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2006

Reining in the Supreme Court: Are Term Limits the Answer?

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Recommended Citation

Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, Reforming the Court: Term Limits for Supreme Court Justices 291 (2006).
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Reining in the Supreme Court: Are Term Limits the Answer?

*Arthur D. Hellman**

When the Supreme Court concluded its 2000–2001 Term—the term that will be remembered for the late-night ruling that cut short the Florida presidential vote count—Professor Walter Dellinger called attention to a striking pattern in the Court's decisions. The Court, he said, "assumes that it is more qualified than Congress to resolve electoral votes, more entitled than the President's agencies to fill gaps in federal law, and better equipped than the professional golf association to determine the rules of golf."[1]

Four years later, at the conclusion of the 2004–2005 Term, Professor Dellinger might have identified a similar pattern—but based on an entirely different set of examples. The Court, he might have said, assumes that it is more qualified than Congress and the sentencing commission to determine sentencing policies,[2] more entitled than state legislatures to decide when be-

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1. *See* Charles Lane, *Laying Down the Law, Justices Ruled With Confidence; From Bush v. Gore Onward, Activism Marked Past Term*, Wash. Post A06 (July 1, 2001) (available on NEXIS) (quoting Professor Dellinger). In addition to Bush v. Gore, 531 U.S. 98 (2000), Professor Dellinger was presumably referring to FDA v. Brown & Williamson Tobacco Co., 529 U.S. 120 (2000) (rejecting FDA's assertion of statutory authority to regulate tobacco products); and PGA Tour, Inc., v. Martin, 532 U.S. 661 (2001) (holding that use of a golf cart is not a modification that would "fundamentally alter the nature" of golf tours sponsored by PGA).

2. *See* Booker v. United States, 125 S. Ct. 738 (2005).

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liefs about morality should be embodied in criminal prohibitions,[3] and better equipped than citizen-jurors to apply "evolving standards of decency."[4]

The Court that handed down these more recent decisions was the same Court that Professor Dellinger was describing in July 2001. In fact, prior to the resignation of Justice O'Connor and death of Chief Justice Rehnquist in mid-2005, the same justices had served together for eleven years. Not since the early nineteenth century has a single group of justices remained together for so long.

This was also a Court that increasingly called to mind the "nine old men" who became notorious for striking down the economic legislation enacted by Congress as part of President Franklin D. Roosevelt's New Deal. Of course the Court of 1994–2005 included two women, but one of those women, Justice O'Connor, was seventy-five when she announced her retirement; the other, Justice Ginsburg, was seventy-two at the close of the 2004 Term. Two of the male justices were considerably older than either of the women: Justice Stevens (eighty-five) and Chief Justice Rehnquist (just short of eighty-one at the time of his death). Two justices (Justice Scalia and Justice Kennedy) will soon turn seventy. Only Justice Thomas is under the age of sixty-five—the age at which most Americans have retired from active employment.[5]

In sum, the Court that sat during the first half-decade of the twenty-first century was an entrenched, elderly Court—and also a Court that could be characterized as self-assured to the point of arrogance. Is there a connection between that self-assurance (or arrogance) and the fact that the justices have stayed on so long? And even if the two phenomena are unrelated, has the time come to move away from life tenure for Supreme Court justices and replace it with something else—age limits, perhaps, or terms of specified length?

Those questions are addressed in the essays that make up this book—essays based on presentations at a conference on "Reforming the Supreme Court?" held at Duke Law School in April 2005. Two major proposals for eliminating life tenure were offered at the conference. Professors Steven G. Calabresi and James Lindgren advocated "a system of staggered, nonrenewable

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3. *See* Lawrence v. Texas, 539 U.S. 558 (2003).

4. *See* Roper v. Simmons, 125 S. Ct. 1183 (2005).

5. In fact, only eighteen percent of men and ten percent of women remain in the civilian labor force over the age of sixty-five. *See* U.S. Census Bureau, *The Older Population in the United States: March 2002* <http://www.census.gov/prod/2003pubs/p20-546.pdf> (last visited June 15, 2005).

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term limits of eighteen years," designed so that each President would have the opportunity to fill two vacancies, one in each Congress of the presidential term.[6] A second proposal, by Professors Paul Carrington and Roger Cramton, was similar in its approach.

In this essay, I shall analyze the likely consequences of adopting a system of eighteen-year terms along the lines proposed by Calabresi-Lindgren and by Carrington-Cramton. First, however, I shall briefly address the question: are the proponents persuasive in arguing that "the American constitutional rule granting life tenure to Supreme Court justices is fundamentally flawed?"[7]

Life Tenure and Its Discontents

Two sets of arguments are advanced against the current system of life tenure for Supreme Court justices. One involves the age of the justices; the other focuses on the length of time that the justices remain on the Court and the resulting infrequency of vacancies.

Age and Mental Decrepitude

The first set of arguments is neatly summed up in the title of Professor David Garrow's "Mental Decrepitude on the U.S. Supreme Court."[8] Professor Garrow marshals evidence in support of the proposition that "mental decrepitude among aging justices is a persistently recurring problem that merits serious attention."[9] While some of his examples are less convincing than others, his overall conclusion is persuasive. Indeed, we can count ourselves fortunate that, in recent decades, the justices who most plainly stayed too long on the Court did not often cast deciding votes in important cases. If Justice Lewis F. Powell had reached the same state of decline in his last years as Justices William O. Douglas and Thurgood Marshall did in theirs, a cloud would hang over much of the constitutional jurisprudence of the late Burger and early Rehnquist Courts.

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6. *See supra* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered* pp. 15–98. All quotations to the Calabresi & Lindgren essay are to their manuscript pages, from which I understand some deletions and alterations have been made for publication in this book.

7. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 2).

8. David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. Chi. L. Rev. 995 (2000).

9. *Id.* at 995.

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Others have discussed the conditions under which the justices carry out their work today, and they explain persuasively why those conditions reinforce the view that the lack of a mandatory retirement age (or other cutoff) is something we should worry about.[10] I will add only one point.

The "hot bench" of today, with the justices firing questions at the lawyers, is a relatively recent development. If other members of the Court were to follow Justice Thomas's example and simply listen during the oral arguments, outsiders would have a very hard time finding out whether a justice was starting to slide into mental decrepitude. Indeed, even if a justice was active in posing questions, we would have to review the transcript to determine whether the justice was genuinely engaged or perhaps simply asking isolated questions supplied by a law clerk. And given the protectiveness of justices' staff and families, we have no guarantee that insiders would take action to accelerate the retirement of a justice who could no longer do the job.

This last concern has been reinforced by the controversy generated by Professor Garrow's recent article on the role of Justice Blackmun's law clerks. Professor Garrow, after studying the voluminous collection of internal memoranda and other files that Justice Blackmun deposited with the Library of Congress, concluded that Blackmun "increasingly ceded far too much of his judicial authority to his [law] clerks."[11] When the article was published, several Blackmun clerks disputed Garrow's conclusion, insisting that it was based on "half the evidence."[12] I think Garrow's analysis withstands the challenges that have been levied against it, but even if others take a different view, the episode underscores the point that law clerks are extremely protective of their justices. That fact, together with the rule of confidentiality that binds all Court staff, means that unless a justice's decrepitude becomes evident at oral argument sessions, outsiders are not likely to become aware that a justice has reached the point where he or she should step down.

Lengthy Tenures and Democratic Accountability

The second set of arguments against life tenure is based on the notion—stated very broadly—that the Supreme Court should follow the election re-

10. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 24–25] and many of the other authors contributing to this Symposium.

11. David J. Garrow, *The Brains Behind Blackmun*, Legal Affairs (May–June 2005).

12. *Readers Respond: Justice Blackmun*, Legal Affairs <http://www.legalaffairs.org/issues/May-June-2005/feature_response_mayjun05.msp> (last visited, June 15, 2005).

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turns.[13] At least at a very general level, I accept the premise.[14] As Chief Justice Rehnquist explained, in a passage quoted with approval by Professors Calabresi and Lindgren, "the institution [of the Supreme Court] has been constructed in such a way that…the public will, in the person of the President of the United States…have something to say about the membership of the Court, and thereby indirectly about its decisions."[15] But I can not take the next step and endorse the proposition that each President should have the same number of appointments to the Court. The argument fails to take account of the numerous other circumstances that affect the relationship between the direction of public opinion in the country and the direction of the Court's decisions.

Consider the situation today. The Republican Party has won seven out of the last ten presidential elections. The Republicans have controlled the House of Representatives without interruption since the Gingrich takeover in 1994; they have controlled the Senate for five of the last six Congresses. There are now twenty-eight states with Republican governors, compared with only eighteen in 1992. Overall, it is fair to say that the nation has moved in a conservative direction. Moreover, Republican Presidents have appointed seven of the nine sitting justices. Thus, if the premises of the Calabresi-Lindgren plan are correct, the Supreme Court too should have moved in a conservative direction. But it has not. On the issues that have the capacity to stir the electorate, the Court's decisions over the past decade are far closer to the mainstream of the Democratic Party than they are to the positions generally held by Republicans. Abortion is the most prominent, but others include homosexual rights, racial preferences, and acknowledgments of religion in public schools.[16]

To be sure, the Court's decisions limiting Congressional power under the Commerce Clause and section 5 of the Fourteenth Amendment are probably

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13. This phrase, of course, was first popularized by humorist Finley Peter Dunne, reporting the observations of the fictional "Mr. Dooley." Ironically, the controversy that prompted the remark is totally forgotten today except by constitutional historians.

14. Of course, the premise should not be carried too far. As developed later in this essay, the Court's legitimacy would be impaired if its decisional law constantly shifted direction as a result of changes in the membership of the Court.

15. William H. Rehnquist, *The Supreme Court* 209–10 (2001), quoted in Calabresi & Lindgren, *supra* pp. 15–98 [ms. p. 27].

16. "On every issue of interest to the Left—abortion, affirmative action, the death penalty, homosexual rights, campaign finance law—the supposedly conservative Rehnquist Court has done as progressives desire." Michael S. Greve, *How to Think about Constitutional Change, Part I: The Progressive Vision*, Federalist Outlook AEI Online <http://www.aei.org/publications/filter.all,pubID.22622/pub_detail.asp> (last visited June 17, 2005).

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more congenial to Republicans than to Democrats. But from the standpoint of democratic accountability these rulings are largely irrelevant because they barely impinge on popular consciousness. Michael S. Greve of the American Enterprise Institute has aptly contrasted the impact of the two sets of cases:

> The Rehnquist Court's federalism "revolution"—the principal target of liberal wrath—consists of margin-nibbling decisions that no ordinary American has heard of, and recent (and, probably, forthcoming) decisions strongly signal an abandonment. At the same time, the supposedly conservative Court has cranked out an amazing array of newfangled rights, especially on sexual mores.[17]

The proponents of the eighteen-year term plan might respond to this line of argument by pointing out that, under the present system, President Carter might well have gotten four appointments (as President Nixon did in his first term); President Clinton might have been able to fill five vacancies during his two terms (as President Eisenhower did). Under either of these scenarios, the Court presumably would have moved even further away from the currents of public opinion. (To be sure, one or more of President Carter's appointees might have stepped down by the time President Clinton made his appointments.) The eighteen-year term plan would not have allowed these outcomes.

I acknowledge that the eighteen-year term plan would preclude extreme scenarios such as those I have hypothesized. But the more important point is that when we look at the Court's actual decisions during this period, we do not find anything like the imbalance we would expect from the fact that one Democratic President (Carter) did not get any appointments, and another (Clinton) got only two rather than four. Somehow, other aspects of the process have compensated for "the random nature of [the] vacancies"[18] over the last forty years. And when we consider that the proponents rest their arguments almost entirely on "the increase in justices' terms on the Supreme Court since 1970,"[19] the paucity of support from the justices' behavior during that period is quite telling.

This brings me to a broader point. One section of the Calabresi-Lindgren article has the title "A Supreme Court divorced from democratic accountabil-

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17. Michael S. Greve, *Liberals in Exile; Beware Their Grand Plan to Impose a Radical, European-style Constitution on America*, Legal Times, May 2, 2005, LEXIS, News Library, Legal Times File. Note that Greve correctly anticipated the decision in Gonzales v. Raich, 125 S. Ct. 2195 (2005) (holding that Congress has power under the Commerce Clause to "prohibit the local cultivation and use of marijuana in compliance with California law").

18. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 57].

19. *Id.* [ms. p. 22].

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ity." It just happened that at the same time that I was reading a draft of the article, two other sets of statements about courts and democratic accountability crossed my desk.

The first was this: "The Congress of the United States for many, many years has shirked its responsibility to hold the judiciary accountable. No longer.... We will look at an arrogant, out of control, unaccountable judiciary." The second statement was this:

> The point, finally, is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means.... The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures. The means are available, and they have been used to great effect when necessary....

The first set of statements received wide publicity in the media in early 2005; the speaker was House Majority Leader Tom Delay.[20] The second statement is from the book "The People Themselves" by Stanford Law Dean Larry Kramer.[21]

Tom Delay and Larry Kramer are probably as far apart politically as any two public figures in America today. If they are both saying that the judiciary has gotten out of control and should be brought to heel, we may have a problem of democratic accountability that goes far beyond justices who stay too long on the bench, and which will not be cured by limiting Supreme Court tenure.

To pursue this point would take me far beyond the topic of this book. Yet it is difficult to separate the concerns raised by the system of lifetime tenure from broader issues centering on the current Court's willingness to override the results of democratic processes. I shall return to these broader issues at the conclusion of this essay.

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20. *See Fox Special Report With Brit Hume* (Fox News television broadcast, Apr. 1, 2005), LEXIS, Nexis Library, Fox News File; *U.S. Representative Tom Delay (R-TX) Delivers Remarks on the Death of Terri Schiavo*, FDCH Political Transcripts (Mar. 31, 2005), LEXIS, Nexis Library, FDCH Political Transcripts File.

21. Larry H. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 247, 249 (2004).

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The Plan for Staggered Eighteen-Year Terms

I turn now to the proposals for staggered eighteen-year terms arranged so that there would be two appointments in each presidential term, with one in each Congress. The proposals differ in details, but in this essay I shall ignore the differences and focus on the basic concept. I see three areas of concern, which I shall discuss in the order in which they would come up in the usual course of events. First, there is the effect on the appointment and confirmation process. Next, there is the effect on the selection of cases and the handling of the cases that the Court does take. Finally, there is the effect on the Court's treatment of its own precedents.

The Appointment and Confirmation Process

I believe that the eighteen-year term plan would significantly increase the politicization of the appointment process even beyond what it is today. Proponents of the plan strongly dispute this assertion; I will explain why I think it is correct.

To begin, it is helpful to recall the 2004 campaign. The possibility of a Supreme Court vacancy was on the horizon, and some people saw it as a major issue. But most did not. Indeed, when the National Election Pool carried out its exit poll survey to determine "which one issue mattered most in determining how [the survey participant] voted for president," the list of issues did not even include "appointments to the Supreme Court."[22]

One reason the issue did not loom large in most people's minds is that the prospect of a vacancy was diffused. Certainly there was widespread speculation that Chief Justice Rehnquist would step down. But Justice Stevens was another possibility, and so was Justice O'Connor. I even saw some speculation about Justice Ginsburg.[23]

Let us put Justice Ginsburg aside and consider only the most senior justices—the three who in 2004 were viewed as most likely to retire during the presidential term beginning in 2005. The effect of a Rehnquist vacancy would be very different from the effect of a Stevens vacancy, and an O'Connor va-

22. National Election Pool, *National Exit Poll Questionnaire* <http://www.exit-poll.net/election-night/Nat_Final.pdf> (last visited May 26, 2005).

23. *See*, e.g., Charlie Savage, *Win May Bring Power to Appoint 4 Justices*, Boston Globe A3 (July 7, 2004), (listing Justice Ginsburg as one of four Justices who might retire during presidential term beginning in 2005; noting that Justice Ginsburg "has battled cancer since 1999").

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cancy would be different from either. With so many possibilities in play, there was a real limit to the ability of interest groups to rouse their followers to put the issue front and center.

Now suppose we knew that under a system of staggered eighteen-year terms, Justice O'Connor's tenure would be coming to an end in the 2005–06 biennium. Every pressure group would have focused on that vacancy, not only in the presidential election but in every state with a contested senatorial election. For many people, the election would have been a referendum to select the O'Connor successor. That cannot be healthy, even if you think the Court should be more accountable to democratic majorities than it is today.

It is true that we cannot assume that a "swing" justice like Justice O'Connor will be stepping down in the immediate aftermath of every presidential election. But a system that guarantees each President two opportunities to fill a vacancy presents numerous other possibilities for drawing the Court more deeply into the swirl of politics. Consider, for example, how the two major party candidates would deal with the upcoming appointments in speeches, debates, and interviews. Perhaps they would confine themselves to describing the kind of individuals they planned to select. But some candidates might go further and announce a "short list" of the names from among whom they would select a nominee for the first vacancy of their presidency.[24] The election would then become, to some degree, a referendum on whether one of those individuals should be appointed.

If, like Brigham Young University political science professor Richard Davis, you believe that Supreme Court justices should be selected through a process that incorporates popular elections, you will probably applaud this outcome.[25] But those who have observed judicial elections in the states would probably say that this carries democratic accountability further than is desirable.[26]

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24. The candidates could not promise to appoint any particular individuals. *See* 18 USC §599 (prohibiting candidates from "directly or indirectly" promising to appoint any person to a public position "for the purpose of procuring support in his candidacy"). However, they could give strong hints. Thus, in the 2000 presidential campaign, Gov. George W. Bush, without making a formal commitment, made clear his intention to appoint Colin Powell as Secretary of State.

25. *See* Richard Davis, *Electing Justice: Fixing the Supreme Court Nomination Process* (2005); Michael McGough, *Intellectual Capital: Confirmation Conversion?* Pittsburgh Post-Gazette (Mar. 14, 2005) (noting that under one of the proposals floated by Davis, "the president would nominate a set number of candidates, perhaps three, for the general election ballot").

26. *See* Republican Party of Minnesota v. White, 536 U.S. 765, 788–92 (2002) (O'-Connor, J., concurring) (outlining concerns about popular election of judges in the states).

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Not surprisingly, Professors Calabresi and Lindgren view the comparison very differently. One of the key points of their argument is the proposition that the infrequency of Supreme Court vacancies under the current system is partly responsible for the increased politicization of the confirmation process for all federal judges. They write:

> Under the current system, vacancies on the Supreme Court arise very irregularly, which means that when one does arise, the President and Senate both act without knowing when the next vacancy might be. Moreover, a successful nominee has the potential to remain on the Court for a very long (and uncertain) period of time. As a result, the political pressures on the President and the Senate are overwhelming. There is simply so much at stake in appointing a new Justice that the President and the Senate (when controlled by the party opposite the President) inevitably become engaged in a bitter political contest that harms the Court both directly and indirectly.[27]

But if infrequency of vacancies is the culprit, why are there so many "bitter political contest[s]" over nominations to the federal courts of appeals? Vacancies on the courts of appeals are anything but infrequent. At the start of President George W. Bush's first term, there were twenty-six open seats on the twelve regional courts of appeals. Over the next two years, nine of those vacancies were filled, while fifteen new seats opened up. By the start of President Bush's second term, eight additional positions had become vacant. Nevertheless, the Democrats mounted vigorous offensives against more than a dozen of President Bush's nominees and succeeded in driving at least three from the field.[28]

The Democrats have pursued this course even though they must be aware that if their party prevails in the presidential election of 2008, there will be no shortage of appellate vacancies for their standard-bearer to fill. If we assume that judges appointed by Democratic Presidents will not be inclined to retire during the presidency of George W. Bush, we can expect that there will be at least thirty-two court of appeals positions to be filled during the presidential term that begins in 2009.[29]

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27. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 30].

28. Miguel Estrada withdrew as a nominee to the District of Columbia Circuit; Carolyn Kuhl declined to be renominated to the Ninth Circuit; and Charles Pickering chose to retire after his recess appointment to the Fifth Circuit expired.

29. This figure includes twenty-two Democrat-appointed judges who will be eligible to retire during George W. Bush's term and ten who will become eligible during the first three

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Moreover, it can hardly be said that "[there is] so much at stake in appointing" judges to the intermediate appellate courts. For example, consider the controversy over Carolyn Kuhl, who was nominated for a seat on the Ninth Circuit Court of Appeals in June 2001, but who fell victim to a Democratic filibuster. That was one position on a court of twenty-eight authorized judgeships (not to mention the twenty or so senior judges who regularly hear cases). The court in question was (and, at this writing, remains) a court heavily dominated by Democratic appointees: in June 2001, eighteen of the twenty-five active judges had been appointed by Democratic Presidents.[30] Not coincidentally, this was also a court that has been notorious for its "liberal" decisions, particularly on issues of criminal procedure and First Amendment rights. How much power would Judge Kuhl have had to move the court in a conservative direction? Even if her views were "outside the mainstream," how much could she have done to impose those views on the citizens of the Ninth Circuit? But the modest stakes for Judge Kuhl's and other court of appeals nominations have not stopped the participants from engaging in fierce combat in a take-no-prisoners mode.

Every now and then, one of these participants will acknowledge how little is really at stake. Senate Democrats and their allies spent four years trying to keep Texas Supreme Court Justice Priscilla Owen from being appointed to the Fifth Circuit Court of Appeals. One of the most vocal members of the opposition was an organization called Texans for Public Justice (TPJ).[31] In May 2005, after a group of Senators negotiated a compromise that averted a showdown over the use of the filibuster, Justice Owen was confirmed to the federal bench. A spokesman for TPJ said:

> We were against her on the principle that judges with such an activist, pro-business background as Owen do not deserve lifetime appointments. Having said that, her confirmation likely won't have much of an impact on the 5th Circuit, which is one of the most conservative circuits in the United States today.[32]

With the confirmation of Justice Owen, one vacancy still remains unfilled on the Fifth Circuit. Do not be surprised if TPJ and the other organizations

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years of the presidential term beginning in 2009. (The assumption is that vacancies occurring during the last year of a presidential term are not likely to be filled in that year.)

30. As of June 2005, sixteen of the twenty-four active judges are Democratic appointees.

31. For a list of letters and press releases, see <http://www.tpj.org/page_view.jsp?pageid=333> (visited June 12, 2005).

32. Michelle Mittelstadt, *Divided Senate confirms Owen*, Dallas Morning News (May 25, 2005) (quoting Craig McDonald).

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that opposed the Owen nomination launch a new campaign to defeat the new nominee—even though the appointment "likely won't have much of an impact" on the court.

My own view is that the "judicial confirmation wars," with their extreme rhetoric and unwillingness to compromise, are driven in very large part by the agendas of advocacy groups for whom the nominees are trophies—trophies of power and influence. How this came to be is a long and complex story, but I do not think it is coincidental that the escalation of hostilities has occurred at about the same time that the McCain-Feingold campaign finance law went into effect. That law severely restricts the ability of political parties and candidates to raise and spend money to win national elections. But campaigns do require money, and if the parties cannot provide enough of it, the advocacy groups are happy to help out—at a price. The price, of course, is support for the group's program. And it happens that judicial nominations are uniquely well-suited for measuring a legislator's fealty to a group's agenda. When issues of policy come before Congress, the legislation can be nuanced, and votes on the floor or in committee can be ambiguous. But with judicial nominations, there is no room for uncertainty or equivocation. Groups can draw a line in the sand; a Senator is with them or against them.[33]

Efforts are under way in Congress to further revise the campaign finance laws, but even if these bear fruit, it is highly unlikely that any new legislation will diminish the influence of advocacy groups in the judicial confirmation process. To be sure, the groups are not all-powerful. Members of the Senate have their own interests and agendas, and every now and then they will find a compromise that averts all-out war. But these truces are likely to be temporary. And for the reasons given, it is unrealistic to think that the intensity of the conflicts would moderate if vacancies on the Supreme Court opened up every two years rather than at unpredictable (and generally longer) intervals.

Calabresi and Lindgren further argue that "by making vacancies a regular occurrence, and by limiting the stakes of each confirmation to an eighteen-year rather than a forty-year term, [their] proposal would greatly reduce the

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33. As one Republican lobbyist said of the battle over judicial nominations, "there's no incentive for a politician to be reasonable, there's no political force to be moderate. For the [Democrats], environment and abortion groups don't become important by letting people get confirmed. And on our side, it doesn't help them if the president nominates moderate judges." T.R. Goldman, *Fail Safe: Defusing the Nuclear Option*, Legal Times 14, 16 (May 23, 2005) (quoting former Senate aide Stewart Verdery).

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intensity of partisan warfare in the confirmation process."[34] This assumes that Senators and other participants in the confirmation process would see a dramatic difference between eighteen-year terms and forty-years terms for Supreme Court justices. I disagree. British Prime Minister Harold Wilson famously observed that "a week is a long time in politics." Although Wilson was speaking rhetorically, judicial nomination battles in this country confirm the basic thrust of his comment.

Recall, for example, the controversy over President George W. Bush's nomination of District Judge Charles Pickering to the Fifth Circuit Court of Appeals. Pickering was just shy of his sixty-fourth birthday when he was nominated in 2001. He would have been eligible for retirement in 2004. Nevertheless, his nomination aroused intense opposition and ultimately a filibuster. (The President gave him a recess appointment, but he resigned rather than run the confirmation gauntlet again for a lifetime position on the court of appeals.) If the prospect of as little as three years of service by one judge on an intermediate appellate court of seventeen judges was enough to trigger a filibuster, what reason is there for thinking that a term of "only" eighteen years for a Supreme Court justice would be regarded with equanimity by those who view the nominee as anathema?

Any discussion of this subject necessarily entails some speculation, but for the reasons I have given, I believe that the eighteen-year staggered term plan would lead to a permanent war over Supreme Court appointments, akin to the "permanent campaign" and indeed perhaps part of it. Perhaps court of appeals nominations would go through more easily, but that would be because the energies now devoted to the confirmation process at the intermediate appellate level would shift to the Supreme Court.

Selection (and De-Selection) of Cases

The second area where I think the eighteen-year-term proposal would have pernicious consequences involves the management of the Court's docket. One of the premises of the proposal is that justices are tempted to engage in—and do engage in—"strategic, political behavior" in deciding when to retire from the Court.[35] But anyone who accepts that premise should be equally concerned about the kinds of strategic behavior the justices would be tempted to engage in if the eighteen-year term limit proposal were adopted. I shall discuss two

34. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 60].
35. *Id.* at [ms. p. 22].

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overlapping aspects of the Court's work: the selection of cases for plenary consideration and the treatment of threshold issues in the cases that the Court agrees to hear.

Today, in selecting cases, the justices consider not only whether a certiorari petition presents an important question, but also whether the case is an appropriate "vehicle" for resolving the issue. "Vehicle" problems can be of many kinds. The facts may be complicated or disputed, or the "record may be cloudy."[36] The important issue may be entangled with other questions of lesser magnitude. The judgment brought for review may rest on alternate grounds, one of which is clearly not "certworthy." The issue that deserves review may not have been clearly raised in the court below. The attorneys may have done "a poor job of advocacy."[37] Indeed, the quality of the petition or the brief in opposition may itself suggest that the Court should await a better "vehicle." Any of these circumstances may lead the Court to deny certiorari notwithstanding the presence of an issue that plainly requires Supreme Court resolution.[38]

In shaping the docket, the justices also act upon the belief that it is often wise to allow issues to "percolate" rather than to resolve them prematurely. Two decades ago, then-Justice Rehnquist, writing for a unanimous Court, emphasized "the benefit [the Supreme Court] receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari."[39] Justice Rehnquist cited an earlier decision, also unanimous, in which the Court explained how percolation had worked in the particular case:

> This litigation exemplifies the wisdom of allowing difficult issues to mature through full consideration by the courts of appeals. By eliminating the many subsidiary, but still troubling, arguments raised by industry, these courts have vastly simplified our task, as well as having underscored the reasonableness of the agency view.[40]

Other examples can be found, not only on statutory issues, but also on issues of constitutional interpretation.[41]

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36. Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 918 (1950) (opinion of Frankfurter, J.).

37. Colorado Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 918 (1976) (Brennan, J., dissenting from denial of certiorari).

38. *See* Arthur D. Hellman, *Never the Same River Twice: The Empirics and Epistemology of Intercircuit Conflicts*, 63 U. Pitt. L. Rev. 81, 104–05 (2001).

39. United States v. Mendoza, 464 U.S. 154, 160 (1984).

40. E.I. duPont de Nemours & Co. v. Train, 430 U.S. 112, 135 n. 26 (1977).

41. For further discussion of percolation, see Arthur D. Hellman, *Preserving the Essential Role of the Supreme Court: A Comment on Justice Rehnquist's Proposal*, 14 Fla. St. U.

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Concerns about finding the right vehicle and allowing percolation to take its course are not simply matters of docket management. If the Court chooses the wrong case, or steps in too soon, it may decide the question on the basis of a distorted or incomplete view of the legal and practical setting. That in turn tends to produce decisions that are at best inconclusive and at worst fatally skewed by their idiosyncratic facts or substandard advocacy or other problems.

But if a justice knows to a virtual certainty that this will be his or her last opportunity to confront the issue, the temptation to overlook the "vehicle" infirmities will be very strong. A vote to grant certiorari would be easy enough to rationalize: a cloudy record might simply require writing a different kind of opinion; poor advocacy by the parties could be compensated for by amicus briefs or extra efforts on the part of law clerks. So too with issues that have not received "full consideration by the courts of appeals;" amicus briefs (or academic commentaries) could be seen as taking up the slack.

I have similar concerns about the justices' willingness to overlook issues relating to justiciability. Standing, mootness, and ripeness are malleable doctrines at best. Bending them a little more in order to be able to decide an important issue before a justice was required to leave the Court would not place a great strain on the justice's conscience.

Here, too, the consequences extend well beyond docket management. The various justiciability doctrines apply in the lower courts as well as in the Supreme Court. Thus, the effect of any "bending" would be felt not only in the quality of the Supreme Court's decisions, but also in the substance of the law that other courts have to apply.

Calabresi and Lindgren argue that we do not have to worry about "final period problems," because we do not see justices at the end of their careers rushing to resolve issues under the current system. They write:

> Surely, Justices Rehnquist, Stevens, and O'Connor on the current Court know that they are in the final period of their life tenure on the Supreme Court. Yet no one suggests that these Justices are behaving in a way that suggests the existence of a final period problem. We do not see why such a final period problem would be any more likely under our system of fixed eighteen-year terms.[42]

L. Rev. 15, 22–23 (1986); Arthur D. Hellman, *The Proposed Intercircuit Tribunal: Do We Need It? Will It Work?* 11 Hastings Const. L.Q. 375, 404–06 (1984).

42. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 76].

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This response is not persuasive. To begin with, the concerns I have expressed do not rest solely on a justice's awareness of his or her own impending departure from the Court. Under the eighteen-year term plan, each justice will also know how long his ideological allies (and adversaries) will be staying. That would provide a powerful incentive to decide controversial issues while a sympathetic majority is on the Court—or to defer them until a hostile majority is gone.

We should also keep in mind that it is not only the justices whose behavior would be affected. Today, major issues are often shepherded through the lower courts by organizations like the American Civil Liberties Union and the Institute for Justice. We can expect that under a system of eighteen-year fixed terms, these organizations would calibrate the pace of litigation based on their knowledge of when particular justices will or will not be on the Court.

Even under the current system, institutional litigants occasionally accelerate or retard the progress of litigation in order to assure that a particular issue will—or will not—reach the Supreme Court at a particular moment. The best-known example is the decision by Planned Parenthood of Pennsylvania to file its petition for certiorari in the 1991 Pennsylvania abortion case as soon as possible, rather than waiting until the end of the ninety-day window. The organization "spent barely two weeks drafting [its] petition," because it wanted to give the Court the opportunity to overrule *Roe v. Wade* before the 1992 presidential election and thus to make the election "a referendum on the right to abortion."[43] A few years later, supporters of racial preferences paid a white plaintiff $433,500 to assure that the Supreme Court would not decide an "affirmative action" case that the Court had already accepted for review and scheduled for argument.[44]

This kind of behavior is rare today, largely because groups like Planned Parenthood and the Black Leadership Forum generally have no reason to think that a delay of a few months or a year in the Supreme Court's consideration of an issue would mean that the issue will be decided by a different group of justices. Under the Calabresi-Lindgren and Cramton-Carrington plans, however, that prospect would loom large in the litigation tactics for many such organizations.

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43. Linda Greenhouse, *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey* 200–01 (2005).

44. *See* Douglas Lederman, *Settlement Prevents Supreme Court From Hearing Key Affirmative-Action Case*, Chronicle of Higher Education A48 (Dec. 5, 1997) (available on NEXIS).

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More fundamentally, the "final period" for the elderly justices on the Court today is not at all equivalent to the situation that would be created by a regime of fixed eighteen-year terms. It is one thing to know that you will be leaving the Court "soon"—but at a time that is within your control (as long as you remain alive and in possession of your faculties). It is quite another to know that your term will expire next year or the year after that, and that no decision you make will allow you to remain on the Court beyond that point.

A dramatic example is close at hand. Chief Justice Rehnquist was diagnosed with a serious case of thyroid cancer early in the Court's 2004–2005 Term. He was then eighty years old. He underwent radiation treatment and chemotherapy, and he wore a tracheotomy tube in his throat. He missed four of the Court's seven argument sessions before returning to the bench in March. Many observers (including myself) believed that he was certain to retire at the end of the term. But in mid-May, Stuart Taylor, Jr., a respected commentator, offered a different view: "Rehnquist appears remarkably robust, mentally sharp, and chipper in private, according to friends. And he has always seemed to carry his opinion-writing and administrative workloads effortlessly. So maybe Rehnquist will surprise a lot of people and stay on for another term or two."[45]

We will never know how long the chief justice might have stayed.[46] In early September his condition deteriorated rapidly, and he died over Labor Day weekend. But this outcome does not diminish the force of the point I am making. When a prominent and widely cited commentator like Stuart Taylor believes that a seriously ill justice might "stay on for another term or two," it is reasonable to assume that the other members of the Court also consider that to be a viable possibility.[47] The justice himself would weigh his medical condi-

45. Stuart Taylor Jr., *The Rehnquist Court*, Nat'l J. 1 (May 21, 2005), LEXIS, News Library, National Journal File. Another respected commentator wrote in a similar vein in a Web analysis posted on June 9, 2005. *See* Lyle Denniston, *Commentary: The Rehnquist Riddle*, The Supreme Court Nomination Blog, <http://www.sctnomination.com/blog/> (June 9, 2005).

46. In mid-July 2005 the chief justice issued a public announcement "to put to rest the speculation and unfounded rumors of my imminent retirement." He stated: "I will continue to perform my duties as chief justice as long as my health permits." Linda Greenhouse, *Despite Rumors, Rehnquist Has No Plans to Retire Now*, N.Y. Times A-10 (July 15, 2005).

47. In fact, the justices "indicated that they were as surprised as the rest of the country to learn late Saturday night that the chief justice had died." One member of the Court added that the chief justice "had an amazing few months," and that his decision at the end of the term not to retire had not seemed unreasonable. Linda Greenhouse, *News Was Surprising To Colleagues on Court*, N.Y. Times A-1 (Sept. 5, 2005) (available on NEXIS).

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tion against the poisonous atmosphere in Washington that might make it impossible to confirm a successor. But it is highly unlikely—especially when we consider the reluctance of most people to confront their own mortality—that the justice would be engaging in final-period stratagems. The situation would be quite different if the nation had adopted a regime of fixed eighteen-year terms.

Perhaps it is wrong to assume that justices of the United States Supreme Court ever engage in strategic behavior to achieve policy or ideological goals. But if you believe that such behavior is within the bounds of possibility—as supporters of the eighteen-year term plan do—then the "final period" problem is very real. Moreover, the phenomenon may manifest itself in ways other than those I have discussed (for example, in encouraging justices to decide some cases on a broad rather than a narrow basis). It thus provides a strong reason for opposing any plan for fixed terms for members of the Court.

Stability of Precedent

The final area of concern involves the stability of Supreme Court precedent. I believe that a system of staggered eighteen-year terms would destabilize the law to some degree by weakening the norm that puts pressure on justices to adhere to decisions that they would not endorse if the particular issue were coming to the Court for the first time.

At the outset, I must acknowledge that even today, stare decisis does not seem to carry enormous weight with the Court. Thus, Justice Kennedy, who has sometimes spoken so eloquently about "the rule of law," is quite willing to overturn a recent precedent when his inner voice tells him that the Constitution means something different today from what it did fifteen years ago.[48] But I think stare decisis would get even less respect on a Court whose membership was changing

48. Justice Kennedy has elaborated on his reverence for "the rule of law" in at least two major speeches: an address at the American Bar Association Annual Meeting in San Francisco on Aug. 9, 2003; and a speech to the Hong Kong High Court on Feb. 5, 1999. In the latter, he emphasized that "the law transcends the judge" and that "the check on the judge… is the law itself." Consistent with that approach, he joined Justice Scalia's opinion in Stanford v. Kentucky, 492 U.S. 361, 377–78 (1989), "emphatically reject[ing]" the suggestion that the Court should apply its "'own informed judgment' regarding the desirability of permitting the death penalty for crimes by 16- and 17-year-olds." However, in 2005, he wrote the opinion of the Court in Roper v. Simmons, 125 S. Ct. 1183 (2005), repudiating Stanford and relying on the majority justices' "own judgment…on the question of the acceptability of the death penalty under the Eighth Amendment." *Id.* at 1191.

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every two years, particularly when one purpose of the new system is to allow the incumbent President to put his—and his party's—stamp on the Court.

Today, it is generally accepted that a change in the composition of the Court is not an acceptable reason for overruling a precedent.[49] In part, this is because one of the "[v]ery weighty considerations" that underlie the practice of stare decisis is "the necessity of maintaining public faith in the judiciary as a source of *impersonal* and reasoned judgments."[50] But under a system of staggered eighteen-year terms, the law—or at least the law announced by the Supreme Court—would become somewhat less "impersonal." Each new justice would come to the Court as the appointee of a President who was entitled by law to make that appointment—and under a system that was explicitly designed to make the Supreme Court "more responsive to the public and the political branches' understanding of the Constitution's meaning."[51]

It would not be unreasonable for a justice to take that purpose into account when confronted by a case in which recent precedent appears to require one result, while the justice's own analysis of the Constitution points to the opposite outcome. As the Court has often said, adherence to precedent "is not an inexorable command," especially in constitutional cases.[52] The altered understanding of the Court's role that would underlie the new regime would make it easier for a justice to reject a precedent handed down by a differently composed Court a few years earlier.

It is instructive to consider the experience of the National Labor Relations Board (NLRB). The NLRB is composed of five members who are appointed by the President for staggered terms of five years. Over the last four decades, the course of adjudication by the board has been marked by frequent reversals of precedent as majority control has shifted from appointees of one Pres-

49. *See*, e.g., Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Assn., 450 U.S. 147, 153 (1981) (Stevens, J., concurring). In Payne v. Tennessee, 501 U.S. 808 (1991), Justice Marshall, in dissent, accused the majority of overruling a recent precedent based on nothing more than a change in "this Court's own personnel." *Id*. at 850 (dissenting opinion). Justice Marshall said that the Court acknowledged that it was doing this, but nothing in the Court's opinion alludes to the change in membership. On the contrary, the Court was careful to give reasons that did not depend on a shift in personnel. *See id*. at 827–30 (majority opinion). However, Justice Marshall was correct in saying that one member of the new majority had previously endorsed the legitimacy of overruling based on a change in membership. *See* South Carolina v. Gathers, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting).

50. Moragne v. States Marine Lines, Inc., 398 U.S. 375, 403 (1970) (emphasis added).

51. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 67].

52. Payne v. Tennessee, 501 U.S. 801, 828 (1991).

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ident to appointees of a new President of the opposite party.[53] The "Kennedy Board" overruled decisions of the "Eisenhower Board;" the "Nixon Board" overruled the "Kennedy Board;" and so to the present, with the George W. Bush Board overturning decisions of the Clinton Board.[54] The current chairman of the NLRB, Robert J. Battista, recently presented a candid and illuminating account of this process:

> [Changes in the law] can come about because of social and economic developments, or because of differing perceptions of what is right and just....
>
> With respect to the differing perceptions, it must be recognized that Congress established an agency whose Members would serve relatively short and staggered terms. Obviously, the Board majority would reflect, to some degree, the governing philosophy of the appointing President. Purists may gnash their teeth at this, but it was part of the congressional design.
>
> This is not to say that Congress intended that one party would blindly overrule the precedents of the other party. [All] holdings must be within the fundamental principles set out in the Act, and all changes must be explained. The Board is an administrative agency, charged with not only an interpretative, but a policy-making role. It is not an Article III court and thus the doctrine of stare decisis does not strictly apply. However, all responsible Members recognize the value of having stability, predictability, and certainty in the law. But, if a Member honestly believes that a prior precedent no longer makes sense, and that a change would be within the fundamental principles described above, he/she can vote to change the law. To be sure, the values of stare decisis counsel against an onslaught of changes. But

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53. *See* Arthur D. Hellman, *Getting It Right: Panel Error and the En Banc Process in the Ninth Circuit Court of Appeals*, 34 U.C. Davis L. Rev. 425, 466 n. 150 (2000).

54. *See*, e.g., Charles J. Morris, *The Case for Unitary Enforcement of Federal Labor Law—Concerning a Specialized Article III Court and the Reorganization of Existing Agencies*, 26 Sw. L.J. 471, 477 (1972) (noting "tendency for certain Board policies to make pendulum-type swings which reflect shifts in national political administrations); Samuel Estreicher, *Policy Oscillation at the Labor Board; A Plea for Rulemaking*, 37 Admin. L. J. 163, 163–66 n. 1 (1985) (listing 37 decisions by "Reagan Board" overruling precedents); Michael D. Goldhaber, *Is NLRB in a Pro-Labor Mood?*, Nat'l L.J., Oct. 9, 2000, at B1 (noting that Board, controlled by Democrats, issued twenty-two decisions overruling precedent in two-year period); Special Report, 176 LRR 330, 333 (2005) (reporting observation by NLRB member that Board "has reversed precedent in about eight or nine cases" since Republican appointees became a majority).

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> prudently exercised, change is proper and indeed was envisioned by Congress.[55]

There is some ambivalence in this description, but the overall thrust is clear. Although Chairman Battista acknowledges that the Board "is not an Article III court and thus [that] the doctrine of stare decisis does not strictly apply," he also emphasizes "the value of having stability, predictability, and certainty in the law." Nevertheless, he points out that the "the structure set up by Congress" invariably and properly leads to "changes in the law" when a newly constituted majority votes in accordance with "the philosophic views of the President" who appointed the members.

I am not suggesting that a system of eighteen-year staggered terms for Supreme Court justices, with the Court's membership changing every two years, would lead to overruling on the scale seen in the NLRB. The Supreme Court *is* an Article III Court, and the doctrine of stare decisis *does* apply. But I do believe that a dynamic similar to the one described by Chairman Battista would come into play. Justices could well take the position that it was "part of the [new constitutional] design" that members of the Court "would reflect, to some degree, the governing philosophy of" the President who appointed them. And if a justice "honestly believe[d] that a prior precedent [did not correctly interpret the Constitution]," he or she could properly vote for a different interpretation. This thread of reasoning might seem especially attractive if the new interpretation reflected not only the justice's own view of constitutional doctrine, but also the "governing philosophy" of the appointing President.

There is no way of knowing how often the justices—individually or in numbers sufficient to constitute a majority—would act upon this line of thinking.[56] But what matters is not only the actual incidence of overruling, but also the willingness of the Court to reconsider its precedents. The stability of the law can be impaired even if the actual incidence of overruling is not

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55. Robert J. Battista, *The NLRB at 70: Its Past and Its Future,* 58th NYU Annual Conference on Labor, <http://www.nlrb.gov/nlrb/press/releases/chairman_052005_nyu_speech.pdf> (May 20, 2005).

56. It is surely not necessary to expound at length on why the frequent overruling of precedent would be undesirable. Judge John R. Roberts, at his confirmation hearing after he was nominated as Chief Justice of the United States, summed up the point succinctly: "Adherence to precedent promotes evenhandedness, promotes fairness, promotes stability and predictability. And those are very important values in a legal system." Second Day of Hearings on the Nomination of Judge Roberts, <http://www.nytimes.com/2005/09/13/politics/politicsspecial1/13text-roberts.html?pagewanted=print> (visited Sept. 18, 2005).

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great. And for the reasons given, I believe that greater instability would be one of the consequences of implementing the Calabresi-Lindgren plan.

Conclusion

Like the other contributors to this book, I have engaged in a great deal of speculation. Thus, I must acknowledge that the consequences of the staggered-term plan may not be as harmful as I have suggested. But the risks are real, and I believe they are substantial.

This leads to a more general point that warrants emphasis. In the preceding analysis I have tried to anticipate the likely behavior of justices, members of Congress, advocacy groups, and institutional litigants (among others) if the proposed new system were to be implemented. But the Supreme Court interacts with so many legal and political actors that no one can confidently predict all of the consequences of change. Moreover, each response is likely to trigger others.

I agree with Professor Farnsworth that those who propose amending the Constitution to replace life tenure for Supreme Court justices with a system of fixed staggered terms bear the burden of showing that the new arrangement would *clearly* create net benefits.[57] When the consequences of that new arrangement will be determined by the reactions and counter-reactions of so many different actors, there is simply no way that the proponents can meet that burden.

Other Possible Measures

Calabresi and Lindgren insist that their plan for staggered eighteen-year terms for Supreme Court justices "is fundamentally a conservative, Burkean idea that would restore the norms in this country that prevailed between 1789 and 1970 as to the tenure of Supreme Court justices."[58] This characterization is not persuasive. There is a vast difference between an eighteen-year *tenure* that comes to an end because the justice dies or chooses to retire and an eighteen-year *term* that is commanded by law. There is a vast difference between an average interval of two years between vacancies and a statute (or constitutional provision) that creates a vacancy for a particular seat at a particular moment.

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57. *See supra* Ward Farnsworth, *The Case for Life Tenure*, pp. 251–269.
58. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 101].

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The more important question, however, is not whether the eighteen-year term proposal would restore the norms of earlier eras but whether it represents good policy for the future. From that perspective, one could argue that some form of term limits would serve a purpose today that would have been largely unnecessary before the Warren Court era. During the nineteenth century and the first half of the twentieth century, there were historical moments when the Supreme Court played a central role in the political life of the nation, but these moments were intermittent. Today, the Court's influence is pervasive. And if justices are lingering on the bench longer than they should, or if lengthy tenures result in a Court too far removed from democratic accountability, the consequences are far more severe.

For the reasons given above, I believe that the proposed system of eighteen-year staggered terms would create more problems than it would solve. I turn now to other possible measures for dealing with concerns about justices' mental decrepitude and for restoring greater democratic accountability.

Averting Mental Decrepitude

Although it is true that mental decrepitude is not necessarily a consequence of advanced age, the correlation is sufficiently great that the most direct way of avoiding mental decrepitude on the Court would be to amend the Constitution to require justices to step down at a specified age. Professor Farnsworth has cogently summarized the arguments for and against this approach. He concludes that "[t]he case for age limits deserves serious consideration."[59]

Professor Farnsworth's analysis is persuasive, but I doubt that even this modest reform is politically feasible. Any attempt to enact a compulsory retirement provision for Supreme Court justices would almost certainly be met with cries of "invidious discrimination" from some quarters of the civil rights community. Indeed, Calabresi and Lindgren themselves decry "mandatory retirement age requirements generally because they blindly discriminate against individuals based on age."[60] Given the difficulty of gaining approval for a constitutional amendment, this is probably a fatal obstacle apart from everything else.

The prospect that one or more justices will remain on the bench establishing the law of the nation for some period after they are no longer mentally

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59. *See supra* Farnsworth, p. 268.

60. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 63]. I disagree with Calabresi and Lindgren on this point. If mental decrepitude in members of the Court is as serious a threat as they believe it to be, a measure that "blindly discriminates" against some elderly but still-competent justices is a small price to pay for avoiding or at least reducing the threat.

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competent is a disturbing one. Perhaps an extreme example will come to public attention sometime in the future and will galvanize public opinion, sweeping away all opposition to a compulsory-retirement amendment. Failing that, we will have to rely on family and friends to persuade or cajole a mentally decrepit justice into accepting the necessity of stepping down. That might seem like a counsel of despair, but informal processes of that kind have operated successfully with lower court judges on at least some occasions.[61]

Restoring Greater Democratic Accountability

Professors Calabresi and Lindgren marshal an impressive array of academics and other commentators who express concern that the system of life tenure for Supreme Court justices deprives "the public and political branches…of their one constitutionally provided method of ensuring that the Supreme Court accurately reflects the popular understanding of what the Constitution requires." They suggest that "the problem of democratic unaccountability is the primary reason cited by scholars for reconsidering life tenure."

I share the concerns about the "democratic unaccountability" of the Court today, but I doubt very much that the proposed reform would provide an effective cure. This is a large subject; I will explain briefly why I do not find the argument persuasive.

A key element of the argument is this: "The mechanism of the appointment process with the President nominating candidates and the Senate confirming them is the main and really the only guarantee that the Supreme Court will reflect public norms."[62] In my view, reliance on the Senate confirmation process to "guarantee that the Supreme Court will reflect public norms" is misplaced. For one thing, as recent history demonstrates, Senate rules and traditions give the minority enormous powers of delay and obstruction. We cannot assume that a nominee who wins confirmation by the Senate will come to the Court "instill[ed with] popular values of constitutional interpretation"[63]—much less that he or she will advance those values as a member of the Court.

More broadly, if divorcement from democratic accountability is reflected in the decisions of the current Court (as I believe it is), the phenomenon is

61. *See* H. R. Jud. Comm., *The Operations of Federal Judicial Misconduct and Recusal Statutes: Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property,* 107th Cong. 91–92 (Nov. 29, 2001) (testimony of Arthur D. Hellman and Michael J. Remington).

62. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 27].

63. *Id.* at [ms. p. 28].

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sustained and fed by forces that are largely impervious to correction by Senate confirmation processes. Here it is necessary to delve briefly into the question: What are the "public norms" that a more democratically accountable Court would embrace? On that point, I agree with Calabresi and Lindgren that "the American public is now more committed than are lawyerly elites to the notion that constitutional cases should be decided based on text and history."[64] I take this position, not on the basis of opinion polls or other surveys, but because it is hard to imagine how the public could be *less* committed to text and history in constitutional interpretation than the "lawyerly elites," particularly those in academia.

But it is a commitment to "text and history"—and to giving text and history priority over particular precedents that support new claims of liberty or equality—that gets nominees (at least Republican nominees) in trouble in the Senate. This is partly a consequence of pressure from interest groups, as discussed earlier in this essay, but it also reflects the zealously argued preferences of the dominant organs of the mainstream media and the "lawyerly elites" whose influence the Calabresi-Lindgren proposal seeks to circumvent.

Today, the mainstream media and the lawyerly elites applaud courts when they implement favored policy choices through the medium of constitutional interpretation. And they exhort Senators to reject nominees who do not share a commitment to an "evolving sense of the meaning of constitutional clauses."[65] These voices are likely to carry more weight in the confirmation process than the vaguely felt concerns of the general public, to whom the issues are remote and arcane.

Of course the media and the elites do not always prevail, but in the environment I have described, it is doubtful whether the confirmation process will foster democratic accountability of the kind that Professors Calabresi and Lindgren seek. In all likelihood, the Supreme Court will continue on its present course whether with the same membership or with new justices—and whether new justices join the Court at regular or irregular intervals. "No more Souters" may be an exhilarating rallying cry for those who are disappointed by the direction the current Court has taken, but I would not put money on it as a description of the Court in the foreseeable future, even if Republican Presidents are making all the appointments.

Is there, then, any hope for bringing greater democratic accountability to the Court? Ironically, today one of the greatest obstacles to pursuing even

64. *See supra* Calabresi & Lindgren, pp. 15–98 [ms. p. 79].
65. *That Scalia Charm*, N.Y. Times A16 (Mar. 21, 2005) (editorial).

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modest measures is the rhetoric of some of the Court's critics.[66] Tom Delay calls for "hearings on the definition of good behavior" to help Congress "hold the judiciary accountable." Pat Robertson suggests that an out-of-control judiciary is a more serious threat to the nation than Al-Qaeda terrorists.[67] Senator John Cornyn appears to say that courthouse violence, although "without justification," can be attributed in part to "judges [who] are making political decisions yet are unaccountable to the public."[68]

Now recall the comments by Dean Kramer:

> The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.

But anyone who proposed any of these measures today would be condemned by the mainstream media, bar associations, and law professors as an ally of Tom DeLay and Pat Robertson seeking to destroy judicial independence. (As far as I have been able to determine, Dean Kramer did not defend DeLay when DeLay was attacked for his comments on an "unaccountable judiciary.")

For my own part, I am reluctant to embrace any of the rather drastic responses that Dean Kramer appears to suggest.[69] There may be some more modest measures that could bring a small degree of "democratic accountability" to the Court, but that is a topic for another day.

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66. I recognize that the statements quoted here do not specifically target the Supreme Court, but that is a distinction that will matter little to those who are disturbed by the rhetoric.

67. *This Week With George Stephanopoulos* (ABC television broadcast, May 1, 2005), LEXIS, Nexis Library, ABC File.

68. 151 Cong. Rec. S 3126 (daily ed. Apr. 4, 2005). Senator Cornyn later clarified his remarks, saying, "I am aware of no evidence whatsoever linking recent acts of courthouse violence to the various controversial rulings that have captured the nation's attention in recent years." Sen. John Cornyn, *Letters; Senator Responds to Editorial on Judges*, Los Angeles Times B14 (Apr. 16, 2005).

69. In September 2004, a subcommittee of the House Judiciary Committee held a hearing on a bill that included two of the "political responses" proposed by Dean Kramer: impeachment and withdrawal of jurisdiction. I testified in opposition to these provisions and to the bill as a whole. See H.R. Jud Comm. *Constitution Restoration Act of 2004: Hearing Before the Subcommittee on Courts, the Internet and Intellectual Property of the House Judiciary Committee on H.R. 3799*, 108th Cong. 17–31 (Sept. 13, 2004).

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