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Supreme Court Politics and Life Tenure: A Comparative Inquiry

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Notes

Supreme Court Politics and Life Tenure: A Comparative Inquiry

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While the process of nominating and confirming justices to the U.S. Supreme Court has always been political in nature, the three most recent nominations of Merrick Garland, Neil Gorsuch, and Brett Kavanaugh illustrate the extent to which the confirmation process has become especially partisan. Whereas the nominations of Antonin Scalia and Ruth Bader Ginsburg each received broad, bipartisan support, no nominee since Stephen Breyer has received more than eighty votes in the Senate. Furthermore, for the first time since 2004, the economy is not the political issue that voters are most likely to consider "very important;" that designation now belongs to the composition of the Supreme Court.

To ease the high-stakes, partisan attitudes that currently define Supreme Court confirmations, this Note advocates for a 28th Amendment, limiting Supreme Court tenure to eighteen-year terms. In doing so, it considers the experiences of countries that have similar confirmation processes but place limits on judicial tenure. Broadly speaking, there are two types of limits on judicial tenure. The first approach is that of a mandatory retirement age, which Brazil adopted in 1891. Brazil's experience, which has been characterized by massive disparities in appointment power among the different presidents, cautions against such an approach. The second approach is that of a "term of years" limit. Mexico adopted fifteen-year term limits in 1994, and the results have generally been encouraging. However, like Brazil, there remains some disparity among various Mexican presidents in their appointment power, fueled in part by the limits placed on judicial tenure. This disparity could be remedied by adopting the eighteen-year proposal advocated by Professors Steven Calabresi and James Lindgren, as opposed to fifteen-year terms, as this would guarantee each president at least two opportunities to nominate a Justice.

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INTRODUCTION

In the United States, there seems to be broad agreement that political partisanship has damaged the Supreme Court confirmation process.[1] Historically, the judiciary has been regarded as the "least dangerous" branch of the federal government.[2] In the past, this understanding has afforded nominees a certain degree of insulation from the political process.[3] This is not to say that the Senate has historically been unduly deferential to the president's nominations or that the nomination process has never been political.[4] However, the "bipartisan spirit" with which the Senate treated the nominations of Antonin Scalia and Ruth Bader Ginsburg has largely faded in the twenty-first century.[5] In fact, no Supreme Court nominee has received eighty votes in the Senate since Stephen Breyer's confirmation in 1994.[6] The trend towards more "hyper-partisan" confirmation battles is perhaps best illustrated by the three most recent Supreme Court nominations.[7]

In the last year of his second term, President Barack Obama nominated Merrick Garland to the Court after Justice Scalia's death.[8] Garland was, by all accounts, "well-qualified" for the job.[9] Accordingly, when Senate Majority

1. *See, e.g.*, Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 381–82 (2010) ("Conventional wisdom says that the confirmation process for Supreme Court Justices is now terribly broken. . . . The common refrain is that 'if only we could get back to the way we did things in the past, the process would be so much better.'").

2. THE FEDERALIST NO. 78 (Alexander Hamilton).

3. *See, e.g.*, Joel K. Goldstein, *Choosing Justices: How Presidents Decide*, 26 J.L. & POL. 425, 488–89 (2011) ("There were no hearings to consider the nominations of Byrnes, Rutledge and Burton in the 1940s and 1950s; the Senate spent only one day and between 23 and 58 pages of hearings on the nominations of Minton, Whittaker, Byron White[,] and Fortas (1965). Even the nominations of Burger in 1969 and Blackmun in 1970 required a single day and only 116 and 134 pages respectively.").

4. *See, e.g.*, Andrew Glass, *Senate Rejects Chief Justice Nominee, Dec. 15, 1795*, POLITICO (Dec. 15, 2016, 12:01 AM), https://www.politico.com/story/2016/12/senate-rejects-chief-justice-nominee-dec-15-1795-232510 (discussing the Federalist-dominated Senate's rejection of President Washington's nomination of John Rutledge for the position of Chief Justice, motivated in large part by Rutledge's opposition to the Jay Treaty).

5. Mel Leonor, *Ginsburg Calls for Return of "Bipartisan Spirit" to Judicial Confirmations*, POLITICO (May 21, 2018), https://www.politico.com/story/2018/05/21/ruth-bader-ginsburg-bipartisan-judicial-confirmations-601835.

6. Stephen Breyer was confirmed in 1997 by a vote of eighty-seven to nine. *See Supreme Court Nominations (Present–1789)*, U.S. SENATE, https://www.senate.gov/legislative/nominations/SupremeCourt Nominations1789present.htm (last visited Apr. 15, 2020). John Roberts was confirmed in 2005 by a vote of seventy-eight to twenty-two. *Id.* Harriet Miers did not receive a vote. *Id.* Samuel Alito was confirmed in 2006 by a vote of fifty-eight to forty-two. *Id.* Sonia Sotomayor was confirmed in 2009 by a vote of sixty-eight to thirty-one. *Id.* Elena Kagan was confirmed in 2010 by a vote of sixty-three to thirty-seven. Merrick Garland did not receive a vote. *Id.* Neil Gorsuch was confirmed in 2017 by a vote of fifty-four to forty-five. *Id.* Brett Kavanaugh was confirmed in 2018 by a vote of fifty to forty-eight. *Id.*

7. *See generally* Jessica Yarvin & Daniel Bush, *Is the Hyper-Partisan Supreme Court Confirmation Process "The New Normal?,"* PBS NEWSHOUR (Sept. 13, 2018, 4:51 PM), https://www.pbs.org/newshour/nation/is-the-hyper-partisan-supreme-court-confirmation-process-the-new-normal.

8. Michael D. Shear et al., *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), https://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html.

9. KAROL CORBIN WALKER, CHAIR, ABA STANDING COMM. ON THE FED. JUDICIARY, STATEMENT OF WALKER CONCERNING THE NOMINATION OF THE HONORABLE MERRICK B. GARLAND TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (2016), https://www.americanbar.org/

Leader Mitch McConnell announced that the Senate would not hold confirmation hearings for Garland, his explanation was strictly political.[10] McConnell never raised objections to Garland's qualifications, temperament, or judicial philosophy; instead, he expressed a preference for "let[ting] the American people decide," as opposed to a "lame duck President."[11] In other words, McConnell explicitly rejected the notion that the confirmation process is beyond the scope of partisan politics. Garland never received a hearing or vote, and his nomination expired at the end of President Obama's second term.[12]

When President Donald Trump nominated Neil Gorsuch to the same seat, virtually all parties acknowledged that Gorsuch, like Garland, was eminently qualified for the position.[13] However, Senate Democrats, embittered by the Republicans' treatment of Garland, voted overwhelmingly against the nominee, and the final vote to confirm Gorsuch (fifty-four to forty-five) fell largely along party lines.[14]

Finally, when President Trump nominated Brett Kavanaugh to the Court to replace Justice Anthony Kennedy who had retired, the confirmation process was partisan from the outset, both with respect to Kavanaugh's jurisprudence and to the availability of certain documents from Kavanagh's tenure in the Bush Administration.[15] However, the process became more political still after Christine Blasey Ford came forward with an allegation that Kavanaugh had sexually assaulted her in high school.[16] After hearing testimony from Ford and Kavanaugh and opening a second background check on the allegations,[17] the

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content/dam/aba/uncategorized/GAO/2016jun21_garlandstatement.authcheckdam.pdf (rating Merrick Garland "Well Qualified" to serve on the Supreme Court).

10. Amita Kelly, *McConnell: Blocking Supreme Court Nomination "About a Principle, Not a Person*," NAT'L PUB. RADIO (Mar. 16, 2016, 12:31 PM), https://www.npr.org/2016/03/16/470664561/mcconnell-blocking-supreme-court-nomination-about-a-principle-not-a-person.

11. *Id*.

12. *See* Amy Howe, *Garland Nomination Officially Expires*, SCOTUSBLOG (Jan. 3, 2017, 6:47 PM), https://www.scotusblog.com/2017/01/garland-nomination-officially-expires.

13. NANCY SCOTT DEGAN, CHAIR, ABA STANDING COMM. ON THE FED. JUDICIARY, STATEMENT OF DEGAN CONCERNING THE NOMINATION OF THE HONORABLE NEIL GORSUCH TO BE ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES (2017), https://www.americanbar.org/content/dam/aba/uncategorized/GAO/Gorsuch%20Statement%20submitted%203%2019%202017F.authcheckdam.pdf (rating Neil Gorsuch "Well Qualified" to serve on the Supreme Court).

14. Roll Call Vote 115th Congress—1st Session, SENATE.GOV, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=1&vote=00111 (last visited Apr. 15, 2020) (showing a summary of the nomination vote for Justice Neil M. Gorsuch).

15. *See* Michael D. Shear et al., *Kavanaugh Ducks Questions on Presidential Powers and Subpoenas*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/us/politics/brett-kavanaugh-hearing.html; *see also* Sheryl Gay Stolberg, *White House Withholds 100,000 Pages of Judge Brett Kavanaugh's Records*, N.Y. TIMES (Sept. 1, 2018), https://www.nytimes.com/2018/09/01/us/politics/kavanaugh-records.html.

16. *See* Robert Barnes et al., *Acrimony, Resolve After Kavanaugh and Ford Testify with Nomination Hanging in the Balance*, ANCHORAGE DAILY NEWS (Sept. 27, 2018), https://www.adn.com/nation-world/2018/09/28/acrimony-resolve-after-kavanaugh-and-ford-testimony-as-nomination-hangs-in-balance ("The warring accounts from Kavanaugh and his accuser . . . gripped the country and intensified what will be one of the most fraught confirmation votes in history.").

17. *See* Noor Wazwaz et al., *Trump Orders Limited FBI Investigation to Supplement Kavanaugh Background Check*, NAT'L PUB. RADIO (Sept. 28, 2018, 7:55 AM),

Senate ultimately voted to confirm Kavanaugh, this time by an almost entirely party-line vote of fifty to forty-eight.[18] The process energized both Republicans and Democrats, and pundits and analysts quickly began to speculate as to how the "Kavanaugh effect" would impact voter turnout in the upcoming midterm elections.[19] In each of these instances, the Supreme Court confirmation process has functioned as a political battleground between left and right, and in the current political climate, this seems unlikely to change, absent some procedural reform.

There is no shortage of explanations as to how we arrived here. Democrats sometimes cast blame on the Republicans' treatment of Merrick Garland in 2016.[20] Republicans point instead to the Democrats' treatment of Robert Bork in 1987.[21] This Note takes no opinion as to how the confirmation process became so polarized. Instead, it begins with the assumption that political polarization has fundamentally changed how the confirmation process works and that this change has been for the worse. This is not to say that the Senate should confirm every candidate that the president nominates, or that the nominee's ideology is not a relevant factor in the Senate's evaluation. To the contrary, the Senate's role of providing advice and consent is an important check on the president, and it would be highly undesirable for a president concerned only with judicial outcomes to have free reign in appointing like-minded justices.

However, confirmation hearings need not be strictly political battles, and because the Court is primarily concerned with the daunting task of interpreting federal law and the Constitution,[22] the nominee's qualifications and character

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https://www.npr.org/2018/09/28/652486413/judiciary-committee-set-to-vote-on-kavanaugh-friday-with-eyes-on-undecided-jeff.

18. Roll Call Vote 115th Congress—2nd Session, SENATE.GOV, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=115&session=2&vote=00223#top (last visited Apr. 15, 2020) (showing a summary of the nomination vote for Justice Brett M. Kavanaugh).

19. *Compare* John Bowden, *Priebus: Republican Voters Energized by "Kavanaugh Effect*,*"* HILL (Oct. 14, 2018, 7:01 AM), https://thehill.com/homenews/sunday-talk-shows/411282-priebus-republican-voters-energized-by-kavanaugh-effect ("Former White House chief of staff Reince Preibus said Sunday that Brett Kavanaugh's successful nomination to the Supreme Court . . . energized Republican-leaning voters and will boost turnout in next month's midterm elections."), *with* Megan Keller, *Poll: "Kavanaugh Effect" Spurs More to Vote Democrat than Republican*, HILL (Oct. 24, 2018, 10:32 AM), https://thehill.com/homenews/administration/412905-poll-kavanaugh-effect-spurs-slightly-more-people-to-vote-democrat ("The brutal battle over Supreme Court Justice Brett Kavanaugh's confirmation has spurred more people to vote Democrat than Republican, according to a new poll.").

20. *See* Jonathan Capehart, *McConnell, not Obama, Is Politicizing the Supreme Court*, CHI. TRIB. (Mar. 17, 2016), https://www.chicagotribune.com/news/opinion/commentary/ct-mitch-mcconnell-obama-supreme-court-merrick-garland-20160317-story.html (arguing that Senate Republicans were wrongfully politicizing Garland's nomination).

21. *See* Kevin D. Williamson, *Your Rules, Democrats*, NAT'L REV. (Feb. 15, 2016, 3:35 PM), https://www.nationalreview.com/corner/democrats-showed-us-how-and-why-block-supreme-court-nominees/ (arguing that the Senate's rejection of Robert Bork's nomination constituted "the arrival of Supreme Court confirmation hearings as bare-knuckle political brawls.").

22. U.S. CONST. art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.").

ought to be emphasized in the Senate's evaluation. Unfortunately, the country's divisive political climate renders it unlikely that the Senate will organically change its approach to evaluating nominees. On the political right, for example, Senate Republicans refused to give Judge Garland a hearing, despite his reputation for being a judicial moderate and his "penchant for judicial restraint," a trait often associated with conservative jurists.[23] Their opposition, of course, had little to do with Garland and everything to do with the fact that it was President Obama who had nominated him.[24] On the political left, Democratic strategists "vowed a fierce battle" against President Trump's replacement for Justice Kennedy just days after Kennedy announced his retirement,[25] with at least one Senate Democrat announcing her opposition to the nominee "twelve days before anyone knew" who the nominee would be.[26] It is difficult to untangle these examples of hyper-partisan Supreme Court politics from the polling data: in 2018, seventy-six percent of voters deemed "Supreme Court appointments" a "very important" issue, which was more than any other issue.[27] For context, the issue most deemed "very important" to voters has been "the economy" in every year since 2004.[28] Furthermore, the partisan gap in how Americans view the Supreme Court is "among the widest in two decades."[29] In short, recent history indicates that our Supreme Court politics have become increasingly polarized. A change in the structure of the confirmation process may be necessary in order to fix this problem. More to the point, drawing on the experiences of other countries that have successfully implemented limited tenure, this Note

23. Timothy Noah & Brian Mahoney, *How Liberal Is Merrick Garland?*, POLITICO (Mar. 16, 2016, 7:52 PM), https://www.politico.com/story/2016/03/supreme-court-merrick-garland-220904.

24. Ron Elving, *What Happened with Merrick Garland in 2016 and Why It Matters Now*, NAT'L PUB. RADIO (June 29, 2018, 5:00 AM), https://www.npr.org/2018/06/29/624467256/what-happened-with-merrick-garland-in-2016-and-why-it-matters-now?utm_source=facebook.com&utm_medium=social&utm_campaign=npr&utm_term=nprnews&utm_content=20180629&fbclid=IwAR1313vggSduDaHbxS7H6gSeDdjrGlOF68Zu5VMXggp2RImrXiaDgiOf61k (explaining that after Justice Scalia died in 2016, Senate Majority Leader Mitch McConnell "looked Barack Obama in the eye and . . . said, 'Mr. President, you will not fill the Supreme Court vacancy.'").

25. Michael D. Shear & Thomas Kaplan, *Political War Over Replacing Kennedy on Supreme Court Is Underway*, N.Y. TIMES (June 28, 2018), https://www.nytimes.com/2018/06/28/us/politics/trump-supreme-court-kennedy.html.

26. *See* Thomas Jipping, *The Truth About Democrats' Opposition to Brett Kavanaugh*, NAT'L REV. (Sept. 12, 2018, 5:44 PM), https://www.nationalreview.com/bench-memos/brett-kavanaugh-supreme-court-nomination-democrat-opposition.

27. *Voter Enthusiasm at Record High in Nationalized Midterm Environment*, PEW RES. CTR. (Sept. 26, 2018), https://www.people-press.org/2018/09/26/voter-enthusiasm-at-record-high-in-nationalized-midterm-environment.

28. Grace Sparks, *Supreme Court Is Voters' Most "Very Important" Issue*, CNN, https://www.cnn.com/2018/09/26/politics/important-issue-vote-pew-supreme-court/index.html (last updated Sept. 26, 2018, 6:11 PM).

29. Bruce Drake & John Gramlich, *5 Facts About the Supreme Court*, PEW RES. CTR. (Oct. 7, 2019), https://www.pewresearch.org/fact-tank/2019/10/07/5-facts-about-the-supreme-court/ (explaining that seventy-five percent of Republicans view the Supreme Court favorably, but only forty-nine percent of Democrats view the Court favorably).

ultimately advocates the adoption of a Twenty-Eighth Amendment, limiting tenure for Supreme Court justices to eighteen-year terms.

Part I provides a brief overview of the Framers' reasons for choosing "good behavior" tenure for Article III judges, including Supreme Court justices. Part II situates the United States as one of the only countries in the modern world that gives life tenure to the judges on its court of last resort, emphasizing the unique risks inherent in life tenure for judges who pass on constitutional questions. Then, having established the prospective benefits of a reduction in Supreme Court tenure and the comparative rarity of life tenure, Part III examines what tenure limits look like in practice. First, it examines mandatory retirement age as a method for limiting tenure. Brazil will be the primary case study, given that its judicial selection process is almost perfectly analogous to that of the United States, although it will also examine Australia to illustrate the extent to which mandatory retirement age can yield shorter terms for judges. Next, Part III will examine the "term of years" approach as a second method for reducing judicial tenure. The case study here will be Mexico, which exemplifies a moderately successful implementation of "term of years" tenure limits, but also highlights how tenure limits can facilitate arbitrary disparities in Presidential appointment power. This disparity, I shall argue, can be mitigated with staggered, 18-year judicial terms.

I. A STRONG AND INDEPENDENT JUDICIARY: THE ORIGINAL PURPOSE OF LIFE TENURE

The current practice for federal judicial tenure in the United States is rooted in Article III of the Constitution, which provides that "judges, both of the supreme court and inferior courts, shall hold their offices during good behavior."[30] Absent impeachment, this affords life tenure to all federal judges.[31]

A. "GOOD BEHAVIOR" TENURE AS A RESPONSE TO BRITAIN'S "AT WILL" TENURE

Article III's "good behavior" approach arose as a reaction to a series of changes in the British judicial appointment process, wherein judges served not during "good behavior" but rather "at [the] pleasure" of the Crown.[32] Historically, the British had used "good behavior" tenure for judges, and when King George III shifted from a "good behavior" system to an "at pleasure" system, the American colonists expressed their dissatisfaction with that change in the Declaration of Independence. One of the grievances listed in the Declaration was that King George III had made "[j]udges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their

30. U.S. CONST. art. III, § 1.

31. Tara Leigh Grove, *The Origins (and Fragility) of Judicial Independence*, 71 VAND. L. REV. 465, 540 (2018).

32. John V. Orth, *Who Judges the Judges?*, 32 FLA. ST. U. L. REV. 1245, 1249 (2005).

salaries."[33] To protect the judiciary against this sort of undue influence by the executive branch, the Framers reinstituted "good behavior" tenure protection for Article III judges.[34] This way, judges would be relatively insulated from political pressures, but Congress could still remove judges for cause in cases of egregious misconduct through the impeachment process.[35] The Framers' system makes sense as a response to George III's encroachments upon the British judiciary, and while the political branches are often critical of the Supreme Court's decisions, their general deference to the authority of Article III is evidence that the Framers were successful in creating what they had intended: a politically independent judiciary. However, by adopting "good behavior" tenure protection as *the means* of securing a politically independent judiciary, the Framers also vested the individual members of the judiciary with immense power to interpret the laws and Constitution of the United States.

B. LONGER TERMS: AVERAGE TENURE FROM THE FRAMERS TO TODAY

The antifederalist Brutus, concerned by this immense power concentrated in federal judges, argued that "[unchecked] power in the judicial, will enable [judges] to mould the government, into almost any shape they please."[36] This certainly played a role in the antifederalists' opposition to life tenure for federal judges.[37] The federalist response to this sort of argument is summed up well by Alexander Hamilton, writing as Publius in Federalist 78: a "temporary duration in office," as opposed to the "good behavior" model enshrined in Article III, would "naturally discourage" those with "sufficient skill in the laws to qualify them for the stations of judges" from "quitting a lucrative line of practice to accept a seat on the bench."[38] This is a strong argument, and if one could only select between "good behavior" tenure and the tenure limits that govern the political branches,[39] the "good behavior" tenure model seems to be the better option. Brutus's argument was further weakened because Justices did not serve particularly long terms at the beginning of the Republic: average tenure on the Supreme Court from 1789 to 1820 was only seven and a half years.[40] Because average tenure was so short, many of the early justices had less of an opportunity to "mould the government" as they wished. This is not to say that many of the Federalist Justices' early decisions were not highly distressing to Jeffersonian

33. THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

34. Orth, *supra* note 32, at 1249.

35. *See* Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges*, 87 MICH. L. REV. 765, 776–78 (1989).

36. BRUTUS, BRUTUS XI (1788).

37. *See Showcase Panel II: Judicial Tenure: Life Tenure or Fixed Non-Renewable Terms?*, 12 BARRY L. REV. 173, 191 (2009) ("Antifederalists . . . were opposed to life tenure in the first place.").

38. THE FEDERALIST NO. 78 (Alexander Hamilton).

39. Two, four, or six years, depending on the office.

40. Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769, 778 (2006).

Republicans.[41] However, with a relatively high rate of turnover in the federal judiciary, subsequent presidents and senates had more opportunities to nominate and confirm judges, thereby limiting the relative power and influence of any one judge.[42]

Today, however, things are significantly different. The average tenure of Supreme Court justices retiring between 1971 and 2006 was 26.1 years.[43] This drastic increase in length of tenure, due in large part to improved life expectancy,[44] increases the power vested in any one judge, especially at the Supreme Court level. Brutus's concern seems far more plausible if justices have not just years, but decades to "mould the government." In fact, contemporary commentators relay his same concerns when they discuss President Trump's "reshaping [of] the federal judiciary."[45] It is a small wonder, then, that the confirmation process has become more partisan. If a judicial nominee, especially for the Supreme Court, is slated to stay on the bench for over two decades, it is not surprising that members of the political branches should be primarily concerned with how that nominee might rule in cases that directly affect the major political and social issues of the day.

Given the choice between the shortened terms characteristic of the average justice in the early Republic and the even shorter terms served by members of congress or the president, Hamilton's argument wins out over that of Brutus. However, given the decades-long tenures that are characteristic of today's justices, the case for a middle ground seems stronger still. As Justice Kagan has cautiously suggested, a constitutional amendment providing for a *modest* reduction in judicial tenure may "take some of the high stakes out of the confirmation process."[46] At the same time, a limit on tenure that cuts too short may result in a sort of revolving door between the Supreme Court and private actors, which could be damaging to the Court's legitimacy as an institution. While the Court's current approval rating of fifty-four percent is not historically

41. *See, e.g.*, Letter from Thomas Jefferson, former President of the United States, to Spencer Roane, Judge, Va. Court of Appeals (Mar. 9, 1821), http://tjrs.monticello.org/letter/1557 ("The great object of my fear is the federal judiciary.").

42. Abhinav Chandrachud, *Does Life Tenure Make Judges More Independent? A Comparative Study of Judicial Appointments in India*, 28 CONN. J. INT'L L. 297, 302 (2013) ("[S]hortening the tenure of a constitutional court judge reduces the amount of time he has to be able to make a difference—making judicial actors less threatening to political powers.").

43. Calabresi & Lindgren, *supra* note 40, at 778.

44. *See* Daniel J. Meador, *Restructuring the Supreme Court: Regularizing Appointments, Providing More Frequent Rotation, Avoiding Physical and Mental Impairment*, 25 J.L. & POL. 459, 461 (2009) ("Life expectancy is now 78 years (up from 47 in the founding generation), and predicted to increase three months every year.").

45. *See* Carrie Johnson, *One Year in, Trump Has Kept a Major Campaign Promise: Reshaping the Federal Judiciary*, NAT'L PUB. RADIO (Jan. 21, 2018, 7:00 AM), https://www.npr.org/2018/01/21/579169772/one-year-in-trump-has-kept-a-major-promise-reshaping-the-federal-judiciary.

46. *Justice Kagan on SCOTUS Term Limits: "Maybe,"* C-SPAN (Oct. 25, 2018), https://www.c-span.org/video/?c4757264/justice-kagan-scotus-term-limits-maybe.

high,[47] it is significantly higher than current presidential,[48] as well as congressional,[49] approval ratings. It is important that the public continue to view the Court as "a disinterested arbiter of the law," rather than "a partisan institution,"[50] and a system in which justices serve short terms and then leave the Court to either run for political office or take well-compensated positions in the private sector may well have an adverse effect on the Court's legitimacy. Therefore, a successful amendment would strike the correct balance between "high stakes" life tenure and, as Justice Stephen Breyer put it, "a term that is so short that the person sitting there is thinking about his next job."[51] America need not look far for inspiration; virtually every other country with a mature judiciary system has adopted some form of restraint on judicial tenure.

II. THE COMPARATIVE RARITY OF LIFE TENURE IN THE TWENTY-FIRST CENTURY

Critics of life tenure tend to emphasize the extent to which it is a uniquely American phenomenon. While it is not true, as some have asserted, that "[n]o other democracy gives life tenure to judges on its version of the Supreme Court,"[52] it is helpful to understand the United States' practice in relation to other judicial systems' in order to appreciate its rarity.

First, one must clarify what constitutes a country's "version of the Supreme Court." The Supreme Court of the United States is relatively consolidated in that it has final say in appeals for all questions regarding the Constitution and federal law.[53] This is not unique, but it is worth noting that many other countries erect constitutional courts separate from courts of general jurisdiction. For instance, the Comoros divides judicial power between its Supreme Court[54] and its Constitutional Court.[55] While judges of either court are technically "irremovable from office,"[56] Constitutional Court judges are limited in tenure to six-year

47. *Supreme Court*, GALLUP, https://news.gallup.com/poll/4732/supreme-court.aspx (last visited Apr. 15, 2020

48. At the time of writing, President Trump's approval rating is averaged at 44.4%. *See How Popular is Donald Trump*, FIVETHIRTYEIGHT, https://projects.fivethirtyeight.com/trump-approval-ratings/?ex_cid=rrpromo (last updated Apr. 15, 2020, 10:06 AM).

49. At the time of writing, Congress's approval rating is twenty-two percent. *See Congress and the Public*, GALLUP, https://news.gallup.com/poll/1600/congress-public.aspx (last visited Apr. 15, 2020).

50. Anthony J. Gaughan, *The Case for Limiting Federal Criminal Jurisdiction over State and Local Campaign Contributions*, 65 ARK. L. REV. 587, 626 (2012).

51. Honorable Stephen Breyer, Justice, U.S. Supreme Court, Conversation at Association of American Law Schools Annual Meeting (Mar. 28, 2016) [hereinafter Breyer Conversation], https://www.youtube.com/watch?v=SjqKy8WOkP0&feature=youtu.be&t=3045.

52. Matthew Yglesias, *No Other Democracy Gives Life Tenure to Judges on Its Version of the Supreme Court*, VOX (Feb. 16, 2016, 4:00 PM), https://www.vox.com/2016/2/16/11024096/life-tenure-judges.

53. U.S. CONST. art. III, § 2, cl. 1.

54. COMOROS CONSTITUTION, MAY 23, 2009, tit. 3, ch. 3, art. 29.

55. *Id.* tit. 6, art. 36.

56. *Id.* tit. 3, ch. 3, art. 28.

terms,[57] whereas Supreme Court judges are not subject to any restrictions on tenure.[58]

A. THE PREVALENCE OF TENURE LIMITS FOR NON-CONSTITUTIONAL HIGH COURTS

At present, there are at least seven countries, including other well-established democracies like Italy and France, that have adopted systems similar to that of the Comoros, in which supreme court judges have life tenure and constitutional court judges have limited tenure.[59] In these countries, the rationale for limiting judicial tenure for constitutional courts but not for non-constitutional supreme courts is straightforward: in a democracy, a legislature can pass a statute if it objects to the outcome of a particular supreme court decision, but constitutional courts often have, "effectively, the last word in conflicts with [legislatures]."[60] Therefore, the prospect of putting a bad judge on a constitutional court is more troublesome than a similarly situated nominee for a supreme court, since the legislature may be powerless to remedy a bad decision.

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57. *Id.* tit. 6, art. 38.

58. *Id.* tit. 3, ch. 3, art. 29.

59. *Compare* LA CONSTITUTION DE LA REPUBLIQUE DU TCHAD PROMULGUEE LE 04 MAI 2018 [CONSTITUTION] May 4, 2018, tit. 6, ch 1, art. 160 (Chad), *translated in* CONSTITUTION OF THE REPUBLIC OF CHAD 27 (Maria del Carmen Gress &J.J. Ruchti trans., Library 2018) ("The members of the Supreme Court are designated for a mandate of seven (7) years removable."), *with id.*, tit. 5, ch. 1, art. 154, *translated in* CONSTITUTION OF THE REPUBLIC OF CHAD, *supra*, at 28 ("The members of the Supreme Court are irremovable during their mandate."); *compare* Ústavní zákon č. 1/1993 Sb., Ústava České Republiky [Constitution of the Czech Republic], ch. 6, art. 84, *translated in Czech Republic 1993 (rev. 2013)*, CONSTITUTE, https://www.constituteproject.org/constitution/Czech_Republic_2013?lang=en (last visited Apr. 15, 2020) ("The Constitutional Court shall be composed of fifteen Justices appointed for a period of ten years."), *with id.*, ch. 4, art. 93, *translated in Czech Republic 1993 (rev. 2013)*, *supra* ("[Supreme Court] Judges are appointed to their office for an unlimited term by the President of the Republic."); *compare* 1958 CONST., tit. 7, art. 56 (Fr.), *translated in France 1958 (rev. 2008)*, CONSTITUTE, https://www.constituteproject.org/constitution/France_2008?lang=en (last visited Apr. 15, 2020) ("The Constitutional Council shall comprise nine members, each of whom shall hold office for a non-renewable term of nine years."), *with id.*, tit. 8, art. 64, *translated in France 1958 (rev. 2008)*, *supra* ("Judges shall be irremovable from office."); *compare* COSTITUZIONE [COST.], tit. 6, § 1, art. 135 (It.), *translated in Italy 1947 (rev. 2012)*, CONSTITUTE, https://www.constituteproject.org/constitution/Italy_2012?lang=en (last visited Apr. 15, 2020) ("Judges of the Constitutional Court shall be appointed for nine years . . . and they may not be re-appointed."), *with id.*, tit. 4, § 1, art. 107, *translated in Italy 1947 (rev. 2012)*, *supra* ("Judges may not be removed from office."); *compare* CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION] (1976), tit. 6, art. 222 (Port.), *translated in Portugal 1976 (rev. 2005)*, CONSTITUTE, https://www.constituteproject.org/constitution/Portugal_2005?lang=en (last visited Apr. 15, 2020) ("The term of office of judge of the Constitutional Court shall be nine years."), *with id.* tit. 5, ch. 3, art. 216, *translated in Portugal 1976 (rev. 2005)*, *supra* ("[Supreme Court] Judges shall enjoy security of tenure and shall not be transferred, suspended, retired or removed from office except in the cases laid down by law."); *compare* URADNI REPUBLIKE SLOVENIJE [CONSTITUTION] Feb. 27, 2003, ch. 8, art. 165 (Slovn.), *translated in Slovenia 1991 (rev. 2016)*, CONSTITUTE, https://www.constituteproject.org/constitution/Slovenia_2016?lang=en (last visited Apr. 15, 2020) ("Constitutional Court judges are elected for a term of nine years. Constitutional Court judges may not be re-elected."), *with id.*, ch. 4, art. 129, *translated in Slovenia 1991 (rev. 2016)*, *supra* ("The office of a [Supreme Court] judge is permanent.").

60. Lech Garlicki, *Constitutional Courts Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 61 (2007).

Accordingly, the system limits tenure for constitutional court judges as a means of mitigating this risk.

When comparing the tenure of United States Supreme Court justices to judges on other courts of last resort, other commentators have generally chosen to emphasize the practices of courts "designed to pass on the constitutionality of government actions" over those of non-constitutional supreme courts.[61] This is understandable, given the importance and relative finality of constitutional decisions, as contrasted with the relative ease by which erroneous non-constitutional decisions can be fixed by legislatures.[62] This Note does not challenge the use of constitutional courts in comparative analysis. Of course, because the American judiciary is not structured along the same bifurcated lines as the Comoros, a bifurcated approach to judicial tenure is not possible. However, because the Supreme Court's authority extends far beyond its interpretation of solely Constitutional matters, it is worth mentioning that several countries have adopted life tenure for high courts that pass on more general issues.[63]

B. THE (EVEN GREATER) PREVALENCE OF TENURE LIMITS FOR CONSTITUTIONAL HIGH COURTS

While the United States is not entirely alone in its practice of giving life tenure to judges who have final say on constitutional questions, it is in rather sparse company. At present, there are only four other countries that extend life tenure to such judges.[64] Additionally, as one learns by looking more closely, the constitutional promise of life tenure does not necessarily guarantee to other judiciaries the same level of judicial independence that one might associate with the American system.

In practice, only two of the four judiciaries that afford life tenures have practices analogous to that of the United States: Estonia and Luxembourg. The Estonian judiciary has three levels of courts (county, circuit, and Supreme), and all are governed by Chapter XIII of the Estonian Constitution.[65] Chapter XIII, Section 147 explicitly provides that "[j]udges are appointed for life" and "may be removed from office only by a court judgment."[66]

Luxembourg's system is slightly different. Whereas Estonia, like the United States, has but one court of last resort, Luxembourg, like Italy and France, maintains a Constitutional Court distinct from its Superior Court of

61. *See, e.g.*, Calabresi & Lindgren, *supra* note 40, at 819 n.138.

62. *See* Garlicki, *supra* note 60, at 66.

63. *See supra* note 59 and accompanying text.

64. *See Judge Selection and Term of Office: Countries Compared*, NATIONMASTER, https://www.nationmaster.com/country-info/stats/Government/Judicial-branch/Judge-selection-and-term-of-office (last visited Apr. 15, 2020).

65. EESTI VABARIIGI PÕHISEADUS [CONSTITUTION] June 28, 1992, ch. 13, art 148 (Est.), *translated in The Constitution of the Republic of Estonia*, RIIGITEATAJA, https://www.riigiteataja.ee/en/eli/530102013003/consolide (last visited Apr. 15, 2020).

66. *Id.* ch. 13, art. 147.

Justice.[67] Unlike Italy and France, however, Luxembourg's Constitution explicitly provides that judges on either court are "irremovable" and "may only be deprived of [their posts] or suspended . . . by a judgment."[68] Therefore, Luxembourg takes on greater risk than its counterparts in extending the same tenure to its Constitutional Court as it does to its Superior Court of Justice. It is also worth noting that both Estonia and Luxembourg are member states of the European Union and are thereby subject to the European Court of Justice (ECJ), much as the several states are subject to judicial review by the United States Supreme Court, and that the judges of the ECJ do not enjoy life tenure.[69] However, for all national matters that fall outside the ECJ's jurisdiction, both countries have chosen to employ the American model of life tenure for judges.

The third country with life tenure is Oman. Its Basic Law, which functions as the sultanate's constitution, provides that judges "shall be irremovable except in circumstances specified by the [Basic] Law."[70] However, as referenced in Article 41, Oman is an absolute monarchy, rather than a democracy, and the Sultan "is the head of State and the Supreme Commander of the Forces, his person is inviolable, respect of him is a duty, and his command is obeyed."[71] Predictably, ultimate power over legal and constitutional matters lies with the Sultan under such a system: Article 71 provides explicitly that all "[j]udgments shall be rendered and enforced in the name of His Majesty the Sultan."[72] Practically, this has meant that while the courts retain nominal control over the administration of the law, the Sultan can overturn judicial decisions if he so chooses.[73] This concentration of power in the executive is fundamentally at odds with the American model of judicial independence, so while Oman may have technically adopted life tenure for judges in its Basic Law, it cannot be said that its judiciary is analogous to that of the United States.

The fourth country is Haiti, although it remains unclear whether Haitian judges actually enjoy life tenure. The Haitian Constitution is inconsistent on the matter. Article 174 of the Haitian Constitution provides: "Judges of the Supreme

67. CONSTITUTION, Oct. 17, 1868, ch. 6, art. 87, 95 (Lux.), *translated in Luxembourg 1868 (rev. 2009)*, CONSTITUTE, https://www.constituteproject.org/constitution/Luxembourg_2009?lang=en (last visited Apr. 15, 2020).

68. *Id.* ch. 6, art. 91.

69. Consolidated Version of the Treaty on the Functioning of the European Union art. 253, Oct. 26. 2012. 2012 O.J. (C 326) 47, 158 ("The Judges . . . of the Court of Justice . . . shall be appointed by common accord of the governments of the Member States for a term of six years.").

70. BASIC LAW OF THE SULTANATE OF OMAN [CONSTITUTION] NOV. 6, 1996, ch. 6, art. 61, *translated in Royal Decree No. (101/96): Promulgating the Basic Statute by the State*, WORLD INTELL. PROP. ORG., https://www.wipo.int/edocs/lexdocs/laws/en/om/om019en.pdf.

71. *Id.* ch. 4, art. 41.

72. *Id.* ch. 6, art. 71.

73. *See Oman*, U.S. DEP'T OF STATE (2011), https://2009-2017.state.gov/j/drl/rls/hrrpt/2010/nea/154470.htm ("The law provides for an independent judiciary; however, the sultan may act as a court of final appeal and exercise his power of pardon as chairman of the Supreme Judicial Council.").

Court and Courts of Appeal are appointed for ten (10) years."[74] This seems to be an unambiguous rejection of the American model of life tenure for judges. It is odd, then, that Article 177 provides instead: "Judges of the Supreme Court, the Courts of Appeal and the Courts of First Instance are appointed for life. They may be removed from office only because of a legally determined abuse of authority."[75] The two articles are obviously in contradiction, and it is unclear from the structure of the document which article should control. To make matters more confusing, in 2005, Boniface Alexandre, an interim president, mandated the early retirement of five Supreme Court judges before any had completed ten years of service.[76] Therefore, even if the Haitian Constitution was found to guarantee life tenure in Article 177, Haiti's practice does not seem analogous to that of the American judicial system.

Notwithstanding these four exceptions, every country in the world has rejected the American model of life tenure for judges.[77] Given the overwhelming number of countries, one should consider whether the problems currently associated with the American confirmation process could be mitigated by reducing judicial tenure.

III. TWO APPROACHES TO LIMITS ON JUDICIAL TENURE

Fundamentally, there are two approaches to limiting life tenure for justices.[78] Either one would have to be implemented by a Twenty-Eighth Amendment, rather than by statute, since Article III specifically provides for "good behavior" tenure.[79] The first proposal is a mandatory retirement age.[80] The second involves limiting each justice's tenure to one eighteen-year, nonrenewable term. While there is a broad range of possible tenures, Justice Kagan has called eighteen years "the going proposal,"[81] and there is at least one

74. 1987 CONSTITUTION DE LA RÉPUBLIQUE D'HAÏTI, ch. 4, art. 174 (Haiti), *translated Haiti 1987 (rev. 2012)*, CONSTITUTE, https://www.constituteproject.org/constitution/Haiti_2012?lang=en (last visited Apr. 15, 2020).

75. *Id.* ch. 4, art. 177

76. INTER-AM. COMM'N ON HUMAN RIGHTS, ORGANIZATION OF AMERICAN STATES, HAITI: FAILED JUSTICE OR THE RULE OF LAW? CHALLENGES AHEAD FOR HAITI AND THE INTERNATIONAL COMMUNITY 15 (2006), http://cidh.org/countryrep/HAITI%20ENGLISH7X10%20FINAL.pdf.

77. *See Judge Selection and Term of Office: Countries Compared*, *supra* note 65 and accompanying text.

78. This Note does not consider more democratic approaches to limiting judicial tenure, such as elections. It does so with the assumption that the American system values judicial independence, which is limited by subjecting judges to elections. For a discussion on the antagonistic relationship between judicial independence and judicial elections, see Shira J. Goodman et al., *What's More Important: Electing Judges or Judicial Independence? It's Time for Pennsylvania to Choose Judicial Independence*, 48 DUQ. L. REV. 859, 860 (2010).

79. U.S. CONST. art. III, § 1.

80. *See* Gabe Roth, *Where John Ashcroft and Merrick Garland Meet*, ST. LOUIS POST-DISPATCH (June 10, 2016), https://fixthecourt.com/2016/06/ftc-op-ed-on-a-mandatory-retirement-age-for-supreme-court-justices/ (advocating a mandatory retirement age of seventy for Supreme Court justices); *see also* Joel Cohen, Richard A. Posner, and Jed S. Rakoff, *Should There Be Age Limits for Federal Judges*, SLATE (July 5, 2017, 5:11 PM), https://slate.com/news-and-politics/2017/07/should-there-be-age-limits-for-federal-judges.html (considering a mandatory retirement age of eighty for federal judges).

81. *See Justice Kagan on SCOTUS Term Limits: "Maybe*," *supra* note 46.

proposal for an eighteen-year term limit that appears to have garnered some traction.[82] Furthermore, 18 years seems long enough to prevent the revolving door concern to which Justice Breyer alluded.[83] This Note considers the two approaches in turn.

A. MANDATORY RETIREMENT AGE IN OTHER COMMON LAW COUNTRIES

At first glance, the mandatory retirement age approach makes particular sense for the United States, given its common law heritage and the fact that the United States adopted life tenure in large part because the English adopted such a practice after the Glorious Revolution of 1688.[84] That the British have since adopted a mandatory retirement age, as have many other common law countries,[85] suggests that a mandatory retirement age might be a good fit for the American system.

1. Mandatory Retirement Age and Reduced Average Tenure in Parliamentary Democracies

The argument in favor of mandatory retirement age reads like this: If we know that a justice must retire at a given age, then there is a fixed upper limit on that justice's term.[86] In theory, this will result in shorter terms for judges, and at least amongst some parliamentary countries, there is some empirical evidence that bears this out.

For instance, Australia, another common law country, has a mandatory retirement age of seventy.[87] In 2015, the average length of service for an Australian High Court justice was about sixteen years,[88] and given the High Court's current composition, the average tenure is expected to fall below twelve years.[89] The United States, having no mandatory retirement age and improving life expectancy, has seen judicial tenure increase rather than decrease: By 2006, the average length of tenure for Supreme Court justices had extended to over twenty-six years.[90] With Justice Kennedy's recent departure from the Court

82. *See* Calabresi & Lindgren, *supra* note 40, at 824.

83. *See* Breyer Conversation, *supra* note 51.

84. Calabresi & Lindgren, *supra* note 40, at 777.

85. *Id*. at 819–20.

86. Layne S. Keele, *Why the Judicial Elections Debate Matters Less Than You Think: Retention as the Cornerstone of Independence and Accountability*, 47 AKRON L. REV. 375, 422 (2014) ("Judges who take office a given number of years away from a mandatory retirement age have an effective, though not explicit, tenure limit.").

87. *Australian Constitution s 51*, ch. 3, art. 72 ("The appointment of a Justice of the High Court shall be for a term expiring upon his attaining the age of seventy years, and a person shall not be appointed as a Justice of the High Court if he has attained that age.").

88. Brian Opeskin, *Models of Judicial Tenure: Reconsidering Life Limits, Age Limits and Term Limits for Judges*, 35 OXFORD J. LEGAL STUD. 627, 646 fig.3 (2015).

89. Alysia Blackham, *Judges and Retirement Ages*, 39 MELBOURNE U. L. REV. 738, 772 (2016).

90. Calabresi & Lindgren, *supra* note 40, at 778.

marking thirty years on the bench, a reduction in this trend of longer terms seems unlikely.[91]

In addition to yielding shorter terms, Australia's judicial selection process also tends to produce substantially less controversy than its American counterpart.[92] Of course, this may have more to do with the broader structure of Australia's judicial selection process than with the length of judicial tenure. Australia is governed under a parliamentary system. Officially, justices are nominated by the Governor-General.[93] This is something of a fiction, however; in practice, the nominating power lies entirely with the government cabinet and, ultimately, the Prime Minister.[94] The Attorney General, who recommends a nominee to the Governor-General, is technically required to consult with state and territorial attorneys general before appointing justices,[95] but ultimately, unchecked authority lies with the government-in-power to fill any vacancies on the Court.[96] This is a material difference from the American system, wherein the president's nomination is only the beginning of the selection process.[97] Therefore, one cannot easily attribute the relative absence of polarization surrounding Australian High Court appointments to the mandatory retirement age.

An additional difference bearing concern is that while the American process of judicial selection may be too polarized, there are significant benefits to providing a check on the presidential power of appointment. In the event that a nominee is underqualified or holds views radically outside the jurisprudential mainstream, it seems desirable to have that nominee vetted by the legislature. In Australia, the Prime Minister's cabinet does not have this constraint; it can appoint anyone to the High Court without consulting the rest of Parliament.[98] In the past, this has enabled Prime Ministers to handpick like-minded politicians for seats on the High Court.[99] Consider the example of Sir John Latham. A highly successful politician who served as Leader of the Opposition and Deputy

91. *See Why Supreme Court Justices Serve Such Long Terms*, ECONOMIST (July 4, 2018), https://www.economist.com/the-economist-explains/2018/07/04/why-supreme-court-justices-serve-such-long-terms.

92. Kate Malleson & Peter H. Russell *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World*, 39 OTTAWA L. REV. 133, 138 (2007) (book review) ("If the United States represents one extreme of judicial appointments in terms of negotiation and openness, the other extreme is surely found in Australia.").

93. *High Court of Australia Act 1979* pt. 2 div. 1 s 6 (Cth).

94. George Williams, *A Better Way to Choose Judges*, SYDNEY MORNING HERALD (July 14, 2009), https://www.smh.com.au/politics/federal/a-better-way-to-choose-judges-20090907-fe33.html.

95. *See High Court of Australia Act 1979* pt. 2 div. 1 s 6 (Cth).

96. *See* Elizabeth Handsley & Andrew Lynch, *Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13*, 37 SYDNEY L. REV. 187, 192 (2015) ("Beyond those very minimal requirements, the manner of judicial appointment adopted by the Commonwealth Government at any point in time is unconstrained.").

97. U.S. CONST. art. II, § 2, cl. 2.

98. *See* Handsley & Lynch, *supra* 96.

99. *See*, *e.g.*, Fiona Wheeler, *Sir John Latham's Extra-Judicial Advising*, 35 MELBOURNE U. L. REV. 651, 651–53 (2011).

Prime Minister in the Parliament,[100] Latham was appointed Chief Justice of the High Court by Prime Minister Joseph Lyons, a political ally of the same party.[101] Throughout his tenure on the Court, he "clandestinely advised several conservative political figures . . . on a range of controversial matters."[102] More disturbingly, Latham is thought to have "secretly advised Prime Minister Menzies on alterations to the *Constitution* to overcome the effect of the Court's ruling" in *Australian Communist Party v. Commonwealth*, a case in which Latham wrote the lone dissent.[103]

Of course, American presidents have also nominated political allies to the Supreme Court as a means of changing the Court's predisposition on a set of issues, but at least in those instances, the nominees were subject to a process of advice and consent before receiving their commissions.[104] The United States and Australia are both common law countries, but even a brief comparison of the two judicial selection systems casts doubt as to whether it would be procedurally possible or desirable for the United States to adopt anything resembling the Australian system. Therefore, in order to more accurately predict the potential impact of a mandatory retirement age on the American process, it is necessary to find a system that bears a closer structural resemblance to the American system.

2. Lula's Court: Brazil's Problems with Mandatory Retirement Age

Brazil offers a system analogous to that of the United States.[105] The American influence on the Brazilian Constitution is well documented.[106] This is reflected in the process by which its Supreme Federal Court ministers are appointed: ministers are nominated by Brazil's President and confirmed by Brazil's Federal Senate.[107] The ministers then serve until mandatory retirement at age seventy-five.[108]

Despite these constitutional similarities, however, the Brazilian process of judicial selection has not been subject to anything resembling the political strife of its American counterpart. No one would suggest that the Brazilian system of judicial selection is too charged or politically partisan; on the contrary, Brazilian

100. *See id*. at 654.

101. *Id.*; *see also* Kelvin Widdows, *Sir John Latham: Judicial Reasoning in Defence of the Commonwealth*, 2016 ABR 16, 42.

102. *See* Wheeler, *supra* note 99, at 652.

103. *Id*. at 652–53.

104. *See*, *e.g.*, JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 89–99 (1989) (summarizing President Roosevelt's political alliance with Senator Hugo Black, as well as Roosevelt's subsequent nomination of Black for the Supreme Court).

105. Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1, 3 (1994).

106. *See generally* Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AM. J. COMP. L. 803 (1990) (explaining that America had a substantial impact on Brazilian law).

107. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] ch. 2, s. 2, art. 84, cl. 14 (Braz.).

108. *How Does Brazil's Justice System Actually Work?*, BRAZILIAN REP. (Oct. 16, 2017), https://brazilian.report/guide-to-brazil/2017/10/16/brazils-justice-system-work.

commentators have periodically voiced the opposite complaint.[109] For instance, Virgilío Alfonso da Silva, a constitutional law professor at the University of São Paulo, who wishes that the Senate would take its role in the confirmation process "more seriously," contrasts the American confirmation process, which takes "days," with the Brazilian process, which takes "just an afternoon."[110] This criticism is not ungrounded: the last time Brazil's Senate rejected a nominee was in 1894.[111]

This lackadaisical approach to judicial confirmations seems especially concerning upon consideration of the disproportionate power that Brazil's mandatory retirement age can instill in certain presidents. Luiz Inácio Lula da Silva's presidency is a good example of this problem. "Lula" served two terms as Brazil's president, holding office from 2003 to 2010.[112] During that time, seven ministers reached the mandatory retirement age of seventy-five, two retired voluntarily, and one died.[113] During his tenure, Lula successfully placed eight ministers on the Supreme Court, and by the time he left office, six of the eleven ministers, a majority, were his appointees.[114] By contrast, the current president-elect, Jair Bolsonaro, will only have two ministers reach the mandatory age of retirement during his four-year tenure.[115] To narrow the difference, Bolsonaro has expressed a desire to pack the Court with 10 new ministers, taking the Court's size from eleven to twenty-one.[116] Regardless of whether Bolsonaro succeeds, the experience of Brazil indicates that this disparity in appointment power vests certain presidents with an arbitrarily high degree of control over the judiciary and ultimately makes the judiciary more susceptible to political encroachment.

This is not to say that there have not been disparities amongst American presidents with respect to judicial appointments.[117] However, the size of the

109. *Jurista Critica Sabatinas de Indicados ao STF*, ESTADÃO (Sept. 28, 2009), https://politica.estadao.com.br/noticias/geral,jurista-critica-sabatinas-de-indicados-ao-stf,442224.

110. *Id*.

111. Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Choosing Judges in Brazil: Reassessing Legal Transplants from the United States*, 59 AM. J. COMP. L. 529, 543 (2011).

112. Mauricio Savarese and Jenny Barchfield, *Brazilian Police Question Ex-President in Corruption Probe*, CTV NEWS, https://www.ctvnews.ca/world/brazilian-police-question-ex-president-in-corruption-probe-1.2803469 (last updated Mar. 4, 2016, 1:49 PM).

113. *See* Oliveira & Garoupa, *supra* note 111, at 542.

114. *Id*.

115. *See Ministros: José Celso de Mello Filho*, SUPREMO TRIBUNAL FED., http://www.stf.jus.br/portal/ministro/verMinistro.asp?periodo=stf&id=28 (last visited Apr. 15, 2020) (showing that Minister Celso de Mello was born in 1945); *see also Ministros: Marco Aurélio Mendes de Farias Mello*, SUPREMO TRIBUNAL FED., http://www.stf.jus.br/portal/ministro/verMinistro.asp?periodo=stf&id=30 (showing that Minister Marco Aurélio was born in 1946).

116. *See* Maria Martha Bruno, *The "Brazilian Donald Trump" Mimics Hugo Chávez in Supreme Court Plans*, BRAZILIAN REP. (July 5, 2018), https://brazilian.report/power/2018/07/05/jair-bolsonaro-trump-chavez.

117. For instance, President Carter never had the opportunity to appoint a candidate for the Supreme Court. President Reagan, his successor, nominated four eventual justices—if one includes William Rehnquist, who President Reagan elevated from Associate Justice to Chief Justice.

disparity in Brazil, in part because of the mandatory retirement age, [118] is far greater than any such disparity in recent American history.[119] Therefore, while one of the goals of a mandatory retirement age is to decrease the political stakes of judicial appointments, it may actually end up further politicizing the appointment process.

To illustrate this concern, consider the nomination of Merrick Garland.[120] Senate Republicans refused to hold hearings for Garland in part to make the Supreme Court a central issue in the 2016 election, effectively encouraging Republican voter turnout.[121] The plan worked, but it also had the consequence of placing the Court directly in the crosshairs of the political branches.[122] Furthermore, while there was only one seat in play for the 2016 election, it is easy to imagine how perception of the Court might change if voters could know that the next president would be responsible for filling a majority of the seats on the Court, as was true in Lula's case. In Brazil, the one-party rule that characterized Lula's term in office was enough to keep the judiciary relatively removed from partisan battles. However, in a competitive political atmosphere, such as that of the United States, this system could be disastrous for the judicial confirmation process.

B. THE SUCCESS OF "TERM OF YEARS" TENURE LIMITS IN MEXICO

Mexico is the best case study for the "term of years" approach because its constitutional structure for appointing judges is similar to that of the United States. The Mexican Supreme Court of Justice of the Nation (SCJN) has eleven ministers, all of whom were nominated by the president and confirmed by the Chamber of Senators, the higher body in Mexico's bicameral legislature.[123] This structure, of course, is quite similar to its American counterpart. The primary difference between the American system and the Mexican system lies in judicial tenure. In practice, there are several facets in which Mexico's confirmation process, in practice, looks preferable to its American counterpart. At the same time, however, its system also illustrates some shortcomings—also having to do with disparities in appointment power—that the United States would do well to avoid, should it adopt a "term of years" approach.

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118. *See* Oliveira & Garoupa, *supra* note 111, at 542.

119. The largest disparity in the post-World War II period is between Dwight Eisenhower, who nominated five Supreme Court justices, and Jimmy Carter, who did not nominate any. *See* Tom Murse, *Which President Has Nominated the Most Supreme Court Justices?*, THOUGHTCO., https://www.thoughtco.com/who-nominated-more-supreme-court-justices-3880107 (last updated July 3, 2019).

120. *See* Elving, *supra* note 24.

121. *Id*. ("[T]he vacancy became a powerful motivator for conservative voters in the [presidential election] . . . . Many saw a vote for Trump as a means to keep Scalia's seat away from the liberals.").

122. *Id.*

123. Constitución Política de los Estados Unidos Mexicanos, CP, Dario Oficial de la Federación [DOF], c. 4, art. 96, 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

1. Mexico Adopts "Term of Years" Tenure Limits on SCJN Ministers

While Mexico's confirmation process does not produce the sort of intense partisan fighting that one finds with American confirmation battles,[124] the current process came into being in large part because its predecessor had come under intense political scrutiny.[125] Throughout the 1990s, commentators became deeply critical of the executive branch's overarching control of the judiciary.[126] In response to this sort of concern, in 1994, Mexico overhauled its judiciary, enacting a series of reforms designed to make it more independent.[127] One of these reforms was to institute fifteen-year "term of service" tenure limits for Supreme Court of Justice of the Nation SCJN ministers.[128] Another reform, also aimed at untangling the judiciary from the political branches, was to prohibit the president from nominating candidates who had held certain public offices in the year prior to nomination.[129] Ironically, after Mexico adopted these reforms in the name of judicial independence, President Ernesto Zedillo, "dismissed" the then-serving ministers of the SCJN and put up his own nominations for the Court.[130] Furthermore, because Zedillo's political party, the Institutional Revolutionary Party (PRI), dominated every branch of the Mexican government at the time, including the Senate, he was able to reshape the Court as he saw fit.[131] In the years after the 1994 overhaul, the Senate continued to be highly deferential to the president's nominees to the SCJN, in large part because of single-party governance.[132]

2. How Mexico Has Succeeded in Avoiding Partisan Confirmation Battles

Today, the PRI no longer dominates Mexican politics as it did in the nineties. Currently, it only has about 16 percent of the seats in the Mexican Senate and no longer controls the presidency.[133] Furthermore, the party currently in charge, the National Regeneration Movement, controls less than 50 percent

124. Robert Kossick, *The Rule of Law and Development in Mexico*, 21 ARIZ. J. INT'L & COMP. L. 715, 753 n.117 (2004) ("[T]he level of scrutiny received by Mexican Supreme Court nominees is nominal.").

125. Alexis James Gilman, *Making Amends with the Mexican Constitution: Reassessing the 1995 Judicial Reforms and Considering Prospects for Further Reform*, 35 GEO. WASH. INT'L L. REV. 947, 956–60 (2003) (summarizing Mexico's constitutional amendments aimed at strengthening judicial independence).

126. *See*, *e.g.*, Michael C. Taylor, *Why No Rule of Law in Mexico? Explaining the Weakness of Mexico's Judicial Branch*, 27 N.M. L. REV. 141, 147-48 (1997); *see also* Alicia Ely Yamin & Pilar Noriega Garcia, *The Absence of the Rule of Law in Mexico: Diagnosis and Implications for a Mexican Transition to Democracy*, 21 LOY. L.A. INT'L & COMP. L. REV. 467, 491 (1999) (describing the judiciary as "subservien[t] to the executive branch").

127. Gilman*, supra* note 125.

128. *Id*. at 957.

129. *Id*.

130. Luke McGrath, *Presumed Guilty?: Criminal Justice and Human Rights in Mexico*, 24 FORDHAM INT'L L.J. 801, 883 (2000).

131. Gilman, *supra* note 125, at 949–950.

132. *Id*.

133. *Cómputos Distritales 2018*, INSTITUTO NACIONAL ELECTORAL (July 8, 2018), https://computos2018.ine.mx/#/senadurias/nacional/1/2/1/2 (last visited Apr. 15, 2020).

of the Senate seats and has had to forge a coalition with the Labor Party and Social Encounter Party in order to secure control of the Senate.[134] Despite the increasingly pluralistic nature of Mexican politics, however, presidents tend to have few problems getting their SCJN nominees confirmed. For instance, Norma Lucía Piña Hernández, President Peña Nieto's most recent SCJN nominee, was confirmed overwhelmingly by a vote of seventy-nine to twenty, despite intense opposition from some in the minority Labor Party.[135] There are three potential explanations for the Senate's apparent willingness to confirm nominees.

a. Coalition Politics

The first explanation pertains to the Mexican Senate's party demographics. Because Mexican politics have become more pluralistic in the decades since the reforms of 1994,[136] presidents now have an incentive to consider factors beyond judicial philosophy and political self-interest. Consequently, a president must nominate candidates who appeal to senators from the various parties that comprise the majority coalition.[137] Historically, the United States has seen a similar phenomenon at play when the presidency and Senate are controlled by different political parties. For example, Anthony Kennedy, often labeled a "moderate,"[138] was nominated after the Senate rejected President Reagan's first Supreme Court nominee, Robert Bork, on the grounds that Bork was too "conservative."[139] Kennedy's nomination, then, can be understood as a sort of compromise with Senate Democrats. This practice seems less applicable in the current political climate, however. President Obama's nomination of the "center-left" Merrick Garland to the Supreme Court, for instance, struck many as an attempt to compromise with a Republican Senate, since many regarded Garland as a moderate jurist.[140] As previously discussed, Garland's nomination did not end as President Obama had hoped.[141] Given this most recent example and the United States' polarized and two-party political structure, it seems

134. Adam E. Badenhorst, *Mexico's Fragile Governing Coalition*, MEDIUM (July 30, 2018), https://medium.com/reformermag/mexicos-fragile-governing-coalition-b1dcc4bd4667.

135. Reed Brundage, *Mexico Supreme Court: Senate Chooses Norma Piña as New Justice*, MEX. VOICES (Dec. 10, 2015), https://mexicovoices.blogspot.com/2015/12/mexico-supreme-court-senate-chooses.html.

136. *See* Ronald F. Wright, *Mexican Drug Violence and Adversarial Experiments*, N.C. J. INT'L L. & COM. REG. 363, 379 (2010) ("The loss of the PRI monopoly on political power with the election of Vicente Fox in 2000 signaled the arrival of a more pluralistic and democratically competitive nation.").

137. *See id*.

138. *See, e.g.*, Colin Dwyer, *A Brief History of Anthony Kennedy's Swing Vote—and the Landmark Cases It Swayed*, NAT'L PUB. RADIO (June 27, 2018, 7:00 PM), https://www.npr.org/2018/06/27/623943443/a-brief-history-of-anthony-kennedys-swing-vote-and-the-landmark-cases-it-swayed.

139. *See, e.g.*, *Against Robert Bork; His Bill of Rights Is Different*, N.Y. TIMES (Oct. 5, 1987), https://www.nytimes.com/1987/10/05/opinion/against-robert-bork-his-bill-of-rights-is-different.html.

140. *See, e.g.*, Nate Silver, *Republicans Could Do a Lot Worse Than Merrick Garland Under President Clinton—or President Trump*, FIVETHIRTYEIGHT (Mar. 16, 2016, 3:42 PM), https://fivethirtyeight.com/features/republicans-could-do-a-lot-worse-than-merrick-garland-under-president-clinton-or-president-trump.

141. *See* Howe, *supra* note 12.

unlikely that the sort of broad, coalition-style nominations that play well in Mexico will find much political success in the United States. It is certainly conceivable that the nomination of a "moderate" candidate *early* in a president's term could be confirmed by a Senate controlled by an opposing party, but, generally speaking, the president likely needs a friendly Senate in order to get nominees confirmed.

b. Jurisprudencia *in Mexico's Civil Law System*

The second explanation, which is clearly inapplicable to the United States, concerns the nature of judicial review in Mexico. In the United States, the principle that lower courts are bound by the Supreme Court's resolution of a particular constitutional issue is fundamental.[142] In Mexico, the SCJN's resolution of a particular dispute between two parties is, at least initially, only binding upon the litigants before the Court.[143] To create *jurisprudencia* in Mexico (that is, to create precedent that binds all state and federal courts), eight ministers of the SCJN must rule on a particular question of law and then uphold the decision with "five consecutive and consistent decisions."[144] This requirement of five consecutive and consistent decisions constitutes one of the starker differences between the function of the United States Supreme Court and Mexico's SCJN. It also likely contributes to the comparatively relaxed approach that the Mexican Senate takes with respect to the president's SCJN nominations.

As an illustrative example, consider the permissibility of recreational cannabis as a legal and political issue. In October 2018, the SCJN issued two rulings that recognized cannabis use as part of the "fundamental right to the free development of personality" guaranteed by the Mexican Constitution.[145] However, the issue of recreational cannabis had been litigated before the SCJN for years prior to these rulings.[146] 2015 marked the first time that the Court invalidated a cannabis prohibition on constitutional grounds.[147] On first glance, it is not at all clear that there was any social consensus that cannabis

142. Winslow v. F.E.R.C., 587 F.3d 1133, 1135 (D.C. Cir. 2009) ("Vertical stare decisis—both in letter and in spirit—is a critical aspect of our hierarchical Judiciary headed by 'one supreme Court.'").

143. *See* Patrick Del Duca, *The Rule of Law: Mexico's Approach to Expropriation Disputes in the Face of Investment Globalization*, 51 UCLA L. REV. 35, 101–02 (2003).

144. *See* Kossick, *supra* note 124, at 770 n.187.

145. *See* Suprema Corte de Justicia de la Nación, Reitera Primera Sala Inconstitucionalidad De La Prohibición Absoluta Del Consumo Recreativo De Marihuana E Integra Jurisprudencia (Oct. 31, 2018), http://www.internet2.scjn.gob.mx/red2/comunicados/noticia.asp?id=5785; *see also* Christopher Ingraham, *Mexico's Supreme Court Overturns Country's Ban on Recreational Marijuana*, WASH. POST (Nov. 1, 2018, 12:04 PM), https://www.washingtonpost.com/business/2018/11/01/mexicos-supreme-court-overturns-countrys-recreational-marijuana-ban/?noredirect=on&utm_term=.a7437b5dc8b2.

146. *See, e.g.*, Carrie Kahn, *Mexico's Supreme Court Ruling Paves Way for Precedent on Marijuana Legalization*, NAT'L PUB. RADIO (Nov. 5, 2015, 4:38 PM), https://www.npr.org/2015/11/05/454907637/mexicos-supreme-court-ruling-paves-way-for-precedent-on-marijuana-legalization.

147. Elisabeth Malkin & Azam Ahmed, *Ruling in Mexico Sets Into Motion Legal Marijuana*, N.Y. TIMES (Nov. 4, 2015), https://www.nytimes.com/2015/11/05/world/americas/mexico-supreme-court-marijuana-ruling.html.

decriminalization was sound policy,[148] much less a legal consensus that the Mexican Constitution contained a fundamental right to use cannabis for recreational purposes. There were at least some, including political leaders,[149] religious readers,[150] and advocacy groups, like the National Union of Parents,[151] for whom the prospect of SCJN ministers invalidating criminal prohibitions on cannabis was troubling. Interestingly, however, the two ministers who delivered the opinions creating *jurisprudencia* on this issue were confirmed by large margins in the Senate. The first was Norma Lucía Piña Hernández, who, as previously mentioned, was confirmed with 79 votes in the Senate.[152] The second, Minister Arturo Zaldívar Lelo de Larrea, was nominated in 2009 and received 90 votes in the Senate.[153] To the degree that the five-decision restriction limits the SCJN's capacity to set binding precedent with national public policy implications, it makes sense that the stakes for each SCJN nominee are lower than they might be in absence of the restriction.

Contrast Mexico's *jurisprudencia* with judicial review in the United States. The U.S. Supreme Court, like the SCJN, also passes on legal issues that have national policy ramifications.[154] The difference between the two is that the Supreme Court's decisions are binding, regardless of whether the Court is considering an issue for the first time or reaffirming a centuries-old principle.[155] In certain cases, the justices have been quite candid in acknowledging the ease with which the Supreme Court can overrule precedent, as well as the ways in which this reality can impact the politics of judicial selection.[156] The Mexican

148. *See, e.g.,* Vanda Felbab-Brown, *Why Legalization in Mexico Is Not a Panacea for Reducing Violence and Suppressing Organized Crime*, BROOKINGS INSTITUTION (Sept. 23, 2010), https://www.brookings.edu/opinions/why-legalization-in-mexico-is-not-a-panacea-for-reducing-violence-and-suppressing-organized-crime ("[T]here are good reasons not to want the very bloody Mexican capos to become legitimized.").

149. *See* Malka Levitin, *Mexican Supreme Court Inches Toward Marijuana Legalization*, COLUM. J. OF TRANSNAT'L L., http://blogs2.law.columbia.edu/jtl/mexican-supreme-court-inches-toward-marijuana-legalization/ (last visited Apr. 15, 2020) ("The president of Mexico, Enrique Pena Nieto, is still opposed to the legalization of marijuana, as are many politicians.").

150. *See, e.g.,* David Agren, *Mexico Supreme Court Rules Ban on Marijuana Use Unconstitutional*, GUARDIAN (Nov. 4, 2015, 5:01 PM), https://www.theguardian.com/world/2015/nov/04/mexico-supreme-court-recreational-marijuana-legal (discussing the Archdiocese of Mexico City's opposition to the SCJN's decision to remove the legalization debate from the legislature, "as if it's a super power.").

151. *See* Dudley Althaus, *Mexico's Supreme Court Rules in Favor of Personal Marijuana Use*, WALL ST. J. (Nov. 4, 2015, 5:05 PM), https://www.wsj.com/articles/mexicos-supreme-court-rules-in-favor-of-personal-marijuana-use-1446670474?alg=y ("This issue should be decided by Congress.").

152. *See* Brundage, *supra* note 135.

153. Claudia Guerrero & Rolando Herrera, *Avala el Senado Relevos en la Corte; Obtienen Respaldo del PRI, PAN y PRD. Sustituye Zaldívar a Genaro Góngora y Aguilar a Azuela en el Poder Judicial*, EL NORTE (Dec. 2, 2009).

154. *See* Eric Black, *How the Supreme Court Has Come to Play a Policymaking Role*, MINNPOST (Nov. 20, 2012), https://www.minnpost.com/eric-black-ink/2012/11/how-supreme-court-has-come-play-policymaking-role.

155. *See, e.g.*, Alshrafi v. Am. Airlines, 321 F. Supp. 2d 150, 156 n.7 (D. Mass. 2004) ("The sweeping nature of recent Supreme Court preemption jurisprudence has been the subject of considerable comment, much of it critical. . . . Still, it is bedrock that Supreme Court decisions bind the analysis of [lower courts].").

156. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 883, 943 (1992) (Blackmun, J., concurring in part) ("In one sense, the Court's approach is worlds apart from that of [the dissent] . . . . And yet, in another sense,

approach to *jurisprudencia*, like the coalition-style politics that currently dominate the Mexican Senate, finds no resonating parallel in the United States.

c. Fifteen-Year SCJN Terms: A Model for the United States?

A third explanation, which is most easily applicable to the United States and most pertinent to the topic of this Note, is that the stakes of each particular nomination are lower when there is a fixed tenure ceiling for each nominee. As mentioned previously, the average length of tenure for a Supreme Court Justice in the modern era is in excess of twenty-six years.[157] This aggravates already existing partisan attitudes about the Supreme Court in two ways. First, the twenty-six-year average creates high stakes for nominations simply by virtue of its length. A confirmation vote is an important decision that senators make with imperfect information about the nominee,[158] and the stakes are higher than if the nominee were slated to sit on the Court for a shorter period of time than a likely twenty-six years.

Second, and perhaps more dangerous, is the uncertainty that comes with "good behavior" tenure. Given the Supreme Court's increasingly central role in deciding issues of public policy,[159] the public has taken a strong interest in the composition of the Court.[160] While this is certainly understandable, it has also given rise to a curious and even disturbing infatuation with the mortality of the Court's members.[161] Almost inevitably, each summer brings with it a series of rumors and speculation concerning the possible retirement of at least one elderly justice, lest he or she die in office and be replaced by a president with differing opinions about the law, thereby shifting the ideological balance of the Court.[162]

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the distance between the two approaches is short—the distance is but a single vote. . . . I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor may well focus on the issue [of abortion].").

157. Calabresi & Lindgren, *supra* note 40, at 778.

158. Oliver Roeder, *Supreme Court Confirmation Hearings Have More Questions and Fewer Answers Than Ever Before*, FIVETHIRTYEIGHT (Sept. 4, 2018, 5:58 AM), https://fivethirtyeight.com/features/supreme-court-confirmation-hearings-have-more-questions-and-fewer-answers-than-ever-before ("[Supreme Court] nominees have nearly perfected the sport of confirmation-hearing dodgeball, ducking and weaving through the thousands of comments.").

159. *See* Black, *supra* note 154.

160. *See Voter Enthusiasm at Record High in Nationalized Midterm Environment*, *supra* note 27.

161. *See, e.g.*, Oliver Roeder, *How Long Will the Supreme Court's Conservative Bloc Survive?*, FIVETHIRTYEIGHT (July 19, 2018, 5:59 AM), https://fivethirtyeight.com/features/how-long-will-the-supreme-courts-conservative-bloc-survive/; *see also* SCOTUS DEATHWATCH, http://scotusdeathwatch.com/ (last visited Apr. 15, 2020); *see also* Chris Kirk & Stephen Laniel, *The Supreme Court Justice Death Calculator*, SLATE (Jan. 14, 2013, 6:00 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2013/01/supreme_court_justice_death_calculator_find_out_the_probabilities_that_different.html.

162. *See, e.g.*, Melissa Quinn, *Mike Lee: "Very Real Possibility" Justice Antony Kennedy Retires This Year*, WASH. EXAMINER (May 23, 2018, 10:21 AM), https://www.washingtonexaminer.com/policy/courts/mike-lee-very-real-possibility-justice-anthony-kennedy-retires-this-year ("[H]e considers himself a Republican, and with all things being equal, would prefer to be replaced by a Republican president."); *see also* Jonathan Turley, *Opinion: Ginsburg Gambled to Stay and Now She May Lose Her Legacy*, HILL (Apr. 10, 2017, 4:00 PM), https://thehill.com/blogs/pundits-blog/the-judiciary/328151-ginsburg-gambled-to-stay-on-the-supreme-

The annual fixation with who might leave the Court and what impact that would have on its balance regularly drums up partisan attitudes about the judiciary.[163] It tends not to help that the end of the term, which is when this morbid speculation reaches its peak intensity, also happens to coincide with the release of the Court's "most important" decisions for the term.[164]

Mexico does not have this annual uncertainty because the ministers of the SCJN have fixed terms. It may well be true that not every minister serves his or her fifteen years to completion. However, one of the purported benefits of establishing fifteen-year terms was greater predictability in the composition and turnover of the SCJN.[165] From 1947 to 1994, for instance, Mexico did not employ the "term of years" approach it currently uses; rather, it employed a mandatory retirement age of seventy.[166] Because of the wide availability of attractive non-judicial positions in the government, fifty-five percent of SCJN ministers left the bench after serving ten years or less.[167] Some commentators thought that the fifteen-year terms instituted in 1994 would result in more ministers completing the term of service, thereby instituting a more spread-out, consistent rate of turnover.[168] A chaotic, uneven rate of turnover, by contrast, seems to inherently produce uncertainty. Granted, in pre-1994 Mexico, this uncertainty did not result in particularly high stakes for judicial selection, since the likelihood of a minister remaining on the SCJN for decades was comparatively low.[169] In the United States, however, the opposite is true. Because turnover is not easily predictable and because terms are so long, the political stakes of each nomination are high. Since no one knows when another vacancy on the Court will open, presidents and senators feel a great deal of pressure to treat vacancies as important political battles. A set term of years would help resolve this uncertainty in large part.

court-now-she-may ("What began as polite suggestions that it 'might be time [for Justice Ginsburg] to leave' became more and more pointed, if not panicked, in the last two years of the Obama term.").

163. *See*, *e.g.*, Janice Williams, *Supreme Court Justice Anthony Kennedy Retirement Rumors Has Washington on Edge for Next Term*, NEWSWEEK (June 24, 2017, 12:47 PM), https://www.newsweek.com/anthony-kennedy-supreme-court-retirement-628842; *see also* Tony Mauro, *Rehnquist Retirement Rumors Flare Up and Go Out Again; Courtside*, RECORDER (June 10, 2002), at 3 ("The story [that Justice Rehnquist was going to retire] was whipping around Washington, feeding on itself, and you could almost hear interest groups dusting off their battle gear for a confirmation battle.").

164. Stephen Wermiel, *SCOTUS for Law Students: The End of the Term*, SCOTUSBLOG (June 18, 2016, 9:17 AM), http://www.scotusblog.com/2016/06/scotus-for-law-students-the-end-of-the-term/.

165. Héctor Fix-Fierro, *Judicial Reform and the Supreme Court of Mexico: The Trajectory of Three Years*, 6 U.S.-MEX. L.J. 1, 6 n.28 (1998).

166. *Id*.

167. *Id*.

168. HÉCTOR FIX-ZAMUDIO & JOSÉ RAMÓN COSSÍO DÍAZ, EL PODER JUDICIAL EN EL ORDENAMIENTO MEXICANO 630–33 (1996).

169. Fix-Fierro, *supra* note 165, at 6 n.28.

3. The Need for Staggered Terms: Lessons from Mexico's Disparities in Presidential Appointment Power

Having identified one positive aspect of Mexico's judicial selection process that would be applicable in the United States (by way of a Twenty-Eighth Amendment), it is also worth noting that the "term of years" approach may help to alleviate some of the partisanship now inherent in the process. Unfortunately, this solution could also have the undesired effect of producing large disparities in nominating power for subsequent presidents, which is part of what makes the Brazilian model so undesirable.[170] A brief examination of the current composition of the SCJN makes this problem more apparent.

Because President Zedillo nominated a wave of ministers at once in 1994,[171] each minister's tenure was set to the same term-of-years clock, so to speak. Theoretically, this would mean that Zedillo and the president who serves fifteen years after Zedillo would each have the opportunity to fill the entire composition of the Court, with no intermediate vacancies for other presidents to fill (assuming each minister serves the entire fifteen-year term). Fortunately, this has not been the case, as not every minister has served the full term.[172] However, the appointment disparity is borne out by the current SCJN, which contains 5 ministers nominated by Filipe Calderón,[173] who served from 2006 to 2012,[174] and only three ministers by Enrique Peña Nieto,[175] the following president, whose term ran from 2012 to 2018.[176] By contrast, the current president, Andrés Manuel López Obrador, whose term will be six years,[177] will have the opportunity to nominate ministers for *at least* six vacancies[178]: as of November 2019, he had already appointed two ministers,[179] one minister had resigned,[180] and three of the current ministers, Fernando Franco González-Salas,[181] Arturo

170. Oliveira & Garoupa, *supra* note 111, at 542–43.

171. McGrath, *supra* note 130, at 883.

172. *See, e.g.*, *All Power: López Obrador's Attempts to Seize the Supreme Court*, CE NOTICIAS FINANCIERAS ENGLISH (Oct. 4, 2019) (describing Eduardo Medina-Mora's resignation from the SCJN).

173. *See Conoce la Corte*, SUPREMA CORTE DE JUSTICIA DE LA NACIÓN, https://www.scjn.gob.mx/conoce-la-corte (last visited Apr. 15, 2020).

174. *See List of Presidents of Mexico,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/list-of-presidents-of-Mexico-1830608 (last visited Apr. 15, 2020).

175. *See Conoce la Corte*, *supra* note 173.

176. *See List of Presidents of Mexico*, *supra* note 174.

177. Constitución Política de los Estados Unidos Mexicanos, CP, Dario Oficial de la Federación [DOF], c. 4, art. 83, 05-02-1917, últimas reformas DOF 10-02-2014 (Mex.).

178. This assumes that all present ministers serve out their full terms.

179. *See Juan Luis González Alcántara Carrancá Is Welcomed at the SCJN*, CE NOTICIAS FINANCIERAS ENGLISH (Jan. 2, 2019).

180. *See All Power: López Obrador's Attempts to Seize the Supreme Court*, *supra* note 172.

181. *See SCJN: Why It Anticipates That It Will Be a Woman to Replace Medina Mora*, CE NOTICIAS FINANCIERAS ENGLISH (Oct. 4, 2019) ("[T]he ministers are elected to a 15-year commission, so the next outing would be that of José Fernando Franco González-Salas, nominated by Vicente Fox in December 2006.").

Zaldívar Lelo de Larrea,[182] and Luis María Aguilar Morales,[183] will each hit their fifteen-year limits before López Albrador's term expires in 2024. Certainly, this is less dramatic than the disparities present in the Brazilian judicial selection.[184] However, if the goal is to reduce the levels of partisanship and political strife that currently infect the process, the ideal solution should allocate opportunities for presidents to nominate candidates on a roughly equal basis.

The problem of disparity in nominating power would perhaps best be addressed by staggering the fixed terms at the outset. This illustrates an important strength of the approach advanced by Professors Steven Calabresi and James Lindgren.[185] The Calabresi-Lindgren model proposes eighteen-year terms with appointments staggered every two years.[186] This has two positive effects. First, it guards against disparity in nominating power by granting each president the opportunity to nominate at least two candidates to the Supreme Court per term. If a president wins two terms in office, then the president will have four opportunities to nominate a candidate. Therefore, while a one-term president will have half as many opportunities to fill vacancies as a two-term president, this will solely be a reflection of the president's extended time in office, reflecting public support. This is to be contrasted with the Brazilian and Mexican systems—as well as, to a certain degree, the current American system—in which the president's influence on the high court is determined by more arbitrary factors, such as the death or retirement of a sitting member. Furthermore, in the event of a premature end to a justice's tenure, be it death or early retirement, the Calabresi-Lindgren approach affords presidents the opportunity to make an interim nomination, also subject to advice and consent of the Senate.[187] Therefore, while *some* presidents will have slight advantages in nominating power over others, the advantage is limited to the remainder of the original eighteen-year term, and importantly, no president will be denied the opportunity to fill at least two full vacancies.

Second, it reduces the political pressure to select (or block) nominees on strictly ideological grounds. Of course, the Senate should not be unduly deferential towards the president's nominations in any instance, and it would be a dereliction of the Senate's duty if it simply rubber-stamped nominees who lacked sufficient credentials, held ideas far outside the mainstream, or exhibited serious character flaws. However, any purely partisan confirmations would likely be offset over time, assuming at least some change in party control of the White House and the Senate. The hope, then, is that the participants in the

182. *See Ministros Eligen Hoy a Presidente de la Suprema Corte*, EXCELSIOR (Feb. 1, 2019, 8 :31 PM), https://www.excelsior.com.mx/nacional/ministros-eligen-hoy-a-presidente-de-la-suprema-corte/1287982 ("Su periodo finaliza el 30 de noviembre de 2024," which translates to "Its period ends on November 30, 2024.").

183. *See The New Minister of the Court will be Decisive to Choose the Head of the PJF*, CE NOTICIAS FINANCIERAS ENGLISH (Aug. 26, 2018) ("[Aguilar Morales's] term as minister ends [in] 2024.").

184. *See* Oliveira & Garoupa, *supra* note 111, at 542.

185. Calabresi & Lindgren, *supra* note 40, at 824.

186. *Id*.

187. *Id*. at 827.

confirmation process place greater emphasis on each nominee's competence to serve on the Court and less emphasis on political gamesmanship.

CONCLUSION

It would be naïve to reduce any existing problems with judicial selection to a single factor or to argue that a modest alteration to the process would remove partisanship from the nomination and confirmation process. As acknowledged from the outset, politics have always crept into the confirmation process. That said, there are degrees of politicization, and when the process becomes as toxic and divisive as it has in recent years in the United States, the underlying causes ought to be addressed.

There is some reason to think that the current practice of life tenure is a contributing factor to the current climate in the judicial selection process. Decades-long terms with no fixed end date incentivizes political actors to treat Supreme Court vacancies as political contests. This is not a strictly theoretical point. Just as other nations have largely abandoned the practice of life tenure, they have also, in many instances, avoided the toxic partisanship that surrounds the judicial selection process in the United States. While a number of structural and political factors account for the difference, the experiences of other countries tend to suggest that a modest reduction in judicial tenure would have some positive effects. The Brazilian experience with mandatory retirement cautions against a mandatory retirement age, but the Mexican experience with a fixed term of years is encouraging. Given these observations, the United States would do well to consider a Twenty-Eighth Amendment that restricted Supreme Court tenure to eighteen years. Mexico is also illustrative of the discrepancies in appointment power that can result from a term of years system. To account for this, the terms ought to be staggered every two years, thereby guaranteeing each president two complete vacancies and the possibility of one or more interim vacancies.