

DOES ELIMINATING LIFE TENURE FOR ARTICLE III JUDGES REQUIRE A CONSTITUTIONAL AMENDMENT?

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ABSTRACT

Beginning in the early 2000s, a number of legal academicians from across the political spectrum proposed eliminating life tenure for some or all Article III judges and replacing it with a term of years (or a set of renewable terms). These scholars were largely in agreement such a change could be accomplished only by a formal constitutional amendment of Article III. In this Article, Dow and Mehta agree with the desirability of doing away with life tenure but argue such a change can be accomplished by ordinary legislation, without the need for formal amendment. Drawing on both originalism and formalism, Dow and Mehta begin by observing that the constitutional text does not expressly provide for lifetime tenure; rather, it states that judges shall hold their office during good behavior. The good behavior criterion, however, was not intended to create judicial sinecures for 20 or 30 years, but instead aimed at safeguarding judicial independence from the political branches. By measuring both the length of judicial tenure among Supreme Court justices, as well as voting behavior on the Supreme Court, Dow and Mehta conclude that, in fact, life tenure has proven inconsistent with judicial independence. They maintain that the Framers' objective of insuring judicial independence is best achieved by term limits for Supreme Court justices.

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INTRODUCTION

Article III, section 1 of the U.S. Constitution provides, “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior.”¹ The constitutional text does not explicitly provide that Article III judges, once confirmed, shall hold their positions until death (or retirement), yet this “good behavior” clause has been understood for many years to provide life tenure to Article III judges.² We therefore refer to the good behavior clause in this essay as the life tenure provision. We undertake an originalist inquiry, revisiting the late eighteenth-century context in which this constitutional language was adopted to determine whether the Founders intended for judges to serve for “life.” We then ask whether changed historical circumstances mean that the good behavior clause no longer necessitates life tenure.

1. U.S. CONST. art. III, § 1.

2. See RAOUL BERGER, *IMPEACHMENT: THE CONSTITUTIONAL PROBLEMS* 70–133 (1974) (exploring how the entitlement of a judge to his position during good behavior originated as a limit on the power of the king to remove judges at will). The conventional view, of course, is that good behavior implies (or compels) life tenure. See, e.g., Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 *YALE L.J.* 72, 90 (2006) (concluding “by the end of the eighteenth century, a simple grant of good-behavior tenure might also be considered ‘tenure for life’ or ‘life tenure’”). Yet, despite the near universal acceptance of this proposition, a somewhat different historical analysis suggests a distinction between good behavior and life tenure. See Robert Kramer & Jerome A. Barron, *The Constitutionality of Removal and Mandatory Retirement Procedures for the Federal Judiciary: The Meaning of ‘During Good Behavior,’* 35 *GEO. WASH. L. REV.* 455, 456 (1967) (arguing that grants of office for “life tenure” were different from grants during good behavior). For a critical response to the Kramer-Barron analysis, see generally Raoul Berger, *Impeachment of Judges and Good Behavior Tenure*, 79 *YALE L.J.* 1475 (1970) (analyzing and critiquing said analysis). For purposes of our argument in this essay, we accept Berger’s position that the good behavior clause is best read as a life tenure provision.

For more than two decades, a variety of judges and legal academicians from across the political spectrum have proposed eliminating life tenure for some, if not all, Article III judges.³ While the substance, breadth, and rationale for these suggestions have varied, there is a rare consensus among those who oppose life tenure that replacing it would require a constitutional amendment.⁴ By looking to both the founding era documents as well as data from the eighteenth, nineteenth, and twentieth centuries, we test the soundness of that consensus and ask whether eliminating or modifying the life tenure provision would require a constitutional amendment, or whether this change could instead be achieved through ordinary legislation.⁵ In short, if there is a coherent originalist understanding of the good behavior clause that does not compel life tenure, then Congress could statutorily enact term limits for Article III judges.

We proceed as follows: In Part I, we briefly explain how an originalist reading of Article III would permit Congress to eliminate life tenure by statute, focusing specifically on Supreme Court justices. In Part II, we elaborate and update two pieces of historical data. The

3. For an overview of some recent proposals, see Kalvis Golde, *Experts Tout Proposals for Supreme Court Term Limits*, SCOTUSBLOG (Aug. 4, 2020), <https://www.scotusblog.com/2020/08/experts-tout-proposals-for-supreme-court-term-limits/>. Perhaps the academician most associated with these ideas is Steven Calabresi, who has been a leading proponent of doing away with life tenure for many years. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 822–42 (2006); see also Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST (Aug. 9, 2002), <https://www.washingtonpost.com/archive/opinions/2002/08/09/term-limits-for-the-high-court/646134cd-8e13-4166-9474-5f53be633d7c/>.

Of course, in the face of these many proposals, there have also been important defenses of life tenure. See, e.g., David R. Stras & Ryan W. Scott, *Retaining Life Tenure*, 83 WASH. U. L. Q. 1397, 1421–25 (2005) (making the case for life tenure); David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi and Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791, 814–21 (2007) (responding specifically to the data and analysis relied on by Calabresi and Lindgren).

For a nuanced overview of the various proposals, see Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATHOLIC U.L. REV. 841, 844 n.9 (2011) (citing and summarizing most prominent criticisms and defenses of life tenure).

4. But see Judith Resnick, *Judicial Selection and Democratic Theory*, 26 CARDOZO L. REV. 579, 614–19 (2005) (suggesting, *inter alia*, the Supreme Court could read Article III to provide for fixed judicial terms).

5. Our interest in examining this commonplace view, that change cannot occur in the absence of a constitutional amendment, is that we agree with those who believe life tenure for Supreme Court justices is undesirable. Yet we are also aware of the difficulty of formally amending the Constitution. Many of the proponents of eliminating life tenure have limited their focus to Supreme Court justices. In part, this focus results from the unique power of the Supreme Court to overturn precedent, and, in part, it results from the bureaucratic and administrative challenges of having life tenure for all of the nearly 800 federal judges. In our discussion here, we likewise limit our focus to Supreme Court justices.

first pertains to the length of judicial tenure in different historical eras; the second pertains to political polarization on the Supreme Court. To our knowledge, we are the first to report on this metric for measuring polarization, and we suggest it may supply important data for assessing whether the Framers had intended for Supreme Court justices to serve for as long as they currently do. Finally, in Part III, we provide an answer to whether the historical record supports the originalist reading we outline in Part I.

I. THE ORIGINALIST ARGUMENT AGAINST LIFE TENURE

Originalists interpret constitutional provisions consistent with the way they believe the Framers themselves had understood those provisions.⁶ Given this simple definition, we can, for heuristic purposes, divide the universe of constitutional propositions into two groups: those which technological or scientific advances have made applying originalism to these issues either challenging or plainly impossible, and those for which technological or scientific advances have not impacted the originalist enterprise. The first group exhibits dynamic originalist meaning; the latter are characterized by stable originalist meaning.

For example, suppose law enforcement authorities, in a car across the street, monitor a house where they suspect marijuana is being illegally grown. From the street, they use heat map sensors to determine whether there is in fact marijuana inside the house. Obviously, the Framers could not have fathomed such technology, which means the Framers could not have conceptualized precisely how the Fourth Amendment's protection against unlawful searches and seizures would

6. The literature on originalism is obviously vast, and this footnote is by no means an attempt to provide a comprehensive bibliography. However, a useful (if now somewhat dated) analysis can be found in Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657 (2009). A clear and incisive examination of originalism as an interpretive method is represented by Lawrence B. Solum, *Faith and Fidelity: Originalism and the Possibility of Constitutional Redemption*, 91 TEX. L. REV. 147 (2012) (discussing the contemporary theoretical development of the method articulated by Jack Balkin). See generally JACK M. BALKIN, *LIVING ORIGINALISM* (2011). The outline of the argument we propose in Part III, *infra*, is a version of what Paul Brest characterized as strict intentionalism. See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B. U. L. REV. 204, 209–17 (1980). Of course, as Dan Farber has demonstrated, intentionalists can disagree among themselves—a fact that some take as casting grave doubt on the very enterprise. See Daniel F. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1100–02 (1989) (discussing this aforementioned disagreement). In this essay, we do not aspire to engage in this debate but simply identify one possible version of originalism and its impact on interpreting the good behavior clause. And although we explore where an originalist understanding of the life tenure provision would lead, we do not necessarily endorse originalism as either a sound or superior or even coherent interpretive approach.

have applied to this scenario.⁷ Similarly, it is difficult, if not impossible, to have a warranted view of whether the Framers would conclude a police officer's search of a cell phone confiscated from a subject who fled a traffic stop represents a violation of the Fourth or Fifth Amendment.⁸ In certain respects, therefore, both the Fourth and Fifth Amendments require dynamic originalist interpretation.

Instances calling for dynamic originalism are not limited to the context of criminal procedure. Whether a prohibition against sex or gender discrimination applies to an individual who has had sex reassignment surgery cannot generate a coherent originalist answer.⁹ Nor can it in the abortion context:¹⁰ determining when the government's interest in the welfare of a fetus becomes sufficient to outweigh the mother's own liberty interest in controlling her body is in part a function of the ability of technology to sustain a prematurely delivered baby. The nature of science makes this, of course, a dynamic matter.¹¹

7. The case, of course, is *Kyllo v. United States*, 533 U.S. 27 (2001), and the literature addressing the case, and the originalist analysis in particular, is vast. For a sample, see, e.g., David E. Steinberg, *Restoring the Fourth Amendment*, 33 HASTINGS CONST. L.Q. 47, 60–66 (2005); Ric Simmons, *Why 2007 is Not Like 1984*, 97 J. CRIM. L. & CRIMINOLOGY 531, 545–47 (2007). We recognize, of course, that the word “precisely” in the text is doing a great deal of work here, but that adverb does not dilute the challenge facing an originalist approach to this scenario. Specifically, an originalist answer to the question generated here demands the use of analogy, rather than merely asking what the Framers themselves believed, and whether analogical reasoning is sound originalism is a subject of some controversy. See, e.g., Robert W. Bennett, *The Mission of Moral Reasoning in Constitutional Law*, 58 S. CAL. L. REV. 647, 649, 654–55 (1985); Nicholas A. Kahn-Fogel, *Property, Privacy, and Justice Gorsuch's Expansive Fourth Amendment Originalism*, 43 HARV. J.L. & PUB. POL'Y 425, 439, 446 (2020) (addressing Gorsuch's use of analogical reasoning in an interpretive methodology he refers to as originalist).

8. Several cases are illustrative, including *Riley v. California*, 573 U.S. 373 (2014). For valuable analysis, see, e.g., Tracey Maclin, *Cops and Cars: How the Automobile Drove Fourth Amendment Law*, 99 B. U. L. REV. 2317, 2324–27 (2019) (discussing SARAH A. SEO, POLICING THE OPEN ROAD: HOW CARS TRANSFORMED AMERICAN FREEDOM (2019)).

9. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741–42 (2020) (holding Title VII prohibition against sex discrimination includes termination on account of sexual orientation or transgender status).

10. Despite being widely criticized for its methodology, *Roe v. Wade*, 410 U.S. 113 (1973), was in fact an originalist tour de force, which sought to examine history to ascertain the moment at which the government's interest in prohibiting or regulating abortion superseded a woman's liberty interest in controlling her body. Under *Roe*, therefore, the abortion right was stable. But the replacement of the *Roe* trimester framework with the undue burden test articulated in *Casey* makes the right to obtain an abortion dynamic. See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 877 (1992) (laying out the undue burden framework).

11. The examples are legion and applicable in some cases even where unexpected. For example, the enumeration clause in U.S. CONST. Art. I, § 23, cl. 3, calling for an “actual enumeration,” would be more precisely implemented by statistical sampling methods unknown to the Framers, yet the use of such techniques has been deemed unconstitutional. See *U.S. Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 317 (1999). This decision has been

Yet there are many other constitutional provisions whose understanding is unaffected by scientific or technological change; these provisions exemplify stable originalist meaning. For example, the meaning of “the Age of twenty-five Years,” the minimum necessary for someone to be eligible to serve in the House of Representatives,¹² is unaffected by scientific technological advance. The same is true for the meaning of “the Legislature of three fourths of the several States,” the fraction needed for ratification of a constitutional amendment.¹³ Those discrete requirements remain unchanged over time.

What is notable about the life tenure guarantee, however, is that it is a chimera of both stable and dynamic character. While the meaning of “life” is stable, the meaning of good behavior is not (or is not necessarily so). Moreover, the Framers could have provided explicitly for judges’ life tenure and made that tenure subject to removal only in the absence of good behavior (just as the President is subject to removal for commission of high crimes or misdemeanors). But, of course, they did not. Therefore, the translation of the good behavior clause into a life tenure provision may be inconsistent with original understanding.

Say, for example, the historical record supports the conclusion the Framers understood the good behavior clause to mean that judges would serve for fifteen (or twenty or even twenty-five) years. If it happens that today, judges are serving for thirty (or thirty-five or even forty) years—far longer than their predecessors—then the originalist understanding of the good behavior clause may not dictate that contemporary judges are guaranteed life tenure. Similarly, if the Framers believed that turnover among justices would be sufficiently regular as to neutralize ideological polarization, but turnover no longer happens at a rate adequate to accomplish that goal, then there is another originalist argument for decoupling the good behavior clause from the life tenure guarantee. Likewise, if the purpose of the good behavior clause was to ensure judicial independence, and if in fact life

defended on originalist grounds by several commentators. *See generally, e.g.*, Thomas R. Lee, *The Original Understanding of the Census Clause*, 77 WASH. L. REV. 1 (2002). For the argument that the sampling techniques challenged in Department of Commerce were unknown to the Framers because they had yet to be invented, *see generally* David B. Goldin, *Number Wars*, 32 U. TOL. L. REV. 1 (2000). In any event, our aim in this part of the essay is not to place every constitutional clause in one category or the other, but simply to show that these two different categories of constitutional provisions provides analytic value in an assessment of whether originalism can generate a coherent answer to a contemporary question.

12. U.S. CONST. art. I, § 2, cl. 2.

13. U.S. CONST. art. V.

tenure undermines such independence, the conventional assumption that good behavior grants life tenure may be unsound.

Therefore, to analyze whether the good behavior clause should continue to be understood as guaranteeing life tenure for Supreme Court justices, we explore a cluster of issues connected to the original meaning of “good behavior” itself, as well as whether the Framers were indifferent to the actual number of years that judges might serve (so long as they exhibit such behavior). If we identify a significant gap between how long the Framers expected judges to serve and how long they actually serve, or if there are other changed historical circumstances that the Framers did not anticipate when they embraced the good behavior standard, then, as an originalist matter, the dynamic “good behavior clause” does not perforce provide life tenure, because what the Framers had intended life tenure to be was something quite different from what we see today.

II. WHAT “LIFE” MEANT THEN, WHAT IT MEANS NOW, AND OTHER CHANGES IN HISTORICAL UNDERPINNINGS

In an important article, which jump-started discussions of the merits and demerits of lifetime tenure¹⁴ and what to replace it with and how, Professors Steven G. Calabresi and James Lindgren identified the many reasons why lifetime tenure for Supreme Court justices is undesirable. Conceding that their alternative would require a constitutional amendment, Calabresi and Lindgren proposed “an eighteen-year, staggered term limit on the tenure of Supreme Court Justices . . . [such that] the turnover of Justices would occur during the first and third year of a President’s four-year term.”¹⁵

In their view, a variety of factors counsel against lifetime tenure, including the increased ideological polarity of the Court and accompanying ideological nature of confirmation hearings.¹⁶ The central data point Calabresi and Lindgren identify as relevant is the increase in the number of years served by Supreme Court justices over

14. See generally Calabresi & Lindgren, *supra* note 3. The conversation inspired by Calabresi and Lindgren has persisted for well over a decade now. A noteworthy volume containing a number of contributions to the debate is REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Paul D. Carrington & Roger C. Cramton eds., 2006). For an argument these reforms do not require a formal amendment, see generally Judith Resnik, *Judicial Selection and Democratic Theory*, 26 CARDOZO L. REV. 579 (2005).

15. Calabresi & Lindgren, *supra* note 3, at 824–25.

16. *Id.* at 800–09.

the years. In this essay, we provide further data illuminating this metric: the mean tenure served by Supreme Court justices.

In addition, we also provide a new metric: how ideological polarization on the Court has changed over time. To be sure, measuring polarization is less straightforward than calculating mean tenure, and there may well be other metrics able to measure polarity beyond the method we have used. But our metric is particularly useful because it reveals a positive correlation between longer judicial terms and ideological polarization—a parallel that supports the proposition that life tenure, rather than fostering political independence, in fact accomplishes the opposite. And although the Roberts Court has taken fewer cases in recent years and decided a larger percentage of those cases unanimously,¹⁷ which ameliorates the trend toward greater polarization, the trend is nevertheless pronounced over the course of U.S. history.

Regarding the length of judicial tenure, Calabresi and Lindgren noted that from 1789 until 1970, the average term served by a Supreme Court justice was just about fifteen years.¹⁸ In contrast, justices who replaced those who retired since 1970 have served on average 26 years.¹⁹ Indeed, because of these much longer terms, Calabresi and Lindgren noted there were no vacancies on the Court from 1994 until the middle of 2005.²⁰

To be sure, the Supreme Court is not designed to be a democratic institution, but its members are appointed and confirmed by presumably democratic institutions. Consequently, insofar as excessively long tenures create unanticipated chasms between the judicial branch and democratic institutions, the judicial branch is even farther removed from the people than the Framers could have imagined. It is not evident that the additional distance is desirable, or that the Framers believed it would be.²¹ Our data show that, for most of U.S. history, a Supreme Court justice confirmed during the first term of a two-term President would serve a number of years that would

17. See, e.g., Cass R. Sunstein, *Unanimity and Disagreement on the Supreme Court*, 100 CORNELL L. REV. 769, 775 (2015); see also Adam Liptak, *The Polarized Court*, N.Y. TIMES (May 10, 2014), <https://www.nytimes.com/2014/05/11/upshot/the-polarized-court.html> (discussing the overall trend towards polarization).

18. Calabresi & Lindgren, *supra* note 3, at 771.

19. *Id.*

20. *Id.*

21. See *infra* text accompanying notes 26 and 27 (addressing discussions of the good behavior clause at the constitutional convention).

permit the following President to nominate a successor during the following President's second term. In recent years, however, a justice confirmed during a President's first term will serve well through that President's tenure—as well as through the next President's two terms.

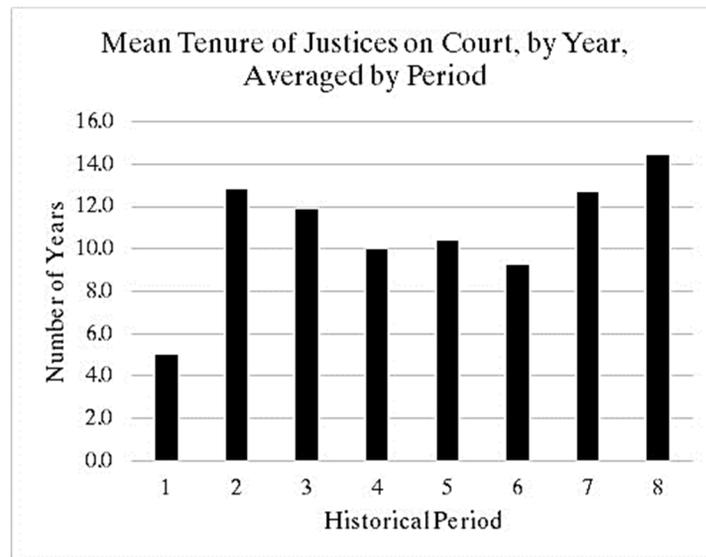
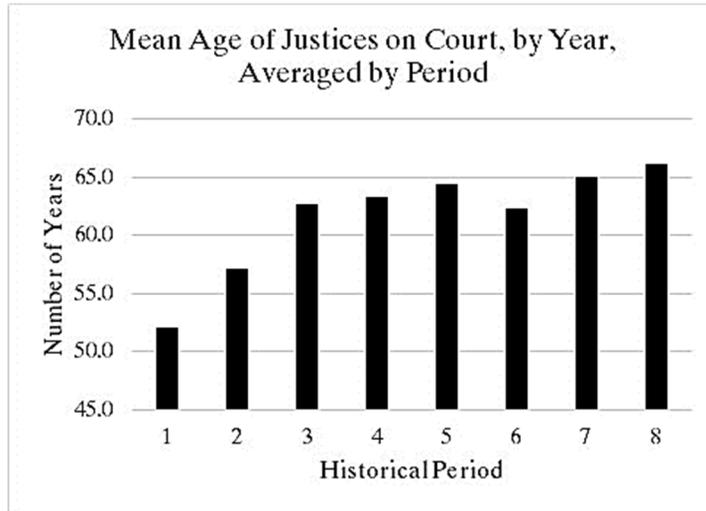
Calabresi and Lindgren believe their proposal provides an alternative superior to the current system, but also believe their proposal requires a formal constitutional amendment. As we have indicated, we remain agnostic on the merits of their proposal, but we have sought to explore whether their alternative, or any alternative, to life tenure would in fact require a formal amendment. Toward that end, we have generated a more granular examination of how the concept of life tenure has changed over U.S. constitutional history and the extent to which Supreme Court voting has become more polarized.

A. The Data and Our Approach

We have divided U.S. history into eight historical periods. The first, the Founding era, runs from 1787 until 1810. Next, the Jacksonian era runs from 1810 to 1840. Third, the Civil War and Reconstruction era goes from 1840 to 1870. Fourth, the Technological Revolutionary era runs from 1870 to 1900. Fifth, the World War I era goes from 1900 to 1930. Sixth, the World War II and New Deal era is from 1930 to 1960. Seventh, the Civil Rights and Space Age era runs from 1960 to 1990. Eighth and finally, the Internet and Pandemic era is from 1990 to 2020. The following charts reveal the average age and cumulative tenure of Supreme Court justices in each historical period.²² To produce the first graph, we calculated—for each year since the founding—the mean age of the justices serving that year. For each historical period, we then took the mean of the yearly means for each year in that period.²³ To produce the second graph, we performed a similar computation, using the total number of years served (tenure) for each justice currently on the court in each year, instead of age, as in the first graph.

22. The raw data used to calculate the mean and median years of tenure in each historical period is contained in the Appendix, which identifies each Supreme Court justice and how long each served.

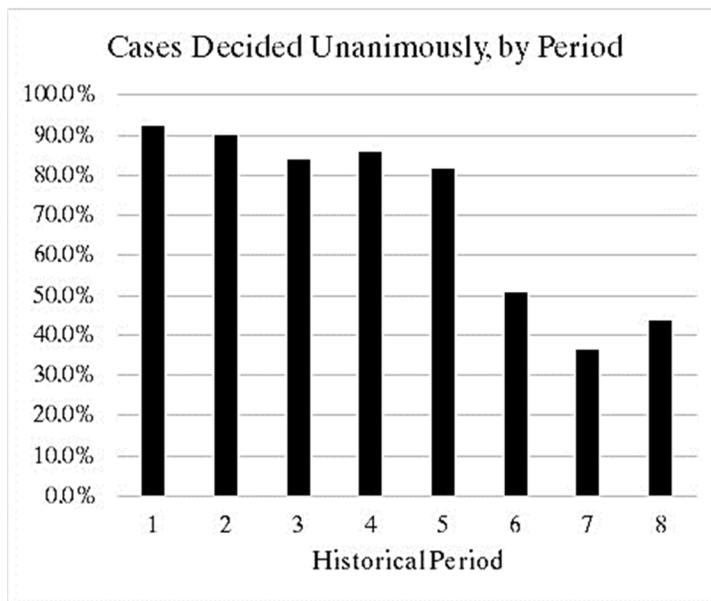
23. We count a justice as serving during a particular year even if he or she serves for only part of that year. For example, Justice Scalia is counted for 2016, Justice Gorsuch is counted for 2017, and both Justice Kennedy and Justice Kavanaugh are counted for 2018.

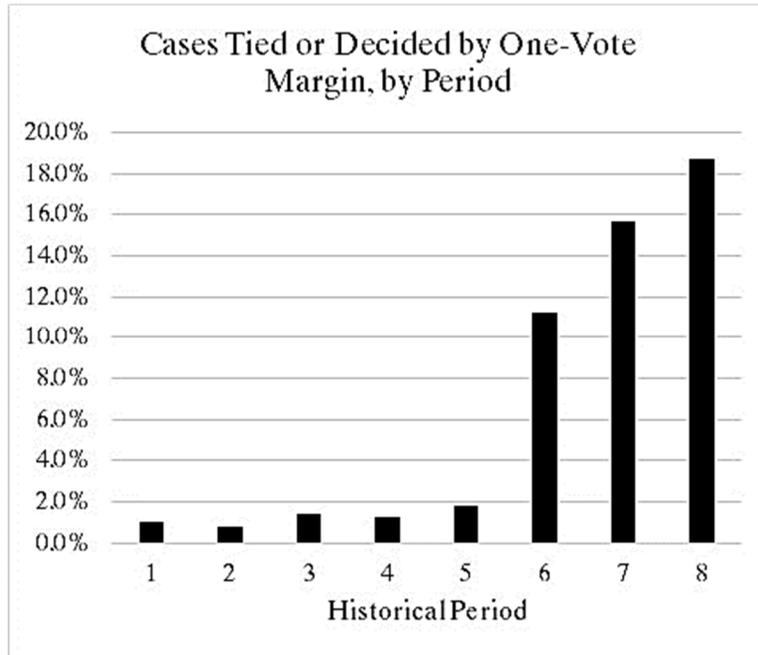


The data reveal that, over time, justices have been serving longer terms and until older ages. The unusually low average tenure for period 1 is because the period began with six justices appointed by President George Washington to a newly formed Court. Because the Court began with zero cumulative years of experience, a comparison between period 1 and other periods is inapt; all other periods began with some incumbent justices. Period 2 saw many longer-serving justices; this metric then declined for most of the nineteenth and early twentieth

centuries. The most recent two periods, however, have seen a sharp uptick in average tenure: from 9.3 years during the 1930-1960 period to 12.7 years during the 1960-1990 period to 14.4 years during the 1990-2020 period. This most recent period has seen a higher average tenure than any of the preceding periods. Recent justices have indeed been holding their seats longer than their predecessors.

Of course, lengthier terms, standing alone, might be a phenomenon the Framers did not anticipate, but not a phenomenon necessarily inconsistent with their objective. However, our second data point, ideological polarization, reveals how the longer terms served by Supreme Court justices contravenes the Framers' intent to create an independent a judicial branch, one insulated from political pressure.





We measure ideological polarization by examining the number of cases decided unanimously (e.g., 9-0 or 8-0) and the number of cases decided by a one-vote margin (e.g., 5-4) and tied cases (e.g., 4-4) over time.²⁴ To be sure, not all 5-4 decisions reflect ideological polarization, and not all 9-0 decisions reflect ideological commonality, but the trendlines reflecting vote splits may nonetheless be useful.

The first chart shows that, from the Supreme Court's founding until 1930, over 80 percent of cases were decided unanimously. That figure dropped significantly as the New Deal era began: In the 1930-1960 period, only about half of cases were decided unanimously, and since 1960, the unanimity rate has hovered around 40 percent.

Even more striking is the second chart, which demonstrates the sharp rise in cases decided by a one-vote margin (or in which the lower court judgment is affirmed by an equally divided court). Because the number of justices has been fixed at nine since 1869, most cases in this

24. We have compiled the raw data on Supreme Court decisions from various databases on "The Supreme Court Database" website by Washington University Law. *The Supreme Court Database*, WASH. UNIV. L., <http://scdb.wustl.edu/index.php> (last accessed Feb. 21, 2021). These sources, however, do not provide the votes in cases. To derive the data points, we use a proxy for ideological polarization, and Mehta wrote a script to extract that information from the source material. Anyone wishing access to the raw data is invited to contact either of the authors.

category are 5-4 decisions. Until 1930, fewer than 2 percent of cases were so closely divided. But this phenomenon has become much more common in the last 90 years, and since 1990, it has occurred in nearly one-fifth (18.7 percent) of cases.

B. Key Findings

There are thus two significant differences between the Supreme Court as it exists in the twenty-first century, and how the Framers likely envisioned it in the late eighteenth. The first is how long justices serve, and the second is how ideologically divided they are. These two factors are mutually reinforcing: Because justices know the Court is ideologically driven, they will be loath to retire if a consequence of that retirement is being replaced by an ideological counterweight. And relatedly, because justices are chosen largely based on their ideological orientation, they generally continue to vote in accordance with that orientation for the duration of their ever-lengthening tenure.²⁵

The Framers neither knew of, nor could they have foreseen, such significant shifts. The originalist question, therefore, is whether either or both of these developments severs the concept of good behavior from life tenure.

Good behavior might not exist when justices vote largely along ideological lines, especially when those ideological lines betray a lack of independence from the political branches. Alternatively, the good behavior standard might have been embraced by the Framers on the premise Supreme Court justices would serve substantially shorter terms than they presently do. There may be other gambits as well that can serve to uncouple the good behavior clause from life tenure. If any of these rationales are persuasive to Congress, then eliminating life tenure and replacing it with something else, including the Calabresi-Lindgren proposal, would not require a constitutional amendment after all.

25. There are of course a handful of counterexamples, including Justice David Souter, who often voted with the so-called liberal wing of the Court despite being nominated by President George H.W. Bush and Justice Harry Blackmun, who also often voted with the so-called liberal wing despite being nominated by President Nixon. These counterexamples, however, serve largely to prove the rule.

III. WHAT THE FRAMERS MEANT BY “GOOD BEHAVIOR”

Both today and in the eighteenth century, life ends upon a person’s death. “Life,” therefore, has stable meaning, but “good behavior” does not.²⁶ Consequently, if the Framers had expressly provided for life tenure in Article III, then it would be more difficult to argue that altering or eliminating life tenure can be achieved by ordinary legislation. But the Framers did not so provide, so the central question (for purposes of answering whether life tenure can be done away with through ordinary legislation) is what the Framers meant by good behavior, and what they sought to accomplish with that phrase.²⁷

We can rule out the possibility that the Framers used the phrase “good behavior” as a euphemism for life tenure. Article II provides that the Vice President shall assume the duties of the presidency in the event

26. Like the meaning of the phrase “high crimes and misdemeanors,” the standard for removing a President through impeachment, the phrase “good behavior” has no perspicuous definition. Compare U.S. CONST. art. II, § 4 (addressing removal of President from office), with U.S. CONST. art. III, § 1 (providing Article III judges “shall hold their Offices during good Behavior”). Both phrases can be examined and parsed by reference to the common law, but, as is often the case, that examination and parsing is non-determinative. Indeed, Gouverneur Morris conceded the inscrutability of the phrase “good behavior.” See Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681, 701 (1979). For an analysis of the phrase “high crimes and misdemeanors,” see generally Laurence H. Tribe, *Defining High Crimes and Misdemeanors*, 67 GEO. WASH. L. REV. 712 (1999) (discussing the potentially broad context of the phrase). On constitutional opacity generally on these standards, see generally BERGER, *supra* note 2; William Bates III, *Vagueness in the Constitution: The Impeachment Power*, 25 STAN. L. REV. 908 (1973) (reviewing BERGER, *supra* note 2 and IRVING BRANT, *IMPEACHMENT: TRIALS AND ERRORS* (1972)).

We shall refer again to Raoul Berger’s argument that judges can be removed for reasons other than failing to adhere to good behavior. See BERGER, *supra* note 2. Berger’s argument was persuasively countered by Judge Irving R. Kaufman, *Chilling Judicial Independence*, 88 YALE L.J. 681 (1979).

27. In a sense, the meaning of good behavior was invented in the colonies and the states, because, at the time the Constitution was drafted, there appear to have been no English judges who had been removed using this criterion. And, in the U.S., the Congress has treated the phrase as similar to the high crimes and misdemeanors standard relevant for removing the president or vice-president. U.S. CONST. art. II, § 4.

According to the Federal Judicial Center, 15 federal judges have been impeached since the founding. Eight were convicted by the Senate and removed from office; the others resigned or were acquitted. In 1804, John Pickering, a federal judge in New Hampshire, was removed “on charges of mental instability and intoxication on the bench.” In 1862, during the Civil War, a federal judge in Tennessee was removed for “refusing to hold court and waging war against the U.S. government.” More recently, impeachments and convictions have focused on bribery and perjury. The only Supreme Court justice to be impeached was Samuel Chase. The House of Representatives accused him of “arbitrary and oppressive conduct of trials,” but the Senate acquitted him in 1805. Essentially, he was impeached for allowing his political views to influence his judicial decision-making, but the Senate viewed this rationale as flimsy. In a sense, therefore, the absence of a well-understood historical meaning for good behavior has facilitated the collapse of this standard into life tenure.

of the President’s “[d]eath, resignation, or [i]nability to discharge the Powers and Duties of the said Office.”²⁸ The Framers were not averse to identifying death as the end of someone’s term of office.

Hence, the Framers might have written that judges would hold their office during good behavior, until death. That formulation would have been redundant, and therefore excluded by ordinary canons of interpretation, if life tenure is inherent in the good behavior clause. But it is also possible the Framers intended to limit judicial terms to good behavior, while also anticipating that judges would not serve for the duration of their natural lives.

The records from the constitutional convention are not particularly illuminating, as the Framers spent very little time discussing the good behavior clause. Indeed, the issue was addressed only briefly on three separate days.

First, on July 17, 1787, the delegates considered whether to allow the “Executive Magistrate” to serve during good behavior, like judges. At this point during the Convention, the delegates were still considering the Virginia Plan, in which Congress would elect the chief executive for a 7-year term; the Electoral College idea had not yet been proposed. James McClurg, of Virginia, proposed replacing the 7-year term with “good behavior.”²⁹ His stated rationale was that “the independence of the Executive to be equally essential with that of the Judiciary department.”³⁰ McClurg’s reasoning suggests that the principal objective of the good behavior clause was insulation from politicization or political interference. In this context, such insulation is best understood to mean that the official (whether an Article III judge or the president) would exercise her or his best judgment, rather than merely reflect the will of the populace.³¹

28. U.S. CONST. art. II, § 1, cl. 5.

29. 2 MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787* at 33 (1911).

30. *Id.*

31. See *THE FEDERALIST NO. 78* (Alexander Hamilton) (“The complete independence of the courts of justice is peculiarly essential in a limited Constitution. . . . one which contains certain specified exceptions to the legislative authority Limitations of this kind can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.”). See also generally Bert Neuborne, *The Myth of Parity*, 90 HARV L. REV. 1105 (1977) (arguing for superiority of Article III judges over state court judges because of the supposed insulation of federal judges from political pressures). Indeed, citing Hamilton’s *The Federalist No. 76*, Professor Emery Lee has argued the Framers gave the appointment power to the president to insulate the process from partisanship, not anticipating how the president would, too, become part of partisan strife. Emery G. Lee III, *The Federalist in an Age of Faction: Rethinking Federalist No. 76 on the Senate’s Role*

George Mason, McClurg’s fellow Virginian, opposed McClurg’s motion, in part because it “[would] be impossible to define the misbehaviour in such a manner as to subject it to a proper trial; and perhaps still more impossible to compel so high an offender holding his office by such a tenure to submit to a trial.”³² Importantly, therefore, Mason did not disagree with McClurg that the overarching goal was to insulate Article III judges from political influence. Yet his opposition to McClurg’s proposal does supply the first instance of direct evidence that some of the Framers viewed good behavior akin to life, for he argued “an Executive during good behavior as a softer name only for an Executive for life. And that the next would be an easy step to hereditary Monarchy.”³³ In the end, McClurg’s motion failed.³⁴

Second, on July 20, the delegates discussed whether Congress should be allowed to impeach the chief executive.³⁵ Rufus King of Massachusetts was skeptical of allowing such impeachments, because—unlike judges—the chief executive would serve a limited term.³⁶ According to Madison’s notes, King argued that, unlike the President, judges would “hold their places not for a limited time, but during good behaviour.”³⁷ Of course, the delegates eventually did provide for the impeachment of the President (the chief executive), but King’s observation that “the Judiciary hold their places not for a limited time, but during good behaviour” is the second piece of direct evidence supporting the notion that the Framers equated good behavior with life service.

Third and finally, on August 27, John Dickinson of Delaware offered an amendment to permit removal of federal judges for reasons other than their violation of good behavior.³⁸ He proposed allowing the President to remove a judge upon request by both houses of Congress—a proposal that failed miserably.³⁹ Gouverneur Morris of New York and Edmund Randolph of Virginia both opposed Dickinson’s proposal, suggesting that making judges reliant on

in the Judicial Confirmation Process, 30 OHIO N. L. REV. 235 (2004). See also *Republican Party of Minn. v. White*, 736 U.S. 765, 788–92 (O’Connor, J., concurring) (noting that an unfortunate consequence of judicial elections is subjecting judges to ordinary political pressures).

32. FARRAND, *supra* note 29, at 34.

33. *Id.* at 32–33.

34. *Id.* at 33.

35. *Id.* at 56–59.

36. *Id.* at 58.

37. *Id.*

38. *Id.* at 340.

39. *Id.* at 335, 340 (noting that Dickinson’s proposal was rejected by a vote of seven to one).

continued approval of Congress would dilute their independence.⁴⁰ These statements are less directly supportive of the equivalence between life tenure and good behavior than King's or Mason's, but they do indicate the Framers' preeminent focus on safeguarding judicial independence.

Though the records from the constitutional convention pertaining to the standard for removing judges are thus rather thin, there is another source germane to determining the originalist understanding of good behavior. That source is the practices of the states. And in adopting the good behavior provision, the Framers largely followed the states' lead.⁴¹

At the time of the constitutional convention, Delaware, Massachusetts, Maryland, South Carolina, Virginia, and North Carolina had all codified the good behavior standard in their state constitutions. The Massachusetts constitution elaborated:

It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, [that] the judges of the supreme judicial court should hold their offices as long as they themselves behave well, and that they should have honorable salaries ascertained and established by standing laws.⁴²

In contrast, Pennsylvania and New Jersey had established seven-year terms for their state supreme court justices.⁴³ It may be relevant, however, that since the founding, life tenure for state judges has fallen out of favor. Today, only Rhode Island uses the good behavior standard.⁴⁴ Massachusetts and New Hampshire provide that state

40. *Id.* at 340.

41. The states in turn had followed England's 1701 Act of Settlement. See Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 135 (2003–04) (noting that the Act of Settlement provided that judges should serve during “good behavior (*quamdiu se bene gesserint*),” rather than at the “Crown's pleasure (*durante beneplacito*)”).

42. MASS. CONST. art. XXIX, pt. I (1780).

43. PA. CONST. § 23 (1776) (“The judges of the supreme court of judicature shall have fixed salaries, be commissioned for seven years only, though capable of re-appointment at the end of that term, but removable for misbehaviour at any time by the general assembly.”); N.J. CONST. art. XII (1776) (“[T]he Judges of the Supreme Court shall continue in office for seven years: the Judges of the Inferior Court of Common Pleas in the several counties, Justices of the Peace, Clerks of the Supreme Court, Clerks of the Inferior Court of Common Pleas and Quarter Sessions, the Attorney-General, and Provincial Secretary, shall continue in office for five years.”).

44. See R.I. CONST. art. X, § 5 (“Justices of the supreme court shall hold office during good behavior.”).

supreme court justices may serve until age 70.⁴⁵ All other states have term limits (generally 6-14 years), although judges can often be reappointed or re-elected.⁴⁶

In sum, although the original source material is not especially dense, one certain conclusion clearly emerges: The Framers had a single overriding concern, and that concern was judicial independence. They adopted a means of safeguarding that independence—the good behavior clause—already used in several states. The evidence, in short, is not that the Framers believed the good behavior clause had any specific meaning, or that it was tantamount to life tenure, but simply that they regarded this standard as one that would insure political insulation of the judicial branch.

Given the attention paid to confirmation of judges today, especially Supreme Court justices, it might seem strange that the Framers discussed judicial tenure and the meaning of good behavior so little.⁴⁷ The best explanation for this inattention to what is now such an important matter is that the Framers shared Hamilton’s view that the judiciary was the “least dangerous” branch.⁴⁸ Federal question jurisdiction was not explicitly conferred until the last quarter of the nineteenth century, and the notion of judicial activism (illustrated, for example, by the creation of substantive due process, which elicits such strident contemporary debate) did not yet exist. In light of the care and specificity with which the Framers treated Congress and the Executive (e.g., including minimum age qualifications and specific terms of office), it seems more likely that the Framers were relatively unconcerned with the length of judges’ tenure because the judicial branch was not all that powerful—not that life tenure itself carried inherent value.

Even Hamilton’s well-known *The Federalist* No. 78 is less a full-throated endorsement of life tenure than an embrace of judicial independence, and furthermore, the importance of a judicial check on

45. MASS. CONST. art. XCVIII, pt. I (1780); N.H. CONST. art. 78 (1776).

46. *State Supreme Courts*, BALLOTPEdia, https://ballotpedia.org/State_supreme_courts (last visited Feb. 13, 2021).

47. By way of contrast, the Framers spent considerable time on the issue of compensation. The delegates initially planned to prohibit both decreases and increases to judicial salaries, but Gouverneur Morris suggested permitting increases in pay—a suggestion initially opposed by Madison, who worried that the power to increase salaries could lead to undue influence over the judicial branch by Congress. Ultimately, Morris’s argument prevailed, and Article III does not preclude increases in judicial compensation.

48. See THE FEDERALIST NO. 78 (Alexander Hamilton) (“[T]he judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the constitution . . .”).

the political branches. As he said concerning the good behavior standard

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. And it is the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.⁴⁹

But despite the judiciary's important role as a counterweight to the political branches, it was inconceivable even to Hamilton that judges would play the role they have come to play. As he argued, judges "can take no active resolution whatever" and "depend upon the aid of the executive arm even for the efficacy of its judgments."⁵⁰ Hamilton's view of judicial impotence was obviously myopic, but that very myopia serves to explain why he and the Framers in Philadelphia simply did not devote much serious thought to the matter of judicial tenure.

IV. DOES ELIMINATING LIFE TENURE FOR SUPREME COURT JUSTICES REQUIRE A CONSTITUTIONAL AMENDMENT?

We set out to address whether Congress may lawfully enact term limits for Supreme Court justices, without the need to formally amend Article III. The answer to that question turns on whether the good behavior clause necessitates life tenure, absent some specific incident of "bad" behavior (whatever this might mean).⁵¹ Further, insofar as the good behavior clause aims to foster certain institutional characteristics of Article III judges, we have identified two specific data points as relevant to determining whether life tenure facilitates those characteristics. The first is the length Supreme Court justices now serve (as compared to how long the Framers could reasonably have

49. *Id.*

50. *Id.* Limits on the power of Article III judges to act are well known and include the case-or-controversy requirement and limits on justiciability including standing, ripeness, and mootness doctrines. The literature on justiciability and its limitations is vast. For a starting point, see generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (1963); Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961). For a more recent defense of robust justiciability doctrine, see generally RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* (1996).

51. See *supra* note 27.

anticipated they would serve); and the second is the increasing ideological polarization on the Court.

We can now answer our question by evaluating the significance of these two data points in light of six distinct propositions that emerge from the historical materials we have examined. The first three of these propositions rest on incontestable historical evidence; the second three of which are nearly as certain.

First, the Framers in Philadelphia spent relatively little time addressing judicial tenure. Second, while the Framers did not expressly embrace life tenure for Article III judges, there are several indications that they believed the good behavior clause would beget that very result. Third, they simultaneously adopted the good behavior standard not because it would mean life tenure, but because it would mean the judicial branch would retain independence from the political branches. That independence was the critical trait that the Framers intended the judicial branch to exhibit.

Fourth, the justices on the Supreme Court serve lengthier terms now than they did in the earlier periods of U.S. history. Fifth, the polarization on the Court is demonstrably more acute than it was in earlier periods. And sixth, judicial independence can more easily be achieved by a term of years than it can by the good behavior standard.

Of these propositions, the third, fifth, and sixth are the most crucial. The third is important because it captures the original purpose of including the good behavior clause in Article III: judicial independence. The fifth suggests that the Supreme Court is increasingly not independent of the political branches, because justices are neither nominated nor confirmed unless they exhibit a deep ideological affinity with a given political ideology.⁵² Indeed, to the extent that the good behavior clause originally aimed at safeguarding independence, and insofar as justices are increasingly not in fact independent, that dearth of independence implies that they are not exhibiting good behavior. Finally, term limits for Supreme Court justices, provided the lengths of those terms are of sufficient duration, would achieve at least the same degree of judicial independence accomplished by life tenure, without the accompanying cost of life tenure.

The key originalist fact is this: What the Framers sought to accomplish with the good behavior clause was judicial independence.

52. Lee, *supra* note 31, at 37–43.

Even if life tenure once achieved that objective, it no longer does so. On the contrary, life tenure, coupled with increased judicial polarization, entrenches political ideology in the Article III courts. In terms of insulating the judicial branch from ordinary politics, term limits could not fare any worse than life tenure, and there are therefore compelling policy reasons, grounded in originalism, for Congress to enact such limits.

Moreover, an act of Congress imposing such limits might well be an act of ordinary legislation no one would have standing to challenge.⁵³ It is also possible a congressional interpretation of the good behavior clause would be a political question not subject to review by an Article III court.⁵⁴ But putting these justiciability issues aside, if term limits are desirable, and a term that could maintain (or achieve) judicial independence could be agreed on, a committed originalist could embrace such a statute.

APPENDIX: SUPREME COURT JUSTICES, BY ERA OF APPOINTMENT

Note: Justices marked with an * served until their deaths. * denotes a justice who served up to 10 years before dying; *(1) denotes a justice who served 11-20 years before dying; *(2) denotes a justice who served 21–30 years before dying; *(3) denotes a justice who served more than 30 years before dying.

1. Founding Era, 1787–1810.

* James Wilson: He joined the Court at age 47 in 1789 and served for 8 years until his death in 1798.

John Jay (chief justice): He joined the Court at age 43 in 1789 and served for 5 years until his retirement in 1795.

John Blair: He joined the Court at age 58 in 1790 and served for 5 years until his resignation in 1795.

53. Addressing the issue of whether anyone would have standing to challenge term limits is beyond the scope of our analysis here, but it is by no means clear that anyone would suffer a concrete and particularized injury necessary to support constitutional standing. Indeed, even under the theory of so-called society rights one of us has advocated, it is not certain anyone would have standing to challenge a law enacting a term of years, because the societal right could be deemed to be an independent judge, rather than a judge who serves for life. *See generally* David R. Dow, *Standing and Rights*, 36 EMORY L.J. 1195 (1987) (arguing for citizen standing to vindicate so-called societal rights, i.e., those that, when abridged, necessarily impose a widely shared, non-particularized injury). There may be prudential standing barriers implicated as well. For an overview, *see generally* ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.3 (2d ed., 1994).

54. Addressing whether interpreting the good behavior clause involves a political question is likewise beyond the scope of our analysis here.

*(1) William Cushing: He joined the Court at age 57 in 1790 and served for 20 years until his death in 1810.

John Rutledge (interim chief justice): He joined the Court at age 50 in 1790 and served for 1 year until his resignation in 1791 to serve on a South Carolina court. He had previously served as Governor of South Carolina. President Washington re-appointed him to the Supreme Court as Chief Justice in 1795, but the Senate refused to confirm him. He did serve as interim Chief Justice for four months and remains the only justice to serve by “recess appointment.”

* James Iredell: He joined the Court at age 38 in 1790, appointed by President George Washington. He served for 9 years until his death in 1799.

Thomas Johnson: He joined the Court at age 59 in 1792, appointed by President George Washington. He served for less than one year until his resignation in 1793 due to health issues.

*(1) William Paterson: He joined the Court at age 47 in 1793, appointed by President George Washington. He served for 13 years until his death in 1806.

*(1) Samuel Chase: He joined the Court at age 54 in 1796, appointed by President George Washington. He served for 15 years until his death in 1811.

Oliver Ellsworth (chief justice): He joined the Court at age 50 in 1796, appointed by President George Washington. He served for 4 years until his resignation in 1800 due to health issues.

*(3) Bushrod Washington: He joined the Court at age 36 in 1798, appointed by President John Adams. He served for 31 years until his death in 1829.

Alfred Moore: He joined the Court at age 44 in 1800, appointed by President John Adams. He served for 3 years until his resignation in 1804.

*(3) John Marshall (chief justice): He joined the Court at age 45 in 1801, appointed by President John Adams. He served for 34 years until his death in 1835.

*(3) William Johnson: He joined the Court at age 32 in 1804, appointed by President Thomas Jefferson. He served for 30 years until his death in 1834.

*(1) Henry Brockholst Livingston: He joined the Court at age 49 in 1807, appointed by President Thomas Jefferson. He served for 16 years

until his death in 1823.

*(1) Thomas Todd: He joined the Court at age 42 in 1807, appointed by President Thomas Jefferson. He served for 18 years until his death in 1826.

2. The Jacksonian Era, 1810–1840.

Gabriel Duvall: He joined the Court at age 58 in 1811, appointed by President James Madison. He served for 23 years until his resignation in 1835 due to hearing loss.

*(3) Joseph Story: He joined the Court at age 32 in 1812, appointed by President James Madison. He served for 33 years until his death in 1845.

*(2) Smith Thompson: He joined the Court at age 55 in 1823, appointed by President James Monroe. He served for 20 years until his death in 1843.

* Robert Trimble: He joined the Court at age 49 in 1826, appointed by President John Quincy Adams. He served for 2 years until his death in 1828.

*(1) Henry Baldwin: He joined the Court at age 50 in 1830, appointed by President Andrew Jackson. He served for 14 years until his death in 1844.

*(3) John McLean: He joined the Court at age 45 in 1830, appointed by President Andrew Jackson. He served for 31 years until his death in 1861.

*(3) James M. Wayne: He joined the Court at age 45 in 1835, appointed by President Andrew Jackson. He served for 32 years until his death in 1867.

*(2) Roger B. Taney (chief justice): He joined the Court at age 59 in 1836, appointed by President Andrew Jackson. He served for 28 years until his death in 1864.

* Philip P. Barbour: He joined the Court at age 52 in 1836, appointed by President Andrew Jackson. He served for 4 years until his death in 1841.

*(2) John Catron: He joined the Court at age 51 in 1837, appointed by President Andrew Jackson. He served for 28 years until his death in 1865.

*(1) John McKinley: He joined the Court at age 57 in 1838, appointed by President Martin Van Buren. He served for 14 years until

his death in 1852.

3. Civil War and Reconstruction, 1840–1870.

*(1) Peter V. Daniel: He joined the Court at age 57 in 1842, appointed by President Martin Van Buren. He served for 18 years until his death in 1860.

*(2) Samuel Nelson: He joined the Court at age 52 in 1845, appointed by President John Tyler. He served for 27 years until his retirement in 1872.

* Levi Woodbury: He joined the Court at age 55 in 1845, appointed by President James K. Polk. He served for 5 years until his death in 1851.

Robert C. Grier: He joined the Court at age 52 in 1846, appointed by President James K. Polk. He served for 23 years until his retirement in 1870.

Benjamin R. Curtis: He joined the Court at age 41 in 1851, appointed by President Millard Fillmore. He served for 5 years until his resignation in 1857. (Notably, he resigned due to a conflict with Chief Justice Taney about the famous Dred Scott case.)

John A. Campbell: He joined the Court at age 41 in 1853, appointed by President Franklin Pierce. He served for 8 years until his resignation in 1861. (His status as a Southerner at the beginning of the Civil War essentially forced him to resign from the Court, even though he opposed secession and advocated against it.)

*(2) Nathan Clifford: He joined the Court at age 53 in 1858, appointed by President James Buchanan. He served for 23 years until his death in 1881.

Noah Swayne: He joined the Court at age 57 in 1862, appointed by President Abraham Lincoln. He served for 18 years until his retirement in 1881.

*(2) Samuel F. Miller: He joined the Court at age 46 in 1862, appointed by President Abraham Lincoln. He served for 28 years until his death in 1890.

*(1) David Davis: He joined the Court at age 47 in 1862, appointed by President Abraham Lincoln. He served for 14 years until his resignation in 1877.

Stephen J. Field: He joined the Court at age 46 in 1863, appointed by President Abraham Lincoln. He served for 34 years until his

retirement in 1897.

* Salmon P. Chase (chief justice): He joined the Court at age 56 in 1864, appointed by President Abraham Lincoln. He served for 8 years until his death in 1873.

4. The Technological Revolution, 1870–1900.

* William Strong: He joined the Court at age 61 in 1870, appointed by President Ulysses S. Grant. He served for 10 years until his retirement in 1880. (Notably, he retired while still in good health, partly to send a message to other ailing justices who were reluctant to step down.)

*(2) Joseph P. Bradley: He joined the Court at age 57 in 1870, appointed by President Ulysses S. Grant. He served for 21 years until his death in 1892.

Ward Hunt: He joined the Court at age 63 in 1873, appointed by President Ulysses S. Grant. He served for 9 years until his retirement due to disability in 1882.

*(1) Morrison R. Waite (chief justice): He joined the Court at age 57 in 1874, appointed by President Ulysses S. Grant. He served for 14 years until his death in 1888.

*(3) John Marshall Harlan (Harlan I): He joined the Court at age 44 in 1877, appointed by President Rutherford B. Hayes. He served for 33 years until his death in 1911.

* William B. Woods: He joined the Court at age 56 in 1881, appointed by President Rutherford B. Hayes. He served for 6 years until his death in 1887.

* Stanley Matthews: He joined the Court at age 56 in 1881, appointed by President James A. Garfield. He served for 7 years until his death in 1889.

*(2) Horace Gray: He joined the Court at age 53 in 1882, appointed by President Chester A. Arthur. He served for 20 years until his death in 1902.

*(1) Samuel Blatchford: He joined the Court at age 62 in 1882, appointed by President Chester A. Arthur. He served for 11 years until his death in 1893.

* Lucius Q.C. Lamar: He joined the Court at age 62 in 1888, appointed by President Grover Cleveland. He served for 5 years until his death in 1893.

* (2) Melville W. Fuller (chief justice): He joined the Court at age 55 in 1888, appointed by President Grover Cleveland. He served for 21 years until his death in 1910.

* (2) David J. Brewer: He joined the Court at age 52 in 1890, appointed by President Benjamin Harrison. He served for 20 years until his death in 1910.

* Henry B. Brown: He joined the Court at age 54 in 1891, appointed by President Benjamin Harrison. He served for 15 years until his retirement in 1906.

George Shiras, Jr: He joined the Court at age 60 in 1892, appointed by President Benjamin Harrison. He served for 10 years until his retirement in 1903.

* Howell E. Jackson: He joined the Court at age 60 in 1893, appointed by President Benjamin Harrison. He served for 2 years until his death in 1895.

* (2) Edward D. White (chief justice): He joined the Court as an associate justice at age 48 in 1894, appointed by President Grover Cleveland. In 1910, he was promoted to Chief Justice by President William Howard Taft. He served until his death in 1921. Justice White served on the Court for 27 years, including 10 years as Chief Justice.

* (1) Rufus Peckham: He joined the Court at age 57 in 1896, appointed by President Grover Cleveland. He served for 13 years until his death in 1909.

Joseph McKenna: He joined the Court at age 54 in 1898, appointed by President William McKinley. He served for 26 years until his retirement in 1925.

5. World War I Era, 1900–1930.

Oliver Wendell Holmes, Jr: He joined the Court at age 61 in 1902, appointed by President Theodore Roosevelt. He served for 29 years until his retirement in 1932.

William R. Day: He joined the Court at age 53 in 1903, appointed by President Theodore Roosevelt. He served for 19 years until his retirement in 1922.

William H. Moody: He joined the Court at age 52 in 1906, appointed by President Theodore Roosevelt. He served for 3 years until his retirement due to disability in 1910.

* Horace H. Lurton: He joined the Court at age 65 in 1910,

appointed by President William Howard Taft. He served for 4 years until his death in 1914.

Charles E. Hughes (chief justice): He initially joined the Court at age 48 in 1910, appointed by President William Howard Taft. He served for 5 years but resigned in 1916 to run for President. He rejoined the Court as Chief Justice in 1930, appointed by Herbert Hoover, and served for 11 years until his retirement in 1941.

Willis Van Devanter: He initially joined the Court at age 51 in 1911, appointed by President William Howard Taft. He served for 26 years until his retirement in 1937.

* Joseph R. Lamar: He initially joined the Court at age 53 in 1911, appointed by President William Howard Taft. He served for 4 years until his death in 1916.

Mahlon Pitney: He joined the Court at age 54 in 1912, appointed by President William Howard Taft. He served for 10 years until his resignation due to disability in 1922.

James C. McReynolds: He joined the Court at age 52 in 1914, appointed by President Woodrow Wilson. He served for 26 years until his retirement in 1941.

Louis D. Brandeis: He joined the Court at age 49 in 1916, appointed by President Woodrow Wilson. He served for 22 years until his retirement in 1939.

John H. Clarke: He joined the Court at age 59 in 1916, appointed by President Woodrow Wilson. He served for 5 years before resigning in 1922.

William Howard Taft (chief justice): He joined the Court at age 63 in 1921, appointed by President Warren G. Harding. He served for 8 years until his retirement in 1930. He had previously been President of the United States and remains the only U.S. Supreme Court Justice to have also been President.

George Sutherland: He joined the Court at age 60 in 1922, appointed by President Warren G. Harding. He served for 15 years until his retirement in 1938.

*(1) Pierce Butler: He joined the Court at age 56 in 1923, appointed by President Warren G. Harding. He served for 16 years until his death in 1939.

*(1) Edward T. Sanford: He joined the Court at age 57 in 1923, appointed by President Warren G. Harding. He served for 7 years until

his death in 1930.

*(2) Harlan Fiske Stone (chief justice): He joined the Court at age 52 in 1925, appointed by President Calvin Coolidge. In 1941, President Franklin D. Roosevelt promoted him to the Chief Justice position, which he retained until his death in 1946. Justice Stone served on the Supreme Court for 21 years total, including 4 years as Chief Justice.

6. World War II and the New Deal, 1930–1960.

Owen J. Roberts: He joined the Court at age 55 in 1930, appointed by President Herbert Hoover. He served for 15 years until his resignation in 1945.

* Benjamin N. Cardozo: He joined the Court at age 61 in 1932, appointed by President Herbert Hoover. He served for 6 years until his death in 1938.

Hugo L. Black: He joined the Court at age 51 in 1937, appointed by President Franklin D. Roosevelt. He served for 34 years until his retirement in 1971 due to stroke.

Stanley Reed: He joined the Court at age 53 in 1938, appointed by President Franklin D. Roosevelt. He served for 19 years until his retirement in 1957.

Felix Frankfurter: He joined the Court at age 56 in 1939, appointed by President Franklin D. Roosevelt. He served for 23 years until his retirement due to stroke in 1962.

William O. Douglas: He joined the Court at age 40 in 1939, appointed by President Franklin D. Roosevelt. He served for 36 years until his retirement in 1975 due to stroke.

* Frank Murphy: He joined the Court at age 49 in 1940, appointed by President Franklin D. Roosevelt. He served for 9 years until his death in 1949.

* James F. Byrnes: He joined the Court at age 59 in 1941, appointed by President Franklin D. Roosevelt. He served for 1 year before resigning in 1942.

*(1) Robert H. Jackson: He joined the Court at age 49 in 1941, appointed by President Franklin D. Roosevelt. He served for 13 years until his death in 1954.

* Wiley B. Rutledge: He joined the Court at age 48 in 1943, appointed by President Franklin D. Roosevelt. He served for 6 years until his death in 1949.

Harold Burton: He joined the Court at age 57 in 1945, appointed by President Harry S. Truman. He served for 13 years until his retirement in 1958.

* Fred M. Vinson (chief justice): He joined the Court as Chief Justice at age 56 in 1946, appointed by President Harry S. Truman. He served for 7 years until his death in 1953.

Tom C. Clark: He joined the Court at age 49 in 1949, appointed by President Harry S. Truman. He served for 17 years until his retirement in 1967.

Sherman Minton: He joined the Court at age 58 in 1949, appointed by President Harry S. Truman. He served for 7 years until his retirement in 1956 due to poor health.

Earl Warren (chief justice): He joined the Court as Chief Justice at age 62 in 1953, appointed by President Dwight D. Eisenhower. He served for 15 years until his retirement in 1969.

John Marshall Harlan (Harlan II): He joined the Court at age 55 in 1955, appointed by President Dwight D. Eisenhower. He served for 16 years until his retirement in 1971.

William J. Brennan: He joined the Court at age 50 in 1956, appointed by President Dwight D. Eisenhower. He served for 33 years until his retirement in 1990 due to health issues.

Charles E. Whittaker: He joined the Court at age 56 in 1957, appointed by President Dwight D. Eisenhower. He served for 5 years until his retirement due to disability in 1962.

Potter Stewart: He joined the Court at age 43 in 1958, appointed by President Dwight D. Eisenhower. He served for 22 years before retiring in 1981.

7. Civil Rights and the Space Age, 1960–1990.

Byron R. White: He joined the Court at age 44 in 1962, appointed by President John F. Kennedy. He served for 31 years until his retirement in 1993.

Arthur J. Goldberg: He joined the Court at age 54 in 1962, appointed by President John F. Kennedy. He served for 2 years until his resignation in 1965.

Abe Fortas: He joined the Court at age 55 in 1965, appointed by President Lyndon B. Johnson. He served on the Court for 3 years until his resignation in 1969.

Thurgood Marshall: He joined the Court at age 59 in 1967, appointed by President Lyndon B. Johnson. He served for 23 years until his retirement in 1991.

Warren E. Burger (chief justice): He joined the Court as Chief Justice at age 61 in 1969, appointed by President Richard Nixon. He served for 17 years until his retirement in 1986.

Harry A. Blackmun: He joined the Court at age 61 in 1970, appointed by President Richard Nixon. He served for 24 years until his retirement in 1994.

Lewis F. Powell: He joined the Court at age 64 in 1972, appointed by President Richard Nixon. He served for 15 years until his retirement in 1987.

*(3) William H. Rehnquist (chief justice): He joined the Court at age 47 in 1972, appointed by President Richard Nixon. In 1986, President Ronald Reagan promoted him to the Chief Justice position, which he held until his death in 2005. Justice Rehnquist spent 33 years on the Court, including 18 years as Chief Justice.

John Paul Stevens: He joined the Court at age 55 in 1975, appointed by President Gerald Ford. He served for 34 years until his retirement in 2010.

Sandra Day O'Connor: She joined the Court at age 51 in 1981, appointed by President Ronald Reagan. She served for 24 years until her retirement in 2006.

*(2) Antonin Scalia: He joined the Court at age 50 in 1986, appointed by President Ronald Reagan. He served for 29 years until his death in 2016.

Anthony M. Kennedy: He joined the Court at age 51 in 1988, appointed by President Ronald Reagan. He served for 30 years until his retirement in 2018.

8. Internet and Pandemic, 1990–2020.

David H. Souter: He joined the Court at age 51 in 1990, appointed by President George H.W. Bush. He served for 18 years until his retirement in 2009.

Clarence Thomas: He joined the Court at age 43 in 1991, appointed by President George H.W. Bush. As of March 2021, he has served for 29 years.

*(2) Ruth Bader Ginsburg: She joined the Court at age 60 in 1993,

appointed by President Bill Clinton. She served for 27 years until her death in 2020.

Stephen Breyer: He joined the Court at age 55 in 1994, appointed by President Bill Clinton. As of March 2021, he has served for 26 years.

John Roberts (chief justice): He joined the Court as Chief Justice at age 50 in 2005, appointed by President George W. Bush. As of March 2021, he has served for 15 years.

Samuel A. Alito: He joined the Court at age 55 in 2006, appointed by President George W. Bush. As of March 2021, he has served for 15 years.

Sonia Sotomayor: She joined the Court at age 55 in 2009, appointed by President Barack Obama. As of March 2021, she has served for 11 years.

Elena Kagan: She joined the Court at age 50 in 2010, appointed by President Barack Obama. As of March 2021, she has served for 10 years.

Neil Gorsuch: He joined the Court at age 49 in 2017, appointed by President Donald Trump. As of March 2021, he has served for 3 years.

Brett Kavanaugh: He joined the Court at age 53 in 2018, appointed by President Donald Trump. As of March 2021, he has served for 2 years.

Amy Coney Barrett: She joined the Court at age 48 in 2020, appointed by President Donald Trump. As of March 2021, she has served for less than one year.