

# THE SELECTION, TENURE, AND EXTRAJUDICIAL AUTHORITY OF THE CHIEF JUSTICE AND OTHER JUSTICES

## ALTERNATIVE CAREER RESOLUTION II: CHANGING THE TENURE OF SUPREME COURT JUSTICES

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### INTRODUCTION

A great deal has been written about proposals to change the tenure of Supreme Court Justices. Those proposals differ in numerous respects. Some would establish fixed terms, renewable or nonrenewable; others would mandate retirement at a certain age. Some proposed terms are long, others short. Some of the proposals would meld service on the Court with service on the lower federal courts, whether as an attempt to avoid the need for a constitutional amendment or a means to correct flaws the proponent perceives in the system of life tenure crafted by those who wrote the Constitution.

The proposals that have received the most serious attention from lawmakers over time have involved constitutional amendments implementing mandatory retirement.<sup>1</sup> In contrast, the proposals that are currently receiving the most serious attention from the academic

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<sup>1</sup> See ARTEMUS WARD, DECIDING TO LEAVE: THE POLITICS OF RETIREMENT FROM THE UNITED STATES SUPREME COURT 136, 158-60 (2003) (discussing proposed constitutional amendments in 1937 and 1946-1955); David J. Garrow, *Mental Decrepitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995, 996, 1023-26, 1028-43 (2000) (same).

community involve a nonrenewable eighteen-year term, at the conclusion of which a Justice would have the option to remain an Article III judge, empowered to participate in the work of the lower federal courts and, according to at least one proposal, to continue to participate in some of the Supreme Court's judicial and nonjudicial work in certain circumstances.<sup>2</sup> Proponents of nonrenewable eighteen-year terms differ on the question whether the change could be implemented by statute.

Steven Calabresi and James Lindgren have made by far the most elaborate case for moving from life tenure to nonrenewable eighteen-year terms. They present a variety of data showing that in the period since 1970: (1) Justices have served far longer than the mean in the period prior to 1970 (26.1 years versus 14.9 years); (2) Justices have served to a much older mean age (79.5 versus 68.3); and (3) we have experienced both an increase in the mean interval between appointments (3 versus 1.91 years) and a disproportionate share of the longest intervals between appointments.<sup>3</sup> As a result, the authors argue, the Court, for which the appointment process is (in their view) the only plausibly effective check ensuring democratic accountability, does not receive regular refreshment drawing it closer to popular understandings of the Constitution; the incentive of Presidents to appoint younger people to the bench is enhanced (depriving the nation of older, perhaps smarter and wiser people); the appointment process has become contentious and politicized to the detriment of the institution; and the problem of Justices overstaying their time has increased in frequency, as has strategic partisan behavior of Justices in timing their retirements.<sup>4</sup>

Because the field of proposals is crowded, I will concentrate on the case that these and other authors have made to replace life tenure for Supreme Court Justices with nonrenewable eighteen-year terms. I do not intend to discuss the question whether, if our lawmakers deemed such a change desirable, they could implement it by statute as opposed to constitutional amendment. That question is neither unin-

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<sup>2</sup> See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, in REFORMING THE COURT 15 (Roger C. Cramton & Paul D. Carrington eds., 2006) (proposing a constitutional amendment prescribing nonrenewable eighteen-year terms); Paul D. Carrington & Roger C. Cramton, *The Supreme Court Renewal Act: A Return to Basic Principles*, in REFORMING THE COURT, *supra*, at 467 (arguing that eighteen-year terms could be prescribed by statute and proposing such a statute).

<sup>3</sup> See Calabresi & Lindgren, *supra* note 2, at 23-28.

<sup>4</sup> See *id.* at 30-44, 62.

teresting nor without difficulty. In the absence of unambiguous text or precedent in the form of court decisions, and given that “constitutional law” is not confined to court decisions, the answer to the constitutional question would turn on an (explicit or implicit) assessment of the policy implications of changing the status quo. This, in turn, would (or should) depend on a comparative assessment of the benefits and costs of the proposed alternative in light of the roles that the Supreme Court plays in our society.

It is easy to see how, so framed, and whether or not couched in the language of constitutional law, a scholarly debate about judicial tenure could be dominated by the kind of “epistemic shallowness”<sup>5</sup> for which law professors are infamous. Indeed, the work of many engaged in the debate is quite relentlessly normative and replete with unsupported causal assertions.<sup>6</sup> For that reason I thought it useful to explore the question whether proponents’ assertions and predictions about political phenomena are supported by the theories or empirical evidence produced by those whose business it is to study political phenomena. More broadly, my goal in this Article is to begin to fill what I perceive to be both theoretical and evidentiary gaps. I seek understanding in the literatures of other disciplines, particularly political science, of whether there are serious problems warranting attention and whether nonrenewable eighteen-year terms would solve those problems (without creating other problems).

Approaching the subject from that perspective, I find that there is little evidence that life tenure on the Supreme Court, as it operates today, is responsible for some of the costs attributed to it or that the costs themselves are serious enough to warrant changing a basic structural arrangement at this time. These include those costs proponents of change associate with presidential incentives in making nominations, the behavior of the Justices in connection with retirement, and the contentiousness of the appointment process. The evidence also suggests to me that, in historical perspective, the problem of Justices remaining beyond the time they are up to the job is less serious than it

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<sup>5</sup> RICHARD A. POSNER, *OVERCOMING LAW* 88 (1995).

<sup>6</sup> Ward Farnsworth’s defense of life tenure is a prominent exception among the articles I have read. See Ward Farnsworth, *The Regulation of Turnover on the Supreme Court*, 2005 U. ILL. L. REV. 407 [hereinafter Farnsworth, *Regulation of Turnover*]. A shorter version of this article appears as Ward Farnsworth, *The Case for Life Tenure*, in *REFORMING THE COURT*, *supra* note 2, at 251.

was in prior periods, before Congress enacted adequate provisions for retirement.<sup>7</sup>

I then turn to arguments that the current system of life tenure for Supreme Court Justices renders them insufficiently accountable to the public, threatening democratic legitimacy by distancing the Justices from popular understandings of constitutional meaning. I argue that the accountability critique is impoverished because it focuses exclusively on the appointment process and treats judicial independence and judicial accountability as both dichotomous and monolithic. Exclusive attention to the appointment process obscures other executive and legislative powers that can render the Court accountable, together with the norms, customs, and dialogic processes that have developed in their shadow, as it obscures normative and empirical scholarship suggesting that the Court in fact never strays very far or for very long from majority preferences. The isolation of judicial independence from judicial accountability enables proponents to invoke comparative data that tell us very little, and it may also cause them to treat less seriously than they should the potential costs that frequent and predictable appointments under their system might entail.<sup>8</sup>

In examining proponents' claims concerning democratic legitimacy, I review the political science literature about the public's knowledge of the Court and its decisions and how that knowledge translates into support (or lack of it). I find little basis to believe that the public at large has understandings of constitutional meaning, as opposed to results in cases that are controversial or highly salient for some reason, let alone understandings of competing interpretive approaches. I also find no credible evidence that the Court today lacks public support to an extent that should concern us; indeed, it enjoys greater support than Congress.<sup>9</sup>

Finally, I seek in the interest group literature clues to the sort of environment in which frequent and predictable appointments would likely play out. The evidence suggests that, far from reducing the contentiousness of the process, a system of frequent and predictable appointments might reinforce the worst tendencies of modern politics, causing a crisis in democratic legitimacy by shining more light more frequently on the Court, and by draping the Court's work in the garb of the ordinary politics of which it would be seen to be a part. The re-

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<sup>7</sup> See *infra* Part I and text accompanying notes 96-101.

<sup>8</sup> See *infra* Part II.A.

<sup>9</sup> See *infra* Part II.B.

sult, in other words, might be a quantum and quality of democratic accountability, shaped by the incentives and tactics of interest groups aligned with political parties, that could swamp the putative independence augured by nonrenewable eighteen-year terms viewed in isolation.<sup>10</sup>

#### I. THE PUTATIVE COSTS OF LIFE TENURE: PRESIDENTIAL INCENTIVES, MENTAL DECREPITUDE, AND STRATEGIC PARTISAN RETIREMENT

Calabresi and Lindgren are to be applauded for gathering and manipulating empirical data in order to quantify the perceived problems to which they respond. Like many other proponents of change, however, they seem fixated on the current institution—at the end of its existence as a “natural court”<sup>11</sup>—and on incentives that may seem irresistible given the current political climate. Lacking historical and institutional perspective, the enterprise has the air of a self-fulfilling prophecy.

What, for instance, should we make of Calabresi and Lindgren’s claim that their proposal “will eliminate the incentive Presidents currently have to find candidates who are even younger”<sup>12</sup> or of others’ claim that the “problem with the current nomination system is that youth has been elevated from one factor among many to one of the most important considerations.”<sup>13</sup> The average age at appointment has remained remarkably uniform over time (at around fifty-three).<sup>14</sup> The basic incentive to appoint younger people is life tenure. As Ward Farnsworth suggests, logically, one would expect greater attention to age at appointment when life expectancies are short;<sup>15</sup> empirical data support that logical supposition.<sup>16</sup> Given numerous long tenures prior

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<sup>10</sup> See *infra* Part III and Conclusion.

<sup>11</sup> “The period during which a court’s membership remains unchanged is known to political scientists as a natural court.” Linda Greenhouse, *Under the Microscope Longer Than Most*, N.Y. TIMES, July 10, 2005, § 4, at 3.

<sup>12</sup> Calabresi & Lindgren, *supra* note 2, at 62.

<sup>13</sup> James E. DiTullio & John B. Schochet, Note, *Saving This Honorable Court: A Proposal to Replace Life Tenure on the Supreme Court with Staggered, Nonrenewable Eighteen-Year Terms*, 90 VA. L. REV. 1093, 1113 (2004); see also *id.* at 1110-16, 1122.

<sup>14</sup> See Calabresi & Lindgren, *supra* note 2, at 30-31.

<sup>15</sup> See Farnsworth, *Regulation of Turnover*, *supra* note 6, at 428-29 (“[T]he incentive to make young appointments does not become greater as Justices live longer.”).

<sup>16</sup> “In the 18th and 19th centuries, the average age at appointment was 51.1 years. . . . In the 20th century, the average age at appointment (for Justices who completed their service before 1997) has been 54.7 years.” John Gruhl, *The Impact of Term Limits for Supreme Court Justices*, 81 JUDICATURE 66, 66 (1997).

to 1970 and the ages of recent nominees, it seems implausible that the perceived lengthening tenure since then has had a significant impact on appointments, when compared, for instance, to a particular President's agenda in making appointments.<sup>17</sup> But we need not speculate; the question should be amenable to empirical investigation.

Before doing such work, however, one should perhaps seek perspective on the phenomenon of "lengthening tenure." Working with medians rather than means,<sup>18</sup> Kevin McGuire finds that "the tenure of the Justices has been quite stable over time,"<sup>19</sup> that the median age of the current Justices (sixty-nine years) is not substantially higher than the historical median (sixty-three years, or sixty-four years from 1900),<sup>20</sup> and that, although the median service of the Justices today (eighteen years) is higher than the median service since the Civil War

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<sup>17</sup> See LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF FEDERAL JUDICIAL APPOINTMENTS* 65 (2005) ("Some commentators say the emphasis on youth reflects the president's interest in creating a legacy. That begs the question of what kind of legacy, however. In many instances the answer is an ideological one."); *infra* text accompanying notes 96-101. David Yalof's study of appointments from Truman through Reagan does not support the claim that age has become a more important criterion in recent years than it was in the (recent) past. See DAVID ALISTAIR YALOF, *PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES* (1999). In fact, the most rigid age criterion Yalof reports is the upper limit of sixty-two set by President Eisenhower. *Id.* at 43; see also *id.* at 104 (recounting that President Nixon "hoped to pair the sixty-one-year-old Burger with a younger nominee, hopefully 'someone in their late forties and no older than sixty'"); *id.* at 127 (explaining that Attorney General Edward Levi's list of possible nominees for President Ford did not include anyone over sixty, "an indication that youth had also been a significant factor in Levi's calculus"). Perhaps most telling is Yalof's evaluation of age as an appointment criterion in the Reagan administration. "Age was a concern, but unlike with Eisenhower and Nixon, the administration did not impose on his subordinates any fixed minimum or maximum at the outset that might preclude the consideration of especially worthy candidates." *Id.* at 134; see *id.* (noting that "the most important criteria were ideological"). Comparing the ages of some of the Justices nominated by Presidents Reagan and Bush (I) (including Scalia (fifty), Kennedy (fifty-one), Souter (fifty-one), and Thomas (forty-three)), with those nominated by President Clinton (Ginsburg (sixty) and Breyer (fifty-five)), Gruhl concludes that it is "unclear whether extending control of the Supreme Court by appointing younger justices will be a goal of future Democratic or Republican administrations." Gruhl, *supra* note 16, at 68; see also David J. Garrow, *Protecting and Enhancing the Supreme Court*, in *REFORMING THE COURT*, *supra* note 2, at 271, 277-78.

<sup>18</sup> The use of means rather than medians for the relatively short period of 1971 to the present may distort comparison with means in the preceding period (1789-1970), particularly given the relatively small number of Justices and the long interval since the last departure in the former period. Note also the potential effects of making the cut in 1970, since both Justices Black and Harlan retired in 1971.

<sup>19</sup> Kevin T. McGuire, *An Assessment of Tenure on the U.S. Supreme Court*, 89 JUDICATURE 8, 8 (2005).

<sup>20</sup> *Id.* at 10.

(which has rarely exceeded fifteen years) the retirement of Justice O'Connor combined with the retirement of one of the Court's oldest members "would return the Court to its historical norm."<sup>21</sup>

The treatment of "mental decrepitude"<sup>22</sup> and strategic partisan retirement by most proponents of change also strikes me as historically tone deaf. Artemus Ward makes clear the importance of retirement arrangements in the historic progression from leaving the Court in a coffin to leaving when a Justice chooses. Mental decrepitude is not a new problem; indeed, it is less of a problem today than it once was. Before adequate provisions for retirement became available, some Justices had no choice but to hang on, often for many years, until the bitter end (unless Congress could be persuaded to enact a private bill).<sup>23</sup> Now that adequate retirement arrangements are in place, and given a discretionary docket and resources to hire (multiple) clerks, it is hard to explain mental decrepitude, to the extent that it has been a problem in recent decades, without considering ego and strategic partisan behavior.

Those who rely on anecdotal evidence in contending that strategic partisan retirement has become not just more frequent, but also a

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<sup>21</sup> *Id.* at 12. Chief Justice Rehnquist died shortly after McGuire's article was published, fulfilling the second condition. McGuire also has a different take on the question whether the current situation poses a problem of "democratic accountability." He argues that, taking life expectancies into account,

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. Critics may well be concerned about citizens having to live under a Court controlled by justices who long outlast those responsible for appointing and confirming them, but over time this problem has become better, not worse. Seen in this way—that is, from the perspective of the average citizen—the justices have been spending less, not more time on the Court.

*Id.* at 14.

<sup>22</sup> See, e.g., Garrow, *supra* note 1.

<sup>23</sup> Of the forty Justices who departed between 1801 and 1896, ten did so by resignation or retirement, while thirty died in office. See WARD, *supra* note 1, at 47, 70. But see Sanford Levinson, *Life Tenure and the Supreme Court: What is to be Done?*, in REFORMING THE COURT, *supra* note 2, at 375, 381 (asserting that in the nineteenth century "most justices did not die in office because they had the good grace to retire"). Because the 1869 legislation authorizing retirement (formally resignation on salary) applied only to those at least seventy years old and with ten years of service, special legislation was required to permit Justice Hunt, who became disabled before reaching ten years of service, to retire. See WARD, *supra* note 1, at 86-87. Similar legislation also proved necessary to permit the retirement of Justice Moody in 1910 and of Justice Pitney in 1922. *Id.* at 106, 116.

problem worthy of attention in recent decades, confront a number of difficulties.<sup>24</sup> Many of their examples involve Justices whose supposed preference to retire strategically yielded to declining health and/or other personal considerations; the evidence is lacking that partisan motivation strongly influenced, let alone dominated, the retirement decisions of many other Justices.<sup>25</sup> The former instances in fact provide anecdotal support for studies showing that, over time, partisan considerations have paled in comparison with other factors, including personal considerations and the availability of pension benefits, in motivating retirement.<sup>26</sup> The most recent of these studies found “no

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<sup>24</sup> Robert Nagel correctly points out that “while somewhat unseemly from some perspectives, timed retirement decisions are not obviously different from any number of strategic decisions that justices routinely make in an effort to prolong and maximize their influence.” Robert F. Nagel, *Limiting the Court by Limiting Life Tenure*, in REFORMING THE COURT, *supra* note 2, at 127, 128. He also observes that, “even on the assumption that timed retirements are different from and more regrettable than other efforts at prolonged influence, it is not clear why they are suddenly such a serious problem as to warrant changing the long-standing practice of life tenure.” *Id.*

<sup>25</sup> This leads some proponents of change to rather odd conclusions. See, e.g., DiTullio & Schochet, *supra* note 13, at 1109 (“Though both . . . [Warren and Douglas] were ultimately prevented from strategically retiring, the very fact that they attempted and thought they could succeed in strategically departing demonstrates the weaknesses of the current system of appointments to the Court.”).

Based on timing, their relative good health, or both, Justices Harlan, Stewart, Burger, White, and Blackmun can be classified as being motivated by partisanship in their departure decisions. While there is little direct evidence to substantiate such a conclusion for any of them, circumstances suggest as much. There is, on the other hand, direct evidence that Earl Warren was clearly partisan in his departure attempt, and that William O. Douglas and Lewis Powell had at least some partisan concerns. Though Justices Brennan and Marshall ultimately did not depart for partisan reasons, they were initially partisan in their departure considerations. Overall, these cases suggest a new level of partisanship in the departure decision-making of the justices.

WARD, *supra* note 1, at 209; see also EPSTEIN & SEGAL, *supra* note 17, at 36-40 (finding retirements to be more often motivated by politics than by economics). But see Garrow, *supra* note 17, at 277 (“Serious questions of interpretive accuracy mar th[e] contention that” strategic retirement is a pervasive and urgent problem.). Note further that any partisanship attributed to Justice Blackmun’s and Chief Justice Warren’s retirement planning relies on the incumbency of presidents of the other party than that to which their appointing presidents belonged. See *infra* note 143.

<sup>26</sup> See Peverill Squire, *Politics and Personal Factors in Retirement from the United States Supreme Court*, 10 POL. BEHAV. 180 (1988) (finding that political considerations fail to account for voluntary departure but that physical infirmity and pension eligibility influence the probability of retirement); Christopher J.W. Zorn & Steven R. Van Winkle, *A Competing Risks Model of Supreme Court Vacancies, 1789-1992*, 22 POL. BEHAV. 145 (2000) (finding little evidence of political factors influencing either retirement or death-related vacancies). But cf. Timothy M. Hagle, *Strategic Retirements: A Political*

consistent support for justices taking partisan factors into account, either in their retirement decisions or in their decisions to remain on the bench.”<sup>27</sup> As Albert Yoon explains in a forthcoming study of judicial turnover on the federal courts as a whole:

[W]hile judges may hold preferences regarding the political environment in which they vacate their seat, they do not appear to optimize solely over them. Much of this can be explained [by] judges’ lack of control over the political environment. Judges, while they may desire a favorable political environment to emerge, cannot compel it. . . . Moreover, even when the political climate is favorable, the judge, when considering other factors—e.g., job satisfaction, institutional norms, a sense of civic duty—may choose to remain on the bench.<sup>28</sup>

There is, thus, reason to doubt whether some of the supposed costs of the current system constitute serious problems today, and it is clear that some of them are less serious than they once were. If any cost properly attributable to the current system of life tenure is deemed serious enough to warrant a change, those responsible for our institutions should consider more finely tailored solutions. In that regard, because he was preoccupied with strategic partisan retirement, Ward proposed changing the current statutory retirement scheme, pursuant to which a Justice can retire at or after age sixty-five upon achieving any combination of age and service totaling 80 (the so-called flexible “Rule of 80”), to a flexible Rule of 100, 110, or 120.<sup>29</sup>

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*Model of Turnover on the United States Supreme Court*, 15 POL. BEHAV. 25, 39-40 (1993) (finding an identifiable political element relating to the timing of retirements from the Court, but using mean age instead of infirmity or pension eligibility as variables). Calabresi and Lindgren, relying on Farnsworth, cite the Hagle study, but neither article cites the more recent study by Zorn and Van Winkle (or the earlier study by Squire). See Calabresi & Lindgren, *supra* note 2, at 33 n.57. For other work disputing the importance of this phenomenon, see Saul Brenner, *The Myth that Justices Strategically Retire*, 36 SOC. SCI. J. 431, 438 (1999), which found that strategic behavior was uncommon among post-1937 Justices “who retired at an ideologically favorable time as well as those who failed to do so.”

<sup>27</sup> Zorn & Van Winkle, *supra* note 26, at 160.

<sup>28</sup> Albert Yoon, *The End of the Rainbow: Understanding Turnover Among Federal Judges*, 1 AM. L. & ECON. REV. (forthcoming Mar. 2006) (manuscript at 18, on file with author). Although Yoon concludes that district court and court of appeals judges “are increasingly synchronizing their tenure of active service with their pension qualification [i.e., taking senior status as soon as eligible to do so],” he finds that phenomenon operating “essentially not at all among Supreme Court justices.” *Id.*, manuscript at 4. The point he makes in the passage quoted in the text is, however, equally applicable to the Justices.

<sup>29</sup> See WARD, *supra* note 1, at 233-37.

Yet, as he recognized, such changes to retirement rules for the purpose of thwarting strategic partisan retirement might exacerbate the problem of mental decrepitude.<sup>30</sup> McGuire has sketched how pension incentives could be structured to encourage retirement at a given age, thereby addressing both problems (to the extent they exist).<sup>31</sup>

## II. MORE PUTATIVE COSTS: ACCOUNTABILITY AND LEGITIMACY

Proponents of changing the tenure of Supreme Court Justices claim that life tenure today, by reason of longer life expectancies and whatever other phenomena contribute to supposedly “lengthening tenure,” results in the Court being too far removed from the will of the people, so that it is insufficiently “democratically accountable and legitimate.”<sup>32</sup> An associated claim made in support of nonrenewable eighteen-year terms is that, as a result of frequent and predictable appointments, the Court will better reflect “popular understanding of the Constitution’s meaning.”<sup>33</sup> Calabresi and Lindgren make an additional, analytically distinct claim that the people favor textualism or originalism and thus that their proposal will not only bring the Court’s decisions, but also its methods, into closer accord with majority preferences.<sup>34</sup> Finally, because proponents in general tend to regard the appointment process as the only means of ensuring the Court’s accountability and legitimacy, they regard the current Court as exercising power that is not only “great” but “totally unchecked.”<sup>35</sup> I take up these claims regarding accountability and legitimacy separately below.

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<sup>30</sup> See *id.* at 236.

<sup>31</sup> See McGuire, *supra* note 19, at 15.

<sup>32</sup> Calabresi & Lindgren, *supra* note 2, at 58. See Terri L. Peretti, *Promoting Equity in the Distribution of Supreme Court Appointments*, in REFORMING THE COURT, *supra* note 2, at 435, 436-41 (discussing the appointment process “as a tool of democratic control”).

<sup>33</sup> Calabresi & Lindgren, *supra* note 2, at 48, 58.

<sup>34</sup> See *id.* at 48-49, 59, 76-77.

<sup>35</sup> *Id.* at 17; see *id.* at 37-39 (finding the appointment process to be “the only check that the other two branches have on the Supreme Court”); see also Carrington & Cramton, *supra* note 2, at 468-69 (discussing traits associated with “unchecked power”). Compare Calabresi & Lindgren, *supra* note 2, at 36 n.64 (acknowledging but disparaging the effectiveness of other “indirect means” of instilling “the public’s political values”), with *id.* at 72 (relying on existing “political checks” in answering the argument that term limits would unduly impinge upon judicial independence).

## A. Accountability

Both the political science literature and interdisciplinary work on judicial independence and accountability suggest that, although the Supreme Court does exercise “great power,” it is *not* “totally unchecked” in doing so. That is not surprising when one considers that “the Constitution would provide very little protection against an executive and legislature intent on controlling the decisional independence of the federal courts.”<sup>36</sup> Proponents of changing the tenure of Supreme Court Justices should thus treat more seriously (and consistently) a variety of means, in addition to the appointment process and the impeachment process, by which Congress and the executive branch have in the past exercised influence, even in matters of constitutional law, and may do so in the future.<sup>37</sup>

Numerous political scientists, from Robert Dahl, to Robert McCloskey, to Gerald Rosenberg, have disputed, and provided empirical evidence controverting, the proposition that the Court is unaccountable to the other institutions of government when deciding cases.<sup>38</sup> Their work, together with more recent work by Lee Epstein, Jack Knight, and Andrew Martin, and others who share their strategic perspective,<sup>39</sup> suggests that the Court does not often have the last word even on matters of constitutional interpretation, and that as a result it does not stray very far or for very long from what the majority wants.

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<sup>36</sup> See, e.g., Stephen B. Burbank & Barry Friedman, *Reconsidering Judicial Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS 9, 14 (Stephen B. Burbank & Barry Friedman eds., 2002).

<sup>37</sup> See Burbank & Friedman, *supra* note 36, at 12-14 (discussing court-stripping, jurisdictional regulation, court packing, budgetary control, and executive enforcement of judgments); see also Charles Gardner Geyh, *Customary Independence*, in JUDICIAL INDEPENDENCE AT THE CROSSROADS, *supra* note 36, at 160, 166-84 (examining the emergence and development of a norm against court packing); Barry Friedman & Anna L. Harvey, *Electing the Supreme Court*, 78 IND. L.J. 123, 127 (2003) (“It is true that none of these ha[s] been utilized in many years, but the possibility is there, and members of Congress resort, on occasion, to threatening the Court with such actions.”).

<sup>38</sup> See, e.g., ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* (2d ed. 1994); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957); Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992); see also Friedman & Harvey, *supra* note 37, at 127.

<sup>39</sup> See, e.g., Lee Epstein et al., *Constitutional Interpretation from a Strategic Perspective*, in MAKING POLICY, MAKING LAW 170 (Mark C. Miller & Jeb Barnes eds., 2004); Neal Devins, *Is Judicial Policymaking Countermajoritarian?*, in MAKING POLICY, MAKING LAW, *supra*, at 189; Louis Fisher, *Judicial Finality or an Ongoing Colloquy?*, in MAKING POLICY, MAKING LAW, *supra*, at 153.

Moreover, as Barry Friedman has observed, “there is general agreement among political scientists, and increasing recognition among legal academics, that more often than not the outcomes of Supreme Court decisions are consistent with popular opinion.”<sup>40</sup>

An argument about accountability solely from the perspective of the appointment process is not necessarily inconsistent with Dahl, insofar as the latter’s claim that the Court “is inevitably a part of the dominant national alliance”<sup>41</sup> stressed the regularity of appointments and hence, in his view, a likely congruence of the policy preferences of a Court majority and the policy aims of the dominant political coalition.<sup>42</sup> Yet, again, the appointment process is not the only means of making the Court accountable, a historical fact of institutional life that, it seems to me, renders even more attractive the argument of Epstein and her colleagues that the resolution of the counter-majoritarian difficulty “rests not on a coincidence of preferences, as Dahl suggests, but on an important effect of the separation of powers

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<sup>40</sup> Barry Friedman, *History, Politics and Judicial Independence*, in JUDICIAL INTEGRITY 99, 114 (András Sajó ed., 2004); see also Nagel, *supra* note 24, at 131 (“One major component of an explanation for American tolerance for judicial power and autonomy is the well documented fact that the Justices’ decisions are seldom far out of line with the preferences of national majorities as measured by polls or by working majorities in Congress.”).

Overall, the Rehnquist Court’s record of representing American public opinion is strikingly similar to that of five earlier Courts since the mid-1930s. Setting aside the handful of closely-divided or inconsistent polls, some 63 percent of the Rehnquist Court’s decisions were consistent with poll majorities, and the remaining 37 percent were inconsistent with the polls. That compares to nearly identical figures of 62 percent consistent and 38 percent inconsistent for the Hughes, Stone, Vinson, Warren and Burger Courts together.

Thomas R. Marshall, *American Public Opinion and the Rehnquist Court*, 89 JUDICATURE 177, 177 (2005). *But see* Calabresi & Lindgren, *supra* note 2, at 48 (“[T]he post-1970 Supreme Court is, if anything, *too* insulated from public opinion.”).

Barry Friedman and Anna Harvey’s study of Supreme Court decisions overruling congressional statutes demonstrates “that the Court is significantly more likely to overturn congressional statutes when it faces an ideologically congenial Congress.” Friedman & Harvey, *supra* note 37, at 138 (citation omitted); see *id.* at 139 (“In other words, the Court does defer to Congress, we believe, but it is more probably the sitting Congress rather than the enacting one. The sitting Congress has ample tools to discipline the Court, should Congress truly believe this is necessary.” (citation omitted)).

<sup>41</sup> Dahl, *supra* note 38, at 293.

<sup>42</sup> See *id.* at 284-85. The decrease in turnover in recent years “has important implications if Dahl’s . . . thesis is correct. A Supreme Court with a stable membership may be less responsive to changes in the political environment. This could result in a loss of public support over time, something that might endanger the Court’s ability to perform its constitutional function.” Squire, *supra* note 26, at 187.

system: a strategic incentive to anticipate and then react to the desires of elected officials.”<sup>43</sup> Even if one does not accept this strategic account, it remains true, as Friedman has pointed out, that “the law itself provides a mechanism for achieving majoritarian results” through a built-in “set of standards deferential to government, if not public, will.”<sup>44</sup>

From the perspectives of both history and neo-institutionalism, then, a view of accountability that begins and ends with the appointment process is impoverished because it focuses on one formal means of exercising power, excluding from view other such means, together with norms, customs and dialogic processes that have developed in their shadow and that may constitute the most important vehicles of “accountability” in a complex system of separated but interdependent powers.<sup>45</sup> Among the norms and customs so neglected are the many ways in which, over time, the Court has exercised self-restraint, which, John Ferejohn and Larry Kramer argue, are critical to its continuing ability to use independent judgment when such judgment is required.<sup>46</sup>

There is another and more basic problem with the view of accountability animating many proposals for change, however. The sponsors tend to treat judicial independence and judicial accountability as both dichotomous and monolithic. This problem might *not* have been avoided by reading the political science literature.<sup>47</sup> But recent

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<sup>43</sup> Epstein et al., *supra* note 39, at 186.

<sup>44</sup> Friedman, *supra* note 40, at 116.

<sup>45</sup> See CHARLES GARDNER GEYH, *WHEN COURTS & CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM* (2006). Elaborating the work presented in Geyh, *supra* note 37, this recently published book makes an important contribution to our understanding of the “dynamic equilibrium” between Congress and the federal judiciary, the influences that contributed to its development, and the forces that currently place it in peril. Professor Geyh convincingly argues that customary norms—of both Congress and the federal judiciary—have proved more important than constitutional text to judicial independence, and that recent controversies concerning judicial appointments are best understood as reflecting greater reliance on a process that has never been constrained by independence norms to right the balance by assuring a greater measure of judicial accountability.

<sup>46</sup> See John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 N.Y.U. L. REV. 962 (2002). The fact that the Court has not always exercised such restraint, including in the recent past, should not lead us to lose perspective. See *infra* text accompanying notes 145-47.

<sup>47</sup> See Stephen B. Burbank, *The Architecture of Judicial Independence*, 72 S. CAL. L. REV. 315, 327 (1999) (arguing that the common political science definition of judicial inde-

interdisciplinary scholarship has revealed that, to the contrary, independence and accountability are different sides of the same coin. It has also shown that there is no one ideal mix of independence and accountability. Rather, the appropriate mix for a given court system, and indeed for a given court, depends upon what a polity seeks from that system or court.<sup>48</sup> We may agree that a nonrenewable eighteen-year term (which is, after all, consistent with the historical mean and the current median) does not represent a plausible threat to judicial independence when viewed in isolation. One cannot, however, determine whether the quantum or quality of judicial independence that nonrenewable eighteen-year terms would afford the Supreme Court of the United States is sufficient without at the same time considering the quantum and quality of accountability that such a proposal—and in particular the frequent and predictable vacancies it would entail—portends, given what we seek from the Court today.

In this light, data about the terms of tenure of the judges on high or constitutional courts of other countries, or on the high courts of the states of the United States, although useful in stimulating thought about alternatives, are potentially misleading.<sup>49</sup> Such data by themselves tell us very little about judicial independence and accountability in those polities,<sup>50</sup> and, as Farnsworth points out, one may have a dif-

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pendence, “requiring virtual immunity from the influence of the other branches, or at least only minimal influence,” is “theoretically and practically . . . too unforgiving”).

<sup>48</sup> See Burbank & Friedman, *supra* note 36, at 14-22.

Recognition of the complementary relationship between judicial independence and judicial accountability is the reason why . . . whenever we discuss judicial independence, we endeavor to ensure that the measure of independence we champion is consistent with the degree of judicial accountability called for by the institutions, customs, and norms of the state or federal system in question. The same careful attention is called for when the focus is on the other side of the coin.

Editorial, *Judicial Accountability*, 89 JUDICATURE 4, 4 (2005).

<sup>49</sup> See, e.g., Calabresi & Lindgren, *supra* note 2, at 44-48, 65 (adducing such data).

<sup>50</sup> *But see id.* at 47 (“The nearly unanimous consensus against life tenure for state judges, both on the highest courts and on intermediate appellate courts, is telling, and it provides further evidence of the undesirability of maintaining a system of lifetime tenure in the present day.”) Shall we therefore elect the Justices? In fact, that possibility has been advanced for consideration, albeit without careful attention to the implications of experience in the states (including the constitutional impediments to avoiding the excesses of electoral politics), in an otherwise valuable contribution to the literature. See RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS 170-77 (2005).

In a comparative study of judicial selection, Lee Epstein and colleagues posit a uniform definition of judicial independence and assume that it is a desirable end (in all of

ferent attitude about judicial tenure when first establishing a court system than one does about changing one part of an interdependent system that has served a polity reasonably well for more than two hundred years.<sup>51</sup> In any event, it is difficult to draw reliable conclusions about the suitability for transplant of the arrangements made in different political systems without understanding those systems and the roles that courts are expected to play in them.<sup>52</sup>

### B. *Legitimacy*

Gerald Rosenberg has noted the tension between, on the one hand, Dahl's claim that such power as the Court has derives from "the unique legitimacy attributed to its interpretations of the Constitution"<sup>53</sup> and, on the other hand, his "primary claim that the Court is a political institution, part of the dominant political alliance."<sup>54</sup> Rosenberg also argued that the evidence did not support Dahl's admittedly speculative claims about legitimacy.<sup>55</sup> I find no such tension in the work of proponents for change, and I believe that their notions about legitimacy are suspect.

As previously discussed, the dominant vision of democratic accountability among those advocating change apparently includes only the accountability that the appointment process provides, ignoring

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the countries from which their data are taken), before asking "[w]hat sorts of formal rules . . . societies invoke to attain it." Lee Epstein et al., *Comparing Judicial Selection Systems*, 10 WM. & MARY BILL RTS. J. 7, 30 (2001). They also treat judicial independence and accountability as dichotomous, *see id.*, while at the same time acknowledging that "no formal retention rule can guarantee judicial independence," *id.* at 31. In any event, since they do not in fact explore the nature of judicial independence and accountability in other countries, it seems not unfair to regard their comparative data as merely "useful in stimulating thought about alternatives." *Supra* text accompanying note 49.

<sup>51</sup> "The question is not whether life tenure would make sense for another country writing a new constitution. The question is whether it makes sense for this country to switch away from [life tenure]." Farnsworth, *Regulation of Turnover*, *supra* note 6, at 451.

<sup>52</sup> *See, e.g.*, Robert A. Kagan, *American Courts and the Policy Dialogue: The Role of Adversarial Legalism*, in MAKING POLICY, MAKING LAW, *supra* note 39, at 13 (exploring and explaining the unique reliance on adversarial legalism in the United States).

<sup>53</sup> Dahl, *supra* note 38, at 293.

<sup>54</sup> Gerald N. Rosenberg, *The Road Taken: Robert A. Dahl's Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 50 EMORY L.J. 613, 627 (2001).

<sup>55</sup> *Id.*

other powers and processes—formal and informal—by which the Court, acting strategically, may be influenced. This leads to the untenable claim that the Court today exercises not only great power, but that it is “totally unchecked” in doing so. It also helps to understand the assertions that, without more regular and frequent turnover, the Justices are not accountable to current “popular understandings of constitutional meaning”<sup>56</sup> and that irregular and infrequent vacancies can “prevent the American people from being regularly able to check the Court when it has strayed from following text and original meaning.”<sup>57</sup>

Calabresi and Lindgren assert that life tenure today fosters a gap between the Court’s jurisprudence and “popular understandings of constitutional meaning”<sup>58</sup> that is itself normatively undesirable and that threatens the Court’s democratic legitimacy. Other proponents assert that “there should be some relationship between the voters’ choice of a president and the relative influence that president has on the Court.”<sup>59</sup> If the appointment process were the only check on the Court’s power, and if “popular understandings of constitutional meaning” could faithfully be translated through that process, perhaps regular appointments would solve both alleged problems and an additional problem that proponents of change lay at the door of infrequent and irregular vacancies on the Court: the increasing contentiousness of the confirmation process, leading to the Court’s politicization.

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<sup>56</sup> Calabresi & Lindgren, *supra* note 2, at 60.

<sup>57</sup> *Id.* at 38.

<sup>58</sup> *Id.* at 60. As to the normative claim about “popular understandings of constitutional meaning,” I will not attempt to rehearse or elaborate Ward Farnsworth’s elegant defense of “slow law” as an important check on temporary majorities. See Farnsworth, *Regulation of Turnover*, *supra* note 6, at 411-18. I would only note, particularly for the benefit of originalists, the extent to which Farnsworth’s account resonates with the picture of James Madison’s concerns so vividly painted some years ago by Jack Rakove. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 290 (1996) (discussing Madison’s discovery on the basis of experience under state constitutions that “the true problem of rights was less to protect the ruled from their rulers than to defend minorities and individuals against factious popular majorities acting through government”); see also THE FEDERALIST NO. 78, at 439 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contending that elected judges would have “too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws”).

<sup>59</sup> DiTullio & Schochet, *supra* note 13, at 1117; see also Calabresi & Lindgren, *supra* note 2, at 35-39, 58-59; Peretti, *supra* note 32, at 436-41.

Even those attracted by the view that the Court's jurisprudence should faithfully and currently reflect "popular understandings of constitutional meaning" or "the country's political values" should be interested in what the nature of those understandings is, how they are formed, and how faithfully they are represented by elected officials. Moreover, to the extent proposals for a fundamental change in the Court rely on a threat to democratic legitimacy, it is presumably relevant to ask how the public views that institution and, in particular, whether there is any evidence of such a threat today. The political science literature has much to offer on both sets of questions, as it does on the claim that regular appointments would solve the supposed problem of politicization of the Court that proponents of change attribute to infrequent, irregular, high-stakes confirmation battles.

There is an extensive literature on what the public knows about the Court, how it comes by that knowledge, and how the knowledge members of the public have about the Court and its decisions translates into support for the institution. Not surprisingly, the controversy over the 2000 presidential election and the Court's role in that election through its decision in *Bush v. Gore*<sup>60</sup> has stimulated a great deal of recent scholarly research on these subjects, refining theoretical questions and furnishing quite current data on public attitudes towards the Court.

Study after study has shown that the public knows very little about the Court or its decisions, but that levels of awareness differ as between the attentive public (who tend to be better educated and more interested in politics and public affairs) and the nonattentive public.<sup>61</sup>

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<sup>60</sup> 531 U.S. 98 (2000).

<sup>61</sup> See, e.g., Gregory A. Caldeira, *Courts and Public Opinion*, in *THE AMERICAN COURTS: A CRITICAL ASSESSMENT* 303, 303 (John B. Gates & Charles A. Johnson eds., 1991) (arguing that the Court's decisions "lack saliency in all but a few situations"); Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in *CONTEMPLATING COURTS* 352, 366 (Lee Epstein ed., 1995) ("[Citizens] are much more likely to become aware of controversial issues that produce substantial and continued media coverage, while remaining ignorant of most other decisions. Only those most consistently interested in politics and the Court are likely to know of the full range of its work and decisions."); Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 *LAW & SOC'Y REV.* 357, 363 (1968) ("Even the kinds of Court decisions that are apt to become most widely known are not particularly visible to a majority of the community."); *id.* at 364 ("People with knowledge about politics and public officials are those most likely to know about the decisions of the Supreme Court.").

In addition, numerous studies demonstrate that most members of the public acquire the knowledge they have about the Court and its decisions from the mass media. Although this is not surprising, it may help to understand a frequent counsel of caution about invoking the public's ignorance. Research has found that the public's knowledge of the Court's decisions varies depending upon a number of factors, including the extent and duration of media coverage and the perceived salience of the contested issue. Salience can be defined either as the perceived relevance to a person's personal circumstances (e.g., race, religion)<sup>62</sup> or to her circumstances as a member of a geographic community.<sup>63</sup>

Gerald Rosenberg has noted that “[t]he positive relationship often asserted between Court decisions and legitimacy depends on a level of public knowledge about the Court that may be missing.”<sup>64</sup> Although I believe his account of the relevant literature neglects an important distinction—that between specific and diffuse support—which I shall discuss, one who has read that literature has difficulty understanding appeals to “popular understandings of constitutional meaning.” Indeed, three considerations—(1) the distinction emerging in the literature between the attentive and nonattentive public, (2) the evidence that only highly salient cases or issues are likely to prompt knowledge among the inattentive public, and (3) the fact that such knowledge relates less to “constitutional meaning” than it does to results<sup>65</sup>—suggest that what we have here is an appeal to the understandings of the portion of the public with which the person making the appeal identifies.<sup>66</sup> Certainly, the evidence offered for the proposition that the peo-

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<sup>62</sup> See Murphy & Tanenhaus, *supra* note 61, at 362 (explaining that the issues most apt to be salient “are clearly the ones that can be viewed in an intensely personal fashion: race, religion, and the security of life and property”).

<sup>63</sup> See Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 97 (2000) (“Most people may not know about most, or even many, of the rulings, but they do hear about those that have some relevance to their community.”). Note also the possibility that “[a]n unusually controversial court decision [may be] able to cross the attention threshold of some of those for whom the judicial system is not a matter of everyday concern.” Richard Lehne & John Reynolds, *The Impact of Judicial Activism on Public Opinion*, 22 AM. J. POL. SCI. 896, 901 (1978).

<sup>64</sup> Rosenberg, *supra* note 54, at 628.

<sup>65</sup> “In fact, evidence suggests that Americans’ view of the Court is driven by their substantive agreement with its decisions.” *Id.*

<sup>66</sup> Cf. Mark A. Graber, *Constructing Judicial Review*, 8 ANN. REV. POL. SCI. 425, 429 (2005) (“Institutional legitimacy is predicated on desirable results, not on jurisprudential methods mastered only by a few elite law professors.”); Nagel, *supra* note 24, at 130

ple prefer constitutional interpretation that focuses on “text and history”<sup>67</sup> pales in comparison with direct evidence of profound general ignorance of the institution, its methods, and the great bulk of its work product among most members of the public.

There is, in fact, some evidence that, when specifically offered choices, the public favors, in general, an approach to the interpretation of the Constitution that gives weight to “[t]he intentions of the people who wrote the Constitution” and to the “Court’s past decisions on similar matters,” far more than they do one that reflects “[w]hether the judges are liberals or conservatives.”<sup>68</sup> In the same study, however, approximately two thirds of the respondents believed that “[w]hat the majority of the public favors” should have either some impact or a large impact on Supreme Court decisions, while close to three quarters of them were of the same opinion as to “[t]he judges’ views of what is good for the public, even if it’s not addressed in the Constitution.”<sup>69</sup> How does one fashion a coherent approach to interpretation from that, and how useful is it with respect to the great constitutional issues of the day? Moreover, what interpretive significance would the average member of the public accord to the intentions of those who *ratified* the Constitution? Would that person agree with James Madison that original intentions must at some point yield to precedent and

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(“As to the empirical claim that the public would push for legalistic values, my own position is that the confirmation process has been dominated by doctrinal and jurisprudential considerations and that this emphasis is unfortunate precisely because it gives excessive influence to elites.”).

<sup>67</sup> Calabresi and Lindgren note:

We think the public has consistently voted since 1968 for presidential candidates who have promised to appoint Supreme Court justices who would interpret the law rather than making it up. Even the Democrats who have won since 1968, Jimmy Carter and Bill Clinton, were from the moderate wings of the Democratic party, and the two Democrats appointed to the Court since 1968 are well to the right of Earl Warren or William Brennan.

Calabresi & Lindgren, *supra* note 2, at 76. On the hazards of trying to derive public opinion about discrete issues from election returns, see, e.g., Barry Cushman, *Mr. Dooley and Mr. Gallup: Public Opinion and Constitutional Change in the 1930s*, 50 *BUFF. L. REV.* 7, 10-11, 76 (2002) (“We must first remember the American people the way they were, not as we might like to imagine them.”).

<sup>68</sup> John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors that Influence Supreme Court Decisions*, 23 *POL. BEHAV.* 181, 185 tbl.1 (2001).

<sup>69</sup> *Id.*

to the “constitutional law” of practice?<sup>70</sup> Finally in this aspect, is originalism itself a “political value,” and is it in any event well calculated to yield results that accord with “the country’s political values”?

In the same group of respondents favoring an interpretive approach that privileges original intent and precedent over ideology, more believed that, in actual practice, ideology has a large impact on Supreme Court decisions than either precedent or the intentions of the Framers.<sup>71</sup> This might suggest that there should be evidence of a problem of democratic legitimacy. For, as the authors of this study observe, “[i]f over time the public (and, especially, the political class) perceives the Court as ‘just another political institution,’ there may be grave consequences for the Court’s legitimacy.”<sup>72</sup> The authors did find that the discrepancies between respondents’ normative preferences and their beliefs about the factors actually influencing the Court’s decisions “detract[ed] from the Court’s overall image.”<sup>73</sup> But, while the strongest negative effect was associated with the intentions of the Framers, the weakest was associated with ideology, suggesting that “the public appears to have by and large resigned itself to this influence.”<sup>74</sup> Moreover, the respondents rated “the performance” of the Court higher than they did that of either the “federal government in general” or the Congress,<sup>75</sup> and both their evaluation of the federal government and of the Court’s performance in the criminal justice area were better predictors of their evaluation of the Court overall than was the “legal factor” (intent and precedent).<sup>76</sup>

Putting to the side questions about what kind of support a question about the Court’s “performance” measures,<sup>77</sup> these studies are

<sup>70</sup> See Richard S. Arnold, *How James Madison Interpreted the Constitution*, 72 N.Y.U. L. REV. 267, 285 (1997) (explaining that Madison “knew that courts are not the only organs of government that make constitutional law”).

<sup>71</sup> See Scheb & Lyons, *supra* note 68, at 185 tbl.1.

<sup>72</sup> *Id.* at 181-82.

<sup>73</sup> *Id.* at 187.

<sup>74</sup> *Id.*

<sup>75</sup> See *id.* at 190 app.

<sup>76</sup> See John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928, 936 (2000).

<sup>77</sup> Scheb and Lyons sought “to avoid the thorny theoretical problem of whether support for the Court can and should be differentiated into ‘diffuse’ and ‘specific’ support” by “focusing on public evaluation of the Court in its most global sense.” *Id.* at 935 n.3. I am inclined to believe that a question asking whether the Court’s “performance is generally poor, fair, good, or excellent,” Scheb & Lyons, *supra* note 68, at 190 app., measures specific support. See Benjamin I. Page, Comment, *The Rejection of Bork*

hardly evidence of a serious problem of legitimacy, and I am aware of no such evidence. To be sure, “legitimacy” is a slippery term in the literature of constitutional law, so much so that Richard Fallon was recently moved to write an article devoted to unpacking that concept.<sup>78</sup> It has the same elusive potential in political science, but far more work, theoretical and empirical, has been done that seeks to bring it to ground. That work is more important to the current inquiry than are discussions of “legitimacy” in constitutional law if only because, in testing theory with evidence, it provides a basis for evaluating the claim that infrequent and irregular vacancies damage the Court’s democratic legitimacy.

That which Fallon refers to as “sociological legitimacy”<sup>79</sup> is akin to what political scientists call “diffuse support,” that is, support for the institution whether or not one agrees with particular products (decisions). Political scientists distinguish diffuse support from “specific support,” that is, support based on particular products (decisions).<sup>80</sup> It is diffuse support, I believe, to which the late Judge Richard Arnold was referring when he stressed, as he often did, the need for the federal courts to have the “continuing consent of the governed,”<sup>81</sup> if they were to preserve the independence necessary for them to make unpopular decisions required by law. Some political scientists do not believe that it is possible to disaggregate specific and diffuse support. Most believe, however, that the distinction is theoretically valuable,

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*Preserved the Court’s Limited Popular Constituencies*, 84 NW. U. L. REV. 1024, 1024 (1990) (remarking that “performance . . . really taps specific support”); *infra* text accompanying note 84.

<sup>78</sup> See Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1789 (2005).

<sup>79</sup> “When legitimacy is measured in sociological terms, a constitutional regime, governmental institution, or official decision possesses legitimacy in a *strong* sense insofar as the relevant public regards it as justified, appropriate, or otherwise deserving of support for reasons beyond fear of sanctions or mere hope for personal reward.” *Id.* at 1795.

<sup>80</sup> See DAVID EASTON, *A SYSTEMS ANALYSIS OF POLITICAL LIFE* 273 (1965); Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992) (“In principle, diffuse support differs from specific support in its sources, greater durability, and more fundamental basis.”).

<sup>81</sup> *E.g.*, Richard S. Arnold, *Judges and the Public*, LITIG., Summer 1983, at 5; see also Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 42-43 (2005).

and there appears to have been progress in designing instruments that permit one to make the separation.<sup>82</sup>

Although the precise nature of the concern about democratic legitimacy is not clear, and even if (pace Judge Arnold) diffuse support is not a good measure of accountability to the public, those scholars who have been most insistent on the distinction between diffuse and specific support acknowledge that there is a dynamic process at work, such that repeated decisions eroding specific support might adversely affect diffuse support.<sup>83</sup> Moreover, polls regarding confidence in leadership seem to measure a combination of specific and diffuse support.<sup>84</sup> Where, then, is the empirical evidence that the Court's standing has suffered to an extent that should concern us because it is currently not accountable to the public or is so regarded by the public? Recent studies show that, to the contrary, the Court enjoys a deep reservoir of goodwill (diffuse support), notwithstanding *Bush v. Gore*.<sup>85</sup>

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<sup>82</sup> See Caldeira & Gibson, *supra* note 80, at 637 n.1 ("We think it possible with careful conceptualization and measurement to keep the two separate."); James L. Gibson et al., *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 356 (2003) (noting that most scholars "recognize a difference at least at the theoretical level"); Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676, 678 (2003) (agreeing with Caldeira and Gibson "that such a distinction is theoretically and empirically feasible").

<sup>83</sup> See Gibson et al., *supra* note 82, at 356 ("Over the long-term, the two types of support should be related (and may converge) . . .").

<sup>84</sup> See *id.* at 357 (suggesting that confidence may measure "something akin to 'presidential popularity,' rather than enduring institutional loyalty"); James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535, 555 (2003) ("[C]onfidence is too much affected by short-term forces").

<sup>85</sup> See Gibson et al., *supra* note 82, at 359 (asserting that the Court "enjoys a reasonably deep reservoir of good will, even after the tumultuous presidential election of 2000"); see generally Herbert M. Kritzer, *The American Public's Assessment of the Rehnquist Court*, 89 JUDICATURE 168 (2005). Professor Kritzer treats as measures of diffuse support responses to questions that other scholars believe tap either specific support or some combination of diffuse and specific support. See *id.* at 169; *supra* text accompanying note 77; *infra* text accompanying note 93. Kritzer's analysis of five sets of time series data leads him to the following conclusion:

What is perhaps most striking about the analysis presented above is that one is likely to draw different conclusions about trends in support for the Supreme Court depending upon which survey series one looks at. It is not even clear that one can draw strong conclusions about whether one group of party identifiers is more supportive than others during a particular period of time. For example, while both the Gallup and Pew series currently show Republicans as more supportive of the Court than are Democrats, there is little difference between Republicans and Democrats in the most recent [National Elections Studies] study. Similarly, while both Gallup and Pew show declining support

Indeed, it enjoys greater diffuse support than Congress.<sup>86</sup> Moreover, “[t]he American people . . . consistently have expressed greater confidence in the Supreme Court and the federal judiciary than in Congress.”<sup>87</sup>

It is possible, of course, to make an argument that Congress itself does not represent public values, because, as Jeb Barnes has pointed out, “(1) elections do not guarantee majoritarian lawmakers and (2) even if members of Congress are perfectly representative of their constituents, taking votes among elected members of Congress does not guarantee majoritarian legislation.”<sup>88</sup> Indeed, Jeffrey Rosen recently opined that the Court’s moderate majority better represents the views of average Americans than either the President or the (highly polarized, bitterly partisan, entrenched by gerrymandering) Congress.<sup>89</sup>

Perhaps both the Court’s current power and its ability to draw on a deep reservoir of diffuse support reflect the instability of the dominant coalition<sup>90</sup> and the extent to which that coalition is out of touch with the “country’s political values.” If so, however, that is hardly an advertisement for a proposed change in the Justices’ tenure, a central premise of which is the ability of the appointment process faithfully to

since 2000, [the] NES [survey] continues to show a relatively steady level of support.

Kritzer, *supra*, at 173-75.

<sup>86</sup> See James L. Gibson et al., *Why Do People Accept Public Policies They Oppose? Testing Legitimacy Theory with a Survey-Based Experiment*, 58 POL. RES. Q. 187, 195 (2005) (“[B]ut the difference is not great.”).

<sup>87</sup> Editorial, *Listening to Judge Lefkowitz*, 88 JUDICATURE 240, 242 (2005).

<sup>88</sup> Jeb Barnes, *Adversarial Legalism, the Rise of Judicial Policymaking, and the Separation-of-Powers Doctrine*, in MAKING POLICY, MAKING LAW, *supra* note 39, at 35, 43. Similarly, “the electoral process may not produce a president and Senate who truly represent the people’s views.” Peretti, *supra* note 32, at 437. It is also possible that the focus should not be on national majorities but rather on “the fact that the substantive outcomes imposed by the Court do frequently conflict with officially registered preferences of majorities within state and local governments.” Nagel, *supra* note 24, at 131. Having dispatched most of the concerns relied on by other proponents of fixed terms, Nagel sees “limiting life tenure [as] a slight and indirect solution to a truly massive problem.” *Id.* at 136.

<sup>89</sup> See Jeffrey Rosen, *Center Court*, N.Y. TIMES, June 12, 2005, § 6, at 17; see also Garrow, *supra* note 17, at 271-72, 274 (noting “mainstream moderation” of the Rehnquist Court). Rosen is developing this idea in a book. See JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA (September 2005 draft) (on file with author).

<sup>90</sup> See Dahl, *supra* note 38, at 294 (explaining that when the dominant coalition is “unstable with respect to certain key policies . . . the Court can intervene . . . and may even succeed in establishing policy”).

translate such values to the Court.<sup>91</sup> Moreover, it hardly seems a sufficient foundation of demonstrated need for a constitutional amendment.<sup>92</sup> In that regard, and ironically, the political science literature on legitimacy suggests the great difficulty that proponents of this change might have in bringing it about. For, whether in the form of a statute (if constitutional) or constitutional amendment, these proposals might be thought to involve a major change of the sort that research indicates is broadly opposed by the American people, whatever their partisan or ideological affiliations. It is questions about just such changes—as opposed to questions about confidence in the job the Court is doing, its performance, or confidence in its leaders—that those scholars who have written the most probing work on legitimacy deem best calculated to tease out differences between diffuse and specific support.<sup>93</sup>

The public might not, however, regard nonrenewable eighteen-year terms as sufficiently fundamental to tap diffuse support, a possibility suggested by research on opposition to FDR's court-packing plan that reveals different views about court packing and mandatory retirement.<sup>94</sup> In all likelihood, it seems to me, that would depend upon how the proposal was framed, and in particular, on whether equal time was given to possible costs and benefits. And it is the question of possible costs, as illuminated by the political science literature, that leads me to doubt the claim that the frequent and predictable appointments occurring under the proposed system of nonrenewable eighteen-year terms, once fully operational, would result in a less con-

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<sup>91</sup> The same is true of an alternative explanation advanced by Thomas Keck, as summarized by Mark Graber: "Few precedential or political foundations presently exist for judicial restraint. Contemporary law is activist and, as the failed Bork nomination demonstrates, the general public supports that activism." Graber, *supra* note 66, at 441 (discussing THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004)).

<sup>92</sup> Noting the possibility that, "in times of severe political polarization, the Supreme Court has some tendency to be more centrist than Congress or the White House," Mark Graber asks whether it would be "wise to tinker with the process for staffing the [C]ourt *before* dealing with the forces underlying political polarization." Posting of Mark Graber, mgrab@gvpt.umd.edu, to The Law And Courts, lawcourts-l@usc.edu (July 12, 2005, 10:26 EST) (on file with author).

<sup>93</sup> See Caldeira & Gibson, *supra* note 80, at 636-41; *id.* at 639 ("[D]iffuse support is opposition to basic structural and functional change."); *supra* note 77.

<sup>94</sup> See Cushman, *supra* note 67, at 71-73 (noting that fifty percent of respondents in a poll opposed court packing, while seventy percent supported mandatory retirement, most at age seventy).

tentious nomination/confirmation process and in less politicization of the Court.<sup>95</sup>

### III. POSSIBLE COSTS OF FREQUENT AND PREDICTABLE APPOINTMENTS

At the outset, I question the premise that lengthening tenures have much to do with, let alone are a primary cause of, the increased politicization of the confirmation process;<sup>96</sup> I also question the claim that Supreme Court confirmation controversies have infected the appointment process for the lower federal courts.<sup>97</sup> Both the relatively noncontroversial confirmations of Justices Ginsburg and Breyer and a comparison of lower court nominations that generated controversy with those that did not suggest much more likely causal influences:

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<sup>95</sup> This regularity in the Supreme Court nomination process should greatly reduce, if not prevent, the intense desire on the part of interest groups and partisans to use what are now infrequent and unpredictable Court vacancies as opportunities to flex their ideological muscles and create new controversies and grudges to feature in their fundraising appeals. With regularity comes routine, and with routine comes less impassioned and more deliberative consideration of nominees.

DiTullio & Schochet, *supra* note 13, at 1141; *see id.* at 1143 (“Viewed objectively, there is little doubt that the uncertainty of expectations has clouded the current process and created a climate of fear and anxiety that has bred contempt and partisan sniping in the judicial confirmation process.”); *see also* Calabresi & Lindgren, *supra* note 2, at 61 (“By creating a predictable schedule of frequent appointments, our proposed amendment should reduce the intensity of the politics associated with confirmations at the Supreme Court level, [as well as perhaps in the lower federal courts].”). As the discussion below demonstrates, these assertions manifest no knowledge of how interest groups actually behave. Moreover, of course, federal court of appeals nominations are frequent and quite predictable (because the great majority of appellate judges take senior status immediately when eligible to do so), a fact that has not prevented controversy with respect to some nominations. *See* MARK SILVERSTEIN, *JUDICIOUS CHOICES: THE NEW POLITICS OF SUPREME COURT CONFIRMATIONS* 128 (1994) (“The pattern of modern American politics virtually assures contentious proceedings in the selection of federal judges.”); *id.* at 164 (“The process of selecting and confirming judges has become thoroughly democratized, and that increases the likelihood of contentious proceedings, whatever the background and quality of the nominee.”).

<sup>96</sup> Calabresi & Lindgren, *supra* note 2, at 39-41; *see also* Carrington & Cramton, *supra* note 2, at 468 (“Supreme Court appointments have become politically contentious not only because the justices exercise great power but because they exercise it for so long.”); DiTullio & Schochet, *supra* note 13, at 1139-44.

<sup>97</sup> *See* Calabresi & Lindgren, *supra* note 2, at 40. In arguing that the “explanation for this strife lies in . . . the enormous power of life tenure, the potential to extend that power through strategic departures, and presidential incentives to nominate young justices,” DiTullio & Schochet, *supra* note 13, at 1141, other proponents of change fail to explain why some appellate court nominations have become so controversial.

the increasingly common practice of Presidents to pursue what Sheldon Goldman calls a policy agenda in making nominations to all federal appellate courts and the Senate's reaction to those nominated pursuant to such an agenda.<sup>98</sup> Potentially affecting both a President's agenda and the Senate's reaction are what Benjamin Page calls "the context of the times,"<sup>99</sup> and the interest group environment in which appointments are made. In any event, lumping Supreme Court and lower court nominations is hazardous from the Senate's perspective,<sup>100</sup> and those who are inclined to see the treatment of Judge Bork as the

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<sup>98</sup> See EPSTEIN & SEGAL, *supra* note 17, at 54-68 (discussing presidential goals); *id.* at 110-15 (discussing the role of ideology in the confirmation process); SHELDON GOLDMAN, PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT THROUGH REAGAN 3-4 (1997) (distinguishing partisan, personal and policy agendas); NANCY SCHERER, SCORING POINTS: POLITICIANS, ACTIVISTS, AND THE LOWER FEDERAL COURT APPOINTMENT PROCESS 6 (2005) (discussing Nixon's "policy-based strategies"); *id.* at 27 ("Simply stated, in the selection and confirmation of lower federal court judges, it is the politicians' pursuit of these policy-oriented strategies . . . that has led to the heightened politicization of the lower federal court appointment process."); SILVERSTEIN, *supra* note 95, 166-71 (discussing the Ginsburg appointment); YALOF, *supra* note 17, at 185 ("[Attorney General Meese's] insistence [in 1987] on the pursuit of policy goals at all costs ultimately dealt a serious blow to the administration's partisan interests."); Sheldon Goldman et al., *W. Bush's Judiciary: The First Term Record*, 88 JUDICATURE 244, 245 (2005) (positing the "central role judicial appointments play in the President's domestic policy agenda").

<sup>99</sup> Nor should we forget the context of the times. Bork, an articulate, energetic, and ideological conservative, was nominated to the Court at a time when it appeared that the entire ideological balance and substantive direction of the Court could easily be tipped. To many, his approval to the Court would have meant the probable overturning of *Roe v. Wade*, reversal of some civil rights decisions, and the establishment of a conservative Court for years to come.

Page, *supra* note 77, at 1028; see also EPSTEIN & SEGAL, *supra* note 17, at 109 (noting as one reason Scalia "breezed through the Senate" the fact that "senators perceived his appointment as being of little consequence to the composition of the Court"); SILVERSTEIN, *supra* note 95, at 5 (arguing that "the measure of characteristics such as 'qualifications' or even 'ideology' is never static but fluctuates over time in response to the political realities of the day"). One of those political realities by the time of the Bork nomination was the growth of interest groups. See YALOF, *supra* note 17, at 160 ("The Bork nomination became a watershed in terms of interest group involvement in the appointment process."); *id.* at 189 ("Encouraged by their success, these and other special interests naturally would vie for influence over future Supreme Court appointments as well."); *infra* text accompanying note 106.

<sup>100</sup> Cf. Stephen B. Burbank, *Politics, Privilege & Power: The Senate's Role in the Appointment of Federal Judges*, 86 JUDICATURE 24 (2002) (discussing the different roles played by the Senate in considering nominations to the various federal courts).

root of all evil should recall President Reagan's judicial appointment agenda.<sup>101</sup>

Just as proponents of change tend to concentrate on formal powers and processes to the exclusion of informal processes and strategic interaction, so do they leave largely out of account (or make unsupported assertions about)<sup>102</sup> the role of interest groups in shaping the environment in which Supreme Court nominations and confirmations take place. Moreover, they give insufficient attention to the potential effect of interest groups and the environment they can create on public support for the Court. I seek to fill that gap, first, by reviewing what empirical research tells us about the incentives and tactics of interest groups in federal judicial appointments, and second, by considering the possible effects of frequent and predictable appointment controversies framed by interest groups in light of the theoretical and empirical literature on legitimacy. That literature suggests to me that, far from being a remedy for an existing or impending problem of legitimacy, the frequent and predictable vacancies occurring under plans for nonrenewable, long-term appointments might create a crisis of legitimacy, cementing the worst tendencies of modern politics.

The work of Jack Walker and his colleagues suggests that interest groups are here to stay, and it also suggests that neither the incentives

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<sup>101</sup> See SILVERSTEIN, *supra* note 95, 121-23 (discussing "[t]he campaign to change the ideological makeup of the Supreme Court" during the Reagan administration); YALOF, *supra* note 16, at 133-67 (discussing Reagan's "pursuit of conservative ideologies"); Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363, 366-67, 396-99 (2003) (same); *supra* note 99.

As convenient as it may be to trace present-day ideological conflict in the judicial appointments process to particular high-profile episodes, however, Senate rejection of Supreme Court nominees was hardly a new phenomenon in 1987. Indeed, statistical analysis suggests that Bork's rejection fits historical trends in the confirmation of Supreme Court justices. Rather, it is conflict over the appointment of circuit and perhaps even district judges that appears to have escalated. Moreover, this escalation was under way before the defeat of the Bork nomination.

David S. Law, *Appointing Federal Judges: The President, the Senate, and the Prisoner's Dilemma*, 26 CARDOZO L. REV. 479, 490 (2005) (footnotes omitted); see also David S. Law & Lawrence B. Solum, *Judicial Selection, Appointments Gridlock, and the Nuclear Option* 36 (Univ. of San Diego Sch. of Law, Legal Studies Research Paper Series, Research Paper No. 07-10, 2005) available at <http://ssrn.com/abstract=791244> ("From this perspective, the high-profile defeat of Robert Bork's nomination . . . was another wholly unsurprising symptom of appointments gridlock.").

<sup>102</sup> See *supra* note 95.

shaping their behavior nor their tactics bode well for the claim that frequent and predictable appointments at two-year intervals would generate less controversy and reduce the politicization of the Court. Walker's work divides interest groups into a number of types: profit, nonprofit, mixed, and citizen.<sup>103</sup> Citizen groups enjoyed the greatest growth in the period he studied.<sup>104</sup> Walker found that "most citizen groups that emerged from social movements in the past have simply faded away once the intense enthusiasms of their followers began to cool, or when a string of policy defeats or compromises caused marginal supporters to lose hope."<sup>105</sup> He also found, however, that in the 1980s,

many of the citizen groups born during the 1960s and 1970s were still in business, with help from their individual and institutional patrons, even though public interest in their causes had declined. These groups now promote concern for their issues and stand ready to exercise leadership whenever there is a new burst of public enthusiasm.<sup>106</sup>

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<sup>103</sup> David C. King & Jack L. Walker, Jr., *An Ecology of Interest Groups in America*, in JACK L. WALKER, JR., *MOBILIZING INTEREST GROUPS IN AMERICA: PATRONS, PROFESSIONS, AND SOCIAL MOVEMENTS* 57, 57 (1991) [hereinafter *MOBILIZING INTEREST GROUPS*].

<sup>104</sup> King & Walker, *supra* note 103, at 63; Jack L. Walker, Jr., *The Mobilization of Political Interests in America*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 19, 34-35; *see also* SILVERSTEIN, *supra* note 95, at 64 ("With the coming of the Burger Court, in the early 1970s, an assortment of these interests—for example, environmentalists, feminists, consumer groups, political reformers—found in the judiciary an attractive alternative to the other branches in the battle to secure their goals."); *id.* at 71 ("Powerful groups from all points along the ideological spectrum now consider a sympathetic judiciary essential to the development and achievement of important policy goals.").

<sup>105</sup> Jack L. Walker, Jr., *The Three Modes of Political Mobilization*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 185, 194.

<sup>106</sup> *Id.* at 195. An important contribution of Walker's work was his response to public choice theory, which posits that, because of the collective action problem, interest groups can come into existence and survive only if they offer personal benefits to members that are sufficiently attractive to overcome that problem, or if their members are coerced into joining (e.g., unions). Walker's work made it clear that patronage from foundations, individuals, and the government itself has been instrumental in the birth and continued existence of many interest groups. *See* David C. King & Jack L. Walker, Jr., *The Origins and Maintenance of Groups*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 75, 85-102; Jack L. Walker, Jr., *Explaining the Mobilization of Interests*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 41, 41-55. He also emphasized the extent to which groups of some sorts seek not personal benefits for their members but collective goods (which is, of course, a threat to the premises of public choice). That led him to suggest that, "[i]nstead of attempting to include nonmaterial incentives in a model seeking to explain collective action, one should ask under what conditions individuals will join groups in order to advance purposive—which is to say collective—

Walker tested the extent to which various types of interest groups follow “inside” strategies (e.g., lobbying in Congress) or “outside” strategies (e.g., appeals to the public), and the reasons why they do so. His findings indicated that, in contrast to most occupational associations (e.g., the ABA), which concentrated on lobbying, most citizen groups followed “outside” strategies to appeal to the public through the mass media and telephone (and after his work was published, electronic mail and mobile text messages).<sup>107</sup>

Perhaps most important for present purposes, Walker found that citizen groups

seeking to further a cause thrive on controversy and must gain the attention of the mass media in order to convince their patrons of the organization’s potency, and also to communicate effectively with their far-flung constituents. The structure and operation of these citizen groups is determined by the requirements of an “outside” strategy of influence.<sup>108</sup>

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goals.” Walker, *supra*, at 47. His answer with respect to citizen groups “supplying purposive benefits” was that they

are very likely to rely heavily upon outside patrons rather than their members for financial support. Presumably, the patrons make investments in groups precisely because they are effective advocates for a cause or because they do a good job of representing the interests of a constituency that the patron wishes to see protected or promoted.

King & Walker, *supra* note 106, at 93; *see also id.* at 101.

<sup>107</sup> See Jack L. Walker, Jr., *Introduction to MOBILIZING INTEREST GROUPS*, *supra* note 103, at 1, 9; Thomas L. Gais & Jack L. Walker, Jr., *Pathways to Influence in American Politics*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 103, 113-14; Thomas L. Gais et al., *Interest Groups, Iron Triangles, and Representative Institutions*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 123, 132. Moreover, “[o]nce either an inside or outside strategy becomes the association’s dominant approach, it is very difficult to move in a new direction.” Gais & Walker, *supra*, at 119.

<sup>108</sup> Walker, *supra* note 107, at 12; *see also* DAVIS, *supra* note 50, at 95 (“Organizationally, groups benefit from controversial nominations.”).

There is a theatrical quality to such fights in Washington that makes short-term national celebrities out of certain activists, such as [Ralph] Neas, who normally spend their time slogging in the C-SPAN trenches. Like a cicada, Neas surfaces once every few years to sing his liberal fight songs for a national audience. And the irony of his life is that the bigger the threat to his ideological worldview, the more enjoyable his job becomes.

Michael Crowley, *Secret Passion*, *NEW REPUBLIC*, Aug. 1, 2005, at 14. Celebrating the growth of interest groups as a means to break down “iron triangles,” Walker found that “citizen groups tried to expand the scope of conflict through the use of the media and other forms of publicity rather than allow policy to be established within the network of subgovernments.” Gais et al., *supra* note 107, at 132.

By mobilizing supporters and making efforts to move conflicts into broader political arenas whenever possible, the citizen groups diminished the autonomy of subgovernments, made policy outcomes less predictable, and forced

If a group is operating in a policy area marked by conflict, one in which many organized groups are advancing different political interests and policy alternatives, both members and patrons will increase their demands for political or purposive benefits in return for group support, and the conflictual environment will produce incentives for interest groups to increase their involvement in all kinds of political action.

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... Groups with a far-flung membership united only by their dedication to a cause ... are naturally drawn toward controversial issues and tactics that will capture the attention of their diffuse membership and demonstrate that they are a consequential group, worthy of continued support.<sup>109</sup>

More recent work by Caldeira, Hojnacki, and Wright in the specific context of federal nominations confirms a number of Walker's findings, while suggesting modifications in others. This research confirms that the groups studied tended not to vary the mixture and proportional use of tactics, although the intensity of use may have differed, in relation to the salience of particular nominations.<sup>110</sup> At the same time, however, the authors did not find any dichotomy between "inside" and "outside" tactics: "Groups generally engage in a wide

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the policy debate into forums open to public view . . . . *Because most of these organizations now have the capacity to remain on the scene, there will no longer naturally be periods of political repose when the traditional interests can reestablish secure subgovernments.*"

*Id.* at 140 (emphasis added). For the view that "the iron triangle concept . . . has never been capable of describing policymaking outside the distributive context," see Daniel McCool, *The Subsystem Family of Concepts: A Critique and a Proposal*, 51 POL. RES. Q. 551, 556 (1998). Proposing a shift from an institutional to a functional perspective, according to which "[p]olicy moves up and down the hierarchy of conflict, and subsystems respond accordingly," *id.* at 565, McCool derives a number of testable hypotheses that could be useful in assessing the conflictual environment of Supreme Court nominations, *see id.* at 565-66.

<sup>109</sup> Gais & Walker, *supra* note 107, at 105.

Citizen groups make policymaking all the more difficult because they frequently sharpen the ideological debate; they have different organizational incentive systems from those of the corporations and trade groups with which they are often in conflict; and they place little emphasis on the need for economic growth, an assumption shared by most other actors.

Jeffrey M. Berry, *Citizen Groups and the Changing Nature of Interest Group Politics in America*, 528 ANNALS AM. ACAD. POL. & SOC. SCI., Jul. 1993, at 30, 36. On the use by interest groups of public confirmation hearings "to gain greater attention for their agendas," see MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENTS PROCESS* 67 (2000).

<sup>110</sup> See Gregory A. Caldeira et al., *The Lobbying Activities of Organized Interests in Federal Judicial Nominations*, 62 J. POL. 51, 52, 62 (2000).

range of activities on all types of federal judicial nominations.”<sup>111</sup> They concluded that “organizations are not participating in nomination campaigns simply to maintain their organizations—that is, to give members or patrons the impression that their dues or contributions are being well spent,” but rather that “they are seriously attempting to provide any and all information that might affect the outcome.”<sup>112</sup> It is therefore no surprise that these authors believe that interest groups are also here to stay in the politics of federal judicial nominations.<sup>113</sup>

As previously noted, if there is a dynamic relationship between specific and diffuse support, it appears that, although diffuse support can insulate the Court from serious damage resulting from an unpopular decision, an accumulation of such decisions may erode diffuse support. Some of the more theoretically sophisticated work in this area attributes the insulating capacity of diffuse support to a “framing effect” whereby unpopular decisions are cushioned (the “bias of positivity frames”) by general views about the Court and the rule of law.<sup>114</sup> Other research suggests that framing of a different sort can adversely affect diffuse support, namely the framing of questions in terms of specific results (e.g., *Bush v. Gore* ended the election con-

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<sup>111</sup> *Id.* at 59. The latter finding led the authors to question “the conventional wisdom about the importance of resources in organizational choice of tactics.” *Id.* at 67; see also SCHERER, *supra* note 98, at 108-32 (discussing strategies and tactics of interest groups involved in the confirmation process).

<sup>112</sup> Caldeira et al., *supra* note 110, at 67. Put otherwise, lobbying—meaning all of the tactics used by interest groups—is not merely about taking positions or engaging in limited action to maintain the organization or gain publicity; instead, lobbying is about winning politically and doing whatever is necessary to do so.” *Id.* at 52.

<sup>113</sup> Caldeira and his colleagues noted:

Some scholars view the organized activity on federal judicial and related nominations in the 1980s and early 1990s as unique, episodic, limited, and sporadic; the groups active on nominations as limited in range, capability, and resources; and the Bork and Thomas nominations as exceptional, somehow different from typical nominations or legislative issues. Our research here suggests the opposite. Organized interests, at least during the 1980s and early 1990s, mobilized often, on a variety of nominations, mustered an impressive array of capabilities and resources, and employed a wide variety of activities on each. . . . The technology may differ somewhat, and, of course, more organized interests exist now, but the essentials of lobbying campaigns appear to be much the same today as in the past.

*Id.* at 67-68; see also DAVIS, *supra* note 50, at 157 (“Clearly, these external players will not go away.”).

<sup>114</sup> See Gibson et al., *supra* note 84, at 553-56 (suggesting positivity frames as a theoretical explanation of findings).

troversy) rather than general or abstract notions (i.e., partisanship) as to which framing does influence specific support.<sup>115</sup>

Putting these two strands of legitimacy research together suggests reason for concern about frequent and predictable Supreme Court appointments in the interest group environment that Walker and subsequent researchers describe. For, the study of federal nominations discussed above, which included five recent Supreme Court nominations (Bork through Kennedy), shows that, in each, citizen groups participated far more than did other types of interest groups and more generally that “citizen groups, professional associations, and institutional advocates [e.g., the Alliance for Justice] dominate the politics of federal judicial nominations.”<sup>116</sup> It is, of course, an empirical question what information and messages such groups try to convey, and it seems likely that some of that information and those messages will vary depending on both the nominee and the audience. In communicating with the public, directly and through the media (with which they typically have “a great deal of credibility”),<sup>117</sup> such groups may couch their concerns (pro or con) in terms of general issues such as ideology. Just as frequently, one imagines, they are likely to be concerned, or to project concern, about results (i.e., this appointment will determine the future of *Roe v. Wade*).<sup>118</sup>

Regular exposure of the public to messages, whether received directly or through the mass media, that frame the Court’s work in terms of results simpliciter could alter the frame through which the public reacts to specific decisions, at the same time affecting diffuse support. That is, diffuse support among the general public might come to behave as if it were specific support, as research has found that it does among elites (the attentive public).<sup>119</sup> This seems particularly likely if the results in question relate to issues salient to the public at large, such as race, religion, and the like. Moreover, recalling that

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<sup>115</sup> See Nicholson & Howard, *supra* note 82, at 690.

<sup>116</sup> Caldeira et al., *supra* note 110, at 56. For a statistical report of these groups’ participation in recent federal appointments, see *id.* at 58 tbl.2.

<sup>117</sup> Berry, *supra* note 109, at 38.

<sup>118</sup> See DAVIS, *supra* note 50, at 103; cf. Anthony Champagne, *Interest Groups and Judicial Elections*, 34 LOY. L.A. L. REV. 1391, 1402 (2001) (“One political action committee . . . ran full-page newspaper ads on the Sunday prior to the election that proclaimed, ‘Will partial birth abortion and same-sex marriage become legal in Idaho? Perhaps so if liberal Supreme Court Justice Cathy Silak remains on the Idaho Supreme Court.’”).

<sup>119</sup> See Caldeira & Gibson, *supra* note 80, at 656 (finding that for many opinion leaders “diffuse support behaves as if it were specific support”).

the same research found greater diffuse support for the Court among those who are less dogmatic,<sup>120</sup> perhaps the ideologically committed should be regarded as a “community” in the same way, and with the same implications for awareness of the Court’s decisions and support for the institution, as the geographical communities that have been subject to public opinion research.<sup>121</sup>

We know that the mass media play an important role in setting the national agenda,<sup>122</sup> and we should question whether the Court is different from the presidency in the effect that greater media exposure has on the amount or variety of public criticism. Indeed, scholars have suggested that “the stability of the Court’s evaluations over time may be a function of insufficient knowledge rather than an enduring level of trust,” leading the authors to “wonder if greater awareness of the Court would result in more volatile evaluations and more problems of enforcement and compliance for an institution whose major currency is legitimacy.”<sup>123</sup> Such a suggestion may seem inconsistent with research finding a correlation between greater awareness of the Court and its work and greater levels of diffuse support.<sup>124</sup> Those findings concern the attentive public, who are most likely to espouse “the belief that judicial decisions are based on autonomous legal principles.”<sup>125</sup> I have suggested that some distinctions between the attentive and nonattentive public might disappear (or that the definition of the “attentive public” might change) with greater attention to the Court that was promoted and framed by interest groups. In that regard, the explanation other scholars have offered for the correlation between awareness and diffuse support involves exposure to “legitimizing messages.”<sup>126</sup> If, on the other hand, greater awareness of the Court were

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<sup>120</sup> “Dogmatism also exerts a direct effect on support: the less dogmatic among our sample tend to lend the Court greater support.” *Id.* at 653.

<sup>121</sup> See Hoekstra, *supra* note 63, at 98 (noting that “there are many types of communities other than geographical”).

<sup>122</sup> See, e.g., Gregory A. Caldeira, *Public Opinion and the U.S. Supreme Court: FDR’s Court-Packing Plan*, 81 AM. POL. SCI. REV. 1139, 1139-40 (1987) (noting the role the mass media played in President Franklin D. Roosevelt’s failure to garner public support for his court-packing plan). For a valuable account of the media’s evolving role in Supreme Court appointments, see DAVIS, *supra* note 50, at 96-102, 142-53.

<sup>123</sup> Franklin & Kosaki, *supra* note 61, at 373.

<sup>124</sup> See Gibson et al., *supra* note 84, at 547-50.

<sup>125</sup> Scheb & Lyons, *supra* note 76, at 929-31.

<sup>126</sup> James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 345 (1998); cf. Scheb & Lyons, *supra* note 68, at 190 (“[T]here is reason to

brought about by delegitimizing messages (i.e., those framed in terms of results), would there not be less diffuse support? Indeed, whatever the dynamic between diffuse and specific support, if the frame were altered, might there not be less of both?<sup>127</sup>

An assessment of the baneful effects that the incentives of, and tactics pursued by, interest groups could have on an appointment process that was put in play not just frequently but predictably should not assume, however, that such groups would be successful in creating the sort of conflictual environment in which they thrive. Again, the appointments of Justices Ginsburg and Breyer are informative. Moreover, it is possible that the existence of predictable appointments would permit politics to play a more constructive role through logrolling, as, according to Kim Scheppele, it does in other countries with high courts whose judges serve fixed terms.<sup>128</sup> The question requires one to consider the tendencies of modern politics and to predict in which direction they are likely to lead. Here again, Jack Walker's work is helpful.

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fear that popular demystification of judicial decision making may further erode popular esteem for the Court.”).

<sup>127</sup> Rather than better and worse craft, justices will be assessed only by those who are for or against some position. If the decisions become understood only as wins and losses, we feed the politicization and gaming of judicial appointments that have become ever more systematic in an effort to predict, and control, the decisions of appointees.

Susan S. Silbey, *The Dream of a Social Science: Supreme Court Forecasting, Legal Culture, and the Public Sphere*, 2 PERSP. ON POL. 785, 789 (2004).

For the “heresy” that “diffuse support is a cause and not a consequence of specific support” through framing and selective perception, see Gibson et al., *supra* note 126, at 356-57; see also Page, *supra* note 77, at 1024, 1024 n.1 (suggesting that specific and diffuse support “influence each other in a complex reciprocal fashion”).

<sup>128</sup> Posting of Kim Lane Scheppele to Balkinization, *Liberals Should Want Rehnquist to Retire Too*, [http://balkin.blogspot.com/2005\\_06\\_26\\_balkin\\_archive.html#11202712770916625](http://balkin.blogspot.com/2005_06_26_balkin_archive.html#11202712770916625) (July 1, 2005 22:22 EST). My colleague Ted Ruger suggests another possible set of incentives that might moderate presidential behavior:

If each 4-year term gets to fill 2 vacancies, every first-term President who contemplates reelection will know for certain that (1) in the run for reelection the public will know that the winner gets 2 more appointments; and that (2) his 2 first term appointments will be exhibits 1A and 1B in public debate over what kind of judges he will choose. My guess is that this might produce a kind of moderating effect that is not now present in our regime of high uncertainty about the timing of retirements . . . .

E-mail from Theodore W. Ruger, Assistant Professor of Law, University of Pennsylvania, to Stephen B. Burbank, David Berger Professor for the Administration of Justice, University of Pennsylvania (July 29, 2005) (on file with author).

Walker, who welcomed the broader participation in government afforded by interest groups, was alert to their impact on parties. He reasoned that, “[w]hen interest groups begin to attract resources and attention to their causes, the parties are forced to alter their programs and reformulate their supporting coalitions to accommodate to shifts in the public’s principal concerns”<sup>129</sup> and that “[t]he leaders of both political parties and interest groups are discovering that ideological commitment, under some circumstances, can serve as a sound basis for long-term organizational membership.”<sup>130</sup> Moreover, he noted research finding “that most of the associations with formal and enduring access to the White House are citizen groups—the type that has enjoyed the greatest growth in the 1960s and 1970s.”<sup>131</sup> Finally for present purposes, Walker concluded that “[a]s the circle of participants in the dialogue over public policy grows and the political system becomes increasingly polarized along ideological lines, each individual interest group will be under pressure to encourage the fortunes of the political party that affords it the best access to government.”<sup>132</sup>

Empirical evidence cannot tell us, of course, whether, in making nominations to the Court under the proposed system of nonrenewable eighteen-year terms, the Presidents of the future would be able to resist the demands of “ideological commitment” and react to interest group pressures as did President Clinton and, perhaps, President George W. Bush in his nomination of Chief Justice Roberts, or whether they would react as have some other recent Republican Presidents.<sup>133</sup> Of course, the same is true of the reaction to nominations by the opposition party in Congress.<sup>134</sup> Even if log-rolling is plausible

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<sup>129</sup> Walker, *supra* note 107, at 14; *see also* Walker, *supra* note 104, at 39.

<sup>130</sup> Walker, *supra* note 104, at 35.

<sup>131</sup> Gais et al., *supra* note 107, at 139.

<sup>132</sup> Mark A. Peterson & Jack L. Walker, Jr., *Interest Groups and the Reagan Presidency*, in *MOBILIZING INTEREST GROUPS*, *supra* note 103, at 141, 156; *see also* SCHERER, *supra* note 98, at 192 (“[Politicians] want to be reelected above all else. This means that politicians must cater to political activists who are responsible for mobilizing voters on the politicians’ behalf. To ignore the activists’ demands is to risk losing the next election.”).

<sup>133</sup> *See* SCHERER, *supra* note 98, at 6 (finding that “the exploitation of ideological litmus tests remains predominantly a Republican elite mobilization strategy”); *infra* note 141 and accompanying text.

<sup>134</sup> *See* SILVERSTEIN, *supra* note 95, at 158 (“The current reality is that the confirmation process now demands a calculation of political variables so complex that even the most experienced and electorally secure senators are often unable to predict the course and outcome of the proceedings.”).

when there are two concurrent vacancies, it may be wishful thinking to imagine it for successive vacancies “in a two-party system with diverse coalitions of the left and right organized into single parties.”<sup>135</sup> It is hard to believe, in any event, that frequent and predictable appointments would not become a fixture of partisan, if not of ideological, politics.<sup>136</sup>

Notwithstanding research results tending to negate the influence of partisanship on diffuse support,<sup>137</sup> one has to wonder whether the same would hold true if the Court became a frequent and predictable issue in, and if its work were framed to suit the needs of, partisan election campaigns. If so, a system resulting in two vacancies in each presidential term could cement a process—treating courts as part, not just of a political system, but of ordinary politics—that should concern not just law professors and political scientists, but the general public. For in such a system, law itself could be seen as nothing more than ordinary politics, and it could become increasingly difficult to appoint people with the qualities necessary for judicial independence—in part because the actors involved would be preoccupied with a degraded

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<sup>135</sup> Scheppele, *supra* note 128. “There are reasons to think that today’s levels of ideological conflict and gridlock have more to do with presidential efforts to push ideologically unpalatable nominees past unwilling senators, than with any inability of repeat play to sustain cooperation among fellow senators.” Law, *supra* note 101, at 506; *see id.* at 510 (“For senators, logrolling goes unremarked as collegiality or business as usual. Such behavior does not, however, characterize the presidency.” (footnote omitted)); SCHERER, *supra* note 98, at 152-53 (“Because the key party and issue activists today place ideological purity over political compromise . . . presidents are much more loath to enter into judicial log-rolls.”).

<sup>136</sup> Kritzer recently explained:

The gap between Republicans and the other two groups [Democrats and Independents] has sharply narrowed in the last couple of years. However, that reflects a sharp drop in the support among Republicans, from a high of 64 percent of Republicans reporting “quite a lot” or a “great deal” of confidence in the Supreme Court immediately after *Bush v. Gore* (the highest level of support among Republicans in the series) to the most recent figure in the high 40s. One can only speculate on the reason for the drop in confidence among Republicans. Is it due to decisions dealing with issues such as gay rights and affirmative action, or the Court’s unwillingness to intervene in the Terry [sic] Schiavo case? Is it due to attacks on the courts generally by Republican and conservative leaders? Unfortunately, it is not possible to pinpoint the reason for this sharp decline.

Kritzer, *supra* note 85, at 171.

<sup>137</sup> *See, e.g.*, Caldeira & Gibson, *supra* note 80, at 643 (finding “no evidence to buttress the argument for a connection between partisanship and institutional support for the Court”); *cf.* Lehne & Reynolds, *supra* note 63, at 899 (finding no significant relationship between partisanship and approval of court performance).

notion of judicial accountability. At the end of the day, judicial independence could become a junior partner to judicial accountability, or the partnership could be dissolved. As recently put by the *Washington Post*:

The war [over Justice O'Connor's successor] is about money and fundraising as much as it is about jurisprudence and the judicial function. It elevates partisanship and political rhetoric over any serious discussion of law. In the long run, the war over the courts—which teaches both judges and the public at large to view the courts simply as political institutions—threatens judicial independence and the integrity of American justice.<sup>138</sup>

Ward Farnsworth's defense of life tenure pays close attention to strategic interaction between the President and Congress. Indeed, a major theme of his article is that the presidential incentives which are a foundation of some proposals for change—such as trying to capture the Court for generations by appointing young Justices—are subject to the braking force of the Senate.<sup>139</sup> Of course, in political circumstances like those obtaining today, that may be thought to depend on the survival of the filibuster as a tool of pivotal nomination politics.<sup>140</sup> Even with the filibuster at risk, the recent nomination of Chief Justice Roberts may reflect precisely the sort of strategic dynamic that Farnsworth emphasizes.<sup>141</sup> If the filibuster did not survive for judicial nomi-

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<sup>138</sup> Editorial, *Not a Campaign*, WASH. POST, July 3, 2005, at B6; see also Editorial, *supra* note 48, at 4 (discussing “the partnership between accountability and independence” and the importance of distinguishing “means that would foster that partnership from those which might destroy it”).

<sup>139</sup> See Farnsworth, *Regulation of Turnover*, *supra* note 6, at 429-30 (discussing presidential decision making “in the shadow of the confirmation process”).

<sup>140</sup> See KEITH KREHBIEL, PIVOTAL POLITICS: A THEORY OF U.S. LAWMAKING 23-24 (1998) (explaining the pivotal politics model, including the filibuster pivot); Law, *supra* note 101, at 513; Law & Solum, *supra* note 101, at 25-45 (applying Krehbiel's model to judicial appointment process and including the nuclear pivot).

<sup>141</sup> A recent piece in the *New Republic* argued:  
 Republicans warn Democrats that their obstructionism will cost them at the polls. Perhaps. But it also appears to have forced Bush into choosing a more conciliatory nominee. Bush seems to have calculated that, with the Iraq war, his failed domestic agenda, and even the Karl Rove scandal, he cannot afford a contentious confirmation battle. He seems to have been genuinely spooked by the Democrats' threat of a filibuster.  
 Ryan Lizza, *Legal Theory*, NEW REPUBLIC, Aug. 1, 2005, at 15, 16; see also Law & Solum, *supra* note 101, at 46 (“A president's political mortality—particularly that of a lame-duck president entering the second half of his last term—can be expected to influence his choice of nomination strategy.”).

nations, the concern about presidential incentives would be more serious,<sup>142</sup> but again, the primary source of concern is not long tenures but rather the President's appointment agenda;<sup>143</sup> the appointment process is not the only means by which the Court is held accountable, and, in light of the evidence from political science that I have reviewed, frequent and predictable vacancies under a system of nonrenewable eighteen-year terms seem more likely to feed the disease of power politics than to cure it.<sup>144</sup>

### CONCLUSION

In recent years there has been substantial progress in bridging the gaps, which once approached chasms, between the legal and political science literatures on courts. Today many scholars in both disciplines are seriously grappling with the traditional wisdom about judges and the judicial process they inherited, and they are thus trying to figure out the roles that law, individual preferences, and strategic behavior

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<sup>142</sup> Yet, "notwithstanding the existence of a nuclear pivot, the threat of a filibuster nevertheless enables minority senators to extract some degree of substantive concessions from the president, in the form of less extreme judicial nominees." Law & Solum, *supra* note 101, at 44.

<sup>143</sup> In a very interesting paper my colleague Ted Ruger explores "judicial preference change," using Justice Blackmun as an exemplar but adducing recent studies suggesting that the phenomenon of Justices "drifting" from the preferences they held at the time of appointment is common. He adumbrates some of the implications of this phenomenon, particularly with respect to the assumption of stable preferences underlying theories of "partisan entrenchment." See Theodore W. Ruger, *Justice Harry Blackmun and the Phenomenon of Judicial Preference Change*, 70 MO. L. REV. 1209 (2005); see also EPSTEIN & SEGAL, *supra* note 17, at 137-39 (discussing preference drift among other causes of declining presidential influence). This perspective thus also calls in question assumptions underlying concern about "locking-up" the Court through the appointment of young Justices, and it illuminates the attempt by presidents to appoint strong ideologues to the bench.

A judge's political beliefs, his or her policy preferences, should not cause concern unless they hold sway with such power as to be impervious to adjudicative facts, competing policies, or the governing law as it is generally understood. When an individual's belief system about social needs or aspirations is that powerful, it seems fair to speak of ideology. And on this understanding, ideology is revealed as the enemy of judicial independence.

Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971, 1999 (1997) (citations omitted).

<sup>144</sup> See Gruhl, *supra* note 16, at 72 ("[P]olitical parties and interest groups would still fight over an [eighteen]-year appointment . . . Perhaps they would even fight harder . . . because they would be able to gear up in advance for the scheduled retirements.")

play in judicial decisions, as they are the relationship between judicial independence and judicial accountability. These scholars understand that the traditional wisdom in both disciplines is simplistic, that there is a place for both normative and empirical scholarship in seeking a more nuanced account that captures what is actually going on in courts, and similarly that there are limits to what both can accomplish, particularly if they proceed in isolation.

In a recent article that considers the politics of the federal courts and the federal judiciary, I lament the tendency toward “posterity worship” and institutional self-aggrandizement of the current Court.<sup>145</sup> I am aware, however, that these are not unprecedented phenomena for that body,<sup>146</sup> as I am that the “current Court” will not remain such for very much longer. Mark Silverstein reminds us that

[e]ven Frankfurter succumbed to the reformer’s frustration with hyperactive judicial review. So great was his disaffection with the Supreme Court’s use of the Fourteenth Amendment to strike down innovative state legislation that in 192[4] he announced in the pages of the *New Republic* his support of the drastic step of repealing that amendment’s due process clause.<sup>147</sup>

As I share the momentary frustration evident in the writings of some proponents of changing Supreme Court tenure, I invite them to share the perspective that a consideration of history and of the lessons of political science can provide. Whether or not scholars should be interested in affecting the course of public policy, when they make proposals that are designed to do that, there is a duty, in my view, to

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<sup>145</sup> Burbank, *supra* note 81, at 60; *see also* Nagel, *supra* note 24, at 132-33. The possibility that the Court’s post-1994 decisions invalidating federal statutes reflected strategic behavior that considered ideological distance from the sitting (rather than the enacting) Congress, *see* Friedman & Harvey, *supra* note 37, at 138-39, does not speak, or at least speak clearly, to this normative question. Moreover, those decisions establish precedents that can be used as a shield for subsequent decisions at a time when the ideological distance is greater. *Cf.* Fallon, *supra* note 78, at 1822 n.153 (“[T]he force of the doctrine of stare decisis lies in its capacity to perpetuate what once was judicial error or to forestall inquiry into the possibility of legal error.”).

<sup>146</sup> *See, e.g.*, WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890-1937 (1994).

<sup>147</sup> SILVERSTEIN, *supra* note 95, at 40 (citation omitted) (alteration of date derived from Editorial, *The Red Terror of Judicial Reform*, NEW REPUBLIC, Oct. 1, 1924, reprinted in FELIX FRANKFURTER ON THE SUPREME COURT 158, 158 n. (Philip B. Kurland ed., 1970); *see also id.* at 49 (“The crisis of the old order had been set in motion by a judicial arrogance founded on a mistaken belief that the resolute exercise of judicial review could withstand the political impulses of the times.”).

escape disciplinary shackles, to discipline theory with evidence, to view contemporary phenomena in historical context, and to resist the natural human inclination to confuse personal preferences with social good.