

Where Have You Gone, Sherman Minton? The Decline of the Short-Term Supreme Court Justice

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Against the backdrop of a decade-long wait for a Supreme Court vacancy, legal academics from across the political spectrum have recently proposed or supported significant constitutional or statutory reforms designed to limit the terms of Supreme Court justices and increase the pace of turnover at the Court. Fearing a Court that is increasingly out of touch with the national mood and staffed by justices of advanced age, advocates of term and age limits contend that the trend in Supreme Court tenures is inexorably upward. But are Supreme Court justices really serving longer now than in the past? If so, why? And what might such trends mean for American constitutional democracy? In a debate otherwise dominated by law professors—and largely without careful empirical analysis—we place the issue of judicial tenure in historical perspective, with special attention to the institutional development of the Court, the changing politics of the appointments process and the types of individuals who emerge from it, and to a lesser extent, broader socio-demographic trends in technology and medicine. In the process, we show how proponents of reforms designed to end life tenure have ignored a significant factor influencing patterns in judicial service: the decline of the “short-term” justice. Trends in judicial tenure, we argue, cannot be explained by more justices serving unusually long terms; rather, they are driven at least in part by the fact that fewer justices are serving relatively short terms. In this article, we consider why justices have retired after only short service throughout much of history, why they rarely do so today, the conditions under which future justices might be compelled to serve shorter terms, and the democratic gains and losses associated with short-term service on the Court. In sum, by following the rise and fall of the short-term justice over the course of American political development, we offer a new perspective, grounded in political science, on an issue currently occupying the attention of lawyers, journalists, and policymakers alike.

For all their disagreements, legal academics as diverse as Bruce Ackerman, Steven Calabresi, Richard Epstein, Sanford Levinson, and Laurence Tribe seem to agree about one thing: lifetime tenure for Supreme Court justices is a very bad idea. As evidence, they point to a number of factors that have changed since 1970, including increases in average tenure in office, which has risen from approximately 16 years to a peak of over 25 years; the average age of justices leaving office, which has reached approximately 79 years; and the time between vacancies, highlighted by the nearly 11 year gap between the appointments of Stephen Breyer and John Roberts.¹ These academics have proposed or supported significant

constitutional or statutory reforms designed to limit the terms of Supreme Court justices and increase the pace of turnover at the Court. Only a few lonely voices have questioned the normative value of such reforms or examined these empirical trends from a historical perspective.²

In this article, our goal is to examine carefully the trends in Supreme Court tenure as well as the competing claims about what those trends might mean. Specifically, in a debate otherwise dominated by law professors, we seek to bring the perspectives of political science, and historical-institutionalist political science in particular, to bear. We address several core questions: first, is there a discernable and meaningful trend in the length of tenure on the Supreme Court? Second, to the extent that such a trend exists, what are the factors driving it? And finally, from the perspectives of democratic and constitutional theory, what are the normative implications of the changes and trends we identify?

Our argument is that the public and academic discussion thus far has been hampered by a basic confusion about both the length of judicial tenures on the modern Court and what accounts for apparent contemporary changes.³ By focusing on the length of tenure of the “average” justice, commentators have concluded that the modern Court has radically broken from the historical

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pattern and is in need of constitutional and statutory reform to prevent justices from serving long terms of office. Both this diagnosis and the associated remedy are misguided. What is distinctive about the modern Court is not that its justices are serving unusually long periods—they are not. What is distinctive about the modern Court is that it has lost its least visible members: the short-term justices. In other words, the modern Court is different not because the justices are setting new records in longevity, but because it does not include any short-termers like Benjamin Curtis or Sherman Minton, the kinds of justices whose relatively brief service has long been a staple on the Court. Whether the disappearance of justices in this mold is a problem that needs to be solved remains an open question, but it raises quite different issues than those assumed by advocates of reform.

This article places the decline of the short-term justice in historical perspective, with special attention to the institutional development of the Court, the changing politics of the appointments process and the types of individuals who emerge from it, and to a lesser extent, broader socio-demographic trends in technology and medicine. The argument proceeds in two main phases. First, we review existing empirical claims and demonstrate why understanding the short-term justice sheds important new light on the debate about Supreme Court tenure. Second, we take up the implications of our findings for American constitutional democracy, asking not only what we gain and what we lose with short-term service but also whether any of the existing proposals for ending lifetime tenure address the concerns we identify.

Rediscovering the Court's Least Visible Members

Empirical claims about the tenure of U.S. Supreme Court justices have thus far fallen into two distinct camps. The first—and by far, the largest—holds that the empirical facts are simple: “justices today serve much longer than they did throughout our history.”⁴ Comparing retirements in the 1941–1970 and 1971–2005 periods, for example, Steven Calabresi and James Lindgren chart a more than 100 percent increase in mean tenure on the Court.⁵ The combination of demographic factors, such as increased lifespan and improved medical technology, with political factors, such as the “enormous increase in the power and saliency of the Court’s decision-making” have resulted in justices who tend to serve longer, who are more likely to extend their tenures into their advanced years, and who are far more strategic about their retirement decisions.⁶ The worry, for this camp, is that lengthening judicial tenure results not only in decreased democratic accountability and increased politicization of the appointments process but also, when advanced age leads to “mental decrepitude,” a troubling

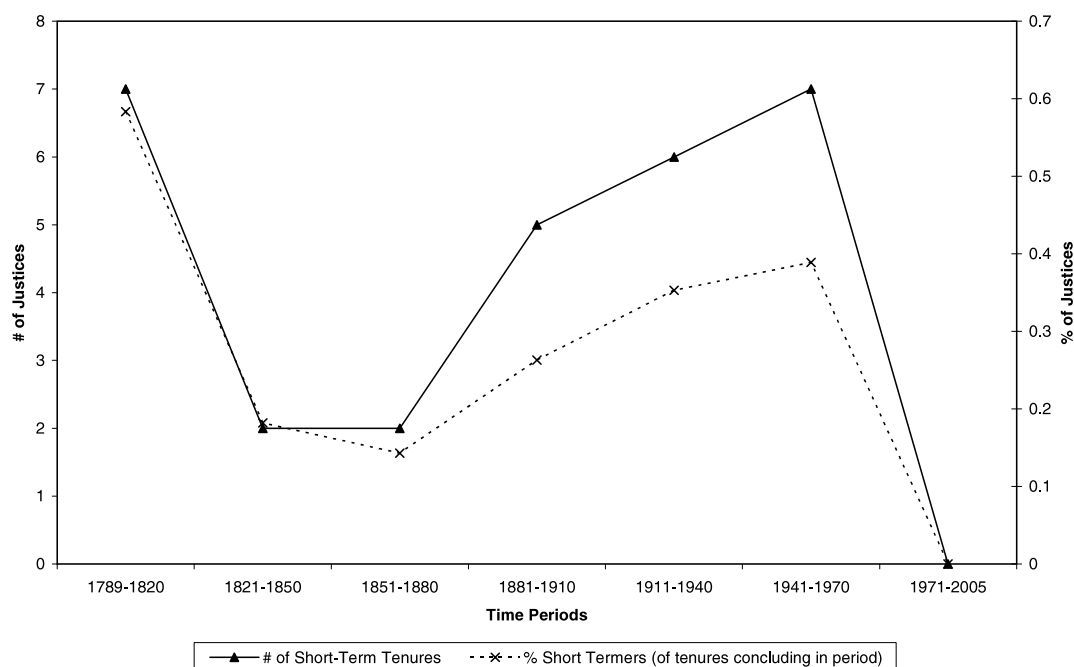
decline in the Court’s ability to fulfill its basic constitutional functions.⁷

Against this perspective on Court tenure, others have argued that the empirical case is not quite so clear. Within the legal academy, David Stras and Ryan Scott have critiqued the Calabresi and Lindgren methodology, arguing that the magnitude of the increase in mean tenure is not as dramatic as portrayed.⁸ From the perspective of political science, Kevin McGuire asserts that “the tenure of the justices has been quite stable over time” and, viewing contemporary trends from a historical perspective, that “the justices are spending no more time on the Court than their brethren who have served over the past 150 years.”⁹ McGuire acknowledges that the age of justices is presently higher than the historical mean but maintains that when increases in lifespan are taken into account, justices are “actually controlling judicial policy for less time than the justices in any previous period.”¹⁰ Calculating tenure as a percentage of the average American’s lifespan, McGuire concludes that “the justices have been spending less, not more time on the Court.”¹¹ From the point of view of democratic accountability, then, McGuire asserts that it is emphatically not the case that citizens are forced to live under a judicial regime they had no hand in establishing; in fact, justices are serving terms very much in line with elected officials, especially members of the Senate. When it comes to the tenure of Supreme Court justices, therefore, McGuire, unlike a broad cross-section of legal academics, sees no empirical or normative problem in dire need of solution.¹²

Our approach borrows from both camps. With Calabresi and Lindgren, we acknowledge recent increases in mean time spent on the bench: the post-1970 era—which McGuire does not treat in his analysis of time on the Court with respect to lifespan—has seen a measurable increase in the average length of tenure. In this sense, proponents of term limits are responding—though perhaps overly aggressively—to real changes in the behavior of Supreme Court justices. The problem is that their responses are not sufficiently sensitive to the reasons for these trends and, by extension, to historical changes in both the nature of the Court as an institution and the character of justices as individuals. Thus, in the spirit of McGuire, we examine patterns in judicial tenure with an eye sensitive to history and political development.¹³ Only by carefully investigating what is causing the movement in measures of central tendency and how those causes relate to past patterns can we adequately evaluate potential solutions.

While granting that each camp is “right” in some sense, our analysis suggests that both have failed to acknowledge the central source of change in the contemporary period. Despite rhetoric to the contrary, it is not the case that the present era marks the emergence of the long-term justice; instead, the period’s defining feature is the disappearance of the short-termers. Indeed, the contemporary decline of

Figure 1
Short-term tenures



justices who serve only briefly substantially affects every measure the camp of would-be reformers points to with alarm—mean length of tenure, the average age of justices at retirement, and the length of time between appointments. To the extent that there is a “problem” with Supreme Court tenures, then, academics have, to this point, misdiagnosed it and, in turn, subsequently proposed solutions that also miss the mark.

What do we mean by short-term justices? While the idea of “short-term” is inherently somewhat relative, we began with the bottom quartile of all Supreme Court tenures, which is approximately 7.23 years or less.¹⁴ Noting this number’s proximity to the duration of two presidential terms, we rounded up to include all justices who served less than eight years on the Court.¹⁵ In addition to the virtue of its relationship to the larger distribution of Court tenures, this operationalization comports with our intuitive sense that a justice who serves less than two full presidential terms may accurately be labeled as having spent only a brief time on the bench. As we will see, these are justices who, often because of illness or death, but occasionally because of dissatisfaction with the Court or ambition to pursue other goals, serve on the Court for only a brief period. As a point of comparison, we consider long-term justices to be those who fall in the top quartile of tenures (just over 23.5 years). Approximately half of justices who served on the Court, then, stayed for between 8 and 23 years. For purposes of our analysis, these justices are neither short- nor long-termers.

Short-Term Justices over Time

Our central finding is that, while the average length of tenure has increased since 1970, increases in mean length of service are not due to more justices serving exceptionally long terms on the bench. The long-term justice has been a feature of our constitutional system from the start. In every period since the Court’s inception, we have seen justices serve terms of thirty or more years.¹⁶ Some of these have been among the Court’s most famous and influential justices—John Marshall, Joseph Story, John Marshall Harlan, and Hugo Black, to name just a few.¹⁷ Oliver Wendell Holmes, Roger Taney, and others served just under thirty years. While the long-term justice is not a new phenomenon, the decline and virtual extinction of the short-term justice is. In the last three decades, we find a dramatic decrease in the number of justices with short tenures on the Court. Prior to 1970, nearly one out of every three appointments to the Court meets our definition of short-term; since 1970, twelve justices have joined the Court, and only the two newest appointments (John Roberts and Samuel Alito) could potentially be short-termers. In this same period, twelve justices have left the Court, and not a single one served less than fifteen years.

Figure 1 depicts two related trends: first, the number of short-term justices who ended their service in each period and, second, the percentage of short-termers among all justices who concluded their service in that period.¹⁸ Both the number and the percentage of short-termers have varied over time.¹⁹ In the Court’s first thirty years, for

example, short-term justices were common; more than 60 percent of the justices who left the bench did so after only brief service. In these early years, the Court was a relatively weak institution whose constitutional powers had yet to be understood fully or fleshed out completely, leaving justices to do little more than exhaust themselves riding circuit.²⁰ Accordingly, during this period, a seat on the Court was not regarded as especially prestigious, and resignation became the dominant mode of departure.²¹

Membership stabilized somewhat under the Chief Justiceships of John Marshall and Roger Taney, not least because the Court became a more significant institution in American politics during these years.²² From the Jacksonian period through Reconstruction, therefore, three of the four short-termers left the Court not because they were dissatisfied with the work or preferred to do something else but because of early death.²³ In the late nineteenth century and the first part of the twentieth century, the number of short-term justices increased, but again, the primary reason was untimely demise or debilitation. Of the eleven short-term justices whose service ended between 1881 and 1940, eight died (most at relatively young ages), one was disabled,²⁴ and only two—Charles Evans Hughes and John Hessin Clarke—resigned. From the end of the Court's unsettled period through the beginning of the New Deal, it seems that short-term service was primarily a function of uncertain life expectancy.

This does not mean, however, that short-termers are solely a function of the justices' health. In the period between 1941 and 1970—a period when health care was presumably at its best relative to all previous eras and when the Court had reached a previously unprecedented level of power and influence—the number of short-term tenures continued to climb, even with the advent of generous retirement benefits.²⁵ At least part of the explanation is that short-termers occur for reasons other than death in this period. Of the seven short-term justices whose tenures ended during these years, only two were due to untimely death, with another two departing for medical reasons and three choosing to resign. Two of these resignations occurred for political reasons—James Byrnes and Arthur Goldberg pursued other positions within the government—and Abe Fortas resigned due to scandal. All seven justices were 65 or younger at the time their tenures concluded.

The New Deal-Great Society era is especially interesting in that it encompasses both a large number of short-term justices as well as the beginning of several exceptionally long terms of service. Just as New Deal appointees Hugo Black and William O. Douglas were settling in for terms that lasted well over thirty years, James Byrnes, also appointed by FDR and similarly favorable toward the political programs of the New Deal, began to realize that progress on the Court was necessarily constrained and incremental. Likewise, just as William Brennan and Byron

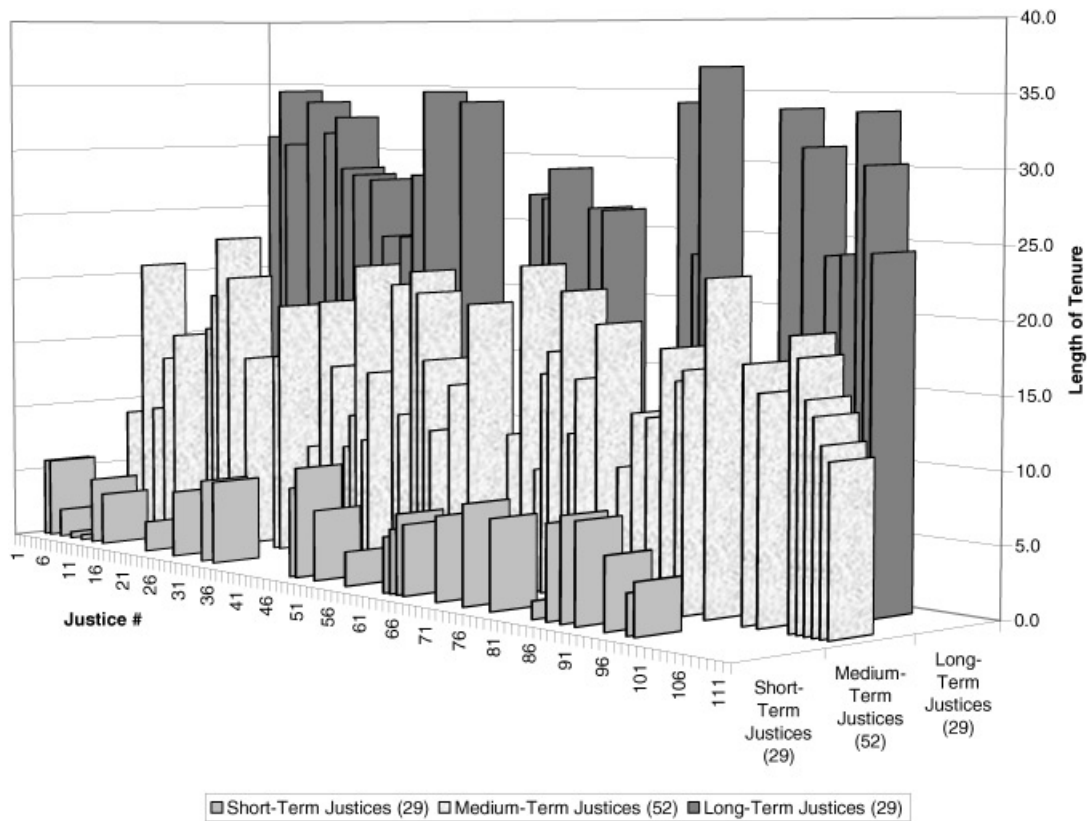
White began terms that extended vestiges of New Deal-Great Society ideology into the 1990s, the abbreviated terms of Arthur Goldberg and Abe Fortas essentially marked the end of the Warren Court ascendancy. In this latter case, the political machinations of Lyndon Johnson worked not to preserve the Democratic majority, but to allow Richard Nixon to begin dismantling it.²⁶

Figure 2 presents the tenure of every justice who served on the Court in order of appointment, with the justices' tenures divided into three categories.²⁷ As this figure suggests, both long-term and short-term justices have been a feature of our judicial system since the Founding. Considered over the course of Supreme Court history, then, the most recent thirty-five years are exceptional for their lack of any short-term justices whatsoever, not because they mark the advent of justices who reach long-term status or because long-termers are staying longer than ever before or because long-term service is occurring more frequently. These years, which roughly correspond to the period of William Rehnquist's service on the Court, are marked by justices who, with the exception of Lewis Powell, simply settle into their seats with no thought of early departure. The most recent period of the Court's history is thus characterized by the virtual extinction of the short-term justice. Simply put, we have witnessed the longest period without a short-term justice (37 years) in the Court's history. Similarly, we have sworn in more justices—fourteen—without a short-termer than ever before. The only instance in which the gap between short-term justices even approaches these numbers is the thirty years and twelve appointments between the resignation of Benjamin Curtis and the death of William Woods, an era marked primarily by the exceptionally long service of Lincoln appointees.²⁸ Whether counted by number of years or number of appointees, then, the post-1970 era is unique in large part due to the absence of short-termers.²⁹

Figure 3 charts the mean tenure of all justices who concluded their service in each period (the lower line) and the same measure with short-term justices excluded (the upper line).³⁰ Though we caution against over-interpretation,³¹ we believe figure 3 highlights two important findings. First, it shows how the presence of short-termers influences mean tenure in each period. Since the shaded area between the two lines signifies, in essence, the effect of short-term service, it appears that the presence of short-termers in previous eras reduces mean tenure between 10 and 44 percent.

Second, by demonstrating how the present period, which does not include any short-termers, compares to a hypothetical past similarly devoid of short-termers, the graph helps us place present trends in better historical perspective. Clearly, the presence or absence of the short-term justice does not explain all the variation in mean tenure over time, but it does suggest why the present period seems so dramatically atypical. As the upper line shows, with short-termers excluded, the present period, though still a

Figure 2
Justice tenures by category



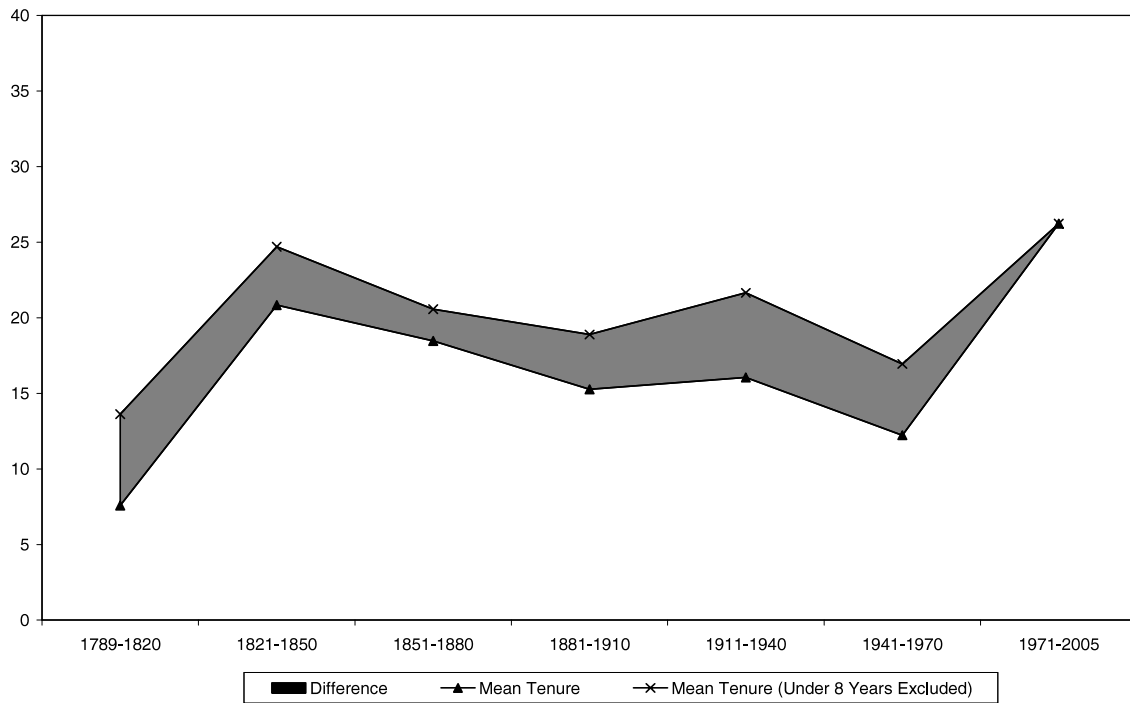
historical high, is not radically out of line with any earlier period in the Court's history and is only one and a half years higher than the previous peak. Setting the Founding period aside, average non-short-term service on the Court has typically ranged between approximately 17 and 25 years, making the present period's average of just over 26 years close to historical norms.³² If the present period had included one or more short-term justices, we would expect a reduction in the mean of anywhere between 2.5 and approximately 12 years.³³ More concretely, if only one long-term justice—say, William Rehnquist—had served a short term (approximately seven years), mean tenure for the entire period would have dropped by more than two years.

In addition, since the mean for the 1971 to 2005 period includes only those justices who have retired, it does not take into account any members of the current Court. As a result, the number displayed is effectively the high point of contemporary mean tenure. If Justice Stevens were to retire tomorrow, the mean would increase ever so slightly, but if both Justice Stevens and Justice Ginsburg (who has also been rumored to be mulling retirement) were to step down, the mean would drop by nearly a year.³⁴ In general, the retirement of any justice besides Justice Stevens would result in a marked decrease in the contemporary average.

It would take exceptionally unusual circumstances, with multiple justices choosing to serve well into their eighties, in order for the contemporary average to rise much beyond the point indicated in figure 3. To reach a tenure of 30 years (the benchmark needed to produce a significant increase in average tenure in the current period), for example, Ruth Bader Ginsburg would need to serve until age 90, Stephen Breyer and Samuel Alito until age 85, Anthony Kennedy until age 82, Antonin Scalia and David Souter until age 81, and John Roberts until age 80. The most plausible candidate to attain 30 years of service is Clarence Thomas, but even he would need to remain on the Court until age 74.³⁵ Our claim is not that justices serving into their eighties to reach 30 years of service is an impossibility; rather, it is that it seems unlikely that multiple justices on the current Court will choose to do so. In fact, throughout the Court's history, only five justices—Stephen Field, Hugo Black, William Brennan, William Rehnquist, and John Paul Stevens—have served 30 years or more and also reached 80 or older. For Justices Breyer and Alito, meeting that mark would mean serving a full ten years past the average life expectancy for American males.³⁶

In sum, our analysis suggests that mean tenure on the Court in any given period is substantially influenced by

Figure 3
Mean tenures



the presence or absence of the short-term justice. The long-term justice has always been—and will likely continue to be—a feature of our constitutional system. The short-term justice has been a consistent presence in every period except the most recent. When we take this development into account, we see that using measures of central tendency as evidence of an inexorable upward trend obscures the full picture. To be sure, we are currently at a historical peak in average service, though we should be careful not to over-interpret this statement about patterns of Court service. But for the absence of the short-term justice, all other trends are similar to other periods in American history.³⁷

Why Do Justices Serve Short Terms?

From the perspective of the present, it seems difficult to understand why anyone would leave the Supreme Court after fewer than eight years. Why is it, then, that abbreviated service has been a regular feature of judicial politics throughout American history? We review four reasons—illness and death, dissatisfaction, political ambition, and scandal.³⁸

In table 1, we divide the 28 short-term justices into these four categories based upon their reason or reasons for leaving the Court.³⁹ Several justices appear in more than one category because our reading of the historical

record indicates multiple reasons for their respective departures.

Illness and Death. Our first and most common category is illness or death. These are the nineteen justices whose time in office is cut short by health concerns or untimely demise. Such concerns were especially prominent early in the Court's history, when the rigors of travel could make riding circuit and other official duties particularly difficult experiences.⁴⁰ Oliver Ellsworth, for example, was appointed Chief Justice in 1796 and served only three years before President Adams requested he travel to France on a diplomatic mission. Although relatively young, Ellsworth's questionable health and a harrowing voyage to Europe ultimately left him extremely frail and weak. Ellsworth wrote that “[m]y pains are constant, and, at times excruciating; they do not permit me to discharge my official duties.”⁴¹ Despite a trip to the waters at Bath, he never fully recovered; he sent his resignation from France in October of 1800 before returning to the United States to live the remaining years of his life in pain so excruciating that it prevented him from accepting any subsequent public service.⁴² Other justices, especially in the mid-nineteenth century, did not last long enough to submit a resignation; Robert Trimble and Philip Barbour, to highlight just two examples, both died suddenly, having served less than five years.

Table 1
Categories of short-term justices

Illness/Death

John Blair (1790–1795)
 Thomas Johnson (1792–1793)
 Oliver Ellsworth (1796–1800)
 Alfred Moore (1800–1804)
 Robert Trimble (1826–1828)
 Philip Barbour (1836–1841)
 Levi Woodbury (1845–1851)
 William Woods (1881–1887)
 Stanley Matthews (1881–1889)
 Lucius Lamar (1888–1893)
 Howell Jackson (1893–1895)
 William Moody (1906–1910)
 Horace Lurton (1910–1914)
 Joseph Lamar (1911–1916)
 Edward Sanford (1923–1930)
 Benjamin Cardozo (1932–1938)
 Wiley Rutledge (1943–1949)
 Fred Vinson (1946–1953)
 Sherman Minton (1949–1956)
 Charles Whittaker (1957–1962)

Ambition

John Jay (1789–1795)
 John Rutledge (1790–1791)
 Charles Evans Hughes (1910–1916)
 James Byrnes (1941–1942)
 Arthur Goldberg (1962–1965)

Dissatisfaction

John Jay (1789–1795)
 John Rutledge (1790–1791)
 Thomas Johnson (1792–1793)
 Benjamin Curtis (1851–1857)
 John Hessin Clarke (1916–1922)
 James Byrnes (1941–1942)
 Sherman Minton (1949–1956)
 Charles Whittaker (1957–1962)

Scandal/Rejection

John Rutledge (1795)
 Abe Fortas (1965–1969)

Even into the twentieth century, however, illness and untimely death continued to result in vacancies and more frequent than anticipated turnover. Sherman Minton, who came onto the Court in 1949, served barely more than seven years before the combination of a heart attack, pernicious anemia, and a crippling spinal ailment caused him to feel that he was “slipping fast.”⁴³ Combined with his boredom on the Court and worries about mental inadequacy, these physical conditions led the staunch Democrat to step down at the moment he was eligible for full retirement benefits, despite the fact that it meant leaving a vacancy to be filled by Republican Dwight Eisenhower.⁴⁴

Charles Whittaker came onto the Court in 1957 with a history of anxiety, depression, and mental instability, and the work of the Court only exacerbated these tendencies.

Finding Washington an unpleasant place and feeling oppressed by the weight of his vote and its implications, Whittaker agonized over decision-making and especially opinion writing. These problems did not go unnoticed by his colleagues, his clerks, or his family. Earl Warren cautioned, “You know, Charley, you can’t let this injure your health,” and in March 1962, Whittaker checked into the hospital claiming that he felt “completely enervated.”⁴⁵ Whittaker’s son believed the problem to be far more serious than simple exhaustion and demanded that his father promise he would not commit suicide. Later that month, at the urging of Chief Justice Warren, Whittaker became the first justice to avail himself of the disability provision of the 1939 Retirement Act, having served only five years on the Court. After retirement, he lived an additional eleven years in Kansas City, taking employment with General Motors and never practicing law again.⁴⁶

Dissatisfaction. With Minton and Whittaker, retirement was prompted by a combination of dissatisfaction and health concerns, but frustration with the Court’s work has also convinced relatively healthy justices⁴⁷ to leave the bench after short service. In the early republic, such frustration was often dominated by concern about the dangers of circuit-riding, especially in the southern circuit. Thomas Johnson, who served only fourteen months (the shortest tenure in Court history), resigned upon learning that Chief Justice Jay would not rotate circuit assignments, thereby dooming Johnson to toil in the extreme southern heat.⁴⁸ Declining George Washington’s offer to be Secretary of State, Johnson instead spent the first part of his 27 post-Court years planning the national capitol.⁴⁹ Sixty years later, Benjamin Curtis found circuit-riding similarly arduous and distasteful, and his dissatisfaction with his duties was compounded by what he perceived as an inadequate salary and by a heated feud with Chief Justice Taney over the *Dred Scott* decision.⁵⁰ Speaking to both of these issues, Curtis wrote to a friend that

I can not feel that confidence in the Court, and that willingness to cooperate with them, which are essential to the satisfactory discharge of my duties as member of that body; and I do not expect its condition to be improved. . . . I do not myself think it of great public importance that I should remain where I believe I can exercise little beneficial influence and I think all might abstain from blaming me when they remember that I have devoted six of the best years of my life to the public service, at great pecuniary loss, which the interest of my family will not permit me longer to incur.⁵¹

Concerns about salary were real; describing the justices’ low rate of pay, North Carolina Senator George Badger called the members of the Court “needy and half paid men” who were “hampered in their private relations, with all the inconvenience and embarrassments of a deficient support.”⁵² After leaving the bench, Curtis returned to a more lucrative law practice. Still, he remained prominent

in national and state legal circles; over the course of the next seventeen years, he argued 54 cases before the U.S. Supreme Court and another 80 before the Supreme Judicial Court of Massachusetts in addition to defending President Andrew Johnson at his impeachment trial.⁵³

In 1922, John Hessin Clarke resigned suddenly, after only six years of service. One of two Wilson appointees to the Court, Clarke never found the atmosphere on the bench to his liking, in part because his duties as a justice prevented him from speaking out on the issues he cared most about. Frustrated with what he perceived to be the insignificance of the work, he complained to Brandeis, “I should die happier if I should do all that is possible to promote the entrance of our government into the League of Nations than if I continued to devote my time to determining whether a drunken Indian had been deprived of his land before he died or whether the digging of a ditch in Iowa was constitutional or not.”⁵⁴ To other colleagues, he also expressed a desire to be more involved in public discourse on the issues of the day and to have the leisure of reading beyond constitutional law. Leaving the Court for such interests was a remarkable choice from the perspective of Chief Justice Taft, who wrote, “Few men have laid down power as you are doing.”⁵⁵ Upon resignation, Clarke spent at least part of his 23 remaining years pursuing the very aims he had long desired, making public speeches and writing articles on behalf of world peace and U.S. participation in the League of Nations, though many of these years were also spent in relative political obscurity.

Political Ambition. Avoiding the prospect of political obscurity was precisely the reason two of Washington’s initial appointments to the Court, John Jay and John Rutledge, left the bench after only brief service. Both justices harbored political ambitions they felt could not be met on a Court that, though nominally the “nation’s highest,” was still weak and fragile. Jay left the bench after learning he had been elected governor of New York, and in a move that indicated the relative weakness of the new national government, Rutledge resigned his first commission, never having sat with the Court, to become Chief Justice of the South Carolina Court of Common Pleas.⁵⁶ Like Rutledge, Charles Evans Hughes resigned his seat as an Associate Justice in order to pursue a more lofty position (he was selected, despite earlier protestations, as the Republican nominee for the 1916 Presidential election), before returning to the Court as Chief Justice some years later.⁵⁷

Even as the Court’s role in American politics has grown, justices have occasionally resigned to pursue broader political ambitions. At the onset of World War II, James Byrnes, who had been a part of the Roosevelt administration prior to his appointment, spent only one unhappy year on the Court, restless at his inability to play a political role in the war effort: “Yesterday with the nation confronted with the greatest crisis in its history, the best I could do was to

spend hours listening to arguments about the payments for ships that were built twenty-three years ago. I was thinking so much about those ships sunk at Pearl Harbor that it was difficult to concentrate on arguments about ships that were built at Bethlehem in 1918.”⁵⁸ Resigning to rejoin the administration, this time as Director of the Office of Economic Stabilization, Byrnes essentially ran the domestic economy and was commonly referred to as “assistant president.” He later served as Secretary of State under Truman and as governor of South Carolina.⁵⁹

While Byrnes’s ambition manifested itself as frustration at his inability to be more directly involved in politics, Arthur Goldberg’s ambition sometimes resembled merely crass opportunism. After securing the labor vote for Kennedy in 1960, Goldberg, who longed to use a top position at the Justice Department in order to vault himself onto the Court, settled for a position as Kennedy’s Secretary of Labor.⁶⁰ Passed over in favor of Byron White in April 1962, Goldberg finally reached the Court six months later, yet rumors soon circulated that he was restless on the bench.⁶¹ Preferring to remake the Court with his own appointees, Lyndon Johnson seized upon these rumors and urged Goldberg to resign in order to assist with the administration’s foreign policy goals.⁶² Despite opposition from his fellow justices Warren and Black, Goldberg found it difficult to resist the “Johnson treatment,” especially when the President told him he was “the only man who can bring peace to Vietnam and the man who does that will be the next man to sit in my seat.”⁶³ Drawn by the possibility of political acclaim, Goldberg left the Supreme Court seat he had long desired to succeed Adlai Stevenson as Ambassador to the United Nations.⁶⁴ It soon became all too clear to Goldberg, though, that his new position was virtually powerless and that Johnson had maneuvered only to open a seat for his good friend Abe Fortas.⁶⁵

Scandal. The President’s maneuverings ultimately turned out to be for naught, however, as Fortas himself was forced to leave the Court after only a short tenure. One of two short-termers to depart under political duress or scandal,⁶⁶ Fortas was embroiled in a controversy about a consulting relationship to financier Louis Wolfson, who had agreed to pay the justice \$20,000 annually for the rest of his life and to continue those payments to his wife after his death.⁶⁷ Though Fortas did not break the law, his close ties to Wolfson, who was also indicted for SEC violations, lent the impression that he was using his political position for personal financial gain. The political controversy surrounding this arrangement ultimately became so intense that Fortas felt he could no longer remain on the Court, and though he insisted in his resignation letter that he had done nothing wrong, he hoped his departure would “enable the Court to proceed with its vital work free from extraneous stress.”⁶⁸

Why Has the Short-Term Justice Disappeared?

From death to dissatisfaction, ambition to scandal, justices have left the Court after short service for a variety of different reasons. Though the balance of these reasons has shifted over time, the presence of these justices has remained constant—at least until the most recent period. If it is true (as we believe it is) that the short-term justice has virtually disappeared from the contemporary legal landscape, what has changed? We identify three categories of factors that may have contributed to the decline of the short-term justice: institutional, personal, and demographic.⁶⁹ By institutional, we mean the development of the Court and its changing role in American politics. Personal factors are related to the kinds of individuals presidents nominate to serve on the Court. Demographic changes have to do with technological and medical advances that make longer life-spans possible and reduce the likelihood of debilitating illness or untimely death. These categories are not perfectly discrete; they may overlap somewhat and influence each other in important ways. Nonetheless, they point to broad patterns that affect changing tenures at the Court. Because the institutional, personal, and demographic changes related to the decline of the short-term justice are equally likely to encourage generally longer terms of service, we grant that the changes we describe will likely lead some justices to stay on the Court longer than in the past. As we have emphasized, though, long-term justices are a regular fixture of Supreme Court politics; the historical irregularity of the present period remains the absence of the short-term justice.

By any account, the Court has experienced a dramatic transformation since the first justices took their seats on the bench.⁷⁰ This transformation has included structural changes in the justices' working conditions, such as the elimination of circuit-riding and the expansion of support staff (secretaries, marshals, and law clerks), as well as more favorable retirement provisions.⁷¹ At the same time, while the Court's workload has decreased, the significant expansion of certiorari jurisdiction has meant that the justices' control over it has increased, thereby allowing the Court to focus its attention on constitutional issues of broad national significance.⁷² The issues the Court takes up are often controversial and politically contested, meaning that the justices have assumed an increasingly prominent and meaningful role in core aspects of American political life. To the extent that these issues are controversial among the public and politicians alike, they are no less so among the justices. As a result, on a closely divided and ideologically polarized Court, one vote can mean the difference between upholding and striking down laws that implicate foundational constitutional and democratic values. In other words, justices, who live a relatively comfortable, well-supported lifestyle, now find themselves in a position of real power and substantial legal and social prestige with few incentives to leave early.⁷³

The increased power and prestige of a Supreme Court seat has contributed to a highly public and politicized appointments process and legal environment.⁷⁴ In turn, such an environment has meant important changes in the types of individuals presidents nominate to fill Supreme Court vacancies.⁷⁵ From the early periods of American history through as late as the 1950s, presidents frequently nominated individuals with either extensive political experience or explicitly political ambitions.⁷⁶ In the twentieth century, a host of justices, including Hughes, Taft, Black, Douglas, Byrnes, Jackson, Warren, White, Goldberg, Fortas, and many others, fit one or both of these two "political" molds. Only since the failed Fortas nomination as Chief Justice in 1968 have presidents consistently looked away from political actors and increasingly toward professional jurists as likely nominees. As David Yalof notes, "Federal circuit court judges have become the 'darlings' of the selection process in modern times."⁷⁷ According to Yalof, this trend can be traced to a number of factors: appellate opinions may offer the best indicator of voting patterns on the high court; appellate judges have already withstood the scrutiny of background checks and appointments politics and as a result may have developed ties to influential senators; and finally, circuit court judges may be able to chart moderate policy stances and, unlike law professors and elected officials, avoid staking out positions on controversial issues that could create trouble during confirmation.⁷⁸ The need to avoid such controversy has only intensified in the years following Reagan's failed 1987 nomination of Robert Bork, a period when appointment politics have become more public and arguably more contentious.⁷⁹

Finally, any discussion of changes in Supreme Court tenure must also acknowledge the rapid technological and medical advances that have continuously extended life expectancy over the past two centuries. Since the New Deal alone, average life expectancy has increased by almost twenty years.⁸⁰ While some of this dramatic increase is undoubtedly the result of declining infant mortality, it is also the case that remaining life expectancies for Americans at age 65 and age 75 are increasing.⁸¹ The implication here is obvious: justices are able to live longer and thus serve longer.⁸² They are less likely to be prematurely felled by illness or disability, and preventative care has made many previously debilitating conditions either avoidable or survivable.

It is clear that these historical changes are profound. What is less clear is whether they are sufficiently thorough and durable as to mean the permanent end of the short-term justice. With respect to the institutional developments we have described, for example, it is unlikely that we will see the return of circuit-riding,⁸³ a dramatic constriction in Court staffing, or the rolling back of generous retirement provisions. It seems similarly unlikely that the Court would suddenly retreat from a more public role

and step back from the controversial issues that currently engulf it. If anything, the Court arguably appears to be moving in the opposite direction, willing to wade into disputed political territory, such as presidential elections or the war on terror, more frequently. Given these factors, the prospect of a member of the Court regarding either the governorship of New York or the chief justiceship of South Carolina as a more prestigious or powerful position, as some justices have done in the Court's past, is highly implausible.⁸⁴ The frequent turnover that defined the Court's early years, with justices leaving for any number of "lesser" positions, seems to be gone forever.

On the other hand, while institutional changes appear entrenched, the durability of personal and demographic factors is less clear. Although it is true that presidents have increasingly turned to federal appellate judges and that all members of the current Court possessed such experience, a careful inspection of the short lists presidents considered for nearly every appointment since Fortas shows that they have also given strong consideration to other types of candidates. Before nominating Powell and Rehnquist, Nixon considered prospective justices with a variety of backgrounds, including senators and representatives from both sides of the aisle, state court judges, legal academics, and even private practitioners.⁸⁵ The lists of possible nominees generated by Ford and Reagan are similar, including individuals as diverse as the president of Brigham Young University, a deputy Secretary of State, and the Director of the FBI. In his search for a "home run nominee," Bill Clinton appears to have considered—and, in more than one case, perhaps even offered the nomination to—New York Governor Mario Cuomo, Secretary of the Interior and former Arizona Governor Bruce Babbitt, Secretary of Education and former South Carolina Governor Richard Riley, and Senate Majority Leader George Mitchell, among others.⁸⁶ More recently, George W. Bush, citing the need for more biographical diversity on the Court, formally nominated White House counsel, former Texas lottery commissioner, and onetime Dallas city councilwoman Harriet Miers before turning to Samuel Alito after Miers requested her nomination be withdrawn.⁸⁷

Our point here is not that all (or even most) justices with political backgrounds will desire to pursue political aims in other venues or become sufficiently frustrated with the political constraints of the Court's work to compel short-term service.⁸⁸ Rather, our claim is that, to the extent that we continue to draw Supreme Court justices from federal appellate judges, who are likely to view the Court as the crowning achievement of a judicial career (perhaps having oriented their entire lives toward the possibility of service on the high court), short-term justices are less likely. With the short lists of various presidents in mind, however, it does not take a fertile imagination to conjure the image of a Court with a substantially different membership, one that might well have led to one or more short-term appointments.

Suppose, for instance, Mario Cuomo, who on one insider account briefly accepted Clinton's offer before later reneging,⁸⁹ was nominated instead of Ruth Bader Ginsburg. At the time Clinton considered him, Cuomo was over sixty years of age and had already served in public life for more than two decades. Given his age, his apparent reticence in pursuing the presidency,⁹⁰ and his subsequent virtual disappearance from the national spotlight, it is well within the realm of possibility that a Justice Cuomo would have served only a few years before retiring to private life. Moreover, given that Cuomo apparently and ironically chose the governorship of New York, a position he would soon lose, over the Supreme Court of the United States, it is not clear that this life-long politician and three-term executive would have enjoyed an institution simultaneously known for its distance from the people and its rhetorical constraint. While we do not want to tread long in the realm of fantasy, we nonetheless think it is both instructive and revealing to contemplate a Court populated by Mario Cuomo, Orrin Hatch, and Harriet Miers as opposed to Ruth Bader Ginsburg, Anthony Kennedy, and Samuel Alito. Given that each of these hypothetical justices was strongly considered for a seat on the Supreme Court, the prospect need not stretch the imagination—nor should the prospect of any of those three retiring after a short period of service. The point is that appointment politics are not so thoroughly dominated by federal appellate judges as to rule out candidates of differing backgrounds from consideration; indeed, with no sign of an end in the politicization of appointments, one might reasonably expect a future president to draw on senatorial courtesy and nominate a member of that body to serve on the Court.

Our third category of factors—technological and medical advancements that lead to increased lifespan and other demographic changes—is no more likely to eradicate the short-term justice than the personal factors we have just described. While a number of deaths in rapid succession would be surprising, it is nonetheless the case that even fast advancing medical technology cannot prevent all sources of debilitation and disease. In recent years, for example, several members of the Court have struggled with serious illness, including breast cancer, colon cancer, and thyroid cancer. Any of these or myriad other illnesses or accidents could still befall any member of the Court at any time. Put simply, short-term justices due to premature death or disability may be less likely than at any point in the past, but they are far from inconceivable.

In this section, we have offered three possible reasons for the decline of the short-term justice but have argued that two of these reasons are not insuperable barriers to future short-termers. We thus speculate that the short-term justice may merely be in temporary hiding, rather than permanently extinct. At present, it is still too early to tell whether the absence of the short-term justice on the

Rehnquist (and now Roberts) Court is an exception or the new historical rule.

The Short-Term Justice and Constitutional Democracy

To this point, our aim has been to outline the empirical facts relating to the short-term justice. We have not yet discussed the normative implications of the presence or absence of short-termers on the Court. In this section, we consider, from the perspective of democratic and constitutional theory, a number of potential gains and losses associated with the short-term justice. We find three plausible reasons to favor the return of the short-term justice on the Court: achieving increased democratic responsiveness, avoiding political brinksmanship, and bringing youth and increased energy to the Court. Against each of these reasons, however, we find persuasive counterarguments, both normative and empirical. As a result, we are not convinced that the decline of the short-term justice is a political phenomenon we should bemoan.

Democracy

Arguments about length of tenure among Supreme Court justices often assert that frequent rotation in office leads to greater democratic accountability.⁹¹ This argument is directly relevant to the short-term justice. On this view, democracy is enhanced when Court decisions are in harmony with current, rather than temporally delayed, majorities. In this sense, shorter terms in office mean more opportunities for current leaders to nominate justices who reflect the attitudes and sensibilities of their party and constituents. By representing the contemporary will of the people, justices are therefore able to avoid the familiar constitutional problem of the “dead hand of the past.”⁹² Presumably, then, Court decisions will be more responsive to present popular will when short-term justices are a regular feature of the system, at least to the extent that the attitudinal model correctly describes the behavior of justices on the Court.⁹³ Justices who serve for only a brief period may also be more humble about the powers of their office and less vulnerable to the temptations of judicial supremacy or the arbitrary wielding of judicial power.

The normative problem with such a conception is that it presumes a strictly majoritarian view of American constitutional democracy.⁹⁴ Under such a view, the Court, whenever it strikes down the enactment of a popularly elected branch, cannot help but act in a counter-majoritarian fashion. Yet, as Christopher Eisgruber has detailed, our constitutional democracy is far from purely majoritarian—instead, it is rife with quasi- and even purportedly counter-majoritarian features.⁹⁵ The key question, then, is not *whether* the Court is accountable, but *to whom* or *to what* it is accountable.⁹⁶ On Eisgruber’s account, American democracy is to be understood as self-

government by the people as a whole, rather than by some subsection thereof. Unlike the majoritarian conception, which seeks responsiveness, but only of a limited type (that is, from the majority of voters to elected representatives), an emphasis on self-government demands that national institutions serve all the people. The Court’s power of judicial review, then, is not a means to thwart the democratic process, but instead a tool to help enable it.⁹⁷ The extent to which the Court is either democratic or responsive has less to do with whether or not justices are in line with the Gallup Poll (or nominated by contemporary elected officials, for that matter) than with whether the Court, the arbiter of a great many moral issues, resolves disputes impartially while preserving space for citizens to govern themselves. The Court may, therefore, enhance democracy even as it frustrates majorities.⁹⁸ On this line of thinking, frequent rotation in office is inapposite to the democratic character (or lack thereof) of the Supreme Court. Similarly, originalists—who presumably do not accept Eisgruber’s argument about the democratic role of the Court—should find little comfort in frequent turnover on the Court. Whether or not one interprets the Constitution in light of Founding commitments has little, if anything, to do with the pace of turnover.

Moreover, as an empirical matter, it is not clear that the dead hand of the past has ever controlled the Court for an extended period of time. The literature on constitutional revolutions makes clear that the Court cannot long withstand substantial changes in the governing coalition.⁹⁹ At several moments in American history, the Court has been either indifferent or outright hostile to the prevailing ideology, but in each case, constitutional change (broadly construed) has been on the horizon. To paraphrase Robert McCloskey, the Court seldom forges far ahead or falls far behind the nation as a whole.¹⁰⁰ Two instances in the twentieth century alone provide empirical support for McCloskey’s aphorism.¹⁰¹ From 1932 to 1936, for example, the Court frustrated Franklin Delano Roosevelt’s attempts to revitalize the national economy by striking down key aspects of the New Deal program.¹⁰² Similarly, throughout much of the 1960s, the Warren Court’s decisions on school prayer, criminal procedure, and freedom of speech infuriated not just Republicans but citizens from across the political spectrum who felt that the Court was attacking God, coddling criminals, and condoning smut.¹⁰³ In both cases, the Court came into line with prevailing opinion to a substantial extent after only a brief period of recalcitrance.

Can we attribute such movement simply to the presence of short-term justices? The evidence here is mixed. With regard to the New Deal, the only short-term justice who joined the Court prior to 1932 and left a vacancy for FDR to fill was Benjamin Cardozo, who despite being a Hoover appointee, already voted with the Court’s

progressive wing. Since Cardozo's death only allowed FDR to replace one pro-New Deal vote (Cardozo) with another (Felix Frankfurter), it cannot be argued that the short-term justice was responsible for the constitutional revolution. In the case of the Warren Court, Lyndon Johnson's attempt to extend Great Society sensibilities beyond his presidency ultimately ended in two new votes for Nixon appointees. Only one of these appointees (Harry Blackmun) was the result of a short-term justice (Abe Fortas) leaving the Court.¹⁰⁴ And in retrospect, even in Blackmun's case, it is not entirely clear that his voting history was substantially different than Fortas's might have been.¹⁰⁵ It seems dubious, therefore, to highlight the short-term justice as the key to democratic responsiveness overcoming judicial intransigence.

Politicization

Another potential benefit of short-term justices is that more frequent turnover may lower the stakes for each appointment, thereby depoliticizing the appointments process. Calabresi and Lindgren assert that the current system is dysfunctional because confirmation battles have become so bitter as to harm the dignity of the Court.¹⁰⁶ More frequent appointments, the argument goes, would make political actors less anxious about when the next appointment might come and less frightened by the prospect of allowing one president to shape the Court (and, in turn, the law) for multiple generations. By extension, therefore, short-term justices might reduce the intensity and ugliness of current confirmation battles by reassuring elected officials that they will have several opportunities to shape the Court and correct potential mistakes—or, in other words, several opportunities to make the Court more accountable to political will.

While we agree that the increasing politicization of the appointments process is worrisome,¹⁰⁷ it is not altogether clear that more frequent vacancies are the solution. In fact, one might imagine that rather than simply reducing the stakes for each appointment, an abundance of short-term justices would create a perpetual cycle of messy, divisive appointment politics. Embroiling the Court in interest-group warfare on a regular basis risks turning an institution committed to the principles of higher lawmaking into a mere tool of partisan politics. Stephen Burbank argues, for example, that “treating courts as part, not just of a political system, but of ordinary politics . . . should concern not just law professors and political scientists, but the general public. For in such a system, law could be seen as nothing more than ordinary politics, and judicial independence could become a junior partner to judicial accountability.”¹⁰⁸ Few deny that the Court is a political institution, but there are different ways in which it might be considered political, and there is normative value in distinguishing between the Court's involvement in the

“high” politics of weighing competing values and principles and other branches' involvement in the “low” politics of wrestling over power and partisan control.¹⁰⁹ For this reason, it is not at all clear that more appointments would mean a Court that fulfills its constitutional role more effectively. Political science research has clearly found, for example, that the bitter back-and-forth of partisan politics in Congress is precisely what turns citizens off to the political system.¹¹⁰ Opinion polling has frequently shown that the Court is one of the more esteemed institutions in American society, and it seems reasonable to assume that such esteem is, in no small part, a function of the fact that it is regarded as being “above the fray.”¹¹¹

In addition, it is possible that the politicization of the appointments process is less a function of the pace of appointments than of who is being nominated to replace whom.¹¹² For instance, the fight over the confirmation of John Roberts, who was tapped to replace a justice with apparently similar ideological commitments, was somewhat less contentious than that of Samuel Alito, who was perceived to be a conservative replacement for a relatively moderate Justice O'Connor. In other words, it is attempts to shift the balance of power on the Court that cause political actors, including members of the Senate and outside interest groups, to mobilize for a pitched battle.¹¹³ Given the inherent unpredictability of when short-term justices will retire, there is a greater chance that such justices will pose a threat to the ideological status quo on the Court. Especially to the extent that we continue to see party alternation in the White House, retirements after only a short period of service may increase the possibility that the president of one party will replace justices appointed by presidents from another. As a result, long-term service by justices who strategically plan retirement based on partisan considerations may, in fact, militate against, rather than further inflame, nasty appointment battles.

Energy

A final possible benefit of short-term tenures is the infusion of greater vigor and youthful energy. When justices stay on the Court for exceptionally long periods of time, they may become vulnerable to two weaknesses. First, long tenures often carry justices into advanced age where their mental acuity may be diminished. Such “mental decrepitude” is widely believed to have characterized the final years of the tenures of both William O. Douglas and Thurgood Marshall, for example.¹¹⁴ Second, justices who have grown accustomed to thinking about issues in a particular way may become overly rigid in their approach to the law, working from a kind of “intellectual autopilot” in which they neglect to consider each case with the open-mindedness we expect from officers of the Court.¹¹⁵ To the extent that short-term justices come

and go from the Court with greater rapidity, they may bring an increased measure of intellectual freshness and creativity.

First, granting that mental decrepitude can hamper the Court's functioning, we concede David Garrow's point that mental and physical decline has characterized some of the Court's greatest justices toward the end of their tenures.¹¹⁶ But we also note, with considerable support from Garrow's own examples, that mental illness can afflict justices of any age or length of tenure. That is to say, depression, illness, or other debilitating disorders may afflict the young as well as the old and can strike those who have served on the Court for a short period of time as well as for a long period of time. In this way, mental disease, troublesome as it may be, is a problem distinct from length of service. Reforms designed to prevent the former should not conflate it with the latter. Just as we can find examples of young or relatively new justices who fall victim to physical or mental difficulties, so too is the Court's history replete with examples of long-serving justices over 70 years of age who seemed to be at the peak of their intellectual capabilities. To the extent that the problem is justices who can no longer discharge their constitutional duties, a mechanism for removal in cases of incapacity seems preferable to more general term or age limits.

Second, it is not clear that the values of energy and vigor trump other values that might be lost if short-term justices were to become a more regular part of our system. In terms of the Court's functioning, it seems desirable that justices serve long enough to move beyond the learning curve to the greater productivity and workload efficiency that comes with experience. Experience on the bench can also allow justices to develop expertise in particular areas of the law over the course of time, thereby making intellectual division of labor both more convenient and more feasible. Such intellectual maturity is no doubt a value for the wise administration of justice. Additionally, when justices serve together for more than a few years, the nation benefits from two types of stability. First, there is the emergence of a kind of camaraderie that, even when justices disagree vehemently about issues of law, can help to preserve the cordial relations that contribute to institutional legitimacy.¹¹⁷ The justices themselves often talk about friendships that bridge jurisprudential difference. Justices Ginsburg and Scalia, who disagree often on matters of law, are reputed to be quite good friends, for example. More to the point, nearly all the justices referred to a shared sense of purpose as integral to their surviving the fury over their decision in *Bush v. Gore*. Second, the law itself may be more stable when frequent appointments do not give rise to increased opportunities to reconsider precedent. Given the fundamental importance of predictability and the danger of perceived arbitrariness, slow turnover on the Court, which in turn contributes to more measured turnover in the law, may be a signal virtue.¹¹⁸

Even if one rejects these arguments, however, the empirical facts simply do not support the case that the short-term justice adds increased intellectual vitality or brings a host of new ideas. More often, short-termers have been defined by their boredom and their frustration with the Court as an institution. As a result, they are a fairly undistinguished lot, suggesting that it requires more than a few years time to make a lasting jurisprudential mark. Indeed, the ratings of judicial greatness, though certainly subjective and of limited utility, seem to bear out this inference.¹¹⁹ Short-termers such as Howell Jackson and John Hessin Clarke rarely even break into the ranks of "average" justices. By contrast, many of the justices considered "great" or "near great," including John Marshall, Oliver Wendell Holmes, and William Brennan, have been some of our longest-serving.¹²⁰

In short, we are doubtful that any of the values we have discussed—an increase in democratic accountability, in reasoned debate about appointments, or in the youthful vigor of the Court itself—are likely to result from an increase in the number of short-termers. We are convinced that when weighed against the normative losses that might accompany frequent turnover, the case for short-term justices becomes substantially less persuasive.

Conclusion

We began this article by talking about the recent slate of proposals for ending lifetime tenure on the Court. After our introduction, however, we have scarcely given these proposals consideration. Part of the reason we have seemingly ignored them is that they have certainly ignored the short-term justice. Since their empirical treatments do not adequately recognize the historical irregularities we identify, their proposals cannot help but miss the point. To the extent that there is a pattern in the length of Supreme Court tenures, it is less an increasing number of excessively long tenures than a decreasing number of relatively short ones. As we have detailed, it is simply too early to conclude that the decline of the short-term justice is a deep constitutional problem that requires a dramatic solution. Even if we were to regard it as such a problem, it is abundantly clear that the solutions thus far proposed by law professors are not adequately tailored to address it. Eighteen-year terms, as proposed by Carrington and Cramton for example, are still more than twice the length of what we have defined as short-term.

We are not claiming that the system will never be in need of modification. Like others, we worry about an overly politicized appointments process and about the dangers of mental decrepitude. We are similarly sensitive to the Court's unique role in our system of constitutional democracy. However, without more historical evidence to prove that the Rehnquist Court's lack of short-term justices is

something other than an aberration, we urge caution—and above all, a more careful consideration of the empirical facts—before abolishing a long-standing feature of constitutional politics in America.

Notes

- 1 Calabresi and Lindgren 2006; Carrington and Cramton 2006.
- 2 For normative critiques, see Burbank 2006; Farnsworth 2005; Stras and Scott 2006. For empirical analyses, see Atkinson 1999; McGuire 2005; Ward 2003; Stras and Scott 2007.
- 3 Greenhouse 2005; Mauro 2005; Taylor 2005. For a wide array of views, see Cramton and Carrington 2006.
- 4 Carrington and Cramton 2006, 3.
- 5 Calabresi and Lindgren 2006, 778–779.
- 6 Carrington and Cramton 2006, 4. The phenomenon of “strategic retirements” has been widely debated in the judicial politics literature. See, for instance, Hagle 1993; Spriggs and Wahlbeck 1995; Squire 1988; Zorn and Van Winkle 2000.
- 7 Calabresi and Lindgren 2006; Dean 2001; Garrow 2000.
- 8 Among other things, Stras and Scott (2007) argue that Calabresi and Lindgren (2006) exaggerate the size of recent increases in mean tenure because of both a “period-selection problem” and a “date-of-observation problem.” Stras and Scott show that the choice of periods (10, 15, 30, 40, or 50-year periods) for analyzing mean tenure makes an important difference in whether recent increases in tenure are seen as “dramatic” and “unprecedented.” Similarly, they demonstrate that treating justice tenures as an observation at the year of appointment, instead of year of departure, also affects the shape of the mean tenure curve. Our findings regarding the decline of the short-term justice hold regardless of choice of periods or date of observation.
- 9 McGuire 2005, 8–9.
- 10 *Ibid.*, 9.
- 11 *Ibid.*, 14.
- 12 The most striking insight to emerge from a comparison of the two camps is how differently they interpret the same data. In some cases, these differences are simply a matter of either computation or periodization (Stras and Scott 2007). In other cases, they are a function of differences in emphasis and approach. While McGuire (2005) is primarily concerned about understanding trends in their historical and demographic contexts, for example, Calabresi and Lindgren (2006) are more inclined to treat the Court in isolation.
- 13 Orren and Skowronek 2004; Pierson 2004.
- 14 This calculation and all subsequent analysis excludes Chief Justice Roberts and Justice Alito, who had served 16 months and 12 months, respectively, at the time of this writing. Including these two newcomers to the bench would have biased our definition of short-termers downward.
- 15 This rounding results in the inclusion of only one additional justice: Stanley Matthews, who served approximately 7.87 years. It is also worth noting that John Campbell, who served 8.07 years, is excluded from our count.
- 16 Service of more than 30.9 years places a justice in the top decile of tenure length.
- 17 In his history of “mental decrepitude” on the Court, Garrow (2000) argues that the long tradition of extended service is precisely the reason term limits of some sort are necessary. We treat this claim in the second part of our argument.
- 18 Following the advice of Stras and Scott, who argue that a robust trend in tenure “should [be] clear regardless of the decision about when each observation is ‘counted’” (2007, 19–20), we also calculated these figures by justices who began service in each period. Whether we calculate by beginning or end of service, our basic findings are unchanged: short-term service has dropped precipitously in the most recent period.
- 19 One might object that figure 1 gives a misleading sense of the drop in short-term justices because our choice of periods essentially sets the Burger and Rehnquist Courts apart. See the vigorous debate between Stras and Scott (2007) and Calabresi and Lindgren (2006) for a full discussion of various possibilities for periodization. While we concede that periodization matters a great deal in discerning patterns over time, it is nonetheless the case that under any reasonable periodization scheme, we have seen a dramatic drop in the number of short-term justices. We explored several possible ways of periodizing the Court’s history, using the literature on political time (Skowronek 1997), critical elections (Burnham 1970; Mayhew 2002; Sundquist 1983), and constitutional revolutions (Ackerman 1991; Balkin and Levinson 2001). We also experimented with moving averages (Calabresi and Lindgren 2006) and other alternatives (Stras and Scott 2007). In the end, we chose to follow the scheme of Calabresi and Lindgren, in part to make comparisons with their findings somewhat more straightforward. In addition to the virtue of having relatively equal numbers of years in each period, this scheme also includes one commonly accepted “critical election” in each period.
- 20 Circuit-riding was the eighteenth and nineteenth century practice of sending Supreme Court justices to sit on cases in the circuit courts, the intermediate

- level of the federal judicial hierarchy. For a thorough history of the practice, see Glick 2003.
- 21 Ward 2003.
 - 22 McCloskey 2005.
 - 23 Several observers of Court history (Vining, Zorn, and Smelcer 2006; Ward 2003) have noted that death is the most frequent reason for departure from the bench during this period. This is true for all justices, regardless of length of service.
 - 24 William Henry Moody, who was only 56 years old at the end of his tenure, had what was described as acute rheumatism, and Congress passed a special statute granting him early retirement due to disability (Atkinson 1999, 80; Ward 2003, 106).
 - 25 The “Rule of 80” was first instituted in 1869. It allowed all federal judges whose age and years of service totaled 80 (provided a minimum of 10 years of service) to retire with full pensions as early as age 70. The Retirement Acts of 1937 and 1954 substantially improved and regularized retirement incentives. The former allowed justices to move to “senior status,” which permitted those who met the retirement qualifications to continue to perform judicial duties and take part in lower court decisions rather than resigning, and the latter allowed justices to retire at age 65 with 15 years of service in the federal judiciary or at age 70 with 10 years of service, while still retaining their full salary at the time of their retirement for the remainder of their lives (Epstein et al. 1994; Ward 2003).
 - 26 Covitz 2006; Ward 2002.
 - 27 As detailed above, short-term justices are those whose tenures lasted less than 8 years; medium-term justices are those whose tenures lasted between 8 and 23.5 years; long-term justices are those whose tenures lasted more than 23.5 years. The Court’s current justices, with the exception of Roberts and Alito (who are excluded), are categorized based on length of tenure so far. The only current justice who has already reached long-term status is John Paul Stevens; all others are medium-termers.
 - 28 The four Lincoln appointees—Noah Swayne, Samuel Miller, David Davis, and Stephen Field—served 19, 28, 15, and 34 years respectively. During this time, Buchanan’s one appointee served 23 years, one of Grant’s appointees served 22 years, and John Marshall Harlan, a Hayes appointee who came to the Court immediately prior to William Woods, served 34 years.
 - 29 Unlike the period between Curtis and Woods, when three justices completed tenures of between eight and ten years, the thirty-six years since the end of the Warren Court has lacked a single justice who comes close to our definition of short-term. Indeed, Lewis Powell’s 15.5 year tenure is the shortest of the contemporary era (not counting currently serving justices).
 - 30 We also computed median tenure in each period and found nearly identical results. Whether one computes means or medians, the last period is an outlier.
 - 31 Of course, the upper line is merely an estimate of what mean tenures would have been had all short-termers been removed—or in other words, if the short-termers had served tenures equal to the mean of non-short-term tenures in each period.
 - 32 Moreover, the present period’s average is inflated (and the previous period’s average deflated) by a quirk in our periodization scheme. Justices Douglas and Black, the first and third longest-serving justices in history, both end their service in the early 1970s. They are two of only three justices whose service extends across three of our thirty-year periods. (John Marshall Harlan, who joined the Court in 1877 and departed in 1911, is the third.) In other words, average tenure in the current period is skewed by two justices who are extreme outliers in length of service. With only slightly shorter terms of service or slight modifications to our periodization parameters, their tenures would have counted in the previous period, thereby reducing the perceived post-1970 increase.
 - 33 This is simply an estimate extrapolated from the minimum and maximum effects of short-term justices in previous periods.
 - 34 Because many of the other justices who retired during this period served exceedingly long terms, Justice Stevens would have to serve well into his 90s in order to increase the mean length of tenure by a substantial amount. Among the retirements in this period are Hugo Black (34 years), William O. Douglas (just under 37 years), William Brennan (nearly 34 years), Byron White (31 years), and William Rehnquist (more than 33 years).
 - 35 Given Justice Thomas’s previous statements, such a prospect does not necessarily seem unlikely. In 1994, for example, Thomas remarked, “I’m going to be here for 40 years. For those who don’t like it, get over it” (Biskupic 1994; quoted in Zorn and Van Winkle 2000, 145).
 - 36 See also McGuire 2005.
 - 37 Among these other trends are the number of long-term justices, the length of long-term service, the average age at appointment, and as McGuire (2005) asserts, the length of justice tenure as a percentage of average American lifespan.
 - 38 We omit a potential fifth category of “justices”—those who were nominated and confirmed but, for one reason or another, declined to serve. The website for the United States Senate lists 7 individuals in this category but offers evidence of an actual

- confirmation vote for only two—William Smith (1837) and Roscoe Conkling (1882) (<http://www.senate.gov/pagelayout/reference/nominations/Nominations.htm#confirmed>). We do not include these “justices” in our data, in part because we count tenure as beginning at the oath of office.
- 39 There are 28 individuals who served short terms on the Court but 29 instances of short tenure. This is because John Rutledge is counted twice, once for each non-consecutive term he served on the Court, each of which fits our definition of short-term. Charles Evans Hughes also served two non-consecutive terms on the Court, but only one of them—his appointment as Associate Justice from 1910–1916—meets our definition of short-term. As a general rule, we treat non-consecutive appointments as separate terms of service, but we treat elevations from Associate Justice to Chief Justice as a continuous term of service. We do this because in the latter case, the justice remains in office, even if sitting in a different chair with increased responsibilities. Thus, Harlan Fiske Stone is counted as having one uninterrupted tenure of 21 years, rather than two separate tenures of sixteen years as Associate Justice and five as Chief Justice.
- 40 For letters detailing John Jay’s experience riding circuit, see Freeman 2006.
- 41 Quoted in Atkinson 1999, 20.
- 42 Atkinson 1999, 19–20; Ward 2003, 38–39.
- 43 Quoted in Ward 2003, 161.
- 44 Atkinson 1999, 122–125; Garrow 2000, 1044–1045; Ward 2003, 161–162.
- 45 Quoted in Ward 2003, 165.
- 46 Atkinson 1999, 127–132; Garrow 2000, 1045–1050; Ward 2003, 164–165.
- 47 That is, those not in “imminent danger of sudden death” (Ward 2003, 48).
- 48 Johnson was also ill for at least part of one of his two terms on the Court, and his resignation letter cited illness, age, and circuit-riding as contributing factors in his decision to step down (Ward 2003, 23).
- 49 Atkinson 1999, 15–16.
- 50 Work by political scientists Christopher Zorn and Steven Van Winkle (2000) suggests that frustrations with the direction of Court policy were not unique to Curtis. Zorn and Van Winkle show evidence that justices who find themselves on the losing side of Court decisions, writing proportionally more dissents, are also more likely to retire.
- 51 Quoted in Ward 2003, 54.
- 52 Quoted in Ward 2003, 52. Our point here is not about the difference between the justices’ salaries and private practice possibilities—the gap between those two remains large—but the absolute level of support. Today, justices enjoy a financially secure, if not exceptionally affluent, lifestyle.
- 53 Atkinson 1999, 36–37.
- 54 Quoted in Atkinson 1999, 90.
- 55 Quoted in Ward 2003, 115.
- 56 Rutledge did participate in circuit duties for approximately two years. Four years later, after lobbying President Washington intensely for the Chief Justiceship vacated by John Jay, Rutledge returned to the Court briefly with a recess appointment but was rejected by the Senate.
- 57 Atkinson 1999, 12–15, 88–89; Ward 2003, 33–35, 110–112.
- 58 Quoted in Ward 2003, 143.
- 59 Atkinson 1999, 117–119; Ward 2003, 142–143.
- 60 Yalof 1999, 72–73.
- 61 Ward 2003, 169.
- 62 This was not the only instance in which Johnson attempted to induce a resignation in order to facilitate a new appointment. When, in advance of the 1968 election, Johnson sought to appeal to African-American voters by appointing Thurgood Marshall to the Court, he named Ramsey Clark his Attorney General in order to force the resignation of Ramsey’s father, Justice Tom Clark (Covitz 2006; Ward 2002).
- 63 Quoted in Ward 2003, 169.
- 64 The resignation prompted a variety of rumors in Washington. Some whispered that Goldberg was promised a spot on the presidential ticket; others suggested Johnson threatened to reveal information connecting Goldberg to possible financial improprieties during his service as Secretary of Labor (Atkinson 1999, 134–135; Ward 2003, 169). Goldberg explained the decision as follows: “Nobody can twist the arm of a Supreme Court Justice . . . We were in a war in Vietnam. I had an exaggerated opinion of my own capacities. I thought I could persuade Johnson that we were fighting the wrong war in the wrong place” (quoted in Ward 2003, 169).
- 65 Goldberg found Fortas in his way once again when Earl Warren retired as Chief Justice and recommended Goldberg as his replacement. By that point, however, Goldberg’s disagreements with Johnson over Vietnam made a return to the bench impossible, so Johnson nominated Fortas instead.
- 66 The other was John Rutledge, whose recess appointment as Chief Justice was rejected by the Senate just five months after he took office. For an analysis of failed Supreme Court nominations, see Whittington 2007.
- 67 Atkinson 1999, 140–142; Ward 2003, 173–175. Fortas’s troubles were foreshadowed during his failed nomination as Chief Justice in 1968, when he was accused of accepting \$15,000 to teach a summer

- seminar at American University, with much of the money coming from private donors whose interests were linked to cases before the Court.
- 68 Quoted in Ward 2003, 174.
- 69 Though we developed our categories independently, we note the similarity to Zorn and Van Winkle's (2000) three broad classes of influences on Supreme Court vacancies: personal considerations, institutional context, and political influences.
- 70 Gillman and Clayton 1999; McCloskey 2005; McGuire 2004; O'Brien 2000.
- 71 Ward 2003; Ward and Weiden 2006. As Ward (2003) details, these retirement provisions are often enacted for partisan purposes—specifically, for legislators to encourage justices of the opposite party to leave the bench.
- 72 Calabresi and Lindgren 2006; Caspar and Posner 1976; Pacelle 1991; Perry 1991; Provine 1980. For a recent discussion of the Roberts Court's caseload, see Greenhouse 2006.
- 73 Moreover, to the extent that individual justices are ideologically consistent across a range of legal issue areas, instead of conservative on some and liberal on others (in the mode of Byron White, for example), being replaced by an appointee from the opposing party may mean being reversed on a multitude of decisions. This prospect of a widespread reversal of their constitutional jurisprudence may provide another incentive for justices to remain on the bench or increase the relevance of partisan considerations in retirement decisions. We thank Chris Eisgruber for sparking our thoughts on this subject.
- 74 Comiskey 2004; Maltese 1995; Silverstein 1994.
- 75 Epstein, Knight, and Martin 2003. We note, though, that age at appointment is one of the factors that has *not* changed substantially over time. As Calabresi and Lindgren argue, "Presidents have appointed justices of substantially similar ages throughout American history: between fifty-two and fifty-seven years old since 1811" (2006, 800).
- 76 The Jacksonian regime was particularly aggressive in this regard (Graber 2005) yet proved to appoint justices who remained on the Court for extended periods of time.
- 77 Yalof 1999, 170.
- 78 *Ibid.*, 170–171.
- 79 Silverstein 1994.
- 80 National Center for Health Statistics 2007.
- 81 *Ibid.*
- 82 Yet, as McGuire notes, even if justices' tenures are increasing, they are not keeping pace with average American lifespans: "Stated simply, although the proportion of a *justice's lifetime* spent on the Court has remained fairly stable for at least 150 years, the proportion of the *average American's lifetime* that a justice spends on the Court has actually declined" (2005, 14).
- 83 But see Calabresi and Presser 2006; Stras 2007.
- 84 We acknowledge, though, that this calculus may change, depending on one's ultimate ambition. Politicians who aspire to be president, for instance, might plausibly feel that a governorship is a better stepping-stone than the Supreme Court.
- 85 Yalof 1999, 118–124.
- 86 Silverstein 1994, 169–176; Stephanopoulos 1999; Yalof 1999, 196–205.
- 87 Of course, Miers's withdrawal followed weeks of only tepid support and sometimes outright opposition from within the president's party.
- 88 We need look no farther than Hugo Black and William O. Douglas, two of the most intensely political men of their time, to find long-term justices with extensive political resumes.
- 89 Stephanopoulos 1999.
- 90 Cuomo appeared to be a front-runner for the Democratic presidential nomination in both 1988 and 1992, only to choose not to run.
- 91 Calabresi and Lindgren 2006; Carrington and Cramton 2006; Taylor 2005.
- 92 Brennan 1986.
- 93 Segal and Spaeth 2002.
- 94 See, for example, Waldron (2001) for a full defense of the majoritarian approach. See also Davis 2005; Levinson 2003.
- 95 Eisgruber 2001.
- 96 Nor is the key question whether judicial accountability is more or less important than judicial independence. We assume that fair-minded observers will value both aims.
- 97 See also Ely 1980; Pettit 2000.
- 98 This conception shares some similarities with Sunstein's (1993) vision of a "republic of reasons," though we note that Eisgruber is less concerned with implementing actual citizen deliberation at the national level.
- 99 Ackerman 1991, 1998; Balkin and Levinson 2001; Dahl 1957; Gates 1991; Klarman 1990. On the Court's relationship to public opinion more generally, see Flemming and Wood 1997; McGuire and Stimson 2004; Mishler and Sheehan 1993, 1996.
- 100 McCloskey 2005.
- 101 A third instance might be the Court's inattention to states' rights and the principles of federalism from the New Deal through the Reagan administration. Not long after Reagan made federalism a priority (with a commitment unseen since Barry Goldwater) and began to appoint justices with that factor in mind, the Court breathed new life into the 10th and 11th Amendments—without the presence of any short-term justices. The entire

example, however, is complicated by the fact that Reagan's constitutional revolution and political reconstruction of American politics is largely considered either incomplete or a failure (Pickerill and Clayton 2004; Whittington 2001).

- 102 Cushman 1998; Leuchtenburg 1995.
 103 Powe 2000.
 104 The other appointee is Warren Burger, who replaced Earl Warren, who was not a short-term justice.
 105 On the evolution of Blackmun's voting behavior, see Ruger 2005.
 106 Calabresi and Lindgren 2006.
 107 But see Comiskey 2004; Peretti 2001.
 108 Burbank 2006, 340. See also Farnsworth 2005.
 109 Levinson 2001.
 110 Hibbing and Theiss-Morse 1995; Mansbridge 1983; Mutz 2002.
 111 Caldeira and Gibson 1992.
 112 The choice of nominees is obviously influenced by a number of factors, including the president's "professional reputation" and "public prestige" (Neustadt 1990); potential differences between the respective policy, partisan, and personal goals of the president and the Senate (Yalof 1999; Goldman 1997); and internal Senate dynamics.
 113 For an empirical analysis supporting this suggestion, see Ruckman 1993. For some normative reflections on "critical nominations" and "transformative appointments," see Ackerman 1988.
 114 For a general analysis of "mental decrepitude" on the Court, see Garrow 2000. On the case of Douglas specifically, see Ward 2000.
 115 Taylor 2005. Scholars who study the Court from the perspective of the attitudinal model (Segal and Spaeth 2002) may question whether judges are ever truly open-minded about the cases before them, but there seems little question that citizens expect justices to approach each case without a preconceived agenda, looking to make the best decision possible based on the facts and the law. Indeed, it is precisely virtues such as impartiality and fair-mindedness that justices often use to distinguish themselves from the more overtly political actors. For one recent example, see Rosen 2007.
 116 Garrow 2000.
 117 Rosen 2007.
 118 Farnsworth 2005. For the relationship between turnover on the Court and change in Court decisions, see Baum 1992; Hensley and Smith 1995.
 119 Abraham 1992, Appendix A: Rating Supreme Court Justices, 412–414.
 120 The only short-termer Abraham (1992) reports as "great" is Cardozo, but we suspect that much of Cardozo's reputation derives from his service on the

New York Court of Appeals, his authorship of *The Nature of the Judicial Process*, and his part in founding the American Law Institute—three events that occurred before he joined the Court.

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