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## RETAINING LIFE TENURE: THE CASE FOR A “GOLDEN PARACHUTE”

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*Abstract: The first vacancies on the Supreme Court in eleven years have sparked renewed debate about the continued viability of life tenure for federal judges. Scholars have decried life tenure as one of the Framers’ worst blunders, pointing to issues such as strategic retirement, longer average tenure, and widespread mental infirmity of Justices. In this Article, the authors argue that, notwithstanding the serious problem of mental and physical infirmity on the Court, life tenure should be retained. They also argue that recent statutory proposals to eliminate or undermine life tenure, for example through a mandatory retirement age or term limits, are unconstitutional.*

*Surprisingly, scholars have failed to take a multidisciplinary approach to the question of life tenure, or to propose alternatives that address its weaknesses without abolishing it. The authors address that gap by adopting an incentives approach to Supreme Court retirement. They first demonstrate that, as an historical and empirical matter, pensions have been the most important factor in influencing the retirement timing of*

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*Supreme Court Justices and comparable actors over history. Building on that track record, the authors propose that Congress create a “golden parachute” for Supreme Court Justices by doubling their retirement benefits upon reaching an appropriate retirement age or upon certifying a mental or physical disability. They also propose modest institutional reforms that will make the office of “Senior Justice” more attractive to Justices considering retirement.*

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## INTRODUCTION

Life tenure is under attack yet again. In the popular press, the first vacancy on the Supreme Court in eleven years has triggered dozens of calls for judges to serve shorter, more predictable terms in office.<sup>1</sup> In the legal academy too, a growing number of scholars decry life tenure as one of the Framers’ worst blunders.<sup>2</sup> They support various replacement regimes, including term limits,<sup>3</sup> direct elections,<sup>4</sup> or a mandatory

1. See, e.g., Doug Bandow, *Fixed Terms for Supreme Court Justices*, L.A. TIMES, Mar. 3, 2005, at C3; Michael Barone & Bruce Bartlett, *Fusillades . . . And Tenure Traps*, WASH. TIMES, July 6, 2005, at A14; Barry Ellington, Letter to the Editor, *Put Limits on Supreme Court Terms*, ARIZ. REPUBLIC, July 10, 2005, at V4 (describing a “growing consensus toward a constitutional amendment to limit service of Supreme Court justices to single terms of [eighteen] years, staggered so that a new justice is appointed every second year”); Jeff Jacoby, Op-Ed., *Don’t Let Judges Serve for Life*, BOSTON GLOBE, May 26, 2005, at A19; Stuart Taylor Jr., *Life Tenure Is Too Long for Supreme Court Justices*, 2005 NAT’L J. 2033.

2. The recent scholarly movement has attracted attention even among nonlawyers. See Linda Greenhouse, *How Long Is Too Long for the Court’s Justices?*, N.Y. TIMES, Jan. 16, 2005, § 4, at 5; Tony Mauro, Op-Ed., *Roots Grow Deeper on the Supreme Court*, USA TODAY, Jan. 13, 2005, at 11A.

3. See Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 48–56 (Roger C. Cramton & Paul D. Carrington eds., 2006) (endorsing eighteen-year staggered terms through constitutional amendment); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 471, *supra*; Sanford Levinson, *Contempt of Court: The Most Important “Contemporary Challenge to Judging,”* 49 WASH. & LEE L. REV. 339, 341 (1992) (advocating single, nonrenewable terms of eighteen years); John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541–43 (1999) (proposing Supreme Court riding by lower court judges for a fixed term); Phillip 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.J. 799, 800–01 (1986) (endorsing eighteen-year staggered terms through constitutional amendment); Panel, *Term Limits for Judges?*, 13 J.L. & POL. 669, 687 (1997) (comment of Judge Laurence H. Silberman); L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 197 (1995) (suggesting nonrenewable eighteen-year terms); Saikrishna B. Prakash, *America’s Aristocracy*, 109 YALE L.J. 541, 570–73 (1999) (reviewing MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999)) (recommending term limits); James E. DiTullio & John B. Schochet, Note, *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, 1096–97 (2004) (recommending eighteen-year staggered terms through constitutional amendment); Akhil Reed Amar & Steven G. Calabresi, Editorial, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23 (supporting term limits for Justices); Gregg Easterbrook, *Geritol Justice*, NEW REPUBLIC, Aug. 19, 1991, at 17, 18–19 (proposing ten-year fixed terms through constitutional amendment).

4. RICHARD DAVIS, *ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS* (2005).

retirement age,<sup>5</sup> implemented by statute<sup>6</sup> or constitutional amendment.<sup>7</sup> Even Chief Justice John Roberts argued in favor of term limits as a government lawyer.<sup>8</sup>

Critics of life tenure score a few palpable hits. Mental and physical infirmity among federal judges is well documented and carries with it real costs for the quality of decisions and the credibility of the courts. Unfortunately, the critics dedicate most of their attention to the least significant problems. Some concerns are overblown, like the supposedly unprecedented increase in the average length of service for members of the Supreme Court. Others are more speculative, like the threat of strategic retirement. Recent scholarly literature that suggests circumventing life tenure by statute is especially alarming because it wraps unnecessary reforms into an unconstitutional package.

Conspicuously absent from the popular and scholarly debate are viable options for addressing reformers' concerns while still retaining life tenure. Although they sometimes acknowledge the availability of more restrained alternatives in passing,<sup>9</sup> critics of life tenure focus their attention on proposals to abolish the system entirely. When they get into the details, they rarely agree on the contours of the brave new world they envision. As a result, potential measures to solve the problems associated with life tenure, without abolishing or substantially undermining it, have gone unexplored in the legal literature.

To address that gap, we adopt an incentives approach to Supreme Court tenure. Historically, pension reform has been Congress's most successful tool for reducing instances of mental and physical disability on the Court and encouraging timely retirement. Building on that track record, we

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5. See ARTEMUS WARD, *DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT* 247 (2003) (advocating a mandatory retirement age for Justices); Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 409 (concluding that a mandatory age requirement is preferable to term limits); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 1086–87 (2000) (supporting mandatory retirement at age seventy-five through constitutional amendment); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211–12 (1988) (arguing for either a mandatory retirement age or term limits for Justices).

6. See, e.g., Carrington & Cramton, *supra* note 3, at 471. For more thorough consideration of statutory proposals to end life tenure, see *infra* Part I.

7. See, e.g., Calabresi & Lindgren, *supra* note 3, at 49; Garrow, *supra* note 5, at 1086; Oliver, *supra* note 3, at 800–01.

8. See John M. Broder & Carolyn Marshall, *White House Memos Offer Opinions on Supreme Court*, N.Y. TIMES, July 30, 2005, at A11.

9. See Calabresi & Lindgren, *supra* note 3, at 93–97; Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 641 (2005) [hereinafter Resnik, *Judicial Selection*]; Judith Resnik, *So Long*, LEGAL AFF., July/Aug. 2005, at 20, 21.

propose that Congress create a “golden parachute” for Supreme Court Justices by increasing their retirement benefits, especially upon reaching an appropriate retirement age or upon certifying a mental or physical disability. We also suggest institutional reforms to improve the status and security of Justices following retirement. These measures would address the most serious shortcomings of life tenure without the upheaval of a constitutional amendment and a new tenure regime.

This Article proceeds in three parts. In Part I, we draw on the text, structure, and original meaning of the Constitution to identify three constraints on Congress’s power to abolish or circumvent life tenure by statute. First, the requirement that judges serve “during good behaviour” bars Congress from directly instituting fixed terms or a mandatory retirement age by statute. Second, the Constitution requires a separate office for “judges of the Supreme Court,” and further prevents Congress from depriving Justices of the essential powers and duties of their office. Together these constraints mean that Congress cannot indirectly institute fixed terms for the Supreme Court, either by taking Justices off of active duty following a certain number of years, or by “designating” lower court judges to serve on the Supreme Court for a limited time. Third, the tenure and salary clauses prevent Congress from interfering with judicial independence.

In Part II, we critically evaluate life tenure, separating real problems from the less substantial ones. We acknowledge mental and physical infirmity among members of the Supreme Court as a serious and continuing concern. Two other widely cited drawbacks of life tenure, however, are overblown. First, the supposedly unprecedented increase in the average length of service on the Supreme Court is in part a product of arbitrary period selection. Calls to return to the length of service imagined at the founding ignore evidence that the Founders explicitly contemplated terms of thirty or forty years, and that American history has seen periods of judicial tenure every bit as long as those that prevail today. Second, although we acknowledge that some retirement decisions are based on political factors, strategic retirement by Supreme Court Justices is a chameleon claim because it is predicated too much on anecdotal evidence. Indeed, attempts to empirically verify strategic retirement behavior by members of the Supreme Court have largely failed. Moreover, to the extent it exists, strategic retirement serves only to slow the pace of doctrinal change on the Court—which has at least as many advantages as disadvantages.

Finally, in Part III, we offer our own package of statutory proposals for Supreme Court Justices, focusing on inducing retirement through pension

and modest institutional reform. We begin by analyzing the history of the pension system for Article III judges, from the first pension enacted in 1869 to the more recent easing of the age and service requirements for pension qualification in 1984. We then turn our attention to the rich empirical literature, which demonstrates that pension qualification has been the most important factor in influencing the timing of retirement by Supreme Court Justices. We also examine the retirement behavior of two comparable actors—tenured faculty members and members of Congress—both of which display significant responsiveness to early retirement incentives. Based on this evidence, we propose a golden parachute for Supreme Court Justices who reach some combination of years of service and age that equals eighty, or upon certification of a permanent mental or physical disability. Rather than a pension annuity that matches their salary during active service, we propose that Congress offer Justices an annuity, upon retirement, worth twice their salary. The plan will create significant economic incentives for retirement and reduce problems of under- and over-inclusiveness associated with proposals for a mandatory retirement age or term limits. We also propose changes to the current system of banishing Senior Justices from the work of the Court and the Supreme Court building itself, offering modest institutional reforms that will make the office of Senior Justice a more appealing option.

### I. THE CONSTITUTIONAL BACKDROP

There is no shortage of scholars hostile to the concept of life tenure for judges.<sup>10</sup> Recognizing the extraordinary difficulty of passing a constitutional amendment, several of them have switched tactics, defending plans to eliminate life tenure by statute. Before proposing our own package of statutory proposals and modifications to internal court procedures, we first consider the scope of Congress's power to alter or abolish life tenure by statute.

The debate at the founding gives no indication that Congress enjoys the power to modify life tenure. For example, Alexander Hamilton in the *Federalist Papers* and the author of the "Brutus" essays disagreed sharply over the virtues of life tenure,<sup>11</sup> but neither doubted that the proposed

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10. See *supra* notes 2–7 and accompanying text.

11. Compare THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body."), with "BRUTUS" ESSAY XV (Mar. 20,

Constitution required it.<sup>12</sup> The annals of the first Congress likewise reveal no discussion of the option to institute a term of years or mandatory retirement age for Article III judges.<sup>13</sup> Tellingly, when President Jefferson grew frustrated with the “farce” of impeachment and led the first charge for term limits between 1805 and 1807, he backed constitutional amendments on three different occasions but never a statutory solution.<sup>14</sup> The historic presumption should therefore cut strongly against a long-dormant congressional power to create term limits or a mandatory retirement age for federal judges.<sup>15</sup>

Perhaps the founding generation simply lacked imagination. For instance, a clever (a bit too clever) proposal by Paul Carrington and Roger Cramton calls for a statute that effectively limits Supreme Court Justices to eighteen-year terms, after which they would serve full-time on lower courts and occasionally sit for active Justices in cases of absence or recusal.<sup>16</sup> The Carrington-Cramton proposal already has garnered endorsements “in principle” from more than forty academic heavyweights.<sup>17</sup> Meanwhile, Steven Calabresi and Jim Lindgren have floated a statutory proposal to appoint judges to a lower court and then “designate” them as Supreme Court Justices for fixed eighteen-year terms, although they ultimately conclude that their plan is unconstitutional.<sup>18</sup>

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1788), reprinted in *THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES* 305 (Ralph Ketcham ed., 1986) (“[T]hey have made the judges *independent*, in the fullest sense of the word. . . . In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.”), and *id.* at 307 (criticizing the lack of a provision allowing Congress to remove judges for “[e]rrors in judgement, or want of capacity to discharge the duties of the office”).

12. Hamilton, discussing the removal of judges, described impeachment as “the only provision on the point which is consistent with the necessary independence of the judicial character, and . . . the only one which we find in our own Constitution in respect to our own judges.” *THE FEDERALIST* NO. 79, *supra* note 11, at 474. Yates, meanwhile, denounced the Constitution’s tenure and salary protections for creating judges so independent that “no authority . . . can remove them, and they cannot be controlled by the laws of the legislature.” “BRUTUS,” *supra* note 11, at 305. The upshot is that the two sides “offered a different assessment” of life tenure, “but not a different reading.” Irving R. Kaufman, *Chilling Judicial Independence*, 88 *YALE L.J.* 681, 702 (1979).

13. To the contrary, the debates on the Judiciary Act of 1789 suggest that Congress viewed impeachment as its sole option after the creation of federal judicial offices. See 1 *ANNALS OF CONG.* 828 (Joseph Gales ed., 1834) (statement of Rep. Smith of S.C.); *id.* at 860 (statement of Rep. Gerry).

14. See Philip B. Kurland, *The Constitution and the Tenure of Federal Judges: Some Notes from History*, 36 *U. CHI. L. REV.* 665, 694–95 (1969).

15. As one member of Congress remarked in 1937 regarding the judiciary’s power to remove its own members, “[i]t scarcely can be believed that the framers intended vesting Congress with an important power and then so skillfully concealed it [that] it could not be discovered save after 150 years.” 81 *CONG. REC.* 6171 (1937) (statement of Rep. Celler).

16. See Carrington & Cramton, *supra* note 3, at 471.

17. See *id.*

18. Calabresi & Lindgren, *supra* note 3, at 78–89.

Judith Resnik has weighed in as well, arguing that Article III permits Congress to enact, by statute, either term limits or a mandatory retirement age for federal judges.<sup>19</sup> Professors John McGinnis and Vikram Amar also appear to support a statutory alternative.<sup>20</sup>

In this Part, we test those proposals by describing the constitutional backdrop against which acts of Congress take place. Drawing on the text, structure, and original meaning of the Constitution, we identify three constraints on Congress's ability to abolish or undermine life tenure by statute. First, although the words "life tenure" do not appear in Article III, the requirement that judges hold office "during good behaviour" operated at the founding to define a term of office in addition to a condition of forfeiture. Whatever misbehavior meant at the founding, it did not include serving eighteen years on the bench or turning seventy. Second, the creation of a distinct office for "judges of the Supreme Court" constrains Congress's ability to strip judges of nearly all work on the Court after serving a term of years or reaching an age threshold. Congress may *add* to a judge's duties, as the first Congress did by requiring that Supreme Court Justices ride circuit, but it may not *subtract* from those duties such that the person ceases to function as a "judge of the Supreme Court." Third, the tenure and salary clauses prevent Congress from interfering with judicial independence. We reject a "flexible" approach to Article III under which Congress could limit the tenure or decrease the salaries of federal judges so long as the judiciary remains independent by some other measure.

#### A. "During Good Behaviour" and Life Tenure

The most obvious constitutional provision limiting Congress's ability to modify life tenure is Article III, Section 1, which provides that "[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."<sup>21</sup> The phrase "during good behaviour" (or rather, its Latin equivalent *quamdiu se bene gesserit*) had appeared in English letters patent as early as the fifteenth century,<sup>22</sup> and had been required for all English judges since Parliament's Act of Settlement in 1701.<sup>23</sup> The Act

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19. See Resnik, *Judicial Selection*, *supra* note 9, at 640–41.

20. McGinnis, *supra* note 3, at 545 (1999); Akhil Reed Amar & Vikram David Amar, *Should U.S. Supreme Court Justices Be Term-Limited?: A dialogue*, WRIT, Aug. 23, 2002, <http://writ.corporate.findlaw.com/amar/20020823.html>.

21. U.S. CONST. art. III, § 1.

22. C. H. McIlwain, *The Tenure of English Judges*, 7 AM. POL. SCI. REV. 217, 220 (1913).

23. 13 Will. 3, c. 2, § 3 (1701) (Eng.).



did not apply in the colonies, however,<sup>24</sup> where most judges served during the pleasure of the King.<sup>25</sup>

Paul Carrington, defending his statutory term limits proposal, correctly notes that the Constitution never uses the words “life tenure.”<sup>26</sup> To imply that “during good behaviour” does nothing more than specify a condition for forfeiting an office, however, misunderstands the nature of grants of office at the founding. Through much of English history, an estate in office functioned much like an estate in real property.<sup>27</sup> In the eighteenth century, for example, the King continued to grant certain offices in fee, in fee tail, or for life.<sup>28</sup> Consistent with common law rules governing transfers of land, a grant of office “during good behaviour” operated to create a life estate, defeasible only upon the misbehavior of the officeholder. As Bacon’s abridgment explained:

If an Office be granted to a Man to have and enjoy so long as he shall behave himself well in it; the Grantee hath an Estate of Freehold in the Office; for since nothing but his Misbehaviour can determine his Interest, no Man can prefix a shorter Time than his Life; since it must be his own Act (which the Law does not presume to foresee) which only can make his Estate of shorter Continuance than his Life . . . .<sup>29</sup>

At common law, then, the phrase “during good behaviour” had two effects: first, it created a condition for forfeiture of the office; and second, it precluded other conditions for terminating the office during the life of the officeholder.

Records from the founding era in America confirm that Article III, Section 1 granted life tenure for well-behaved judges.<sup>30</sup> Hamilton wrote in

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24. Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104, 1110–11 (1976).

25. The Declaration of Independence cited, among its grievances, the fact that the King “made Judges dependent on his Will alone, for the tenure of their offices.” THE DECLARATION OF INDEPENDENCE para. 11 (U.S. 1776).

26. Webcast: Paul D. Carrington, Presentation at the Duke Law School Symposium: Reforming the Supreme Court? (Apr. 9, 2005), <http://realserver.law.duke.edu/ramgen/spring05/publiclaw/04092005b.rm>.

27. McIlwain, *supra* note 22, at 218 (noting that “there is a feudal element of the tenure, which enters into and affects judicial tenure in all its history”).

28. 3 MATTHEW BACON, NEW ABRIDGMENT OF THE LAW 732–33 (3d ed., London, Worrall 1768) (noting that the offices of Earl Marshall, parkkeeper, forester, jailer, and sheriff may descend as inheritances).

29. *Id.* at 733.

30. *See, e.g.*, 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 491 (Max Farrand ed., rev. ed., 1937) (statement of Mr. Pinkney, Sept. 3, 1787) (referring to “[t]he great offices . . . of the

*The Federalist No. 79* that federal judges, “if they behave properly, will be secured in their places for life.”<sup>31</sup> At the Pennsylvania ratification convention, Thomas McKean contrasted the President, who serves a four-year term, with members of the judiciary, who “may continue for life, if they shall so long behave themselves well.”<sup>32</sup> Detractors of the proposed Constitution apparently shared that view, with *Federal Farmer No. 15* complaining that “[t]he same judge may frequently be in office thirty or forty years.”<sup>33</sup> In a speech at the Connecticut ratification convention, Benjamin Gale quoted the good behavior language and added, “by that I understand as long as they live.”<sup>34</sup>

The Constitution contains a textual clue as well. Article II, Section 1 provides that the President “shall hold his Office during the Term of four Years.”<sup>35</sup> It would be inconsistent for the phrase “he shall hold his office during” to precede a clear term of office for the President in Article II, but to say nothing about the term of office for judges in Article III.

Of course, tenure during good behavior differs from true “life tenure” in that it ends when a judge misbehaves. Professor Raoul Berger has argued that the requirement of good behavior creates an independent basis for the removal of judges, outside the impeachment process.<sup>36</sup> He notes that “misbehavior” was litigated at common law in England using a writ of *scire facias*, which allowed an action in equity against an officeholder to determine whether he had forfeited his office.<sup>37</sup> Perhaps the proponents of statutory term or age limits might argue, like Berger, that “good

Judiciary Department which are to continue for life”); 1 *id.* at 138 (statement of Mr. Madison, June 6, 1787) (speculating on the number of cases of a particular type that “wd. probably arise in the life of a Judge”); *see also* 3 *id.* at 332 (statement of Mr. Madison in the Virginia Convention, June 20, 1788); 2 *id.* at 45 n.10 (statement of Mr. Madison, July 18, 1787).

31. THE FEDERALIST NO. 79, *supra* note 11, at 473.

32. Thomas McKean, Speech before the Pennsylvania Convention (Dec. 10, 1787), *reprinted in* 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 540–41 (Merrill Jensen ed., 1976) [hereinafter DOCUMENTARY HISTORY]; *see also id.* at 545 (stating that “[t]he judges hold their offices during life”).

33. FEDERAL FARMER NO. 15, *reprinted in* LETTERS FROM THE FEDERAL FARMER TO THE REPUBLICAN 101 (Walter Hartwell Bennett ed., 1978).

34. Benjamin Gale, Speech Before the Connecticut Convention Election (Nov. 12, 1787), *reprinted in* 3 DOCUMENTARY HISTORY, *supra* note 32, at 428.

35. U.S. CONST. art. II, § 1, cl. 1.

36. *See* Raoul Berger, *Impeachment of Judges and “Good Behavior” Tenure*, 79 YALE L.J. 1475, 1487–92, 1527–28 (1970). The orthodox reading, endorsed twice by the Supreme Court, is that “the good-behavior language does nothing more than provide a cross-reference to the impeachment process.” Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. REV. 673, 699 (1999); *see also* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 59 (1982) (Brennan, J., plurality opinion); U.S. *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955).

37. Berger, *supra* note 36, at 1479–83.

behaviour” incorporates the common law standard for misbehavior necessary for the issuance of a writ of *scire facias*. That standard was indeed low and imprecise, allowing forfeiture for “every voluntary act done by an officer contrary to that which belongs to his office.”<sup>38</sup> A jailer, for example, might forfeit his office for negligently allowing escapes,<sup>39</sup> and a recorder might forfeit his office for failure to attend sessions of a corporation.<sup>40</sup> Although it was never employed against officials comparable to federal judges, the writ theoretically applied to all persons who held office by letters patent.<sup>41</sup> Berger argues that the writ remained viable in America at the founding.<sup>42</sup>

Even the most aggressive reading of “good behaviour” provides no constitutional basis for enacting term limits or a mandatory retirement age by statute. At common law, misbehavior simply did not include reaching seventy years of age or serving eighteen years on the bench. At a minimum, the writ required some misfeasance or nonfeasance “contrary to the Duty of his Office.”<sup>43</sup> Growing old is neither an act nor an omission—it is not even “behavior,” let alone “misbehavior”—and nothing about advanced age or lengthy tenure is inconsistent with judicial office.<sup>44</sup> Moreover, it was typically the King who brought a writ of *scire facias*, and judges of the equity courts who decided whether the officer had misbehaved.<sup>45</sup> Parliament played no role in creating, initiating, or deciding the writ, which makes the device unhelpful as precedent for statutory modifications to life tenure.<sup>46</sup> Berger himself concedes that the

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38. *Henry v. Barkley*, (1597) 79 Eng. Rep. 1223, 1224 (K.B.). Similar standards appear in founding-era abridgments. See, e.g., 16 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY 121 (2d ed., London, G.G.J. and J. Robinson 1793) (“If he does *contrary to the duty of his office*, as if he *doth not right to the parties*, this misfeasance is forfeiture.”).

39. 16 VINER, *supra* note 38, at 121.

40. *R v. Bailiffs of Ipswich*, (1706) 91 Eng. Rep. 378, 378 (K.B.).

41. See Berger, *supra* note 36, at 1480–81.

42. *Id.* at 1483. A number of scholars have disputed the viability of *scire facias* in America. See, e.g., Kaufman, *supra* note 12, at 694–98; Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 138.

43. 3 BACON, *supra* note 28, at 741.

44. To be sure, growing older makes some (debatable) forms of “misbehavior,” like physical or mental disability, more likely. But a writ of *scire facias* would issue only against individual officials, based on their individual misbehavior. In contrast, term limits and a mandatory age requirement would operate automatically against all judges.

45. 4 BACON, *supra* note 28, at 415–16.

46. Besides, the writ provided paper-thin protection for judges. The King, or even a private citizen, was free to target officials for political reasons. See 4 BACON, *supra* note 28, at 416. And although the King could not formally remove a judge who held office during good behavior without *scire facias*, he could strip the judge of all powers and duties at any time. For example, in 1672, when Sir John Archer of the court of common pleas insisted on *scire facias* rather than surrender his office, the King ordered him to stop serving as a judge, named a replacement to the court, and likely even

Constitution forbids all forms of *congressional* removal outside the impeachment process.<sup>47</sup>

The requirement that judges hold office “during good behaviour” prevents Congress from directly creating term limits or a mandatory retirement age for judges by statute. The founding generation understood Article III, Section 1 to guarantee life tenure to judges who behave well. Accordingly, neither the English common law tradition nor the Constitution supports removal of a judge based on a definition of “misbehavior” that includes aging or service for a certain term of years.

### *B. The Essential Powers and Duties of a Supreme Court Justice*

The Constitution further constrains Congress’s ability to circumvent life tenure by requiring a separate “office” for Supreme Court Justices. On any fair textual reading, the Constitution creates three distinct judicial offices: Chief Justice of the Supreme Court, judges of the Supreme Court, and judges of the inferior courts. The Constitution does not demand absolute separation between these offices. Based on the text and the original meaning of judicial “office,” however, the Constitution does assign to judges a set of essential powers and duties, which includes the adjudication of disputes that come before their assigned court. Congress may *add* to a judge’s responsibilities, subject only to the requirement of reappointment for duties wholly nongermane to the office. But Congress may not *subtract* responsibilities in a way that strips a judge of the essential powers and duties associated with the office.

Based on this standard, we defend the results of the abysmally reasoned *Stuart v. Laird*,<sup>48</sup> which in 1803 upheld Congress’s power to require that Supreme Court Justices ride circuit. That power does not, however, enable Congress to banish a Supreme Court Justice to the lower courts after

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stripped him of his salary, leaving him to collect only fees until his death. McIlwain, *supra* note 22, at 223. Given Article III’s other strong guarantees of judicial independence, it seems unlikely that the Constitution at the same time tacitly imitated the weaker *scire facias* regime.

Notably, Parliament had a separate mechanism for removing judges that was far more effective than impeachment. Under the Act of Settlement, Parliament could remove any judge, without cause, by “address” through a vote of both houses. *See* 13 Will. 3, c. 2, § 3 (1701) (Eng.). The Framers considered and rejected a congressional power of removal by address, although some state constitutions that provided judges with tenure during good behavior allowed the state legislature to remove judges on address. Charles Gardner Geyh & Emily Field Van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31, 36 (1998).

47. *See* Berger, *supra* note 36, at 1526. Berger sees *scire facias* as an historical precedent establishing that the judiciary may remove its own members for misbehavior, *see id.*—a dubious proposition given that the judiciary had no power to initiate *scire facias* at common law.

48. 5 U.S. (1 Cranch) 299, 309 (1803).

eighteen years or at age seventy. Those actions would deprive Justices of the essential powers and duties assigned by the Constitution to “judges of the Supreme Court.”

### 1. *Separate Offices for “Judges of the Supreme Court”*

An important threshold consideration is whether the Constitution creates a distinct office for Supreme Court Justices. Carrington and Cramton contend that “Congress has broad power to define and redefine the ‘Office’ of a federal judge” and that “intermixture of duties on the Supreme Court with those of a lower Article III court is constitutionally permissible.”<sup>49</sup> If they are correct, then Congress could circumvent life tenure on the Supreme Court through a statute that either (1) demotes Supreme Court Justices to an inferior court after a term of years,<sup>50</sup> or (2) promotes inferior-court judges to the Supreme Court for a term of years.<sup>51</sup> We take issue with both proposals because, on a fair reading of its text and structure, the Constitution contemplates separate offices for judges of the Supreme Court and judges of the inferior courts.

Again, the starting point is Article III, Section 1, which provides that “[t]he Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour.”<sup>52</sup> Two constructions of this language are possible: first, that it contemplates two distinct categories of judges, either of the Supreme Court or the inferior courts (the “separate offices reading”); and second, that it contemplates a single category of federal judges who may serve on the Supreme Court, the lower courts, or both (the “overlapping offices reading”).<sup>53</sup> Surprisingly, the scholarly consensus

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49. Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, July 25, 2005, <http://paulcarrington.com/Supreme%20Court%20Renewal%20Act.htm> (elaborating on the holding of *Stuart v. Laird*).

50. This is the substance of the Carrington-Cramton proposal, under which Supreme Court Justices would change status after an eighteen-year term. *See id.* Such Justices would retain life tenure by serving full-time on the lower courts. *Id.* They would also remain eligible to participate in Supreme Court decisions in cases where an active Justice could not, due to absence or recusal. *Id.* After their eighteen-year terms, however, Justices would have no power to vote in the overwhelming majority of Supreme Court decisions.

51. This is the substance of a proposal by Calabresi and Lindgren, under which the President would appoint, and the Senate would confirm, an already-confirmed inferior-court judge to serve an eighteen-year stint on the Supreme Court. Calabresi & Lindgren, *supra* note 3, at 79–81. When this “designation” expired, Supreme Court Justices would automatically revert to their original positions on the lower courts. *Id.* Professor McGinnis supports a similar “Supreme Court riding” proposal, except that the term is much shorter under his plan. *See McGinnis, supra* note 3, at 541.

52. U.S. CONST. art. III, § 1.

53. *See* John Harrison, *The Power of Congress over the Terms of Justices of the Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 362–63, *supra* note 3.

is that this provision, standing alone, is ambiguous,<sup>54</sup> although Professor McGinnis concedes that the first reading is the “most natural.”<sup>55</sup>

We find no such ambiguity. First, the words “both . . . and” draw an unmistakable distinction between the supreme and inferior courts. Second, the comma before “both” indicates that the phrase “both of the supreme and inferior Courts” modifies the word “judges.” The phrase therefore describes two distinct kinds of judges, those “of” the Supreme Court and those “of” the inferior courts, and specifies that the rest of the sentence applies to “both.” Third, it is difficult to see what the phrase “both of the supreme and inferior Courts” accomplishes if it does *not* divide judicial offices among the two types of courts. The preceding sentence established the Supreme Court and gave Congress the option of creating inferior courts,<sup>56</sup> so there was no need to reiterate that the courts themselves are different. If the intention had been to permit judicial offices that straddle the two, the sentence simply could have read: “The judges shall hold their offices during good behaviour.” The words “both of the supreme and inferior Courts” do *nothing but* confirm that life tenure applies to both Supreme Court judges and inferior court judges. Under the overlapping offices reading, that phrase is surplusage.<sup>57</sup>

The Constitution uses the same sentence structure in two other provisions, both of which reinforce the separate offices reading. The Presidential Succession Clause in Article II, Section 1 allows Congress to provide for “the Case of Removal, Death, Resignation or Inability, both of the President and Vice President.”<sup>58</sup> Similarly, the Oath or Affirmation Clause of Article VI applies to “all executive and judicial Officers, both of the United States and of the several States.”<sup>59</sup> If the claim is that “X, both of Y and Z” leaves ambiguous whether Y and Z represent distinct offices, then these provisions should create ambiguity as to whether the President and Vice President have distinct offices, or whether offices of the United States are distinct from offices of the several states.<sup>60</sup> Both propositions

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54. See Calabresi & Lindgren, *supra* note 3, at 86; Carrington & Cramton, *supra* note 49; Harrison, *supra* note 53, at 362; McGinnis, *supra* note 3, at 545.

55. McGinnis, *supra* note 3, at 545.

56. U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”).

57. One of the most enduring rules of constitutional construction is that no provision is “mere surplus[age], is entirely without meaning.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

58. U.S. CONST. art. II, § 1, cl. 6.

59. U.S. CONST. art. VI, cl. 3.

60. If the slightly more refined claim is that “X, both of Y and Z” leaves ambiguous whether X can be “of” Y and Z at once, then these provisions should create ambiguity about whether the

are absurd.<sup>61</sup> The similar language in these two other provisions lays to rest any ambiguity as to whether judges of the supreme and inferior courts hold separate offices.

It may border on overkill, then, to point to the Appointments Clause in Article II, Section 2, which provides that the President “shall appoint . . . Judges of the supreme Court,” as well as “all other Officers of the United States.”<sup>62</sup> As Justice Story pointed out in his *Commentaries* in 1833,<sup>63</sup> this express reference to judges of the Supreme Court, alongside other distinct offices like ambassadors, ministers, and consuls, “disambiguates” Article III and makes the separate offices reading persuasive.<sup>64</sup> Moreover, the Constitution creates a third distinct judicial office, with a unique function in the impeachment process, by requiring in Article I, Section 3 that “[w]hen the President of the United States is tried, the Chief Justice shall preside.”<sup>65</sup> The office of Chief Justice cuts against the overlapping offices reading, under which all federal judges belong to an undifferentiated mass. Based on Article III and related provisions, the best reading is that the Constitution creates separate offices for judges of the Supreme Court.

## 2. *The Essential Powers and Duties of “Judges”*

The fact that the Constitution demands a distinct office for judges of the Supreme Court only partly answers whether Congress can rotate Supreme Court Justices to the lower courts after a fixed term of years. Two questions remain. First, given the requirement of “separate offices,” can Congress assign *any* lower court duties to members of the Supreme Court? Second, if so, can Congress assign *principally or exclusively* lower court duties to members of the Supreme Court? The first question goes to Congress’s ability to *add* to the duties of a judge’s office, while the second question goes to Congress’s ability to *subtract* from the duties of a judge’s office.

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President and Vice President may somehow suffer the same death, or whether a judge can hold an office consisting of duties on both federal and state courts. The former is logically impossible, and the latter seems inconsistent with Article III, which refers only to the judicial power of the United States.

61. See U.S. CONST. art. II, § 1, cl. 1 (creating separate offices for the President and Vice President); U.S. CONST. art. II § 2, cl. 2 (granting the President the power to nominate and appoint officers of the United States).

62. U.S. CONST. art. II, § 2, cl. 2.

63. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 437 n.1 (Boston, Hilliard 1833) (finding it “manifest, that the constitution contemplated distinct appointments of the judges of the courts of the United States” and concluding that Supreme Court Justices are “expressly appointed for that court, and for that court only”).

64. Harrison, *supra* note 53, at 363; see also Calabresi & Lindgren, *supra* note 3, at 87.

65. U.S. CONST. art. I, § 3, cl. 6.

Adding powers and duties to an office is almost always permissible. Even offices that are separate need not have mutually exclusive duties.<sup>66</sup> In fact, Congress's power to add duties has been tested twice in Appointment Clause controversies. The Court held in 1893 that "Congress may increase the power and duties of an existing office without thereby rendering it necessary that the incumbent should be again nominated and appointed," as long as the "additional duties [are] germane to the offices already held."<sup>67</sup> The Court applied this germaneness standard (with less than full enthusiasm) again in 1994 in *Weiss v. United States*.<sup>68</sup> It concluded that the duties of military judges were germane to the duties of commissioned military officers, noting that all officers enjoyed the power to quell quarrels, impose nonjudicial disciplinary punishments, and serve as a summary court-martial.<sup>69</sup> Because this germaneness analysis appears to turn on the *character* of the assigned duties, it would take something jarring—along the lines of the nonjudicial business assigned to the courts in *Hayburn's Case*<sup>70</sup>—to qualify. Accordingly, Congress may add additional duties, especially ordinary judicial duties, to a judicial office without violating the Appointments Clause.

Subtracting powers and duties from an office is far more problematic. In some cases, the Constitution expressly assigns powers to a particular office. Congress could not outlaw recess appointments, for example, because the Constitution expressly grants that power to the President.<sup>71</sup> But what if the Constitution is silent? The vast majority of federal offices are entirely creatures of statute. A few others, like "ambassadors" and "judges," are named in the Constitution but are assigned no specific duties. Does that mean Congress may freely revoke their powers and reassign them?

We begin with the basic but essential point that all "offices" carry with them certain powers and duties. Bacon's abridgment nicely summarized the notion of an office under English common law: "It is said, that the

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66. For example, the Supreme Court has upheld the addition of nonjudicial duties to the offices of federal judges. *Mistretta v. United States*, 488 U.S. 361, 404 (1989) (upholding the requirement that federal judges serve on the U.S. Sentencing Commission); *Morrison v. Olson*, 487 U.S. 654, 680–84 (1988) (upholding the participation of judges, through the Special Division, in administrative duties relating to the independent counsel investigating officers of the Executive branch).

67. *Shoemaker v. United States*, 147 U.S. 282, 301 (1893).

68. 510 U.S. 163, 174–75 (1994) (assuming *arguendo* that the germaneness standard applied). Justices Scalia and Thomas found the germaneness standard controlling. *Id.* at 196 (Scalia, J., concurring in part and concurring in the judgment).

69. *Id.* at 174–75 (Rehnquist, C.J., for the Court).

70. *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409 (1792).

71. U.S. CONST. art. II, § 2, cl. 3.



Word *Officium* principally implies a Duty, and in the next Place the Charge of such Duty.”<sup>72</sup> Blackstone dedicated a chapter of his Commentaries to the “rights and duties” of the King’s subordinate officers,<sup>73</sup> and described the writ of mandamus as an action to compel the judges of any inferior court “to do justice according to the powers of their office.”<sup>74</sup> As discussed above, whenever an officer’s misbehavior was litigated at common law, the inquiry turned on whether he had acted “contrary to the Duty of his Office.”<sup>75</sup> A half-dozen drafts and speeches preserved in Madison’s notes from the Constitutional Convention make explicit reference to the powers and duties of executive officers.<sup>76</sup>

Even when the Constitution does not detail the responsibilities of an office, it contemplates that every officer has certain duties. Consider the Opinions Clause of Article II, Section 2, which grants the President the power to demand a written opinion from “the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.”<sup>77</sup> The Constitution never elaborates on those “duties.” It never even names any departments, although it obviously creates a distinct office for department heads.<sup>78</sup> Nonetheless, the Opinions Clause makes clear that those officers *have* duties (beyond the duty to provide written opinions).<sup>79</sup>

In several places, the Constitution creates offices without express powers and duties but with well-defined implied powers and duties. For example, the Appointments Clause refers to the office of

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72. 3 BACON, *supra* note 28, at 718 (footnote omitted). The abridgment also captures the principle that an office requires the exercise of some power: “[I]t is a Rule, that where one Man hath to do with another’s Affairs against his Will, and without his Leave, that this is an Office, and he who is in it is an Officer.” *Id.*

73. WILLIAM BLACKSTONE, 1 COMMENTARIES \*327–53 (discussing at length “the rights and duties of the principal subordinate magistrates”).

74. 3 *id.* \*110.

75. 3 BACON, *supra* note 28, at 741. For a fuller discussion of *scire facias* and the common law standard for misbehavior, see *supra* notes 37–41 and accompanying text.

76. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 30, at 499 (proposed amendment reported by Mr. Brearly, Sept. 4, 1787); 2 *id.* at 495 (same); 2 *id.* at 329 (statement of Mr. Gerry, Aug. 18, 1787); 2 *id.* at 185 (proposed plan presented by Mr. Rutledge, Aug. 6, 1787); 1 *id.* at 145 (statement of Mr. Dickerson, June 6, 1787); 1 *id.* at 140 (statement of Mr. Wilson, June 6, 1787); 1 *id.* at 68 (statement of Mr. Sherman, June 1, 1787).

77. U.S. CONST. art. II, § 2, cl. 1.

78. In addition to the Opinions Clause, the Appointments Clause recognizes a separate office for executive department heads. U.S. CONST. art. II, § 2, cl. 2 (authorizing Congress to vest the appointment of inferior officers in “the Heads of Departments,” among others).

79. Thus, a statute that stripped an officer of all powers and duties, leaving nothing but an empty shell and a paycheck, would violate the constitutional notion of an “office.”

“Ambassador[.]”<sup>80</sup> Although the Constitution nowhere describes the responsibilities of that office, the post of ambassador had certain clearly understood powers and duties at the founding.<sup>81</sup> By naming the office, the Constitution incorporates those powers and duties into the job description. For example, Congress could not pass a statute stripping the Ambassador to Japan of the power to communicate with the Japanese. Communication with foreign governments is among the essential powers and duties of an “ambassador,” and is therefore implicitly required by the Constitution.

Likewise, the Constitution creates separate offices for “judges of the Supreme Court”<sup>82</sup> without expressly defining their powers and duties. By using the word “judges,”<sup>83</sup> however, the Constitution incorporates the essential powers and duties of a judge, as understood at the founding. The most basic, almost tautological, power of a judge is the power to adjudicate disputes that come before the court to which he is assigned.<sup>84</sup> That power does not extend to every case, of course, as even at the founding judges were required to recuse themselves from disputes in which they had various forms of personal interest.<sup>85</sup> But especially for judges on the highest appellate court in a jurisdiction, that power includes the presumptive right to cast a vote in every dispute. At the founding, judges in the Exchequer Chamber in England enjoyed that right.<sup>86</sup> Indeed, by 1787 the high courts (or comparable hybrid bodies) of most states had

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80. U.S. CONST. art. II, § 2, cl. 2.

81. *See, e.g.*, 1 BACON, *supra* note 28, at 85 (“An Ambassador is a Person sent by one Sovereign Prince to another, to transact in the Place of his Sovereign such Matters as relate to both States.” (footnotes omitted)); 1 THE LAW-DICTIONARY 83 (Giles Jacob ed., 1st Philadelphia ed. 1811) (same).

82. *See supra* notes 52–65 and accompanying text.

83. U.S. CONST. art. II, § 2, cl. 2 (granting the President power to appoint “Judges of the supreme Court”); U.S. CONST. art. III, § 1 (“The judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”); *see also* U.S. CONST. art. VI, cl. 2 (providing that “the Judges in every State shall be bound” by the Constitution, treaties, and laws of the United States).

84. *Cf.* 1 BACON, *supra* note 28, at 555 (noting that all judges must “exercise [their authority] in a legal Manner, and hold their Courts in their proper Persons, for they cannot act by Deputy, nor any way transfer their Power to another”). That Article III, Section 2 grants original and appellate jurisdiction to the Supreme Court reinforces the notion that judges hold some implied powers and duties. *See* U.S. CONST. art. III, § 2, cl. 2.

85. *See* 1 BACON, *supra* note 28, at 556 (noting, for example, that “[n]o Person can be a Judge in his own Cause”) (footnote omitted).

86. *See* 6 VINER, *supra* note 38, at 501 (describing the Exchequer Chamber, which assembled “all the Justices” to hear errors from the King’s Bench); *see also* ROSCOE POUND, ORGANIZATION OF COURTS 21 (1940) (discussing the development of the English appellate jurisdiction). The House of Lords, which had the final say on questions of law in England, likewise granted its members the presumptive right to vote on each matter before the body. *See* MARK ROSE, AUTHORS AND OWNERS: THE INVENTION OF COPYRIGHT 97–98 (1993) (“In 1774 the House of Lords decided cases by a general vote of the peers, lawyers and laymen alike”). Although some state constitutions initially vested powers of appellate review in legislative bodies, the U.S. Constitution explicitly rejected that approach. *See* THE FEDERALIST NO. 81 (Alexander Hamilton), *supra* note 11, at 483.

express quorum rules that required some minimum number of judges to be present and cast votes in order to hold court.<sup>87</sup> Of course, statutory term-limits proposals or a mandatory retirement age go much further than removing the presumptive power of Supreme Court Justices to vote in every case. Instead, these proposals mean that, after attaining a certain age or tenure, a Justice presumptively will not vote in *any* case before the Court.

The original public meaning of the “office” of a “judge” has two consequences for the power of Congress. Congress may *add* to the responsibilities of an office, subject only to the requirement of germaneness. Yet Congress may not *subtract* from the responsibilities of an office in a way that deprives officers of the essential powers and duties of the office. For judges, those powers include adjudicating disputes that come before the court to which they are assigned.

### 3. *Altering the Duties of Supreme Court Justices by Statute*

Based on the “essential powers and duties” standard, we next test the constitutionality of four actual and proposed acts of Congress: (1) circuit riding; (2) sitting by designation, whether downward, lateral, or upward; (3) taking Supreme Court Justices out of the full-time rotation after eighteen years, as in the Carrington-Cramton proposal; and (4) designating lower court judges to the Supreme Court for eighteen-year terms.

The first and oldest practice we consider is “circuit riding,” established as part of the Judiciary Act of 1789 and finally discontinued in 1891.<sup>88</sup> Circuit riding required Supreme Court Justices to appear on inferior circuit courts spread throughout the nation.<sup>89</sup> By all accounts, it was a miserable part of the job.<sup>90</sup> In 1803, the Supreme Court expressly upheld circuit riding against constitutional challenge in *Stuart v. Laird*.<sup>91</sup> The Court’s discussion (all 119 words) noted simply that any constitutional objection “is of recent date” and that “practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”<sup>92</sup>

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87. See POUND, *supra* note 86, at 92–102.

88. Joshua Glick, Comment, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753, 1755 (2003).

89. See Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74–75 (1789).

90. See Letter from John Jay et al. to President George Washington (Aug. 9, 1792), in 4 THE FOUNDERS’ CONSTITUTION 163–64 (Philip B. Kurland & Ralph Lerner eds., 1987).

91. 5 U.S. (1 Cranch) 299, 309 (1803).

92. *Id.* Whatever the merit of claims stating that longstanding practice, unbroken since the

Professors Calabresi and Lindgren find this analysis “not completely persua[sive],” both because extensive circuit riding duties are non-germane to the appointed office and because they pose “a threat to judicial independence.”<sup>93</sup>

To the contrary, we find circuit riding as practiced in the Court’s early years to be constitutionally sound as an original matter.<sup>94</sup> As detailed above, we agree that the text of the Constitution requires a distinct office for judges of the Supreme Court.<sup>95</sup> But giving Supreme Court Justices some responsibilities on the lower courts does not run afoul of that requirement. Riding circuit added to the responsibilities of the office but in no way deprived judges of the Supreme Court of the essential powers and duties of their office.<sup>96</sup> They retained the presumptive right to adjudicate every dispute before the Court.<sup>97</sup> True, circuit riding imposed an opportunity cost.<sup>98</sup> The Court would have been vastly more productive

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founding, is *ipso facto* constitutional, it is difficult to accept that a widely criticized practice becomes immune from constitutional scrutiny after only thirteen years of noncontinuous “acquiescence.” *See id.* at 305–06 (remarks of Mr. Lee, counsel for plaintiff in error) (noting that circuit riding existed from 1789 to 1801 but was eliminated, then reinstated, by the judiciary acts of 1801 and 1802, respectively).

93. Calabresi & Lindgren, *supra* note 3, at 84. Calabresi and Lindgren’s main point, with which we wholeheartedly agree, is that the circuit riding precedent is so questionable that it should not be expanded to justify statutory term limit proposals. *Id.* at 85–86.

94. Circuit riding was not an innovation of the Judiciary Act of 1789. Both colonial courts and pre-constitutional state court systems commonly required circuit riding by high court judges. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 123 (1973). During the ratification debates, the only apparent concern about circuit riding was that the large size of the republic would make it impractical and time-consuming, not that the practice would violate the Constitution. *See A Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 2 DOCUMENTARY HISTORY, *supra* note 32, at 193, 195 (worrying about the consequences of federal circuit riding); AM. HERALD, Jan. 7, 1788, *reprinted in* 5 DOCUMENTARY HISTORY, *supra* note 32, at 636, 639 (predicting that the Court would become “too bloated to go to the extensive circuit of all America”).

95. *See supra* notes 52–65 and accompanying text.

96. *See* Harrison, *supra* note 53, at 368 n.21 (noting that “[c]ircuit riding was in addition to service on the Court,” and not “a substitute for service on the Court”).

97. Circuit riding did marginally increase the number of recusals because a Justice who heard a case in a lower court often did not participate in any appeal before the Supreme Court. In *Stuart v. Laird*, Chief Justice Marshall sat out for precisely this reason. 5 U.S. (1 Cranch) 299, 308 (1803). It also undoubtedly increased the number of times a Justice could not hear Supreme Court cases because of delays in travel.

98. Calabresi and Lindgren take this notion seriously, and appear to draw the line at “the very onerous lower court duties imposed on Supreme Court justices during our early constitutional era.” Calabresi & Lindgren, *supra* note 3, at 84. Their analysis hinges on the germaneness requirement of the Appointments Clause under *Weiss*. At some point, they argue, duties on the lower courts can become so demanding that they are nongermane to the office of Supreme Court Justice. *See id.* at 82–83. That reading of *Weiss* is misguided, however, as the germaneness standard looks to the *character* of the additional duties, not to the *amount* of additional work. *Weiss v. United States*, 510 U.S. 163, 174–76 (1994); *see supra* notes 66–70 and accompanying text. In *Weiss*, the duties of military judges were germane to the duties of commissioned officers not because they took up so little time, but because the existing disciplinary powers of officers resembled the judicial powers of military judges.

without long periods of travel every year. But the Constitution demands no minimum workload for the Supreme Court.<sup>99</sup> Because the Justices continued to exercise their essential powers and duties on the Court, circuit riding was and is constitutional.<sup>100</sup>

A second practice, still common today, allows federal judges to “sit by designation” on lower federal courts other than those to which they were appointed. For example, active and senior district court judges might sit by designation on appellate court panels, or senior circuit court judges might sit by designation on a different circuit.<sup>101</sup> Active Supreme Court Justices occasionally sit by designation on lower courts as well.<sup>102</sup> Downward, lateral, and upward designation raise different concerns analytically.

We conclude that, as practiced today, sitting by designation does not contravene the separate offices requirement.<sup>103</sup> Supreme Court Justices sitting by designation on a lower court (“downward” designation) is conceptually identical to circuit riding, assuming that the Justices still have the ability to vote on Supreme Court matters. Lower court judges sitting by designation on other lower courts (“lateral” designation) likewise does not deprive judges of ordinary decision-making power on their “home” court.<sup>104</sup> The power of Congress to constitute the inferior courts and to

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*Weiss*, 510 U.S. at 174–76. Thus, although we reach the same conclusion as Calabresi and Lindgren, we premise our argument on the essential powers and duties of “judges of the Supreme Court” rather than on the germaneness test of the Appointments Clause.

99. See U.S. CONST. art. III, § 2.

100. Two other factors provide further support for the conclusion that circuit riding was constitutional as an original matter. First, for federal judges, the practice began with the Judiciary Act of 1789, which was written by “essentially the same men who wrote Article III in 1787.” Susan Low Bloch, *The Marbury Mystery: Why Did William Marbury Sue in the Supreme Court?*, 18 CONST. COMMENT. 607, 610 n.11 (2001). Second, circuit riding was commonplace not only in state courts, but also in England, where appellate judges sat in courts of *nisi prius*—essentially trial courts within the King’s Bench. See James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court’s Supervisory Powers*, 101 COLUM. L. REV. 1515, 1564 (2001). Neither factor fully answers the question, but both cut in favor of the constitutionality of circuit riding.

101. See, e.g., 28 U.S.C. §§ 291–92, 294 (2000) (circuit and senior judges, respectively).

102. See, e.g., 28 U.S.C. § 43(b) (allowing Supreme Court Justices to sit as judges of the courts of appeal to which they are assigned as Circuit Justices). Then-Associate Justice Rehnquist famously sat by designation as a district court judge in a 1986 civil trial in the Northern District of Virginia. On appeal, a three-judge panel of the Fourth Circuit reversed, per curiam. *Heislup v. Town of Colonial Beach, Va.*, Nos. 84-2143, 85-1128, 1986 WL 18609, at \*10 (4th Cir. Nov. 6, 1986).

103. Senior judges may raise other constitutional concerns, for example, under the Appointments Clause. See David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?* (forthcoming).

104. Harrison sees a potential problem when district court judges sit by designation on the Supreme Court. The relationship among levels of the federal judiciary, he explains, is “not symmetrical.” Harrison, *supra* note 53, at 364. The concern apparently reflects his belief that circuit riding can be defended as “an aspect of the[] [C]ourt’s appellate jurisdiction”—an extension of its supervisory function. *Id.* at 365 n.16. Because we ground our standard in the essential powers and duties of judicial office, and not on the particulars of a federal judicial hierarchy that Congress could

define their jurisdiction strongly suggests that it may authorize lower courts to share personnel on occasion.<sup>105</sup>

Whether lower court judges may occasionally sit by designation on the Supreme Court (“upward” designation) is a tougher question, and thankfully, a novel one. Something akin to upward designation occurred in *United States v. Aluminum Co. of America* (“*Alcoa*”), the landmark antitrust case in which the Supreme Court could not muster a quorum and referred the appeal to a special panel of the Second Circuit led by Judge Learned Hand.<sup>106</sup> The case is widely treated as having the binding precedential force of a Supreme Court decision.<sup>107</sup> Under our standard, the practice of “upward” designation certainly would not violate the requirement of a separate office for *inferior* courts, assuming the lower court judges continued to exercise the essential powers and duties of that office. Although we do not rule out the possibility of “upward” designation, we note a potential textual objection to the practice: Article III creates “one supreme Court,”<sup>108</sup> and designees from other courts arguably interfere with both its singularity and its supremacy.

A third proposal, which would take Supreme Court Justices out of active rotation after eighteen years, would be unconstitutional. The Carrington-Cramton proposal would allow Senior Justices, after a fixed term, to continue as life-tenured judges on the lower courts, with the possibility of occasionally sitting when active Supreme Court Justices cannot participate.<sup>109</sup> There is no question that under this plan, “[a]fter eighteen years, [J]ustices would participate little or perhaps not at all.”<sup>110</sup> Because the essential powers and duties of a “judge” include the power to adjudicate disputes that come before the court, any plan that exiles Supreme Court Justices to the lower courts after serving a term of years or reaching a certain age would violate the Constitution.

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alter at any time, we have no trouble with district court judges sitting by designation on appellate courts. We note that our standard seems fully compatible with Harrison’s notion of “participation in substantially all” the work of the Court. *Id.* at 366.

105. See U.S. CONST. art. I, § 8, cl. 9; U.S. CONST. art. III, §§ 1–2; *cf.* *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 448–49 (1850) (holding that the greater power to abolish the lower federal courts includes the lesser power to control their jurisdiction).

106. *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

107. See *Am. Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946) (citing *Alcoa* and noting that the decision “was decided . . . under unique circumstances which add to its weight as a precedent”); James J. Friedberg, *The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*, 52 U. PITT. L. REV. 289, 298 n.31 (1991) (“[T]he opinion holds the authority of a de facto Supreme Court decision.”).

108. U.S. CONST. art. III, § 1.

109. See Carrington & Cramton, *supra* note 3, at 471.

110. Harrison, *supra* note 53, at 367.

Fourth, however it is framed, “designating” a sitting Article III judge by renomination and reconfirmation to an eighteen-year statutory stint on the Supreme Court would be unconstitutional. As described by Calabresi and Lindgren, the proposal relies on an underlying fiction that the lower court judge *remains* a lower court judge throughout his tenure on the Supreme Court.<sup>111</sup> If believed, however, the fiction means that there are never any “judges of the Supreme Court”—only statutory designees—which seems obviously to violate the separate offices requirement.<sup>112</sup> On the other hand, if the fiction is rejected, the proposal would create full-fledged judges of the Supreme Court, only to improperly strip them of their power to adjudicate cases before that Court after eighteen years. Either way, as Calabresi and Lindgren ultimately acknowledge, the proposal is unavailing.<sup>113</sup>

### C. *Judicial Independence*

A third, frequently discussed limitation on Congress’s power to abolish life tenure by statute derives from the principle of judicial independence. The Constitution’s signature protections of judicial independence are its tenure and salary clauses, which provide that federal judges “shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.”<sup>114</sup> Hamilton dedicated *The Federalist Nos. 78* and *79* to explaining the importance of the tenure and salary provisions, respectively, to “[t]he complete independence of the courts of justice.”<sup>115</sup> He viewed judges “who hold their offices by a temporary commission” incapable of adequately guarding constitutional rights, and wrote that “[p]eriodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence.”<sup>116</sup> He also famously defended salary protection by observing that “*a power over a man’s subsistence amounts to a power over his will.*”<sup>117</sup>

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111. Calabresi & Lindgren, *supra* note 3, at 80–81.

112. Conversely, designees would sit full-time on the Supreme Court while doing little or no work on their ostensible “home” court, preventing them from carrying out the essential powers and duties of their office.

113. Calabresi & Lindgren, *supra* note 3, at 89.

114. U.S. CONST. art. III, § 1.

115. THE FEDERALIST NO. 78, *supra* note 11, at 466; see THE FEDERALIST NO. 79; see also *United States v. Hatter*, 532 U.S. 557, 567–68 (2001) (discussing Hamilton’s views on the importance of the salary and tenure clauses to judicial independence).

116. THE FEDERALIST NO. 78, *supra* note 11, at 471.

117. THE FEDERALIST NO. 79, *supra* note 11, at 472. That the tenure and salary clauses prohibited

Critics of life tenure have argued that lengthy nonrenewable terms or a generally applicable mandatory retirement age would pose no risk to judicial independence. To be sure, the Framers could have adopted other regimes to protect judicial independence. Whether or not tenure and salary protections were the right choice, however, they were the founders' choice. Hamilton's case for life tenure carried the day in 1787.

We are therefore puzzled by the persistence of arguments that Congress may ignore the tenure and salary clauses so long as it protects some level of judicial independence. Professors Kramer and Barron argued that, because it would not violate "the underlying principle of article III tenure—the independence of federal judges," a statutory mandatory retirement age would be constitutional.<sup>118</sup> Similarly, Carrington and Cramton argue that their plan is constitutional precisely because it "protects judicial independence just as well as do current arrangements."<sup>119</sup> Judith Resnik defends statutes that would abolish life tenure on the grounds that "this part of the Constitution is not one in which forms of originalism or textualism have had much sway."<sup>120</sup>

It is a bold claim coming from serious constitutional scholars. Even those who applaud the Supreme Court's flexible approach to Article III's vesting language in *Commodities Futures Trading Commission v. Schor*<sup>121</sup> ought to swallow hard before brazenly overriding the unambiguous commands of the tenure and salary clauses. Congress does not have the power, in the name of functionalism, to circumvent the express language of Article III without a constitutional amendment.

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fixed terms for judges was clear not only to proponents of the Constitution like Hamilton but also to its opponents, who complained that Article III did not permit periodical appointments for judges, comparable to those served by members of Congress. See 3 DOCUMENTARY HISTORY, *supra* note 32, at 440 (statement of Col. Jeremiah Halsey & Mr. Wheeler Coit, Preston, Conn., Nov. 26, 1787).

118. Robert Kramer & Jerome A. Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of "During Good Behaviour."* 35 GEO. WASH. L. REV. 455, 469 (1967).

119. Carrington & Cramton, *supra* note 3, at 49 (advancing a "purposive or functionalist reading" of Article III, Section 1).

120. Resnik, *Judicial Selection*, *supra* note 9, at 641. She is certainly incorrect as to the tenure and salary protections, as the Supreme Court's Compensation Clause decisions have taken a surprisingly hard line on even indirect diminutions of salary. See *Hatter*, 532 U.S. at 576.

121. 478 U.S. 833 (1986). Briefly, the "flexible approach" of *Schor* at least arguably honors the requirement that the judicial power of the United States "shall be vested in" federal courts, in that it considers the degree to which a statute creating Article I tribunals reserves to Article III courts "the 'essential attributes of judicial power,'" for example, by preserving some form of appeal to the Article III judiciary. *Id.* at 851; see also Paul M. Bator, *The Constitution as Architecture: Legislative and Administrative Courts Under Article III*, 65 IND. L.J. 233, 267–68 (1990) (discussing necessity of judicial power over administrative adjudication). No such argument can be made on behalf of a statutory term limits proposal, which unapologetically violates the text.



A “functional” reading of Article III does particular violence to the Compensation Clause. Presumably it would allow Congress to freely diminish judicial salaries for budgetary reasons, as long as the cuts were not subjectively motivated by retaliation.<sup>122</sup> Moreover, on purely functional grounds, ignoring the text of Article III in favor of an ephemeral requirement of judicial independence ultimately *weakens* judicial independence because it invites Congress to push the envelope.<sup>123</sup> Taken together, the Constitution’s tenure and salary protections provide robust protection for judicial independence. We decline to adopt an interpretation of Article III that transforms judicial independence from a *constraint* on Congress into an *invitation* for Congress to experiment with alternatives to tenure and salary protections.<sup>124</sup>

## II. IN DEFENSE OF LIFE TENURE

The Constitution prevents Congress from tinkering with life tenure through the ordinary legislative process. Most scholars, however, argue that term limits or a mandatory retirement age should be implemented through a constitutional amendment.<sup>125</sup> Accordingly, we now take up the longstanding policy debate over the substantive merits of life tenure.<sup>126</sup>

First, we present two affirmative reasons for retaining life tenure. One emphasizes the legitimacy of the courts. Life tenure means slower turnover on the Supreme Court, which has the salutary effect of ensuring gradual development of the law and less frequent reversals. The other emphasizes the independence of the courts. Life tenure has the unique

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122. The Court’s decision in *Hatter*, 532 U.S. at 576, is to the contrary.

123. See Calabresi & Lindgren, *supra* note 3, 90–92 (describing the practical risks of statutory term limits, including the prospect that an incoming party would reinstitute life tenure upon taking control); Harrison, *supra* note 53, at 372 (same).

124. The tenure and salary clauses do not represent the only constitutional source that shields judicial independence. The separation of powers, implicit in the Constitution’s structure, also prohibits the legislative branch from interfering with the independence of the judiciary. In *Mistretta v. United States*, for example, the Court applied a separation of powers analysis to the President’s power to appoint federal judges to the U.S. Sentencing Commission and subsequently remove them, noting that “the independence of the Judicial Branch must be ‘jealously guarded’ against outside interference.” 488 U.S. 361, 409 (1989) (quoting *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 60 (1982)). The separation of powers prohibits “encroachment and aggrandizement” by any branch, and in particular shields courts from interference that would undermine public confidence in their impartiality. *Id.* at 382.

125. See sources cited *supra* note 7.

126. To call the scholarly discourse over life tenure a “debate” may give too much credit to those, like us, who defend life tenure. As Calabresi and Lindgren note, few principled defenses of life tenure have appeared in the literature. See Calabresi & Lindgren, *supra* note 3, at 19. It is our hope to add to this discourse.

advantage of insulating judges from having to please political constituencies in order to secure another political office following departure from the judiciary.

Second, we respond to the three most powerful critiques of life tenure. The first, grounded in concerns about democratic accountability, is that the average length of terms served by Supreme Court Justices has dramatically increased since 1971, impairing the ability of the political branches to assert regular majoritarian influence over the Court. The second is that Justices engage in strategic retirement behavior to ensure a like-minded successor. The third is that some judges suffer from mental or physical infirmity but refuse to leave the bench.

Third, we argue that, to the extent that others find them convincing, these criticisms are better addressed by less drastic means than constitutional amendment. Congress can promote shorter terms that provide greater democratic accountability, blunt incentives for strategic retirement, and encourage Justices who suffer from mental and physical infirmity to retire, all while retaining life tenure.

#### A. *An Affirmative Case for Life Tenure*

Before responding to the well-known criticisms of life tenure, we present an affirmative case for retaining life tenure by pointing to two of its unique advantages over competing tenure regimes.<sup>127</sup>

The first advantage relates to the continued legitimacy of our federal court system. As Ward Farnsworth has noted, an important feature of life tenure is that it decelerates the rate of legal change.<sup>128</sup> By definition, life tenure maximizes each judge's time on the bench, which naturally tends to produce slower turnover of court personnel. Gradual change in the composition of the Supreme Court generally results in gradual changes in the law, as individual judges generally do not reverse course on issues they have already decided.<sup>129</sup> Constitutional law in particular develops more cautiously and incrementally as a result.<sup>130</sup>

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127. Before presenting an affirmative case for life tenure, we would be remiss if we failed to mention the powerful negative case for life tenure. Calabresi and Lindgren attempt to turn the long tradition of life tenure into a liability, complaining that it survives merely because of "inertia." Calabresi & Lindgren, *supra* note 3, at 97. It is a bizarre claim coming from self-described Burkean conservatives. Of course, inertia plays a role. Anyone who proposes to abolish a longstanding institution like life tenure, especially through the extraordinary means of a constitutional amendment, bears the burden of persuasion.

128. Farnsworth, *supra* note 5, at 412.

129. See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 952–53 (2005) (noting that Justices are more likely to reconsider precedents in which they did not

In contrast, term limits (or direct election of judges) would by design produce brisk legal change because both models aim for more rapid, regular turnover of judges in the name of democratic accountability.<sup>131</sup> Constitutional law would change more swiftly to reflect more rapid changes in the composition of the Court.<sup>132</sup> The shorter the term, the sooner a new batch of Justices can correct the purported errors of the outgoing Court. In fact, the public may come to see reversals of precedent as the “spoils” of an electoral victory.<sup>133</sup> The possibility that one political party will have the *right* to capture the Court in a relatively short period of time will create greater legal instability.<sup>134</sup>

We do not mean to overstate the disparity. Life-tenured judges sometimes make sudden changes in the law, including some famous reversals of precedent.<sup>135</sup> Likewise, term-limited state court judges have shown themselves perfectly capable of gradual legal change. The point is that, in the aggregate and over time, life tenure means *slower* legal change and *less frequent* overruling of precedents. Rhode Island and New Hampshire, two of the three states that grant their high court judges life tenure, illustrate this phenomenon.<sup>136</sup> A study of ten state supreme courts between 1991 and 2000 showed that the Supreme Courts of Rhode Island

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participate, and that life tenure operates as a brake on reconsidering precedent); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1488 (1999) (noting that “[c]hanges of mind . . . are of course possible,” but that they are “hard to justify to the public”).

130. Volokh, *supra* note 129, at 1488 (arguing that judges recognize that “[c]onstitutional text isn’t supposed to mean one thing this year and the opposite ten years later”).

131. See Calabresi & Lindgren, *supra* note 3, at 48–49.

132. See Ross E. Davies, *Remedial Nonacquiescence*, 89 IOWA L. REV. 65, 77–78 (2003).

133. See Farnsworth, *supra* note 5, at 437 (arguing that if each President were guaranteed two appointments to the Supreme Court, there would be a perception that “[h]e earned them” and was therefore entitled to the resulting legal change).

134. See *id.* at 415–16. For instance, under Calabresi and Lindgren’s proposal, a party would have the right to “capture” a majority of the Court any time it won three consecutive presidential elections, as the Democrats did during the Roosevelt administration and the Republicans did during the Reagan and Bush administrations. Our concern is that a system designed to facilitate swift capture and recapture by shifting political majorities would lead to erratic changes in the law.

135. The most celebrated example is *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), which overruled *Plessy v. Ferguson*, 163 U.S. 537 (1896). The most pilloried example is the Court’s flip-flopping in the area of state immunity, beginning with *Maryland v. Wirtz*, 392 U.S. 183 (1968), which was overruled in *Nat’l League of Cities v. Usery*, 426 U.S. 833 (1976), and then vindicated when *Usery* was overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985). Chief Justice Rehnquist in 1991 documented thirty-three reversals of precedent over the twenty preceding terms of the Court. *Payne v. Tennessee*, 501 U.S. 828, 830 n.1 (1991). Although a few reversals came after only three or five years, see Ranae Bartlett, Case Note, *Payne v. Tennessee: Eviscerating the Doctrine of Stare Decisis in Constitutional Law Cases*, 45 ARK. L. REV. 561, 574 (1992), on average more than forty years passed between an original decision and its reversal. See *Payne*, 501 U.S. at 828 n.1.

136. Joseph J. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 SAN DIEGO L. REV. 997, 1006 (2004) (noting that the third such state is Massachusetts).

and New Hampshire overruled themselves only two times and six times, respectively, during the decade, fewer than any of the other states in the study and in sharp contrast with the 109 reversals in Montana.<sup>137</sup>

The choice between fast or slow legal change implicates the legitimacy of the courts, echoing the most common justifications for stare decisis.<sup>138</sup> 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.<sup>139</sup> Slow legal change and reluctance to overrule precedent promote the institutional credibility of the judiciary by demonstrating that judges decide cases fairly, consistently, and impartially.<sup>140</sup>

A second advantage of life tenure relates to judicial independence. The most widely cited virtues of life tenure, articulated by Alexander Hamilton in *The Federalist No. 78*, include its power to shield judges from interference by the political branches and the people, leaving them free to fairly and correctly interpret the counter-majoritarian Constitution.<sup>141</sup> Life tenure promotes independence in several ways. First, it prevents the political branches from retaliating against judges for unpopular decisions by removing them from office.<sup>142</sup> Second, it removes incentives to curry favor with the political branches in an effort to win reappointment.<sup>143</sup> Third, it means that federal judges "have reached the end of their official careers,"<sup>144</sup> rendering them unconcerned about angling for future political appointment.<sup>145</sup>

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137. Jeffrey T. Renz, *Stare Decisis in Montana*, 65 MONT. L. REV. 41, 54 fig.2 (2004). Measured on a per-filing basis, Rhode Island reversed itself in only 0.46 cases and New Hampshire in 0.73 cases per 1,000 filings, again the lowest rates of reversal in the study, compared with 17.8 reversals per 1,000 filings in Montana. *Id.* at 57 tbl.2.

138. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (calling predictability the "mainstay" of stare decisis, but also citing judicial economy and "public faith in the judiciary"). It is possible to support life tenure on these grounds and yet oppose stare decisis. While both regimes protect stability, they pose different trade-offs. Stare decisis promotes stability at the expense of correctness, while life tenure promotes stability at the expense of some majoritarian influences.

139. See Pintip Hompluem Dunn, Note, *How Judges Overrule: Speech Act Theory and the Doctrine of Stare Decisis*, 113 YALE L.J. 493, 493 (2003).

140. See William S. Consovoy, *The Rehnquist Court and the End of Constitutional Stare Decisis: Casey, Dickerson, and the Consequences of Pragmatic Adjudication*, 2002 UTAH L. REV. 53, 54 (describing stare decisis as "a public relations tool useful in protecting the Court as a political institution, rather than a jurisprudential doctrine designed to protect the Court's precedent").

141. THE FEDERALIST NO. 78, *supra* note 11; see also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (stating that "life tenure" "helps to guarantee what Alexander Hamilton called the 'complete independence of the courts of justice'").

142. Michael J. Gerhardt, *Merit vs. Ideology*, 26 CARDOZO L. REV. 353, 362 (2005).

143. Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from The Federalist Papers*, 61 S. CAL. L. REV. 1669, 1681 (1988).

144. Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the*

One might disagree, of course, that the judiciary needs protection from the political branches,<sup>146</sup> or that independence necessarily promotes fairness and constitutional fidelity.<sup>147</sup> By and large, however, supporters of term limits believe in these basic goals of life tenure.<sup>148</sup> They argue instead that fixed, nonrenewable terms would just as effectively safeguard judicial independence.<sup>149</sup> After all, a fixed term prevents the political branches from removing a judge prematurely, and a nonrenewable term removes incentives related to reappointment.<sup>150</sup>

Even fixed, nonrenewable terms, however, would introduce incentives for Supreme Court Justices to cast votes in a way that improves their prospects for future employment outside the judiciary.<sup>151</sup> Longer terms, like the eighteen years proposed by Calabresi and Lindgren, would reduce the frequency, but not the potency, of those incentives. It is easy to imagine that a young Justice, such as Justice Thomas, who will be sixty-one years old after serving eighteen years on the Court, could have a successful “second career” in politics.<sup>152</sup> It is even easier to imagine that a “successor Justice,” who under most term limit plans would serve out the end of the term for a Justice who dies or resigns early,<sup>153</sup> will be influenced by plans for post-Court employment. Life tenure on the Supreme Court will always offer one unique form of judicial independence: the option to spend one’s entire career on the Court.<sup>154</sup>

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*Alien Tort Statute*, 2004 SUP. CT. REV. 153, 192 (2004).

145. Lower court judges may, of course, hope for a promotion within the federal judicial hierarchy, but Supreme Court Justices have gone about as far as they can go.

146. See Prakash, *supra* note 3, at 575.

147. See Jack N. Rakove, *Once More into the Judicial Breach*, 72 GEO. WASH. L. REV. 381, 385 (2003) (arguing that “Article III offers powerful incentives to exploit life tenure, not in the interest of promoting judicial impartiality, but for exactly opposite purposes”).

148. See, e.g., Calabresi & Lindgren, *supra* note 3, at 67; L.A. Powe, Jr., *Go Geezers Go: Leaving the Bench*, 25 LAW & SOC. INQUIRY 1227, 1235 (2000).

149. See Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1211 (1988).

150. *Id.*

151. Oliver, *supra* note 3, at 818 (noting the possibility that “Justices would alter their votes in order to smooth their way into post-Court professional or political careers”).

152. Calabresi and Lindgren express confidence that by automatically designating Supreme Court Justices to the lower courts when their term expires, their plan avoids this criticism. See Calabresi & Lindgren, *supra* note 3, at 55 n.132. We think they seriously overestimate the *appeal* that a demotion to the lower courts holds for judges who have already reached the pinnacle of their careers on the Supreme Court. Indeed, one of the reasons that Justices resist retirement today is that continued active service is far more attractive and prestigious than the office of Senior Justice, which already includes service on the lower federal courts.

153. See Calabresi & Lindgren, *supra* note 3, at 53; DiTullio & Schochet, *supra* note 3, at 1122 n.108.

154. True, Supreme Court Justices today have the option of resigning their posts to accept political appointments, as Justice Goldberg did when he resigned to become Ambassador to the United Nations.

## *B. Responses to Criticisms of Life Tenure*

A voluminous and thoughtful literature has developed criticizing life tenure,<sup>155</sup> while surprisingly few scholars have rushed to its defense.<sup>156</sup> We do not attempt to address every argument here.<sup>157</sup> Instead, we focus on the three criticisms we find most credible: (1) that an increase in the average length of terms has rendered the Supreme Court democratically unaccountable; (2) that life tenure allows Justices to engage in strategic retirement behavior to ensure a like-minded successor; and (3) that life tenure allows Justices who suffer from serious mental and physical infirmity to remain on the bench. The first two criticisms suffer from empirical and theoretical weaknesses, and if they represented the only disadvantages of life tenure, we would be inclined to leave the present system in place. The serious and ongoing problem of mental and physical infirmity, however, requires action. All three criticisms could be addressed by statutory incentives, like our proposed golden parachute, without amending the Constitution.

### *1. Increased Term Length and Democratic Accountability*

The most potent criticism of life tenure is that the slow rate of turnover produces an unaccountable judiciary. The argument typically consists of two claims. First, the average term length for Supreme Court Justices has dramatically increased in the last thirty years, disrupting what had been the expectation of the Framers and a stable historical norm. Second, the increase is problematic because it impairs the ability of the political

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However, the possibility of voluntary, premature resignation exists in every tenure regime. Term limits add another pressure for young judges, who must either accept a demotion or find work elsewhere when their term ends.

155. See Calabresi & Lindgren, *supra* note 3; DiTullio & Schochet, *supra* note 3; Oliver, *supra* note 3; Prakash, *supra* note 3.

156. Two noteworthy defenses are Farnsworth, *supra* note 5, and William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063 (1990).

157. Specifically, we do not address arguments that life tenure causes the President to nominate candidates who are too young, that clustering in the distribution of vacancies deprives presidents of seats on the Court to which they are somehow entitled, or that life tenure is responsible for the politicization and contentiousness of the confirmation process. See Calabresi & Lindgren, *supra* note 3, 30–32, 61–62; DiTullio & Schochet, *supra* note 3, at 1110–19. For a response, see Farnsworth, *supra* note 5, at 424–30, 435–39 (younger nominees and clustering); Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in REFORMING THE COURT: TERM LIMITS FOR THE SUPREME COURT JUSTICES 298–303, *supra* note 3 (politicization and contentiousness of confirmation).

branches, through the nomination and confirmation process, to assert a proper democratic check on the Court.

The first claim is empirical, and a closer look at the data suggests that it depends more on the chosen period lengths than a bona fide trend. Calabresi and Lindgren document an increase in term length from an average of 12.2 years during 1941–1970 to an average of 26.1 years from 1971–2000.<sup>158</sup> Related statistics have since popped up in a number of editorials in the popular press.<sup>159</sup> On its face, the figure reveals an “astonishing” and “dramatic” increase.<sup>160</sup>

The problem is that this statistic is based on a period length (thirty years) and a cutoff date (1971) that exaggerates the trend. A number of Justices served unusually short terms in the 1940s, 1950s, and 1960s: Byrnes (1.3 years), Rutledge (6.6 years), Vinson (7.2 years), Minton (7.0 years), Whittaker (5.0 years), Goldberg (2.8 years), and Fortas (3.8 years).<sup>161</sup> Average tenures actually were *higher* before 1940,<sup>162</sup> so the trend looks more like a random walk than a steady climb. At the same time, drawing the cutoff date at 1971 ensures that the unusually long tenures of Justices Black (34.1 years) and Douglas (36.6 years) count as recent developments, even though both ended more than thirty years ago, when the authors claim the current trend began.<sup>163</sup>

A decade-by-decade view of the same data belies both of their central claims. Average tenure today is neither “dramatically increasing” nor historically unprecedented:

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158. Calabresi & Lindgren, *supra* note 3, at 24.

159. See, e.g., Doug Bandow, *A Question of Justice*, STAR-LEDGER, Mar. 6, 2005, at 3; Fred Graham, *In Need of Review: Life Tenure on the U.S. Supreme Court*, USA TODAY, Jan. 16, 2006, at 11A.

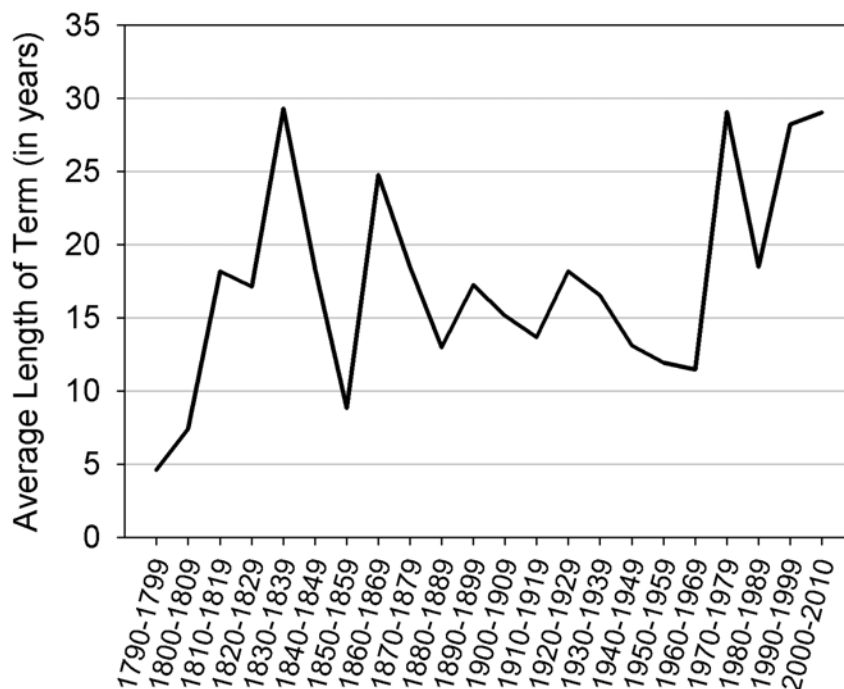
160. Calabresi & Lindgren, *supra* note 3, at 20, 23.

161. We derive all of our data from the invaluable Federal Judicial Center, *History of the Federal Judiciary*, <http://air.fjc.gov/history/home.nsf> (last visited Nov. 26, 2005). Like other authors, we count each term separately for the two Justices who served noncontinuous terms, Hughes and Rutledge. All charts take into account the recent passing of Chief Justice Rehnquist and the January 31, 2006 retirement of Justice O'Connor.

162. Calabresi & Lindgren, *supra* note 3, at 23 chart 1.

163. Calabresi & Lindgren, *supra* note 3, at 24 (alleging that “the average age at which justices have left office has increased remarkably throughout history, and most sharply in the past thirty-five years”).

**Chart 1**  
**Average Length of Term, by Decade**



Although the average length of tenure did dramatically increase in the 1970s, it actually dipped to around eighteen years in the 1980s with the departures of Chief Justice Burger and Justices Stewart and Powell. And even in the 1970s and 1990s, average tenure never eclipsed the 29.3 year average tenure of retiring Justices in the 1830s.

A fair criticism of both our chart and Calabresi and Lindgren's is that too much turns on the arbitrariness of the selected periods. A year here or there, on one side or the other of a cutoff, and the average for the period might rise or fall considerably. Yet a rendering of the data that flattens those periods, taking judges in groups of five, likewise reveals no dramatic recent trend or unprecedented length of service:<sup>164</sup>

164. Justices in this chart are grouped in chronological order by date of commission, excluding those who remain in active service. The column labeled "5" represents the average tenure of the first five individuals commissioned to serve on the Court. The column labeled "10" represents the next five, etc. Because our data set includes 103 Justices, divided into groups of five, the final group includes



**Chart 2**  
**Average Length of Term, in Groups of 5**



An even less convincing argument, closely related to the “dramatic recent increase” claim, is that the length of tenure today has disrupted the expectations of the founders. Calabresi and Lindgren argue that improvements in medicine and increases in average life expectancy have caused a fundamental change in “the real-world, practical meaning of life tenure,”<sup>165</sup> producing a system that is “very different now from what it was in 1789.” When the Federalists and Anti-Federalists discussed their expectations, however, they contemplated even longer tenure on the courts than we have seen to date. *Federal Farmer No. 15* complained that judges with life tenure would serve “thirty or forty years.”<sup>166</sup> Meanwhile, Hamilton in *The Federalist No. 79* assailed New York’s mandatory retirement age of sixty for judges on the grounds that “[t]he deliberating and comparing faculties generally preserve their strength much beyond

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only the three most recently commissioned Justices to leave the bench, Chief Justice Rehnquist and Justices O’Connor and Powell.

165. Calabresi & Lindgren, *supra* note 3, at 20.

166. FEDERAL FARMER NO. 15, *supra* note 33, at 101.

that period in men who survive it.”<sup>167</sup> Moreover, the argument imputes to the Founders spectacular shortsightedness. They almost certainly knew then, as we know today, that life expectancy continues to increase over time. They chose life tenure anyway.

Although we believe there has been no dramatic change since 1971, and that present average tenure falls within the expectations of the founders, we do not deny that the average length may increase over time due to advances in medical care. The last members of the Rehnquist Court, who served together longer than any contingent since the 1820s,<sup>168</sup> could nudge average term lengths upward in the coming decades. Nonetheless, given the nation’s history of periods in which average tenure reached levels every bit as high as those that prevail today, we have not come close to a point of constitutional crisis.

Their second claim is normative and it proceeds as follows. The lengthy terms associated with life tenure make the Supreme Court less democratically accountable<sup>169</sup> because they hinder operation of the principal device through which the political branches exercise control over the judiciary: the appointment and confirmation process.<sup>170</sup> Although judges enjoy independence once in office, the selection process for judges injects majoritarian values into the courts. Life tenure, therefore, creates a feckless judicial “aristocracy,” unresponsive to the preferences of the people.<sup>171</sup> Term limits, on the other hand, would guarantee regular opportunities to make the courts more democratically accountable.

Critics of life tenure, however, struggle to explain how “democratic accountability” means anything other than “popular results.”<sup>172</sup> The problem with deriding unpopular decisions is that they may be correct. The Warren Court’s racial equality cases, including *Brown v. Board of Education*<sup>173</sup> and *Loving v. Virginia*,<sup>174</sup> encountered fierce resistance when

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167. THE FEDERALIST NO. 79, *supra* note 11, at 474.

168. Mary Deibel, *Court Jumps into Politics*, CINCINNATI POST, July 1, 2004, at A5.

169. See Calabresi & Lindgren, *supra* note 3, at 35–39.

170. See U.S. CONST. art. II, § 2, cl. 2.

171. Prakash, *supra* note 3, at 573.

172. As Ward Farnsworth has noted, the public does not hold strong preferences about judicial philosophy, but does hold strong preferences about the outcomes in some cases. See Farnsworth, *supra* note 5, at 423 (arguing that, to the extent the public cares about judicial candidates’ avowals of “interpretive theory,” such claims are used as “signaling device[s] to denote types of judges who will produce certain outcomes”).

173. 347 U.S. 483, 495 (1954) (holding that racial segregation in public schools violates the Fourteenth Amendment).

174. 388 U.S. 1, 2 (1967) (holding that state antimiscegenation statutes violate the Fourteenth Amendment).

decided.<sup>175</sup> Of course, many unpopular decisions happen to be wrong as well, and greater democratic responsiveness might reverse them faster. The point is that, by imperiling all unpopular decisions, greater democratic accountability carries serious costs.

Term limits, meanwhile, accomplish too little. Assuming a nine-member Supreme Court, during a period when life tenure produced twenty-four-year average terms, a majority of the Court turns over approximately every 13.3 years ( $5/9 \times 24$ ).<sup>176</sup> Under a system of fixed, nonrenewable eighteen-year terms, a majority of the Court will turn over every ten years ( $5/9 \times 18$ ).<sup>177</sup> Fixed terms, in other words, would allow the political branches to recapture an utterly unaccountable court, on average, 3.3 years or (almost) 25% faster. For such a dramatic change in the operation of the federal judiciary, the payoff is surprisingly modest.

Moreover, as discussed above, quick turnover has costs for the legitimacy of courts.<sup>178</sup> To be sure, a rapidly changing, democratically accountable Court could swiftly reverse unpopular decisions, even moving back and forth repeatedly, if needed, to accommodate fickle public preferences. But that behavior would, over time, undermine confidence in the courts as an impartial, independent branch of our republican government. Crucially, even under life tenure, the President and Senate exert a democratic check on the courts.<sup>179</sup> As Professor Farnsworth has observed, life tenure produces “varying degrees of responsiveness in the Court depending on the ages at which the Justices are appointed,”<sup>180</sup> but the initial appointment process ensures that Justices are never truly unaccountable. Assuming that accountability and legitimacy are both valuable, as even critics of life tenure seem to recognize,<sup>181</sup> then average

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175. Calvin Woodard, *Listening to the Mockingbird*, 45 ALA. L. REV. 563, 563 n.1 (1994) (describing the “Southern Manifesto” by Southern congressmen who rejected the decision, “omnipresent” signs calling for Chief Justice Warren’s impeachment, and state “interposition” of the decision).

176. Again, theoretically, it could turn over faster or slower depending on the spacing of Justices’ starting and departure dates.

177. Theoretically, it could turn over faster if death, resignation, or impeachment resulted in a vacancy before the end of a Justice’s term.

178. See *supra* notes 138–40 and accompanying text.

179. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1076 (2001) (“One might think of this as ‘counter-majoritarian,’ but in fact, it is not. It represents a temporally extended majority rather than a contemporaneous one.”).

180. Farnsworth, *supra* note 5, at 424.

181. See Calabresi & Lindgren, *supra* note 3, at 39; Prakash, *supra* note 3, at 576 (expressing confidence that even with short terms and removal at will by Congress, federal judges would have the “sturdy backbones” necessary to act fairly and independently).

term length must be recognized as involving a tradeoff between those values. Each potentially comes at the expense of the other.

Increased average length of tenure on the Court does not justify abandoning life tenure. The supposed recent increase in average length of tenure is belied by the data, and historically, today's terms are neither unprecedented nor unexpected. Reducing the average length of tenure may produce more popular results, but at a cost to the legitimacy of the courts.

## 2. *Strategic Retirement*

A second criticism of life tenure is that judges engage in strategic retirement behavior to ensure a like-minded successor. History provides a few remarkable examples. Chief Justice Taft wrote in 1929 that, despite feeling "older and slower and less acute and more confused," he felt the need to "stay on the court in order to prevent the Bolsheviki from getting control."<sup>182</sup> Justice Douglas engaged in a transparent effort to prevent his personal political enemy Gerald Ford, who had once led a charge to impeach Douglas, from appointing his successor.<sup>183</sup> The notion that strategic retirement behavior is pervasive on the Supreme Court has become, for many, an article of faith.

Nonetheless, most empirical analyses have rejected the hypothesis that Justices retire for strategic reasons. A study conducted by Peverill Squire in 1988 found no statistically significant relationship between voluntary retirements and the unity of the party affiliations between a Supreme Court Justice and the President.<sup>184</sup> Another study by Christopher Zorn and Steven Van Winkle in 2000 confirmed Squire's finding.<sup>185</sup> An analysis of retirements since 1937, conducted by Saul Brenner in 1999, coded Justices as "liberal" and "conservative" rather than relying on party affiliation, and concluded that "possibly two of the 33 justices (6.5%) who left the Court in the post-1937 era might have strategically retired."<sup>186</sup>

Most recently, in a 2005 study, Professor Albert Yoon found that federal judges in general, and Supreme Court Justices in particular, were

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182. Letter from William Howard Taft to Horace Taft (Nov. 14, 1929), *quoted in* 2 HENRY F. PRINGLE, *THE LIFE AND TIMES OF WILLIAM HOWARD TAFT* 967 (1939).

183. WARD, *supra* note 5, at 186.

184. Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180, 184, 185 tbl.1, 190 (1988).

185. Christopher J. W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies 1789–1992*, 22 POL. BEHAV. 145, 155 tbl.2, 157 (2000).

186. Saul Brenner, *The Myth that Justices Strategically Retire*, 36 SOC. SCI. J. 431, 436 (1999).

“largely unaffected by either political or institutional environment,”<sup>187</sup> including the political affiliation of the President.<sup>188</sup> All three studies found that pension eligibility, on the other hand, played a significant role in retirement decisions.<sup>189</sup> Only one empirical study, conducted by Timothy Hagle, has found evidence of strategic retirement.<sup>190</sup> Hagle found that retirements were significantly more likely in four situations: (1) during a President’s second term, (2) during the earlier years of the second term, (3) when there was unity of party between the Senate and a majority of the Supreme Court but the majority in the Senate was decreasing, and (4) when Justices did not have prior political experience.<sup>191</sup>

Important methodological differences separate the studies. Squire and Zorn and Van Winkle analyze each Justice’s decision to retire or not retire each year as a separate observation.<sup>192</sup> Hagle has criticized this approach, noting that it creates a data set with a large disparity between voluntary retirements (fewer than fifty) and total observations (more than 1,650).<sup>193</sup> But Hagle’s approach suffers from far more serious problems. He analyzes only whether *any* Justice retired in a given year, and therefore necessarily ignores crucial individual factors<sup>194</sup>—most obviously the individual Justice’s political party or ideology, but also nonpolitical factors that demonstrably affect retirement decisions, like age, pension eligibility and health problems.<sup>195</sup> As a result, his modeling of strategic behavior is crude,<sup>196</sup> and he cannot rule out other conventional explanations as interfering variables when explaining his results.<sup>197</sup>

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187. Albert Yoon, *Pensions, Politics, and Judicial Tenure: An Empirical Study of Federal Judges, 1969–2002*, 8 AM. L. & ECON. REV. (forthcoming 2006) (manuscript at 6, on file with author).

188. See *id.* (manuscript at 37).

189. See *infra* Part III.A.2.b.

190. See Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25, 36–37 (1993).

191. *Id.* at 36–38.

192. Squire, *supra* note 184, at 184; Zorn & Van Winkle, *supra* note 185, at 150.

193. Hagle, *supra* note 190, at 27.

194. Yoon, *supra* note 187 (manuscript at 10).

195. Hagle defends this choice because “[f]rom the president’s point of view, it is of less concern whether any *specific* justice resigns than if *any* will before the next election.” Hagle, *supra* note 190, at 30. But we are interested in the reasons why Justices retire, not in how such a retirement affects the President.

196. See *infra* note 210.

197. Hagle found that neither the mean age of the Court as a whole nor the proportion of the Court over eighty are significantly related to retirement. Those variables are clumsy substitutes for the age of a particular Justice, which is the relevant factor for our purposes. Hagle, *supra* note 190, at 35–36, 37 tbl.1. He did not test pension eligibility or health problems, both of which Squire had found significant in 1988. Squire, *supra* note 184, at 185–86.

Still, the strategic retirement criticism has never been about the numbers. It has been about anecdotes. Sometimes the stories are inconsistent. Allegedly, Justice White delayed his retirement to benefit his party at the expense of his ideology,<sup>198</sup> while Justice Blackmun delayed his retirement to advance his ideology at the expense of his party.<sup>199</sup> Sometimes the stories are implausible. One current theory is that Chief Justice Rehnquist strategically declined to retire in July 2005 because simultaneous vacancies would have allowed President Bush to nominate a “mixed slate—one more conservative, one less conservative,”<sup>200</sup> and Rehnquist could not bear the thought of anything less than two resolute conservatives.<sup>201</sup>

But mostly, the stories are resilient. For example, Justice O’Connor appeared to hand critics of life tenure a “smoking gun” in 2000. A front-page story in the *Wall Street Journal* reported that when news stations predicted that Al Gore would win Florida in the 2000 election, Justice O’Connor privately denounced the result as “terrible,” with her husband explaining that although she had planned to retire, she would now have to wait four more years.<sup>202</sup> Yet Gore lost the election, and O’Connor still waited almost five years to retire, in spite of widespread anticipation of the razor-thin margin in the 2004 election. Does this disprove the theory that her retirement was strategic? Of course not, reply the critics. Some say the “shadow of *Bush v. Gore*” made it suspicious for any member of the 5–4 majority in that case to retire.<sup>203</sup> Others say her delay was a conscious effort to make it *appear* that she was not retiring strategically.<sup>204</sup> Get it? If a judge’s behavior looks strategic, it is strategic. If it looks nonstrategic, it is strategic obfuscation.

We do not deny that strategic factors influence retirement decisions. Plainly they do, and even Chief Justice Rehnquist has publicly acknowledged that the President’s party affiliation affects some retirement

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198. Linda Greenhouse, *White Announces He’ll Step Down from High Court*, N.Y. TIMES, Mar. 20, 1993, at A1 (reporting that there had been “rumors” that White wanted to retire “if a Democrat was elected President”).

199. DiTullio & Schochet, *supra* note 3, at 1104 & n.41.

200. Ron Fournier & Gina Holland, *Rehnquist Announces He’s Not Retiring from Court*, ST. LOUIS POST-DISPATCH, July 15, 2005, at A2.

201. See Doug Kmiec, *Delay is Good*, NAT’L REV., July 15, 2005, <http://www.nationalreview.com/comment/kmiec200507150835.asp>.

202. Jess Bravin et al., *Supreme Interests: For Some Justices, the Bush-Gore Case Has a Personal Angle*, WALL ST. J., Dec. 12, 2000, at A1.

203. See Amar & Calabresi, *supra* note 3.

204. See DiTullio & Schochet, *supra* note 3, at 1105 n.44 (conjecturing that O’Connor was embarrassed that her remarks were widely circulated).

decisions.<sup>205</sup> But strategic retirement is a chameleon claim. With so many variables in play—the President’s party, the Senate’s composition, high-profile opinions, the likely outcome of the next election—one can always find some way to characterize a decision to retire (or not retire) as strategic. Meanwhile, every empirical study to test the strategic retirement claim with respect to the Supreme Court finds that other factors, especially pension eligibility, influence the timing of retirements far more.<sup>206</sup> Professor Yoon rightly warns against “the danger of making generalizations regarding judicial service from anecdotal evidence.”<sup>207</sup>

Two other factors blunt the strategic retirement criticism. First, not all types of strategic retirement are equally problematic. The criticism begins from the assumption that there is a “right time” for every Justice to retire based on nonpolitical factors. Justices may retire before that time (“strategic early retirement”) or after that time (“strategic late retirement”).<sup>208</sup> Strategic early retirement allows a Justice to extend his influence on the Court through another appointment. Although transparently strategic early retirement damages confidence in the Court,<sup>209</sup> it is not “undemocratic,” because naming a replacement still falls to a duly elected President, and it can only occur when a like-minded President has won election long after the Justice was appointed.<sup>210</sup> It may entrench a waning political or legal philosophy for another term, but as discussed above, gradual development of the law has its advantages as well as disadvantages.<sup>211</sup>

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205. Interview by Charlie Rose with Chief Justice William H. Rehnquist, United States Supreme Court (PBS television broadcast Jan. 13, 1999), *quoted in* WARD, *supra* note 5, at 218.

206. *See supra* notes 184–89 and accompanying text.

207. Yoon, *supra* note 187 (manuscript at 42).

208. LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM* 368 n.a (2d ed. 1996).

209. Earl Warren’s botched attempt to retire in time for Lyndon Johnson to appoint his successor was a spectacular embarrassment, widely denounced by the right and left. *See* DiTullio & Schochet, *supra* note 3, at 1101–02.

210. Notably, the Hagle study modeled only strategic early retirement, not strategic late retirement. It treated all retirements in a President’s second term as strategic retirements, on the theory that uncertainty about the next race, with no incumbent, would induce Justices to retire prematurely. *See* Hagle, *supra* note 190, at 32. It also treated all retirements *early* in a President’s second term as strategic, on the theory that Justices would retire prematurely to take advantage of the President’s postreelection political capital. *Id.* at 31–32. It treated retirements during years when the Senate saw a reduced majority and the majority of the Court (but not necessarily the retiring Justice!) shared that party’s political affiliation as strategic, on the theory that Justices would retire quickly, before the Senate majority evaporated. *Id.* at 32–33. Not only do these techniques run a high risk of reporting false positives because they ignore the retiring Justice’s political or ideological affiliation, they ignore strategic late retirement entirely. In contrast, the other studies measure such factors as bare political unity between a Justice and the President, which attempts to capture strategic late retirements as well.

211. *See supra* notes 138–40 and accompanying text.

Strategic late retirement, on the other hand, may have grave consequences. Justices injure their own reputation and the reputation of the Court when they attempt to hold on to office while their mental and physical health deteriorates.<sup>212</sup> The danger of strategic late retirement has nothing to do with whether it succeeds or fails.<sup>213</sup> The danger is that it may exacerbate the serious problem of mental and physical infirmity.

Second, alternatives to life tenure involve serious risks of strategic behavior as well. Term limits or a mandatory retirement age, for example, would create “final period problems”: Justices may change their behavior strategically during their final period on the Court (or the final period of their ideological allies) to extend their own influence or thwart their successors.<sup>214</sup> If the claim is correct, then in a regime that limits retirement options, Justices presumably will find ways *other* than retirement to achieve their strategic objectives.<sup>215</sup> Litigants too would have greater strategic options under a system of term limits or a mandatory retirement age. Interest groups would have a strong incentive to expedite or delay a strong test case, given absolute certainty that a “good” or “bad” Justice will soon be forced from the Court.

Strategic factors influence the timing of retirements, but other factors play a far more important role. Most empirical research rejects the hypothesis that Justices retire for strategic reasons, and the claim rests instead on anecdotes so resilient and chameleon that they are impossible to disprove. The danger of strategic retirement lies mostly in its potential to worsen the problem of mental and physical infirmity on the Court.

### 3. *Mental and Physical Infirmity*

The third critique, and the least controversial, is that many Justices suffer from mental or physical infirmity<sup>216</sup> but adamantly refuse to retire

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212. See *infra* Part III.A.1.

213. See Ross, *supra* note 156, at 1086–87 (noting that strategic late retirement frequently fails, and the “wrong” President ends up naming a replacement anyway).

214. Hellman, *supra* note 157, at 298–303. Professor Hellman notes that retiring Justices will have an incentive to load the docket, ignoring justiciability and “vehicle” problems, in order to decide important cases before their tenure ends. *Id.* He also notes that advocacy groups, which play a crucial role in bringing cases before the Court, will have an incentive to time their actions strategically as a result of greater certainty about the composition of the Court. *Id.* at 306.

215. See, e.g., David R. Stras, *The Incentives Approach to Judicial Retirement*, 90 MINN. L. REV. (forthcoming 2006) (manuscript at 10–12, on file with author) (describing the various ways that Justices act strategically).

216. When using the term “infirmity” in the text, we are talking about such an incapacitating condition that Justices are unable to perform their duties for an extended period of time. We therefore exclude physical disabilities, such as blindness or deafness, that do not prevent Justices from



for one reason or another. Professor David Garrow’s encyclopedic history of mental “decrepitude” on the Supreme Court reveals the breadth and depth of this problem.<sup>217</sup> In the twentieth century, at least eleven members of the Supreme Court suffered a serious mental decline during their final years: Chief Justices Fuller and Taft and Justices McKenna, Holmes, Murphy, Minton, Whittaker, Black, Douglas, Powell, and Marshall.<sup>218</sup> Another four suffered incapacitating long-term physical disabilities: Justices Gray, Brewer, Moody, and Pitney.<sup>219</sup> That group represents 29% of the 52 Justices who retired during the period.<sup>220</sup> Their refusal to step down caused a whole host of embarrassments, some of which caused lasting damage to the reputation of the Court.<sup>221</sup> Garrow blasts the “overly sanguine” conventional view that “no formal remedies need to be considered.”<sup>222</sup> He is correct. A Justice’s mental and physical infirmity threatens both the performance and credibility of the Court.

Yet Garrow’s proposed solution, a constitutional amendment creating a mandatory retirement age of seventy-five for federal judges,<sup>223</sup> only indirectly addresses the problem. Age is not a perfect proxy for mental and physical infirmity, and thus a mandatory retirement age suffers from two drawbacks. First, it is underinclusive. Garrow acknowledges that four twentieth century Justices, more than a third of those who suffered mental infirmity, began their decline before reaching his proposed retirement age: Murphy (59), Minton (65), Whittaker (65), and Taft (72).<sup>224</sup> The same goes for all four Justices who suffered incapacitating physical disability on the Court: Gray (74), Brewer (64), Moody (54), and Pitney (64).<sup>225</sup> Second, it is overinclusive. Many Justices serve beyond age seventy-five without suffering mental or physical decline.<sup>226</sup> Indeed, in the last century,

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performing their duties.

217. Garrow, *supra* note 5.

218. *Id.* at 1012 (Fuller), 1017 (Taft), 1012–16 (McKenna), 1017–18 (Holmes), 1027–28 (Murphy), 1043–45 (Minton), 1045–50 (Whittaker), 1050–52 (Black), 1052–56 (Douglas), 1069–70 (Powell), 1072–80 (Marshall).

219. *See* WARD, *supra* note 5, at 99–100 (Gray), 102–03 (Brewer), 106 (Moody), 116 (Pitney). Justices Gray, Brewer, Moody, and Pitney each suffered serious maladies, requiring their colleagues to pick up the slack for them. *Id.* Indeed, Justices Moody and Pitney suffered such serious long-term physical difficulties that Congress passed special pension legislation to induce each of them to retire. *Id.* at 106, 116.

220. *See* Federal Judicial Center, *supra* note 161.

221. *See infra* Part III.A.1.

222. Garrow, *supra* note 5, at 995.

223. *Id.* at 1085–86.

224. *Id.* at 1085.

225. *See* WARD, *supra* note 5, at 99–100, 102–03, 106, 116.

226. Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 26–27 (2001); John Gruhl, *The Impact of Term Limits for Supreme Court Justices*, 81 JUDICATURE 66,

Garrow's proposed age limit would have affected more than twice as many healthy Justices (thirteen) as unhealthy Justices (six), cutting short the careers of Chief Justices Warren and Burger as well as Justices Harlan, Van Devanter, McReynolds, Brandeis, Sutherland, Hughes, Frankfurter, Brennan, Blackmun, and Edward and Byron White.<sup>227</sup> Plus, even when an age limit would have "worked" by ending a Justice's career before infirmity set in, it sometimes would have worked too soon. Justice Holmes deteriorated seriously in his nineties, but he continued to serve in good mental and physical health for more than a decade after he reached age seventy-five.<sup>228</sup> Term limits are even less helpful, as length of tenure is an even poorer proxy for disability.<sup>229</sup>

### *C. A Few Words for the Skeptic*

Suppose that, as a critic of life tenure, you find all of this discussion unconvincing because you want to see greater accountability for the Court, fewer strategic retirements, and fewer mentally or physically infirm Justices continuing to serve. Our proposal to create a golden parachute for Supreme Court Justices is a significant step toward solving all of these problems.

First, the most obvious effect of pension reform is to encourage Justices to retire earlier, which will reduce average term lengths and increase the frequency with which the political branches can hold the courts accountable through the appointment process. It also blunts incentives for strategic late retirement by forcing Justices to forego a substantial financial payoff if they wish to gamble on their ability to persevere until a new administration takes office. Better than any revised tenure regime, it also targets mental and physical infirmity by removing disincentives for the retirement of infirm Justices prior to pension qualification.

Second, our proposal does not require a constitutional amendment. We emphasize this feature not only because it makes our proposal more

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69–70 (1997).

227. See Federal Judicial Center, *supra* note 161.

228. Garrow, *supra* note 5, at 1017.

229. Fixed eighteen-year terms also would have cut short more than twice as many healthy careers (fourteen) as unhealthy careers (six) in the twentieth century. See Federal Judicial Center, *supra* note 161. Compared with a mandatory retirement age at seventy-five, term limits would have failed to prevent one more instance of mental infirmity on the Court, see Garrow, *supra* note 5, at 1069–71 (discussing Justice Powell), but would have prevented one case of physical infirmity, see WARD, *supra* note 5, at 99–100 (discussing Justice Gray).

politically expedient, but also because constitutional change should take place only after Congress has exhausted all other options. Whatever your assessment of the overall problem, we hope that you give serious consideration to our solution.

### III. AN INCENTIVES APPROACH TO RETIREMENT

Life tenure should be retained. If increased length of tenure and the threat of strategic retirement represented the only drawbacks to life tenure, we would recommend leaving the present system in place. But the serious problem of mental and physical infirmity demands reform. We therefore propose an analytical approach and a package of reforms designed with the dangers of mental and physical infirmity in mind.

Accordingly, we move in an entirely different direction from other scholars by advocating an incentives approach to Supreme Court tenure. First, we argue that pension reform, by way of implementing a golden parachute, will encourage Justices to retire before or immediately after mental or physical infirmity sets in. Second, we propose that Congress, as well as the Supreme Court itself, take straightforward measures to make the office of Senior Justice a more attractive alternative.

#### A. *Pension Reform and the Golden Parachute*

The most surprising aspect of reformers' singular focus on major structural changes like term limits or a mandatory retirement age is that, to date, Congress's most powerful tool for influencing the retirement timing of Justices has been pension reform. We begin by examining the historical and empirical evidence indicating that an increase in the size of judicial pensions should induce a greater number of Justices to retire upon mental or physical infirmity.

##### 1. *The History of Federal Judicial Pensions*

For about the first eighty years of this country's history, the United States did not offer any type of pension benefits to Article III judges. Relatively low salaries for Supreme Court Justices coupled with the lack of retirement benefits contributed, at least in part, to Justices staying on the Court too long.<sup>230</sup> Indeed, twenty of the twenty-four Justices who served between 1801 and 1868 died in office.<sup>231</sup>

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230. For example, between 1819 and 1854, an Associate Justice earned \$4500 per year and the

For example, Justice Baldwin was known to be mentally infirm within the first two years of his appointment to the Court in 1830.<sup>232</sup> Despite missing the entire 1833 Term of Court while he was hospitalized for what was termed “incurable lunacy,”<sup>233</sup> he “hung on to his seat for fourteen years until death in order to continue drawing his salary.”<sup>234</sup> Richard Peters, the Court’s reporter, wrote about Baldwin: “[H]is mind [*is*] out of order . . . . He sits in his room for three or four hours in the dark—jumps up and runs down into the judges’ consultation room in his stocking feet, and remains in that condition while they are deliberating.”<sup>235</sup> Financial considerations also played a role in Justice Cushing’s decision to stay on the Court despite his mental decline.<sup>236</sup>

In response to this problem, Congress passed retirement legislation in 1869 that provided Article III judges with a yearly pension benefit equal to their annual salary at the time of retirement, so long as they had reached the age of seventy and served at least ten years.<sup>237</sup> The results of the legislation could only be described as mixed, with some Justices retiring shortly after eligibility and others holding on too long. Passage of the 1869 Act produced a greater balance between the number of Justices who died in office (nineteen) and those that retired (seventeen) in the period from 1869–1936.<sup>238</sup>

Initially, the 1869 Act seemed to have its intended effect, as Justices Grier and Nelson, both of whom could no longer carry their share of the Court’s workload, took advantage of the pension benefits shortly after the law was enacted.<sup>239</sup> In fact, passage of the Act started a trend of four

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Chief Justice \$5000 per year, *see* EPSTEIN ET AL., *supra* note 208, at 42. Converting this salary to 1994 dollars, an Associate Justice would earn from \$36,646 in 1819 to \$67,429 during the period from 1849–1853. RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 385–86 (1996).

231. *See* WARD, *supra* note 5, at 3–41.

232. *Id.* at 51.

233. Garrow, *supra* note 5, at 1002.

234. WARD, *supra* note 5, at 51; *see also* Johnson v. United States, 79 F. Supp. 208, 211 (Fed. Cl. 1948) (noting that judges had stayed on the bench after becoming mentally or physically disabled “to draw the salary of the office as long as they lived.”).

235. Letter from Richard Peters, Jr. to J. Hopkinson (Mar. 18, 1838), in G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE 1815–1935*, at 302 (abr. ed. 1991).

236. WARD, *supra* note 5, at 60; *see also* Garrow, *supra* note 5, at 1001 (stating that Justice Cushing’s “mental facilities” had waned to the point where he was deranged, but that financial considerations had kept him on the bench).

237. Judiciary Act of 1869 § 5, 16 Stat. 44, 45. Technically, a judge had to resign to receive pension benefits under the 1869 Act, but for consistency throughout this Article we will refer to the decision to step down with pension benefits as retirement.

238. *See* WARD, *supra* note 5, at 4–5.

239. *See id.* at 4 tbl.1.1, 74 tbl.4.2, 78–79.

straight pension-eligible Justices opting for retirement.<sup>240</sup> In addition, Justices Grier, Strong, Shiras, and Brown all opted for retirement within one year of pension eligibility.<sup>241</sup>

By the end of the nineteenth century, however, the tide had turned and more Justices were opting to stay on the bench rather than retire.<sup>242</sup> Most notably, Justice Field stayed despite the fact that Chief Justice Fuller refused to assign any opinions to him during his last years on the Court.<sup>243</sup> During those final years, Justice Field purportedly asked questions during oral argument that demonstrated he no longer had a grasp on the issues presented, and it was reported that he could not remember how he had voted in conference.<sup>244</sup> Justice Field finally retired in 1897, long after his health had declined and he was no longer able to contribute to the Court’s work.<sup>245</sup> Others during this period, including Justices Clifford, Gray, and Brewer, stayed on the Court for a considerable amount of time after they had become physically or mentally disabled.<sup>246</sup>

In 1919, Congress passed a law that allowed lower court judges to retire from active service and take on senior status.<sup>247</sup> Under the law, judges would have the option of either fully retiring from the judiciary or continuing to hear and decide cases on a reduced basis as a senior judge.<sup>248</sup> In either case, the President would be entitled to nominate a successor for the vacant judgeship.<sup>249</sup>

Then, largely in response to President Roosevelt’s court-packing plan and the limited effectiveness of the 1869 Act, Congress extended the option of senior status to Supreme Court Justices in 1937.<sup>250</sup> The law guaranteed that, under either senior status or full retirement, a judge would continue to receive a pension equivalent to the full salary of an active

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240. *See id.* at 74 tbl.4.2.

241. *Id.* at 73.

242. *See id.* at 4 tbl.1.1.

243. Garrow, *supra* note 5, at 1009.

244. CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW 442 (1930); WARD, *supra* note 5, at 97.

245. *See* WARD, *supra* note 5, at 98.

246. *Id.* at 83–85, 99–100, 102–03.

247. Act of Feb. 25, 1919, ch. 29 § 6, 40 Stat. 1156, 1157. Retired judges were not officially called “senior judges” until 1958. Act of Aug. 25, 1958, Pub. L. No. 85-755, § 5, 72 Stat. 848, 849. For consistency, we will refer to all retired judges that elect to continue to hear cases as “senior judges.”

248. Section 6, 40 Stat. at 1157.

249. *Id.*

250. Act of Mar. 1, 1937, ch. 21, 50 Stat. 24, 24; *see also* WARD, *supra* note 5, at 136–37 (describing the political environment for passage of the 1939 Act).

judge.<sup>251</sup> In 1948, Congress passed yet another law that permitted senior judges, including former Supreme Court Justices, to participate in any salary increases offered to their active counterparts.<sup>252</sup>

The 1937 Act was more effective in inducing retirements than the 1869 Act. Just three months after the 1937 Act was passed, Justice Van Devanter elected to take senior status.<sup>253</sup> Less than a year later, Justice Sutherland departed as well.<sup>254</sup> The notes of Chief Justice Hughes suggest that passage of the 1937 Act was a motivating factor in the retirements of both Justices.<sup>255</sup> During the period from 1937 to 1945, five of the nine Justices who left the Court retired under the terms of the 1937 Act.<sup>256</sup>

All five Justices who left the Court during the nine years following 1945, however, died during their tenures in office.<sup>257</sup> One of the five, Justice Murphy, was mentally infirm but was ineligible under the 1937 Act because he had not yet served ten years.<sup>258</sup> According to at least one account, Justice Murphy was afflicted with sciatic neuralgia and shingles, but was compelled to stay because he had little money beyond his annual salary.<sup>259</sup> Justice Murphy himself indicated he would have retired had he been eligible for full pension benefits, stating in a letter to his brother that “the public servant should be allowed to retire without reference to disability or age.”<sup>260</sup> The other four Justices all died quite suddenly and did not linger on the Court while their mental capacities deteriorated.<sup>261</sup>

Congress passed another important measure in the wake of President Roosevelt’s failed attempt to pack the Court. In 1939, Congress enacted a law providing benefits to Article III judges who failed to meet the age and service requirements for retirement under the 1937 Act but nonetheless could not continue to carry out the duties of their office.<sup>262</sup> Under the 1939

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251. 40 Stat. at 1157.

252. Act of June 25, 1948, ch. 646, 62 Stat. 903.

253. DAVID N. ATKINSON, *LEAVING THE BENCH* 104–05 (1999); see *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVAN HUGHES* 303 (David J. Danelski & Joseph S. Tulchin, eds. 1973) [hereinafter *HUGHES NOTES*].

254. WARD, *supra* note 5, at 138.

255. *HUGHES NOTES*, *supra* note 253, at 303.

256. WARD, *supra* note 5, at 131 tbl.6.2.

257. *Id.*

258. WARD, *supra* note 5, at 148.

259. J. WOODFORD HOWARD, JR., *MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY* 458 (1968); see also Garrow, *supra* note 5, at 1085 (stating that Justice Murphy suffered from a condition that “should have precluded [his] ongoing service”).

260. Letter from Frank Murphy to George Murphy (Feb. 10, 1949), *quoted in* HOWARD, *supra* note 259, at 458.

261. WARD, *supra* note 5, at 146–50; see also ATKINSON, *supra* note 253, at 116–17, 120–22.

262. Act of Aug. 5, 1939, ch. 433 § 3, 53 Stat. 1204, 1205. In 1957, Congress passed a law permitting an additional judge to be appointed when a majority of the circuit judicial council certifies

Act, permanently disabled judges were entitled to retire with full pay, regardless of age, if they had served more than ten years in the federal judiciary.<sup>263</sup> Those judges who failed to meet the ten-year service requirement could retire on half pay.<sup>264</sup> Justice Whittaker, who suffered a nervous breakdown while serving on the Court, was the first and only Justice to retire under the 1939 disability legislation.<sup>265</sup>

The 1939 disability statute remedied the often inconsistent treatment of permanently disabled Justices over the course of the nation’s history. For example, Congress passed a law in 1882 that allowed Justice Hunt, who had been unable to serve at all for three years,<sup>266</sup> to retire with full benefits even though he failed to meet the eligibility requirements under the 1869 Act.<sup>267</sup> Congress also passed special retirement legislation for Justices Pitney and Moody in 1910 and 1922, respectively,<sup>268</sup> both of whom were apparently holding out for retirement benefits.<sup>269</sup>

Other Justices, such as Benjamin Cardozo, were not so lucky. Three years into his tenure, Justice Cardozo suffered a heart attack, and one visitor to the Court observed that Justice Cardozo “struggled to read an opinion from the bench.”<sup>270</sup> During the course of his service, he suffered two more heart attacks, contracted shingles, and suffered a debilitating stroke.<sup>271</sup> An important factor in Justice Cardozo’s decision to stay on the Court was that he was not yet entitled to full retirement benefits after completing only six years of service.<sup>272</sup> Indeed, Justice Cardozo’s decline was the catalyst for the 1939 disability legislation.<sup>273</sup>

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the disability. Act of Sept. 2, 1957, Pub. L. No. 85-261, 71 Stat. 586. Only six judges have been involuntarily certified as “disabled” under this law. Charles Gardner Geyh, *Informal Methods of Judicial Discipline*, 142 U. PA. L. REV. 243, 275 (1993).

263. Section 3, 53 Stat. at 1205.

264. *Id.*

265. A number of federal circuit and district court judges have retired based upon disability since 1939. See ATKINSON, *supra* note 253, at 130. See FEDERAL JUDICIAL CENTER, JUDGES TAKING DISABILITY RETIREMENT, 1939 TO PRESENT, 1–3 (2005) (on file with author).

266. See Bryan H. Wildenthal, *The Cost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 OHIO ST. L.J. 1051, 1163 n.530 (2000).

267. Act of Jan. 27, 1882, ch. 4, 22 Stat. 2, 2.

268. Act of Dec. 11, 1922, ch. 1, 42 Stat. 1063, 1063 (regarding Mahlon Pitney); Act of June 23, 1910, Priv. L. No. 61-129, 36 Stat. 1861, 1861 (regarding William Moody).

269. WARD, *supra* note 5, at 106, 116.

270. *Id.* at 139.

271. ATKINSON, *supra* note 253, at 107; WARD, *supra* note 5, at 139–40.

272. WARD, *supra* note 5, at 140.

273. *Id.*

In 1954, Congress expanded “senior status” to cover judges who were sixty-five years of age and had accumulated fifteen years of service.<sup>274</sup> Twenty-eight years later, Congress once again eased the eligibility requirements for retirement by adopting the “rule of eighty,” which allows federal judges to take senior status *or* retire on a sliding scale of age or service, beginning at age sixty-five and fifteen years of service, and ending at age seventy with ten years of service.<sup>275</sup> The rule of eighty remains in force today.<sup>276</sup>

As with the other retirement legislation, the effects of the 1954 Act were observed almost immediately. The first Justice to retire, Justice Minton, retired the very month that he accumulated his fifteenth year of service.<sup>277</sup> The evidence surrounding his departure suggests that Justice Minton would have retired earlier if he had been eligible for benefits, as his health had been “precarious” for some time.<sup>278</sup> His retirement started an astonishing trend of nineteen Supreme Court Justices who retired or resigned rather than dying in office.<sup>279</sup>

As Professor David Garrow has documented, however, Justices Black, Douglas, Powell, and Marshall retired *after* they had become mentally infirm on the job.<sup>280</sup> For instance, Justice Douglas’s mental condition was so grim that his colleagues voted seven to one to preclude him from writing any opinions and decided to hold over all cases where the Court’s decision hinged on Douglas’s vote.<sup>281</sup> Likewise, Justice Marshall dozed off

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274. Act of Feb. 10, 1954, ch. 6 § 4, 68 Stat. 8, 12 (codified as amended at 28 U.S.C. § 371 (2000)). In 1956, Congress enacted a voluntary survivor’s annuity program—which allows federal judges to contribute a small percentage of their salary with an additional contribution from the United States Treasury—that pays an annuity to the surviving spouse and/or children of a federal judge. Act of Aug. 3, 1956, ch. 944 § 2, 70 Stat. 1021, 1021 (codified as amended at 28 U.S.C. § 376 (2000)).

275. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 204(a), 98 Stat. 333, 350 (codified at 28 U.S.C. § 371 (2000)); see Emily Field Van Tassel, *Resignations and Removals: A History of Federal Judicial Service—and Disservice—1789–1992*, 142 U. PA. L. REV. 333, 398 (1993).

276. 28 U.S.C. § 371 (2000). Congress also introduced a certification process for senior judges in 1989, requiring them to meet minimum workload requirements. Ethics Reform Act of 1989, Pub. L. No. 101-194, § 705(a), 103 Stat. 1716, 1770.

277. See Garrow, *supra* note 5, at 1043–44.

278. WARD, *supra* note 5, at 161. By the time he retired, Justice Minton had long suffered from pernicious anemia, spinal cord damage, and circulatory problems in his legs. Minton likely stayed on the Court for the start of the new Term in the fall of 1956 in order to collect his full retirement benefits. *Id.* at 162.

279. *Id.* at 159 tbl.7.5.

280. Garrow, *supra* note 5, at 1085.

281. *Id.* at 1054.



during some oral arguments, and it was reported that he spent much of his day in chambers watching daytime television.<sup>282</sup>

Professor Garrow’s account makes the powerful point that mental infirmity remains an ongoing problem with respect to Supreme Court Justices. We wholeheartedly agree. In evaluating the problem, however, Garrow appears more concerned with the number of Justices that are mentally infirm rather than the length of incapacitation. He also ignores harms associated with physical incapacity, which can also be devastating for the Court. Moreover, the amount of time that incapacitated Justices stayed on the Court during the nineteenth century while incapacitated was staggering.<sup>283</sup>

Pension reform, as an historical matter, has been remarkably effective at enticing some Justices to leave once they become mentally or physically infirm. It also has encouraged others, such as Justice Potter Stewart, to leave while relatively young and healthy.<sup>284</sup> Nonetheless, the fact that infirm Justices continue to serve on our nation’s highest court means that there is still work to do.

## 2. *The Empirical Support for Pension Reform*

The historical evidence suggests that pension reform has affected the retirement behavior of many Supreme Court Justices. Most legal scholars, however, have limited their research almost exclusively to such evidence, ignoring the rich social science literature that points to an alternative approach. Empirical studies in disciplines such as economics and political science consistently have demonstrated that pensions represent one of the most significant factors in shaping retirement behavior.

We begin by examining the vast empirical research on the factors that influence retirement decisions of the general population. We then turn our attention to the empirical studies that focus on the retirement decisions of Supreme Court Justices. Finally, we discuss the factors influencing the retirement decisions of two comparable actors: members of Congress and

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282. *Id.* at 1071–72. Given the quality of some arguments before the Court, one might be tempted to forgive the Justices for taking a quick nap. But if sleeping through proceedings amounts to (almost) *per se* ineffective assistance of counsel, *see* *Burdine v. Johnson*, 262 F.3d 336, 349–50 (5th Cir. 2001) (en banc), we ought to expect more of Justices on the Supreme Court.

283. For instance, Justice Todd missed five of the eighteen terms he served, Justices Clifford and Grier missed seven or eight of their twenty three terms, and Justice Swayne missed at least a decade of his eighteen-year tenure. *See* Gruhl, *supra* note 226, at 68.

284. *See* WARD, *supra* note 5, at 193.

tenured faculty members at colleges and universities around the United States.

*a. General Trends in Empirical Pension Research*

For sixty years, labor economists have studied how different types of pension systems affect retirement behavior.<sup>285</sup> As research during the 1970s demonstrated, “retirement (and early retirement) rates rose dramatically as the Social Security and pension systems expanded. Noticeable changes in participation rates occur at ages important in pension and Social Security rules—60, 62, and 65.”<sup>286</sup> One study published in 1977 found that, for one sample, combined Social Security and pension eligibility reduced the probability of labor force participation by 26%, and that among those with relatively poor health, the correlation between eligibility for either Social Security or a pension and the probability of labor force participation was stronger than for those in good health.<sup>287</sup> Further, other early studies indicated that the amount of pension wealth was a key determinant of retirement.<sup>288</sup> Accordingly, economists have long viewed retirement income rights as an “asset or stock of wealth” that potential retirees consider before making the retirement decision.<sup>289</sup>

More recent econometric research has benefited from dynamic modeling that better isolates the individual effects of variables.<sup>290</sup> For instance, a 1984 study found that incremental changes in retirement wealth can lead to significant changes in the date of retirement.<sup>291</sup> Another study

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285. See JOSEPH F. QUINN ET AL., *PASSING THE TORCH: THE INFLUENCE OF ECONOMIC INCENTIVES ON WORK AND RETIREMENT* 43–53 (1990) (describing the early research dealing with Social Security and retirement).

286. *Id.* at 62; see also David A. Wise, *Retirement Against the Demographic Trend: More Older People Living Longer, Working Less, and Saving Less*, 34 *DEMOGRAPHY* 83, 87 (1997) (recognizing the increases in retirement rates at the key ages of 55, 60, 62, and 65).

287. See QUINN, *supra* note 285, at 64–66 (explaining Joseph F. Quinn, *Microeconomic Determinants of Early Retirement: A Cross-Sectional View of White Married Men*, 12 *J. HUM. RESOURCES* 329, 338, 342 (1977)); see also Wise, *supra* note 286, at 94 (“Health status is . . . an important determinant of retirement, and the effect of health status may interact with the effect of pension plan provisions.”).

288. QUINN, *supra* note 285, at 68–70 (discussing Richard V. Burkhauser, *The Pension Acceptance Decision of Older Workers* 14 *J. HUM. RESOURCES* 63, 73–74 (1979) and Richard V. Burkhauser, *The Early Acceptance of Social Security: An Asset Maximization Approach*, 33 *INDUS. & LAB. REL. REV.* 484, 492 (1980)).

289. *Id.* at 70.

290. See *id.* at 79.

291. *Id.* at 100 (describing the findings in Gary S. Fields & Olivia S. Mitchell, *The Effects of Social Security Reforms on Retirement Ages and Retirement Incomes*, 25 *J. PUB. ECON.* 143, 158–59 (1984)).

of an unanticipated early-retirement window offered by a Fortune 500 company demonstrated that providing a bonus payment of three-to-twelve months salary could as much as double retirement rates.<sup>292</sup> Finally, another important study conducted in 1983 found that potential retirees act rationally in approaching retirement, taking into account *changes* in total retirement wealth from another year of working in addition to the total discounted value of the entire stream of pension payments.<sup>293</sup> There is, to be sure, some disagreement in the literature about the extent to which different pension plans influence retirement, but there seems to be near unanimity that they influence the average worker’s decision to retire.<sup>294</sup>

*b. Empirical Studies on the Retirement of Supreme Court Justices*

The general pension research discussed above explores only the retirement decisions of the average worker. Of course, Supreme Court Justices are far from average. As a group, they tend to be better educated, more wealthy, and in a job of much higher prestige and power than the average American. In addition, Supreme Court Justices differ from many Americans in that they enjoy life tenure. Thus, it may come as a surprise that recent studies have demonstrated that Supreme Court Justices affirmatively respond to financial incentives to retire.

The first statistical study analyzing the retirement decisions of Supreme Court Justices was conducted in 1988 by Professor Peverill Squire.<sup>295</sup> Using each year a Justice served as a separate unit of analysis, Professor Squire tested nine independent variables, including age, infirmity,<sup>296</sup> and pension eligibility, against the dependent variable of the retirement

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292. Robin L. Lumsdaine et al., *Efficient Windows and Labor Force Reduction*, 43 J. PUB. ECON. 131, 156 (1990).

293. Richard V. Burkhauser & Joseph F. Quinn, *Is Mandatory Retirement Overrated? Evidence from the 1970s*, 18 J. HUM. RESOURCES 337, 347 (1983).

294. See, e.g., Patricia M. Anderson et al., *Trends in Male Labor Force Participation and Retirement: Some Evidence on the Role of Pensions and Social Security in the 1970s and 1980s*, 17 J. LAB. ECON. 757, 778 (1999); Alan L. Gustman et al., *The Role of Pensions in the Labor Market: A Survey of the Literature*, 47 INDUS. & LAB. REL. REV. 417, 432 (1994) (arguing that some studies show smaller, but statistically significant, correlations between generous pensions and retirement decisions).

295. Squire, *supra* note 184. Professor Squire employed event-history analysis to explain retirements from 1789 to 1980. Event-history analysis uses longitudinal data to study the causes of retirements, crimes, death, and other “people” events. See generally PAUL D. ALLISON, *EVENT HISTORY ANALYSIS: REGRESSION FOR LONGITUDINAL EVENT DATA* (1984) (explaining event history analysis).

296. Professor Squire defined “infirmity” as “major physical disability,” not “failing health or mental incapacity.” Squire, *supra* note 184, at 186.

decision.<sup>297</sup> He found that the two most important variables affecting a Justice's decision to retire are infirmity and pension eligibility.<sup>298</sup> According to Squire, "the provision of judicial pensions and their subsequent improvement [have made] Supreme Court justices . . . more likely to voluntarily retire from the bench."<sup>299</sup>

A second, more comprehensive study was performed by Professors Christopher Zorn and Stephen Van Winkle.<sup>300</sup> Also using regression analysis,<sup>301</sup> the authors determined the relationship of a number of variables, including age and pension eligibility, to retirement and death.<sup>302</sup> Their model demonstrated that the single greatest factor influencing the retirement decision of Supreme Court Justices is pension eligibility.<sup>303</sup> Pension eligibility "has a strong, significant, positive effect on the retirement hazard."<sup>304</sup> Holding all the other variables at their means, pension eligibility increased the baseline hazard of retirement by an astounding 393%.<sup>305</sup>

Professor Albert Yoon recently performed a third study, concluding that "[a]cross all levels of court, the best predictor of judicial vacancy is pension qualification,"<sup>306</sup> although he also found that the effect of pension eligibility is somewhat weaker for Supreme Court Justices than for lower court judges.<sup>307</sup> Unlike the other studies, Professor Yoon's analysis differentiated between retirements that occurred during the year of pension qualification and those that occurred during the years following

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297. *Id.* at 185 tbl.1.

298. *See id.*

299. *Id.* at 187. It bears noting that an article by Professor Timothy Hagle criticizes the methodology of the Squire study. The bulk of Professor Hagle's criticism, however, is directed toward Squire's approach in assessing the relationship between political factors and retirement, not the relationship between pension eligibility and retirement. In fact, if anything, Professor Hagle's criticism demonstrates that the Squire study underestimated the influence of the pension variable. *See Hagle, supra* note 190, at 27.

300. Zorn & Van Winkle, *supra* note 185.

301. Zorn and Van Winkle used an independent competing risks model. *Id.* at 153–54. In this model, the hazard associated with each of the risks—retirement and death in this case—"is assumed to be independent from that of the other risks, conditional on the effects of the independent variables." *Id.* at 154.

302. *Id.* at 155 tbl.2. Unlike the Squire study, Zorn and Van Winkle did not include infirmity in their analysis. *See id.*

303. *See id.*

304. *Id.* at 154.

305. *Id.* at 155. The influence of pension eligibility on the retirement hazard is expressed as a percentage, meaning that pension eligibility increases the baseline hazard of retirement by approximately five times. *See id.* at 163 n.13.

306. Yoon, *supra* note 187 (manuscript at 40).

307. *See id.* (manuscript at 39 tbl.7).

eligibility.<sup>308</sup> According to Professor Yoon, Supreme Court Justices are less likely than circuit and district court judges to retire during the year of pension qualification.<sup>309</sup>

Perhaps Yoon’s findings with respect to Supreme Court Justices indicate that the financial payout from retirement is not large enough to overcome the other accoutrements of the office—power, prestige, and the utility derived from judging. Indeed, Professor Yoon does not rule out the possibility that a sufficiently large pension might induce different retirement behavior.<sup>310</sup> Moreover, the explanatory power of pension qualification in the first year is not the issue. The key policy objective is to induce retirement when a Justice becomes mentally or physically infirm, which historically has seldom occurred during the first year of pension eligibility.<sup>311</sup>

These empirical outcomes should not be surprising. Judge Richard Posner wrote in 1993 that judges and Justices are rational maximizers of their own utility function, which includes pecuniary income from salary and retirement benefits.<sup>312</sup> As Professor Yoon has further argued, “judges appear to recognize—at least implicitly—the judicial compensation structure and how best to maximize it.”<sup>313</sup>

### *c. Empirical Studies on Comparable Actors*

If there is a weakness in the existing empirical research on Supreme Court retirement behavior, it is that these studies necessarily can examine only a small number of observations, spread out over more than 200 years.<sup>314</sup> Accordingly, we think it is useful to examine other comparable actors, such as legislators and tenured faculty members, to determine whether financial incentives to retire have been successful in similar circumstances.

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308. *See id.*

309. *Id.* (manuscript at 27).

310. *See* E-mail from Albert Yoon, Associate Professor of Law, Northwestern University School of Law, to David Stras, Associate Professor of Law, University of Minnesota Law School (Apr. 12, 2005, 21:28 CST) (on file with author).

311. Professor Yoon’s data do show a spike in retirements following the pension eligibility of Supreme Court Justices, just not as considerable as that of lower court judges. Yoon, *supra* note 187 (manuscript at 27, 29 fig.6).

312. *See* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 31 (1993).

313. Yoon, *supra* note 187 (manuscript at 43).

314. For example, the Zorn and Van Winkle study examines fifty-one retirements and forty-seven deaths. *See* Zorn & Van Winkle, *supra* note 185, at 151 tbl.1.

First, a useful comparison is to the retirement behavior of members of Congress. Like Justices, Senators and Representatives tend to be highly educated and more affluent than the average American. In addition, they hold positions of great power and prestige, although perhaps not to the same degree as Supreme Court Justices.

At least four studies have analyzed the atypical Congressional elections of 1992,<sup>315</sup> which involved such anomalies as the scandal involving overdrafts on the House bank, extensive redistricting, and, most importantly, substantial financial incentives to retire.<sup>316</sup> Thirty-three Representatives who were eligible to convert leftover campaign funds to personal use retired in 1992, the last year in which such funds could be kept by members of Congress.<sup>317</sup> This golden parachute was worth a collective \$8.6 million to the retiring members.<sup>318</sup>

A study by Professors Groseclose and Krehbiel examined the impact of the golden parachute on the retirement of House members before the 1992 election.<sup>319</sup> Accounting for other factors such as the House Bank scandal and redistricting, the authors found that “golden parachutes alone accounted for a striking net increase of approximately . . . 19 retirements—more than one-third of the total number of retirements.”<sup>320</sup> “[B]y a substantial margin, golden parachutes were the main cause of retirements,” causing “nearly twice as many retirements as redistricting and nearly four times as many retirements as the House Bank scandal.”<sup>321</sup>

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315. See Sunil Ahuja et al., *Modern Congressional Election Theory Meets the 1992 House Elections*, 47 POL. RES. Q. 909 (1994); Harold D. Clarke et al., *More Time with My Money: Leaving the House and Going Home in 1992 and 1994*, 52 POL. RES. Q. 67 (1999); Timothy Groseclose & Keith Krehbiel, *Golden Parachutes, Rubber Checks, and Strategic Retirements from the 102d House*, 38 AM. J. POL. SCI. 75 (1994); Richard L. Hall & Robert P. Van Houweling, *Avarice and Ambition in Congress: Representatives' Decisions to Run or Retire from the U.S. House*, 89 AM. POL. SCI. REV. 121 (1995).

316. See Groseclose & Krehbiel, *supra* note 315, at 77.

317. Martin Tolchin, *33 Retirees in House Are Eligible for \$8.6 Million*, N.Y. TIMES, June 7, 1992, § 1, at 22. Representatives that were eligible to convert their campaign funds to personal use were called “grandfathers” or “grandfathered members.” The 1979 Federal Election Campaign Act Amendments, the law at issue, mandated that only members serving prior to 1980 could take advantage of this golden parachute. Groseclose & Krehbiel, *supra* note 315, at 77, 84.

318. Tolchin, *supra* note 317.

319. Groseclose & Krehbiel, *supra* note 315, at 84.

320. *Id.* at 91.

321. *Id.* at 94–95. Another study conducted the same year found that the average member who had \$100,000 or more available to convert to personal use was thirteen percent more likely to retire than a member with no golden parachute. See Ahuja et al., *supra* note 315, at 914–15. Yet another paper stated that having access to the maximum amount of convertible cash made an average Republican member three times as likely to retire in 1992. See Clarke et al., *supra* note 315, at 77.

A second article, published in 1995, reexamined the 1992 election, looking also at increases in expected long-term pension income that resulted from a 1989 wage increase for House members.<sup>322</sup> Because pension benefits are calculated based on the three highest earning years for a House member, the 1989 pay increase resulted in a dramatic forty-five percent increase in the present value of expected pension benefits for the median member who retired in 1992.<sup>323</sup>

The authors found that increases in expected pension benefits had an even greater impact on the decision to run or retire in 1992 than the golden parachute.<sup>324</sup> The pension factor “increase[d] the probability of retirement in 1992 from 4.0% to 12.3%—over 2½ times the change associated with convertible campaign cash.”<sup>325</sup> According to the authors, “members *do* look ahead to the implications for their postretirement income stream” in determining whether to retire, and thus “the implication is that we should see nonincremental increases in voluntary retirements in the lagged aftermath of nonincremental pay raises.”<sup>326</sup> Although a variety of methodologies are used to measure congressional retirement behavior, these studies demonstrate that “unusually attractive financial incentives . . . significantly affected retirement decisions in 1992.”<sup>327</sup>

Second, a comparison can be drawn between Supreme Court Justices and tenured faculty members at colleges and universities throughout the United States.<sup>328</sup> Tenured faculty members generally are at least as highly educated as Supreme Court Justices. Also, like Justices, tenured faculty members ordinarily enjoy their positions for life;<sup>329</sup> indeed, colleges and universities have been barred from enforcing a mandatory retirement age for professors since 1994.<sup>330</sup> The prohibition on mandatory retirement has

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322. Hall & Van Houweling, *supra* note 315, at 123. Specifically, Congress passed a major pay increase for House members in a 1989 ethics reform package, causing salaries to increase from \$96,000 per year in 1990 to \$129,500 by 1992. See Ethics Reform Act of 1989, Pub. L. No. 101-194, § 703, 103 Stat. 1716, 1768.

323. Hall & Van Houweling, *supra* note 315, at 124. The present value of expected pension benefits for the median house member increased by \$185,000 between 1990 and 1992. *Id.*

324. *See id.* at 128.

325. *Id.* at 130.

326. *Id.* at 132–33.

327. Clarke et al., *supra* note 315, at 68.

328. See Charles Fairman, *The Retirement of Federal Judges*, 51 HARV. L. REV. 397, 432 (1938) (“The experience of the universities and colleges is persuasive in a discussion of compulsory retirement. For in this respect the case of the professor is similar to that of the judge.”).

329. Robert L. Clark & P. Brett Hammond, *As Professors Age, Retirement Policies Need Rejuvenation*, CHRON. HIGHER EDUC., June 2, 2000, at B7.

330. See Robert L. Clark & P. Brett Hammond, *Introduction: Changing Retirement Policies and Patterns in Higher Education*, in TO RETIRE OR NOT: RETIREMENT POLICY AND PRACTICE IN HIGHER EDUCATION 1, 1 (Robert L. Clark & P. Brett Hammond eds., 2001) [hereinafter TO RETIRE OR NOT?]

caused a greater proportion of college faculty members to retire later than the average worker, often well into their seventies.<sup>331</sup> Supreme Court Justices often do the same.<sup>332</sup>

Perhaps the most comprehensive studies of faculty retirement behavior have focused on the University of California system. Due to severe budgetary constraints in the early 1990s, California established a series of three voluntary early retirement incentive programs (“VERIPs”) for faculty members that met certain age and service requirements.<sup>333</sup> The severance incentives provided by the VERIPs altered the formula for the computation of pension benefits under California’s defined benefit plan by adding years of service and age credits.<sup>334</sup> VERIPs amounted to a sophisticated buyout program of tenured faculty members.

One study of the California VERIPs, conducted by Professor John Pencavel, a professor of economics at Stanford University, analyzed the statistics for all faculty that were eligible for the VERIPs and found that the increase in retirement rates attributable solely to the VERIPs was approximately eighteen percent for all three plans.<sup>335</sup> These findings led to the conclusion that “faculty were very responsive to the separation incentives: holding constant a number of other factors (such as age and salary), someone presented with a 10 percent higher severance incentive had an 8 percent higher severance probability.” A second scholar examining the VERIPs concluded that such “incentives are positively and significantly associated with early retirement across the three VERIP samples.”<sup>336</sup>

Although the attributes of tenured faculty members and members of Congress do not perfectly match those of Supreme Court Justices, these examples nonetheless provide strong evidence that retirement incentives do influence retirement behavior. For both of these comparable actors,

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(noting that mandatory retirement for tenured faculty ended when an amendment to the Age Discrimination in Employment Act became effective).

331. Orley Ashenfelter & David Card, *Did the Elimination of Mandatory Retirement Affect Faculty Retirement?*, 92 AM. ECON. REV. 957, 958, 968 (2002).

332. See Calabresi & Lindgren, *supra* note 3, at 24.

333. See John Pencavel, *The Response of Employees to Severance Incentives*, 36 J. HUM. RESOURCES 58, 59–61 (2001); Ellen Switkes, *The University of California Voluntary Early Retirement Incentive Programs*, in *TO RETIRE OR NOT?*, *supra* note 330, at 106, 111 fig.4.

334. See Pencavel, *supra* note 333, at 61–62.

335. See *id.* at 79–81 & tbl.9.

336. Seongsu Kim, *The Impact of Research Productivity on Early Retirement of University Professors*, 42 INDUS. REL. 106, 120 (2003).



“early retirement incentives . . . greatly increase the chances of retirement.”<sup>337</sup>

### 3. *The Golden Parachute for Supreme Court Justices*

Justices respond to financial incentives to retire, as the empirical and historical evidence amply demonstrates. Yet at times, mentally and physically incapacitated Justices still serve on the Supreme Court, even for extended periods of time. In this section, we introduce economic justifications to explain the reluctance of Justices to retire. We then outline our golden parachute, which provides a substantial financial incentive for Justices to retire in a timely manner. Finally, we respond to objections and show that a golden parachute could change the late retirement norm on the Court.

#### a. *The Intangible Benefits of Judging*

In addition to pensions, the intangible benefits of judging also play a considerable role in the calculus of when to retire. As Judge Posner has noted, senior judges on the lower courts essentially “work[] for nothing” because they receive approximately the same pension whether they work or not.<sup>338</sup> Yet the vast majority of judges opt to remain on the bench, at least in a limited capacity, by electing senior status.<sup>339</sup>

Moreover, federal judges actually leave money on the table by staying on active duty rather than electing senior status. Unlike the salaries of active judges, the pension income of senior judges is not subject to FICA taxes,<sup>340</sup> and “many states with an income tax exempt such income.”<sup>341</sup> Nonetheless, many Supreme Court Justices in particular have stayed on the bench for years after they have become pension eligible. What explains this seemingly irrational behavior?

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337. Bahman Bahrami & Jerome Stockrahm, *Analysis of Faculty Retirement Intention: Using a Proportional Odds Model*, 17 J. APPLIED BUS. RES. 55, 58 (2001).

338. POSNER, *supra* note 230, at 33. To be sure, senior judges meeting the certification requirements remain eligible for annual salary increases, whereas retired judges do not. However, in light of the small raises for federal judges in recent years, presumably a retired judge could do better working in the private sector.

339. Albert Yoon, *As You Like It: Senior Federal Judges and the Political Economy of Judicial Tenure*, 2 J. EMPIRICAL LEGAL STUD. 495 (2005).

340. 26 U.S.C. §§ 3101, 3121(i)(5) (2000) (exempting compensation for senior judges from FICA taxes); Yoon, *supra* note 187 (manuscript at 44).

341. Darryl Van Duch, *Senior Judge Ranks Close Vacancy Gap*, NAT'L L.J., July 22, 1996, at A1.

If there is no financial incentive to remain on the bench, then the intangible aspects of judging must provide substantial utility to federal judges.<sup>342</sup> Judge Posner identifies several potential considerations: reputation, prestige, popularity, and avoiding reversal.<sup>343</sup> Calabresi and Lindgren further argue that the “social status associated with being a [Supreme Court] Justice” has drastically improved over time, encouraging more Justices to stay on the bench.<sup>344</sup> Indeed, the job of being a Supreme Court Justice may be “the ultimate achievement” for any lawyer.”<sup>345</sup> The added prestige and social status associated with being a judge, and particularly a Supreme Court Justice, may be the most salient intangible factor in the retirement decision. Some have speculated that this might explain William Rehnquist’s refusal to retire from the coveted position of Chief Justice, despite difficult treatment for what proved to be terminal thyroid cancer.<sup>346</sup>

Professor Albert Yoon recently conducted a survey of every sitting senior judge on the federal circuit and district courts, asking them to elaborate on their decision to take senior status rather than fully retire.<sup>347</sup> More than thirty percent of senior circuit judges answered that they liked being a judge and wanted to continue doing it.<sup>348</sup> Many cited the intellectual stimulation of the work.<sup>349</sup> Still others stated that senior status maintained structure in their lives and kept their brains active.<sup>350</sup> Perhaps one respondent summed up the intangible factors best: “I have a deep and abiding regard and love for the federal judiciary and wish to serve as long as possible.”<sup>351</sup>

The intangible benefits of being a judge may help explain the retirement behavior of Supreme Court Justices. When a Justice decides not to retire, the marginal utility acquired from continuing to judge must

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342. A federal judge that chooses active status over senior status, or senior status over full retirement, must gain more marginal utility from judging than from having the additional leisure time.

343. Posner, *supra* note 312, at 31.

344. Calabresi & Lindgren, *supra* note 3, at 34. At least one reason for the increased prestige, according to Calabresi and Lindgren, is that the Court has become increasingly politicized in recent years, garnering greater attention from the public. *See id.* at 34.

345. *See id.* (manuscript at 24).

346. *See, e.g.,* David A. Savage, *Chief Justice Isn’t Retiring*, L.A. TIMES, July 15, 2005, at A1.

347. Yoon, *supra* note 339, at 499.

348. *Id.* at 536. District judges also cited their enjoyment of the job as being the primary reason for electing senior status. *Id.* at 538.

349. *Id.* at 536.

350. *Id.* at 537–39. One senior district judge wrote: “I love my job. Nothing I am doing ‘on the outside’ can compare with the challenge, the interest, and the learning I enjoy on the bench.” *Id.* at 538.

351. *Id.* at 540–41.

outweigh the next best alternative. As the empirical evidence has established, the current financial incentives to retire are effective,<sup>352</sup> but perhaps not to the degree to which we would desire. Assuming that Supreme Court Justices are rational economic actors, greater financial incentives to retire ought to tip the scales toward retirement, especially if the accoutrements attached to the office of Senior Justice help to minimize any corresponding loss of prestige and social status.<sup>353</sup>

*b. Our Proposal*

There are a number of methods to augment retirement benefits, from lump-sum payments to changing the pension annuity. We believe that a fixed annuity is the best way to encourage timely retirement and to ensure that the incentive remains in place on an ongoing basis. With an annuity, the financial incentive to retire is always present, even when a Justice decides to retire in his nineties as Oliver Wendell Holmes did. Therefore, our plan has two major features: (1) it doubles the pension annuity available to Justices, and (2) it allows Justices who certify their disability to accelerate eligibility for the full pension.

We first propose increasing the pension annuity to double the salary of an active Justice, an increase that provides a powerful incentive for retirement without promising payouts so large as to make the plan politically untenable. Table 1 confirms that the difference in pension wealth for an Associate Justice that retires at age sixty-five under our proposal is striking, taking into account taxes and a reasonable five percent discount rate.<sup>354</sup> Table 1 uses the current life expectancies for an individual that has already reached sixty-five years of age.<sup>355</sup> It also assumes no increase in salaries over time to ensure that our estimates are conservative.<sup>356</sup>

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352. See *supra* Part III.A.2.b.

353. See *infra* Part III.B.

354. For simplicity, we assume a thirty-five percent tax rate, which should be a close approximation taking into account the wealth of the current Justices and the exemption from federal FICA taxes and the income taxes of most states. See *supra* note 340. The discount rate is slightly above the current rate of the ten-year Treasury bond, but closer to the historical average rate for that instrument. See POSNER, *supra* note 230, at 32 n.59 (advocating the use of a discount rate between two and seven percent for finding the present value of a judge's pension).

355. See Donna L. Hoyert et al., *Deaths: Preliminary Data for 2003*, NAT'L VITAL STAT. REP., Feb. 28, 2005, at 25 tbl.6, [http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53\\_15.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr53/nvsr53_15.pdf) (current life expectancies). A person who lives to sixty-five can, on average, expect to live 18.5 more years. *Id.*

356. See Exec. Order No. 13,368, 70 Fed. Reg. 1147, 1152 sched. 7 (Jan. 5, 2005) (to be codified at 5 U.S.C. § 5332 sched. 7) (current salaries for Supreme Court Justices).

TABLE 1  
PRESENT VALUE OF PENSION ANNUITY  
USING YEAR 2003 LIFE EXPECTANCIES (WITH TAXES)

Age	Regular Salary	1.5 Times Salary	2 Times Salary
65	\$1,562,810.88	\$2,344,216.32	\$3,125,621.77
66	\$1,510,092.07	\$2,265,138.11	\$3,020,184.14
67	\$1,454,677.39	\$2,182,016.09	\$2,909,354.79
68	\$1,396,429.00	\$2,094,643.49	\$2,792,857.99
69	\$1,335,201.97	\$2,002,802.95	\$2,670,403.93
70	\$1,270,843.99	\$1,906,265.98	\$2,541,687.98
71	\$1,203,194.96	\$1,804,792.43	\$2,406,389.91
72	\$1,132,086.58	\$1,698,129.87	\$2,264,173.16
73	\$1,057,341.95	\$1,586,012.93	\$2,114,683.90
74	\$978,775.13	\$1,468,162.70	\$1,957,550.27
75	\$896,190.67	\$1,344,286.00	\$1,792,381.34
76	\$809,383.11	\$1,214,074.66	\$1,618,766.22
77	\$718,136.50	\$1,077,204.75	\$1,436,272.99
78	\$622,223.84	\$933,335.75	\$1,244,447.67
79	\$521,406.52	\$782,109.78	\$1,042,813.04
80	\$415,433.74	\$623,150.61	\$830,867.47
81	\$304,041.86	\$456,062.79	\$608,083.72
82	\$186,953.77	\$280,430.66	\$373,907.54
83	\$63,878.18	\$95,817.28	\$127,756.37

With taxes included in the calculation, Justices who elect retirement or senior status at age sixty-five will increase the present value of their expected pension wealth by \$1,562,810.88 under our proposal. Under our proposal, the present value of retiring this year, as opposed to next year, steadily increases from around \$105,000 at age sixty-five to around \$250,000 at age eighty-two. The present value of retiring this year, as opposed to four years from now, increases from approximately \$455,000 at age sixty-five to more than \$915,000 at age seventy-nine.

Of course, Justices have only one purely financial incentive to retire today: the pension annuity, as opposed to their salary, is free of FICA taxes and income taxes in many states.<sup>357</sup> Even for Justices who are relatively wealthy, an increase in expected pension wealth of this

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357. See *supra* notes 340–41 and accompanying text.

magnitude represents a significant financial incentive to retire.<sup>358</sup> The principal benefit of increasing the pension annuity is that, although expected pension wealth is maximized on the day a Justice becomes pension-eligible, there is always an economic incentive to retire until the day a Justice dies.<sup>359</sup>

For scholars who support term limits or a mandatory retirement age, the pension annuity can also be structured such that the incentive reaches its peak after the desired length of tenure or at the preferred age. For instance, Congress could approximate a mandatory retirement age by passing legislation that rendered a Justice’s pension annuity free from federal income taxes if the Justice retires or elects senior status within five years after first becoming pension-eligible.<sup>360</sup> Because most Justices become eligible for their pension at age sixty-five, the inducement to retire would be strongest before the age of seventy.<sup>361</sup> Alternatively, Congress could approximate fixed term limits by exempting the pension from federal income taxes for any Justice who retires or elects senior status within one year of reaching, say, fifteen years of service on the Court. Table 2 shows the power of such incentives by calculating the present value of the expected pension annuity for Associate Justices free of taxes, using the same assumptions as Table 1.<sup>362</sup>

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358. Another potential advantage of the golden parachute is that it responds, albeit indirectly, to Chief Justice Rehnquist’s repeated pleas to raise judicial compensation. See 2002 YEAR-END REPORT ON THE FEDERAL JUDICIARY, <http://www.supremecourtus.gov/publicinfo/year-end/2002year-end-report.html> (citing *Insecure About Their Future: Why Some Judges Leave the Bench*, THE THIRD BRANCH, (ADMIN. OFF. U.S. CTS., WASH. D.C.), Feb. 2002); David S. Broder, *Rehnquist and Breyer Argue for Judicial Pay Increases*, WASH. POST, July 16, 2002, at A15.

359. Couching our retirement incentive in an annuity means that the total amount of the economic incentive to retire for a Justice will decrease over time. Nonetheless, at any given point after a Justice becomes pension-eligible, the incentive to retire is always greater than the incentive to remain on the Court. Moreover, the year-to-year incentive—that is, the incentive to retire this year rather than next year—would actually increase each year after a Justice becomes pension eligible.

360. At first glance, this limited window for favorable tax treatment would appear to violate the Compensation Clause, which provides that judges’ “Compensation . . . shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 1. However, a Justice who fails to retire during the window never receives the benefit of the favorable tax treatment. “Compensation” that is never earned cannot be diminished. See *United States v. Hatter*, 532 U.S. 557, 575 (2001) (stating that the right to receive pension benefits “did not vest until retirement”). On the other hand, if Congress passed a law subsequently removing favorable tax status for a Justice who retired at age sixty-five, that action likely would be unconstitutional. See *id.* at 569, 572–76.

361. Of the nine sitting Justices, eight have become or will become pension-eligible at age sixty-five, while only one (David Souter) became pension-eligible within months after turning sixty-five.

362. See *supra* notes 355–56 and accompanying text.

TABLE 2  
PRESENT VALUE OF PENSION ANNUITY  
USING YEAR 2003 LIFE EXPECTANCIES (WITHOUT TAXES)

Age	Regular Salary	1.5 Times Salary	2 Times Salary
65	\$2,404,324.92	\$3,606,487.38	\$4,808,649.84
66	\$2,323,219.04	\$3,484,828.56	\$4,646,438.08
67	\$2,237,965.67	\$3,356,948.51	\$4,475,931.34
68	\$2,148,352.73	\$3,222,529.10	\$4,296,705.46
69	\$2,054,157.28	\$3,081,235.92	\$4,108,314.56
70	\$1,955,144.99	\$2,932,717.48	\$3,910,289.98
71	\$1,851,069.54	\$2,776,604.30	\$3,702,139.07
72	\$1,741,672.01	\$2,612,508.01	\$3,483,344.02
73	\$1,626,680.25	\$2,440,020.38	\$3,253,360.51
74	\$1,505,808.20	\$2,258,712.30	\$3,011,616.40
75	\$1,378,755.15	\$2,068,132.73	\$2,757,510.31
76	\$1,245,205.03	\$1,867,807.55	\$2,490,410.07
77	\$1,104,825.60	\$1,657,238.40	\$2,209,651.20
78	\$957,267.63	\$1,435,901.45	\$1,914,535.26
79	\$802,164.04	\$1,203,246.05	\$1,604,328.07
80	\$639,128.95	\$958,693.43	\$1,278,257.91
81	\$467,756.80	\$701,635.20	\$935,513.60
82	\$287,621.24	\$431,431.86	\$575,242.49
83	\$98,274.15	\$147,411.22	\$196,548.30

Tax-free treatment of the pension annuity increases expected pension wealth even more. At double the current annuity, for example, expected pension wealth increases by nearly \$1.7 million over a taxable pension, resulting in a total increase of over \$3.2 million over the current regime. The present value of retiring this year, as opposed to next year, would steadily increase from about \$160,000 at age sixty-five to about \$380,000 at age eighty-two. The present value of retiring this year, as opposed to four years from now, would increase from approximately \$700,000 at age sixty-five to more than \$1.4 million at age seventy-nine.<sup>363</sup>

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363. The present value of the pension assumes, of course, an average life expectancy of 83.5 years for those reaching the age of sixty-five. For a Justice whose health is declining, the time horizon may appear shorter and thus lessen the effectiveness of the incentive to retire. Based on research showing a cumulative effect for health problems and retirement incentives, however, we remain confident that the larger pension benefit will be attractive even to Justices in the early stages of physical or mental

Second, because we view mental and physical infirmity of Justices as the central problem, we propose further changes to the treatment of disabled Justices. Under current law, a judge that qualifies for disability retirement receives “the salary of his office” for life if he has served ten or more years, but receives only “one-half the salary of the office” if he has served less than ten years.<sup>364</sup> We propose that disabled Justices receive the same pension annuity as Senior Justices, even if they do not satisfy the age and service requirements of the rule of eighty or serve for ten or more years.<sup>365</sup> Such a change would remove the existing financial disincentive to retire once a Justice has become mentally or physically infirm, which unfortunately has been the case for several Justices in the past.<sup>366</sup>

*c. A Few More Words for the Skeptic*

Suppose that, as an advocate of term limits or a mandatory retirement age, you doubt the effectiveness of a golden parachute. Perhaps you view the Supreme Court as a unique body whose members would be unresponsive to financial incentives. The job involves tremendous prestige and power, and no individual would give it up lightly. Indeed, many who accept the nomination are demonstrably less responsive to economic pressures because they have foregone, and continue to forego, lucrative work in private practice. As one reviewer of this Article asked rhetorically, “Would any amount of money persuade Justice Stevens to quit as long as he remains healthy?”<sup>367</sup>

Even if you believe that Supreme Court Justices simply do not think about money, we encourage you to consider three other reasons why our proposal should influence the timing of retirements. First, our proposal

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infirmity. *See infra* notes 368–70 and accompanying text. Indeed, the net present value of the golden parachute will be highest for the precise group of Justices we would most like to leave the Court: those who have suffered serious physical or mental infirmity but expect to live for a long time.

364. 28 U.S.C. § 372(a) (2000). To meet the standards for retirement based upon “permanent disability” in § 372, an Associate Justice of the Supreme Court must present the President with a certificate of disability signed by the Chief Justice. *Id.* It appears that the Chief Justice can meet the requirements of § 372 by submitting a certificate of disability to the President signed only by him. *See id.*

365. *See supra* notes 275–76 and accompanying text. Although it is beyond the scope of this Article, Congress may also wish to investigate whether more generous disability insurance can serve the same purpose, without the accompanying stigma and publicity surrounding the disability certification of a sitting Justice.

366. *See, e.g., supra* notes 265, 270–72 and accompanying text (explaining the cases of Justices Cardozo and Whittaker).

367. E-mail from Arthur D. Hellman, Professor of Law, University of Pittsburgh School of Law, to David Stras, Associate Professor of Law, University of Minnesota Law School (Aug. 28, 2005, 18:10 CST) (on file with author).

would supplement and interact with existing noneconomic incentives to retire, especially incentives related to declining health. Research on retirement decisions has found that, although both health concerns and retirement incentives significantly affect the timing of retirements, the influence is even greater when the two factors are combined.<sup>368</sup> In other words, “those in relatively poor health . . . [are] more sensitive to their financial decisions.”<sup>369</sup> Certainly health problems alone have prompted some Justices, most recently Justices Douglas and Marshall, to retire. But there may have been close calls over the years as well. For example, there was speculation about Justice Ginsburg’s retirement after she was diagnosed with colon cancer and underwent chemotherapy and radiation treatment.<sup>370</sup> The point is that, as with other individuals, noneconomic issues like physical or mental infirmity arise in the lives of Justices, independently prompting them to seriously contemplate retirement.

At precisely these moments, the golden parachute has its greatest potential, adding one more powerful incentive to retire sooner rather than later. The purpose of the golden parachute is not to prompt perfectly healthy Justices to give up their positions on the Court. We should not *want* to oust Justice Stevens from the Court “as long as he remains healthy.” Instead, as research on the private sector has demonstrated, financial incentives like the golden parachute will interact in a cumulative fashion with existing noneconomic factors, especially declining mental or physical health, to prompt timely retirement.

Second, the very act of passing a proposal like ours provides a significant noneconomic incentive to retire. The pension reform we propose would send a strong signal to the Court that Congress disapproves of the Justices’ current retirement behavior. The political branches have, on occasion, applied informal pressure on the Court by entertaining various types of “Court-curbing” legislation.<sup>371</sup> As many positive political theorists stress, “Supreme Court Justices take strategic actions to avoid

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368. QUINN, *supra* note 285, at 65.

369. *Id.*

370. Angie Cannon, *The Supremes’ Future*, U.S. NEWS & WORLD REP., May 15, 2000, at 18, 20.

371. Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 376 (1992) (“Attacking the Court is an old congressional practice dating back to the early years of the nation.”). The most infamous example is President Roosevelt’s Court-packing plan, but there have been dozens of more modest examples. See Stuart S. Nagel, *Court-Curbing Periods in American History*, 18 VAND. L. REV. 925, 926 (1965). We take no position on the constitutionality of aggressive Court-curbing activity. Nor do we propose any such activity in this article. Instead, we make the basic point that by enacting a golden parachute, Congress can make clear its dissatisfaction with current retirement practices on the Court.



negative responses by Congress.”<sup>372</sup> Our proposal communicates Congress’s displeasure in two ways. First, it puts substantial sums of money at stake, strongly communicating that Justices have no excuse to remain on the Court while enduring mental or physical infirmity. Second, it signals that Congress may consider further action, including a constitutional amendment to abolish life tenure, if Justices continue to impair the functioning and credibility of the Court by staying too long. For Justices who are particularly resistant to financial incentives, but who care about the future welfare of the Court, a golden parachute creates a noneconomic incentive to conform to the wishes of Congress.

Third, our proposal may be more successful in combination with other incentives-based reforms of the Supreme Court.<sup>373</sup> In an upcoming paper, for example, one of the authors will propose that Congress expand the workload of the Court, both by reinstating circuit riding and expanding the Court’s non-discretionary jurisdiction. We believe that pension reform, on its own, can change retirement behavior, but we see even greater potential for a golden parachute as part of a package of incentives aimed at influencing the retirement decision.

#### *d. Objections to a Golden Parachute*

The case for a golden parachute is strong. First, it will assuage the serious problem of mental and physical infirmity. Second, by encouraging shorter tenure, it will address a whole host of other concerns raised by critics of life tenure, including strategic retirement and a lack of democratic accountability for the Court. Third, it can bring about significant change with only modest reform. Our proposal, unlike the vast majority of competing plans, does not require a constitutional amendment, nor does it modify the institution of life tenure.

Nonetheless, critics of our proposal may argue that, at a time when many Americans have become deeply suspicious of the excessive salaries and pension packages paid to corporate executives,<sup>374</sup> our scheme simply is not politically practical. Like any retirement benefit, however, an increased pension is probably more palatable than raising salaries directly. In addition, our proposal need not go into effect all at once, although an

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372. Steven Puro, *Congress-Supreme Court Relations: Strategies of Power*, 19 ST. LOUIS U. PUB. L. REV. 117, 122 (2000).

373. See Stras, *supra* note 215 (manuscript at 18–20).

374. See, e.g., Dick Martin, *Corporate Reputation: Reputational Mythmaking*, J. BUS. STRATEGY, Dec. 2004, at 39; Patrick McGeehan, *Despite Uproar, Wall Street Elite Keep Enjoying Big Paydays*, INT’L HERALD TRIB., Mar. 23, 2004, at 11.

abrupt and sizeable increase in pensions would have a greater influence on retirement behavior. Congress could phase in the golden parachute over time, so long as it applies any future increases retroactively to Justices that have already retired.<sup>375</sup> Finally, Congress successfully increased its own salaries and pensions simultaneously through the Ethics Reform Act of 1989, resulting in a forty-five percent increase in pensions and a forty percent increase in salaries by 1992.<sup>376</sup> While this was not a particularly popular move,<sup>377</sup> a sizable increase in pensions for high-ranking government officials is not unprecedented.<sup>378</sup> At a minimum, critics of life tenure would have to concede that our proposal is far more feasible than passing a constitutional amendment.

Others may argue that our proposal is also over- and under-inclusive. It is over-inclusive to the extent that Justices are compensated when they would have retired at the same time anyway,<sup>379</sup> or at some point before the onset of physical or mental infirmity. It is under-inclusive to the extent that it does not guarantee that Justices, even those suffering from physical or mental infirmity, will leave the Court. Although we concede both critiques to some extent,<sup>380</sup> the strength of our proposal is that it targets the people who are most resistant to departure: Justices who refuse to retire even when their health is failing. Thus a golden parachute has *less serious* over- and underinclusiveness problems than fixed term limits or a mandatory retirement age.<sup>381</sup>

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375. If Congress were to pass a modest increase in pensions beginning next year, for example, and not make any future increases retroactive, there might be a perverse incentive for older Justices to hang on in anticipation of future raises.

376. See Hall & Van Houweling, *supra* note 315, at 122, 124.

377. See *Generous George*, ROCKY MTN. NEWS, Feb. 2, 1990, at 64; William Raspberry, Op-Ed, *Taking the Credit, Avoiding the Blame*, ST. LOUIS POST-DISPATCH, Feb. 20, 1989, at 3b.

378. In addition, one of the authors will argue in a future article that Congress should increase the docket and workload of the Court, which, if adopted, would make the golden parachute look more like compensation for additional work than a windfall.

379. Perhaps the most compelling example is the retirement of Potter Stewart, who retired while in good health at sixty-six years of age. Because Justice Stewart would have retired anyway, a golden parachute would not have affected the timing of his retirement.

380. Over- and underinclusion is endemic to generally applicable rules, see generally FREDERICK SCHAUER, PROFILES, PROBABILITIES, AND STEREOTYPES (2003), but lawmakers should do their best to minimize the gap between their rules and objectives.

381. The solution perhaps most narrowly tailored to the problem of mental and physical infirmity is some form of medical review board, charged with periodically certifying that Justices remain fit for duty. Although such a proposal lies outside the scope of this Article, we note that it would be of dubious constitutional validity. See generally Kaufman, *supra* note 12 (raising constitutional objections to procedures which allow judges to remove their colleagues, even based upon manifest inability). We also note that, despite its obvious potential to address the serious problems of mental and physical infirmity, the high stakes involved in certification decisions could jeopardize judicial independence. Cf. THE FEDERALIST NO. 79 (Alexander Hamilton), *supra* note 11, at 474 (“An attempt

The over-inclusiveness critique applies to retirement incentives generally. Economic incentives have varying influence on people, and there will always be individuals who would have retired in a timely fashion absent the additional incentive. Some Justices may also respond to the incentive for the “wrong” reasons—that is, for reasons other than mental and physical infirmity. Because the retirement behavior of Justices has become a serious and persistent problem, however, we should be willing to tolerate modest expenditures to protect the legitimacy and credibility of the Court.

Moreover, for two reasons, a golden parachute has fewer overinclusiveness problems than a mandatory retirement age or fixed term limits. First, to the extent that the overinclusiveness critique emphasizes the loss of productive years from our “great” Justices, such as Justice Holmes and Chief Justice Marshall, at least our proposal still vests the ultimate decision to retire in the Justices themselves. Plus, retirement incentives tend to have their greatest effect on the weakest performers. Empirical studies of faculty retirement behavior demonstrate that the least engaged and productive faculty members tend to take advantage of economic retirement incentives.<sup>382</sup> Likewise, Professor Squire has found that “the more a [J]ustice produces the less likely he is to retire.”<sup>383</sup> Accordingly, the golden parachute should have a disproportionately strong influence on the least active Justices, which is likely our target population.<sup>384</sup> Second, as noted above, financial incentives tend to interact in a cumulative fashion with noneconomic incentives to retire, especially declining health.<sup>385</sup> Thus, a golden parachute is a solution that tracks more closely with the problem of mental and physical infirmity on the Court.

The under-inclusiveness critique is that a golden parachute cannot guarantee that Justices will retire at any particular time, which critics of life tenure present as an advantage of imposing a mandatory retirement

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to fix the boundary between the regions of ability and inability would much oftener give scope to personal and party attachments and enmities than advance the interests of justice or the public good.”).

382. See Steven G. Allen et al., *Phasing Into Retirement*, 58 INDUS. & LAB. REL. REV. 112, 124 (2004) (“[T]he evidence is unambiguous—the odds of entering phased retirement were strongly and inversely related to employee performance, as measured by recent pay increases.”); Kim, *supra* note 336, at 122 (finding that “professors who slowed down on research later in their careers were more likely to retire early” in response to the California VERIPs).

383. Squire, *supra* note 184, at 186; see also Zorn & Van Winkle, *supra* note 185, at 156 (“[A]n increase in the number of opinions and dissents from its mean of eighteen to 32 (a change of one standard deviation) results in an 82 percent decrease in the hazard rate for retirement.”).

384. Zorn and Van Winkle note that “a justice’s health will be reflected in the amount of work he or she is able to accomplish.” Zorn & Van Winkle, *supra* note 185, at 156.

385. See *supra* notes 368–69 and accompanying text.

age. We do not deny that our proposal lacks certainty; economic incentives can never guarantee results because of widespread variation in human behavior and preferences. Our claim, however, is that even if Justices do not retire according to a fixed schedule they should, over time and in the aggregate, react to economic incentives to retire, and mentally and physically infirm Justices are the most likely to respond. Moreover, if the primary problem associated with life tenure is mental and physical infirmity, requiring Justices to retire at a certain age or after a certain term of years is actually counterproductive because those conditions do not follow a fixed schedule either. A golden parachute would not ensure that Justices retire by any particular age, but it can better address the chronic problems associated with mentally and physically infirm Justices.

Finally, critics might argue that the golden parachute creates a perverse incentive for a President to nominate independently wealthy candidates, who should be the least responsive to financial incentives to retire. While this argument has some facial plausibility, we doubt that a President will strongly consider socioeconomic status in making nomination decisions. A nominee's sensitivity to wealth over a long period is difficult to predict even if a President has perfect information today about a nominee's net worth. Far more salient issues, such as a nominee's confirmability and stance on important constitutional issues, would influence a President's nomination decision more than the mere possibility that economic incentives might induce a nominee to retire in two or three decades.

### *B. Enhancing the Office of "Senior Justice"*

In the lower federal courts, the position of senior judge carries many of the same responsibilities as active status. For instance, senior judges are able to participate in the work of their courts,<sup>386</sup> and sometimes senior circuit judges can even participate in en banc proceedings.<sup>387</sup> Other perquisites may include keeping their chambers in the same courthouse<sup>388</sup> and retaining their full cadre of law clerks.<sup>389</sup> Many times the only appreciable difference between senior and active status is the amount of work involved.<sup>390</sup>

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386. See 28 U.S.C. § 294(b), (c) (2000); Van Duch, *supra* note 341.

387. See POSNER, *supra* note 230, at 136.

388. See Kelly J. Baker, Note, *Senior Judges: Valuable Resources, Partisan Strategists, or Self-Interest Maximizers?*, 16 J.L. & POL. 139, 139 (2000).

389. See James Gill, *No More Room at the Courthouse?*, NEW ORLEANS TIMES-PICAYUNE, Jan. 3, 1996, at B7.

390. See Yoon, *supra* note 339, at 519–22. Senior judges also have greater control over their

The office of Senior Justice, however, bears little resemblance to service as an active Justice. First, the offices of Senior Justices are located in the Thurgood Marshall Federal Judiciary Building behind Union Station in Washington, D.C., which is several blocks from the Court building.<sup>391</sup> Second, Senior Justices receive only one law clerk, not the usual four allotted to active Justices.<sup>392</sup> Third, some Senior Justices, such as Justice Brennan, have been barred from using the Court’s cars and drivers.<sup>393</sup> Finally, despite the lack of any obvious constitutional limitation, Senior Justices do not participate in any meaningful way in the Court’s business.<sup>394</sup> They do not vote on certiorari petitions, sit by designation on the Court, or even dine with the other Justices with any regularity in the Justice’s Dining Room.<sup>395</sup> The office of Senior Justice is largely limited to sitting by designation on the lower federal courts,<sup>396</sup> and occasionally performing special projects.<sup>397</sup> It is no wonder that Justices are so reluctant to retire.

The Court should make the office of Senior Justice more appealing by implementing modest reforms. It would be significant, for example, if Senior Justices were once again allowed to fully take advantage of the Court’s resources, including its cars and drivers. More importantly, at the conclusion of the Court’s modernization project, Senior Justices should once again be assigned offices in the Court building. Justices obviously will be more reluctant to retire if they will no longer have an opportunity to converse with their former colleagues or take advantage of the Court’s resources.

Congress can take action as well. Rather than limiting a Senior Justice to sitting on the lower courts and working on special projects, Congress can enact a statute allowing Senior Justices to take on important

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dockets.

391. Justice O’Connor is the first Senior Justice since Justices Brennan and Powell to retain an office in the Supreme Court building. Compare Tony Mauro, *Space Race*, LEGAL TIMES, Jan. 23, 2006, at 4, with WARD, *supra* note 5, at 207.

392. Mauro, *supra* note 391, at 10.

393. See EDWARD LAZARUS, CLOSED CHAMBERS 26 (1998).

394. See Carrington & Cramton, *supra* note 3, at 470.

395. See Richard Corelli, *Souter, Brennan: Friends of the Court Two Justices Share a Bond Beyond Ideology*, SEATTLE TIMES, Aug. 6, 1995, at A14.

396. See 28 U.S.C. § 294(a) (2000).

397. For instance, retired Justice Byron White chaired the Commission on Structural Alternatives for the Federal Courts of Appeals, which investigated whether to split the Ninth Circuit. Carl Tobias, *Justice Byron White and the Importance of Process*, 30 HASTINGS CONST. L.Q. 297, 300–01 (2003). Also, Chief Justice Burger retired, in part, to devote more time to the bicentennial celebration of the Constitution. See John Paul Stevens, “*Random Recollections*,” 42 SAN DIEGO L. REV. 269, 272 (2005).

administrative duties related to the work of the federal judiciary, the Supreme Court, the Judicial Conference of the United States, or the Federal Judicial Center. Developing a “menu” of suitable duties will require creativity, but there are many projects that Senior Justices might find attractive.<sup>398</sup> For example, Senior Justices could head up committees that consider revisions to federal procedural, evidentiary, or bankruptcy rules, or play an expanded role in policy decisions that affect the Supreme Court.<sup>399</sup> When needed, they could function as special masters in cases arising under the Court’s original jurisdiction—a role that increasingly has been filled by law professors in recent years.<sup>400</sup> Congress could also authorize Senior Justices to perform some of the miscellaneous high-prestige duties presently assigned, by historical coincidence, to the Chief Justice. For example, a Senior Justice could serve as a Regent of the Smithsonian Institution or a Trustee of the National Gallery of Art, both of which are current duties of the Chief Justice.<sup>401</sup>

Modest institutional reforms can make the office of Senior Justice far more attractive. As stated above, the intangible benefits of judging play a large role in the retirement decision. Thus, improving the accoutrements attached to the office of Senior Justice should encourage more Justices to retire in a timely manner.

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398. A significant change in the duties of a Supreme Court Justice upon electing senior status, particularly if the new office involves exclusively nonjudicial duties, may well create Appointments Clause and Article III problems. See *supra* notes 66–70 and accompanying text. We discuss these constitutional objections, and potential solutions, in a forthcoming article. See Stras & Scott, *supra* note 103.

399. Perhaps the best way to keep Senior Justices engaged in the work of the Court would be to allow Senior Justices to sit by designation in cases where a Justice in regular active service is absent or recused. Such a system would have the added advantage of reducing the odds that an equally divided Court will summarily affirm lower court decisions. There would be some risk, however, that litigants would strategically choose named parties that would result in a recusal, hoping to replace an active Justice with a more favorable Senior Justice. Moreover, Congress would need to closely examine the constitutionality of such a proposal, for some of the reasons we have described. See *supra* notes 80–87 and accompanying text (explaining that the essential powers and duties of judicial office include the presumptive right to cast a vote in disputes that come before the court); *supra* notes 106–08 and accompanying text (suggesting that “upward” designation to the Supreme Court may run afoul of the Article III requirement of “one supreme Court”).

400. Anne-Marie C. Carstens, *Looking in the Shadows of Judicial Process: Special Masters in the Supreme Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 647–48 (2002).

401. See J. Clifford Wallace, *Comparative Perspectives on the Office of Chief Justice*, 38 CORNELL INT’L L.J. 219, 219–20 (2005).

### CONCLUSION

We join the chorus of commentators that call for changing the retirement behavior of Supreme Court Justices. Unlike others, however, we find a mandatory retirement age or term limits to be an unsatisfactory solution. The statutory proposals to modify life tenure are unconstitutional, both as a textual and an original matter. More fundamentally, even constitutional amendments to abolish life tenure focus on the wrong problems. The most serious problem associated with belated retirement on the Court is mental and physical infirmity of Justices, which has cultivated skepticism about the Court’s credibility. The purported recent increase in average length of tenure is largely overblown, and longer tenure helps to protect the legitimacy and credibility of the Court. Although we acknowledge the danger of strategic retirement, the evidence is largely speculative, and in any case other factors have a far stronger effect on retirement decisions. Simply put, life tenure should be retained.

Arguing in favor of life tenure does not end the matter: the problems associated with mental and physical infirmity must still be addressed. Vast empirical and historical evidence, much of which has been ignored by the legal academy, demonstrates that pension reform is the single most important tool in affecting the retirement behavior of Justices and comparable actors. We thus propose that Congress implement a golden parachute by doubling the pension annuity of Justices upon retirement or certification of permanent disability. As Judge Posner has hypothesized and empirical scholars have verified, Justices will respond to economic incentives to change their behavior. In this same vein, Congress and the Court should also implement modest institutional reforms to make the office of Senior Justice more attractive to Justices. In combination, such reforms should assuage the problems associated with life tenure without eradicating it.