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Proposals to Modify Supreme Court Justices' Tenure: Legal Considerations

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To insulate the federal judiciary from political influence, the Constitution specifies that Supreme Court Justices “shall hold their Offices during good Behaviour.” While the Constitution does not define “good Behaviour,” the prevailing interpretation is that Congress cannot remove Supreme Court Justices from office except via impeachment. Thus, under existing law and longstanding historical practice, Supreme Court Justices generally enjoy life tenure.

Some maintain that life tenure for Supreme Court Justices promotes important values, including judicial independence and expertise. Others support establishing age or term limits for Supreme Court Justices for various reasons, including regularizing judicial appointments and reducing the risk that failing health will negatively affect a Justice’s work. While many proposals to modify Supreme Court Justices’ tenure involve amending the Constitution, some maintain that Congress could impose term or age limits legislatively. While no court has yet considered that question directly, a court might conclude that the Constitution’s text, structure, and history prohibits legislative adjustments to judicial tenure.

If Congress chose to amend the Constitution to alter the Justices’ tenure, it would have to decide how to structure that amendment. For instance, Congress could consider whether to impose an age or a term limit, as well as how long the Justices’ tenure will last. These options pose various legal issues that Congress may explore. Besides modifying judicial tenure, Congress could also consider other ways to influence the Court’s composition and operations, such as changing the Court’s size.

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To safeguard judicial independence, the Constitution insulates the Supreme Court from certain forms of political influence.¹ Among other protections,² the Constitution guarantees that Supreme Court Justices “shall hold their Offices *during good Behaviour*”—a phrase the Supreme Court and the Constitution’s Framers have interpreted to prohibit Congress from removing Justices from office except by impeachment.³ Thus, under prevailing interpretations of the Constitution and longstanding historical practice, Supreme Court Justices enjoy life tenure.⁴

While some maintain that life tenure promotes desirable values like judicial independence and expertise, others criticize life tenure on various grounds.⁵ For instance, some argue that life tenure may allow older Justices to remain on the bench after failing health renders them unable to perform judicial duties. Others argue that allowing Justices to remain on the Court until they die or voluntarily retire causes judicial vacancies to arise at irregular intervals, causing unpredictability and political disruptiveness. Thus, some commentators propose term or age limits for Supreme Court Justices.

Though many observers agree that the Good Behavior Clause bars Congress from modifying Supreme Court Justices’ tenure without amending the Constitution, some maintain that Congress could impose term or age limits by ordinary legislation.⁶ While no court has yet considered that question directly, a court might conclude that the Constitution’s text, structure, and history prohibit legislative adjustments to judicial tenure.

This report discusses proposals to alter Supreme Court Justices’ tenure.⁷ The report first explains that, under current law and practice, Justices typically remain on the Court for life unless they retire voluntarily.⁸ The report then describes the debate over whether to modify Supreme Court Justices’ tenure, including proposals to impose term or age limits for the Supreme Court.⁹ While many of those proposals involve amending the Constitution, others would impose term or age limits legislatively. As the report explains, if Congress attempted to alter life tenure by ordinary legislation, a court might hold that legislation unconstitutional.¹⁰ The report then identifies issues Congress may consider if it opts to modify life tenure by amending the Constitution.¹¹ The report concludes by noting other ways Congress might influence the Court’s composition and operations.¹²

¹ See, e.g., THE FEDERALIST NO. 78 (Alexander Hamilton); THE FEDERALIST NO. 79 (Alexander Hamilton).

² See, e.g., U.S. CONST. art. III, § 1 (providing that Supreme Court Justices shall “receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”).

³ *Id.* (emphasis added). See also *infra* “Current Law and Practice.”

⁴ See *infra* “Current Law and Practice.”

⁵ See *infra* “The Debate over Life Tenure.”

⁶ See *infra* “Would Modifying Life Tenure by Ordinary Legislation Violate the Good Behavior Clause?”

⁷ While some of the issues this report discusses may apply to lower federal court judges, this report focuses on Supreme Court Justices exclusively.

⁸ See *infra* “Current Law and Practice.”

⁹ See *infra* “The Debate over Life Tenure.”

¹⁰ See *infra* “Would Modifying Life Tenure by Ordinary Legislation Violate the Good Behavior Clause?”

¹¹ See *infra* “Amending the Constitution.”

¹² See *infra* “Other Legislative Options.”

Current Law and Practice

When the Founders declared independence from England, they noted as one of their grievances against the King that he had “made Judges dependent on his Will alone, for the tenure of their offices.”¹³ Thus, when establishing the federal judiciary, the Constitution’s Framers decided to insulate judicial tenure from political control. For instance, Alexander Hamilton stated in the Federalist Papers that federal judges could not be expected to uphold constitutional limitations on the federal government or protect individuals’ rights if they held temporary office at the will of the political branches.¹⁴ Hamilton also argued that qualified jurists would be disinclined to join and remain on the federal bench unless they enjoyed life tenure.¹⁵

To that end, Article III of the Constitution provides that Supreme Court Justices “shall hold their Offices during good Behaviour.”¹⁶ Although the Constitution does not define “good Behaviour,”¹⁷ the Federalist Papers suggest that federal judges will be “secured in their places for life” so long as “they behave properly.”¹⁸ Likewise, the Supreme Court has stated repeatedly that federal judges enjoy life tenure and may not be removed from office except by impeachment.¹⁹

Because Congress has never removed a Supreme Court Justice by impeachment, Justices typically remain on the Court until they pass away or voluntarily leave the bench.²⁰ Existing law contemplates several ways a Justice may leave the Court voluntarily. *First*, Justices who satisfy

¹³ THE DECLARATION OF INDEPENDENCE (U.S. 1776). *See also, e.g.*, United States v. Hatter, 532 U.S. 557, 567-69 (2001).

¹⁴ *See* THE FEDERALIST NO. 78 (Alexander Hamilton) (“That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch with possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.”).

¹⁵ *See, e.g., id.* (“[A] temporary duration in office, which would naturally discourage [qualified jurists] from quitting a lucrative line of practice to accept a seat on the bench, would have a tendency to throw the administration of justice into hands less able, and less well qualified, to conduct it with utility and dignity.”).

¹⁶ U.S. CONST. art. III, § 1.

¹⁷ *See* Judith Resnik, *Judicial Selection and Democratic Theory: Demand, Supply, and Life Tenure*, 26 CARDOZO L. REV. 579, 639-40 (2005) (“The Constitution does not directly address the question of what ‘good Behaviour’ means.”).

¹⁸ THE FEDERALIST NO. 79 (Alexander Hamilton).

¹⁹ *See, e.g.*, United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 16 (1955) (explaining that Article III courts “are presided over by judges appointed for life, subject only to removal by impeachment”); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality opinion of Brennan, J.) (“The ‘good Behaviour’ Clause guarantees that Art[icle] III judges shall enjoy life tenure, subject only to removal by impeachment.”); United States v. Hatter, 532 U.S. 557, 567 (2001) (explaining that the Good Behavior Clause grants federal judges “the practical equivalent of life tenure”).

²⁰ *See, e.g.*, Daniel J. Meador, *Thinking About Age and Supreme Court Tenure*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 115 (2006) (“As a practical matter, only death or a voluntary act of the justice can terminate service on the Court.”); Todd C. Peppers & Chad M. Oldfather, *Till Death Do Us Part: Chief Justices and the United States Supreme Court*, 95 MARQ. L. REV. 709, 721 (2012) (explaining that the House of Representatives has impeached one Justice since the Constitution’s ratification, whom the Senate ultimately acquitted).

statutory age and length of service requirements may voluntarily *retire from judicial office*.²¹ Justices who do so cease performing judicial duties, but receive a salary for life.²²

Second, Justices who satisfy certain age and length of service requirements may *take senior status*—that is, retain judicial office, but retire from active service.²³ Senior Justices continue collecting a salary.²⁴ Senior Justices may not hear Supreme Court cases or vote on which cases the Court will accept,²⁵ but may hear cases in the intermediate federal courts of appeals and perform other judicial and administrative duties.²⁶ For instance, Retired Associate Justice David H. Souter frequently sits on the United States Court of Appeals for the First Circuit.²⁷ Despite having this opportunity to retire from active service with a full salary, Justices often remain in active service after they become eligible to take senior status,²⁸ and it is fairly common for Justices to remain in active service until death.²⁹

Third, Justices who become unable to perform the office's duties may *retire for disability*.³⁰ Justices who retire for disability after ten years continue receiving the same salary as their non-retired colleagues, while Justices who retire for disability after fewer than ten years receive half of that salary.³¹

Finally, a Justice who is ineligible to retire with a salary may *resign* from the Court.³² For instance, Justice Arthur Goldberg resigned after three years to become the Ambassador to the United Nations.³³

A President may not appoint a new Supreme Court Justice until a sitting Justice either dies, voluntarily leaves the Court, or is impeached and convicted.³⁴

²¹ See 28 U.S.C. § 371(a). See also *id.* § 371(c) (age and length of service requirements).

²² See *id.* § 371(a); David R. Stras & Ryan W. Scott, *Are Senior Judges Unconstitutional?*, 92 CORNELL L. REV. 453, 460-61 (2007).

²³ See 28 U.S.C. § 371(b). See also *id.* § 371(c) (age and length of service requirements).

²⁴ See *id.* § 371(b), (e).

²⁵ See *id.* § 294(d) (“No . . . designation or assignment [of retired Justices] shall be made to the Supreme Court.”); David R. Stras & Ryan W. Scott, *Retaining Life Tenure: The Case for a “Golden Parachute”*, 83 WASH. U. L.Q. 1397, 1465 (2005) [hereinafter Stras & Scott, *Golden Parachute*] (“Senior Justices . . . do not vote on certiorari petitions [or] sit by designation on the Court . . .”).

²⁶ See 28 U.S.C. §§ 294(a), 371(e)(1)(A)-(E).

²⁷ See, e.g., *Newton Covenant Church v. Great Am. Ins. Co.*, 956 F.3d 32 (1st Cir. 2020) (Souter, J.).

²⁸ See, e.g., Roger G. Cramton, *Reforming the Supreme Court*, 95 CAL. L. REV. 1313, 1318 (2007) (observing that Supreme Court Justices “only rarely take senior status when eligible to do so”).

²⁹ See, e.g., CRS Report R46550, *The Death of Justice Ruth Bader Ginsburg: Procedural Issues on an Eight-Justice Court*, by Caitlain Devereaux Lewis, at 1 (explaining that Justice Ruth Bader Ginsburg served on the Supreme Court for 27 years before passing away at age 87), and CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*, coordinated by Andrew Nolan and Brandon J. Murrill, at 1 (“Justice Antonin Scalia passed away unexpectedly at the age of 79, vacating a seat on the Supreme Court which he had held for nearly 30 years.”).

³⁰ 28 U.S.C. § 372(a).

³¹ *Id.*

³² See Lisa T. McElroy & Michael C. Dorf, *Coming Off the Bench: Legal and Policy Implications of Proposals to Allow Retired Justices to Sit by Designation on the Supreme Court*, 61 DUKE L.J. 81, 105 (2011).

³³ See, e.g., Charles D. Duskow, *The Juvenile Death Penalty: The Beat Goes On*, 24 J. JUV. L. 45, 56 (2004).

³⁴ See, e.g., 28 U.S.C. § 371(d) (“The President shall appoint, by and with the advice and consent of the Senate, a successor to a justice . . . who retires under this section.”); *id.* § 372(a) (“Any justice . . . of the United States appointed to hold office during good behavior who becomes permanently disabled from performing his duties may retire from regular active service, and the President shall, by and with the advice and consent of the Senate, appoint a successor.”).

The Debate over Life Tenure

Commentators have identified several values that life tenure may promote:

- *Judicial Independence*—Life tenure prevents the political branches from using the threat of removal to influence the Justices' decisions.³⁵ Requiring Justices to leave the bench before they want to retire could also encourage Justices to modify their rulings to curry favor with future employers and clients.³⁶
- *Doctrinal Stability*—Life tenure decelerates turnover on the Court, which may promote stability in Supreme Court precedent.³⁷
- *Judicial Experience*—Lifetime appointments give Justices more time to develop skills and expertise, which may improve the Court's decisionmaking.³⁸
- *Attracting and Retaining Qualified Candidates*—Life tenure may encourage highly qualified jurists to join and remain on the Court.³⁹

Others dispute that Supreme Court Justices should enjoy life tenure.⁴⁰ Opponents criticize life tenure on the following grounds:

- *Physical and Mental Decline*—Life tenure may result in older Justices remaining on the bench after failing health renders them unable to perform judicial duties.⁴¹
- *Strategic Retirements*—If Justices can choose when to retire, they may time their retirements so a President with similar ideological views would appoint their successor.⁴²

See also *id.* § 1 (“The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices . . .”).

³⁵ See, e.g., Mary L. Clark, *Judicial Retirement and Return to Practice*, 60 CATH. U. L. REV. 841, 888 (2011) (arguing that life tenure “promotes institutional independence because a high degree of security of tenure promotes the judiciary’s autonomy to review and interpret the law”).

³⁶ See, e.g., Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407, 446; William G. Ross, *The Hazards of Proposals to Limit the Tenure of Federal Judges and to Permit Judicial Removal Without Impeachment*, 35 VILL. L. REV. 1063, 1137 (1990).

³⁷ See Stras & Scott, *Golden Parachute*, *supra* note 25, at 1422 (arguing that life tenure “decelerates the rate of legal change”); Arthur D. Hellman, *Reining in the Supreme Court: Are Term Limits the Answer?*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 308-09 (2006) (predicting that “stare decisis would get even less respect on a Court whose membership was changing every two years”); Christopher Sundby & Suzanna Sherry, *Term Limits and Turmoil: Roe v. Wade’s Whiplash*, 98 TEX. L. REV. 121, 156 (2019) (suggesting that Supreme Court term limits could “destabilize important constitutional precedents” and “change the way that constitutional jurisprudence evolves by pushing it away from gradual shifts and towards more sudden jolts”).

³⁸ See, e.g., Clark, *supra* note 35, at 889; Ross, *supra* note 36, at 1087.

³⁹ See Clark, *supra* note 35, at 889; THE FEDERALIST NO. 78 (Alexander Hamilton).

⁴⁰ See, e.g., L.A. Powe, Jr., *Old People and Good Behavior*, 12 CONST. COMMENT. 195, 197 (1995) (characterizing life tenure for Supreme Court Justices as “the Framers’ greatest lasting mistake”).

⁴¹ See, e.g., David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 995 (2000) [hereinafter Garrow, *Mental Decrepitude*] (claiming that the Court’s history “is replete with repeated instances of [J]ustices casting decisive votes or otherwise participating actively in the Court’s work when their colleagues and/or families had serious doubts about their mental capacities”); Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 838 (2006) (arguing that “[l]imiting the length of service of any Justice to only eighteen years would reduce greatly the likelihood of a Justice continuing service on the Court despite incapacity”).

⁴² See, e.g., Calabresi & Lindgren, *supra* note 41, at 802; Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47

- *Judicial Inexperience*—Life tenure may encourage Presidents to nominate younger, less experienced jurists.⁴³
- *Irregular Vacancies*—If Justices remain on the Court until they die or voluntarily retire, judicial vacancies may arise at irregular intervals.⁴⁴ This may cause uncertainty and political disruptiveness, and may give different Presidents unequal opportunities to appoint Supreme Court Justices.⁴⁵
- *Political Unresponsiveness*—Life tenure may render Justices unresponsive to the electorate and prevailing social views.⁴⁶
- *Judicial Activism*—Life tenure may embolden Justices to behave more like policymakers than neutral arbiters.⁴⁷

Some who oppose life tenure support term limits for Supreme Court Justices.⁴⁸ Commentators have offered numerous Supreme Court term limit proposals that vary with respect to the term's length, whether the term would be renewable, whether Justices could continue to hear lower court cases after their terms expire.⁴⁹ The most common proposal is to limit Supreme Court Justices' terms to eighteen years.⁵⁰ That proposal would stagger Justices' terms so that one Justice would depart the bench every two years.⁵¹ Justices would receive a fixed salary for life after their terms expire.⁵² While retired Justices could continue hearing cases on the federal appellate courts, they would no longer rule on Supreme Court cases, or would only sit on the Supreme Court to fill a temporary vacancy.⁵³

OHIO ST. L.J. 799, 805 (1986).

⁴³ See, e.g., James E. DiTullio & John B. Schochet, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096 (2004); Calabresi & Lindgren, *supra* note 41, at 836-37.

⁴⁴ See, e.g., Calabresi & Lindgren, *supra* note 41, at 832-33.

⁴⁵ See, e.g., Cramton, *supra* note 28, at 1321 ("Because vacancies are uneven over time but sometimes are bunched, one President may make five appointments in a four-year term and others make none."); DiTullio & Schochet, *supra* note 43, at 1096.

⁴⁶ See, e.g., Michael J. Mazza, *A New Look at an Old Debate: Life Tenure and the Article III Judge*, 39 GONZ. L. REV. 131, 156 (2004) (arguing that "[r]otating offices helps a country's institutions stay in touch with the people whom they are supposed to serve"); Cramton, *supra* note 28, at 1321 ("[D]ecisions having great moment for the nation's future are made by Justices whose appointments came many years before and who may not be influenced by, or even knowledgeable about, the views of those voters who are members of generations other than that of the most elderly.");

⁴⁷ See, e.g., Calabresi & Lindgren, *supra* note 41, at 823; John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541-42 (1999); Saikrishna B. Prakash, *America's Aristocracy*, 109 YALE L.J. 541, 544 (1999).

⁴⁸ See, e.g., Calabresi & Lindgren, *supra* note 41, at 772; John Harrison, *The Power of Congress Over the Terms of Justices of the Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 373 (2006); Prakash, *supra* note 47, at 568; Oliver, *supra* note 42, at 800. See also Supreme Court Term Limits and Regular Appointments Act of 2020, H.R. 8424, 116th Cong. (2d Sess. 2020).

⁴⁹ See, e.g., Stephen B. Burbank, *Alternative Career Resolution II: Changing the Tenure of Supreme Court Justices*, 154 U. PA. L. REV. 1511, 1511 (2006).

⁵⁰ See, e.g., Calabresi & Lindgren, *supra* note 41, at 772; DiTullio & Schochet, *supra* note 43, at 1096-97; Powe, *supra* note 40, at 197; Oliver, *supra* note 42, at 800.

⁵¹ See, e.g., Calabresi & Lindgren, *supra* note 41, at 772; DiTullio & Schochet, *supra* note 43, at 1119; Powe, *supra* note 40, at 197.

⁵² See, e.g., Calabresi & Lindgren, *supra* note 41, at 843; Charles S. Collier, *The Supreme Court and the Principle of Rotation in Office*, 6 GEO. WASH. L. REV. 401, 424 (1938).

⁵³ See Calabresi & Lindgren, *supra* note 41, at 825; DiTullio & Schochet, *supra* note 43, at 1120 n.105; Collier, *supra* note 52, at 423.

Alternatively, some opponents of life tenure advocate a mandatory retirement age for Supreme Court Justices, rather than a term limit.⁵⁴

Would Modifying Life Tenure by Ordinary Legislation Violate the Good Behavior Clause?

Because Article III guarantees that Supreme Court Justices “shall hold their Offices during good Behaviour,”⁵⁵ many commentators agree that Congress could not impose a term or age limit for Supreme Court Justices without amending the Constitution.⁵⁶ However, some commentators dispute that modifying judicial tenure would require a constitutional amendment.⁵⁷ Emphasizing that Article III states that Justices “shall hold their Offices *during good Behaviour*” rather than “hold their Offices *for life*,” these scholars interpret the Good Behavior Clause as a protection from partisan impeachment, rather than a guarantee of life tenure.⁵⁸ According to these commentators, so long as Justices enjoy tenure that is long enough to guarantee their decisional independence, and so long as Justices may continue to exercise judicial duties on the lower courts for the rest of their lives after their term expires, congressional modifications to judicial tenure would not violate the Good Behavior Clause.⁵⁹

A court might reject that argument for several reasons. Beginning with the Constitution’s text,⁶⁰ it is not clear that a Justice barred from participating fully in the Court’s activities still “holds the Office” of Supreme Court Justice within the meaning of Article III.⁶¹ If that is correct, a court

⁵⁴ See, e.g., Garrow, *Mental Decrepitude*, *supra* note 41, at 1086-87 (proposing “a constitutional amendment mandating compulsory retirement at age seventy-five”).

⁵⁵ U.S. CONST. art. III, § 1.

⁵⁶ See, e.g., David J. Garrow, *Protecting and Enhancing the U.S. Supreme Court*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 278 (2006) [hereinafter Garrow, *Protecting and Enhancing*] (claiming that “the overwhelming consensus of the critical commentary . . . indicates that only a change in the Constitution itself could properly convert Justices of the Supreme Court into simply lesser Article III federal judges”). See also, e.g., Stras & Scott, *Golden Parachute*, *supra* note 25, at 1421 (“The Constitution prevents Congress from tinkering with life tenure through the ordinary legislative process.”); DiTullio & Schochet, *supra* note 43, at 1097 (“Ending life tenure would require a constitutional amendment.”).

⁵⁷ See, e.g., Cramton, *supra* note 28, at 1334; Alan B. Morrison, *Opting for Change in Supreme Court Selection, and for the Chief Justice, Too*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 209 (2006); Sanford Levinson, *Life Tenure and the Supreme Court: What Is To Be Done?*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 377 (2006).

⁵⁸ See, e.g., Levinson, *supra* note 57, at 379 (“[N]either the text nor the presumed purpose of [Article III] rules out the following argument: The ‘good behaviour’ clause guarantees that judges, *whatever their term of service*, cannot be removed from office for partisan political reasons that would, by definition, threaten the very idea of judicial independence . . . [O]ne could argue that the ‘good behaviour’ clause is a protection against partisan impeachment, but most definitely not an assignment of the office literally for life.”).

⁵⁹ See, e.g., Cramton, *supra* note 28, at 1334 (arguing that Congress could impose term limits legislatively so long as Justices whose terms expired continued to enjoy “life tenure on a constitutional court” and the term was “lengthy, fixed in time, non-renewable and [could not] be affected by the political branches of government”).

⁶⁰ See, e.g., NLRB v. New Vista Nursing & Rehab., 719 F.3d 203, 221 (3d Cir. 2013) (“When interpreting the Constitution, ‘we begin with its text.’”) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)).

⁶¹ See, e.g., Stras & Scott, *Golden Parachute*, *supra* note 25, at 1418 (arguing that “any plan that exiles Supreme Court Justices to the lower courts after serving a term of years or reaching a certain age would violate the Constitution” because “the essential powers and duties of a ‘judge’ include the power to adjudicate disputes that come before the court”); William Van Alstyne, *Constitutional Futility of Statutory Term Limits for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 391 (2006); Richard A. Epstein, *Mandatory Retirement for Supreme Court Justices*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 416

could find that precluding Supreme Court Justices from hearing Supreme Court cases solely because they have served for a specified number of years or reached a certain age to be tantamount to removing Justices from office for reasons other than their “Behaviour” in contravention of the Good Behavior Clause.⁶²

A court considering the constitutionality of a term or age limit might also examine the Constitution’s structure.⁶³ Article III grants the Supreme Court a unique constitutional status by differentiating the “inferior Courts”—that is, the lower federal courts created by Congress—from the “one supreme Court.”⁶⁴ Thus, a court might hold that a Justice barred from hearing cases on the “one supreme Court” and relegated to hearing cases on the “inferior Courts” no longer “holds the Office” of Supreme Court Justice under the Good Behavior Clause.⁶⁵

Historical sources also may suggest that Congress cannot modify life tenure by statute. For instance, courts often consult the Federalist Papers when interpreting the Constitution.⁶⁶ As discussed above, the Federalist Papers indicate that the Good Behavior Clause “secure[s] [Supreme Court Justices] in their places for life” to ensure their “complete independence” from the political branches.⁶⁷ Consequently, the Framers appear to have understood the Good Behavior Clause to preclude congressional modifications to judicial tenure.⁶⁸

Additionally, while no court has considered whether a term or age limit statute would be constitutional because Congress has never enacted one,⁶⁹ the Supreme Court has interpreted the Good Behavior Clause to guarantee life tenure and curb legislative influence over the federal judiciary.⁷⁰ Thus, existing precedent may counsel against an interpretation of Article III that would authorize Congress to affect judicial tenure legislatively.

(2006).

⁶² See Stras & Scott, *Golden Parachute*, *supra* note 25, at 1404, 1407 (arguing that “[w]hatever misbehavior meant at the founding, it did not include serving eighteen years on the bench or turning seventy”).

⁶³ See, e.g., *Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1656 (2020) (examining the Constitution’s structure as an aid to constitutional interpretation).

⁶⁴ See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested *in one supreme Court, and in such inferior Courts* as the Congress may from time to time ordain and establish.” (emphasis added)).

⁶⁵ See, e.g., Epstein, *supra* note 61, at 417 (“[Article III’s text] make[s] tolerably clear that the appointment for each judge is to a particular office, and that service in that office is what is guaranteed for the length of good behavior. The Constitution’s reference to judges on both the Supreme and inferior courts suggests that judges are appointed to a single position, and not to the bench”); Stras & Scott, *Golden Parachute*, *supra* note 25, at 1418 (arguing that “[b]ecause the essential powers and duties of a ‘judge’ include the power to adjudicate disputes that come before the court, any plan that exiles Supreme Court Justices to the lower courts after serving a term of years or reaching a certain age would violate the Constitution”); Calabresi & Lindgren, *supra* note 41, at 865 (arguing that the Constitution “contemplates a separate office of Supreme Court Justice to which individuals must be appointed for life and not merely for eighteen years”).

⁶⁶ See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1127 (2016).

⁶⁷ THE FEDERALIST NO. 78 (Alexander Hamilton); THE FEDERALIST NO. 79 (Alexander Hamilton). See also *United States v. Hatter*, 532 U.S. 557, 567 (2001) (explaining that granting federal judges “the practical equivalent of life tenure . . . helps to guarantee what Alexander Hamilton called the ‘complete independence of the courts of justice’”). See also *supra* “Current Law and Practice.”

⁶⁸ See, e.g., Stras & Scott, *Golden Parachute*, *supra* note 25, at 1402-03 (“The debate at the founding gives no indication that Congress enjoys the power to modify life tenure. For example, Alexander Hamilton in the Federalist Papers and the author of the ‘Brutus’ essays disagreed sharply over the virtues of life tenure, but neither doubted that the proposed Constitution required it.”); Van Alstyne, *supra* note 61, at 390 (arguing that the founding generation would not have interpreted Article III to allow term limits).

⁶⁹ See, e.g., *Burbank*, *supra* note 49, at 1512-13.

⁷⁰ See *supra* note 19 and accompanying text.

Some commentators argue that the Supreme Court's 1803 decision in *Stuart v. Laird* supports the constitutionality of a term or age limit statute.⁷¹ In *Stuart*, the Court considered whether the Constitution authorized Congress to require Supreme Court Justices to “ride circuit”—that is, spend a portion of each year hearing lower federal court cases.⁷² The Court held that because the earliest Congresses had required Justices to ride circuit since the nation's founding, longstanding acquiescence eliminated any doubts about the practice's constitutionality.⁷³ According to some term limit proponents, if Congress can require Supreme Court Justices to spend a portion of *each year* hearing lower court cases, Congress could require Justices to spend the *final years of their judgeships* hearing lower court cases exclusively.⁷⁴

Stuart does not appear to support that proposition, however.⁷⁵ Whereas the early Justices would perform circuit-riding duties in addition to hearing Supreme Court cases,⁷⁶ most term limit proposals would prevent Justices from ever hearing Supreme Court cases again, or would only allow retired Justices to hear Supreme Court cases to fill a vacancy on the Court.⁷⁷ As discussed, it is questionable whether a Justice barred from participating in most of the Court's decisionmaking still “holds the office” of Supreme Court Justice under the Good Behavior Clause.⁷⁸ Also, whereas the *Stuart* Court emphasized that Congress had required the Justices to ride circuit since the nation's founding,⁷⁹ Congress has never required Justices to sit on the lower courts *exclusively* after a specified term.⁸⁰ Because the Supreme Court has indicated that legislative actions without historical precedent are particularly likely to be unconstitutional,⁸¹ the

⁷¹ See Cramton, *supra* note 28, at 1333-34.

⁷² See 1 Cranch 299 (1803). See generally David R. Stras, *Why Supreme Court Justices Should Ride Circuit Again*, 91 MINN. L. REV. 1710 (2007) (discussing circuit riding); Steven G. Calabresi & David C. Presser, *Reintroducing Circuit Riding: A Timely Proposal*, 90 MINN. L. REV. 1386 (2006) (same); Joshua Glick, *On the Road: The Supreme Court and the History of Circuit Riding*, 24 CARDOZO L. REV. 1753 (2003) (same).

⁷³ See 1 Cranch at 309 (“Another reason for reversal is, that the judges of the supreme court have no right to sit as circuit judges, not being appointed as such, or in other words, that they ought to have distinct commissions for that purpose. To this objection, which is of recent date, it is sufficient to observe, that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer, and has indeed fixed the construction.”).

⁷⁴ See Cramton, *supra* note 28, at 1333-34.

⁷⁵ See, e.g., Van Alstyne, *supra* note 61, at 395 (emphasizing that the constitutionality of term limits was not “before the Court” in *Stuart*).

⁷⁶ See, e.g., Glick, *supra* note 72, at 1797.

⁷⁷ See *supra* “The Debate over Life Tenure.”

⁷⁸ See Calabresi & Lindgren, *supra* note 41, at 863 (“[*Stuart*] suggests that Supreme Court Justices can in the same year have duties on both the Supreme and inferior federal courts. It does not necessarily suggest that one can further carve up a Justice's total term and allocate the first eighteen years of it to Supreme Court business and the remainder to lower federal court cases.”); Van Alstyne, *supra* note 61, at 394-95 (arguing that “nothing about [*Stuart*] suggests that should Congress so desire, it might also impose some fixed limit to a Supreme Court justice's full and equal participation in the business of that Court, excluding them thereafter from all essential powers to be exercised by that Court, and switch them to . . . duties on some circuit or some district court or courts, until such time as they might thereafter resign, retire, die, or be impeached”). See also *supra* notes 60-65 and accompanying text.

⁷⁹ See 1 Cranch at 309.

⁸⁰ See, e.g., Judith Resnik, *Democratic Responses to the Breadth of Power of the Chief Justice*, in REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES 181 (2006); Epstein, *supra* note 61, at 416.

⁸¹ Cf., e.g., *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) (“Perhaps the most telling indication of [a] severe constitutional problem . . . is [a] lack of historical precedent’ to support it.” (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010))).

lack of historical precedent for statutory term and age limits may counsel against their constitutionality.⁸²

Amending the Constitution

Thus, if Congress opts to modify Supreme Court Justices' tenure, the most legally sound route would be to amend the Constitution. Congress may propose constitutional amendments by a two-thirds vote of both houses of Congress.⁸³ An amendment proposed in this way becomes effective if three fourths of the states vote to ratify it.⁸⁴

If Congress proposed such an amendment, it would have to choose whether to impose a *term* limit, an *age* limit, or some other modification to life tenure. The option Congress selects could depend on its policy goals. For instance, if Congress's primary reason for modifying life tenure is to regularize Supreme Court vacancies, it might prefer terms that expire at fixed intervals.⁸⁵ By contrast, if Congress's primary concern is the risk that older Justices may remain on the bench after failing health renders them unable to perform judicial duties, it might prefer a mandatory retirement age.⁸⁶

Term Limit Considerations

If Congress decided to limit Justices' terms, it would have to select that term's length. Scholars have proposed terms of varying durations ranging from six months to twenty years.⁸⁷ As discussed, the most common proposal is an eighteen-year term that creates a vacancy every two years.⁸⁸ While some maintain that shorter terms could encourage judicial restraint, others contend that shorter terms could undermine judicial independence.⁸⁹

Because the Constitution does not specify how many Justices the Court will have,⁹⁰ staggered terms present unique practical considerations. Although a federal statute presently sets the Court's

⁸² See, e.g., Stras & Scott, *Golden Parachute*, *supra* note 25, at 1402-03 (arguing that “[t]he historic presumption should . . . cut strongly against a long-dormant congressional power to create term limits or a mandatory retirement age for federal judges”).

⁸³ See U.S. CONST. art. V (“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution . . .”). See also *id.* (authorizing “the Legislatures of two thirds of the several States” to “call a Convention for proposing amendments”).

⁸⁴ See *id.* (providing that amendments “shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress”).

⁸⁵ See *supra* note 44-45 and accompanying text.

⁸⁶ See *supra* note 41 and accompanying text.

⁸⁷ See, e.g., L.H. Larue, “Neither Force Nor Will”, 12 CONST. COMMENT. 179, 182 (1995) (proposing 10-15 year terms); Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202, 1212 (1988) (advocating 15-20 year terms); Collier, *supra* note 52, at 419 (supporting terms of “twelve years or less”). Cf. McGinnis, *supra* note 47, at 541, 546 (proposing that “federal judges sitting on the inferior courts of the United States” be “randomly assigned to the Supreme Court for short periods, such as six months or a year”).

⁸⁸ See *supra* “The Debate over Life Tenure.”

⁸⁹ Compare, e.g., McGinnis, *supra* note 47, at 542 (arguing that judges who served on “the Supreme Court only for a short time” would be “more likely to treat constitutional issues and other momentous decisions” like “quotidian matters”), with, e.g., DiTullio & Schochet, *supra* note 43, at 1129 (maintaining that “shorter nonrenewable terms (six years, for instance)” could “increase the risk of justices seeking to curry favor with potential post-Court employers”).

⁹⁰ See CRS Legal Sidebar LSB10562, “Court Packing”: Legislative Control over the Size of the Supreme Court, by Joanna R. Lampe. See also U.S. CONST. art. III.

membership at nine Justices,⁹¹ Congress has changed the Court's size various times, and could conceivably do so again.⁹² For mathematical reasons, proposals to establish staggered, eighteen-year terms that create a vacancy every two years may not operate as intended if the Court does not have nine Justices.⁹³ Thus, if Congress amended the Constitution to impose term limits, it might consider also amending the Constitution to prohibit changes to the Court's size, or creating variable terms that change depending on the Court's size to try to ensure that only one vacancy arises every two years.

Another question is whether the terms should be renewable. While many term limit proposals would establish nonrenewable terms,⁹⁴ others would permit the President to reappoint Justices after their terms expire.⁹⁵ While some commentators claim that the prospect of reappointment would make Justices more productive and responsive to the electorate,⁹⁶ others argue that opportunities for reappointment would encourage Justices to alter their votes to appease the appointing President.⁹⁷

Age Limit Considerations

Establishing a mandatory retirement age for Supreme Court Justices would implicate different considerations. For instance, while a mandatory retirement age could mitigate aging's effects on the Court, it could incentivize Presidents to appoint younger, less experienced nominees.⁹⁸

Some have argued that amending the Constitution to impose a *specific* maximum age could be shortsighted, as future medical advances could increase life expectancies or reduce the incidence of disabling health conditions in older populations.⁹⁹ Thus, Congress might explore amending the Constitution to authorize Congress to set the mandatory retirement age by statute. However, if the Constitution permitted Congress to change the mandatory retirement age by ordinary legislation, future Congresses might modify the maximum age when it approves or disapproves of the Court's composition—a result that could introduce additional political considerations into the appointment process.¹⁰⁰

⁹¹ See 28 U.S.C. § 1 (“The Supreme Court shall consist of a Chief Justice of the United States and eight associate justices . . .”).

⁹² See Lampe, *supra* note 90.

⁹³ See DiTullio & Schochet, *supra* note 43, at 1146 n.178.

⁹⁴ See, e.g., *id.* at 1127-28; Powe, *supra* note 40, at 197.

⁹⁵ See Prakash, *supra* note 47, at 568.

⁹⁶ See *id.* at 571 (“Presidents would not bother attempting to reappoint lazy, senile, or incompetent judges.”); *id.* at 576 (“[T]he representative branches and the people should hold judges accountable for their failures and faults by declining to reappoint . . . them.”).

⁹⁷ See, e.g., Oliver, *supra* note 42, at 826; DiTullio & Schochet, *supra* note 43, at 1127.

⁹⁸ See *supra* notes 41, 43, and accompanying text.

⁹⁹ See, e.g., Calabresi & Lindgren, *supra* note 41, at 840 (“[I]t is a mistake in general to write numbers into the Constitution because they can become obsolete with the passage of time . . . It seems quite possible that in fifty or one hundred years a mandatory retirement age of seventy or even seventy-five might seem absurdly young if people were routinely living to be over 100.”).

¹⁰⁰ Cf. Harrison, *supra* note 48, at 372 (arguing that if Congress could modify life tenure by statute, Congress might engage in “gamesmanship” by granting Justices life tenure when it approves of the Court's composition and then imposing tenure limits when it disapproves of the Court's membership).

Other Legislative Options

As an alternative to age or term limits, some scholars advocate retaining life tenure but creating stronger incentives for Justices to retire voluntarily.¹⁰¹ While these commentators maintain that life tenure promotes doctrinal stability and judicial independence, they also recognize that life tenure creates a risk that older Justices may remain on the Court after they are unable to perform judicial duties.¹⁰² Thus, these scholars advocate encouraging Justices to retire earlier by increasing their pensions.¹⁰³ Because this proposal still would allow Justices to choose when to retire, it may not require a constitutional amendment to implement.¹⁰⁴ Congress also could consider encouraging earlier retirement in other ways. For example, some have advocated making long service on the Court less attractive by increasing the Justices' workload, such as by reestablishing the discontinued circuit-riding requirement¹⁰⁵ or by reducing how many law clerks Justices may hire.¹⁰⁶

As other CRS products explain in greater depth, Congress might be able to influence the Supreme Court's composition and operations by other means. For instance, as mentioned above, Congress enjoys at least some power to set the Supreme Court's size.¹⁰⁷ The Constitution also grants Congress some authority to delimit the Court's appellate jurisdiction, although the constitutional boundaries of that authority remain uncertain.¹⁰⁸ Additionally, the judicial confirmation process lets the Senate influence which nominees join the Court.¹⁰⁹

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¹⁰¹ See, e.g., Clark, *supra* note 35, at 856; Stras & Scott, *Golden Parachute*, *supra* note 25, at 1439.

¹⁰² See Stras & Scott, *Golden Parachute*, *supra* note 25, at 1422, 1424, 1437.

¹⁰³ See, e.g., Clark, *supra* note 35, at 890; Stras & Scott, *Golden Parachute*, *supra* note 25, at 1402; Kevin T. McGuire, *Are the Justices Serving Too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8, 15 (2005). See also *supra* "Current Law and Practice" (discussing existing laws governing pensions for retired Justices).

¹⁰⁴ See Stras & Scott, *Golden Parachute*, *supra* note 25, at 1461 (arguing that this proposal would "not require a constitutional amendment").

¹⁰⁵ See Stras, *supra* note 72, at 1734; Calabresi & Presser, *supra* note 72, at 1416. See also *supra* note 72 and accompanying text.

¹⁰⁶ See Garrow, *Protecting and Enhancing*, *supra* note 56, at 285.

¹⁰⁷ See Lampe, *supra* note 90.

¹⁰⁸ See U.S. CONST. art. III, § 2 ("In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, *with such Exceptions, and under such Regulations as the Congress shall make.*" (emphasis added)). See generally, e.g., CRS Report R44967, *Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein*, coordinated by Kevin M. Lewis.

¹⁰⁹ See U.S. CONST. art. II, § 2 (specifying that the President "shall nominate, and *by and with the Advice and Consent of the Senate*, shall appoint . . . Judges of the supreme Court" (emphasis added)). See generally, e.g., CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

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