

AN UNCONSTITUTIONAL CONSTITUTIONAL AMENDMENT IN THE CONTEXT OF ARTICLE III: WHY WE CAN'T—AND SHOULDN'T—TELL UNITED STATES SUPREME COURT JUSTICES WHEN TO RETIRE

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This Article discusses the unconstitutionality of a proposal that seeks to amend the United States Constitution so as to limit the terms of United States Supreme Court Justices to a single eighteen-year term. The first section explores the historical and continuing rationale behind granting life tenure to federal judges while the other two branches both have set terms provided for in the body of the Constitution. Admittedly, the Executive's term has been tampered with; however, the circumstances surrounding the evolution of the Presidency to two terms are fundamentally different from those purported to support a term limit for the Judiciary, as will be discussed in the second section. The third section shows how the separation of powers system would be harmed if such an amendment were to pass. The fourth section will show how this amendment would not accomplish the intended goal of limiting judicial power, while the final section will explore how such an amendment would deprive the Court of its power to decide cases on the merits. The power granted to the Judiciary would necessarily transfer to the Legislature, which would support the all-powerful Legislature the Founders feared.

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I. INTRODUCTION

The United States Constitution grants federal judges and Justices life tenure “during good Behaviour.”¹ However, scholar Erwin Chemerinsky² advocates for a constitutional amendment that would provide for an eighteen-year non-renewable term for Supreme Court Justices³ on the basis that Supreme Court Justices hold too much power and have been retaining that power for far too long in recent years.⁴ He further argues that this proposed amendment is the best way to limit that power while still maintaining the independence of the Judiciary. Professor Chemerinsky’s proposal is that the eighteen-year terms be non-renewable, so that a vacancy is created every two years, ensuring that no president will be deprived of the opportunity to make Supreme Court appointments, and further relieving the Court of the pressures that accompany term renewal or reelection.⁵

¹ U.S. CONST. art. III, § 1.

² This issue has been prevalent for at least several decades in modern times and has recently come back into the public spotlight as a result of Senator Ted Cruz’s (R-Texas) open support for a limitation on the Judiciary. Supporters of an eighteen-year term limit for Supreme Court Justices include such notable figures as Steven G. Calabresi (Professor of Law, Northwestern University), James Lindgren (Professor of Law, Northwestern University), and Senator Ted Cruz. Note that Senator Cruz advocates for retention elections, but has not specifically advocated for the same eighteen-year term that Professors Chemerinsky, Calabresi, Lindgren, and others support.

³ Erwin Chemerinsky, *Ted Cruz is Right: The Supreme Court Needs Term Limits*, NEW REPUBLIC (July 2, 2015), <https://newrepublic.com/article/122225/ted-cruz-right-supreme-court-needs-term-limits> (“the best idea is that each justice [sic] should be appointed for an 18-year, non-renewable term”).

⁴ See *contra* THE FEDERALIST NO. 78 at 465–66 (Alexander Hamilton) (THE FEDERALIST PAPERS, Clinton Rossiter ed., 1961) (arguing that the Judiciary will always be the least dangerous of the three branches regarding threats to constitutional rights because the Judiciary is in the least “capacity to annoy or injure them”). It is also notable that Professor Chemerinsky is adamantly against giving nine individuals such a vast amount of power for so long, but he fails to consider that a two-term President will have appointed four of the nine Justices during his Presidency, the first of whom will leave the bench ten years after the President leaves office. Under Professor Chemerinsky’s scheme, it is a guarantee that the President will be exercising power long after he leaves office, as he will have appointed nearly half the bench for a decade after his term ends. Under the current appointment scheme, it is certainly a possibility that this could occur, but it seldom does, and it is not a guarantee in any respect.

⁵ ERWIN CHERMERINSKY, *THE CASE AGAINST THE SUPREME COURT* 310–12 (Viking, 1st ed. 2014). It is worth noting that Professor Chemerinsky addresses the possibility of the death of a sitting Justice by proposing that a vacancy be filled by interim appointment; however, this creates additional concerns with regard to the level of power that interim Justice would be able to exercise, the qualifications of the interim Justice, and the interim Justice’s future once the term concludes. If a sitting Justice were to die with only one year remaining in his term, it is unclear whether the new interim appointee would serve on the

Although Professors Steven G. Calabresi and James Lindgren set forth a detailed proposal that would require a constitutional amendment fixing the number of Justices at nine,⁶ the idea of appointments occurring every two years would quickly fall apart if the term limit amendment were not passed in conjunction with the amendment fixing the number of Supreme Court Justices. The Constitution grants Congress the ability to determine how to establish federal courts, which includes discretion as to how many Justices are to sit on the Court.⁷ It is much easier for Congress to pass a legislative act than it is to pass a constitutional amendment; with this in mind, if the amendment setting a fixed number of Supreme Court Justices did not pass, the number of Justices could increase or decrease in the future with less difficulty than passing a constitutional amendment to this effect. If the number of Justices were to change, the two-year appointment schedule would be thrown off, and certain Presidents would have the ability to nominate more Justices than would other Presidents,

Court for one year, eighteen years, or be permitted to serve a second term as a result of having served such a partial term; from this stems the concern of whether the interim Justice would be subjected to new nomination and confirmation proceedings, if it would be implicit that he would serve a second term at the time of his initial appointment, or if he would be subjected to a retention election, much like those used in many state court elections. A greater question is presented when it is considered that a Justice could die nine and one-half years into his term. In such a situation, would the judicial appointment scheme be similar to the scheme presented for the Executive in the Twenty-Second Amendment, wherein the interim Justice could serve a second term, only if he has not served for more than one-half of the deceased's term (the Twenty-Second Amendment allows a President to run for reelection only if he has not served more than two years of another President's term, so it follows that a Justice may be able to serve a second term only if he has not served for more than half of another Justice's term)? If the scheme were similar to that of the Twenty-Second Amendment, a Justice could theoretically sit on the bench for up to one day less than twenty-seven years. If any one of these schemes were adopted, it would defeat one of the primary rationales behind Professor Chemerinsky's idea. If Justices were permitted to serve more than eighteen years, regardless of the circumstances, it would only be a matter of time before the "appointments-every-two-years" scheme were defeated. *See also* Calabresi & Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL'Y 769 (2006). The authors lay out a far more detailed plan than Professor Chemerinsky's and account for complications that may occur if such an amendment were passed, such as how to handle sitting Justices, phasing in the term limit, and other similar issues.

⁶ Calabresi & Lindgren, *supra* note 5, at 772 (proposing that Congress pass a constitutional amendment pursuant to Article V "instituting a system of staggered, eighteen-year term limits," which would allow every one-term President to appoint two Justices and every two-term President to appoint four Justices; the authors note that this scheme would not apply to any of the sitting Justices or any existing nominee at the time the amendment were ratified).

⁷ U.S. CONST. art. III § 1 ("the judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish").

depending upon which Justices' terms were to conclude within that Presidency.

This Article will explore the unconstitutionality of such a proposal by first considering the intent of the Founders in granting life tenure to Article III judges and Justices, including the ramifications such a proposal would have on the politics of the Court. The second section will consider the tenure of past and current Justices to show that there is no historical basis for such an amendment, as Justices have historically served in excess of eighteen years. It will also refute the argument that such an amendment would be similar in nature to the Twenty-Second Amendment, which provides that the President may only serve two terms. The third section will confront the separation of powers issues that would result from this proposal and show how such a scheme would have the effect of strengthening the already-powerful Legislature at the expense of the Judiciary. The fourth section will show how this amendment would not accomplish the intended goal of limiting judicial power, while the final section will explore how such an amendment would deprive the Court of its power to decide cases on the merits. The scope of this Article will deal only with the United States Supreme Court and United States Supreme Court Justices, unless otherwise noted.

II. TERM LIMIT FOR JUDICIARY EXCLUDED FROM THE CONSTITUTION WHILE LEGISLATURE AND EXECUTIVE TERM LIMITS EXPLICITLY INCLUDED

Article II of the United States Constitution explicitly states that the President shall serve a four-year term;⁸ Article I states that Senators shall serve a six-year term,⁹ and that House Representatives shall serve a two-year term.¹⁰ By including a set period of years for which the President and congressmen may hold office during any given term, the Founders clearly contemplated the idea of limiting the power of both the Executive¹¹ and

⁸ U.S. CONST. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years”).

⁹ U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six Years”).

¹⁰ *Id.* at § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year”).

¹¹ JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 37, 40–41 (Gaillard Hunt & James Brown Scott eds., The Lawbook Exchange 1999) (showing the debate during the Constitutional Convention regarding the Executive and whether he should be elected to a term of years, how long that term should last, and whether that term should be renewable; ultimately, there was a majority vote in favor of a seven-year term for the Executive; the debate included considerations from many delegates regarding how long an appropriate

Congress,¹² and chose to do so.¹³ Article III, however, simply provides that “judges, both of the supreme and inferior courts, shall hold their Offices during good Behaviour.”¹⁴ It is significant that Articles I and II limit the service of the President and congressmen during any given term while Article III contains no such restriction on the Judiciary. The inclusion of a specified term of years in Articles I and II shows the contemplation of the Founders to limit the power of the Executive¹⁵ and

term would last, without giving an individual too much power with no adequate opportunity for recourse in the event the Executive was unqualified).

¹² *Id.* at 91–92, 94–96 (debating the term for Legislators; Edmund Randolph of Virginia favored a seven-year term for the Legislature and argued “A firmness & independence may be the more necessary also in this [Legislative] branch, as it ought to guard the Constitution ag[ainst] encroachments of the Executive who will be apt to form combinations with the demagogues of the popular branch;” James Madison was likewise in favor of a seven-year term, as he believed a term of that length would grant stability to the federal government, which he viewed as a necessity; Madison further supported a lengthier term by arguing that in “States where the Senates were chosen in the same manner as the other branches, of the Legislature, and held their seats for 4 years, the institution was found to be no check whatever ag[ainst] the instabilities of the other branches”). This debate was ongoing throughout the Constitutional Convention until very near the end of the Convention.

¹³ THE FEDERALIST NO. 69 *supra* note 4 (Alexander Hamilton) (offering an in-depth comparison between the powers of the English monarch and the American President to show where the powers vary and to what degree. This comparison shows a vast reduction in the powers afforded to the President as opposed to the monarch, and it must be kept in mind that having been previously ruled by England, the Founders understood the implication of changing the governmental structure to such a degree.); THE FEDERALIST NO. 52, *supra* note 4, at 325–27 (James Madison) (comparing the American House of Representatives to the British House of Commons to show why the Founders opted to impose a more regular system of elections and accountability for the Legislature than that system utilized by the British government; the irregular system of elections for the House of Commons was flawed, in Madison’s view, as the development of the election scheme was both ambiguous and discretionary, at various points in its progression); THE FEDERALIST NO. 53, *supra* note 4, at 331 (James Madison) (continuing the discussion of the British Parliament and the flaws that exist therein:

[I]t is maintained that the authority of the Parliament is transcendent and uncontrollable . . . They have . . . changed, by legislative acts, some of the most fundamental articles of the government. They have in particular, on several occasions, changed the period of election; and, on the last occasion, not only introduced septennial in place of triennial elections, but by the same act, continued themselves in place four years beyond the term for which they were elected by the people.

The Founders sought to prevent the Legislature from becoming the sort of self-governing, power-hungry body the British Parliament evolved into, which was one of the primary reasons for limiting the power of the American Legislature).

¹⁴ U.S. CONST. art. III, § 1.

¹⁵ MADISON, *supra* note 11, at 270–71 (providing the debate amongst the Founders regarding whether to grant the Executive tenure “during good behavior;” Colonel George Mason found this to be a very dangerous proposition as “during good behavior” was another term for life tenure, which, in the context of the Executive, was a short step from a monarch, which was the exact type of government the Founders were trying to avoid; the

Legislature. However, the exclusion of such a restriction in Article III shows that, having already contemplated imposing a limitation on both the Executive and the Legislature, the Founders determined that the Judiciary was unique and required no such limitation. The Founders clearly felt empowered to impose a set term on the branches of government, as a general matter, but opted not to exercise that power in the context of the Judiciary and instead granted the Judiciary life tenure as opposed to term appointments.¹⁶

The terms set for both the Executive and Legislature show the intent of the Founders to limit the power of those two branches of government, most notably the Legislature, which the Founders feared would become too powerful.¹⁷ This fear led the Founders to create a system wherein the Legislature and Executive would be accountable to the people on a regular basis.¹⁸ However, the life tenure written into Article III shows that the Founders intended to create a more powerful Judiciary that would not fear job loss and would not feel the need to cater to the people.¹⁹ These

Founders also spent a significant amount of time discussing further the seven-year term previously agreed upon, whether that term should be upheld, and whether it should be non-renewable). The Founders' frequent and lengthy discussions regarding the term of the Executive and its potentially non-renewable nature exhibit a strong fear against an all-powerful enduring Executive.

¹⁶ *Id.* at 275–78 (debating the salaries of the Judiciary and showing the agreement to grant life tenure “during good behavior,” with no dissenters; however, it was substantially debated whether the Judiciary’s salary was to be fixed—the main point of contention was whether the salary should be subject to be increased by the Legislature during a judge’s term, or whether the salary should remain absolute throughout a judge’s tenure; ultimately, the delegates voted that the judicial salary could be subject to increase during a judge’s tenure).

¹⁷ See THE FEDERALIST NO. 78, *supra* note 4, at 465 (Alexander Hamilton) (discussing the idea that the Judiciary enjoys far less power than the Executive and Legislature because the Judiciary cannot act unless one—or both—of the other branches acts first. The Legislature holds the power of the purse and “prescribes the rules by which the duties and rights of every citizen are to be regulated,” and the Executive has the ability to determine which laws to enforce. The Judiciary, however, only has the ability to pass judgment on the acts of the other two branches and does not hold any power that truly allows it to engage in original acts of its own. Furthermore, while the Judiciary can pass judgment, it still must rely on the Executive for enforcement of those judgments and possesses no power of its own to put into motion the judgments it makes).

¹⁸ THE FEDERALIST NO. 69, *supra* note 4 (Alexander Hamilton) (the chief discussion is of the Executive and how best to ensure that he would be both an independent Executive while simultaneously maintaining a sense of accountability); THE FEDERALIST NO. 52, *supra* note 4 (James Madison) (*see supra* note 13); THE FEDERALIST NO. 53, *supra* note 4 (James Madison) (*see supra* note 13).

¹⁹ THE FEDERALIST NO. 78, *supra* note 4, at 466 (Alexander Hamilton) (expressing the notion that the Judiciary is in constant danger of being overpowered by the other two branches, which necessitates life tenure as an “indispensable ingredient in its constitution,” as nothing other than life tenure can so strongly contribute to the Judiciary’s independence and strength).

consequences could result from a defined term that would mandate that Justices either be reappointed at the end of the term or leave the bench.²⁰

A. Politicization of Supreme Court

If the Constitution were to be amended to set a term for which Justices may serve—even a generous term—the rationale behind Article III would be lost. The Judiciary would no longer enjoy the power it currently possesses and would instead feel accountable to the people; Supreme Court appointments would begin to more closely resemble elections by virtue of their frequency and predictability, which would directly contradict Article III. The President and Senate are both accountable to the people by nature of being elected officials. Because the President must nominate a Justice and the Senate must confirm the nominee, if appointments are made that the people disapprove of, the constituency will retaliate against the elected officials who were responsible for appointing that Justice to the bench.

Naturally, only those Justices who rule in favor of the popular views—which may or may not align with the law—would be appointed, or the Senate and President would face significant backlash and could risk losing the reelection. As a result, the Judiciary would be accountable to the people by extension of the frequent appointments with which those elected officials would have to deal. Were Supreme Court appointments to become a matter of occurrence every two years, the Senate and Executive would be forced to make political appointments as opposed to those appointments that would be best for the Judiciary. If the Executive and Senate chose not to make appointments for political reasons, those elected officials would risk losing at reelection. Therefore, Supreme Court Justices would be chosen for political reasons to an even greater extent than they are now because the Court, as a whole, would be beholden to the people by extension of the frequent appointments and the nature of elected officials.

Such is not the principle behind the Judiciary. The Executive and the Legislature were intended to be held accountable while the Judiciary was

²⁰ *Id.* at 471.

Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the Judiciary's] necessary independence. If the power of making them was committed either to the Executive or Legislature, there would be a danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either.

intended as a check on the other two branches.²¹ If an amendment made all three branches accountable to the people, the system of checks and balances the United States holds so dear would fall apart. The system of checks and balances would instead be replaced by a political arena aimed at pleasing the voters in the moment, as opposed to upholding the law, which is the primary purpose of the Judiciary.

Furthermore, elections for members of state judiciaries have shown that when judges are made accountable to the people, they pledge to decide cases in a manner consistent with what the people want; this holds true even when it is impossible to know if cases to support that position will present themselves during the judge's time on the court.²² The vast number of studies on state judicial elections shows that when judges are up for election or reelection, they pledge to (and do) decide cases in a manner consistent with the views of their biggest supporters.²³

A similarly unfavorable situation would be likely to occur if a new Supreme Court Justice were appointed every two years. Justices would feel compelled to show support for the positions of those senators and the President who supported their appointment out of fear that if the Justices did not exhibit their appreciation for having been appointed, future Justices may be appointed who hold different views.²⁴ Those senators and the President who once supported an individual Justice with certain views may reconsider their allegiance if that Justice were to threaten the Senator's or the President's ability to win the reelection. As a result, the President and

²¹ *Id.* at 467 (arguing that the Judiciary was intended to be an intermediary between the Legislature and the people in order "to keep the [Legislature] within the limits assigned to their authority").

²² Russell S. Sobel & Joshua C. Hall, *The Effect of Judicial Selection Processes on Judicial Quality: The Role of Partisan Politics*, 27 *CATO J.* 69, 70 (2007) (in the 2004 West Virginia Supreme Court election, "The incumbent, well known for his reputation of deciding cases for labor interest and against business interests, stressed this reputation in his media ads, while the challenger outwardly vowed to decide cases in a more business friendly manner if he were to be elected.").

²³ *Id.*; Andrew Cohen, *An Elected Judge Speaks Out Against Judicial Elections*, *THE ATLANTIC* (Sept. 3, 2013), <http://www.theatlantic.com/national/archive/2013/09/an-elected-judge-speaks-out-against-judicial-elections/279263/> (a study conducted by the American Constitution Society for Law and Policy found that regarding elected state supreme court justices, "The more campaign contributions from business interests justices receive, the more likely they are to vote for business litigants . . . a justice who receives half of his or her contributions from business groups would be expected to vote in favor of business interests almost two-thirds of the time").

²⁴ *THE FEDERALIST NO. 78*, *supra* note 4, at 471 (Alexander Hamilton) (expressing the belief that periodical appointments, regardless of how such appointments were regulated or came about, would destroy the independence the Judiciary must necessarily enjoy in order to do its job properly; Hamilton goes on to argue that "If the power of making [the periodic appointments] was committed either to the executive or legislature, there would be danger of an improper complaisance to the branch which possessed it.").

Senators would be more likely to pursue a candidate whose views would support them come election time, regardless of whether that candidate's views would be the most beneficial in upholding the law.²⁵ Likewise, Justices would feel inclined to return the favor in deciding cases that would benefit their supporters in order to encourage those same Senators and that same President to appoint future Justices with similar views.

However, a two-term President's behavior would likely shift during his second term, as he would no longer fear reelection. In such a situation, the President would likely resort to one of two rationales in nominating individuals: 1) nominees would be chosen to benefit the President's political party and gain support for future political candidates of the party; or 2) nominees would be chosen according to the legal interpretation they adhere to and the rulings they are likely to make. The mode of thinking employed by the second-term President would largely depend on his party allegiance, the national and world climate at the time, and the personal inclinations of the President toward one rationale over the other.

Interestingly, under Professor Chemerinsky's scheme, Justices would be appointed every two years, which is the same term that a House Representative enjoys.²⁶ This calls into question whether one of the motives of the scheme is to make the Senate feel more inclined to adhere to the whims of the people. If Professor Chemerinsky's plan were implemented, Senators would face three Supreme Court appointments per term.²⁷ As a result, Senators would feel even greater pressure to form a Court that is well-liked by their constituency. If three Court appointments were to occur while a Senator were in office and his or her constituency were unhappy with the resulting appointments, that Senator would be less likely to be reelected. This likelihood increases when it is considered that there would be three more appointments to be made during the following term, and that Senator had already shown an inability to mold a Court that is supported by his constituency. While these frequent appointments may

²⁵ See also Charles Gardner Geyh, *Why Judicial Elections Stink*, 64 OHIO ST. L. J. 43, 45 (2003) (presenting the idea of California Governor Gray Davis that when a judge is faced with "a decision that is contrary to [the Governor's] position," "They shouldn't be a judge. They should resign. My appointees should reflect my views. They are not there to be independent agents" (quoting *Transcript of Governor's Comments on Judges*, SACRAMENTO BEE, Feb. 29, 2000, at 8.)). While one would hope that United States Supreme Court Justices would act as independent agents, and Governor Davis's comments are likely more on the extreme end of this model of thinking, it is conceivable that similar viewpoints could manifest themselves in the Executive and the Legislature if Supreme Court Justices were subject to appointment on a two-year rotation.

²⁶ U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year").

²⁷ *Id.* at § 3, cl. 1 ("The Senate of the United States shall be composed of two Senators from each State, chosen by the legislature thereof, for six Years").

appear beneficial in terms of increasing the accountability of the Senate, the reality is that the Senate would resort to the appointments that would help them win the reelection as opposed to those appointments that would best uphold and interpret the law. Legislative accountability is not bad per se, but if that accountability comes at the expense of an independent and qualified Judiciary, it is certainly misplaced.²⁸

In sum, by virtue of having a Court that faces appointments every two years, the Justices would be far more accountable to the people because of how this shortened term would influence the elections of those senators who are responsible for their confirmation. House Representatives are elected every two years, which makes them more accountable to the people than Senators, who are elected every six years. However, if Justices were appointed every two years, this would increase the pressure on senators to adhere to the constituency's influence every two years—which may or may not be a bad thing, depending on one's views—but it would force the Senate into a position more akin to that of the House of Representatives.

B. The Supreme Court's Influence on the Appointment Process

In a Nation with a new Supreme Court Justice appointment every two years, it would be inevitable that sitting Justices would tailor their opinions to maximize the chances that a like-minded individual would be the next appointee. An individual Justice only holds power when he or she can either block a decision or garner enough votes in his or her favor to propel a decision. The most logical step for a Justice seeking to advance his or her agenda, then, is to gain the support of as many other Justices as he or she can; if that means that support can be gained through the appointment of a new Justice, the sitting Justice will seek to ensure that a certain nominee secures the appointment. There can be a feeling of fear if the Court is either too liberal or too conservative. As a result, if a Justice wishes to secure a conservative appointee on an already right-leaning Court, that Justice may author opinions that appear to be more on the liberal end of the spectrum, while still maintaining the holding that he or she believes to be correct. For example, an opinion authored by a conservative Justice may not employ the full breadth of traditionalist and textual interpretations at his or her disposal, but the ultimate holding would likely be the same as if the Justice had utilized all of the tools typically involved in reaching a conservative holding.

²⁸ “Essential to the rule of law in any land is an independent judiciary, judges not under the thumb of other branches of Government, and therefore equipped to administer the law impartially.” Ruth Bader Ginsburg, *Judicial Independence: The Situation of the U.S. Federal Judiciary*, 85 NEB. L. REV. 1, 1 (2006).

The climate of the Court can influence the nomination process as much as the political party controlling both the White House and the Senate. The recent death of Associate Justice Antonin Scalia left a precarious 4-4 balance amongst the remaining Justices,²⁹ leading to nomination proceedings that were considered to be very high stakes. Liberal members of the political community expressed fear—or at the very least, displeasure—at the idea of a right-leaning Court,³⁰ while conservatives outwardly refused to even consider a left-leaning nominee.

With this in mind, it is conceivable that an individual Justice or group of Justices could perceive an opportunity to sway the nomination and confirmation process by manipulating the climate of the Court. Currently, this is not an overtly prevalent issue because vacancies do not occur on a set timetable, and unexpected vacancies are even more rare.³¹ However, if vacancies were to become as predictable as they would be under Professor Chemerinsky's plan, it would be common knowledge eighteen years in advance which Justice would be the next to vacate the Court, assuming no Justice were to die while on the bench or choose to leave the bench early.³²

Under this scheme, it would be much easier for Justices to mold the Court in such a way that an appointee would ascend to the bench whose views were more in line with the views that the Court—or an individual Justice—thinks are necessary or desirable at that time, considering the views of the other sitting Justices. The end result would be that the Court would feel it necessary to constantly sculpt its own political climate in hopes of a more politically favorable candidate being appointed at a later

²⁹ Note that Judge Neil Gorsuch of the Tenth Circuit was confirmed to the Supreme Court on April 7, 2017, and is expected to be “a reliable conservative committed to following the original understanding of the original understanding of those who drafted and ratified the Constitution.” Adam Liptak and Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, THE NEW YORK TIMES (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html>.

³⁰ Adam Liptak, *What the Trump Presidency Means for the Supreme Court*, THE NEW YORK TIMES (Nov. 9, 2016), https://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html?_r=0.

³¹ See Philip Bump, *Antonin Scalia is only the 3rd Supreme Court Justice to die on the bench in the last 63 years*, THE WASHINGTON POST (Feb. 13, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/02/13/supreme-court-justices-used-to-often-die-on-the-bench-these-days-its-very-rare/> (discussing the infrequent deaths of sitting Supreme Court Justices, and noting that Justice Antonin Scalia's death while on the bench is only the third since the latter half of the twentieth century; prior to Justice Scalia's death, only two sitting Justices had died in the last sixty-six years: Chief Justice William Rehnquist passed in 2005, while Chief Justice Fred Vinson passed in 1953).

³² See also Eric Hamilton, Note, *Politicizing the Supreme Court*, STAN. L. REV. ONLINE 35 (2012). The author gives an overview of how the Supreme Court may become more politicized and the protections the Framers wrote into the Constitution to protect the Court from such politicization.

date. Had Justice Scalia been appointed under Professor Chemerinsky's plan nearly eighteen years before his death, other members of the Court would have known that Justice Scalia's time on the Court would soon end. As a result, the other conservative members of the Court would have been likely to author opinions that were more liberal in nature—although still holding true to what that Justice deemed the appropriate judgment—in order to create the appearance of a more liberal Court, and thereby incentivize the replacement of the conservative Justice with another conservative Justice. At the same time, the liberal Justices on the Court would have found it beneficial to author more conservative opinions to give the appearance of a Court that was more conservative than it actually was, which would have encouraged a more liberal appointee.

The reasoning behind this manipulation sounds in the notion that the Nation is afraid of having a Court that leans too strongly toward either the left or the right. In creating a false appearance of conservatism or liberalism, the Court can encourage the next appointee to be one who would “balance” the Court. However, this would be an artificial balance that would be the result of manipulation, as opposed to the true views of Supreme Court Justices. The Supreme Court decisions would therefore be based as much, if not more so, on politics and long-term planning than on what the law requires and what the Constitution reflects. Such politicization of the Supreme Court would be detrimental to the American system because the Court would fall victim to the political gamesmanship that drives the other two branches of the federal government.

III. TWENTY-SECOND AMENDMENT HAS A BASIS IN THE ORIGINAL TEXT OF THE CONSTITUTION, UNLIKE AN AMENDMENT LIMITING JUDICIAL SERVICE

The Twenty-Second Amendment to the United States Constitution provides that a President may only serve two terms in office, with an exception for a partial term in office.³³ While the Nation has historically allowed amendments such as this one, an amendment limiting a Justice's time on the bench would be fundamentally different because the Twenty-Second Amendment finds its basis within the original Constitution, while an amendment limiting the Judiciary's term would not. The Twenty-Second Amendment serves to expand upon Article II, which provides that

³³ U.S. CONST. amend. 22, § 1.

No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once.

the President shall serve a four-year term;³⁴ Article III, however, contains no reference to time with respect to how long members of the federal Judiciary may serve, or how long a term is to last.³⁵ As a result, an amendment that would create an eighteen-year term for Supreme Court Justices would not be expanding on an existing limitation, as the Twenty-Second Amendment did.³⁶ Rather, such an amendment would create an entirely new limitation on the Judiciary that was not meant to exist.³⁷

Article II of the Constitution serves to illustrate and limit the Executive's powers, one of which is a limit on how long a President may serve in any given term.³⁸ This limitation that was written into the Constitution lends support to the Twenty-Second Amendment because the Founders clearly intended to use time to constrain the power of whoever may hold the Presidency,³⁹ while Supreme Court Justices are merely limited by their own mortality and "good Behaviour."⁴⁰ The Twenty-

³⁴ U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years").

³⁵ U.S. CONST. art. III provides for life tenure, which is arguably an unlimited length of time, subject only to a Justice's death, compared to the explicit term limits provided for the Executive and Legislature in Articles I and II, respectively.

³⁶ While some may suggest that Congress could simply pass an act to achieve the result of a non-renewable eighteen-year term, this proposal forgets that a legislative act cannot prevail over the text of the Constitution. The Supreme Court frequently strikes down federal laws on the basis of unconstitutionality; as a result, any endeavor to change the interpretation of the Constitution must resonate from the Constitution itself, which leaves only one avenue for change: a constitutional amendment. While that option has been exercised numerous times, it would not be appropriate in this situation because such an amendment would be groundless and violative of both Article III and the founding meaning of Article III, without any historical or textual support within the Constitution. Therefore, if Congress were to attempt to pass a constitutional amendment to achieve what an act could not, the amendment would certainly be unconstitutional and inappropriate in the American Judiciary.

³⁷ THE FEDERALIST NO. 78, *supra* note 4, at 466 (Alexander Hamilton) (the Judiciary "is in continual jeopardy of being overpowered, awed, or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence, as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution").

³⁸ U.S. CONST. art. II ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years").

³⁹ See also MADISON, *supra* note 11, at 37, 40–41 (George Mason and Gunning Bedford, Jr. initially suggested that the Executive serve a non-renewable term. Mason proposed a period of at least seven years, and Bedford countered that this could empower an unqualified individual for too long with no hope of rectifying the situation, as impeachment would be inadequate to correct the deficiencies. Bedford's proposal was to elect the Executive every three years, who would then be ineligible after a period of nine years—this scheme is remarkably similar to the one that is currently in practice). Both of these proposals show an inclination toward not allowing the Executive to hold power for an indefinite amount of time.

⁴⁰ U.S. CONST. art. III, § 1 (as "during good Behaviour" has been interpreted to mean that the federal Judiciary shall enjoy life tenure, it follows that a Justice shall remain on the

Second Amendment only served to limit the President's power further and thus was a lawful amendment. An amendment limiting the term of a Supreme Court Justice would not be lawful because the term of a Supreme Court Justice was not intended to be limited to a term of years originally, hence the grant of life tenure;⁴¹ thus, instead of building on an existing limitation, as the Twenty-Second Amendment did, such a proposed amendment would undercut the existing powers of the Judiciary by imposing a term limit that has no basis within the body of the Constitution.

The Presidency was not originally limited to two four-year terms; however, the Presidency has always been limited to terms of four years, at which point the President must face reelection.⁴² The effect of this four-year limitation is that Presidents have always been held accountable to the people on a regular basis, even though the Presidency has not always been limited by the Twenty-Second Amendment. The federal Judiciary, however, is different from the Executive in that the Judiciary was not intended to be held accountable to the people.⁴³ This key difference lends support to the notion that Justices were intended to be limited only by their own mortality or by their lack of "good Behaviour."⁴⁴

Such an amendment to the judicial power would serve to limit a power that was intended to be vast, and that was not intended to be limited by time. As a result, were an amendment regarding the Judiciary's term

bench until his or her death, should he or she choose to do so. However, it would be error to argue that a Justice's term is absolutely without limitation. A Justice's tenure cannot outlive his or her physical life, meaning that when a Justice dies, his or her tenure must cease at that exact moment. As a result, death is a limitation on a Justice's tenure, just as the qualifying "during good Behaviour" serves as a limitation on a Justice's tenure. However, this limitation cannot be interpreted in the same manner as the limitation on the Presidency imposed in Article II because a Justice may serve for an indeterminate length of time and is thus not held accountable to the people; the President, on the other hand, is explicitly held accountable every four years, thus creating a limitation that may or may not continue for an additional four years).

⁴¹ THE FEDERALIST NO. 78, *supra* note 4, at 466 (Alexander Hamilton) (explaining that the protection afforded to the Judiciary by way of life tenure is absolutely vital to the existence of the Judiciary and the Judiciary's ability to function independently of the other two branches of government).

⁴² U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years"); *see* THE FEDERALIST NO. 69, *supra* note 4, at 416 (supporting the notion that although the President was not originally limited to two terms, the Founders did wish to differentiate him from a monarch by requiring him to face reelection every four years in an effort to hold him accountable to the people).

⁴³ *See supra* 8–9 (discussing the protections intended for the Judiciary in order to insulate the Judiciary from public influence).

⁴⁴ U.S. CONST. art. III, § 1.

to be passed, it would create a new limitation on the federal Judiciary that was not intended to exist.⁴⁵

The amendment process is admittedly very difficult to achieve,⁴⁶ which some may argue supports the notion that the Founders intended to allow amendments if the proper support could be gained.⁴⁷ While this may be true, it cannot be argued that the Founders intended to allow amendments that would undermine the separation of powers system, which lies at the heart of the Constitution.⁴⁸ The Founders expressed profound concerns regarding the power to amend the Constitution, and they pointedly debated whether the amendment power would be abused or manipulated in the future to achieve the government's ends.⁴⁹

⁴⁵ THE FEDERALIST NO. 78, *supra* note 4, at 466 (Alexander Hamilton).

⁴⁶ U.S. CONST. art. V (passing a constitutional amendment requires that the amendment be proposed by a two-thirds vote in both the House and the Senate then subsequently ratified by three-fourths of the states; alternatively, an amendment could be passed by way of a constitutional convention, although this method has never been employed. Passing an amendment by constitutional convention requires that the Legislatures of two-thirds of the states call for such a convention, then three-fourths of the states subsequently ratify said amendment.).

⁴⁷ Many would argue that had the Founders intended to prohibit certain constitutional provisions from being amended, they would have written a perpetuity clause into the Constitution, thereby prohibiting an amendment to said provision. However, such clauses were uncommon when the Constitution was drafted, and between 1789 and 1944, such clauses were included in, at most, twenty percent of new constitutions. Richard Albert, *The Unamendable Core of the United States Constitution*, in *COMPARATIVE PERSPECTIVES ON THE FUNDAMENTAL FREEDOM OF EXPRESSION* (András Koltay ed.), 14–15 (2015). As a result, the Founders may not have considered such a provision to be a viable option that would endure and garner respect in the centuries to follow, given that at the time the Constitution was drafted, perpetuity clauses were so seldom included.

⁴⁸ See also THE FEDERALIST NO. 78, *supra* note 4, at 469 (Alexander Hamilton) (suggesting that the Legislature should not amend the Constitution when a majority of the constituents “momentar[ily]” wishes to do so, if that amendment would be inconsistent with “the existing Constitution”); see also MADISON, *supra* note 11, at 571–72 (detailing the debate over the power to amend the Constitution, as well as the concerns of many that this power was too vast and would be subject to abuse; Colonel George Mason was expressly concerned that the government would manipulate this power so as to prevent the people from amending the Constitution in truly essential ways and, as a result, become oppressive).

⁴⁹ MADISON, *supra* note 11, at 573–77 (George Mason expressed the concern that in granting the amendment power, “no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive, as he verily believed would be the case”).

A. Passing Judgment on a Federal Constitutional Amendment Would be Akin to Passing Judgment on a State Constitutional Amendment

The power of the Supreme Court allows it to pass judgment on the constitutionality of laws and state constitutions;⁵⁰ it follows that the Supreme Court could likewise pass judgment on the validity of a federal constitutional amendment, and such a judgment would not be fundamentally different from passing judgment on a state constitution and rendering a state constitutional amendment invalid.

Historically, the United States Supreme Court has only passed judgment on state constitutions, never the federal Constitution. The Supremacy Clause certainly allows the federal Constitution to overrule any state laws or constitutions that may be in conflict with the federal Constitution, which provides a strong foundation for challenges to state constitutions.⁵¹ When looking at the role state constitutions play in the United States, they can be considered to be the smaller-scale counterparts to the federal Constitution in the sense that state constitutions are the ultimate governing law for that respective state, much like the United States Constitution is the ultimate governing law for the United States. It follows that state constitutional amendments are the smaller-scale counterparts to federal constitutional amendments. Importantly, the federal Constitution always trumps state constitutions. However, even with this in mind, if the federal Judiciary has the authority to render part of a state constitution null and void due to contrary ideas between the state constitution and the federal Constitution, it is not implausible that the Supreme Court would have the authority to render a constitutional amendment null and void due to inconsistency with the body of the Constitution.

Typically, when two laws are in conflict, the law that was passed later in time wins the day. However, if an amendment were passed that seemed to negate one of the founding principles of the federal Judiciary, the amendment may be regarded differently than an ordinary law, as laws do not tend to alter the very foundation of the United States. If this were to occur, it could be argued that the established Constitution—which has been in existence for more than 225 years—takes precedence over an amendment that seeks to rid the Constitution of one of its protective elements because the very purpose of the Constitution is to uphold the

⁵⁰ See *Romer v. Evans*, 517 U.S. 620 (1996) (ruling that an amendment to the Colorado Constitution was invalid because the amendment was inconsistent with the Fourteenth Amendment to the United States Constitution).

⁵¹ U.S. CONST. art. VI, cl. 2 (“This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby; any Thing in this Constitution or the Laws of any State to the Contrary notwithstanding”).

United States as a nation. If any type of legislation, constitutional amendment or otherwise, seeks to impose on that purpose, the Constitution should win out in order to protect the Nation.

B. Constitutional Moments and Other Methods of Effecting Constitutional Change

Until 1940, no President had both sought and won a third presidential term.⁵² In 1795, George Washington set the precedent that established a two-term limit on the presidency; no President successfully broke this tradition until 1940, when President Franklin Delano Roosevelt was elected to a third term in office. For nearly a century and a half, America abided by an unwritten rule that dictated that Presidents could only serve two terms; this rule became law in 1951 with the ratification of the Twenty-Second Amendment.⁵³

Professor David A. Strauss argues that the formal amendment process frequently has no bearing on constitutional changes, and that such changes occur, absent a constitutional amendment, as a result of other factors.⁵⁴ Professor Strauss further argues that absent an amendment or legislation to effect change, “Deep, enduring changes in society will find some way to establish themselves with or without a formal amendment . . . through changes in private behavior.”⁵⁵ For nearly 150 years Presidents served only two terms, which is arguably a “Deep, enduring change” in American society from the monarchy of England.⁵⁶

⁵² THOMAS H. NEALE, CONG. RESEARCH SERV., R40864, PRESIDENTIAL TERMS AND TENURE: PERSPECTIVES AND PROPOSALS FOR CHANGE 7-5700 (2009) at 1 (“While [the two-term tradition was] generally honored as sacrosanct until . . . 1940 . . . no fewer than four 19th and 20th century Presidents before President Franklin Roosevelt were tempted to seek a third term.”).

⁵³ *Id.* at 10 (explaining that within two years of President Roosevelt’s death, the Twenty-Second Amendment had been proposed and was subsequently ratified in 1951).

⁵⁴ David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59 (2001) (“through most of our history, the amendment process has not been an important means of constitutional change On the contrary, the forces that bring about constitutional change work their will almost irrespective of whether and how the text of the Constitution has changed”).

⁵⁵ *Id.* at 1464.

⁵⁶ *Contra id.* at 1493 (although I find Professor Strauss’s idea of a “Deep enduring change” clearly applicable to the situation of a two-term President, Strauss, while admitting that this is a plausible view, argues that the Twenty-Second Amendment was necessary to effect change because of the effects that accompany the mandate that a President vacate the office after two terms, such as the effect of a lame duck President. Professor Strauss is likely correct in his assertion that the Twenty-Second Amendment was essential in creating some of the phenomena that exist today, however, the argument that a “Deep enduring change” took effect prior to the ratification of the Twenty-Second Amendment holds strong with regard to the idea as a whole. My argument does not rest on the idea that the Twenty-Second Amendment was absolutely vital to create every effect that exists today; rather my

Although the limit was not constitutionally mandated until 1951, it can be argued that the two-term limit had already been dictated and had already taken effect in America because it had been in place for so long.⁵⁷ The behavior of past Presidents in not pursuing—or pursuing unsuccessfully—a third term solidified this idea, and the Twenty-Second Amendment served only to formally constitutionalize what had already been accepted by American society.

The idea of a dualist democracy, set forth by Professor Bruce Ackerman, argues that change can be effected either through ordinary political discourse, meaning that government makes decisions, or through the People, which is a less frequently used method to effect change, due to the difficulty of accomplishing change via this avenue.⁵⁸ In the latter method, an extraordinary number of citizens must come to care about the movement and determine to support the idea, and the citizens must repeatedly decide to support this initiative, or this method will be ineffective.⁵⁹ When such a movement has been effective, Professor Ackerman argues that a constitutional moment has occurred that results in a constitutional amendment as a result of the collective outcry of the People.⁶⁰

The public support of a few select scholars and politicians in favor of limiting judicial tenure is not a constitutional moment. It lacks the characteristics shared by other constitutional moments that did effect change; nowhere in the dialogue is an assertion that limiting judicial tenure has gained widespread support or necessity. The other significant constitutional moments have all been characterized by necessity, in order for the country to endure on, and widespread—though not universal—

argument relies only on the proposition that the Twenty-Second Amendment merely served to codify what had already been in practice with respect to the tradition of a President serving two terms; any other effects that followed the Twenty-Second Amendment are merely ancillary to my argument).

⁵⁷ *Id.* at 1459 (explaining that on certain occasions, “when amendments are adopted, they often do no more than ratify changes that have already taken place in society without the help of an amendment”).

⁵⁸ 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6–7 (1991) (explaining that governmental decision-making occurs on a daily basis, but the people can only take charge of the democracy “if they succeed in mobilizing their fellow citizens and gaining their repeated support in response to their opponents’ counterattacks,” at which point the citizenry can “proclaim that *the People* have changed their mind and have given their government new marching orders”).

⁵⁹ *Id.*

⁶⁰ *Id.* at 51–55 (President Roosevelt’s successful constitutional moment in rejecting the Article V transformative process and instead garnering public support to pass the New Deal is in stark contrast to President Reagan’s failed constitutional moment wherein President Reagan unsuccessfully attempted to gain popular support for his critique of the welfare initiatives that accompanied the New Deal).

support for the movement that eventually resulted in a constitutional amendment or series of amendments.

The three established constitutional moments, the Foundation of the country, the Reconstruction Era, and the New Deal⁶¹ were all characterized by necessity. Had the Bill of Rights not been insisted upon and subsequently passed, the Constitution likely would not have been ratified. Had the North not protested slavery and had the Civil War not ensued, the Fourteenth Amendment would not have been passed. Had the Roosevelt administration not sought the much-needed economic reform, the New Deal would have been nonexistent. Each of the results from these events is characterized by necessity. None of these amendments or legislation would have become law had they not been absolutely necessary for the continued existence of the United States. An amendment limiting judicial tenure is not necessary. It will not ensure the continued presence of the United States, nor will it ensure the continued presence of the United States in its current form. Such an amendment would modify the United States and would place it in no better a position of enduring strength than the Nation is currently in without such an amendment.

Likewise, each of the three constitutional moments noted above were marked by widespread support. Both the passage of the Bill of Rights and the Fourteenth Amendment were a result of multiple states requiring some sort of constitutional amendment. The New Deal had the support of most of the Nation, as the Nation was in the midst of an economic crisis and needed salvation.

The proposal to amend Article III, however, does not have the same degree of support as any of these three events. While it is true the proposed amendment is once again back in the spotlight, it is in the spotlight based on the prominence of its supporters, not the sheer number of its supporters. Not all great changes in American history have been backed by a large number of supporters—such as the Constitutional Convention, arguably—but those events that endure as constitutional moments have substantial support by virtue of the vast number of Americans seeking to support that idea.⁶² This proposed amendment lacks the requisite support to be considered a constitutional moment.⁶³ It is neither necessary nor is it

⁶¹ *Id.* at 41, 57 (“lawyers and judges are right to look upon the Founding, Reconstruction, and the New Deal as decisive moments at which deep changes in popular opinion gained authoritative constitutional recognition”).

⁶² *Id.* at 6 (in order to successfully pass a “law in the name of the People, a movement’s political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics”).

⁶³ *Id.* at 6–7 (describing the characteristics of changes that are effected by *the People* and have enough enduring popular support to be considered constitutional moments).

supported in the same fashion as a constitutional moment and it is fundamentally different from events such as the Constitutional Convention; as a result, it cannot properly be considered a constitutional moment and thereby gain legitimacy.

C. The Practices Outlined in the Twenty-Second Amendment Were in Practice for 150 Years Before the Limitation Was Constitutionalized

The citizenry backed two-term presidencies for nearly 150 years, beginning with President George Washington's refusal to serve more than two terms. Since that time, Americans supported the idea that no President would serve for more than two terms and repeatedly renewed this commitment, as Professor Ackerman argues is necessary for change to occur through the People.⁶⁴ While it could be argued that this commitment was abandoned with the presidency of Franklin D. Roosevelt, a temporary departure from the commitment was necessary, as the following section will show. Prior to President Roosevelt's four terms, the citizens made a commitment to two-term presidencies that endured for nearly 150 years and maintained that commitment until extraordinary circumstances mandated that the citizens take alternative action for the preservation of the Nation.

Admittedly, the Twenty-Second Amendment was not proposed until after President Franklin D. Roosevelt had been elected to serve a fourth term, which was cut short by his death.⁶⁵ However, the political climate and world events during President Franklin D. Roosevelt's presidency were unique from those of Presidents past, and the events warranted an exception to the unofficial rule.

In 1929, America was struck by the Great Depression,⁶⁶ and the Nation did not fully recover to pre-Depression growth patterns until 1942,⁶⁷ at which point, President Franklin D. Roosevelt was already well into his third term. Had Roosevelt chosen not to seek a third term in 1940, he would have left the Nation in a precarious position, as the world had recently plunged into the Second World War, and America was still

⁶⁴ Professor Ackerman argues that in order for the People to effect change, Americans must support the proposal "time and again" until such change is effected. *Id.* at 6.

⁶⁵ NEALE, *supra* note 52, at 10 (explaining that fewer than three months after beginning his fourth term in office, President Roosevelt died from a cerebral hemorrhage on April 12, 1945).

⁶⁶ Christina D. Romer, *The Nation in Depression*, 7. J. ECON. PERSPECTIVES 19, 21 (1993) (showing that the American construction industry began plummeting in 1929, which signaled the beginning of the Great Depression).

⁶⁷ *Id.* at 35 (discussing the recovery of the American economy following the Great Depression).

attempting to recover from the decade-long Depression.⁶⁸ Any change in administration in 1941 would have left America vulnerable because any ripple at that time would have made the country more prone to attack,⁶⁹ and the possibility exists that the economic recovery that Roosevelt put in place may not have continued under a different administration.

Similarly, when Roosevelt was again reelected in 1944, the United States was in the midst of World War II. Although the War ended shortly after Roosevelt's death, at the time of his reelection in 1944, the German and Japanese forces had yet to surrender and continued to pose a serious threat as the Holocaust continued.⁷⁰

It is unclear if America would have accepted third and fourth terms from President Franklin D. Roosevelt had the Great Depression and World War II not posed such significant threats during his administration and during the election years in question. However, the presidency set forth by President Roosevelt was unique in that it fell during a time of turbulence, the magnitude of which has seldom been seen in America.

These extenuating circumstances created an exception to the unofficial "two-term rule" created by President George Washington because of the danger that would have accompanied even a minor shift at the time of President Franklin D. Roosevelt's reelections.⁷¹ As a result, Professor Strauss's idea that tradition and behavior can modify the Constitution still stands. This idea is bolstered by the notion that the

⁶⁸ Interestingly, at the time Roosevelt was nominated for a third term, many of his critics attacked the third term by claiming he was seeking to violate a "tradition" established by President George Washington. *Third Term? Or First Term?*, N.Y. TIMES, July 21, 1940 at E1. However, some claimed that such a third term "would upset an unwritten part of the American Constitution." George Gallup, *Ebb and Flow of the Third-Term Issue*, N.Y. TIMES, Oct. 13, 1940 at 108.

⁶⁹ Notably, even without a significant change, the Japanese still successfully bombed Pearl Harbor in 1941. Had America seen a change in its political climate, the country would have been more vulnerable than it was simply because changes are almost never seamless.

⁷⁰ Michelle Hall, *By the Numbers: End of World War II*, CNN (Sep. 2, 2013, 4:05 PM), <http://www.cnn.com/2013/09/02/world/btn-end-of-wwii/> (Germany surrendered on May 8, 1945, and the Japanese surrendered on September 2, 1945; World War II did not officially end until the Japanese surrendered).

⁷¹ Though beyond the scope of this Article, an interesting consideration is whether the two-term limit ever became unofficially constitutionalized and if so, at what point? While Washington began the trend of a two-term Presidency, it would be difficult to argue that he single-handedly established this trend as a constitutional mandate. The Constitution is crafted in a way that a single individual cannot affect a constitutional amendment; however, Roosevelt, as the thirty-second President was the first to successfully pursue a third—and subsequently, a fourth—term. The question then becomes, at some point between Washington's Presidency and Roosevelt's was a constitutional amendment effected and did Roosevelt fail to abide by that amendment? If such an amendment was created by these unofficial means, at what point did it garner enough support to actually be considered an amendment?

Twenty-Second Amendment was ratified in 1951, shortly after Roosevelt's death. The ratification following so quickly on the heels of President Roosevelt's death shows that the country already considered two terms to be the standard, and the Nation wanted to make it clear that what was already considered to be the unofficial rule was to become law.

D. Supreme Court Justices Have Not Been Serving Eighteen-Year Terms for Any Notable Period of Time

While the Twenty-Second Amendment found much of its validity in the historical practice of Presidents serving no more than two terms, there is no such practice amongst the Supreme Court Justices of historically remaining on the bench for no more than eighteen years.⁷² In applying Professor Strauss's idea that a "Deep, enduring change" can effect an amendment,⁷³ it is clear that such a change existed with respect to the Twenty-Second Amendment and the nearly 150 years of precedent on the matter. However, the data shows that for nearly fifty years, the average tenure on the Court has been more than twenty-six years,⁷⁴ the argument that a shorter judicial term has already manifested itself within the Court and within society based on data prior to the mid-twentieth century shatters when considered alongside the more recent data.⁷⁵ If this pattern of Supreme Court Justices remaining on the Court for fewer than eighteen years had been a "Deep, enduring change"⁷⁶ of the same nature as two-

⁷² Calabresi & Lindgren, *supra* note 5, at 778 (while the authors attempt to argue that Supreme Court tenure "has increased considerably since the Court's creation in 1789," the authors seem to be looking only at select datasets; when comparing the data beginning in the year 1821—a mere thirty-two years after the creation of the Court—with the most recent dataset, the difference in Supreme Court tenure shows a change of only 5.2 years, which is not the "astonishing" increase the authors would like to portray); David R. Stras & Ryan W. Scott, *An Empirical Analysis of Life Tenure: A Response to Professors Calabresi & Lindgren*, 30 HARV. J.L. & PUB. POL'Y 791 (2007).

⁷³ See Strauss, *supra* note 54.

⁷⁴ Calabresi & Lindgren, *supra* note 5, at 778 (the data, as portrayed by Professors Calabresi and Lindgren, shows that since 1970, the average length of Supreme Court tenure has been 26.1 years).

⁷⁵ *Id.* The authors analyze the statistical nature of Supreme Court Justices with regard to the amount of time spent on the Court for each period of roughly thirty years, spanning from 1789 to 2006.

⁷⁶ Strauss, *supra* note 54, at 1458–59 (asserting that "The changes produce the amendment, rather than the other way around;" however, it is impossible to argue that the change in favor of eighteen-year non-renewable terms is in the process of effecting a constitutional amendment because such a change is not apparent, regardless of how the data is considered; furthermore, there was no trend in favor of moving toward such an amendment prior to 1970 because if there had been, the change would have been so rooted in the culture of the Supreme Court that the Justices would have stepped down following a single eighteen-year term; however, the Court clearly moved toward longer terms instead

term presidencies, Justices would not have controverted this policy by choosing to collectively remain on the Court for such a lengthier period of time.

Many prominent scholars argue that the Founders did not intend for Justices to serve for several decades, as they do in the present era.⁷⁷ As Professors Calabresi and Lindgren point out, advances in technology, medicine, and changes related to politics and perceptions of the Judiciary have motivated the tenure of Supreme Court Justices to lengthen to a degree.⁷⁸ However, the data compiled by Professors Calabresi and Lindgren contradict the idea that the Founders did not intend for the average tenure to extend as it does today.⁷⁹

The average tenure between 1821 and 1850, according to Professors Calabresi and Lindgren, was 20.8 years, while the average tenure between 1971 and 2000 was 26.1 years.⁸⁰ Considering that in the time period beginning only thirty-two years after the ratification of the Constitution, Justices were already serving for more than two decades, on average, it is difficult to believe that the Founders did not foresee a tenure of this duration. Furthermore, over 150 years, the average tenure of a Supreme Court Justice increased by little more than five years, while the average life expectancy over the same time period has increased by at least thirty years.⁸¹ This showing of the dramatic increase in life expectancy, coupled

of shortening the collective tenure, which shows that no change or trend toward an amendment has been effected within the body of the Court).

⁷⁷ Calabresi & Lindgren, *supra* note 5, at 772 (however, the authors neglect the fact that according to their own data, Justices were serving for more than twenty years just thirty-two years after the Court was created—given the short timespan during which the Court was constituted and Justices started serving for decades, it seems senseless to say that the Founders did not foresee and did not intend such a result when granting tenure “during good Behaviour”).

⁷⁸ *Id.* at 777 (“Americans have experienced drastic changes in medicine, technology, politics, and social perceptions of judges”).

⁷⁹ See Stras & Scott, *supra* note 72. Professors Stras and Scott deconstruct Calabresi and Lindgren’s claims that life tenure is “fundamentally flawed,” and that increases in Supreme Court tenure have been “astonishing” and “unprecedented.” *Id.* at 792–93.

⁸⁰ *Id.* at 778.

⁸¹ Clayne Pope, *Adult Mortality in America Before 1900: A View from Family Histories*, in STRATEGIC FACTORS IN NINETEENTH CENTURY AMERICAN ECONOMIC HISTORY: A VOLUME TO HONOR ROBERT W. FOGEL 267, 280 (Claudia Goldin & Hugh Rockoff eds., 1992) (showing that for birth periods 1760 through 1799, the average life expectancy at age twenty was 43.5 years for men and 44.2 years for women; for the time period from 1800 through 1819, the average life expectancy was 43.4 years for men and 42.5 years for women); CENTERS FOR DISEASE CONTROL, *Life Expectancy at Birth, at 65 Years of Age, and at 75 Years of Age, by Race and Sex: United States, Selected Years 1900–2007*, <http://www.cdc.gov/nchs/data/hus/2010/022.pdf> (last visited July 4, 2016) (showing that the average life expectancy for a male born in 2007 is 75.4 years while for a woman born in the same year, the average life expectancy is 80.4 years). The data shows that over the past two centuries, the average life expectancy for women has increased by at least 36.2

with the short increase in average tenure, dispenses with the idea that the increase in life expectancy has encouraged Justices to remain on the bench longer; rather, the increased life expectancy seems to have encouraged Justices to serve for a slightly longer period of time, but retire from the bench rather than die while on the bench.⁸²

IV. SEPARATION OF POWERS ISSUES WOULD BE IMPLICATED IN EXPANDING THE LEGISLATURE'S POWER THROUGH SUPREME COURT TERM LIMITS: TAKING POWER FROM THE JUDICIARY WOULD FURTHER EMPOWER THE LEGISLATURE

In effect, if the Legislature were successful in passing an amendment limiting the Judiciary's term, this transformation would redefine the role of the Judiciary and would empower the Legislature far more than the Founders intended.⁸³ If the Legislature succeeded in passing such an amendment, the Legislature would be taking power away from the Judiciary and would instead reserve that power for itself. By its very nature, if the Legislature finds within its own power the ability to limit that of another branch beyond the constitutional mandates, the Legislature has expanded the power it was given.

Currently, the Judiciary holds the power to determine its own term. A Justice can leave the bench when he sees fit for whatever reason he or she may choose; in exceptional circumstances, a Justice may be impeached, but this situation seldom occurs.⁸⁴ However, if an amendment were passed that imposed a set term for Justices, the Court's members would no longer have the power to determine the duration of each of their own terms. The Legislature would have full power to decide, at the passage of the amendment, how long a Justice should be permitted to serve. That power has time immemorial been reserved to the Court, and it would contravene the set boundaries of the Legislature's power to allocate it to any other body.

years when considering the data conservatively, while the male life expectancy has shown an increase of thirty-two years, again when considering the data conservatively.

⁸² See Bump, *supra* note 31 (explaining that Justice Antonin Scalia is only the third Justice to die on the bench since the latter half of the twentieth century; prior to Justice Scalia's death, Chief Justice William Rehnquist died while sitting on the bench in 2005 and Chief Justice Fred Vinson died in 1953).

⁸³ MADISON, *supra* note 11, at 282–88 (arguing that it is a fundamental principle that the separation of powers system be maintained and that it is just as fundamental that each branch exercise its own powers without invasion from the other two branches).

⁸⁴ Richard B. Lillich, *The Chase Impeachment*, 4 AM. J. LEGAL HIST. 49, 49 (1960). The only Supreme Court Justice to be impeached in American history is Associate Justice Samuel Chase, who was impeached in 1805 and later acquitted by the United States Senate.

Regardless of whether there is a finite amount of power that must be divvied up between the three branches, the nature of determining term limits for the Judiciary dictates that this power cannot be shared by two branches simultaneously. Professor Charles Geyh asserts that the life tenure granted to Article III judges and Justices is a form of “doctrinal independence,” in that it is granted in the text of the Constitution.⁸⁵ Professor Geyh goes on to briefly discuss what may be considered a threat to doctrinal independence, and it follows from his examples that an amendment revoking life tenure would be such a threat.⁸⁶

Although the Appointments Clause⁸⁷ provides minimal guidance, at best, as to how Supreme Court Justices are to come by their appointments, the current method of appointing Supreme Court Justices involves a nomination by the President once a vacancy presents itself, followed by confirmation by a simple majority in the Senate.⁸⁸ Thereafter, the newly confirmed Justice remains on the bench either until he or she chooses to retire, or dies on the bench. However, were the proposed eighteen-year term limit to become a constitutional amendment, the President’s power to appoint Justices would be diluted because his appointees would no

⁸⁵ Charles Gardner Geyh, *The State of the Onion: Peeling Back the Layers of America’s Ambivalence Toward Judicial Independence*, 82 IND. L.J. 1215, 1217 (2007) (“a federal judge’s tenure during good behavior is explicitly guaranteed by Article III of the U.S. Constitution and is thus a matter of doctrinal independence”).

⁸⁶ *Id.* n.13 (explaining that a bill, “which proposed not only to strip the federal courts of jurisdiction . . . but to disregard a judicial order, thereby arguably encroaching on judicial power and violating the separation of powers” would threaten doctrinal independence (citing Bill Ruthhart, *Sodrel: Prayer Measure Fights “Judicial Activism,”* INDIANAPOLIS STAR, Feb. 22, 2006, at B6)).

⁸⁷ U.S. CONST. art. II, § 2, cl. 2 (“he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme court”). Note that the Advice and Consent Clause is frequently criticized as being one of the most ambiguous phrases in the Constitution, as it sets out no method by which the Senate is to give its “Advice and Consent,” nor does it give any semblance of a clue as to how strongly weighted the Senate’s “Advice and Consent” should be.

⁸⁸ While there is no rule explicitly dictating how many votes are necessary to confirm a Justice, the cloture rule provides that a simple majority vote in the Senate is necessary to defeat a filibuster. Prior to invocation of the nuclear option to change Senate Rule XXII as it applies to Supreme Court nominees, a three-fifths vote of the entire Senate was necessary to defeat a filibuster; however, this rule died in order to allow the confirmation of now-Justice Neil Gorsuch. Matt Flegenheimer, *Senate Republicans Deploy ‘Nuclear Option’ to Clear Path for Gorsuch*, THE NEW YORK TIMES (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html>. A nominee cannot be approved if an ongoing filibuster does not come to an end; therefore, in order for a nomination to even come to a vote, fifty-one senators must vote to end the filibuster—voting to end the filibuster in order to bring the nomination to a vote is closely related to voting on the nomination itself because if a favorable nominee can garner enough support to defeat a filibuster, he or she is likely to receive enough votes to earn the appointment. Conversely, if the filibuster is never called to an end, the Senate will never vote on the nominee, and he or she will not receive the appointment.

longer remain on the bench until either retirement or death, but would rather be forced to leave the bench after eighteen years.

The current practice allows a President's legacy to live on indefinitely, as there is no measurable way to predict when a Justice will leave the bench—this has become a primary method of exercising the Presidential power in a way that allows the political ideologies of that President to outlast his Presidency.⁸⁹ If this were to change, not only would the political balance shift moving forward, but the Legislature would succeed in grasping a portion of the Executive's power that is considered to be of primary importance in creating a lasting impression on the Nation. Furthermore, the Founders saw fit to grant the appointment power to the President, knowing that Supreme Court Justices had been granted life tenure; were the President to be deprived of his power to appoint Justices for life (and thereby exercise his power beyond his Presidential term), the Legislature would violate Article II of the Constitution. As a result, such an amendment would not only be unconstitutional in terms of Article III, but it would be unconstitutional in terms of Article II, as it would deprive the President of one of his constitutionally granted powers.

When a branch of government loses a portion of its independence, that independence must go somewhere—there must be some reason why that independence has been lost, and the power associated with that independence likewise must resurface elsewhere, unless a power is abolished in its entirety. If life tenure were removed from the Constitution, the power of a Justice to determine his or her own term would not be abolished entirely; rather, that power would transfer to the Legislature, were the amendment at issue to be formally introduced in Congress and subsequently passed. It would be incorrect to argue that this power would cease to exist because some entity must determine a Justice's term—currently, a Justice determines his or her own term; if no party were responsible for determining a Justice's term, Justices would have to remain on the bench in perpetuity, which, realistically speaking, means until death. This is not a practical proposition due to the uncertainty and political battles that ensue following a sitting Justice's death, and this would not be conducive to an effective Judiciary.⁹⁰

⁸⁹ Just as some may argue that Supreme Court Justices have been holding too much power for too long and accountability is warranted, some may also argue that allowing a President's legacy to live on in the Court for decades after he leaves office is allowing the Executive to exercise too much power from beyond the Oval Office.

⁹⁰ Consider Justice Antonin Scalia's recent death. Justice Scalia died roughly nine months before the 2016 presidential election, resulting in a slew of politically fueled statements and arguments. Prior to confirmation of Judge Gorsuch, the Court was comprised of eight Justices, which was problematic as cases were permitted to be decided

As this power would not be abolished in its entirety, it must vest elsewhere and would no longer reside with the Judiciary. The Legislature is responsible for constitutional amendments and, although it acts at the behest of the people, the Legislature itself is considered to retain those rights associated with legislation. Therefore, if an amendment were passed that took away from the Judiciary the ability to determine its own terms, that power must go to the Legislature because the Legislature is the body responsible for passing amendments and setting the specific terms of those amendments. As a result, if the Legislature were to pass an amendment reducing life tenure to a single eighteen-year term, the Legislature would intentionally be taking away one of the foundational powers of the Judiciary, and immediately reserving for itself the ability to exercise that power.

V. EVEN IF SUCH AN AMENDMENT WERE LAWFUL, IT WOULD NOT ACCOMPLISH THE GOAL OF LIMITING JUDICIAL POWER

Those who favor an amendment limiting the term for Supreme Court Justices are not attacking the power wielded by individual members of the Judiciary for an extensive period of time. They are attacking the idea of nine very well known people sitting on the highest Court in the country, gaining notoriety, and making decisions that are unpopular with at least one side. If the amendment's supporters were actually attacking the power held by the Judiciary, those supporters would be calling for a complete reform of Article III tenure as opposed to reform for just the Supreme Court.

without a majority for more than one year, consequently allowing circuit court decisions to stand on issues important enough that they warranted Supreme Court review. Furthermore, it takes time to nominate and confirm a Justice—albeit, it may not be much time under ordinary circumstances, but the Court cannot cease to function during the time in which it lacks a full Court. Finally, Justice Scalia's death gives a nice preview of the situation of a Justice's death in an election year, but the implications could be far more dramatic if a sitting Justice were to die closer to an election. Were that to happen, the 2016 political atmosphere surrounding the next appointee would pale in comparison to the situation of a Justice dying within one or two months of an election taking place. If the Executive were to change hands and shift to the opposing political party as a result of a Presidential election, there is a good possibility that midnight appointments could occur with respect to empty Supreme Court appointments, provided the Senate were willing to cooperate with the departing President.

A. Circuit Court Supremacy

Many circuit courts hold a vast amount of power—in some situations, just as much power as the Supreme Court.⁹¹ The Supreme Court is unable to hear the vast majority of cases in which a petition for *certiorari* is filed.⁹² However, there are certain types of cases that the Supreme Court is more likely to take than others; it is known that the Supreme Court is more likely to grant *certiorari* in a case that exhibits a circuit split.⁹³ If an important case presents itself to a Circuit Court that the circuit judge believes warrants Supreme Court review, the circuit judge will likely be inclined to decide the case in a manner that increases the chances that the Supreme Court will grant *certiorari* to hear that case and thereby create binding precedent.⁹⁴ As judges frequently employ strategy in their decisions, it is reasonable to believe that this strategy plays a role in deciding a case with respect to the potential for Supreme Court review. There are certain issues that affect the entire Nation and are more appropriate for Supreme Court review than circuit review.⁹⁵ Knowing that the Supreme Court is unable to hear every case presented, judges use their insight into the *certiorari*-granting process to decide those few important

⁹¹ When the Supreme Court declines to hear cases in a certain legal field for a number of years, or in situations wherein there is no majority holding, the circuit court's decision stands, often for a great length of time, until the Supreme Court determines to hear a similar case and successfully reaches a majority holding on the issue. *See Friedrichs v. California Teachers Ass'n*, 578 U.S. ____ (2016) (holding was a 4-4 split decision, following the death of Justice Scalia; such a split meant that the Supreme Court did not reach a majority decision and the Ninth Circuit's opinion below would stand as governing law).

⁹² *Supreme Court Procedures*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited May 19, 2017) (the Supreme Court is only able to accept roughly two percent of the cases it is asked to hear each year).

⁹³ H. W. PERRY, JR., *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 246–52 (1991) (showing that the existence of a circuit split is perhaps the most “important generalizable factor” in determining whether to grant *certiorari*. Note that the entirety of chapter eight is dedicated to “Certworthiness” and discusses the factors that are most relevant in granting *certiorari* as well as those factors that tend to immediately disqualify a case from being one of the few the Supreme Court determines to hear).

⁹⁴ *Id.* at 251 (suggesting that when there is a known circuit split and jurisdiction would be proper in multiple circuits, litigants may find it wiser to file a case in a circuit that lacks favorable precedent, if doing so means that the Supreme Court is likely to hear the case on appeal. A litigant can thereby increase his or her chances of appealing the case to the Supreme Court and allowing the Court to create binding precedent). Litigants are not the only parties who are able to take advantage of such a strategy. It is a short leap to reason that judges may employ this same insight into the *certiorari*-granting process in order to take advantage of an opportunity to allow the Supreme Court to create binding precedent in an area that may not otherwise be ripe for Supreme Court review for years, if ever.

⁹⁵ Enduring issues and those issues that are far-reaching, such as gay marriage, are more appropriate for disposition by the highest Court than for final disposition by an intermediate court.

cases in a manner that increases the likelihood that the Supreme Court will take the case, such as by creating a circuit split

In *Friedrichs v. California Teachers Association*, the Court failed to reach a majority decision, meaning that the Ninth Circuit's decision would stand as the governing law.⁹⁶ While there is no definitive way to ascertain how long the Ninth Circuit's decision will stand, this outcome is noteworthy because it shows that the Ninth Circuit is effectively exercising the power of the Supreme Court by virtue of asserting the holding in a case in which the Supreme Court granted *certiorari*.

In granting *certiorari*, the Court asserts its power to hear and decide cases. However, when the Court fails to decide a case, a decision must come from somewhere—the current practice for allowing cases like *Friedrichs* to be decided is by allowing the lower court's decision to stand. When this occurs, the lower court assumes the power of the Supreme Court that the Court exercised by granting *certiorari*. Although the Court's entire power does not exist in its ability to grant or deny *certiorari*, a significant portion of the Court's power vests in this ability. Therefore, when the Court exercises this power then subsequently allows a lower court's decision to stand for lack of a majority holding, the Supreme Court is thereby allowing this power to subsume in the lower court.

Consider also the situation wherein the Supreme Court lacks quorum.⁹⁷ When a quorum does not exist to hear a case, the Chief Justice may order a case remitted to the appellate court that heard the case below so that a decision may be issued.⁹⁸ Although it is infrequent for such a case to present itself, the Court to grant *certiorari*, then subsequently be unable to hear the case for lack of quorum,⁹⁹ this was the situation

⁹⁶ *Friedrichs v. California Teachers Ass'n*, No. 13–57095, 2014 WL 10076847 (9th Cir. Nov. 18, 2014), *aff'd*, 136 S. Ct. 1083 (2016) (per curiam) (the Supreme Court's opinion read, in its entirety “The judgment is affirmed by an equally divided Court.”).

⁹⁷ A quorum is six Justices. 28 U.S.C. § 1 (1948).

⁹⁸ 28 U.S.C. § 2109 (1948).

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose.

⁹⁹ See LOUIS J. VIRELLI III, *DISQUALIFYING THE HIGH COURT: SUPREME COURT RECUSAL AND THE CONSTITUTION* 80–83 (2016) (identifying only one case—*Alcoa*—in which *certiorari* was actually granted, but later left undecided by the Supreme Court for want of quorum). However, Professor Louis Virelli identifies several cases in which the Court simply determined not to hear a case for lack of quorum—each case wherein the Court denied *certiorari* solely because it lacked quorum is a situation that prevented the Court from exercising the fullest extent of its power, and thereby leaving no choice but to allow a lower decision to stand, even if the Court did not desire to effect such a result.

presented in *United States v. Aluminum Company of America (Alcoa)*.¹⁰⁰ As a result, the case was ultimately heard and decided by the Second Circuit, whose decision has not been overturned by the Supreme Court. Because the Supreme Court could not attain a quorum, it expressly transferred its power to a lower court because the Supreme Court ventured to take a case that it was later unable to decide. The end result was that the Supreme Court exercised the option to allow a lower court to absorb its power for the purpose of deciding *Alcoa*, which was important enough to warrant a grant of *certiorari*.

In effect, the Second Circuit sat in place of the Supreme Court. Although the Second Circuit's decision is not binding on all other circuit courts in the same way that a Supreme Court decision would be, this case is still widely considered good law and is a landmark case in the antitrust arena. Even though the Second Circuit did not absorb the entirety of the Supreme Court's power for the purpose of deciding *Alcoa*, the Second Circuit absorbed whatever power is associated with the Supreme Court's ability to determine a case. As this decision has stood for more than seventy years and is recognized almost exclusively as the leading decision on the issue therein presented,¹⁰¹ it could be suggested that the Second Circuit's decision holds nearly the same weight as a Supreme Court decision would have because lower courts rarely seek to hold in opposition to *Alcoa*.

Judge Learned Hand was one of the three judges who presided over *Alcoa*; although he never gained a seat on the Supreme Court,¹⁰² Judge Hand is one of the most influential jurists in American history, and his teachings live on today.¹⁰³ Judge Learned Hand's tenure on the Second

¹⁰⁰ *United States v. Aluminum Co. of Am.*, 320 U.S. 708 (1943) (having previously granted *certiorari*, four Justices subsequently disqualified themselves, rendering the Court unable to determine the case; as a result, the Court transferred the case to a special docket and postponed hearing the case until such time as quorum was attained—such quorum was never reached); *United States v. Aluminum Co. of Am.*, 322 U.S. 716 (1944) (deciding to transfer the case to the Second Circuit, as a quorum was still lacking); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (1945) (proceeding with final disposition of the case and determining that Alcoa had, in fact, engaged in anticompetitive practices).

¹⁰¹ *See contra* *United States v. LSL Biotechnologies*, 379 F.3d 672 (2004) (rejecting portions of the Second Circuit's holding in *Alcoa*).

¹⁰² He was nominated for a Supreme Court seat twice and was rejected both times.

¹⁰³ Mark M. Arkin, "The Tenth Justice: A Review of *Learned Hand* by Gerald Gunther," 12 THE NEW CRITERION 75 (2016) (available at <https://www.newcriterion.com/articles.cfm/-ldquo-The-Tenth-Justice-rdquo-4964>) (reviewing GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994)) (when asked which Supreme Court Justice was the "greatest living American jurist," Justice Benjamin Cardozo stated, "The greatest living American jurist isn't on the Supreme Court' He was, of course, referring to Learned Hand").

Circuit Court of Appeals endured for thirty-seven years¹⁰⁴—longer than the longest-serving Supreme Court Justice.¹⁰⁵ Judge Thomas Swan, who also presided over *Alcoa*, served on the Second Circuit for thirty-eight years,¹⁰⁶ while Judge Augustus N. Hand sat on the bench for twenty-seven years.¹⁰⁷

Given that both Judges Learned Hand and Thomas Swan served longer than any Supreme Court Justice,¹⁰⁸ and only one current Justice has served longer than Judge Augustus Hand served,¹⁰⁹ it must be questioned what critics of life tenure for the Supreme Court are really criticizing. These three judges presided over and decided a vast number of cases, many of which are still controlling decades after these judges left the bench. They held an extreme amount of power for an extended period of time, and their influences are still highly regarded and frequently controlling. Yet, even though these three judges served on the Second Circuit Court of Appeals and exercised arguably more power than many Justices have—and quite possibly more than any Justice could exercise in eighteen years—those who advocate for an eighteen-year term only suggest such a term for the Supreme Court, not for the lower federal courts that are often subject to judges like Learned Hand, Thomas Swan, and Augustus Hand.

These scenarios, wherein a circuit court exercises a substantial amount of the Supreme Court's power and judges serve on circuit courts longer than any Supreme Court Justice, serve to support the proposition that those who seek to impose a limited tenure on Supreme Court Justices really are not attacking the power wielded by the Court for an extended period of time. If the supporters of such an amendment were truly opposed to such a great amount of power residing with a few individuals for an

¹⁰⁴ *Id.*

¹⁰⁵ Justice William O. Douglas served on the Supreme Court for thirty-six years, which is the longest tenure for any Supreme Court Justice to date. *William O. Douglas*, OYEZ, https://www.oyez.org/justices/william_o_douglas (last visited May 19, 2017).

¹⁰⁶ Judge Swan retired from full service and took senior status for his last twelve years on the bench. Second Cir. Hist. and Commemorative Events Committee, *Special Supplement: Colleagues for Justice: One Hundred Years of the United States Court of Appeals for the Second Circuit*, 65 ST. JOHN'S L.R. 937, 939 (1991).

¹⁰⁷ Judge Augustus Hand took senior status for his final year on the bench. *Id.*

¹⁰⁸ Justice Douglas was the longest serving Supreme Court Justice. *William O. Douglas*, OYEZ, https://www.oyez.org/justices/william_o_douglas (last visited May 19, 2017).

¹⁰⁹ Justice Anthony M. Kennedy has served as an Associate Justice for twenty-nine years to date, three years longer than Judge Augustus Hand served. At the time of his death, Justice Antonin Scalia had been on the bench for twenty-nine years as well. *Members of the Supreme Court of the United States*, SUP. CT. OF THE U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited May 12, 2017).

extended period of time, they would attack all Article III judges, not just Supreme Court Justices.

B. Shortening Supreme Court Tenure Will Not Lessen Judicial Power

Those who support an eighteen-year term are of the opinion that shortening the term of a Supreme Court Justice will lessen his or her power. However, those who support such an amendment fail to recognize the power that will continue to vest in the former Justice, once he or she leaves the Supreme Court bench, if he or she takes a seat on a lower court. As shown above, circuit courts can hold incredible amounts of power and the same judges can sit together for decades. If Article III is amended to allow for a single eighteen-year term on the Supreme Court, followed by the option to maintain life tenure on a lower court, it is possible that a circuit court could be composed entirely, or almost entirely, of former Supreme Court Justices. Were this to occur, the federal Judiciary would essentially have a Supreme Court and an unofficial supreme court at the lower level, composed exclusively of those whose time had run out at the Supreme Court level.

Those former Justices serving on circuit courts would be accorded a greater level of respect than those circuit judges who never served on the Supreme Court simply because if one attains the title of Supreme Court Justice, his or her opinion on legal matters is typically given more weight by virtue of his or her experience with the highest Court. As a result, the decisions rendered by former Justices, while not possessing the same binding effect as Supreme Court issued decisions, would likely carry more influence than a decision written by a judge who had never sat on the Supreme Court. This would create a tiered effect in the federal Judiciary wherein district judges would be the least powerful members of the federal Judiciary, ordinary circuit judges would hold more power than district judges, but less power than former Justices, and current Supreme Court Justices would hold marginally more power than their counterparts whose tenure had expired.

Because the Supreme Court takes so few cases each year, this tiered system could lead plaintiffs to file cases in a jurisdiction where every circuit judge is a former Justice. Such strategic legal maneuvering would allow a party to appeal a trial court's decision to a court whose decision is likely to be influential for years to come. While it is always possible that the circuit court's decision could be appealed to and overturned by the Supreme Court, filing in a jurisdiction where a party is guaranteed an appeal to an incredibly influential court is dangerous. This maneuvering would thus eliminate a key component of the Supreme Court in its ability to grant or deny *certiorari*. Not all cases are worthy of appeal to the

Supreme Court, and some cases contain issues that the Supreme Court does not see fit to weigh in on at that point in time.

However, if a circuit court were to be composed entirely of former Justices whose opinions are highly regarded, a party who lost at the trial level in that circuit would be guaranteed an appeal to that circuit court. This would force a court that is more powerful than any current circuit court to hear cases and create precedent on issues that may not be appropriate for such strong precedent at that time.¹¹⁰ This is one of the key reasons behind the power to grant or deny *certiorari*—it is dangerous to force courts holding that magnitude of power to hear certain cases.¹¹¹

Furthermore, the Supreme Court could be less inclined to take cases heard by a circuit court constituted almost entirely of former Justices. As stated above, such a court would hold enough power that its decisions would be highly regarded and would be extremely persuasive authority, where those decisions were not binding. As a result, the Supreme Court would frequently not see fit to expend judicial resources on cases decided by such a circuit court, unless the Supreme Court intended to overturn the decision, because of the highly influential nature of the circuit court's decision. With a heavy docket, the Supreme Court cannot afford to spend time hearing and deciding cases just to affirm the decision of a court whose

¹¹⁰ See generally *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003) (suggesting that twenty-five years after this landmark affirmative action holding, such affirmative action would no longer be necessary to ensure educational equality). Although the Court granted *certiorari* in *Grutter* and subsequently rendered an opinion, the Court expressly stated that it anticipated that its holding would become obsolete within twenty-five years; however, at the time this case presented itself, the Court found it inappropriate to strike down the type of affirmative action scheme presented therein. The importance lies in the acknowledgement that this holding would not endure, and was not intended to endure indefinitely; rather, this holding was intended to endure only so long as it was necessary—in effect, the Court intended its *Grutter* decision to stand only so long as the political and social climate regarding equal opportunities in education remained unchanged. Once the climate changed, the Court intended for the law to change with that climate. The notion that underscores this holding is that the *Grutter* Court understood that affirmative action should not be the law indefinitely, but at the time *Grutter* presented itself, America was not in a position to accept an educational system that lacked affirmative action. As a result, the Court deferred striking down affirmative action until such time when it was no longer needed from either a political or social standpoint.

¹¹¹ See generally Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 10–11 (2011) (asserting that the Judiciary Act of 1891 was originally intended, largely, to give the Court the discretionary power of *certiorari* in order to ease the workload of the overburdened Court). However, the power to grant or deny *certiorari* has evolved to the point where it is now considered of vital importance to the Court in terms of regulating its decisions based on political and social ideologies of the time. Note also that the Judiciary Act of 1891 created *discretionary* review of cases, which implies that Congress intended for the Court to use its best judgment, in whatever form it may take, in deciding which cases are ripe for review.

power is only marginally lesser than its own and whose decision would likely stand for years to come, even absent Supreme Court review.

It is doubtful that such an “unofficial Supreme Court” at the circuit level would have the effect of easing the true Supreme Court’s workload since the Supreme Court currently accepts only up to roughly two percent of the cases it is asked to review in any given year.¹¹² Such a low acceptance rate could indicate either: the Court refuses to accept the other thousands of cases for reasons other than time and resource constraints; or the Court simply lacks time and resources to hear all of these cases. It is possible that the Court has a political, ideological, or legal reason for refusing to accept each of the cases it is asked to review, but in light of the state of the Judiciary as a whole, the more likely reason is that the Court simply does not have enough time or resources to hear each case and issue a decision. As an abundance of cases would likely warrant review if the Supreme Court were able to hear them, those cases that would otherwise go unheard would likely take the place of cases reviewed by the circuit court composed almost entirely of former Justices. The end result would be more cases being heard by a powerful court, but no less of a burden on the Supreme Court.

It could benefit America if more issues were heard by a court whose presence were similar to that of the Supreme Court, but the issue still exists as to the right to appellate review and the notion that not all issues should be heard by a court whose power approaches that of the Supreme Court. It would be more dangerous to allow these issues to reach a court of this power than it would be to continue the status quo wherein only a small percentage of arguably important issues are considered and decided by the Supreme Court. Forcing the creation of powerful precedent could have unintended consequences, whereas declining to create powerful precedent carries with it the consequence of situations remaining stagnant. Precedent is more difficult to overturn at a later time than the stagnancy from a declination to decide a case. Therefore, if one must decide between creating undesirable precedent and refusing to take any action at all, resulting in the continuation of a negative situation, he or she should choose the latter, or he or she will risk not being able to undo the undesirable precedent at a later date. Hence, the Court has the power of *certiorari*, which allows it to exercise judgment in determining which cases should not be decided by a court possessing such a great degree of

¹¹² *Supreme Court Procedures*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1> (last visited May 19, 2017) (the Supreme Court accepts roughly 100 to 150 “of the more than 7,000 cases that it is asked to review each year,” which equates to roughly two percent, when calculated conservatively).

power; however, if a circuit court were composed almost entirely of former Justices, this power of *certiorari* would diminish and precedent that otherwise would not have been created could come into existence.

VI. “POLITICAL LIBERTY” AND DEPRIVATION OF THE POWER TO DECIDE CASES ON THE MERITS

With *Marbury v. Madison*, the Court found within Article III the power of the Supreme Court to decide cases, and to do so on the merits of those cases.¹¹³ For more than two hundred years the Supreme Court has exercised this power, and this power has become fundamental to the American Judiciary—if the Court did not have the power to decide cases on the merits, or if it uniformly opted not to exercise that power, the Nation would have no meaningful court of last resort.¹¹⁴ However, were the term limit proposal to become a formal constitutional amendment, its legality would undoubtedly be challenged and the Supreme Court would be faced with the question of whether such an amendment is unconstitutional. If presented with this situation, the Court would be deprived of its fundamental power to decide cases on the merits, as the Court would have no real choice but to determine the case on any grounds *other than* the merits. Hence, the passage of such an amendment would not only be unconstitutional in its own right, but it would unconstitutionally deprive the Supreme Court of the power it has exercised since *Marbury*.¹¹⁵

¹¹³ *Marbury v. Madison*, 5 U.S. 137, 138 (1803). In determining the outcome of this case, the Court made a bold move in asserting its power to not only act as a court empowered to determine cases in controversy, but also to decide those cases on the merits; by finding that deliverance of a commission is not necessary for an officer to actually take office, the Court decided the case on the merits as opposed to procedural grounds, which it easily could have done, thereby avoiding the issue of whether William Marbury was entitled to the commission as of right; note that although the Court determined that Marbury was entitled to the commission, Marbury ultimately lost the case on jurisdictional grounds.

¹¹⁴ If the Court were to decline to decide any cases on the merits, the only true course of action an appellant would have would be to find some procedural flaw in the proceedings below, and appeal on those bases. However, this presents a problem when it is considered that the Supreme Court is responsible for reconciling circuit splits, those issues that come before it based on original jurisdiction, and other substantive matters that the courts below incorrectly decide. A meritorious Supreme Court is fundamental to the United States Judiciary because without such a Court, there would be no body responsible for ensuring that laws and the Constitution are carried out uniformly throughout the country—each state, territory, and circuit would operate under its own interpretation of the Constitution and federal laws, which would create a disjointed Nation.

¹¹⁵ *Marbury*, 5 U.S. at 138 (determining that the Supreme Court holds the power to determine cases on the merits).

The Supreme Court's authority derives from public confidence in the Court.¹¹⁶ Such confidence will only sustain as long as the public believes in the Court and believes that the Court is acting out of concern for the Nation as a whole; if the Court were to strike down an amendment limiting Justices to a single eighteen-year term, the public perception would be that the Court is protecting itself and its own interests, as opposed to the interests of the public. This is not a viable option for the Court to pursue because the moment it finds in its own favor, a large portion of the public will view the result as nothing more than a self-serving holding that lacks a basis in Supreme Court precedent. The effect would not be such as to maintain the power the Court has exercised for more than two hundred years, as intended; rather, by holding to maintain the status quo, the true effect would be to lessen the Court's power by lessening public confidence in the Court. The Court's authority is a direct result of public confidence; therefore, if public confidence in the Court lessens, the authority of the Court will lessen as well.

Conversely, if the Court were to uphold such an amendment, it would severely curtail its own power in a way that the Supreme Court is unlikely to do—practically speaking, the Supreme Court, which is currently composed of four Justices who have served in excess of eighteen years,¹¹⁷ is unlikely to find that as of the eighteen-year mark, each Justice individually becomes incapable of rendering coherent decisions or is no longer fit to sit on the Court, simply by virtue of having served for just shy of two decades. The likelihood of the Court turning to historical precedent with regard to Supreme Court tenure is remarkable and upon such findings—as well as the inherent nature of the Court—it is highly unlikely that the Supreme Court would actually see fit to lessen its own power in this way.

Neither of the two potential scenarios that could result from a decision on the merits would be practical or beneficial when considering the effects either decision could have. If this case were to present itself, the Court's analysis would reveal that deciding the case on the merits is not a true option because doing so would be detrimental to the Court to the extent that its power would diminish in a way that it may never recover from. As a result, the Court would not decide the case on the merits;

¹¹⁶ *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence”).

¹¹⁷ *Biographies of Current Justices of the Supreme Court*, SUP. CT. OF THE U.S., <https://www.supremecourt.gov/about/biographies.aspx> (last visited May 19, 2017) (Justices Anthony M. Kennedy, Clarence Thomas, Ruth Bader Ginsburg, and Stephen G. Breyer have served on the Supreme Court in excess of eighteen years).

instead, the Court would seek an alternative way to dispose of the case gracefully,¹¹⁸ in order to maintain both public confidence and the power it has properly exercised since *Marbury*.

Such an amendment would effectively deprive the Supreme Court of the power to decide cases on the merits. By placing the Supreme Court in a position where it must decide whether to uphold its constitutionally granted power or preserve the public confidence that gives life to its decisions, the Court is being asked to make a choice between either giving up a significant amount of its power or giving up the confidence that gives its power meaning.¹¹⁹ Such a choice is no choice at all, but is actually an attempt to coerce the Supreme Court into holding that Article III does not create the Supreme Court that the *Marbury* Court found to exist.¹²⁰

The Supreme Court cannot afford to make this decision. In considering the cost-benefit analysis, the Court would certainly find the costs of deciding on the merits to severely outweigh the benefits. The ultimate effect would be that Congress would force the Court to forgo a portion of the power it has traditionally exercised since *Marbury*; under the separation of powers scheme, Congress is not empowered to lessen the Court's authority in this way.¹²¹ The result would be an unconstitutional seizure of power from the Supreme Court by Congress.¹²² As the Legislature is the most powerful branch and the Judiciary is the least powerful branch,¹²³ such a seizure cannot be tolerated.¹²⁴

¹¹⁸ Such disposition could find the Court reaching its holding on procedural or standing grounds, or the like, in order to avoid the essential question.

¹¹⁹ See generally 1 CHARLES DE SECONDAT BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., rev. vol. 1914) at 161, 163 (“Political liberty is to be found . . . only when there is no abuse of power Again, there is no liberty, if the judiciary power be not separated from the legislative and executive”). Although Montesquieu argues for separation of the Judiciary from the Legislature out of fear that the Judiciary would become abusive if it possessed both powers, it must be remembered that Montesquieu considered the Judiciary to be the least powerful branch. *Id.* at 167. It follows that Montesquieu was more concerned with the power the Legislature would bring to the Judiciary than with the power the Judiciary would bring to the Legislature. If the Legislature forces the Supreme Court to give up a portion of its power for lack of alternative options, the Legislature will invade the realm of the Judiciary and “political liberty” will necessarily suffer.

¹²⁰ See, *Marbury*, 5 U.S. at 138.

¹²¹ Although this is an interesting argument, it is beyond the scope of this paper.

¹²² MADISON, *supra* note 11, at 282–88 (arguing that it is imperative that each branch exercise its own powers without intrusion from either of the other two branches).

¹²³ MONTESQUIEU, *supra* note 119, at 167 (when discussing the interactions between the Legislature, the Executive, and the Judiciary, Montesquieu posits “Of the three powers mentioned above, the judiciary is in some measure next to nothing”).

¹²⁴ Consider also that the Judiciary is intended as a check on the Legislature. If the Legislature can be permitted to take the Supreme Court's power in a way that is not allowed for in the Constitution, the balance of power would become even more skewed and the Judiciary would quickly cease to have any meaningful existence.

VII. CONCLUSION

The proposal that Supreme Court Justices be subjected to a single, non-renewable eighteen-year term would violate Article III of the United States Constitution, and such an amendment would find no constitutional basis outside of Article III. The Founders intended to construct the Judiciary in a different manner than the Executive and the Legislature, in part by granting Article III judges life tenure. To do away with this fundamental principle would be to eliminate one of the key protections afforded to the Supreme Court that enables it to perform its duties free from excessive political interference. Even absent the Founders' intent, there is no basis for such an amendment, as there is no standing tradition of eighteen-year terms, and there are no dire circumstances that mandate a break from the tradition of Justices determining their own terms. Furthermore, such an amendment could have the unintended consequence of forcing an overly powerful circuit court to issue opinions creating precedent that should not be created and that would be detrimental to the welfare of the Nation as a whole. In short, were such an amendment to be passed, the Nation could face its first instance of an unconstitutional constitutional amendment.