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The Policy Consequences of Term Limits on the U.S. Supreme Court

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For decades, the question of whether United States Supreme Court justices should be subject to term limits has been persistently raised by legal scholars, commentators, and politicians alike. For the most part, these debates have been normative, centering around whether term limits are an appropriate way to reform the country's most powerful and unelected institution. This project seeks to provide an empirical perspective to this debate. Using what political scientists know about the patterns in the nomination and confirmation process, we present data on how term limits might have altered the composition of the Court during the last half-century. We then consider how a policy of term limits would have impacted the nature of legal policy established by the Court during the same time period.

INTRODUCTION[1]

The recent death of Supreme Court Justice Antonin Scalia and the ensuing battle over his replacement has opened the door to many

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conversations about the role of the President in choosing Supreme Court justices.[2] While many of these conversations have revolved around the timing of the nominations, how much the President can or should impact the Court, and whether late-term presidents should have the ability to shift the balance of the Court for decades to come, a subtler narrative also emerged: what if every president had the same opportunities to pick judicial replacements and what if these replacements happened on a predictable schedule? Justice Scalia's death has led some scholars and commentators to renew the call for term limits for Supreme Court justices.[3]

The call for term limits is not a new one.[4] Rather, the suggestion that we should limit the service of members who serve in America's only unelected branch might be as old as the Court itself.[5] Term limiting federal judges, especially on the Supreme Court of the United States, seems to get a boost of popularity every time the Court makes a controversial decision or when a retirement or death on the Court has the possibility to shift its ideological balance.[6] Indeed, a poll conducted in June 2015, before Justice Scalia's death thrust the Court back into the hands of the elected branches, but after the Court issued controversial decisions on same-sex marriage, fair housing, and health care, suggested that a strong majority of Americans (66%) favored term limits for Supreme Court justices.[7] A similar poll conducted in April 2014 found that 71% of Americans would approve of justices' tenure being limited to some "fixed timeframe," while 74% said

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2. Stephen Collinson, *Antonin Scalia's Death Quickly Sparks Political Battle*, CNNPOLITICS (Feb. 14, 2016, 6:57 PM), http://www.cnn.com/2016/02/13/politics/antonin-scalia-supreme-court-replacement/.

3. Orin Kerr, *Justice Scalia's Death and the Case for Supreme Court Term Limits*, WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/16/justice-scalias-death-and-the-case-for-supreme-court-term-limits/; *see Term Limits and the Supreme Court: Is It Bad to Have a Bunch of Old Judges?*, THE ECON. (Aug. 20, 2015, 5:27 PM), http://www.economist.com/blogs/democracyinamerica/2015/08/term-limits-and-supreme-court.

4. *See generally* Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006) [hereinafter Calabresi & Lindgren, *Term Limits*].

5. Lyle Denniston, *Constitution Check: Did the Founders Want Term Limits for Supreme Court Justices?*, NAT'L CONST. CENTER (Mar. 31, 2015), http://blog.constitutioncenter.org/2015/03/constitution-check-did-the-founders-want-term-limits-for-supreme-court-justices/.

6. Andrew Cohen, *Should The Supreme Court Have Term Limits?*, CBS NEWS (Feb. 29, 2009, 3:32 PM), http://www.cbsnews.com/news/should-the-supreme-court-have-term-limits/; *see* Jamal Greene, *Revisiting the Constitution: We Need Term Limits for Federal Judges*, N.Y. TIMES (July 31, 2015, 5:04 PM), http://www.nytimes.com/roomfordebate/2012/07/08/another-stab-at-the-us-constitution/revisiting-the-constitution-we-need-term-limits-for-federal-judges; *see also* Emma Baccellieri, *Term Limits for U.S. Supreme Court Justices?*, SEATTLE TIMES (July 27, 2015, 3:33 PM), http://www.seattletimes.com/nation-world/term-limits-for-us-supreme-court-justices/.

7. Lawrence Hurley, *Americans Favor Supreme Court Term Limits—Reuters/Ipsos Poll*, REUTERS (July 20, 2015, 12:09 PM), http://www.reuters.com/article/us-usa-court-poll-idUSKCN0PU09820150720.

they would strongly or somewhat support justices serving for a "fixed term of 18 years."[8]

Perhaps because this issue seems so resilient in American political discourse, scholars have paid a fair amount of attention to the normative arguments for and against judicial term limits.[9] Much less attention has been given, however, to the empirical implications of term limits, and most notably, how term limits would change the Court and the legal policy it produces.[10] We attempt to fill this gap by presenting data on how term limits might have altered the Court's composition and its legal outputs for the last half-century.

This exploration is important for at least three reasons. First, it informs an important policy debate. As scholars and practitioners continue to wrestle with the question of whether justices should serve for a limited amount of time, the empirical implications of such a change will become increasingly relevant. Second, our data helps deepen scholars' understanding of the nomination and confirmation process of Supreme Court justices. Examining how presidents' choice of nominee and how Senate voting on that nominee would have changed during different political environments helps shine a light on the various political and strategic considerations each actor faces and demonstrates how those considerations play out over time. Finally, our general approach of bringing real data to bear on hypotheticals and historical counterfactuals can be employed to examine a number of proposals to reform both the judiciary and other American political institutions as well.

We begin by discussing the current state of judicial term limits in the United States and how those limits compare to similar courts internationally. We then turn to a brief discussion of the normative debate surrounding term limits on the Supreme Court and how those debates leave the door open for fruitful empirical research. Then, we discuss our own approach, addressing the assumptions we made and the data we used to answer two related questions: (1) How would term limits have changed the composition of the Court?; and (2) How would that changed composition have altered cases that the Court decided in the latter part of the 20th

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8. This survey split the sample such that half of respondents were asked if they supported a general limit and the other half of the sample was asked to respond to an 18-year limit. *Democracy Corps Supreme Court Project*, DEMOCRACY CORPS, 2 (Apr., 2014), http://www.democracycorps.com/attachments/article/979/042214%20DCORPS%20SCOTUS%20FQ.pdf (survey conducted by Greenberg Quinlan Rosner Research).

9. *See generally* Calabresi & Lindgren, *Term Limits*, *supra* note 4.

10. *See generally id.* (demonstrating that most scholarly research on the subject of term limits centers around how a term limit system would function or be implemented, not on the empirical implications of term limits).

century? We conclude with a discussion of how the empirical data can inform the normative approach, and how this approach could inform other debates for institutional change on the Supreme Court of the United States.

TERM LIMITS: WHAT THEY ARE AND WHAT THEY COULD BE

Article III, Section I of the United States Constitution states that federal judges, appointed by the President and confirmed by the Senate, "shall hold their offices during good behavior."[11] This has traditionally been interpreted to mean that federal judges and justices have lifetime appointments, barring impeachment.[12] So-called "Article III" judges are distinct from Article I judges, who preside over courts that are set up by Congress for specific purposes and who retain neither lifetime tenure nor protection from Congress reducing their salaries.[13] These courts include federal bankruptcy and tax courts, the United States Court of Federal Claims, and the United States Court of Military Commission Review.[14] Term limits for Article I judges range, depending on the law that created them, between fourteen and fifteen years.[15] However, Article III judges exercise most of the judicial power that is wielded in this country.[16]

Perhaps because of the tremendous power they wield, there has been extensive discussion of the merits and downsides of term limits for Article III judges, especially United States Supreme Court justices.[17] While many proposals for term limits have been advanced, the most commonly cited proposals envision a system where each justice serves a fixed, non-renewable eighteen-year term.[18] The terms would be staggered, so that turnover should occur in the 1st and 3rd year of every presidential term.[19] As a result, each president who serves out his or her entire four-year term would be able to make two appointments to the Supreme Court.[20] This proposal mirrors the recent Supreme Court Renewal Act of 2005, a piece of

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11. U.S. CONST. art. III, § 1.

12. *See* Ellen E. Sward, *Legislative Courts, Article III, and the Seventh Amendment*, 77 N.C. L. REV. 1037, 1049-50 (1999).

13. *Id.* at 1041.

14. *See id.* at 1040, 1042.

15. *See* James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 754 (2004) (using military court judges as an example).

16. *See id.* at 649-50.

17. *See generally* Calabresi & Lindgren, *Term Limits*, *supra* note 4.

18. James E. DiTullio & John B. Schochet, *Saving this Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court With Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1096-97 (2004) [hereinafter DiTullio & Schochet, *Saving this Honorable Court*].

19. *See* Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799, 822 (1986) [hereinafter Oliver, *Systematic Justice*].

20. DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18, at 1119; *see* Oliver, *Systematic Justice*, *supra* note 19, at 822.

legislation coauthored by two law professors (Roger Cramton and Paul Carrington) that has not yet been introduced in Congress, but has formed the foundation of their edited volume *Reforming the Court.*[21]

Proponents of term limits advance several normative arguments in its favor.[22] First, as Calabresi and Lindgren discuss at length, confirmation hearings for Supreme Court justices have become remarkably polarized in recent years.[23] Term limits, the argument goes, would reduce the need for confirmation hearings to become heavily politicized because the Court's turnover would be regular and predictable.[24] As Calabresi and Lindgren explained:

> Under the current system, vacancies on the Supreme Court arise very irregularly, which means that when one does arise, the President and Senate both act without knowing when the next vacancy might be . . . As a result, the political pressures on the President and the Senate are overwhelming. There is simply so much at stake . . . that the President and the Senate . . . inevitably become engaged in a bitter political contest . . . .[25]

Having predictable and equal numbers of appointments for each president would help to alleviate this problem.[26] Moreover, proponents argue that the predictability of term limits would reduce the desire for justices to strategically retire based on who is serving in the White House and who he or she believes the next president will be.[27]

Second, advocates for the eighteen-year proposal argue that because the Supreme Court has become so politically powerful in the modern era, more needs to be done to check its power as an unelected institution.[28] Because justices are serving longer, their views, which were theoretically in the political mainstream when they were appointed, become "increasingly

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21. *See generally* ROGER C. CRAMTON, REFORMING THE COURT: TERM LIMITS FOR SUPREME COURT JUSTICES (Roger C. Cramton & Paul D. Carrington eds., 2006).

22. *See generally* Calabresi & Lindgren, *Term Limits*, *supra* note 4.

23. *Id.* at 813.

24. *See id.*

25. *Id.*

26. *See id.*

27. Empirical evidence that justices make these considerations for strategic reasons is robust in political science literature. *See generally* Timothy M. Hagle, *Strategic Retirements: A Political Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25 (1993); Kjersten R. Nelson & Eve M. Ringsmuth, *Departures From the Court: The Political Landscape and Institutional Constraints*, 37 AM. POL. RES. 486 (2009). There is also evidence that United States Courts of Appeals also consider ideological and strategic factors when deciding to retire. *See generally* James F. Spriggs II & Paul J. Wahlbeck, *Calling It Quits: Strategic Retirement on the Federal Courts of Appeals, 1893-1991*, 48 POL. RES. Q. 573 (1995).

28. Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 809-11.

divorced from democratic accountability," as Calabresi and Lindgren phrase it.[29] This not only vests too much power in the judiciary, but it also allows justices who do not have to be reelected and who have no aspirations for higher office once they leave the bench to make decisions based more on their own ideological preferences than the country's preferences.[30]

Third, proponents argue that justices who are serving longer, often to their death, face diminishing mental and physical capacity in their old age, which prevents them from effectively completing their work.[31] This is why many high courts worldwide institute some form of mandatory retirement age.[32] Term limits would have a similar effect to mandatory retirement age by ensuring that justices do not stay on the bench longer than their mental capacities allow them to be effective merely because they have the job for life.[33]

Finally, proponents point out that the United States is largely out of step with the rest of the world on this issue.[34] Indeed, tenure for the national high court is fairly rare in other countries.[35] Of the 200 countries on which the CIA World Factbook has accurate data regarding judicial selection and term of office, eighty-seven nations impose some sort of term limit.[36] Of the countries that appoint their high court judges for life, most impose a mandatory retirement age.[37] Indeed, only twenty-four other countries have unrestricted lifetime appointments as in the United States Supreme Court.[38]

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29. *Id.* at 813.

30. Laurence H. Silberman, *Federalist Society Symposium: Panel Five: Term Limits for Judges?*, 13 J.L. & POL. 669, 683-87 (1997); *see* John O. McGinnis, *Justice Without Justices*, 16 CONST. COMMENT. 541, 541-43 (1999).

31. Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 815-16.

32. *See generally* David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000) (providing a historical account of this problem over the history of the United States Supreme Court).

33. Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 815-16.

34. *See id.* at 819-21.

35. *See id.*

36. *See generally* Lee Epstein, Jack Knight & Olga Shvetsova, *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7 (2001) [hereinafter Lee Epstein et al., *Comparing Judicial*]; The World Factbook, *Field Listing: Judicial Branch*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/2094.html (last visited Aug. 28, 2016) [hereinafter *Judicial Branch*] (demonstrating that term limits range from one year to fifteen years with an average term limit of 7.98 years); *see also* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 819-21.

37. The average mandatory retirement age for these countries is 67. It is perhaps interesting to note that of all of the justices on the United States Supreme Court who have retired or passed away since 1946, only Justices Vinson, Minton, Whittaker, Goldberg, and Fortas have left the bench before this age. *See History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/servlet/nGetCourt?cid=0&order=c&ctype=sc&instate=na (last visited Aug. 28, 2016).

38. These countries are: American Samoa, Aruba, Austria, Chad, Comoros, Cote d'Ivoire, Czech Republic, Estonia, Greece, Guinea-Bissau, Haiti, Luxembourg, the Federated States of Micronesia, Monaco, New Zealand, Russia, Saudi Arabia, Serbia, Singapore, Sint, Maarten, Suriname, Sweden, Timor-Leste, and the United Kingdom. *See generally Judicial Branch, supra* note 36.

Moreover, forty-nine of the fifty United States have also rejected the idea of lifetime appointments, with Rhode Island being the lone exception.[39]

Of course, not all scholars agree that term limits are either normatively appealing or the best practical solution to the problems outlined above.[40] The most prominent objection to term limits is that life tenure was created to ensure judicial independence.[41] If justices do not have higher political aspirations, and do not need to advance their career once they leave the bench, they will be able to make principled decisions, rather than popular ones.[42] Farnsworth argues:

> [L]ife tenure and the longer terms it creates is the regime most consistent with a vision of the Justices as impersonal appliers of interpretive theories. Fixed terms would . . . cause the public's appetites to be satisfied more regularly, but there is no reason to think they would change the content of the appetites or the relationship between the appetites and judicial behavior . . . .[43]

In short, many opponents fear that term limits will create more of the problem they are trying to fix by creating more activist judges who are more responsive to politics and parties than their life-tenured alter egos.[44]

Second, opponents argue that life tenure slows down the lawmaking process as a necessary check on a rapidly-moving legislature.[45] As Calabresi and Lindgren have explained, "[opponents] see[] the Court as a major anchor to windward that slows down social movements for change, and [they] argue[] that to some extent judicial independence is desirable because a slowed down law-making process is desirable as a matter of good public policy."[46] As the political winds shift rapidly, and party control of the White House and Senate changes hands frequently from one party to another, opponents fear that the Court will also shift too rapidly, ignoring the confines of *stare decisis* and acting to create new policy while reversing old policy as quickly as Congress can.[47] This scenario is potentially made worse if justices, who know they serve for a limited time, try to use that time to enact new policy as quickly as they can.[48] Life-tenured justices

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39. Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 821.
40. *See generally* Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 (2005) [hereinafter Farnsworth, *Regulation of Turnover*].
41. *See* Farnsworth, *Regulation of Turnover*, *supra* note 40, at 411.
42. *See generally id.*
43. *Id.* at 423-24.
44. *See generally id.*
45. *See id.* at 414.
46. Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 844.
47. *See id.*
48. *See id.*

know they have time to allow the law to gradually develop on its own; term-limited justices may feel the need to make more "activist" decisions during their finite time on the bench.[49]

Finally, opponents fear that, as a practical concern, one political party who wins as few as four consecutive elections could "capture" the entire Supreme Court, making it unanimously liberal or unanimously conservative.[50] In the same way that a relatively even split between the two parties in Congress can act as an extra check on the legislative branch's power, or that divided government can check the executive's powers relative to the legislative branch's powers and vice versa, a relatively even ideological split on the Supreme Court ensures that no decision is made too easily and that, through dissents, minority voices are still represented even if they do not always prevail.[51] "Supreme Court capture" is far more likely when each president is guaranteed a certain number of seats and justices cannot help to safeguard their ideological wing by strategically retiring.[52]

Of course, all of these arguments are purely speculative. The United States has never had a term-limited Supreme Court, and thus we cannot make a direct comparison to whether these arguments bear out in the real world. That said, we have some indirect empirical evidence from two distinct literatures: the lower federal courts and comparative politics. We briefly discuss each, in turn.

First, Graves, Howard, and Corley examine judicial independence in federal courts by comparing the votes of judges who were recess-appointees during the time before and after the full Senate confirmed them.[53] They argue, and find, that judges lobbying to keep their jobs (who must consequently be confirmed by the Senate) exhibit substantially different behaviors before, rather than after, their confirmation.[54] This, they argue, demonstrates that the life-tenure protections embedded in the Constitution promote judicial independence.[55]

Because there is more variability on the international stage, more work has been done to examine the effect of tenure length on judicial

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49. *See* Abhinav Chandrachud, *Does Life Tenure Make Judges More Independent? A Comparative Study of Judicial Appointments in India*, 28 CONN. J. INT'L L. 297, 299-300 (2013) [hereinafter Chandrachud, *Life Tenure*].

50. *See* Farnsworth, *Regulation of Turnover*, *supra* note 40, at 437-38; *see also* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 845.

51. *See* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 771-72.

52. *Id.* at 845.

53. *See generally* Scott E. Graves, Robert M. Howard & Pamela C. Corley, *Judicial Independence: Evidence from a Natural Experiment*, 36 U. DENV. L. & POL'Y 68 (2014) [hereinafter Graves et al., *Judicial Independence*].

54. *See id.* at 72.

55. *See generally id.*

independence.[56] While many political scientists, including Graves, Howard, and Corley, assume that a key feature of judicial independence is lifetime appointment without a mandatory retirement age, the empirical evidence from international courts may suggest otherwise.[57] For example, Abhinav Chandrachud focuses on the India High Court and argues that while longer tenure might encourage more judicial activism, it does not ensure judicial independence.[58] Rather, judges in India, who have some of the shortest term limits in the world, are also some of the most staunchly independent judges in the world.[59]

In a similar comparative study of selection and retention systems in European democracies, Epstein, Knight, and Shvetsova argue that short, non-renewable terms may help ensure judicial independence.[60] They write, "if we define judicial independence as the ability to behave sincerely, that is, in line with truly-held preferences, then non-renewable terms may be a better mechanism for inducing such behavior than life tenure."[61]

There has even been a small amount of empirical research devoted to the need for term limits on the U.S. Supreme Court, focusing specifically on the mental decrepitude argument.[62] For example, McGuire examined the length of the average justices' tenure on the Supreme Court since its inception, and compared it to both the average life expectancy in those eras and a justice's median age at their departure from the bench, and concluded that modern justices do not serve markedly different tenures than they did in the early years of the Court.[63] Indeed, he concludes, "[w]hatever method one might advocate, it bears emphasizing that the empirical case for modifying life tenure is not a strong one."[64]

In a similar analysis, Josh Teitelbaum examined the relationship between justices' age and their productivity on the bench, and likewise found that there is no empirical relationship between age on the bench and productivity, as measured by the number of opinions produced or number of cases accepted.[65] Choi, Gulati, and Posner argue that while federal judges' pension plan can serve as a powerful incentive for judges and justices to retire before their mental capabilities are diminished, thus alleviating the

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56. *See generally Judicial Branch, supra* note 36.
57. *See generally* Graves et al., *Judicial Independence*, *supra* note 53.
58. *See* Chandrachud, *Life Tenure*, *supra* note 49, at 299-300.
59. *Id.* at 300.
60. *See generally* Lee Epstein et al., *Comparing Judicial*, *supra* note 36.
61. *Id.* at 35.
62. *See* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 815-16.
63. *See generally* Kevin T. McGuire, *Are the Justices Serving too Long? An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8 (2005).
64. *Id.* at 15.
65. *See generally* Joshua C. Teitelbaum, *Age and Tenure of the Justices and Productivity of the U.S. Supreme Court: Are Term Limits Necessary?*, 34 FLA. ST. U. L. REV. 161 (2006).

need for term limits or mandatory retirement ages, certain judges are insulated from these incentives.[66] Judges who have a lot of personal wealth are less responsive to the vesting of their pension when deciding when to step down.[67] Additionally, even judges who do respond to financial incentives make strategic choices about exactly when to retire depending on which political party is in power.[68]

Here, we take on a slightly different normative question: what would the political implications of term limits be? Specifically, can term limits, as some suggest, create more ideological equity on the Supreme Court and allow the Court to be more democratically accountable to the American people by producing output closer to public opinion? Or would a system of term limits result in an unbalanced, captured Court that makes lasting changes to America's legal landscape too quickly?[69] To answer these questions, we use a historical counterfactual method to analyze how the ideological composition of the Court would have been different if term limits had been in place for Supreme Court justices since 1937.

USING HISTORICAL COUNTERFACTUALS TO EXAMINE POLICY PROPOSALS

One of the benefits of using hypotheticals is that it allows scholars to use real data to examine some specific normative claims.[70] This can allow us to better understand causal inference, because we can tweak specific norms one by one and examine the effects of intuitional changes one at a time.[71] Moreover, hypotheticals can serve as an important teaching tool, pushing us to think more deeply about the effects of institutional structure and its impact on policy outputs.[72]

Indeed, even scholars involved in the normative debate over term limits emphasize the need for empirical data to be brought to bear on the question.[73] Farnsworth cautions at the conclusion of his article:

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66. *See generally* Stephen J. Choi, G. Mitu Gulati & Eric A. Posner, *The Law and Policy of Judicial Retirement: An Empirical Study* (Institute for Law & Economics Olin Research Paper No. 550, 2011), *available at* http://scholarship.law.duke.edu/faculty_scholarship/2377.

67. *Id.* at 8.

68. *See id.*

69. *See generally* Hemant Sharma & Colin Glennon, *A Case for Supreme Court Term Limits? The Changing Ideological Relationship between Appointing Presidents and Supreme Court Justices*, 41 POL. & POL'Y 267 (2013) (providing an interesting discussion of how term limits might have an impact on justices' propensity to ideologically drift away from the presidents who appointed them).

70. *See generally* AMIR PAZ-FUCHS, THE FOUND. FOR LAW, JUSTICE AND SOC'Y, EMPIRICAL AND NORMATIVE CLAIMS IN SOCIAL CONTRACT ARGUMENTS: HISTORICAL AND THEORETICAL PERSPECTIVES (2007), *available at* http://www.fljs.org/sites/www.fljs.org/files/publications/Social%2520Contract%2520Report.pdf (demonstrating how to use data to examine normative claims) [hereinafter PAZ-FUCHS, SOCIAL CONTRACT].

71. *See generally id.*

72. *See generally id.*

73. *See* Farnsworth, *Regulation of Turnover*, *supra* note 40, at 441-42.

> [t]he difficulty is that most claims about the consequences of life tenure and fixed terms are speculative. Terms of eighteen years would cause more frequent turnover than we now see; this may or may not have perceptible effects on the Court's output . . . These all are empirical questions, and . . . [t]he resulting uncertainties make it hard to conclude that any of these approaches is likely to produce noticeably better results than the others.[74]

We now turn to shedding some light on these "resulting uncertainties."

ASSUMPTIONS

Even the most basic of empirical analyses will involve assumptions.[75] This is all the more true when one starts to pose hypotheticals as we do here. In thinking about how a term limits system would play out, we had to make a number of choices along the way to make the counterfactual analysis empirically tractable. Our goal, at each one of these decision points, was to try and ground our choices in findings from the relevant literature and, perhaps most importantly, be transparent about the choices we made.

As suggested above, we evaluate the impact of using eighteen year, non-renewable term limits that are tied to a president's term in office.[76] In particular, we look at a system where a president would fill a vacancy during both his or her first and third year of a four-year term.[77] Having settled on the length and timing of terms, our first question was when to start our inquiry. We chose our starting date as the Court's 1937 term. Part of this motivation, to be sure, was practical. A number of the empirical comparison we perform below look at the preferences of the "real" Supreme Court as compared to our hypothetical term-limited Court. The measure that we use, scores generated by political scientists Andrew Martin and Kevin Quinn,[78] are currently only available starting with the Court's 1937 term.

Convenience aside, there is a potential substantive justification to a 1937 start date, as well. On February 5, 1937, President Franklin D. Roosevelt revealed the Judicial Procedures Reform Bill of 1937, which we

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74. *Id.* at 451.

75. *See generally* PAZ-FUCHS, SOCIAL CONTRACT, *supra* note 70.

76. DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18, at 1119.

77. *See* Oliver, *Systematic Justice*, *supra* note 19, at 822.

78. *See generally* ANDREW D. MARTIN & KEVIN M. QUINN, DYNAMIC IDEAL POINT ESTIMATION VIA MARKOV CHAIN MONTE CARLO FOR THE U.S. SUPREME COURT, 1953–1999, POL. ANALYSIS 10(2) (2002).

more commonly today call his "court-packing plan."[79] The bill would have allowed a president to appoint additional justices based on advanced age of justices currently on the Court.[80] We submit that rather than introducing this specific plan, FDR could have proposed the creation of term limits like those we have discussed above. Such a proposal would not have allowed FDR to instantly (and repeatedly!) change the composition of the Court, which arguably was a key factor in generating the backlash that his actual proposal received.[81] A term limit plan, by contrast, would have limited FDR to a single appointment: in acknowledgment of the first year of his most recent term in office.[82]

Of course, the Supreme Court was fully staffed at the time that this term limits reform would have been implemented.[83] How, then, does one deal with the existing justices on the bench? For the sake of simplicity, we assume that these justices would depart from the bench in the same way that they would have in the absence of a term limits proposal. That is, these justices would still enjoy their position for life, as opposed to having term limits retroactively imposed upon them. Thus, the results we present below for the initial terms of a post-reform court will still include a number of actual justices who served on the Court.

During this time period, an astute student of the Court might observe that such a decision creates a problem: the pattern of departures does not neatly align with the year when a president would be "owed" a seat on the Court. For example, when the Court would meet to start its new term in October, 1938, a year where a president would not be entitled to make an appointment, there would be one vacancy from the death of Justice Cardozo during the previous summer.[84] Similarly, the Court would lose another justice just one month into its work during the following term, when Justice Butler died on November 16, 1939.[85]

Existing proposals are generally quiet on the logistics of how to handle these sorts of events.[86] Again, we take the easiest path and assume that

79. Nick Badgerow, *Opinion: Don't Tread on Me, The Separation of Powers Doctrine and the Need for a Strong Judiciary*, 85 MAY J. KAN. B.A. 30, 34 (2016).

80. *Id.*

81. *Id.*

82. *See* Oliver, *Systematic Justice*, *supra* note 19, at 822.

83. *See generally* William E. Leuchtenburg, *When Franklin Roosevelt Clashed with the Supreme Court—and Lost*, SMITHSONIAN MAG., May 2005, *available at* http://www.smithsonianmag.com/history/when-franklin-roosevelt-clashed-with-the-supreme-court-and-lost-78497994/?no-ist (providing an overview of the United States Supreme Court's composition in 1937).

84. *Benjamin Nathan Cardozo, 1932-1938*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_cardozo.html (last visited Aug. 28, 2016).

85. *Pierce Butler, 1923-1939*, SUP. CT. HIST. SOC'Y, http://supremecourthistory.org/timeline_butler.html (last visited Aug. 28, 2016).

86. *See generally* DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18; Oliver, *Systematic Justice*, *supra* note 19.

vacancies, such as these in the initial years, would go unfilled. As we show below, this actually would have resulted in a much smaller Supreme Court for a decent number of terms immediately after term limits were implemented. As a result, any serious proposal for term limits would need to determine how to temporarily fill seats on a short-staffed Court. We can envision a number of possibilities, ranging from allowing retired justices to serve (perhaps as a way to satisfy activity requirements to retain senior status), to having circuit court judges serve by designation (like district court judges on the courts of appeals), to allowing a president to make a temporary appointment.

We also make a number of assumptions worth noting.

Assumption #1: Presidents Fill Vacancies Reasonably Near Their Ideal Point

As President Obama is currently keenly aware, before any nominee can enjoy a lifetime appointment to the nation's highest court,[87] he or she must first be confirmed by the Senate.[88] For some time, political scientists have been interested in examining variation in the Senate's treatment of judicial nominees, especially to the U.S. Supreme Court.[89] President Obama's current experience notwithstanding, the most current research suggests that presidents are predominantly able to confirm who they want to the Court, with much less pushback from the Senate than one might expect.[90]

In a paper forthcoming in the *American Political Science Review*, political scientists Charles Cameron and Jonathan Kastellec perform a comprehensive theoretical and empirical audit of the nomination and confirmation process.[91] Using more nominations and better measures, they find that presidents are generally unconstrained by the Senate, which is to say that senators frequently vote to confirm nominees that traditional accounts would suggest they should reject.[92] Following this result, we assume a strong congruence between a president's policy preferences and

87. *See generally* SCOTT E. GRAVES & ROBERT M. HOWARD, JUSTICE TAKES A RECESS: JUDICIAL RECESS APPOINTMENTS FROM GEORGE WASHINGTON TO GEORGE W. BUSH (2009) (discussing the topic of using a recess appointment to temporarily fill a judicial vacancy).

88. U.S. CONST. art. II, § 2.

89. *See generally* Robin Bradley Kar & Jason Mazzone, *The Garland Affair: What History and the Constitution Really Say About President Obama's Powers to Appoint a Replacement for Justice Scalia*, 91 N.Y.U. L. REV. 53 (2016) [hereinafter Kar & Mazzone, *The Garland Affair*].

90. *See id.* at 58.

91. *See generally* Charles M. Cameron & Jonathan P. Kastellec, *Are Supreme Court Nominations a Move-the-Median Game?*, AM. POL. SCI. REV. (forthcoming 2016).

92. *See generally id.*

the policy preferences of who he or she is able to put on the Supreme Court.[93]

Assumption #2: Justices Do Not Prematurely Leave the Court Before Their Term is Up

Additionally, we assume that once a justice takes his or her seat on the Court, he or she will occupy it for the entire eighteen-year term—that is to say, we assume that justices do not die or decide to hang up their robe before they have been on the Court for eighteen years. As we continue our work on this topic, we plan to relax this assumption and allow for some non-zero risk that a justice departs in a given year of his or her term. If a justice were to leave midterm, then, consistent with Calabresi and Lindgren's proposal, we would allow a sitting president to fill that vacancy, but the replacement would only serve until the end of the initial term, as opposed to starting an entirely new eighteen-year term.

Assumption #3: Justices Do Not Change Their Policy Preferences Across Time

Perhaps the most tenuous assumption that we make is that once on the Court, a justice's policy preferences remain constant for the entirety of his or her term. This, of course, flies in the face of what we know about how the preferences of a number of justices have, in fact, changed across time.[94] Unfortunately, although we know preferences change, we do not know nearly as much about *why* they change.[95] Political scientists Ryan Owens and Justin Wedeking show that justices, who exhibit what they call "cognitive inconsistency," are more likely to change their preferences over the course of their careers, but their analysis does not tell us about changes that occur from term-to-term, which is precisely what we would hope to incorporate into our analysis.[96] In short, we know that preferences change, but the determinants of why and how they change are still a mystery.

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93. In particular, we regressed the first-term voting behavior of actual justices on the ideal point of their appointing president. We then used parameter estimates from this equation (and the uncertain around those parameter estimates) to estimate the location of nominees under a system with term limits. The uncertainty allows for variation to exist within an individual president's nominees. Thus, although all of President George W. Bush's nominees will be conservative, they will not all have the same policy preferences.

94. *See generally* Lee Epstein, Andrew D. Martin, Kevin M. Quinn & Jeffrey A. Segal, *Ideological Drift Among Supreme Court Justices: Who, When, and How Important?*, 101 NW. U. L. REV. 1483 (2007) [hereinafter Epstein et al., *Ideological Drift*].

95. *See generally id.*

96. *See generally* Ryan J. Owens & Justin Wedeking, *Predicting Drift on Politically Insulated Institutions: A Study of Ideological Drift on the United States Supreme Court*, 74 J. POL. 487 (2012).

TERM LIMITS AND THE COMPOSITION OF THE SUPREME COURT

We begin our analysis of the policy consequences of judicial term limits by looking at how they would have affected the Court's membership. Figure 1 describes the aggregate number of years each president's appointees served under a life-tenure system (the light grey bars) as compared to the term-limited system we outline above (the dark grey bars).

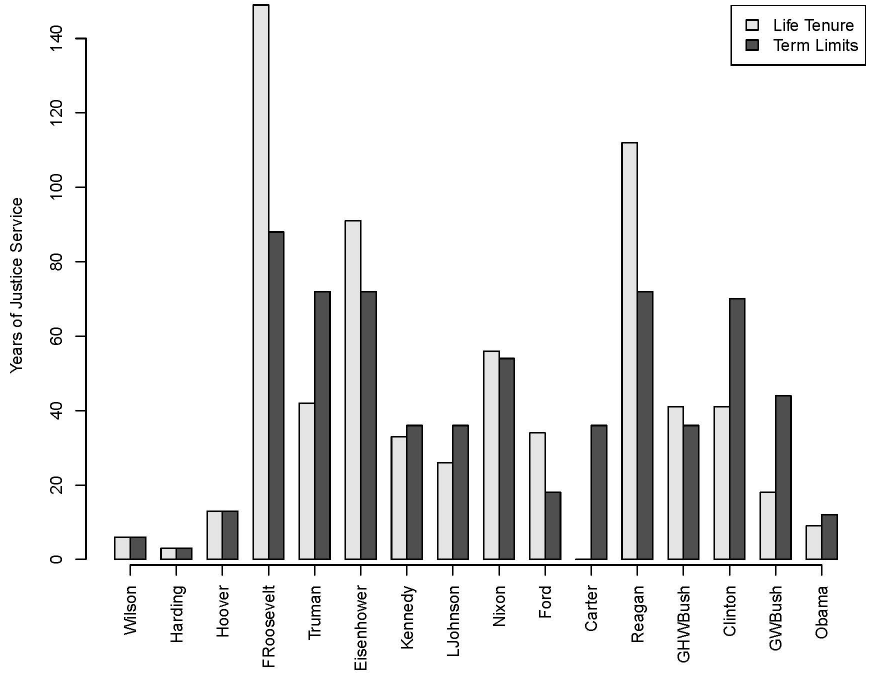

Figure 1: Aggregate number of years each presidents' appointees served given life tenure system (light grey) and a term-limited system (dark grey).

At the outset, we note that the term limit system is, perhaps unsurprisingly, much more equitable to all presidents than the status quo. Two-term presidents all retain about the same number of judicial years of service from their appointees. This is a stark contrast from a life-tenure system, where the amount of judicial service varies between zero (since President Carter was not able to nominate anyone during his term in office) and 150 years (since President Franklin D. Roosevelt's nominees collectively served almost 150 years on the bench).[97] Under a term-limited

97. *Supreme Court Justices by President*, CNNPOLITICS (Apr. 9, 2010, 10:18 PM), http://www.

system, six presidents (Truman, Johnson, Carter, Clinton, George W. Bush, and Obama) would have seen their amount of judicial influence lengthened, and six presidents (Franklin D. Roosevelt, Eisenhower, Kennedy, Nixon, Reagan, and George H.W. Bush)would have seen it shortened.[98] Presidents Franklin D. Roosevelt and Reagan would have been hit the hardest by a term limits system. Roosevelt would have seen his influence on the federal bench cut by more than half (from almost 150 years of combined service to seventy-two years,) and Reagan likewise would have seen a fairly substantial reduction from over eighty years of combined service[99] to seventy-two years. Interestingly, the judicial influence of President Nixon, who made four appointments to the Court in his term and a half in the White House,[100] would have been nearly unchanged.

As the figure shows, modern presidents would benefit more from a term limits system than their early-to-mid 20th century counterparts. This finding is in line with the scholarship arguing in favor of term limits, which suggests that justices in the latter half of the 20th century stayed on the bench longer and were more likely to retire strategically.[101]

At first blush, these data would seem to support the arguments made by proponents of term limits that term limits create a more equitable system. Figure 2 provides even more evidence of this. Two bar plots depict the overall composition of the Court in each term based on the identity of the appointing president. Here, the top panel depicts the status quo Court, and the bottom panel depicts the hypothetical term-limited Court.[102]

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cnn.com/2010/POLITICS/04/09/presidents.nominees/ (noting that President Carter did not appoint anyone to the United States Supreme Court); *Compare Franklin D. Roosevelt Supreme Court Appointments*, INSIDEGOV, http://supreme-court-justices.insidegov.com/d/d/Franklin-D.-Roosevelt (last visited Aug. 28, 2016) (providing length of service for President Franklin D. Roosevelt's appointees to the United States Supreme Court).

98. Note that there is little difference between the systems under Presidents Wilson, Harding, and Hoover, because their nominees would have been allowed to carry out their full life tenures if President Franklin D. Roosevelt had implemented term limits in 1937.

99. *Compare Ronald Reagan Supreme Court Appointments*, INSIDEGOV, http://supreme-court-justices.insidegov.com/d/d/Ronald-Reagan (last visited Aug. 28, 2016).

100. *Compare Richard Nixon Supreme Court Appointments*, INSIDEGOV, http://supreme-court-justices.insidegov.com/d/d/Richard-Nixon (last visited Aug. 28, 2016).

101. *See* DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18, at 1096.

102. We observe a number of terms where the Court has fewer than nine justices. In the top panel, these are due to vacancies that existed as of August 1 in the year of a term, which is the date we used to generate this bar plot. In the bottom panel, the vacancies are due to retirements or deaths of justices who were on the Court in 1937, which is when our hypothetical term limits plan was implemented. As we note above, when a vacancy occurs during a non-appointment year, we assume the seat goes unfilled until the next scheduled appointment.

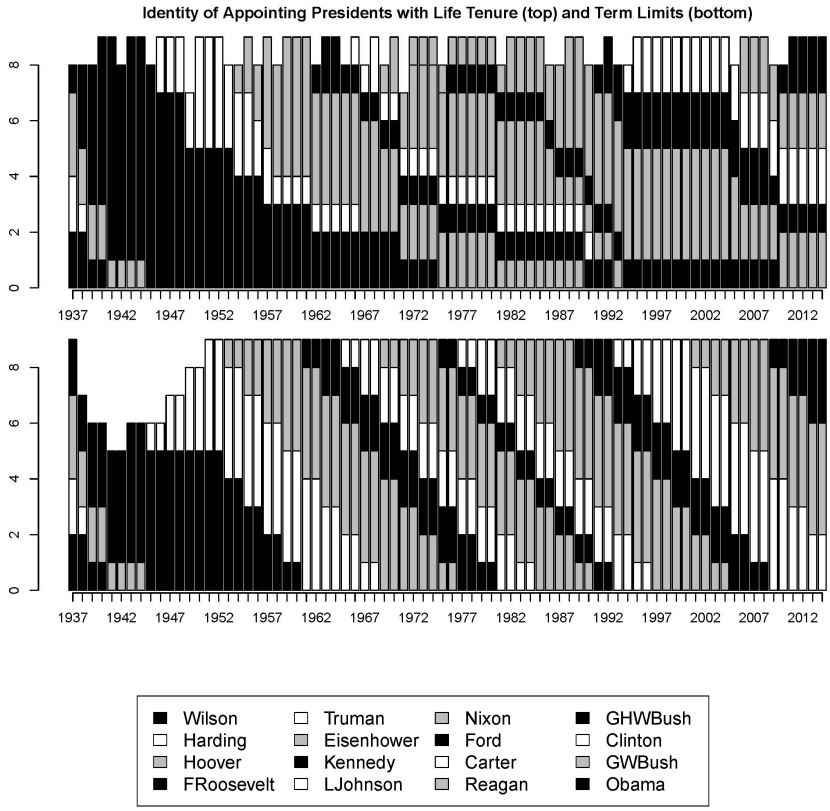

Figure 2: Composition of the Supreme Court in each term by appointing president. Top panel represents status quo system without term limits and bottom panel represents hypothetical term-limited Court.

Again, we see that the term-limited Court has a fair amount more equity and predictability in turnover than the life-tenured Court. This seems to support the proponents' arguments that predictable turnover might lead to less contentious confirmation hearings[103] or, at the very least, would help to ensure that no president wields too much power over the long-term future of the Supreme Court.

Moreover, turning our attention to the bottom panel of Figure 2, while there are some years where two presidents' appointees (Roosevelt and Hoover, or Roosevelt and Truman) would have made up the entire Supreme Court, a term-limited Court would not have experienced direct "capture" by

103. *See* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 813.

any one president. Moreover, in most of the years where that might have occurred, the status-quo Court was also made up by appointees from those two presidents.

That said, term limits would have created a slightly less diverse Court over the years. There are several terms in the late 1970's and early 1980's where as many as six presidents had appointed justices to the historic Supreme Court.[104] A term-limited system would allow for, at most, five different appointing presidents' justices to serve at one time.

However, these results are entirely a function of the number of years a president served. In other words, under our set of assumptions, all two-term presidents are created the same and all one-term presidents are the same, in terms of the amount of influence they receive under a term-limits system. This makes "capture" by one president mathematically impossible, as the presidents themselves are term-limited. The more interesting normative question is whether one *party* is able to control the entire Supreme Court. We turn to this possibility in Figure 3.

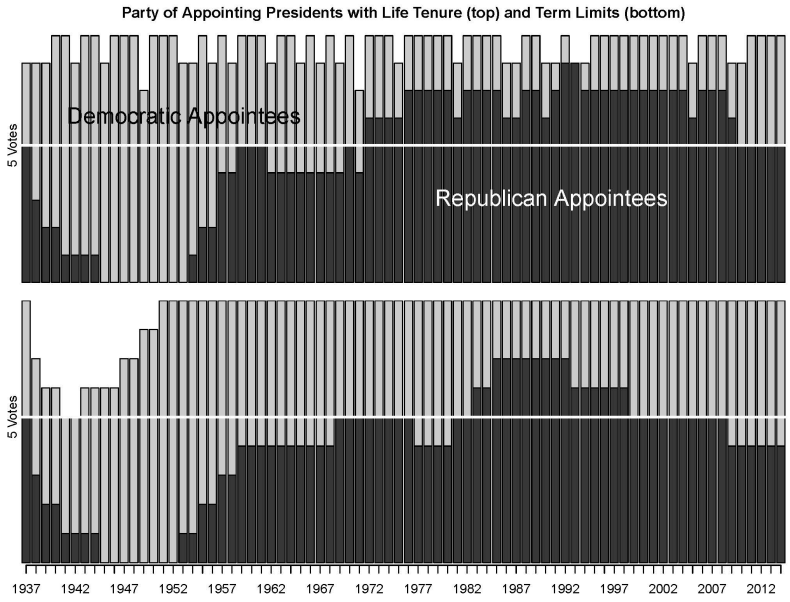

Figure 3: Composition of the Supreme Court in each term by appointing president's party. Red indicates Republican appointees, blue indicates democratic appointees. Top panel represents status quo system without term limits and bottom panel represents hypothetical term-limited Court.

104. *See Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/members_text.aspx (last visited Aug. 28, 2016).

This Figure replicates Figure 2, except Figure 3 colors the bars by the appointing president's party. Red indicates the proportion of the Court held by Republican appointees and blue indicates Democratic appointees. The white line on the figure indicates a five-vote majority. In short, the concern about party capture appears to be relatively unfounded. Except in the late 1940's (during which time the Supreme Court was controlled by all Democratic appointees), there is no other time when one party would have had exclusive control over the Court.[105] Here again, a term-limited Court appears to create more equitable membership between the parties. In reality, however, Republican appointees had a substantial majority on the Court between 1971 and 2009—a period of thirty-eight years.[106] Term limits would have shortened this "Republican era" to 1982 to 1998—a period of only sixteen years.

It is also potentially noteworthy that under a term-limited Court, Democratic appointees would have had two eras of majority control they did not experience under the life-tenured system. The first era of majority control would have been in the late 1970's, a natural result of the addition of Carter appointees. The second era of majority control would have started in 2008 and continued to the present day. Indeed, our term-limits simulation suggests that the contemporary Court would have a one-member Democratic advantage. These two additional "Democratic eras" might be especially noteworthy, given that it is primarily Republican lawmakers who are calling for Supreme Court term limits.[107]

This may be interesting to consider in the context of the current showdown between President Obama and Senate Republicans over Obama's nomination of Judge Merrick Garland to replace Justice Scalia on the Supreme Court.[108] Hypothetically speaking, in a term-limited world, Justice Scalia (a Reagan appointee) would have left office in 2004 and been replaced by a George W. Bush appointee. Therefore, the vacancy the Court is now left with either never would have existed or may not have created this contentious nomination process from a Democratic president, because it would not have shifted the balance of the Court.

That said, term limits likely would not have created any more "pivot nominations" (nominations that shift the balance of the Court from conservative to liberal or vice-versa) than our current life-tenure system.

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105. *See id.*

106. *See id.*

107. *See generally* Erwin Chemerinsky, *Ted Cruz Is Right: The Supreme Court Needs Term Limits*, NEW REPUBLIC (July 2, 2016), https://newrepublic.com/article/122225/ted-cruz-right-supreme-court-needs-term-limits [hereinafter Chemerinsky, *Cruz Is Right*].

108. Michael D. Shear, Julie Hirschfeld Davis & Gardiner Harris, *Obama Chooses Merrick Garland for Supreme Court*, N.Y. TIMES (Mar. 16, 2016), http://www.nytimes.com/2016/03/17/us/politics/obama-supreme-court-nominee.html?_r=0.

Under each system, there were five times throughout history where a nomination would have taken control of the Court from one party and given it to the other. Of course, the timing of these pivot nominations would change, but our results suggest they would not be any more frequent.

On the other hand, term limits would have created about twice as many years where the Court was divided 5-4 between Republican and Democratic appointees. There would have been twenty-one 5-4 Republican-majority terms under a term limits system, and only ten 5-4 Republican-majority terms in the current life-tenure system. Democrats would have experienced similar shifts. In the life-tenure system, Democratic appointees enjoyed nine years of a 5-4 majority, whereas in a term-limited system that number would increase to twenty-one years.

Of course, not all appointments from either party are the same. A judge's (and by extension, their appointing president's) ideology matters as much, or often more, than their political party's ideology. Not all presidents are equally liberal or conservative, and they do not all have equal success in appointing justices who reflect their ideologies. Thus, to truly examine the effect that term limits would have on membership change, we must look at the ideology of the resulting Court. In particular, it is important to explore how this institutional change would have moved the median member of the Court; as most political science scholarship suggests, the median is the most able to set policy.[109] Figure 4 demonstrates how a system of term limits could have altered the ideology of the median member of the Court.

109. *See generally* Robert Anderson IV & Alexander M. Tahk, *Institutions and Equilibrium in the United States Supreme Court*, 101 AM. POL. SCI. REV. 811 (2007); Chris W. Bonneau, Thomas H. Hammond, Forrest Maltzman & Paul J. Wahlbeck, *Agenda Control, the Median Justice, and the Majority Opinion on the U.S. Supreme Court*, 51 AM. J. POL. SCI. 890 (2007); Cliff Carrubba, Barry Friedman, Andrew D. Martin & Georg Vanberg, *Who Controls the Content of Supreme Court Opinions?*, 0 AM. J. POL. SCI. 1 (2011); Tom S. Clark & Benjamin Lauderdale, *Locating Supreme Court Opinions in Doctrine Space*, 54 AM. J. POL. SCI. 871 (2011).

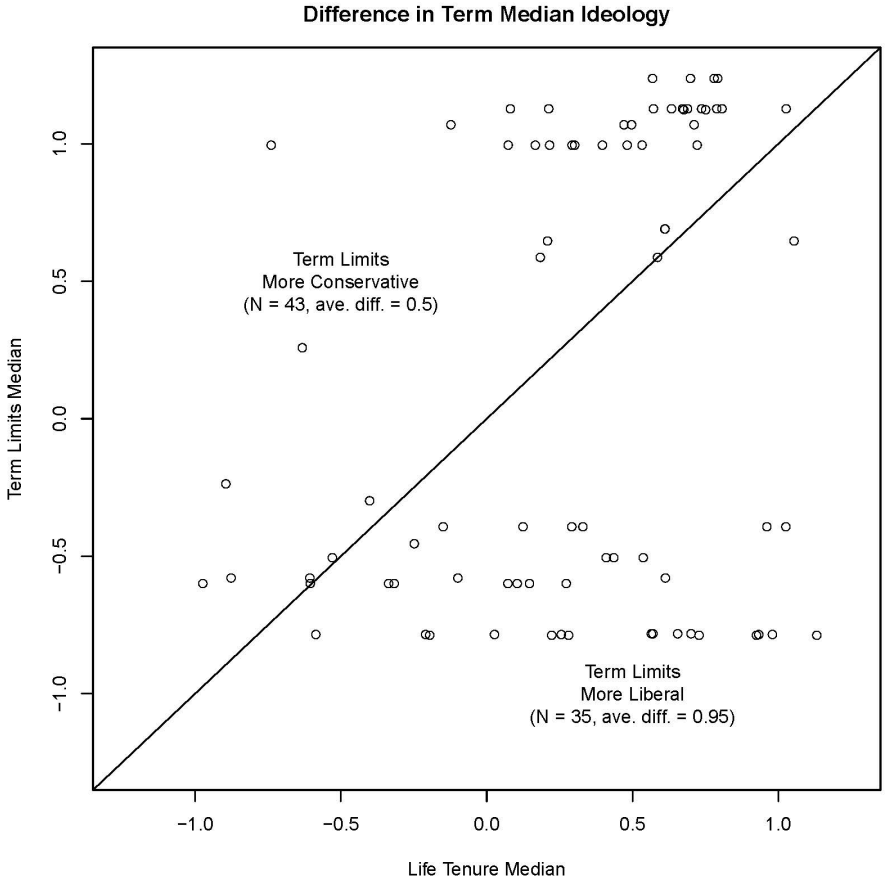

Figure 4: Scatter plot of the likely term median under a term limits system (y-axis) and the life tenure system (x-axis). Each point indicates a term in the analysis.

Figure 4 is a scatter plot of the likely term median under a term limits system (y-axis) and the life-tenure system (x-axis). Each point indicates a term in the analysis. The solid line on the diagonal of the Figure represents no change, while points above the line show terms where the median would have been more conservative than they were historically, and points below the line indicate that a hypothetical term-limited median would have been more liberal.[110]

110. To obtain estimates of the ideology of hypothetical justices, we first regressed each real justice's first-term Martin-Quinn (MQ) score on their nominating president's NOMINATE score. The R^2 for that regression is 0.53. We then used a Clarify-like procedure and used the coefficients and variance/covariance matrix from that regression to generate 5,000 sets of parameter estimates from that

As Figure 4 makes clear, conservatives appear to benefit from term limits because there are more years where the median shifts in the conservative direction than in the liberal direction; a term-limited Supreme Court would have seen a more conservative median in forty-four years, while the median would have moved to the left in only thirty-three years. However, liberals seem to benefit more from term limits when considering the intensity of the shift. Indeed, the average shift in the median when the hypothetical Court would have moved left is nearly double the shift it would have made if it moved right. The average estimated shift to the right from the life-tenured Court to the term-limited Court was approximately .47 Martin-Quinn points, while the average shift to the left was estimated to be about .98 Martin-Quinn points.[111] Here, however, we think it is important to remind the reader that these shifts are in context to the historic Supreme Court which was, during the period of our analysis, already quite conservative. As a result, it is easier to move a conservative Court comparatively to the left than it is to move an already conservative Court even further to the right.

In Figure 5, we depict how the median would have moved over time on a term-limited Court. The top panel of the Figure plots the actual term-by-term Court median (the blue line) together with the estimated term-limited Court median (orange line). The thicker lines are Lowess smoothing curves for each series. The bottom panel of Figure 5 shows the ideological spread of the Court's membership from the 25th (liberal) to 75th (conservative) percentiles.

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regression. To generate a hypothetical justice's ideal point, we took one of those 5,000 draws and plugged in the president's ideal point into that equation. The value of this is that it means a president making four appointments will have some variation in the ideological makeup of those appointments.

111. Another caveat to keep in mind here is that while standard Martin-Quinn scores vary from term to term, to account for any potential ideological drift a justice may have over the course of his or her tenure, the scores we estimate of hypothetical justices are fixed across time.

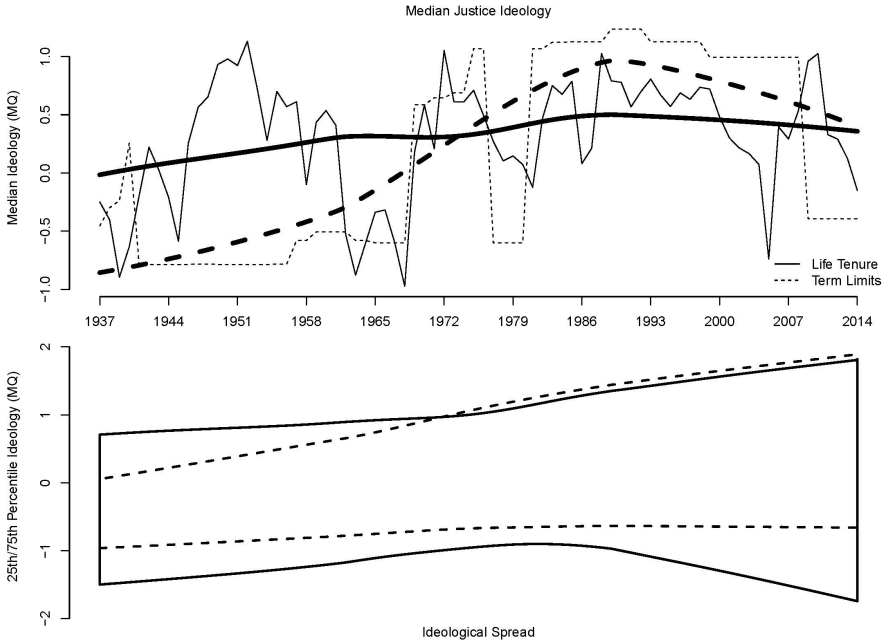

Figure 5: Top panel: Ideology of the status-quo Court median (blue line) and the predicted term-limited Court median (orange line). Thicker lines indicate the Lowess smoothing curve. Bottom panel: ideological spread of the Court's membership from the 25th (liberal) to 75th (conservative) percentiles of the actual life tenured Court (blue) and estimated term-limited Court (orange).

Beginning with the top panel, there is some evidence to suggest that the life-tenure system makes the median slightly less volatile and slightly more moderate. Indeed the actual term median each year hovers somewhere near a zero in the MQ range and does not deviate substantially from that over time. By contrast, our term-limited median experiences deeper shifts that coincide with the political shifts in the country. As the figure suggests, the term-limited median was much more liberal than the historic median in the early parts of the 20th century and moved steadily more conservative in second half of the century.

The bottom panel indicates, however, that there is still a fair amount of overlap between the two institutional arrangements in the overall composition of the Court. The bottom panel also hints that a life-tenured Court is slightly more ideologically heterogeneous than a term-limited Court, though we suspect this is an artifact of the fact that our term-limit estimates do not vary over time like the "true" Martin-Quinn scores do.

Here again, however, we can see that the balance of the Court, both historically and hypothetically, leaned more heavily left in the early years of our analysis and grew increasingly conservative in the late 20th and early 21st centuries.

Taken together, these results can give us additional leverage to explore some of the normative claims made by advocates and opponents of Supreme Court term limits.[112] Each of our analyses makes clear that term limits would provide a more equitable distribution of justices to each president and would obviously distribute the amount of time they spend on the bench more equitably. Our results, likewise, indicate that fears of "Supreme Court capture" by one political party or the other seem relatively unfounded. This is especially true given how rare it is for the White House to be held by one party for more than two or three consecutive presidential terms.

Our results also suggest that both parties would have benefited in some way from term limits. What is less clear, however, is how equal those benefits would have been. For example, the long spell of a Republican appointee majority in the latter part of the 20th century would have been substantially shortened with term limits (a benefit for liberals) and the liberal holds that did exist would have probably moved left (another benefit to liberals). But conservatives would have benefitted from more years of a conservative median justice, and the impact for them would have come later in the century, perhaps explaining why so many conservative lawmakers are pushing for term limits today.[113]

Of course, none of these results allow us to make a normative statement about which system is better. Indeed, that is not our goal. However, we do believe that knowing the empirical implications of term limits can help each side analyze and critically evaluate the normative debate. We turn next to looking at how a hypothetical system of term limits would have affected the outcomes of real cases.

TERM LIMITS AND SUPREME COURT DECISIONS

One of the most prominent arguments in favor of term limits is that they ensure democratic accountability.[114] In other words, advocates argue that term-limited justices have less incentive to be "activist" or to decide cases based on their own ideological preferences because they do not have the job for life.[115] Moreover, advocates argue that frequent turnover on the bench should make the composition of the Court more closely resemble the

112. *See generally* DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18; Oliver, *Systematic Justice*, *supra* note 19.

113. *See generally* Chemerinsky, *Cruz Is Right*, *supra* note 107.

114. *See* DiTullio & Schochet, *Saving this Honorable Court*, *supra* note 18, at 1116-19.

115. *See id.*

ideological composition of the country.[116] While our data cannot help us gain leverage on the first argument, it can help us explore the second. To this end, in Figure 6 we compare the predicted policy output of our hypothetical term-limited Court to Stimson's policy mood.[117]

Stimson's "mood measure" combines the results of thousands of repeatedly asked survey questions since the 1950s to create a unidimensional measure of how generally liberal or conservative the responses are, ranging from zero (extremely conservative) to 100 (extremely liberal).[118] Political scientists frequently compare this measure to the percent of the Court's decisions in a term that are decided in a liberal direction in order to assess how responsive, or at least congruent, the Court is to public opinion.[119] For our purposes, this comparison can also help us explore whether a hypothetical term-limited Court can better, or worse, represent the public.

The top panel of the Figure depicts the two series (public mood and percent of decisions decided in a liberal direction) under the life-tenure system. As widely found in scholarship on the Court and in public opinion, the Court's policy output is fairly consistent with the country's mood.[120] Over the years of our analysis, the Pearson's correlation coefficient is about .17.[121] During this span, the Court was more conservative than the country for about fifty years, with an average deviation of 14.9.[122] There were thirteen years where the Court was more liberal than the country, here with an average deviation of 8.8. Over the course of modern American history, the Court has been consistently more conservative than the country, and has been this way for longer time periods. That said, our evidence suggests that as the country moves in one direction or the other, the Court follows.

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116. *See* Calabresi & Lindgren, *Term Limits*, *supra* note 4, at 833.

117. *See generally* JAMES A. STIMSON, PUBLIC OPINION IN AMERICA: MOODS, CYCLES AND SWINGS (2d ed. 1999).

118. *See generally id.*

119. *See generally* Christopher J. Casillas, Peter K. Enns & Patrick C. Wohlfarth, *How Public Opinion Constrains the U.S. Supreme Court*, 55 AM. J. POL. SCI. 74 (2011); Michael W. Giles, Bethany Blackstone & Richard L. Vining, *The Supreme Court in American Democracy: Unraveling the Linkages Between Public Opinion and Judicial Decision Making*, 70 J. POL. 293 (2008); Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018 (2004).

120. *See generally id.*

121. Note that this correlation is not statistically significant.

122. This means that the Court decided 14.9% more cases conservatively than the value of the country's mood score. We should stress, however, that these numbers are not directly comparable, even though they are on the same scale, so deviations should only be examined in relative terms to other deviations (rather than being interpreted as values themselves).

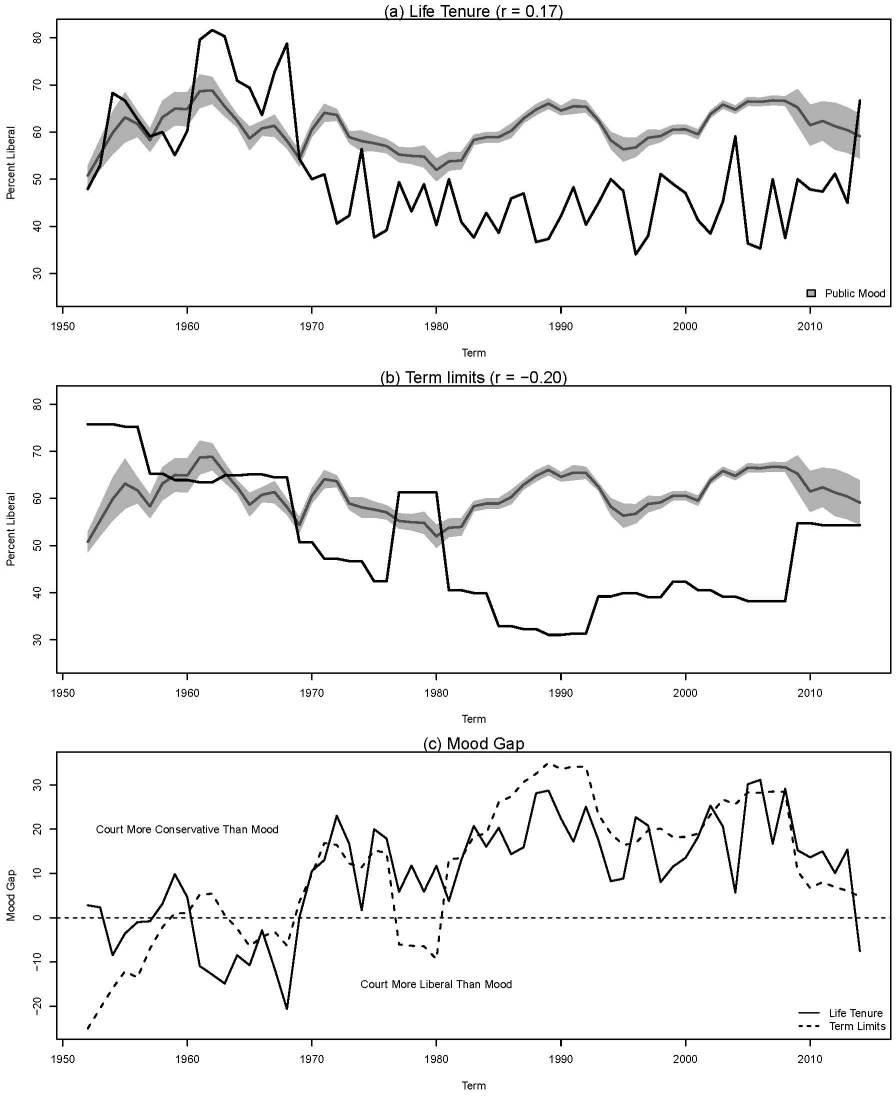


Figure 6: Comparison of the Court's policy output under life tenure (top panel) and term limits (center panel) to public mood. Bottom panel depicts the gap between policy output and mood under both systems. The shaded regions depict the 95% confidence intervals around the estimates.

Compare the top panel to the center panel, which instead plots the public mood against the output of our hypothetical Court.[123] Here the correlation is actually stronger, but negative (the correlation coefficient is about -.2). In other words, as the country moves in one direction, the hypothetical term-limited Court would move slightly in the opposite direction.[124] Here, the largest gap between the country's preferences and the Court's outputs would have been from about 1980 to 2010. On average, the hypothetical Court would have been more conservative than the country for a shorter time period (forty-seven years) but with a slightly higher average gap (17.7 years). Liberals would have experienced a few more years where the Court was ideologically left of the country (seventeen years) and had a slightly higher average gap (9.2 years).

These gaps are made especially clear in the bottom panel of Figure 6. This panel plots the difference between mood and the Court under a life-tenure system (blue line) and the term limits system (orange line). As those lines move toward the dashed line in the figure, the country and the Court are more aligned. The farther the series track above the dashed line, the more conservative the Court is relative to the country, and below the dashed line, the more liberal the Court is *vis-a-vis* the country. In general, both the term-limited Court and the actual Court have been more conservative than the country. If we think of liberal policy output in terms of progressivism, this perhaps makes normative sense. The Court should respond slowly to the progressive whims of the country. But, even so, the discrepancies are higher under the term limits system. If anything, our results suggest that term limits make justices less democratically accountable, or at least less democratically representative than a term-limited Court.

That said, these results should be interpreted with caution in light of several caveats. First, we assume that every justice votes in line with his or her ideology in every case. This is obviously an oversimplification of a much more complicated decision-making process. More problematic, this assumption does not allow for justices to vote against their ideologies exactly because they want to be democratically accountable, which scholars

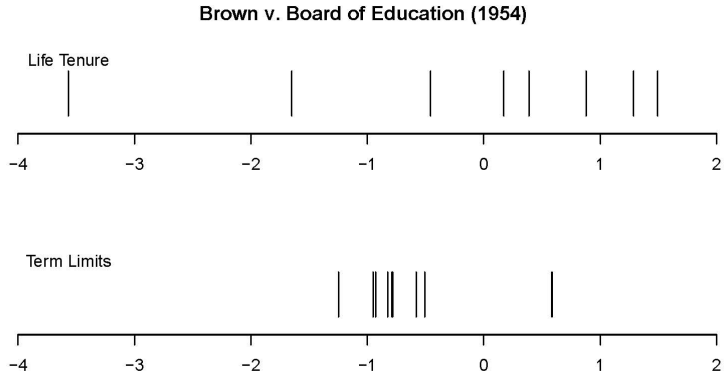
123. To predict the hypothetical policy output of our term-limited Court, we first regressed the percent of the actual Court's liberal decisions in a term on the median justice's MQ score, the 25th percentile justice's MQ score, and the 75th percentile justice's MQ score. All three were significant ($p < 0.10$). We then plugged in our MQ estimates for what a term-limited justice's preferences would have been during those terms using the scores we describe above. The orange confidence intervals in this figure, signifying the term limits percent of liberal decisions, come from applying Clarify-like simulations to the parameter estimates that were used to generate the initial estimates.

124. This coefficient is also statistically insignificant.

have found that justices do empirically in a life-tenure system.[125] Second, our analysis uses the Court's actual agenda. Obviously, different justices would choose to grant different cases. This may always be true, but it is especially problematic given that the cases we assume the justices granted came from a life-tenured court of appeals. If we expect term limits to impact the composition of the Supreme Court, they would also impact the composition of the lower courts, which would in turn have an effect on which cases were appealed to the Supreme Court and the host of cases justices could choose between when determining whether to grant certiorari.

These caveats aside, it is an interesting thought experiment to look at how some of the Court's most important cases might have been decided differently given an alternate institutional design where justices were term-limited. Figures 7 and 8 attempt to do just that.

These figures plot the ideological placement of justices on the historic Court (on the top line) and the term-limited Court during years when the Court decided some of the most important cases of the 20th century. Of the four cases we examined: *Brown v. Board of Education*,[126] *Miranda v. Arizona*,[127] *Roe v. Wade*,[128] and *Bush v. Gore*,[129] two cases, *Brown* and *Miranda*, might have had different outcomes with a term-limited Court. Figure 7 depicts the Court's composition in those two cases.



125. *See generally* Amanda C. Bryan & Christopher D. Kromphardt, *Public Opinion, Public Support, and Counter-Attitudinal Voting on the U.S. Supreme Court*, JUST. SYS. J. (2016), *available at* http://www.tandfonline.com/doi/abs/10.1080/0098261X.2016.1179608?journalCode=ujsj20.

126. 349 U.S. 294 (1955).

127. 384 U.S. 436 (1966).

128. 410 U.S. 113 (1973).

129. 531 U.S. 98 (2000).

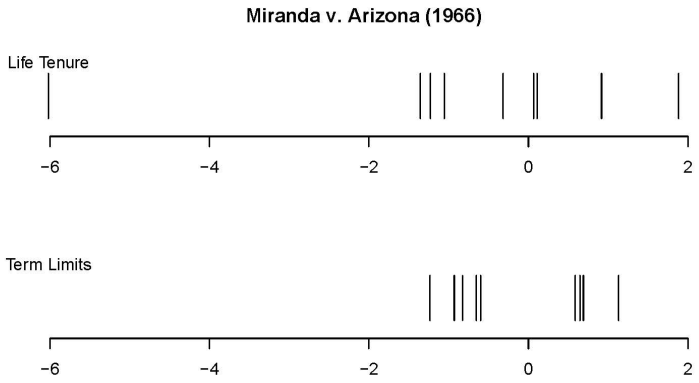


Figure 7: Comparison of Court composition under life tenure and term limits in years when salient cases were decided. Vertical lines indicate each justice's Martin-Quinn score.

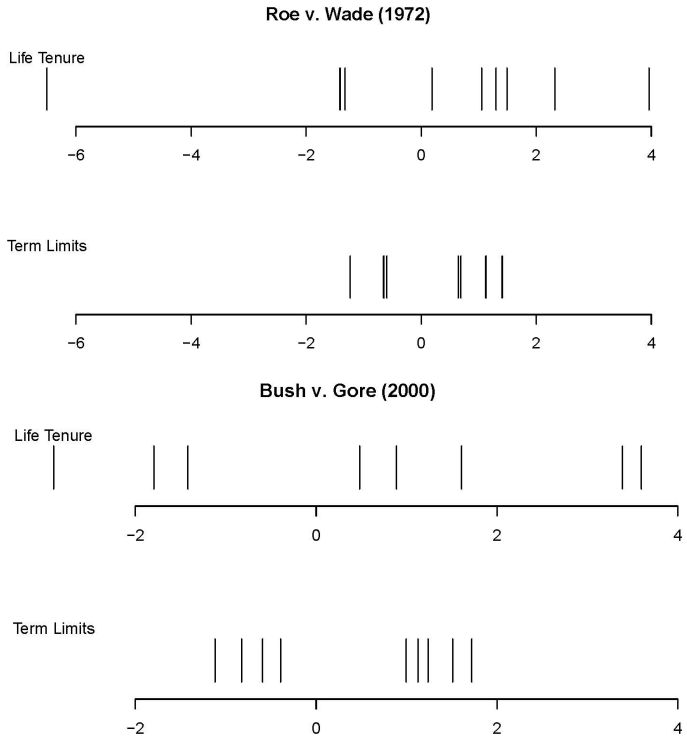


Figure 8: Comparison of Court composition under life tenure and term limits in years when salient cases were decided. Vertical lines indicate each justice's Martin-Quinn score.

While the actual decision in *Brown* was a unanimous decision in favor of school desegregation, many scholars point to the ideological heterogeneity of the Court, and the struggle to get all of the justices to agree, as one of the reasons the Court decided not to require schools to desegregate immediately.[130] This, in turn, caused the decision to have little practical consequence for African-American schoolchildren in the South.[131] Indeed, the top line in Figure 7 shows this distribution. The life-tenured Court of 1954 had a wide ideological range of justices, ranging from very liberal to very conservative. A term-limited Court (the second line in the *Brown* panel) would have produced a much more moderate and more ideological homogenous Court in 1954, which might have resulted in a more coherent stance on the timeline for desegregation.

We observe a similar situation in the 1965 Court that decided *Miranda v. Arizona*. The actual Court that decided *Miranda* was even more heterogeneous than the *Brown* Court. A term-limited Court would have had a clear 5-4 split with justices who were clustered homogenously into a liberal wing and a conservative wing. Each wing also would have been a fair amount closer to the center and might have produced a more moderate opinion.

That said, Figure 8 indicates that neither the outcome in *Roe v. Wade* nor the outcome in *Bush v. Gore* would have changed the final outcome in our hypothetical term-limited Court. Again, in *Bush v. Gore*, term limits would have produced more coherent left-right wings, but the split likely still would have been 5-4 in the conservative direction. *Roe*, too, would likely have remained unchanged.

Shifting our focus to the outcomes of specific cases provides an answer to the question of "how would outcomes in particular cases change if term limits scheme had been in place?" In our last analysis, we add a layer of nuance and examine the probability that justices would vote liberally or conservatively, given their estimated Martin-Quinn scores. As before, we necessarily need to make some simplifying assumption. Chief among them is that the content of the Supreme Court's agenda is exogenous to the identity of the Court. Like many assumptions, we know this to be demonstrably false, but this was a necessary simplification for our analysis.[132] We started by using the Supreme Court Database to examine

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130. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2d ed. 2008).

131. *See generally id.*

132. We know that justices' ideological preferences and the legal factors in each case play a large role in which cases justices accept or reject. *See generally* Ryan C. Black & Ryan J. Owens, *Agenda-Setting in the Supreme Court: The Collision of Policy and Jurisprudence*, 71 J. POL. 1062 (2009); Robert L. Boucher Jr. & Jeffrey A. Segal, *Supreme Court Justices as Strategic Decision Makers: Aggressive Grants and Defensive Denials on the Vinson Court*, 57 J. POL. 824 (1995).

how the median justice's ideal point influenced the outcome in specific cases.[133] Our exploratory analysis revealed this relationship to be significant in a number of issue areas, especially civil liberties, but most especially so in First Amendment cases (N = 583). We thus estimated a bivariate logistic regression where we regressed the median justice's ideal point on whether the case was decided in a liberal manner. Using the resulting equation, we then generated predicted probabilities for each of these cases. These probabilities range between 0.35 and 0.82. The former value indicates a case that is predicted to be conservative in its outcome, whereas the latter denotes a case quite likely to be liberally decided. These probabilities in hand, we then focused on the subset of cases where the predicted outcome corresponded to the observed outcome. That is, we omit cases where the very simple model predicted a liberal outcome, but the case was ultimately conservatively decided, and vice versa. We take this step because the underlying model is admittedly simplistic in nature and ideology is not a driving force in all cases. But looking only at cases where ideology was a factor, we can generate more realistic counterfactuals. This step left us with a total of 325 cases. We then took the same equation and substituted our estimate of the median justice's ideal point if term limits existed, which generate a separate set of probabilities for these 325 cases. Figure 9, then, compares the probabilities generated from the "real" median justice versus our hypothetical median justice.

133. *Supreme Court Database*, WASH. U. L., http://supremecourtdatabase.org/data.php?s=2 (last visited Aug. 28, 2016) (select "2015 Release 02" and choose a data set).

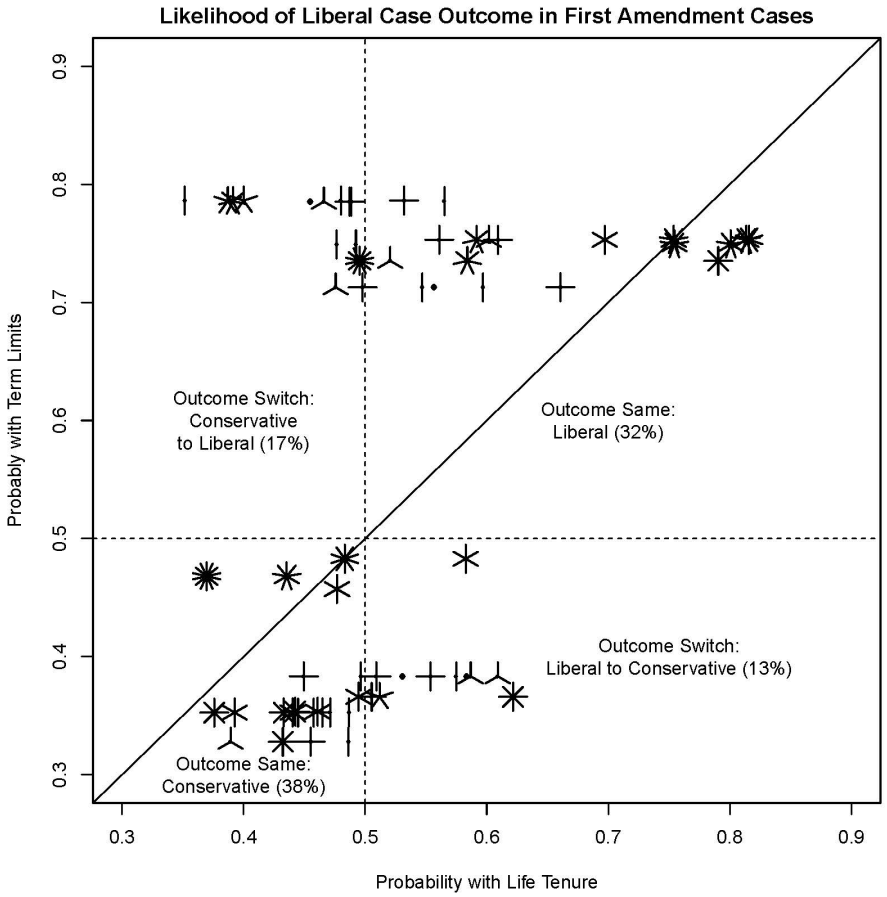

Figure 9: Predicted probability of a liberal decision on First Amendment cases for a term-limited Court (y-axis) and a life tenured Court (x-axis). Additional petals on the red sunflower points indicate more cases at that point.

The y-axis of Figure 9 is the predicted probability of a liberal outcome with term limits, and the x-axis is the predicted probability in the life-tenure system. Each petal on the red sunflower plot of the Figures indicates a case in our analysis. Sunflowers with more petals indicate a higher frequency of cases at that point, and sunflowers closer to the solid diagonal line indicate cases that are unlikely to change under a term limits system. Here, we see that approximately 32% of First Amendment cases decided in a liberal direction and 38% of cases decided in a conservative direction would likely have remained unchanged—70% of cases overall.

However, in the 30% of cases that might have changed under a term-limited Court, 17% would have switched from conservative to liberal outcomes and 13% would have switched from liberal to conservative outcomes. Within this subset of cases, where we might have expected the outcome to change, are some highly salient cases (including *Citizens United v. Federal Election Commission*[134]) that we predict could have had a .71 probability of being decided in a liberal direction under a term-limited Court. On the other hand, the model also predicts that the landmark Ten Commandments case, *McCreary County v. American Civil Liberties Union*,[135] would have had a .61 probability of switching from a liberal to conservative outcome.

If we keep in mind that these results are hypotheticals and, thus, make a fair number of limiting assumptions, they can teach us a fair amount about the policy implications of term limits. Most notably, the Court's policy output would have undoubtedly been different under this institutional arrangement. That said, these changes might have had less of an impact than we might have expected. Many cases in our analysis would have likely come out similarly to the decisions actually issued by the life-tenured Court. There is also again a fairly even split between those decisions that would have benefited liberals in a term-limited system and those that would have benefitted conservatives. If nothing else, these results answer an interesting thought experiment.[136]

CONCLUSIONS AND DISCUSSION

The results we present certainly have their limitations. Chief among them are the simplifying assumptions we had to make to construct our counterfactual Court. For example, we ignore the Senate's role in confirming potential nominees and the impact that might have on who gets appointed to the bench. We also do not account for the possibility that justices' ideology could drift over their time on the Court and we do not factor in the possibility that a justice may die or retire early from his or her eighteen-year term. Future efforts might consider relaxing some of these rather strict assumptions. Moreover, there are other simplifying assumptions we had to make that we cannot account for in the analyses, such as how term limits might politicize or depoliticize the confirmation hearings, how they might affect justices' attitudes toward their own role on the bench (and, in turn, their decision-making process), and how the agenda

134. 558 U.S. 310 (2010).

135. 545 U.S. 844 (2005).

136. Not unlike Stephen King's path-breaking work *11/22/63*, which we could not recommend more highly. But you have to read the book before you watch the far inferior miniseries based on it, currently airing on Hulu.

of cases the Court decides might change given the different justices who can elect to accept or reject those cases. Ultimately, historical counterfactuals are just that: they are hypothetical thought experiments that, while we believe they can be very useful in assessing potential policy consequences, can never accurately gauge all of the downstream consequences they might have.

These limitations aside, the empirical can teach us a great deal about the normative. First and foremost, our results suggest that term limits would have created more equity in the appointments each president, and each political party, would have been able to make to the Supreme Court. While we cannot say this for sure, we believe this would likely have the consequence of making confirmation hearings less contentious affairs. We also find that there is little possibility of Court capture under a term limits system, but that term limits might create a potentially less, not more, democratically accountable judicial system.

More broadly, our results emphasize how important it is to both examine normative claims with empirical data and to demonstrate how useful historical counterfactuals can be when used correctly. This type of analysis can be an especially helpful tool when studying the potential consequences of policy changes and institutional reforms. In extension pieces, we plan to employ similar analyses in order to look at: (1) the potential consequences of an elected judiciary; (2) how the Court might have changed if failed nominations had succeeded; and (3) how the Court might have looked different if President Franklin D. Roosevelt's Court-packing plan had prevailed.

The United States Supreme Court is slow to change, but its institutions set the rules of the game. Ultimately, one of the best ways to understand the Court is to understand the rules it plays by and what might happen if those rules were changed.