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Packages of judicial independence: implications for reform proposals on the selection & tenure of Article III judges

Judicial independence is necessary to assure the rule of law and protection of rights; accountability in some form is necessary for legitimate judicial review in a democracy.[1] Rules about selection, tenure, and removal of judges are important parts of the "package" of provisions, practices, and institutional designs that influence the degree and shape of judicial independence and public accountability. This package includes legal, institutional, political, psychological, sociological, and cultural elements that affect judicial independence in complex ways. These elements are often interdependent; a change in one may create, or call for, changes in others. This essay focuses on the selection and tenure rules that are parts of the package of institutional designs protecting the independence of Article III federal judges, in light of recent controversies over the nomination process and proposals for "term limits" for Supreme Court justices.

The U.S. Supreme Court justices, and the judges who serve in the federal district courts and circuit courts of appeals, are all Article III judges, appointed and holding office pursuant to Article III of the Constitution.[2] Nominated by the president and confirmed by the Senate, Article III judges hold office "during good Behaviour" and their salary cannot be reduced once in office. On conventional understandings, they can be removed from office only by impeachment in the House and conviction in the Senate, by a two-thirds vote, for "Treason, Bribery, or other high Crimes and Misdemeanors." Article III judges are not the only federally appointed judges, but function as part of a much larger system of judging and justice that includes non-Article III federal judges and the state-court judges.

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1 This essay is drawn from a longer one, "Packages of Judicial Independence: The Selection and Tenure of Article III Judges," which first appeared in *The Georgetown Law Journal* 95 (4) (2007).

2 See U.S. Const., article III, providing for a Supreme Court, and for "inferior" or lower federal courts to be established by Congress.

The appointments process for Article III judges is a political one by constitutional design. The process allows for a form of democratic participation, through elected representatives, in the selection of federal judges and for the possibility of democratic accountability for those selections. Through a variety of rules – some constitutional, others a matter of Senate or White House practice – this process has worked in complex ways to accommodate concerns by the political branches about partisan affiliation and ideology, competence, and the demographic mix of appointees. Although most nominees to the Article III courts continue to be approved by overwhelming majorities in the Senate, many observers believe that the rancor of the process in recent years has sharpened, leading to suggestions for change in the Senate's voting rules on nominations. The political nature of the process has the potential for disputes to become so contentious that some fear they could threaten the culture and practice of judicial independence in the Article III courts.

For these reasons the tenure rules assume especial importance in safeguarding judicial independence. The long tradition that Article III judges are not removed from office based on disagreement with their legal decisions has been an important part of the package. A number of scholars have recently argued that the terms of Supreme Court justices should be limited to eighteen years. Comparative experience suggests that serious levels of judicial independence can be attained in some settings with long, nonrenewable terms (and without life tenure). But such a change in an established and ongoing system, with an existing package of institutional features operating in a specific constitutional culture, could have ramifications elsewhere – for the confirmation process, for the internal dynamics of the Court, for its relationship to the lower federal and state courts, possibly for the stability of law – that require careful and cautious consideration.

The Article III federal courts, headed by the Supreme Court, have functioned as judicial anchors for the supremacy of federal law in a large country, with many different selection systems (including elections for fairly short terms in some of the state courts), that has managed to sustain a serious commitment to the rule of law. The federal courts are part of the overall package that is the U.S. court system, whose commitment to the rule of law under the Constitution has accommodated the states' freedom to adopt different approaches to judicial selection and tenure, perhaps in part by assuring strong tenure and salary protections for the independence of the Article III federal judiciary.[3] Our public representatives and fellow citizens must think hard before deciding whether it would make sense to change one of the pillars of this ongoing system.

There are different meanings and degrees of judicial independence, different forms of accountability, and different balances between independence and judicial accountability. While all who act as judges are expected to exercise independent judgment, in the sense of being impartial between the parties and not having a personal stake in the dispute, there is disagreement about how independent from the public, or from elected political branches, judges should be in

3 See U.S. Const., article III, which provides that Article III judges shall hold office "during good Behaviour" and specifies that their compensation "shall not be diminished during their Continuance in Office."

interpreting and applying the law. There is, moreover, a range of accountability mechanisms, both within the federal judiciary (giving public reasons for decisions, appeal to a higher court, or internal discipline, for example) and by the political branches that appoint federal Article III judges, fund the courts, and enact the laws, including those concerning federal courts' jurisdiction. There are ranges of political responses to unpopular decisions (including constitutional amendment) that may be more, or less, consistent with the decisional independence of judges. Judges who must stand for frequent election or reappointment have more reason to be concerned that making an unpopular decision will harm their livelihood than do judges appointed under Article III. Indeed, the decisional independence promoted by the tenure and salary protections of Article III is often admired, even as the consequences of this independence in checking other branches of government can be highly contentious.

The selection and tenure rules for Article III judges affect both the decisional independence of individual judges and the institutional independence of the judiciary as a whole.[4] But these selection and tenure rules do not function in isolation from other legal rules, including those governing the courts' jurisdiction, when it is exercised, who can invoke it, and who can change it; the finality of the courts' judgments, who they bind, and how judgments are enforced;[5] judges' salaries, court funding and control of administration, hiring, and location of work;[6] restrictions on judges' nonjudicial speech or activities;[7] and availability of pensions for disability or retirement.[8] Legal structures alone, moreover, do not necessarily result in judicial inde-

4 Compare John A. Ferejohn, "Independent Judges, Dependent Judiciaries: Explaining Judicial Independence," *Southern California Law Review* 72 (1999): 353, which distinguishes the independence of individual judges from the dependence of the judiciary as an institutional matter on legislative decisions – for example, about jurisdiction or funding.

5 On the importance of finality, see, for example, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which held unconstitutional a federal statute that permitted one side in a private litigation to reopen final judgments entered by Article III courts; on enforceability, see, for example, *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 362 (1816), which directly affirmed the judgment of the lowest level state court rather than remanding to the state appellate court, which had previously challenged the Supreme Court's authority; on the binding effect of constitutional decisions, see Vicki C. Jackson, "The Binding Effect of Constitutional Adjudication: A View from the United States," in *L'interprétation constitutionnelle*, ed. Ferdinand Mélin-Soucramanien (Paris: Dalloz, 2005), 219.

6 See, for example, Mark Ramseyer, "The Puzzling (In)dependence of Courts: A Comparative Approach," *Journal of Legal Studies* 23 (1994): 725–728, describing political control of Japanese judges through job assignment, including less favorable geographic locations.

7 See, for example, ABA Model Code of Judicial Conduct, Canon 2, Rule 2.10(a) (2007): "A judge shall not make any public statement that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court . . . "; ibid., Canon 3, which limits judges' extrajudicial activities; see also, 5 U.S.C. App., sections 501, 502, which limit outside income and prohibit many activities that could generate outside income; but compare *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which holds unconstitutional, under the First Amendment, a state rule that generally prohibited candidates for judicial office from expressing views on specific legal issues which might come before the court on which the candidate sought to serve.

8 See generally Artemus Ward, *Deciding to Leave: The Politics of Retirement from the United*

pendence; they are only part of the story. Some political scientists, for example, argue that effective party competition in electoral politics is keenly associated with independent courts.[9] Important as well are the professional norms of lawyers and judges,[10] the political culture and popular conceptions about law,[11] and the capacities of all branches of government for self-restraint.[12] But it seems plausible to assume, at least for present purposes, that selection and tenure rules play some role in supporting commitments to the independence of judging and the rule of law.

A brief look at the history and structure of the most directly relevant constitutional provisions may help set parameters for further analysis of what judicial independence is for, what judges are to be independent to do, and how the selection methods and tenure rules relate to these goals. In a sense, the question of what Article III judges were to be independent *from* is most readily answered: judges were to be independent of popular passions and certain kinds of pressures from other branches of the government. These were the purposes of the provisions for life tenure, the high standard for removal by impeachment, and the clause that salaries cannot be diminished while a judge is in office. The harder question is, what were judges to be independent to do? Some answers: they were to be independent to judge according to law; they were to have the independence to *interpret* the law in order to render judgment; they were to protect minorities from popular passions that would violate their legal rights; and they were to check the other branches of government when they departed from the fundamental commitments set forth in the Constitution.[13]

The proponents of the Constitution in the ratification debates recognized (as did the opponents of ratification) that there were risks of according judges this kind of independence. In The Federalist No. 79, Hamilton acknowledged suggestions that there be a provision to remove judges for "inability," but concluded that such a provision "would either not be practiced upon or would be more liable to abuse than calculated to answer any good purpose." No human institution can avoid some defects, Hamilton's comment suggests, and a provision for removal other than by impeach-

States Supreme Court (Albany: State University of New York Press, 2003), 8–9, 16–19.

9 See, for example, Ramseyer, "The Puzzling (In)dependence of Courts," 722; Matthew C. Stephenson, "'When the Devil Turns . . .': The Political Foundation of Independent Judicial Review," *Journal of Legal Studies* 32 (2003): 78–84.

10 See ABA Model Code of Judicial Conduct, Canon 2 (2007), which requires judicial impartiality. For a somewhat idealized version of what those aspirations were, see Anthony Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Cambridge, Mass.: Belknap Press, 1993), 116–121.

11 See, for example, Barry Friedman, "Attacks on Judges: Why They Fail," *Maine Bar Journal* 13 (1998): 124, discussing the role of "popular sentiment."

12 On judicial self-restraint, see John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," *New York University Law Review* 77 (2002): 962.

13 See Alexander Hamilton, The Federalist No. 78, in *The Federalist Papers: A Collection of Essays Written in Support of the Constitution of the United States: From the Original Text of Alexander Hamilton, James Madison, John Jay*, ed. Roy P. Fairfield (Baltimore: Johns Hopkins University Press, 1981), 226, 227–229, 231–232.

ment would pose too great a risk of misuse, even if its absence allowed some lacking in "ability" to remain on the bench. Hamilton likewise rejected suggestions that a mandatory retirement age be adopted, as existed in New York. Public accountability of the courts was to be achieved in other ways: in the political selection of learned lawyers with integrity, through Congress's passage of laws (including those controlling the federal courts' jurisdiction), through the possibility of constitutional amendment, and, for judicial "malconduct," through impeachment proceedings to remove a sitting judge.[14]

So, in a classic example of separated powers and checks and balances, Article III of the Constitution distributes authority with respect to the establishment and staffing of the courts between the Congress and the president, and specifies that it is the courts that exercise the "Judicial Power of the United States." It further provides that the judges of both the Supreme and inferior courts shall hold office "during good Behaviour" and specifies that their compensation "shall not be diminished during their Continuance in Office." The need to secure the independence of the federal judiciary was a point of consensus in the Constitutional Convention. How to select those judges was, however, very much in controversy. Indeed, for quite some time during the three-month Convention held in Philadelphia in the summer of 1787 it appeared that the Senate would have exclusive authority to appoint judges. On June 13, members of the Convention adopted a proposal by James Madison, one of the Convention's most influential members, that the Senate select judges. In July, a proposal to give the power of appointment exclusively to the president was voted down in convention. Until rather late in the drafting process the power of appointment was vested exclusively in the Senate, out of fear of giving the president the "dangerous prerogative" of appointing the judiciary.[15] Not until September 7 was the present rule agreed to; the Constitution was signed on September 17, 1787, and ultimately ratified by the states.

The selection mechanisms contemplated by the Constitution represent a distinctive set of choices. For example, unlike in some other countries, the Constitution did not mandate any self-replicating or professionally controlled selection process: Article III judges do not select, nominate, confirm, or appoint other Article III judges and have no formal consultative or advisory role.[16] Rather, the process of judicial nomination and confirmation is allocated to two other branches of government. Moreover, unlike in some other systems, neither the president nor the Senate, acting on their own, has authority to select any permanent members of the Article III judiciary. Instead, the two political institutions of government *must* work together, in a system intended to impose significant

14 Hamilton, The Federalist No. 79, in *The Federalist Papers*, ed. Fairfield, 234–235.

15 Sheldon Goldman, *Picking Federal Judges: Lower Court Selection from Roosevelt through Reagan* (New Haven: Yale University Press, 1997), 5–6, quoting George Mason. I am indebted to Professor Goldman's book, from which the description in this whole paragraph generally is drawn, and to his regular articles on federal judicial selection, which were very helpful in preparing the longer essay from which this short essay is drawn.

16 Article III judges do participate in selecting non-Article III judges, who perform important adjudicatory functions within the Article III court system as a whole. For discussion, see note 18 below and Judith Resnik's essay in this issue of *Dædalus*.

checks on the authority of any one actor to make appointments to the life-tenured bench.

Finally, one selection tool that the Constitution provides for some offices – direct or indirect election by the people – is not used for the selection of judges. Rather, by allocating selection to the president, with confirmation by the less populist house of Congress, the framers designed a system to select persons whose competence was believed best discernible through means other than popular elections. A political selection system, requiring agreement or compromise between the president and Senate, would appoint those with specialized competency in law.

Other choices are reflected in an array of federal tribunals, whose judges do not enjoy Article III tenure and salary protections. Our current federal judiciary is an amalgam of Article III judges, of other judicial officers appointed by Article III judges, of Article I or "legislative" tribunals in the territories and for specific subject matters (such as tax disputes, contracts or "takings" claims against the government, or veterans benefits) and of administrative judges who sit in executive or administrative agencies to perform their adjudicatory functions. The non-Article III magistrate and bankruptcy judges, whose numbers come close to those of the Article III judiciary,[17] now perform a large amount of adjudicatory work in federal district courts, in both civil and criminal cases (though their decisions are in theory subject to review by Article III judges). Non-Article III, "statutory" federal judges are selected in a variety of ways and may have to meet specific criteria; they are often subject to limited-term appointments; and they may be evaluated for reappointment or continued fitness.[18]

All judges are supposed to be impartial and fair-minded in judgment, for reasons identified with the Due Process Clause and which may also inhere in the concept of judging itself. Article III judges, however, have added institutional protections, designed to secure a greater degree of independence from political, social, or economic pressures than is required by the Due Process Clause, a degree of independence often associated with the federal courts' obligation to serve as a check on the actions of the other branches of the federal government. In contrast to the "statutory" federal judges, for active Article III judges there are no minimal professional qualifications, no term limits, no regular evaluations of fitness or of whether the judge should continue in office. Appointment of an Article III judge is an investment in, and gamble on, the future, for she may sit for thirty or more years. And it is Article III judges who, in the end, have

17 According to the Administrative Office of the U.S. Courts, in 2006 there were 678 authorized district-court judgeships and 179 authorized judgeships on the courts of appeals, as well as 857 full-time magistrate and bankruptcy judges' positions authorized. See U.S. Courts, Judicial Facts and Figures, Table 1.1, http://www.uscourts.gov (accessed July 14, 2008); follow link for "library," then "statistical reports," then "Judicial Facts and Figures."

18 Judith Resnik uses the term "statutory judges" to refer to the non-Article III federal judiciary. See Judith Resnik, "Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III," *Harvard Law Review* 113 (2000): 924; Judith Resnik, "'Uncle Sam Modernizes his Justice': Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation," *The Georgetown Law Journal* 90 (2002): 607. For a more detailed discussion, see Jackson, "Packages of Judicial Independence," 972 – 973, Appendix I, 1010 – 1011, 1025 – 1027.

jurisdiction to review questions of constitutional and other federal law, from cases in the state courts as well as the non-Article III federal courts, and to "say what the law is."[19] Thus, for Article III judges, the stakes of the initial appointment decision are the highest.

Current debates question whether the selection process for Article III judges allows too much room for political partisanship and consideration of judges' ideology, and whether the tenure rules promote too much of, or the wrong kinds of judicial independence. In recent decades, a number of highly contentious disputes in the nominations process (especially involving lower federal courts) have raised concerns about whether the selection process is "broken."[20] "Precommitments" of how a nominee would rule (for example, on current controversies about which nominees are likely to be questioned at public hearings) could compromise the appearance and actuality of impartiality and commitment to fair judicial process in the resolution of cases, although nominees generally resist answering such questions. Even without precommitments, a highly ideological or partisan selection process might convey the expectation that decisions should be in accord with political ideology, affecting the norms of judging according to law and also adversely affecting public views of the courts' legitimacy; courts that lack public trust may be less able to function independently of popular passions.

An unpleasant selection process might discourage the best qualified from serving, yielding judges not competent enough to use their independence to judge according to law, and might also lead to escalations of political battles that affect judicial independence in other ways. Some also fear that a trend toward choosing Supreme Court justices from lower courts could affect the decisional independence of lower court judges. Finally, "recess" appointments, the use of which reemerged in 2000 and 2004 after a twenty-year hiatus, allow temporary judges, with greater incentives to worry about the political branches' evaluation of their actions, to hear the most serious matters, including criminal trials.[21]

Law reviews and op-ed pages have been unusually full of reform proposals relating to selection and tenure rules for Article III judges, and understandably so. The idea that any public service position is held for life as a matter of right is in tension with modern conceptions of merit and public accountability. Legitimate constitutional government, moreover, requires both independent courts and effective democratic participation in governance; dissatisfaction with the relationship between the courts and the work of the elected branches of government, arising out of judicial invalidation or failure to invalidate actions of other branches and levels of government, has fed interest in reform proposals.

Some critics, on both the right and the left, seek institutional changes designed to produce a more populist or democratically constituted Supreme Court, after an unusually long period (1994 – 2005) of unchanging membership on that court. Others attribute high levels of

19 *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

20 See, for example, Sheldon Goldman, "Judicial Confirmation Wars: Ideology and the Battle for the Federal Courts," *University of Richmond Law Review* 39 (2005): 871.

21 For development of these points, see Jackson, "Packages of Judicial Independence," 974 – 986.

partisanship and rancor in the confirmation process to the voting rules, or the high stakes produced by the interaction of life tenure and the random and unpredictable pace at which vacancies become available (particularly on the Supreme Court). Still others are concerned with the capacity of Supreme Court justices to time their resignations for strategic political purposes. I will comment briefly on two sets of proposals that have received attention: (1) changing voting rules for confirmation of judges and (2) changing judicial tenure for Supreme Court justices, either by statute, by constitutional amendment, or through incentives.

The Constitution requires simply the "Advice and Consent" of the Senate to proposed nominations, language long interpreted as requiring only consent by a majority in the Senate. The great majority of federal judges are confirmed by overwhelming votes that far exceed two-thirds of the Senate.[22] In the wake of Justice Thomas's confirmation by an unusually close (52 – 48) vote, proposals emerged to require a two-thirds vote to confirm judges for life-tenured seats. Proponents argued that a higher supermajority was appropriate because judges serve such long terms, far beyond the term of the administration then in power, and exercise such important responsibility in interpreting the Constitution insofar as it constrains other branches; moreover, a supermajority rule would foster a more cooperative process of identifying high-quality nominees who can win approval from segments of both major parties, thereby improving the process and producing high-quality "moderate" or "mainstream" judges.[23] The Senate's authority by internal rule to require a two-thirds vote on judicial nominees is unclear, in light of the limited supermajority voting rules specified in the Constitution itself;[24] a constitu-

22 See Judith Resnik, "Judicial Selection and Democratic Theory: Supply, Demand, and Life Tenure," *Cardozo Law Review* 26 (2005): 636, chart 5, which shows that the overwhelming majority of President Clinton's and President Bush's nominees to the lower federal courts, through 2003, were confirmed by affirmative votes of at least 91 senators, and that of the 548 nominees for lower-court Article III judgeships who reached the floor of the Senate from 1993 through 2003, only three of President Clinton's and three of President Bush's were confirmed with less than 61 votes (three-fifths of the senators); see also Lee Epstein, "A Better Way to Appoint Justices," *Christian Science Monitor*, March 17, 1992, stating that since 1937, "only one successful nominee to be an associate justice [of the Supreme Court] might have failed to gain 67 Senate votes" had a two-thirds rule for confirmation been in place.

23 See Epstein, "A Better Way," which argues that a two-thirds rule would produce nominees chosen more for their "legal credentials" to gain "true bipartisan support" and notes that, historically, a two-thirds vote would have had force on only a small number of nominations, though at the margin a different voting rule might produce some different votes; Resnik, "Judicial Selection and Democratic Theory," 637 – 638, which argues for a three-fifths voting rule as generating "movement towards a middle ground."

24 Compare John O. McGinnis and Michael B. Rappaport, "The Constitutionality of Legislative Supermajority Requirements: A Defense," *Yale Law Journal* 105 (1995): 483, arguing that the constitutional authority given to each house of Congress to provide for its own rules permits either house to adopt a supermajority voting requirement for its own action, with Susan Low Bloch, "Congressional Self-Discipline: The Constitutionality of Supermajority Rules," *Constitutional Commentary* 14 (1997): 1, arguing that, in light of the Constitution's specificity in defining those circumstances in which a two-thirds vote is required, neither house has constitutional authority to require a supermajority for bill passage or for giving advice and consent to presidential nominations.

tional amendment would in theory be possible. Other recent proposals, not directed at the Senate's rules but, rather, at some form of bipartisan nominating commission, likewise aim to secure a broader political consensus for nominees.[25]

A very different kind of proposal is animated not by a desire for greater consensus but for more pure majority voting in the Senate, by abolishing the minority's power to filibuster judicial nominations.[26] The filibuster is a device available in unusual cases (because political restraints prevent its use more generally) to require supermajority voting on particularly controversial candidates. The filibuster differs significantly from a general rule requiring a supermajority vote for judicial nominees: a general rule suggests that a high degree of consensus should ordinarily be required for such judicial appointments, while reliance on the filibuster suggests that supermajority voting rules need special justification and are a departure from the norm.

Although arguments are made on both sides of this question, the case for having heightened voting rules – as a general rule or available in exceptional cases – for the appointment of life-tenured officeholders seems relatively strong, as compared to its use for officeholders whose terms are shorter. Supermajority voting rules are required for the selection of justices to some constitutional courts in Europe.[27] Here, the argument for heightened voting rules is at its strongest with respect to appointments to the Supreme Court, because of its final authority within the hierarchy of courts.[28] Closely divided votes on confirmation of judges may, over the long run, diminish the judges' stature in the public eye and diminish the sense of law as a constraint that exists somewhat apart from politics. Conversely, procedures that conduce to more cooperation in evaluating professional standards may help reinforce the distinctiveness of law and legal judgments from partisan poli-

25 For example, Senator Schumer reportedly proposed use of commissions, with equal numbers of Democrats and Republicans, to identify a single nominee, to be selected by the president unless he found the candidate "unfit for judicial service." Editorial, "Balancing Judges," *The Boston Globe*, May 6, 2003. This proposal may raise serious constitutional questions. Compare *Pub. Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), which construed the Federal Advisory Committee Act not to apply to the ABA's work on judicial nominations, in part because of constitutional concerns about restrictions on the president's authority in the nominating process; ibid., 467 (Kennedy, J., concurring), which concluded that the statute reached the ABA's activity but was unconstitutional in so doing. President Carter relied on presidentially appointed nominating commissions, which made *advisory* recommendations of possible candidates for the federal courts of appeals. For a recent ABA recommendation favoring the use of bipartisan commissions to help identify prospective nominees to the lower federal courts, see American Bar Association, Standing Committee on Federal Judicial Improvements Recommendation to the ABA House of Delegates (Resolution 118) (2008), http://www.abanet.org/scfji/pdf/SCFJI_Res_HOD.pdf. (I participated in a task force that worked on this recommendation.)

26 See generally Michael Gerhardt, "The Constitutionality of the Filibuster," *Constitutional Commentary* 21 (2004): 445.

27 See John A. Ferejohn and Pasquale Pasquino, "Constitutional Adjudication: Lessons from Europe," *Texas Law Review* 82 (2004): 1681, 1702.

28 Compare John O. McGinnis and Michael B. Rappaport, "Supermajority Rules and the Judicial Confirmation Process," *Cardozo Law Review* 21 (2005): 546, arguing that filibusters, which work toward moderation in appointments, should be available for Supreme Court but not lower-court nominations.

tics. Given the necessarily political nature of the process, and the association of political differences with differences over constitutional issues, it is neither realistic nor necessarily healthy to expect that ideological views would no longer play a role. Voting rules changes might, however, at the margin foster a more cooperative focus on finding nominees with broader support, thereby reducing the arena (and dominance) of ideological battle.

The question of term limits or mandatory retirement for Supreme Court members has arisen episodically. In the late 1980s, for example, Henry Monaghan, a law professor at Columbia University, proposed term limits of fifteen to twenty years for Supreme Court justices.[29] After the Rehnquist Court had served a full decade of service with no change in membership, proposals for reform multiplied. Kevin McGuire, a political scientist at the University of North Carolina, proposed a statutory financial incentive for justices to retire, by setting higher pensions for those who retire before a specific age.[30] A number of scholars have proposed a mandatory retirement age comparable to those of other Western democracies,[31] and some have suggested that the chief justiceship be rotated or time-limited.[32]

Packages of judicial independence

Two different sets of authors, building on earlier work, have recently proposed schemes – one statutory, one requiring a constitutional amendment – for eighteen-year term limits for Supreme Court justices. Both would apply only prospectively to new appointees. Paul Carrington and Roger Cramton, law professors at Duke University and Cornell University, respectively, have proposed a statute that would, in effect, redefine the office of Supreme Court justice, making it one served for eighteen years, after which the justice would remain an Article III judge serving on the lower federal courts (and would be available as a "back up" justice on the Supreme Court if one of the nine more junior justices were unable to sit on a case).[33] A considerable number of academics, associated with different parties and ideologies, have expressed their agreement with the general principle of this statutory propos-

29 Henry Paul Monaghan, "The Confirmation Process: Law or Politics?" *Harvard Law Review* 101 (1988): 1211, which argues that judicial independence can be achieved with long, nonrenewable terms: "[W]hat relieves judges of the incentive to please is not the prospect of indefinite service, but the awareness that their continuation in office does not depend on securing the continuing approval of the political branches."

30 Kevin T. McGuire, "An Assessment of Tenure on the U.S. Supreme Court," *Judicature* 89 (2005): 8, 15, which suggests a statute providing for a pension of 200 percent of salary if a justice retires prior to a certain set age or term of years, or 100 percent of salary as a pension if the justice retires after those points.

31 See, for example, Resnik, "Judicial Selection and Democratic Theory," 614 – 615, 640 – 641; see also Ward, *Deciding to Leave*, 12.

32 See Alan B. Morrison, "Opting for Change in Supreme Court Selection, And for the Chief Justice, Too," in *Reforming the Court: Term Limits for Supreme Court Justices*, ed. Roger C. Cramton and Paul D. Carrington (Durham: Carolina Academic Press, 2006), 210 – 223; Judith Resnik and Lane Dilg, "Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States," *University of Pennsylvania Law Review* 154 (2006): 1588, 1644 – 1647.

33 See Paul D. Carrington and Roger C. Cramton, "The Supreme Court Renewal Act: A Return to Basic Principles" (as revised, January 2005, and abbreviated, July 5, 2005), in *Reforming the Court*, ed. Cramton and Carrington, 467 – 471.

al.[34] Steven Calabresi and James Lindgren, law professors at Northwestern University, disagree that this change can or should be made by statute; they have proposed a constitutional amendment to limit terms on the Supreme Court to eighteen years.[35] Each proposal generally contemplates selection of a new justice every two years.

Most other Western democracies, including those with high courts regarded as independent and of high quality, provide either for single nonrenewable terms, mandatory retirement ages, or both.[36] These approaches appear to be compatible with judicial independence.[37] The "during good Behaviour" provisions of Article III were enacted in the late eighteenth century, when average life spans were far shorter than today. Some reasons given at that time for life tenure (such as the need to avoid judges' worrying about earning a living after their service) have been basically mooted by the provision of pensions for Article III judges. And studies indicate some lengthening of the average term in fact served by justices of the Supreme Court, though magnitudes depend somewhat on the precise periods selected for comparison.[38]

34 Among the more than fifty legal experts reported to "have endorsed the Carrington-Cramton proposal 'in principle,'" meaning, to have endorsed "the statutory proposal in general terms without commitment to the specific form or language of either the proposed statute or the document presenting it," are Professors Bruce Ackerman, Jack Balkin, Jerome Barron, Walter Dellinger, Norman Dorsen, Richard Epstein, Richard Fallon, Lino Graglia, Yale Kamisar, Larry Kramer, Sanford Levinson, Frank Michelman, Richard D. Parker, H. Jefferson Powell, L. A. Scot Powe, Jr., David L. Shapiro, Carol S. Steiker, Nadine Strossen, Lawrence H. Tribe, and Mark V. Tushnet. See Paul D. Carrington and Roger C. Cramton, The Supreme Court Renewal Act 2005: A Return to Basic Principles (July 5, 2005); available at http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm; see also "Reforming the Supreme Court: An Introduction," in *Reforming the Court*, ed. Cramton and Carrington, 5–7.

35 Steven G. Calabresi and James Lindgren, "Term Limits for the Supreme Court: Life Tenure Reconsidered," *Harvard Journal of Law and Public Policy* 29 (2006): 769, 824–831. The Calabresi-Lindgren and Carrington-Cramton proposals build on earlier work. See, for example, Philip D. Oliver, "Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court," *Ohio State Law Journal* 47 (1986): 799.

36 See Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, 2nd ed. (New York: Foundation Press, 2006), 497–500.

37 Query whether other rules, such as minimum age requirements for service, or post-employment prohibitions, might be helpful to minimize the use of judicial positions as "stepping stones" to advancement and the ensuing possibility of non-merits incentives for decision. In Germany, with a minimum age of 40 for appointment to the Constitutional Court, it is reported that on completion of their single nonrenewable terms, Constitutional Court justices might be attractive candidates for appointments to other courts. See Donald P. Kommers, *Judicial Politics in West Germany: A Study of the Federal Constitutional Court* (Beverly Hills, Calif.: Sage Publications, 1976), 87, 116.

38 See, for example, Calabresi and Lindgren, "Term Limits for the Supreme Court," 778–781, comparing the 26.1 years average tenure for justices retiring after 1970 with 14.9 years for justices leaving office from 1789 through 1970 and showing an average tenure of 20.8 years for justices who left office between 1821 and 1850; Resnik and Dilg, "Responding to a Democratic Deficit," 1595, which found a twenty-year average tenure for Supreme Court justices whose tenure terminated between 1833–1853 and a twenty-four-year average tenure for

Thus, if we were starting from scratch in designing an independent judiciary, there would be a range of alternatives to life tenure, some perhaps superior, to consider. But we in the United States are not starting from scratch. We have an ongoing working system; making changes could have unforeseen effects, including a sense of diminished independence born from the direction of the proposed change. It is thus important to consider carefully the problems such a significant change would be addressed to.

Term limit proposals are motivated in part by frustration at the Court's substantive decisions and workload (including how few cases are being taken for review on the merits), accompanied by worries over "hubris" and potential "overreaching" from lengthy office-holding; in part by concerns over the rancorous (and seemingly more ideological) nature of the selection process, believed to be related to the unpredictability of vacancies; and in part by concerns whether opportunities for appointment are distributed fairly across democratically elected presidential administrations and are frequent enough for appropriate political accountability. Also contributing to the recent support for term limits is an increased knowledge of the structure and organization of other constitutional courts in the world, as well as concern for the effects of age on mental acuity and the role of partisan factors in the timing of retirements. Both of the proposals noted above are directed only at the Supreme Court, which is justifiable since the Court is the final decision-maker, within the judicial hierarchy, on the meaning of laws. Each proposal raises serious questions and concerns.

To make such a large change by an ordinary *statute* seems especially problematic, for reasons that include its uncertain constitutionality,[39] its complexity, and the possibility that to make such a change by statute would create a slippery slope toward a considerably less independent judiciary.[40] Once some departures from existing understandings of life tenure are justified, it could well become easier, and more tempting, to move toward others – removal of

justices whose service terminated between 1983 – 2003; but compare McGuire, "An Assessment of Tenure on the U.S. Supreme Court," 9 – 12, arguing that on some measures justices "are spending no more time on the Court than their brethren who have served over the past 150 years" and suggesting that the retirement of Justice O'Connor, plus one more vacancy (which soon thereafter arose with Chief Justice Rehnquist's death) "would return the Court to its historical norm" median years of service; Susan Low Bloch et al., *Inside the Supreme Court: The Institution and Its Procedures*, 2nd ed. (St. Paul, Minn.: Thomson/West, 2008), 1116, estimating an average of fifteen years of service for the justices sitting in mid-2007.

39 For arguments that the statutory proposal is unconstitutional, see, for example, John Harrison, "The Power of Congress Over the Terms of Justices of the Supreme Court," in *Reforming the Court*, ed. Cramton and Carrington, 361, 372; David R. Stras and Ryan W. Scott, "Retaining Life Tenure: The Case for the Golden Parachute," *Washington University Law Quarterly* 83 (2005): 1408 – 1421; see also Stephen B. Burbank, "Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices," *University of Pennsylvania Law Review* 154 (2006): 1512 – 1513, stating that the constitutional "question is neither uninteresting nor without difficulty."

40 See Ward Farnsworth, "The Regulation of Turnover on the Supreme Court," *University of Illinois Law Review* 2005 (2) (2005): 451 – 452; Ward Farnsworth, "The Case for Life Tenure," in *Reforming the Court*, ed. Cramton and Carrington, 251, 266 – 267.

judges for reasons short of the impeachment standard, for example.[41]

Before deciding whether a *constitutional amendment* to provide for staggered eighteen-year terms for members of the Supreme Court is, on balance, a good idea, careful analysis (beyond what space permits here) of the fit between the problem and the remedy is required. For example, concerns for judicial disability have been largely (though not wholly) addressed by informal practice, and "decrepitude" can emerge even during an eighteen-year term. If the concern is that the Supreme Court should better mirror present political sentiments,[42] there is disagreement as a matter of principle about whether this goal is desirable or whether the structural role of the Court is not to provide a check on current politics and a link with our constitutional history, as judges of earlier generations must be persuaded of the constitutionality of challenged laws.[43] If the concern is to advance a particular ideology or methodology of interpretation,[44] it is doubtful that any proposal along these lines will be effective over the long run because preferences as to ideology and methodology may conflict, and the distribution of those preferences is unstable.[45]

On the other hand, if the concern is to remove the randomness of whether elected presidents get to appoint justices in numbers commensurate with their term, and to assure more regular democratic inputs to the Court, staggered terms with appointments every two years would be effective toward that goal – but so might other approaches, for example some expansion of the Supreme Court's bench, or staggered terms that expire every four years for two (or three) seats. Moreover, politically motivated retirements – however large or small a problem this is considered – would be limited under some versions of the proposal, but could also be addressed through mandatory retirement ages. Finally, if the concern is to reduce the rancor of the confirmation process, some argue that with confirmations expected every two years, the incentives and willingness to wage major battles would decline. But it is unclear whether staggered single terms would necessarily have this effect or if, given interest-group politics around confir-

41 Although the conventional understanding is that impeachment proceedings are the exclusive method for removing Article III federal judges, some scholars propose that Congress could by statute authorize courts to remove federal judges from office for misbehavior. See Saikrishna Prakash and Steven D. Smith, "How to Remove a Federal Judge," *Yale Law Journal* 116 (2006): 74 – 79.

42 See Calabresi and Lindgren, "Term Limits for the Supreme Court," 810 – 811, 833, which argues that turnover "must be relatively frequent and regular" in order for the democratic check of the appointments process to be effective, and that with more regular turnover, there would be a "more direct link between the will of the people and the tenor of the Court."

43 Compare Farnsworth, "The Regulation of Turnover on the Supreme Court," 411 – 418, describing the "slower law" of constitutional adjudication.

44 See, for example, Calabresi and Lindgren, "Term Limits for the Supreme Court," 823, 852 – 853, which suggests that with staggered, eighteen-year terms more "originalist" or "textualist" judges would be appointed.

45 Compare Burbank, "Alternative Career Resolution II," 1514, which finds "little basis to believe that the public at large has understandings of constitutional meaning, as opposed to results . . . let alone understandings of competing interpretive approaches."

mations, it would turn an episodic fracas into a regular one.[46]

Indeed, one question for further analysis might be whether a change to staggered, fixed terms would require other changes, including supermajority voting rules in the Senate, to achieve the desired goals. If Supreme Court nominations were to happen every two years, should the package of rules relating to judicial independence and accountability be changed as well to provide for confirmation by a three-fifths or a two-thirds vote in the Senate? Would any tendency of a more regular and frequent nomination process to promote posturing and confrontation be mitigated by the anticipated effect of supermajority voting rules to produce nominees whose qualifications, attitudes, and character appealed more broadly to segments of both major parties?

These proposals raise interesting questions for debate, about how to preserve the good that judicial independence promotes while smoothing out opportunities for political accountability through appointments (and avoiding some concerns about disability and retirement).[47]

Although many of the European courts rely on single nonrenewable terms, they do so for courts which, in the European tradition, are specialized constitutional courts that do not hear the range of cases the U.S. Court does. The Supreme Courts of Canada and Australia may be more comparable to the U.S. Court than the constitutional courts of Europe. Situated in the common law tradition, Canada and Australia have a supreme or high court with jurisdiction over constitutional and statutory matters; their constitutions protect judges from being removed from office except in limited circumstances;[48] and each country amended its constitution in the mid-twentieth century to provide for a mandatory retirement age for their judges.[49] While it is healthy to look comparatively at how successful constitutional courts have been structured in other Western democracies, it is important to give close and careful consideration to the varying contexts.[50]

46 See ibid., 1514 – 1515, 1537 – 1547; see also Arthur D. Hellman, "Reining in the Supreme Court: Are Term Limits the Answer?" in *Reforming the Court*, ed. Cramton and Carrington, 298 – 303.

47 Some courts have staggered terms for groups of justices that expire around the same time, raising the possibility of compromise over "slates" among or within appointing authorities. Compare, for example, Kommers, *Judicial Politics in West Germany*, 128 – 144, describing a "modus vivendi," by which different political parties were able to fill different seats on the German Constitutional Court, subject to others' veto; Jackson and Tushnet, *Comparative Constitutional Law*, 498 – 499, which notes the informal cooperation among parties and chambers of the legislature in selecting German justices.

48 In Canada the constitution provides that superior court judges "shall hold office during good behaviour," Constitution Act, 1867, section 99(1) (Can.), while in Australia the constitution provides that High Court and federal judges can be removed only on a finding of "proved misbehaviour or incapacity," Const. of Austl., article 72(ii). These judges are removable only on the procedure of "address" by both houses of their respective legislatures. See Constitution Act, 1867, section 99(1) (Can); Const. of Austl., article 72(ii).

49 See Jackson, "Packages of Judicial Independence," 1005 n. 172, describing Canadian and Australian constitutional amendments setting mandatory retirement ages of 75 and 70, respectively.

50 See Vicki C. Jackson, "The Supreme Court, 2004 Term: Comment: Constitutional Comparisons: Convergence, Resistance, Engagement," *Harvard Law Review* 119 (2005): 125 – 126.

Vicki C. Jackson on judicial independence

Other ideas, for example very short terms for federal judges, are plainly designed to diminish judicial independence and move toward a more populist judiciary.[51] As Chief Justice Rehnquist wrote in his 1992 book, *Grand Inquests*, the idea of an independent judiciary was one of the most "original contributions to the art of government" made by the Constitutional Convention that met in Philadelphia. The Senate's rejection in the Chase impeachment of removal based on disagreement with a judge's decisions or views was, in his view, central to the success of the idea of the independent judiciary. Even though it would be easy at times of intense conflict and polarization for those "engaged in the struggle to see it as an apocalyptic confrontation between good and evil, when customary restraints must be cast off," Rehnquist wrote, enough Senators maintained their loyalty to the Constitution, over narrow partisan interest, to help secure judicial independence through their vote to acquit.[52] At a time when more of the world's countries are moving to a system of independent courts for constitutional review, it would be quite a step for the United States – which contributed the idea of judicial review by independent courts to the world – to move away from it.

Article III judges were designed to function with great independence – independence from political and popular pressures, independence to interpret and apply the law, including the Constitution, so as to resist encroachments by other branches of government. This does not mean that courts necessarily have the final word on large questions of substance. Legislative disagreements with judicial decisions interpreting statutes can be expressed in amended statutes. Disagreement with constitutional interpretations can sometimes be addressed through revised laws, through litigation over time, or through a constitutional amendment: term limits are not the only response to concerns about judicial policy-making or for more democratic forms of lawmaking.

Just as it is almost impossible to envision a confirmation process in which politics and ideology play no roles, so it is difficult to imagine that, on deliberation, members of Congress or members of the public would abandon the tradition of strong judicial independence for the federal judiciary. The federal Article III courts function as part of a much larger set of connected systems of adjudicators, including the state courts and non-Article III federal courts. Many other courts, federal and state, whose judges lack Article III protections, make initial decisions on important questions – and most of these decisions end up not being reviewed in an Article III court. Yet they are made in the shadow of the supremacy of federal law and the possibility of Article III court review.[53]

51 See, for example, Saikrishna B. Prakash, "America's Aristocracy," *Yale Law Journal* 109 (1999): 568 – 569, which suggests that life tenure be eliminated for all federal judges and that they serve renewable three-, four-, or six-year terms.

52 Quotations in this paragraph are from William Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (New York: Morrow, 1992), 275 – 278.

53 Supreme Court review of state-court judgments and the availability of the inferior federal courts to assure states' compliance with federal norms are fundamental to the overall operation of the U.S. Constitution and the American court systems. See, for example, Lawrence Gene Sager, "The Supreme Court, 1980 Term: Foreword: Constitutional Limi-

The United States is unusual not only in having life tenure for its Article III judiciary, but also in the degree to which it relies on popular elections for the selection or retention of its state-court judiciary.[54] The strong institutional independence of Article III judges anchors the legal infrastructure that accommodates elected judges in the state courts with the rule of law. This anchoring role provides added reason why proposals to jettison central features of the traditional structure of federal judicial independence should be evaluated with great caution and with attention to the effects that change in one part of the "package" could have on other parts. For the federal courts do not function alone, but as part of a broader federal system.

tations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts," *Harvard Law Review* 95 (1981): 45–57, which concludes that under the Constitution, "superintendence of state compliance with" supreme federal law is an "essential function" of the federal judiciary; compare O. W. Holmes, *Collected Legal Papers* (New York: Harcourt, Brace and Howe, 1920), 295–296: "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void. I do think the Union would be imperiled if we could not make that declaration as to the laws of the several States"; quoted in Geoffrey Stone et al., *Constitutional Law*, 4th ed. (Gaithersburg, Md.: Aspen Law & Business, 2001), 50.

54 See, for example, Hans Linde, "Elective Judges: Some Comparative Comments," *Southern California Law Review* 61 (1988): 1996: "To the rest of the world the American adherence to judicial election is as incomprehensible as our rejection of the metric system"; see also Herbert Jacob et al., *Courts, Law, and Politics in Comparative Perspective* (New Haven: Yale University Press, 1996), 390, finding that among the several countries studied the United States uses "the most partisan selection process" for choosing judges; Roy A. Schotland, "Comment," *Law and Contemporary Problems* 61 (1998): 153, which notes the shortness of terms of many elected judges, and reports that 62 percent of elected trial judges serve terms of no more than six years, while 45 percent of elected appellate judges serve six-year terms.