

The Need for a Supreme Court Term Limit in the United States

By Emma Schoenauer

Section 1: What is the Problem?

On eight occasions in American history, the President has successfully nominated and appointed a United States Supreme Court justice replacement in an election year. In 2016, President Barack Obama nominated Merrick Garland to the Supreme Court to fill Justice Anthony Scalia's seat after his unexpected passing. However, then Senate Majority Leader Mitch McConnell led the way in refusing a Senate vote on this nomination because "it was an election year". Then, during the Trump presidency, the vacant seat was filled by Neil Gorsuch. Three years later, Amy Coney Barrett replaced the late Supreme Court Justice Ruth Bader Ginsburg, forging the court's conservative 6-3 majority.¹ The Supreme Court has notably overturned *Roe v. Wade* (1973) with *Dobbs v. Jackson* (2023). This comes as 56% of Americans disagreed with this decision; 64% of Americans believed the former *Roe v. Wade* decision was correct; and 67% of Americans view the Supreme Court's in *Dobbs v. Jackson* decision as political.²

The current conservative court has also limited the EPA's authority in effectively limiting carbon dioxide emissions,³ revoked affirmative action in university admissions,⁴ and backed a

¹ Klein, Ezra. *Why We're Polarized*. First Avid Reader Press hardcover edition. New York, Avid Reader Press, 2020.

² Newall, Mallory. "Has the Dobbs Decision Made the Public More Divided on Abortion?" *IPSOS*, Reuters, Bloomberg, 22 June 2023, www.ipsos.com/en-us/has-dobbs-decision-made-public-more-divided-abortion.

³ Supreme Court of the United States. "WEST VIRGINIA ET AL. v. ENVIRONMENTAL PROTECTION AGENCY ET AL." 20-1530, CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, Oct. 2021, www.supremecourt.gov/opinions/21pdf/20-1530_new_1537.pdf.

⁴ Supreme Court of the United States. "STUDENTS FOR FAIR ADMISSIONS, INC. v. PRESIDENT AND FELLOWS OF HARVARD COLLEGE ." 20-1530, CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, Oct. 2022, www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf.

website designer’s refusal to work for LGBTQ+ clients.⁵ The United States Supreme Court’s politicization has been driven by its life appointments. While a president can only serve for eight years, a Supreme Court Justice can serve for decades, allowing a president's legacy and ideology to extend long beyond their time in office. Indeed, the longest-serving Justice, William O. Douglas, served for 36 years and seven months, and the longest-serving Chief Justice, John Marshall, served for 34 years and five months.⁶ Although the average tenure of a Supreme Court Justice from 1789-1970 was 14.9 years, for those justices who have retired since 1970, the average tenure has jumped over a decade from 12.2 to 26.1 years (Chart 1).⁷ Additionally, the average age at which justices are leaving office has jumped over 20 years from 58.3 in 1789 to 78.7 in 2006 (Chart 3).⁸ While increases in life expectancy over this period may play a small role in this increase, this trend also suggests that the modern United States Supreme Court may receive weaker democratic checks from the other branches of government.

⁵ VanSickle, Abbie, and Adam Liptak. “Gay Rights vs. Free Speech: Supreme Court Backs Web Designer Opposed to Same-Sex Marriage.” *The New York Times*, The New York Times, 1 July 2023, www.nytimes.com/live/2023/06/30/us/gay-rights-free-speech-supreme-court.

⁶ Supreme Court of the United States. “FAQs - Supreme Court Justices.” *Home - Supreme Court of the United States*, 2023, www.supremecourt.gov/about/faq_justices.aspx#:~:text=The%20longest%20serving%20Justice%20was,days%2C%20from%201790%20to%201791.

⁷ Calabressi, Steven G., and James Lindgren. *TERM LIMITS FOR THE SUPREME COURT: LIFE TENURE RECONSIDERED*, Northwestern Law School, 31 Jan. 2006, <https://blogs.chicagotribune.com/files/supctlawcalabresi.pdf>.

⁸ See footnote 7.” with “Calabressi, Steven G., and James Lindgren. *TERM LIMITS FOR THE SUPREME COURT: LIFE TENURE RECONSIDER...*

Chart 1: Length of Tenure on the U.S. Supreme Court
by Period of Leaving the Court
1789–Jan. 2006
103 Terms, 101 Justices

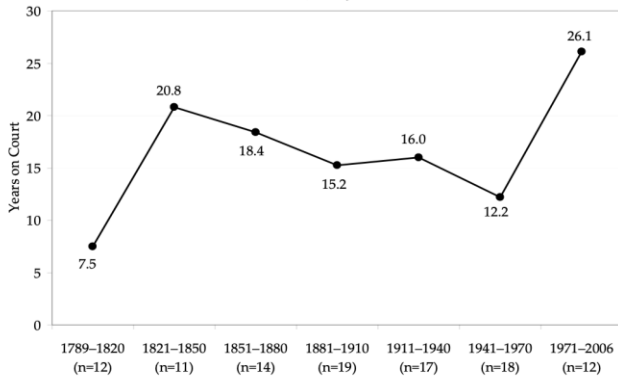
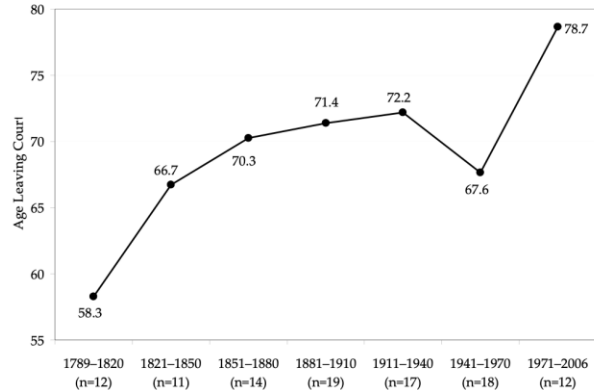


Chart 3: Age at Leaving Office
by Period of Leaving the U.S. Supreme Court
1789–Jan. 2006
103 Terms, 101 Justices



According to the University of Chicago Law Review, “while the pre-twentieth-century Court featured at least four justices – Baldwin, Grier, Clifford, and Field and perhaps two more – Rutledge and Cushing– whose mental incapacity should have barred their continued service, the twentieth-century Court has featured eleven justices whose mental decrepitude or mentally infirm judgment should have led to their departure from the bench before they vacated their seats.”⁹ Real or imagined fears of mental decrepitude in the Supreme Court arguably decreases the legitimacy of their decisions.

The politicization of the Supreme Court was not the intention of the Founders of the Constitution. Rather, the Supreme Court, after assuming the role of judicial review in *Marbury v. Madison* (1803), has overturned legislation or executive actions which, in the Court’s considered judgment, conflict with the United States Constitution.¹⁰ To ensure an independent Judiciary, the

⁹ Garrow, David J. (2000) "Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment," *University of Chicago Law Review*: Vol. 67: Iss. 4, Article 2. Available at: <https://chicagounbound.uchicago.edu/uclrev/vol67/iss4/2>

¹⁰ The Supreme Court of the United States. “The Court and Constitutional Interpretation.” *Home - Supreme Court of the United States*, www.supremecourt.gov/about/constitutional.aspx. Accessed 7 Dec. 2023.

Constitution provides that judges serve during “good behavior,” and that their salaries may not be diminished while they serve on the bench.¹¹

In practice, the current system of life appointment of Supreme Court Justices allows for strategic retirement, encourages the appointment of young nominees who can serve for longer, and fails to evenly distribute appointment power across democratically elected presidents.¹²

Section 2: Addressing the Problem – A Proposal

The proposal to resolve the highly politicized court is to impose staggered eighteen-year term limits on the Supreme Court’s nine justices such that a vacancy would occur every two years at the end of the term in every odd-numbered calendar year (not an election year).¹³ This means that each one-term president would be able to appoint two justices at a minimum and every two-term president would be able to appoint four. After justices serve their eighteen-year terms, they would receive the automatic right to sit on the lower federal courts for life, or transition to senior status, and maintain their lifetime salary as promised by the Constitution.

Enacting eighteen-year terms for Supreme Court Justices would help to depoliticize the Supreme Court of the United States. With a fixed number of appointments per president, the Justice nomination process would become less partisan and better reflect public opinion, given that their democratically elected president would have a more equal and protected opportunity to elect Justices. This means that if the United States should begin to favor one party, a reformed Supreme Court justice system would be proactive and responsive to these policy shifts without taking an activist approach.

¹¹ The Supreme Court of the United States. “The Court as an Institution.” *Home - Supreme Court of the United States*, www.supremecourt.gov/about/institution.aspx. Accessed 7 Dec. 2023.

¹² See footnote 7.” with “Calabressi, Steven G., and James Lindgren. *TERM LIMITS FOR THE SUPREME COURT: LIFE TENURE RECONSIDER...*

¹³ “Strategy 1: Achieve Equality of Voice and Representation.” *Our Common Purpose | American Academy of Arts and Sciences*, www.amacad.org/ourcommonpurpose/report/section/6. Accessed 7 Dec. 2023.

Term limits would also decrease the mental decrepitude of the Supreme Court and prevent the strategic retirement of justices. With nearly half of justices having died in office,¹⁴ an eighteen-year term limit would ensure that those serving on the highest court in America would be of adequate mental capability to make life-altering decisions for Americans.

By decreasing the partisan influence on the United States Supreme Court nomination process and ensuring the mental aptitude of justices, enacting an eighteen-year term limit would restore the legitimacy of the Supreme Court of the United States and better represent the changing values and preferences of all Americans.

Section 3: Potential Complications with a Supreme Court Term Limit

While this democratic reform proposal has many benefits, public policymakers may question its political feasibility.

This democratic reform could be enacted through a constitutional amendment, of which only 27 have been ratified since 1791, or by statute. A recent poll by the Associated Press-NORC Center for Public Affairs Research found that 67% of the American public, 82% of Democrats, and 57% of Republicans, would support term limits for Supreme Court justices.¹⁵ If members of Congress are truly representative of their constituents' preferences, perhaps this amendment could gain support in both chambers of Congress. However, under divided government, the successful passage of this proposal through Congress is beholden to the majority party which may not wish to relinquish any of its powers.

¹⁴ Stolzenberg RM, Lindgren J. Retirement and death in office of U.S. Supreme Court justices. *Demography*. 2010 May;47(2):269-98. doi: 10.1353/dem.0.0100. PMID: 20608097; PMCID: PMC3000028.

¹⁵ Gresko, Jessica, and Emily Swanson. "AP-NORC Poll: 2 in 3 in US Favor Term Limits for Justices." *AP, NORC at the University of Chicago*, 25 July 2022, <https://apnorc.org/ap-norc-poll-2-in-3-in-us-favor-term-limits-for-justices/>.

Even then, the proposal could be overruled by the Supreme Court as “unconstitutional” if Supreme Court justices do not wish to reform the current system of lifetime appointments. Policymakers suggest that because Supreme Court justices will still receive a salary for life and be transitioned down to a lower court after their eighteen-year term limits, they will feel this is adequate compensation and accept this amendment in the best interest of the American people.

With eighteen-year term limits on Supreme Court Justices, America’s highest court would enjoy increased legitimacy and better represent the American public’s diverse views. Supreme Court term limits are a change that an increasingly polarized America needs.

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