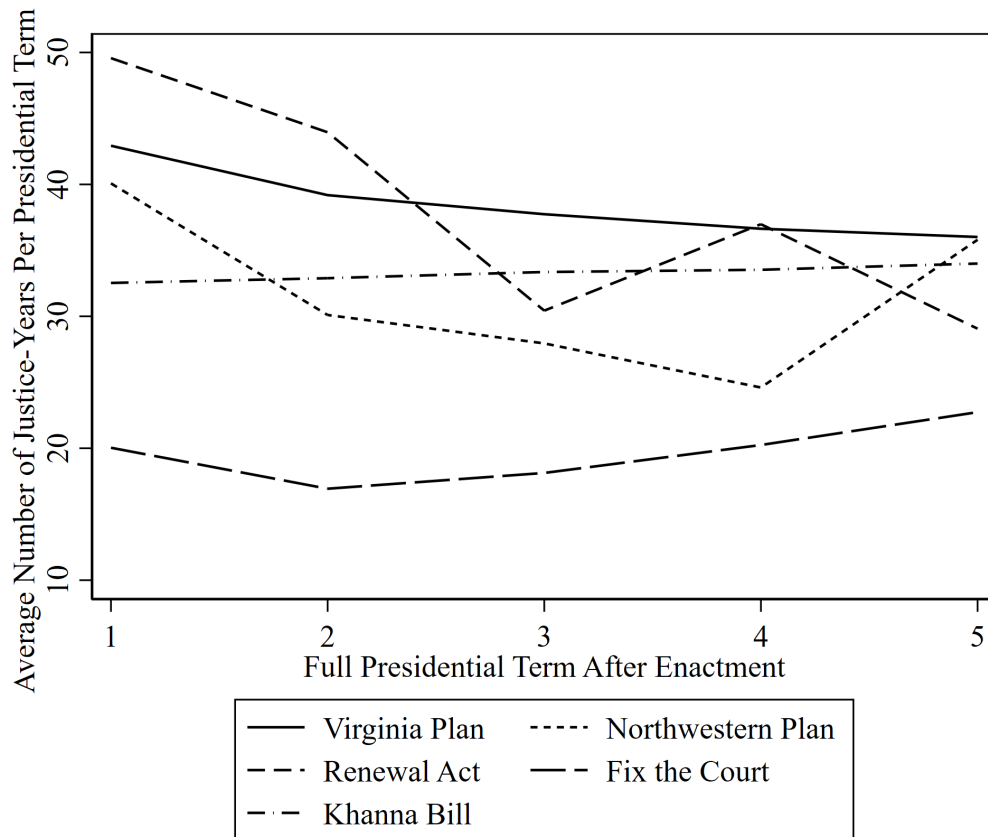


Figure 12 reports the results of this analysis. The results suggest that several of the plans are designed in a way that creates a windfall for the president at the time of enactment. Specifically, for the Renewal Act, the president at the time of enactment would appoint justices that would serve an average of 49.5 justice-years, and the next president would appoint justices that would serve an average of 44.0 justice-years. Similarly, the Virginia Plan would allow the president at the time of enactment to appoint justices that would serve an average of 43.0 justice-years, and the Northwestern Plan would allow the president at the time of enactment to appoint justices that would serve an average of 40.4 justice-years. For all three plans, this number of justice-years is noticeable larger than for the next several presidents. The Khanna Bill, in contrast, produces near identical averages across these initial presidential terms: roughly 33 justice-years per president. The Fix the Court proposal, however, produces an average of roughly 20 justice-years per president across these presidential terms. This is because the Fix the Court plan has justices appointed after the plan is passed wait “on deck” until spots open up as the legacy justices leave the Court. If it takes eight years for a spot to open up for a newly

appointed justice to join the voting members of the Court, that justice would only serve for 10 years (the remainder of their 18 years). As a result, the initial presidents would get less than the standard 36 justice-years from their appointments.

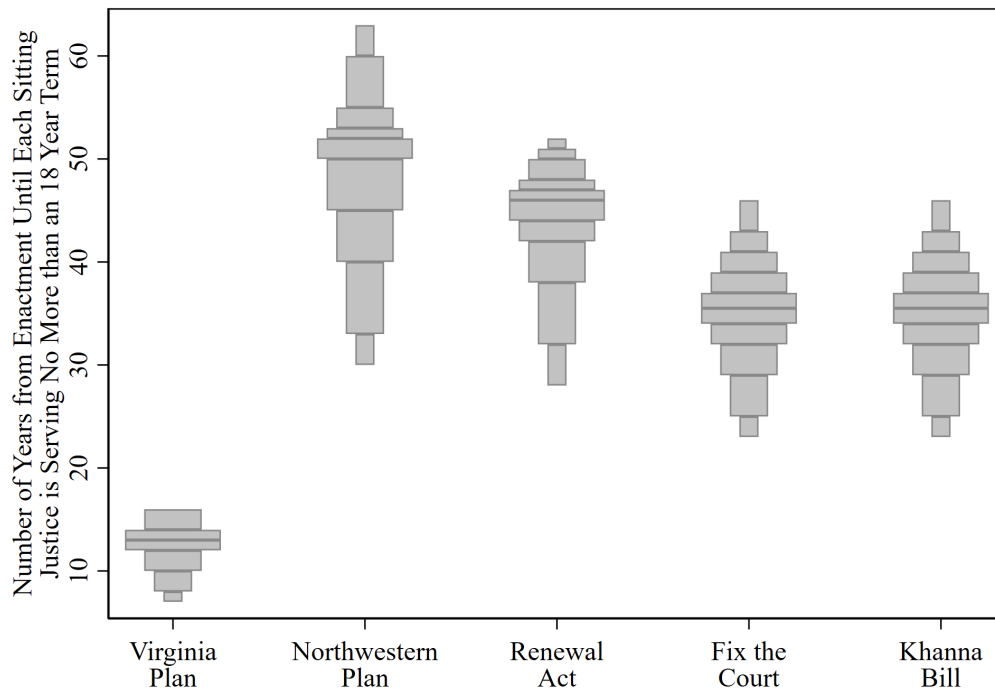
Length of Enactment Period. Proposals vary significantly in terms of how they handle the rollout of term limits. Those that do not allow the justices serving on the Supreme Court at the time of enactment to retain their life tenure allow for a fairly quick transition, whereas those that allow the legacy justices to retain life tenure can take longer to become fully effective (that is, have a full slate of Justices serving staggered 18-year terms). The result is thus that there can be considerable differences in how long it would take for a plan to become fully enacted.

More specifically, for the proposals that would not allow the current justices to serve for life—specifically the Virginia Plan—the length of enactment has a definite end: 16 years following the initial year that the first justice is appointed under the new system.¹¹⁷ This is because these proposals immediately begin to replace existing justices on a predictable schedule. For the other proposals that allow for some continued role for the legacy justices, however, the enactment will not be complete until all the current justices leave the Court either through death, retirement, or removal.

To assess the enactment period for these proposals, we estimate the number of years that it takes for the term limits proposals to become fully in effect by simulating how long it would take until all justices on the Court were appointed to a term-limited term. Figure 13 reports the results of these simulations. The simulations reveal that the Virginia Plan is always fully in effect within 16 years after the first justice is appointed, but on average it would be fully enacted within 13 years (this is due to deaths by legacy justices that would accelerate appointments of new justices that are term-limited).

¹¹⁷ For example, if the first justice was appointed in 2001, the ninth justice would be appointed in 2017 (the schedule would specifically be: 2nd in 2003, 3rd in 2005, 4th in 2007, 5th in 2009, 6th in 2011, 7th in 2013, 8th in 2016, and 9th in 2017).

Figure 13: Simulated Number of Years from Enactment Until Every Sitting Justice is Serving an 18-Year Term



The Khanna Bill and Fix the Court proposal both produce the same distribution of results. This is because they begin appointing justices immediately that are term-limited and both allow a role for legacy justices until they finish their life tenure. As a result, they would both wait until the final legacy justice leaves the Court fully to go into effect—which, on average across our simulations, is 35.5 years.

The longest enactment period is the Northwestern Plan. This lengthy enactment time is due to the fact that some of the appointments on the initial scheduled are skipped. In particular, roughly 20 percent of appointments from the initial schedule are skipped, and roughly 5 percent are skipped twice. This also causes the distribution of the number of years of the initial appointments during the roll out to vary considerably.

The second longest enactment period is the Renewal Act, which has a median time of 44 years. This lengthy enactment time is due to the fact that the 18-year rollout period does not start until the justices who still enjoy life tenure leave the Court. This means that the enactment period is simply the average number of years that a justice sitting in a given year will remain on the bench plus 16 years. For example, if the plan was enacted in 2020, the 18-year appointments would not start until the last current justice leaves the Court, and the rollout period would then take 16 additional years.

4. Confirmation Incentives

Because vacancies can interfere with the Court's decisionmaking,¹¹⁸ it would be preferable if term limits reforms could avoid creating situations that are likely to leave seats on the Court open for significant length of time. Although there may be several factors that increase the likelihood of lengthy vacancies, the recent process of replacing Justice Scalia highlights two factors that are may be particularly relevant. First, whether the Senate is controlled by the opposite party of the president is likely a decisive factor in whether there would be a lengthy vacancy. If the Senate is controlled by the same party as the president, it is unlikely that the president and Senate majority would be unable to reach a compromise. But if the Senate is controlled by the opposite party as the president, it may be unlikely that the Senate would confirm even a moderate candidate that share ideological leanings with the president. Second, the year of the presidential term when a Supreme Court seat becomes vacant may influence whether the seat is promptly filled. As the Garland affair illustrate, the Senate may become more able, or more willing, to block a nominees that are to fill vacancies that arise later in presidential term.

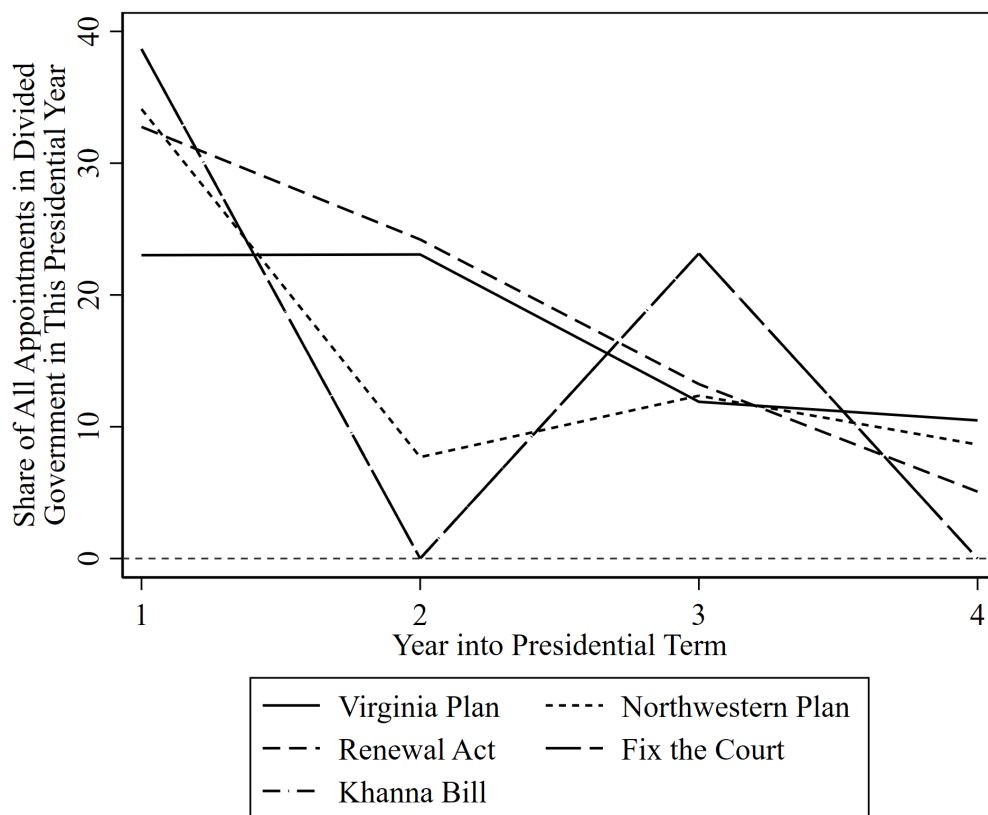
To assess whether these conditions are more likely to emerge with some term limits plans than others, we break out the results of our simulations by when vacancies occurred based on the year of the presidential term (i.e., the 1st, 2nd, 3rd, or 4th year) and whether the opposite party to the president controlled the Senate. To do so, we take the total number of appointments that occur for a given plan and report the share of the total vacancies that occurred during divided government by year.

Figure 14 reports the results of this analysis. In total, 66.0 percent of all appointments occurred during years when the Senate was controlled by the opposite party of the president. For all five plans, the plurality of vacancies in divided government (33.4 percent on average) occurred in the first year of presidential terms, a year when a large share of appointments are made. Three of the plans, however, produced a considerable number of vacancies when the senate was controlled by the opposite party in the final year of presidential terms. Notably, the Virginia Plan produced 10.4 percent of vacancies in the 4th

¹¹⁸ For example, if the Court has only eight justices, as it did for more than a year after Justice Scalia's death in 2016, it can be unable to reach decisions in cases in which the Justices are evenly divided. During that period, the Court was unable to resolve several important disputes due to the inability to break ties on the Court. For instance, The highest-profile case in which this occurred was *United States v. Texas*, 136 S. Ct. 2271 (2016) (per curiam). That said, it is worth noting that at least some scholars have argued that there having a Court with an even number of members may be preferable. See Eric J. Segall, *Eight Justices Are Enough: A Proposal To Improve The United States Supreme Court*, 45 PEPP. L. REV. 547 (2018) (arguing in favor of an 8-member Court evenly divided on ideological grounds).

year of presidential terms senate was controlled by the opposite party, the Renewal Act produced 5.1 percent, and the Northwestern Bill produced 8.7 percent.

Figure 14: Share of Appointments During Divided Government by Year of Presidential Term



In contrast, the Khanna Bill and the Fix the Court proposals exclusively produce vacancies during the first and third year of presidential terms. This is because these plans fill unexpected vacancies by allowing justices that have served longer than their 18-year terms to return to active service. By doing so, they avoid creating scenarios where a justice would have to be confirmed during the final year of a presidency senate was controlled by the opposite part,

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

5. *Profile of Nominees*

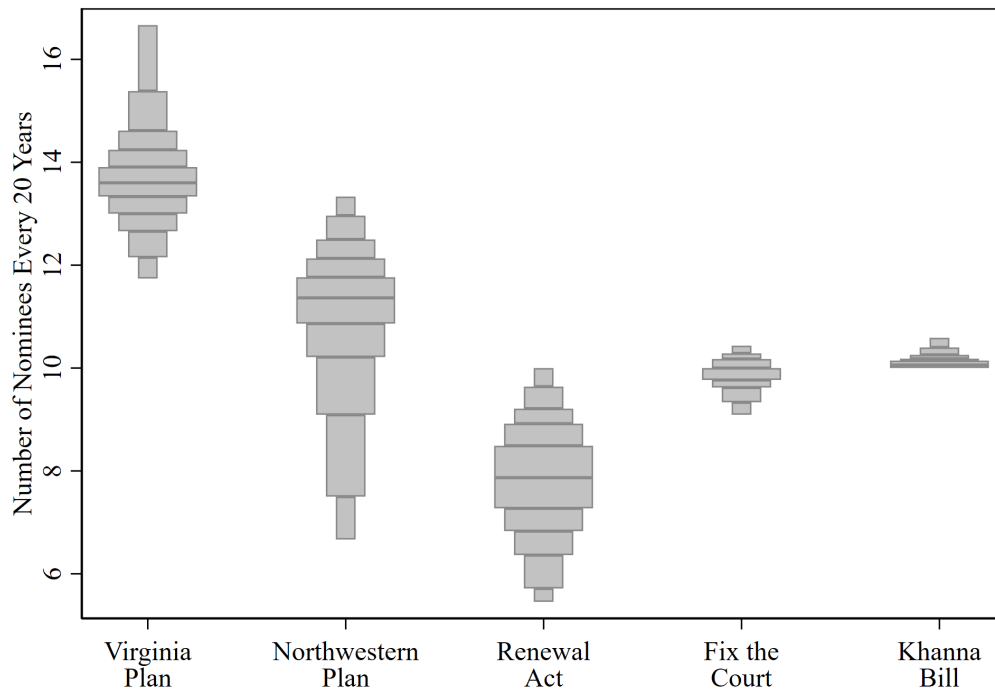
There are several ways that term limits proposals may alter the profile of the justices nominated to the Supreme Court.¹¹⁹ This Section evaluates two ways this may occur: (1) diluting the quality of justices by increasing the number of justices appointed to the Court over time and (2) changing the age profile of justices appointed to the Court.

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

Of course, for any viable term limits plan, there are undoubtedly many more lawyers across the country that are qualified nominees than would be realistically required. However, the pool of available nominees may be much smaller if the president is fixed on appointing justices that: (1) are already serving in high-level legal positions (e.g., federal district or circuit courts, state supreme courts, or the Office of Solicitor General); (2) are within a narrow age band; and (3) fit the ideological and demographic preferences the president has for the appointment. The pool of potential justices that satisfy these criteria may be relatively small. As a result, relatively small increases in the absolute number of nominees that are required under term limits plans may dilute the quality of Supreme Court nominees.

¹¹⁹ In Section III.B.2. above, we considered how term limit proposals may alter ideological profile of the justices appointed to the Supreme Court.

Figure 15: Distribution of the Number of Nominees Required for Every 20-Year Period



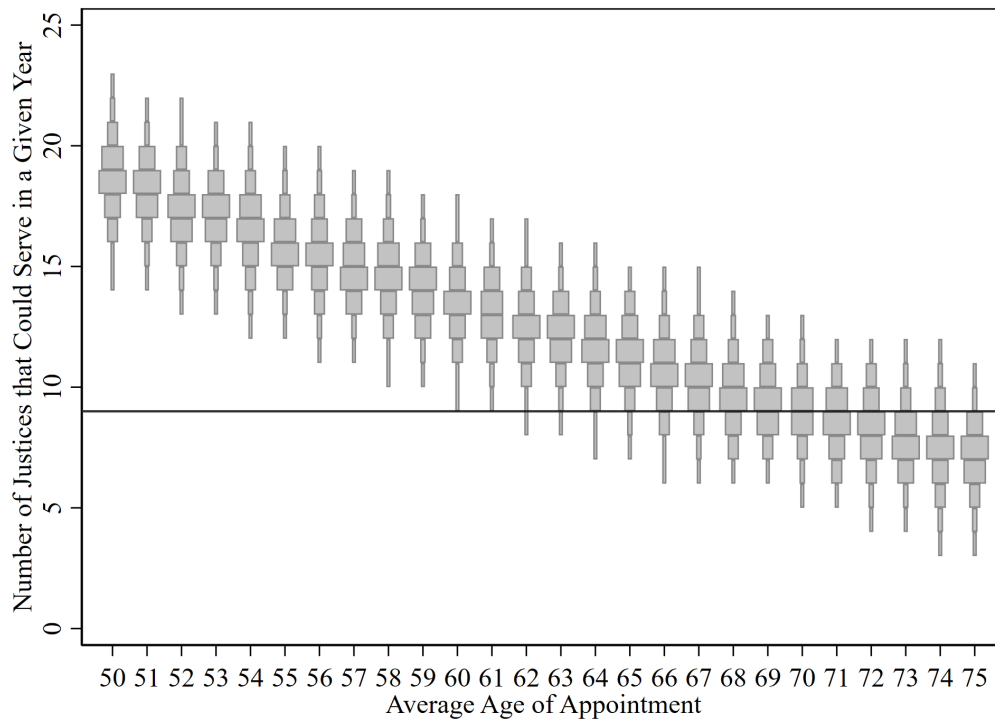
To assess this possibility, we calculated the number of nominees that would be required by each plan across our simulations. Figure 15 specifically reports the distribution of nominees that would be required in a 20 year period by plan. These results reveal that there are noticeable differences across proposals in the number of nominees that would be required for every 20 year period. For instance, the Virginia Plan would require roughly 14 justices every 20 years. This is because, when unexpected vacancies occur, the Virginia Plan does not allow for senior justices to rejoin the Court. Instead, it provides for interim appointments that would serve the remainder of the term who are not eligible for reappointment. The Fix the Court and Khanna Bill proposals require 10 justices on average every 20 years due to the fact that unexpected vacancies are typically filled by adding a senior justice back to the Court. In contrast, the Renewal Act and Northwestern Plan provide for considerable more variation in the number of justices that would be required. This is because they provide for new appointments when existing justices die or voluntarily leave the Court, implying that random deaths result in greater variability.

Age of Nominees. It is also possible that term limits may alter the age profile of nominees. For instance, term limits may lead to older nominees on average by decreasing the value of appointing someone with the highest possible longevity. Alternatively, term limits may lead to younger nominees on average by decreasing objections to young nominees because senators would not worry that they would stay on the Court for decades.¹²⁰ Given that either of these dynamics could play out, we do not make strong predictions about how term limits proposals could change the age profile nominees. It is possible, however, to assess how young nominees would have to be to ensure there is a high probability that they would complete a full 18-year old term.

To explore how term limits may influence the age of nominees, Figure 16 reports the results of simulations that estimate how many justices would be eligible to serve on the Supreme Court assuming that a term limits proposal had been fully implemented and all justices had been appointed at the same age. For example, if an 18-year term limits proposal were fully implemented and every president had appointed justices at 50 years old, our simulations suggest that the 1st and 99th percentiles for the number of justices alive in any given year are 14 and 23. Moreover, the simulations further suggest that there would be more than nine eligible justices in at least 99 percent of years for any age of appointment of justices who are 62 years old or younger. If the average age of appointment were greater than 62, however, our simulations suggest that 2 percent of the time there would be fewer than 9 justices able to serve on the Court.

¹²⁰ These dynamics could also potentially expand the pool of potential justices that presidents would consider nominating. For instance, presidents may now only consider nominees that are within five years of 50 years old, but these changes in incentives may expand the pool of potential nominees to allow for candidates between, say, 40 and 60 years old. If this occurred, it could potentially offset the concerns raised in the previous section.

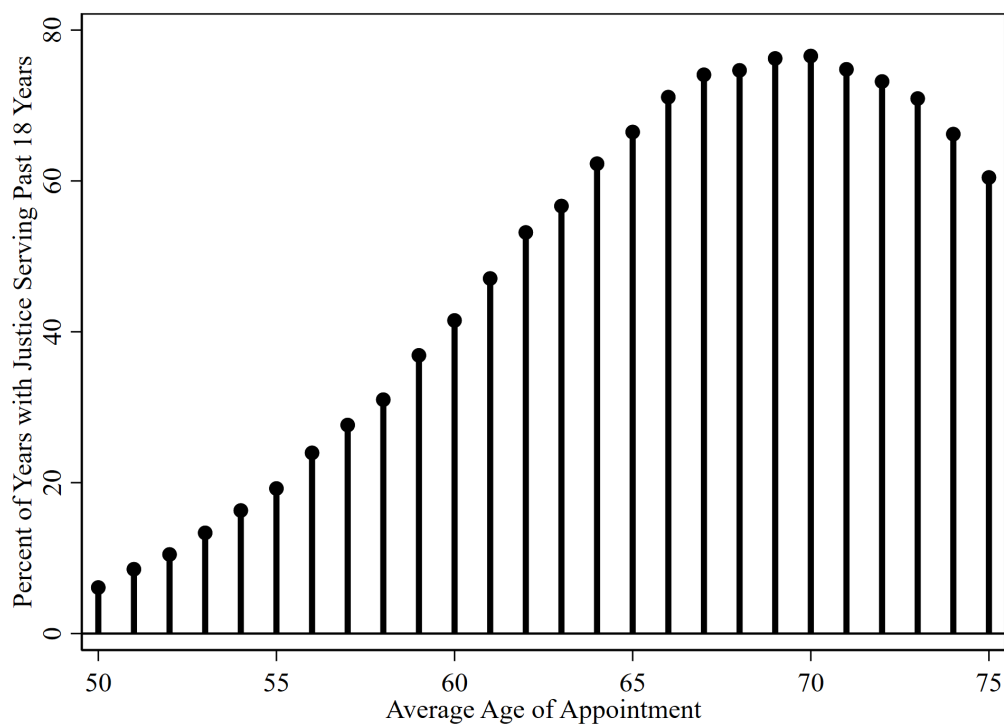
Figure 16: Estimated Number of Justices That Could Serve Conditional on Average Age of Appointment for All Justices



In a related analysis, for plans that have senior justices re-join the Court when there is an expected vacancy among the nine most junior members, we can also assess the probability that there would be a senior justice on the Court in any given year.

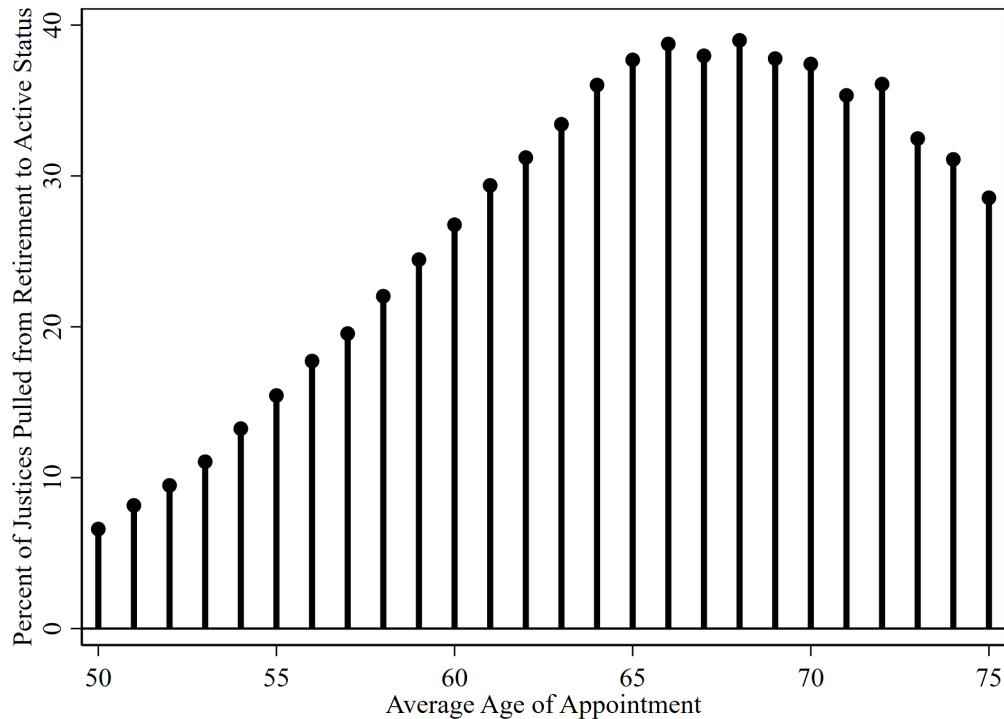
Figure 17 reports the results of these simulations. The estimates suggest that if the average age of nominees were 50 years old, a justice would be pulled back to serve back on the Court after their 18-year term in 6 percent of years; if the average age of nominees were 60 years old, there would be a justice pulled back to serve back on the Court after their 18-year term in 42 percent of years; and if the average age of nominees were 70 years old, there would be a justice pulled back to serve back on the Court after their 18-year term in 76 percent of years.

Figure 17: Percent of Years With a Justice Serving Beyond 18-Year Term Based on Average Age of Appointment



Additionally, this same question can be analyzed at the justice level instead of the year level. That is, instead of examining whether there would be one or more justice serving on the Court after their 18-year term in a given year, we can assess the probability that a given justice would ever end up serving on the Court beyond their 18-year term. Figure 18 reports these results. They suggest that if the average age of nominees were 50, 7 percent of justices would end up re-joining the Court after their 18-year term; if the average age of nominees were 60, 27 percent of justices would end up re-joining the Court after their 18-year term; and if the average age of nominees were 70, 37 percent of justices would end up re-joining the Court after their 18-year term.

Figure 18: Percent of Justices Serving Beyond 18-Year Term Based on Average Age of Appointment



IV. DISCUSSION

Although our simulations produced several noteworthy findings, they reveal what we believe are three design choices that are particularly important for any policymaker hoping to implement an 18-year term limits plan to address.¹²¹ First, how a plan handles the transition from the old system to the new can have significant consequences. Second, how the plan deals with unexpected vacancies due to deaths or early retirements can undermine or advance some of the goals of reform. Third, plans should include some provision for dealing with Senate impasse, given that obstinance by the Senate could unravel a reform designed to equalize appointments across presidencies.

A. Transition Timing

Perhaps our most important takeaway is that the biggest difference between proposals involving terms of the same length is how long they can take to become effective. The first choice the designer must face is how to handle

¹²¹ As noted above, most reformers have converged on 18-year terms as the best solution, and our analysis is focused on optimizing such plans. However, these prescriptions would likely be applicable to term-limits proposals involve different term lengths.

legacy justices. A reform such as the Virginia Plan that went into effect immediately would take on average 13 years to complete the transition, and at most 16 years. Reforms that permit legacy justices to retain life tenure take much longer. The Northwestern Plan, for example, takes an average of 52 years to become fully effective—and in some cases significantly longer, depending on how long the legacy justices live and when they leave the Court in relation to the others.

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

Other normative considerations may also play a role. Calabresi and Lindgren argue that “[s]ince the current Justices were appointed to the Court on the assumption that they would have life tenure, it would be unfair to them, as well as to the appointing parties (both the president and the Senate), to alter the arrangement struck in the appointment.”¹²² These concerns are not obviously determinative. Fairness to political actors seems at best a second- or third-order concern when discussing policy changes designed to make a governmental institution's membership correspond better to the results of elections. But in any event, if policymakers choose to retain life tenure for legacy justices, it is important for them to understand the implications of the choice, as it is a momentous one that affects the composition of the Court for decades.

But even once this choice is made, there are still meaningful differences among plans in terms of how long they take to transition. Among plans that permit legacy justices to retain life tenure, there is a significant difference between the Fix the Court and Khanna Bill proposals on the one hand (which take an average of 35.5 years to transition) and the Northwestern Plan and Renewal Act on the other hand (which take an average of 52 and 44 years, respectively). The difference appears to be explained by the fact that the former

¹²² Calabresi & Lindgren, *supra* note 6, at 826.

two plans begin the cycle of 18-year appointments *immediately*, whereas the latter two plans have more complex procedures. The Renewal Act does not begin the cycle of regular appointments until all legacy justices leave the Court, whereas the way the Northwestern Plan assigns the early appointees to designated terms prolongs the transition. Absent some other advantages of the Renewal Act or Northwestern Plan, we think our findings reveal that the transition mechanisms used by the Khanna Bill and the Fix the Court plan are superior, and should be incorporated into any future reform that permits legacy justices to retain life tenure.

The Virginia Plan was the only one we simulated that applied term limits to the legacy justices. Accordingly, we do not have any findings that offer comparative findings on such plans. But there is unlikely to be significant variation in such plans, and all such plans will take 16 years to ensure that all justices on the Court are serving full 18-year terms (rather than temporary, shorter appointments) unless the plan abandons a commitment to staggering the terms.

B. Unexpected Vacancies

A second takeaway is that how plans handle unexpected vacancies can have significant consequences. Refer back to figure 7, which shows the distribution of justice years relative to 36 by presidential term in the simulations. The plans with the highest variance is the Renewal Act, under which part of the variance is due to this plan's longer transition periods. But part is also explained by how this plan handles unexpected vacancies: under this plan, when an unexpected vacancy occurs, the president appoints a justice that takes the place of an appointment that would have been made by the next president.¹²³ This provision can provide significant windfalls to whoever happens to be president when a justice dies or retires outside of the expected schedule.

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

There are other modifications we can imagine which might regularize appointments further. One applies only to plans that do not permit legacy justices to retain life tenure; we call this procedure the “dynamic rollout.” It would provide an improved way of addressing early deaths or retirements of

¹²³ See Cramton & Carrington, *supra* note 6.

legacy justices during the transition period that would minimize the need for interim appointments. The best way to explain how it would work is by using a concrete example.

Imagine that a reform were enacted in 2021. Justice Barrett, the most junior justice, would be scheduled to have her term expire in January 2038. Under the Virginia Plan, if she were to leave the Court unexpectedly in 2030, the president would make a temporary appointment to serve for 8 years until a new 18-year appointment can be made. Under the dynamic rollout procedure, if the president had not yet made two appointments during that presidential term, the president would appoint a replacement justice to serve for a full 18-year term. The remaining legacy justices would then be “reshuffled” in order to keep the schedule on track—the second-most junior Justice, Justice Kavanaugh, who was originally slated to leave the Court in 2036, would leave the Court in 2038 instead. Only if a president had already made two appointments in the current presidential term would an interim appointment be made. The dynamic rollout procedure would not shorten the transition. But it would minimize the role of random events by reducing the likelihood that any one president would make more than two appointments (including temporary appointments). [We have not simulated this plan, but we may do so in a future iteration of the paper.]

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

But a more creative possibility would be to permit a president, at the time of the initial appointment, to designate additional lower-court judges as “backups” for the justice appointed to the Court.¹²⁴ That would mean that, in the event of the appointed justice’s early departure from the Court, one of the backups could fill the departing justice’s seat for the remainder of the term. Perhaps these backups would be formally nominated and confirmed at the time of the initial appointment; that requirement would best preserve the Senate’s role in the process. Assuming the president were permitted to designate a sufficient number of backups, this system would guarantee equal impact on

¹²⁴ This procedure would almost certainly only work if reform was accomplished through a constitutional amendment rather than a statute.

the Court among presidents and would greatly reduce the role of random events in shaping the composition of the Court.¹²⁵

C. Senate Impasse

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

Our findings show that this situation could arise with some regularity. Under our simulations, 75 percent of vacancies on the Court arose during periods when the Senate and presidency were controlled by different parties for the Renewal Act, the proposal where this scenario arose most frequently. Even under the Khanna Bill and Fix the Court Plan, at the other end of the spectrum, 62 percent of vacancies arose during divided government. If refusal to act on the other party's nominees becomes the norm, these scenarios could quickly derail the reform.

One possibility would be to provide that presidents get both appointments in the first year of their term, a period when divided government is less likely. But even so, our simulations found that many first-year appointments still arose during divided government. For this reason, we think a more targeted solution is called for. What's needed is some set of provisions that would reduce the Senate's incentives to refuse to approve any of the president's nominees. One possibility, discussed briefly above, is Calabresi's suggestion that the president and Senate be forced to reach agreement before they could perform any other government business, and while holding their salaries hostage.¹²⁶

¹²⁵ Random events that required backups to be called into active service would still play some role in shaping the Court's jurisprudence, as one president's nominees do not vote in lockstep. President Clinton's nominees, Justices Ginsburg and Breyer, did not always agree, nor did President Bush's nominees, Chief Justice Roberts and Justice Alito. Nonetheless, a system that limited the role of random events to causing the swap of one president's nominee with a different nominee by the same president would almost certainly give less of a role to random chance than a system that permits an unexpected departure to produce a significant ideological shift.

¹²⁶ See Calabresi, *supra* note 50.

But we can imagine other less aggressive possibilities. One option would be, in the event of the Senate's refusal to confirm a nominee within some period of time, to automatically appoint one of a number backups previously designated if the president in question had made earlier appointments during her presidency. Such a provision would deprive the Senate of the ability to hold out indefinitely in order to keep a seat open.

This option would not work, however, if the deadlock arose during the president's first appointment to the Court, and thus some other mechanism is needed. Perhaps there could be a penalty for the party in control of the Senate. If, for example, the Senate failed to act on president's nominee, justices currently on the Court who had been appointed by presidents of the party currently controlling the Senate could have their terms reduced by a set amount (such as 18 years collectively). This procedure is not ideal, however, as it would reduce the influence of a prior president who was not responsible for the deadlock. Another possibility would be to penalize the Senate majority's party by depriving the next president from that party of nominations to which she would normally be entitled. Such a provision would thus deprive a further president of the very advantage which the Senate was attempting to seize.

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

CONCLUSION

Despite decades of debate over the relative merits of life tenure and term limits, there have not been any major changes to the system since the ratification of the United States Constitution. One reason that the Court has been so stable is likely because any structural reform of the Supreme Court will create both winners and losers. At present, term limits would benefit Democrats and harm Republicans, given that Republicans have had more success and luck appointing Justices to recent years and currently enjoy a six-Justice majority on the Court. This dynamic may make Supreme Court reform difficult, if not possible. But if policy makers do decide to implement term limits, our research offers concrete guidance on how to design such a regime.

Of course, there are a number of other considerations relevant to choosing between possible term limit proposals that that we did not consider here. For instance, one important question is whether some of the design choices outlined above may make a given plan more politically viable and thus more likely to be enacted. For example, proposals that push off changes further into the future (such as by not imposing term limits on legacy justices) might be either more politically viable because they do not look like power grabs or less politically viable because they produce immediate benefits such that they are more likely to find political champions. Yet which path is most likely seems difficult

to know. Indeed, as Adrian Vermeule has noted, this “trade-off between impartiality and motivation” may make Supreme Court systematically unlikely to occur: a proposal that takes effect later “makes reform possible by creating an appearance of impartiality and buying off current opposition, but the tactic also makes the reform less likely to be proposed and pursued” precisely because there are no short-term gains from enacting it.¹²⁷ Given this complexity, and given that we lack any comparative expertise in political viability, we tend to agree with Vermeule’s suggestion that academic discussions of reform should “deliberately ignore political feasibility,” leaving it to politics itself to determine which proposals, if any, are viable.¹²⁸

Another important consideration involves the question of legal constraints on Supreme Court reform. Is a statutory term limits proposal constitutionally permissible if properly constructed or would it inevitably run afoul of Article III’s guarantee of tenure during good behavior? And even if statutory term limits reform of some kind is possible, do other specific design choices—such as whether to impose term limits on legacy justices—raise additional constitutional problems? Although these are questions on which legal scholars have offered their expertise,¹²⁹ they are beyond the scope of our inquiry. The constitutional issues appear sufficiently nuanced and complex that we could not give them adequate consideration while also engaging in the comparative inquiry that is our main goal here.

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

But even though we do not address all these subjects, if either party were to push for term limits for the Supreme Court justices, our research gives important guidance into how to design such a plan. We not only explain the nine

¹²⁷ Adrian Vermeule, *Political Constraints on Supreme Court Reform*, 90 MINN. L. REV. 1154, 1169 (2006).

¹²⁸ *Id.* at 1172.

¹²⁹ See, e.g., Prakash & Smith, *supra* note 15; Saikrishna Prakash & Steven D. Smith, *(Mis)Understanding Good-Behavior Tenure*, 116 YALE L.J. 159 (2006); Redish, *supra* note 15; Cramton, *supra* note 64.

design decisions that any plan must make, but we also show that the choices that are made can result in substantial differences across a range of key outcomes. This includes the degree to which the plan regularizes appointments across presidential terms, how long the plan would take to fully implement, and whether there are likely to be unplanned vacancies in periods that are more likely to result in the Senate blocking appointments. In short, our research reveals that the way that any Supreme Court term limits proposal is designed has profound implications for the functioning of the Court.