COMPARING JUDICIAL SELECTION SYSTEMS

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INTRODUCTION

At the Philadelphia Constitutional Convention in 1787, in the midst of a debate over the selection of judges, Benjamin Franklin proposed that lawyers ought to decide who should sit on the federal courts.[1] After all, Franklin quipped, the attorneys would select "the ablest of the profession in order to get rid of him, and share his practice among themselves."[2] Franklin was joking, of course, but the question of who should appoint federal judges was no laughing matter at the Convention. Quite the opposite: it was a — perhaps *the* — major source of contention pertaining to the federal judiciary, with the delegates contemplating several different plans. Those who opposed a strong executive (e.g., George Mason, Elbridge Gerry, and Oliver Ellsworth) wished to follow the dominant state practice and vest appointing authority in Congress.[3] Others (e.g., Alexander Hamilton, James Madison, and Gouverneur Morris) wanted the executive to appoint judges.[4] It was Hamilton who first suggested that the president nominate and the Senate confirm *all* federal judges,[5] but the Convention twice rejected this

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All data used in this Article are available at http://artsci.wustl.edu/~polisci/epstein/. We used SPSS to analyze the data.

[1] *See* DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 55 (1990).

[2] *Id.*

[3] *Id.* at 57-60.

[4] *Id.*

[5] Though Hamilton originally supported a proposal that the president alone make appointments to the courts, he was the first to make the general suggestion that the president nominate judges with the Senate having the authority to "reject or approve" candidates. *See* Charles McC. Mathias, Jr., *Advice and Consent: The Role of the United States Senate in the Judicial Selection Process*, 54 U. CHI. L. REV. 200, 201-02 (1987); Randall R. Rader, *The Independence of the Judiciary: A Critical Aspect of the Confirmation Process*, 77 KY. L.J. 767, 782 (1989). But it was Nathaniel Gorham (from Massachusetts) who proposed, following constitutional practice in his state, that the president nominate with the "advice and consent" of the Senate. *See* FARBER & SHERRY, *supra* note 1, at 57; Rader, *supra* at 782. For more on the constitutional debates surrounding the selection of federal judges, see generally John O. McGinnis, *The President, the Senate, the Constitution, and the Confirmation*

compromise before finally adopting it.[6] Following British practice and that emerging in the states, the new Constitution provided that federal judges should serve during good behavior.[7]

By the end of the convention, the Framers had made two choices with regard to the employment of federal judges: how they would be selected and how long they would retain their jobs. But did they make good choices? Judging from contemporary commentary, especially on the United States Supreme Court, the answer seems to be "no."[8] As Professors David Strauss and Cass Sunstein write, "[i]t is difficult to find anyone who is satisfied with the way Supreme Court Justices are appointed today."[9] That may explain why scholars and other observers have, in their quest to remedy perceived defects in the system, offered mounds of proposals — from advocating that the Senate submit a list of potential nominees to the president with a goal of producing a more intellectually and legally distinguished bench,[10] to recommending that the Senate refrain from taking into account nominees' judicial philosophies with an aim of creating a more independent judiciary.[11]

These are just a few examples; the range of proposals is large and the goals they seek to accomplish are many in number.[12] And yet, for all their variation in substance and purpose, lurking beneath most of them is a simple assumption: formal and informal rules governing the selection and retention of judges "matter." Given that some of the most fervent constitutional debates over the institutional design of the judicial branch — whether they transpired in Philadelphia in 1787,[13]

Process: A Reply to Professors Strauss and Sunstein, 71 TEX. L. REV. 633 (1993); David A. Strauss & Cass R. Sunstein, *The Senate, the Constitution, and the Confirmation Process*, 101 YALE L.J. 1491 (1992).

[6] *See* Rader, *supra* note 5, at 783-85.

[7] *See* FARBER & SHERRY, *supra* note 2, at 60.

[8] *See, e.g.*, Strauss & Sunstein, *supra* note 5.

[9] *Id.* at 1491.

[10] *See, e.g.*, Mathias, *supra* note 5; Glenn Harlan Reynolds, *Taking Advice Seriously: An Immodest Proposal for Reforming the Confirmation Process*, 65 S. CAL. L. REV. 1577 (1992); Strauss & Sunstein, *supra* note 6. Creating a judiciary of "greater distinction" is not the only objective afoot here. Strauss & Sunstein, *supra* note 5, at 1491. Another is to provide the Senate with a meaningful "advice" role without encroaching on the president's power to appoint. Reynolds, *supra* at 1580.

[11] *See, e.g.*, Richard D. Freidman, *Tribal Myths: Ideology and the Confirmation of Supreme Court Nominations*, 95 YALE L.J. 1283 (1986) (reviewing LAURENCE H. TRIBE, GOD SAVE THIS HONORABLE COURT: HOW THE CHOICE OF SUPREME COURT JUSTICES SHAPES OUR HISTORY (1985)); Rader, *supra* note 5.

[12] For summaries of proposals to reform the selection system, see STEPHEN L. CARTER, THE CONFIRMATION MESS: CLEANING UP THE FEDERAL APPOINTMENTS PROCESS 187-206 (1994); GEORGE L. WATSON & JOHN L. STOOKEY, SHAPING AMERICA: THE POLITICS OF SUPREME COURT APPOINTMENTS 215-19 (1995).

[13] *See* LEE EPSTEIN & THOMAS G. WALKER, CONSTITUTIONAL LAW FOR A CHANGING

or in Moscow in 1993-94[14] — implicated not its power or competencies, but who would select and retain its members, political actors apparently agree.[15]

AMERICA: INSTITUTIONAL POWERS AND CONSTRAINTS 58-60 (3d ed. 1998); FARBER & SHERRY, *supra* note 1, at 51-77.

[14] *See* Alexander Blankenagel, *The Court Writes Its Own Law*, E. EUR. CONST. REV., Summer/Fall, 1994, at 74, 75; Herbert Hausmaninger, *Towards a "New" Russian Constitutional Court*, 28 CORNELL INT'L L.J. 349, 368 (1995).

[15] *See generally* EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES (1944) (tracing controversies over judicial selection and tenure back to the fourth century B.C.). For examples and discussions of particular debates, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 323-39 (1973); RALPH A. WOOSTER, THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850-1860, at 64-80 (1969); Paul D. Carrington, *Judicial Independence and Democratic Accountability in Highest State Courts*, L. & CONTEMP. PROBS., Summer 1998, at 79; Anthony Champagne, *Judicial Reform in Texas*, 72 JUDICATURE 146 (1988); Anthony Champagne & Judith Haydel, *Introduction*, *in* JUDICIAL REFORM IN THE STATES 1 (Anthony Champagne & Judith Haydel eds. 1993); A. John Pelander, *Judicial Performance Review in Arizona: Goals, Practical Effects and Concerns*, 30 ARIZ. ST. L.J. 643 (1998); John M. Roll, *Merit Selection: The Arizona Experience*, 22 ARIZ. ST. L.J. 837 (1990); Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 U. PA. L. REV. 1104 (1976); Malcolm Smith, *The California Method of Selecting Judges*, 3 STAN. L. REV. 571 (1951); Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1 (1995); Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135; Samuel Latham Grimes, Comment, *"Without Favor, Denial, or Delay": Will North Carolina Finally Adopt the Merit Selection of Judges?*, 76 N.C. L. REV. 2266 (1998); Glenn C. Noe, Comment, *Alabama Judicial Selection Reform: A Skunk in Tort Hell*, 28 CUMB. L. REV. 215 (1997-1998).

Why institutions governing selection and retention engender such controversy is an interesting question, with no shortage of answers. But surely a principal one is that political actors and the public alike believe these institutions will affect the type of men and women who will serve and, in turn, the choices they, as judges, will make. Hence, the controversies are not so surprising, nor is the immense scholarly and public interest in the general subject of judicial selection. This interest has been manifest for decades. As Haynes noted in 1944, "[w]hole shelves could be filled with the speeches, debates, books and articles that have been produced . . . dealing with the choice and tenure of judges." HAYNES, *supra* at 4-5. Writing nearly forty years later, Philip Dubois made a similar observation: "[I]t is fairly certain that no single subject has consumed as many pages in law reviews and law-related publications over the past fifty years as the subject of judicial selection." Philip L. Dubois, *Accountability, Independence, and the Selection of State Judges: The Role of Popular Judicial Elections*, 40 SW. L.J. (Special Issue), May 1986, at 31, 31.

What is surprising, though — as even a glance at the writings of which Haynes and Dubois speak would reveal — is that the studies focus almost exclusively on the selection of American judges; with few exceptions, comparative work is virtually non-existent. *But cf.* MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES (1988); Burton Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577 (1989); John Bell, *Principles and Methods of Judicial Selection in France*, 61 S. CAL. L. REV. 1757 (1988);

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As do we. Indeed, we invoke the assumption that institutions "matter" as the centerpiece of our attempt to examine two goals that seem especially important to scholars offering proposals to reform the existing rules for the appointment and retention of federal jurists: creating and sustaining an (1) intellectually and legally distinguished and (2) a politically independent bench.

Our interest in so doing lies not in debating whether these goals are worthy (though we believe that they are), that they fit with the intent of the Framers (though we believe that they do), or that the current institutions governing judicial selection and retention meet them (though we believe that they do not). What interests us rather is this: assuming that we desire to design formal rules that would maximize the achievement of a distinguished and independent bench, what would those rules look like?

To address this question, we need not create new rules out of whole cloth. For the world's democracies have devised, in the form of formal constitutional provisions and laws, a number of responses to the query we propose — responses that the vast majority of American scholars have not contemplated.[16] In light of chronic complaints with the modes of appointment and retention of U.S. state and federal jurists,[17] this void in our thinking is not just surprising; it is also unfortunate. For, before we weigh the sorts of rules (much less the wholesale changes or even mere alterations in the existing rules that some scholars and policy makers have proposed)[18] that might induce particular outcomes — be those outcomes a more distinguished judiciary, a more independent one, or both — ought we not to consider the range of existing possibilities?

Believing that the answer to this question must be in the affirmative, we undertake that consideration here. Specifically, we use the results of an inventory we conducted of formal judicial selection and retention systems currently in use in democratic societies throughout Europe to shed light on the sorts of institutions that may lead to a more distinguished and independent judiciary here in the United

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David J. Danelski, *The People and the Court in Japan*, *in* FRONTIERS OF JUDICIAL RESEARCH 45 (Joel B. Grossman & Joseph Tanenhaus eds., 1969); George H. Gadbois Jr., *Selection, Background Characteristics, and Voting Behavior of Indian Supreme Court Judges, 1950-1959*, *in* COMPARATIVE JUDICIAL BEHAVIOR 221 (Glendon Schubert & David J. Danelski eds., 1969); David J. Meador, *German Appellate Judges: Career Patterns and American-English Comparisons*, 67 JUDICATURE 16 (1983); Fred L. Morrison, *The Swiss Federal Court: Judicial Decision Making and Recruitment*, *in* FRONTIERS OF JUDICIAL RESEARCH, *supra* at 133; T. Leigh Anenson, Note, *For Whom the Bell Tolls . . . Judicial Selection by Election in Latin America*, 4 SW. J.L. & TRADE AM. 261 (1997). We know practically nothing about how the various mechanisms for the appointment and retention of jurists elsewhere operate; we do not even have a good sense of the range of alternatives invoked by societies outside the United States.

[16] *See supra* note 15 for the limited exceptions.

[17] *See supra* notes 9-11 & 15.

[18] *See supra* notes 10-12.

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States. In Part I of this essay, we explain in some detail how we carried out the inventory, with specific emphasis on what countries we included, on what courts we focused, and from where we gathered our data. Next, in Part II, we turn to the goal of creating and preserving a legally and intellectually distinguished judiciary. In so doing, we focus on institutional provisions abroad governing *qualifications* for appointment to the bench and for maintaining a judicial seat — in other words, rules that the American Framers did not explicate with any degree of specificity. Part III considers the objective of devising an independent bench. Here we explore the various rules promulgated in Europe pertaining to the retention of justices, which range considerably — from life tenure to limited service to renewable terms. The analysis here, as well as in Part II, leads to a straightforward conclusion: if creating and sustaining an (1) intellectually and legally distinguished and (2) politically independent bench are goals that political actors want to maximize, they should consider taking cues from their colleagues in other democracies and devise different institutions for selecting and retaining American justices.

I. A COMPARATIVE INVENTORY OF INSTITUTIONS GOVERNING THE SELECTION AND RETENTION OF JUSTICES: SOME METHODOLOGICAL NOTES

Undergirding this essay is the idea that institutions governing the selection and retention of justices abroad can help shed light on the sorts of rules we ought to adopt in the United States if we hope to maximize the attainment of an intellectually and legally distinguished and politically independent federal bench. Animating this idea required us to collect data on those institutions — that is, to conduct inventory of rules in use elsewhere.

In attempting to conduct this inventory, three questions loomed large: (1) what countries to include; (2) on what courts to focus; and (3) from where should we collect the data? What follows explains the answers we reached.

A. *Countries Included*

Nearly 200 countries exist in the world today, and we could have included virtually all of them in our study. We did not do so, however, opting instead to focus on twenty-seven European nations[19] that are parliamentary or presidential democracies,[20] and that have courts with the power to review government acts to

[19] The twenty-seven countries are: Albania, Armenia, Austria, Azerbaijan, Belarus, Bulgaria, Czech Republic, Croatia, Estonia, France, Georgia, Germany, Hungary, Iceland, Ireland, Italy, Latvia, Lithuania, Macedonia, Malta, Moldova, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine.

[20] *See* WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES (George Thomas Kurian ed., 1998) [hereinafter WORLD ENCYCLOPEDIA] (describing all but three countries — Armenia, Georgia, and Slovakia — of interest here as "parliamentary democracies,"

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determine their compatibility with the nation's constitution. We chose to focus on these societies for several reasons, not the least of which is that there is variation in the age of their contemporary constitutional documents (specifically, of provisions dealing with their courts), ranging from Austria (1929) to Albania (1998).[21] Such variation enables us to explore both older and newly devised answers to our primary research question. Yet another reason for our focus on Europe is that information on these countries is available from a number of sources, permitting an inference of reliability that we cannot make for many nations in other regions.[22]

B. *Courts Investigated*

When it comes to the Constitution, Americans are a proud bunch. They may point out that it is the oldest surviving of such documents in the world today, that many societies have looked to it when drafting their own charters, or even that countries have adopted its provisions verbatim. The latter is certainly true with regard to particular features of the U.S. Constitution, but it does not hold true for judicial selection and retention. In fact, many democratic nations have rejected the choices made by the American Framers, adopting instead a multitude of other schemes, such as "parity" in selection[23] and renewable terms for retention.[24]

Why the various societies made the choices they did has, in all likelihood, a good deal to do with the aims they had in mind for their courts. The institutional designers in many nations did not have the same vision for their highest constitutional courts as did the majority of America's founders. So, for example, while the U.S. Framers gave federal jurists life tenure presumably to maximize judicial independence, other nations opted for renewable terms presumably to maximize accountability.

Selection and retention mechanisms were not the only ways in which democratic societies elsewhere departed from the American framework. Another critical distinction comes in the types of courts they created to exercise

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including the United States).

[21] Actually one of the oldest and newest constitutions in our sample is Latvia's, which was adopted in 1922 but substantially amended and revised in 1998. *See* LAT. CONST., *at* http://www.vernet.lv/VT/constitution.html (last visited Nov. 15, 2001).

[22] We return to the subject of data sources below in Section C.

[23] Under "parity systems", various actors are able to nominate a specified number of judges. So, for example, in Georgia, "[t]hree members of Constitutional Court shall be appointed by the President, three members shall be elected by the Parliament by at least three fifth [sic] of the total number of deputies and three members shall be designated by the Supreme Court of Georgia." The Constitutional Court Law of Georgia, ch. 2, art. 6 (1996) (Geor.), *available at* http://www.constcourt.gov.ge/lcourte.html.

[24] For more on renewable terms, see *infra* Table 5 and accompanying text.

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constitutional review. While all courts in the U.S. federal system (and those abroad modeled after it) can review acts to determine their compatibility with constitutional documents (the "American" model), in many other nations only those tribunals designated as constitutional courts (or some variant on that title) can do so; the "ordinary" tribunals cannot (the "European" model).

This may be the most fundamental difference between the two *basic* models of constitutional review but many others exist, with Table 1 denoting those most prominent in the literature.[25] Appreciating the distinctions may be best accomplished through an example of how a constitutional case might proceed in the United States (and other countries that pattern their courts on the American system) and in Russia (and other countries that invoke a similar version of the European model).[26]

Assume that the United States Congress passes a piece of legislation outlawing the burning of the American flag, and that the Russian Parliament enacts a similar law. Further assume that individuals in both countries desire to challenge their respective laws on constitutional grounds. In America, the individual would have to present a real case or controversy, one in which she would have a personal and real stake in the outcome.[27] To create such a dispute, she might violate the law by burning an American flag, having herself arrested, and ultimately facing trial in a federal district court. If she lost there, she might appeal to a U.S. Court of Appeals. Finally, assuming that the circuit court affirmed the trial judge's decision, she could attempt to attain review in the U.S. Supreme Court, though her chances of convincing the justices to grant *certiorari* border on the trivial.[28]

In Russia, our hypothetical litigant (who may be an ordinary citizen or a part of the government, including a member of the Parliament that passed the law or even the president) need not violate the law to mount a challenge to it, nor would he

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[25] We stress "basic" because, while the similarities among courts within each classification may be greater than their differences, important variations do exist. *See* Alec Stone, *Abstract Constitutional Review and Policy Making in Western Europe*, *in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 41 (Donald W. Jackson & C. Neal Tate eds., 1992). Indeed, with regard to the European system (also called the "Austrian" or "Kelsen" system), some scholars distinguish between the German and French models. In the former, ordinary citizens can file constitutional complaints, most of which are concrete disputes that address the ex post constitutionality of statutes; under the French model, only specified state actors can bring constitutional cases, which the court can address only in the abstract and only before the statute under review goes into effect. Most European constitutional courts follow one or the other of these models, or are hybrids. *See* Lee Epstein et al., *The Role of Constitutional Courts in the Establishment and Maintenance of Democratic Systems of Government*, 36 LAW & SOC'Y REV. (forthcoming 2002).

[26] We adapt the discussion in the following paragraphs from Epstein et al., *supra* note 25 (manuscript at 4, *available at* http://artsci.wustl.edu/~polisci/epstein/research/concts.pdf).

[27] *Id.*

[28] Or roughly 1%. *Id.*

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begin his case in a lower "ordinary" court. Because he is alleging that the act violates Russia's constitution, because the ordinary courts do not decide constitutional cases, and because the only court that does decide constitutional cases — Russia's Constitutional Court — does not require concrete controversies to render decisions, our litigant could take his case directly to that court. The only similarity of note between his plight and that of his American counterpart lies in his chances of review: the Russian Constitutional Court is even more discretionary than the U.S. Supreme Court, deciding in recent years less than 0.3% of the petitions it receives for review.[29]

Table 1: Key Characteristics of Court Systems[30]

	American System	European System
Institutional Structure (Who has the power to engage in judicial review?)	*Diffused.* Ordinary courts can engage in judicial review, that is, they can declare an act unconstitutional.	*Centralized.* Only a single court (usually called a "constitutional court" [CC]) can exercise judicial review; other courts are typically barred from so doing, though they may refer constitutional questions to the CC.
Timing (When can judicial review occur?)	*Ex Post.* Courts can only exercise judicial review after an act has occurred or taken effect.	*Ex Ante and Ex Post.* Many CCs have ex ante review over treaties; some have ex ante review over governmental acts; others have both ex ante and ex post review, while still others have either but not both.
Type (Can judicial review take place in the absence of a real case or controversy?)	*Concrete.* Courts can only resolve concrete cases or controversies.	*Abstract and Concrete Review.* Most CCs can exercise review in the absence of a concrete case or controversy; many can exercise concrete review as well.
Standing (Who can initiate disputes?)	Litigants, engaged in a real case or controversy, who have a personal and real stake in the outcome, can bring suit.	The range can be large, from governmental actors (including executives and

[29] *Id.*

[30] *See id.* (manuscript at 4 tbl. 1).

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What do these distinctions mean for our inventory? Primarily, they forced us to consider what sorts of courts to include in it. While many possibilities presented themselves, given the key difference between the two models — namely, whether constitutional review is centralized or decentralized — we thought it was most prudent to focus only on rules governing the highest constitutional courts (*e.g.*, "supreme courts" in American-type systems and "constitutional courts" in European ones) in the societies in our sample. In this way, we avoid mixing apples with oranges, though in our analysis, we remain sensitive to the differences in "supreme" and "constitutional" courts and illuminate them where they seem particularly relevant.

C. *Sources of Data*

Were it the case that we could gather all the requisite data from constitutions, our task would be easy; certainly easy enough to include virtually every country in the world in our inventory. Unfortunately, because these documents do not always reflect changes that have come about in selection mechanisms over time, nor do they necessarily supply all the details our inventory requires, we could not limit our search to them. Instead, we needed to augment it by gathering various laws promulgated by legislatures and other bodies to structure their courts. Here our luck improved since the vast majority of courts included in our study maintain web sites containing the relevant documents. When we could not locate the information we needed from these sites or other primary materials, or when the formal rules were not entirely transparent, we e-mailed court personnel, who were typically quite cooperative, and/or consulted secondary sources.[31]

Accordingly, we feel confident that our inventory provides a reliable account of rules governing judicial selection and retention *circa* 2001.[32] With this data, we begin our exploration of the two goals of specific concern here: creating and sustaining (1) an intellectually and legally distinguished and (2) politically

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[31] For sources available on the Internet, see Constitutional Courts — Presentations, *at* http://artsci.wustl.edu/~polisci/epstein/courses/conct/asm1.html (last visited Sept. 21, 2001).

[32] We emphasize this date because institutions pertaining to the appointment and retention of judges are not static, but rather, can change as a result of various political, legal, social, or economic factors. This is true in America, where, on average, states have altered their selection systems 4.8 times; only six states have made no changes in the way they select and retain their state supreme court justices. *See* Lee Epstein et al., Selecting Selection Systems (Oct. 2, 2000) (paper presented at the 2000 annual conference on the Scientific Study of Judicial Politics, Columbus, Ohio), *at* http://www.artsci.wustl.edu/~polisci/epstein/conference/archive00/EpsteinKnight.pdf. This is true throughout the world as well. For example, in Russia, constitutional court justices appointed in 1991 could expect to hold their jobs for life but those selected after the adoption of the new constitution in 1993 were granted only a single, limited term. *See* Epstein et al., *supra* note 25 (manuscript at 17).

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independent judiciary.

II. CREATING AND SUSTAINING AN INTELLECTUALLY AND LEGALLY DISTINGUISHED U.S. SUPREME COURT

While scholars may debate precisely what the Framers had in mind when they drafted provisions relating to the federal courts,[33] little doubt exists that they hoped to attract the intellectually and legally distinguished to the bench. Indeed, they rejected several proposals regarding the appointment of judges (vesting the power in the president or the Senate alone, for example) at least in part because they thought such proposals would lead to the appointment of unqualified jurists.[34] Housed in Article II of the U.S. Constitution is the one mechanism they seemed to think would accomplish that end: a unique system of judicial appointment, whereby the president would nominate and the Senate confirm federal judges.[35]

But that is all the Constitution says about judicial selection. The Framers gave no substantive content to the words "advice and consent"; they provided no clear standards for the president and Senate to follow to ensure the selection of high-quality justices and the preservation of a bench of great distinction, despite their obvious interest in achieving those ends.

As our discussion below reveals, many of the nations in our survey did not go for such ambiguity. Rather, they attacked the problem before appointment (qualifications for office) and after nominees attained a seat on their highest court (retirement provisions).

A. *Qualifications for Office*

When the Framers drafted the U.S. Constitution, they inserted qualifications for all elected offices. To wit:

(1) Senators must be at least thirty years old and have been a citizen of the United States not less than nine years;[36]
(2) Representatives must be at least twenty-five years old and have been a citizen not less than seven years;[37]
(3) Every member of Congress must be, when elected, an inhabitant of the

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[33] *Compare, e.g.*, Strauss & Sunstein, *supra* note 5, *with* McGinnis, *supra* note 6.

[34] *See* Mathias, *supra* note 6, at 202; Strauss & Sunstein, *supra* note 5, at 1496-97.

[35] U.S. CONST. art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court.").

[36] U.S. CONST. art. I, § 3, cl. 3.

[37] U.S. CONST. art. I, § 2, cl. 2.

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state that he or she is to represent;[38]

(4) No one may be a member of Congress who holds any other "Office under the United States";[39]

(5) Presidents must be natural-born citizens who are at least thirty-five years old and have been residents of the United States for at least fourteen years.[40]

But when it came to requirements for the one branch of government composed of non-elected officials — the federal judiciary — the Framers were notably silent; nominees for the bench need not have even read in the law,[41] much less hold a law degree.

With the exception of France, all twenty-seven nations[42] in our sample took a different tack, with their constitutions or laws specifying qualifications for office.[43] In some instances the relevant provisions are no more detailed than Georgia's, which simply requires that a candidate for its constitutional court be a citizen "with the high legal education, who has attained the age of 35."[44] In others, the list of qualifications for office is long indeed — as is the case in Iceland:

> Only a person who fulfils the following conditions may be commissioned to the office of Supreme Court judge:
>
> (1) Has attained the age of 35 years.
>
> (2) Is an Icelandic national.
>
> (3) Has the necessary mental and physical capacity.

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[38] U.S. CONST. art. I, § 2, cl. 2.; U.S. CONST. art. I, § 3, cl. 3.

[39] U.S. CONST. art. I, § 6, cl. 2. In addition, the Fourteenth Amendment states that no person may be a senator or a representative who, having previously taken an oath as a member of Congress to support the Constitution, has engaged in rebellion against the United States or given aid or comfort to its enemies, unless Congress has removed such disability by a two-thirds vote of both houses. U.S. CONST. amend. XIV, § 3.

[40] U.S. CONST. art. II, § 1, cl. 5.

[41] *Cf.* LEE EPSTEIN ET AL., THE SUPREME COURT COMPENDIUM 265 (2d ed. 1996):

> During the early years of the nation's history it was common for lawyers to be trained by 'reading the law' rather than attending law school. This was accomplished through self-study by serving as an apprentice under an experienced lawyer. Only in the more modern period have justices trained in a formal law school setting.

[42] Including all three with American-type supreme courts: Iceland, Ireland, and Estonia — although the latter has a constitutional chamber within its supreme court.

[43] *See* WORLD ENCYCLOPEDIA, *supra* note 20.

[44] The Constitutional Court Law of Georgia, ch. 2, art. 7 (1996) (Geor.), *available at* http://www.constcourt.gov.ge/lcourte.html.

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(4) Is legally competent to manage his or her personal and financial affairs, and has never been deprived of the control of his or her finances.
(5) Has not committed any criminal act considered to be infamous in public opinion, or evinced any conduct detrimental to the trust that persons holding judicial office generally must enjoy.
(6) Has completed a graduation examination in law, or graduated from a university with an education deemed equivalent thereto.
(7) Has for a period not shorter than three years been a district court judge, Supreme Court lawyer, professor of law, commissioner of police, magistrate, Director of Public Prosecutions, Assistant Director of Public Prosecutions, public prosecutor, Director General of a Government Ministry, Chief of Office at the Ministry of Justice, or Ombudsman, or has for such period discharged a similar function providing similar legal experience.
(8) Is deemed capable to hold the office in the light of his or her career and knowledge of law.

A person who is, or has been, married to a Supreme Court judge already in office, or a person related to such judge by blood or marriage by ascent or descent, or in the second sideline, may not be commissioned to the office of a Supreme Court judge.[45]

Though this provision is atypical in length and specificity, one feature of it is not: the requirement of legal experience. Whether as a judge, professor, or government attorney, twenty-one of the twenty-seven countries in our sample (77.8%) mandate some service — with the mean number of years being nearly nine.[46] If we focus only on those twenty-one nations requiring experience, the mean jumps to twelve.[47]

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[45] Act on the Judiciary, ch. 2, § 4 (1998) (Ice.), *available at* http://brunnur.stjr.is/interpro/dkm/ dkm.nsf/pages/eng_jud_act.

[46] *See infra* Figure 1. The laws vary considerably on the type of legal experience they require. We chose to focus on these three because they appear, in various combinations, in the constitutional documents of many of the countries under consideration here.

[47] With a standard deviation of 5.1. *Id.*

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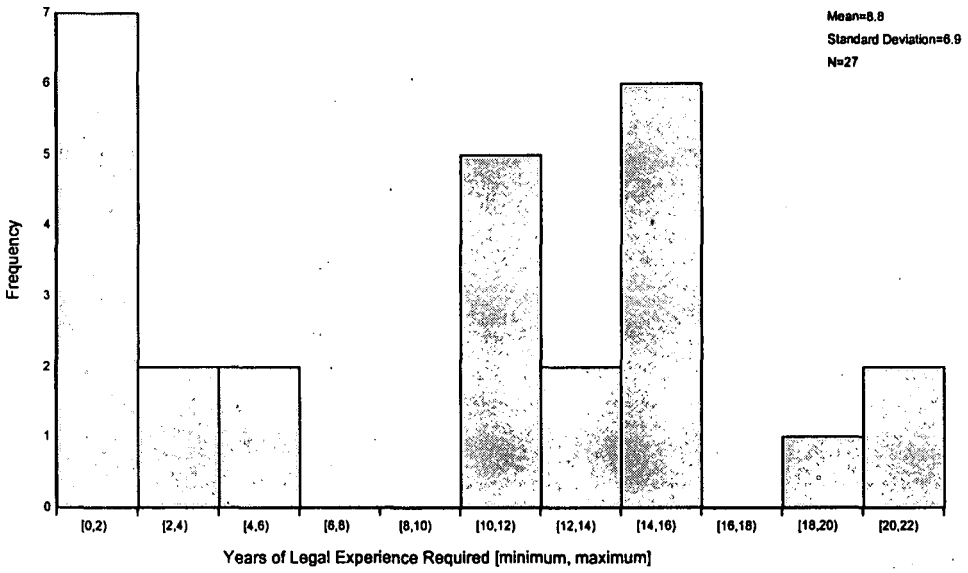
Figure 1: Years of Legal Experience Required for Service as a Justice in 27 European Nations (Histogram)



But does such a requirement ensure an intellectually and legally distinctive bench? This is an exceptionally difficult question to answer — especially in the context of other nations. What we can do, however, is consider how this criterion — legal experience as a judge, law professor, or government attorney for twelve years (the mean number of years for countries requiring service) — would have affected nominees to the U.S. Supreme Court. Would it have eliminated truly outstanding jurists? Were those with the requisite experience particularly prominent members of the Court?

To address these questions, we have amassed a database on the legal service — whether on federal or state benches, in the nation's law schools, or in government — of the forty-seven associate justices appointed to the U.S. Supreme Court since 1900.[48] We chose to focus exclusively on associate justices because many countries have devised selection mechanisms and qualifications for their chief justices (sometimes called chairs or presidents) that are distinct from those invoked to pick associates. We consider only the post-1900 period to level the playing field, as fewer than five justices appointed prior to the turn of the century even possessed a

[48] The raw data come from EPSTEIN, *supra* note 41, at 252 tbl. 4-4, 272 tbl. 4-6, 284 tbl. 4-8 & 296 tbl. 4-9.

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law degree, a formal requirement in virtually every country in our sample.[49]

Table 2 displays the basic results of our efforts. Using the criterion invoked on average by the nations in our sample — twelve years of legal experience — note that just fifteen of the forty-seven associate justices (31.9%) would have had sufficient service to attain nomination to a European constitutional court. Certainly, several of those fifteen often appear on lists of "great" justices (e.g., Oliver Wendell Holmes, Jr.,[50] Benjamin Cardozo[51]) but the same holds true for at least some of the thirty-two who do not meet the criterion (e.g., Louis Brandeis,[52] Hugo L. Black[53]).

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[49] Only fifteen even attended law school, much less graduated; the balance "read the law," which was quite common during the early years of the country's history. *See supra* note 41.

[50] *See* SIDNEY H. ASCH, THE SUPREME COURT AND ITS GREAT JUSTICES 83-99 (1971); ALBERT P. BLAUSTEIN & ROY M. MERSKY, THE FIRST ONE HUNDRED JUSTICES 37 (1978); JOHN P. FRANK, MARBLE PALACE 43 (1958); ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 4 & 31 n.2 (1938); Robert C. Bradley, *Who are the Great Justices and What Criteria Did They Meet?*, *in* GREAT JUSTICES OF THE U.S. SUPREME COURT 1, 14-18 tbls. 1-5 (William D. Pederson & Norman W. Provizer eds., 1993); George R. Currie, *A Judicial All-Star Nine*, 1964 WIS. L. REV. 3, 19-23; Felix Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 783 (1957); James E. Hambleton, *The All-Time, All-Star, All-Era Supreme Court*, 69 A.B.A. J. 463, 464 (1983); Bernard Schwartz, *The Judicial Ten: America's Greatest Judges*, 1979 S. ILL. U. L.J. 405, 407, 420-24 (1979).

[51] *See* ASCH, *supra* note 51, at 143-59; BLAUSTEIN & MERSKY, *supra* note 50, at 37; FRANK, *supra* note 50, at 43; POUND, *supra* note 50, at 4 & 31 n.2; Bradley, *supra* note 50, at 14-16 tbls. 1-3, 18 tbl. 5; Frankfurter, *supra* note 50, at 783; Hambleton, *supra* note 50, at 464; Schwartz, *supra* note 50, at 407, 424-28.

[52] *See* ASCH, *supra* note 50, at 103-16; BLAUSTEIN & MERSKY, *supra* note 50, at 37; FRANK, *supra* note 50, at 43; Bradley, *supra* note 50, at 14-16 tbls. 1-3, 18 tbl. 5; Currie, *supra* note 50, at 23-27; Frankfurter, *supra* note 50, at 783; Hambleton, *supra* note 50, at 464.

[53] *See* ASCH, *supra* note 50, at 189-203; BLAUSTEIN & MERSKY, *supra* note 50, at 37; Bradley, *supra* note 50, at 14-18 tbls. 1-5; Hambleton, *supra* note 50, at 464; Stuart S. Nagel, *Characteristics of Supreme Court Greatness*, 56 A.B.A. J. 957, 957 (1970); Schwartz, *supra* note 50, at 407, 428-31.

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Table 2: Prior Legal Experience of Associate Justices of the U.S. Supreme Court, 1900-2001

Justice	Years as a Judge[54]	Years as a Law Professor[55]	Years as a Government Attorney[56]	Does Justice Meet the 12-Year Experience Criterion?
Breyer	10	13	9	Yes
Cardozo	19	0	0	Yes
Clark	0	0	17	Yes
Frankfurter	0	27	8	Yes
Ginsburg	13	17	0	Yes
Holmes	20	1	0	Yes
Kennedy	12	0	0	Yes
Lurton	26	0	0	Yes
O'Connor	7	0	5	Yes
Rutledge	4	20	0	Yes
Scalia	4	12	4	Yes
Souter	13	0	10	Yes
Stone (Associate)	0	19	1	Yes
Van Devanter	8	0	7	Yes
Black	1	0	2	No
Blackmun	11	0	0	No
Brandeis	0	0	0	No
Brennan	7	0	0	No
Burton	0	0	3	No
Butler	0	0	6	No
Byrnes	0	0	2	No
Clarke	2	0	0	No
Day	8	0	0	No
Douglas	0	8	0	No
Fortas	0	5	1	No
Goldberg	0	3	0	No
Harlan	1	0	6	No

[54] Includes both state and federal experience.

[55] Excludes experience as instructor or lecturer; includes experience at the assistant or professor levels or as a dean.

[56] Must be service in legal capacity (e.g., as a state attorney general or counsel to a legislative committee or in the U.S. Justice Department), not simply (non-legal) stints in the White House or in an executive agency.

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Hughes (Associate)	0	2	1	No
Jackson	0	0	7	No
Lamar	2	0	0	No
Marshall	4	0	2	No
McReynolds	0	0	5	No
Minton	8	0	1	No
Moody	0	0	9	No
Murphy	7	0	2	No
Pitney	11	0	0	No
Powell	0	0	0	No
Reed	0	0	10	No
Rehnquist (Associate)	0	0	2	No
Roberts	0	0	10	No
Sanford	15	0	2	No
Stevens	5	0	3	No
Stewart	3	0	0	No
Thomas	1	0	3	No
White	2	0	1	No
Whittaker	3	0	0	No

On the one hand, our results seem to indicate that the imposition of the (rather stringent) experience criterion would have deprived the Court of a handful of its most distinguished members. On the other hand, it is possible that some or even all of the thirty-two "ineligibles" would have adapted their career paths to the relevant service requirement and, thus, would still have been eligible for appointment to the bench; after all, strategic behavior in pursuit of a spot on the nation's highest court is not unknown.

Moreover, in perusing Table 2, we cannot help but wonder whether the president and Senate in the United States have *de facto* adopted some version of a service requirement. To illustrate, we need only consider that only two — John Paul Stevens and Clarence Thomas — of the nine justices on the current Court do not meet it (and Stevens, the Court's most senior associate, comes rather close).[57] The other seven all served as judges (Stephen Breyer, Ruth Bader Ginsburg, Anthony Kennedy, and Antonin Scalia held positions on the U.S. circuit courts prior to their appointment to the Court; David Souter and Sandra Day O'Connor, on state courts; and William H. Rehnquist, of course, was an associate justice on the Supreme Court before ascending to the Chief Justiceship), as professors (Breyer at Harvard; Ginsburg at Rutgers and Columbia; and Scalia at Virginia and Chicago),

[57] Rehnquist did not meet the requirement at the time of his initial appointment to the Court but would have when he ascended to the chief justiceship — a position he attained after fourteen years of service as associate justice.

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or as government attorneys (Breyer for the U.S. Justice Department and U.S. Senate Judiciary Committee; O'Connor for San Mateo, California and the state of Arizona; Scalia for the White House Office of Telecommunications Policy and the U.S. Justice Department; and Souter for the state of New Hampshire).

Whether this trend will continue is a question on which we can only speculate; we do know that many of the lawyers (apparently and presently) under consideration for a spot on the U.S. Supreme Court hold (or have held) legal positions in government or seats in the nation's judiciary, including J. Michael Luttig, Emilio Garza, Alberto Gonzales, and Edith Jones. It also seems to be the case that America's current president, George W. Bush, has made nominations to the U.S. Courts of Appeals and other government posts (such as, Miguel Estrada and Theodore Olson) with an eye toward elevating them to the High Court. This strikes us as nearly explicit (though certainly unstated) adoption of a norm of legal experience.

B. *Retirement Age*

Attempting to place outstanding nominees on the bench is one thing; preserving quality and distinction is quite another. Various countries in our sample have devised a number of institutions designed to maximize this objective, with none more prevalent than the compulsory retirement age.[58] As Figure 2 shows, nearly half (twelve of the twenty-seven) have such a mandate, with a mean of 68.6 years for those possessing it. And we suspect this figure would be even higher if not for the presence of limited terms (formal provisions permitting justices to serve for only a set number of years), which may negate the need for compulsory retirement. In fact, of the six nations with life tenure, two-thirds[59] have compulsory retirement provisions; of the twenty-one countries with limited terms, only about a third have compulsory retirement provisions.[60] To put it another way, the United States, lacking either a mandatory retirement age or limited terms for members of its highest constitutional court, is something of an anomaly — at least compared with the countries in our sample.

[58] The societies in our sample are not the only ones with mandatory retirement provisions for their justices; indeed, in the United States alone, thirty-six states have such provisions — with the U.S. Supreme Court upholding them in *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[59] Four of the six. *See infra* Figure 2.

[60] Eight of the twenty-one (38.1%). *Id.*

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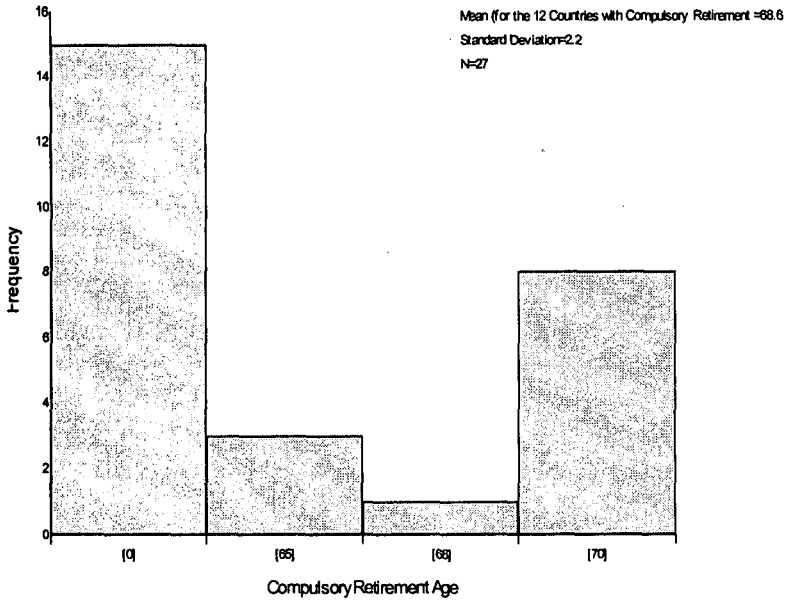
Figure 2: Compulsory Retirement Ages for Justices in 27 European Nations (Histogram) [61]



Of course, compulsory retirement ages (or limited terms, for that matter) do not guarantee the preservation of a quality court; we doubt that any formal rule, in and of itself, could accomplish this end. Then again, both academics and political observers alike, suggest that forced retirement may, at a minimum, work to reduce the presence of "mental decrepitude" on the bench.[62] This, at least according to David Garrow, has not been a trivial problem on the U.S. Supreme Court; indeed, he identifies eight justices appointed since 1900 whom he believes were not intellectually up to the task before they stepped down from the bench: Oliver

[61] [0] indicates no compulsory retirement age.

[62] See David J. Garrow, *Mental Decreptitude on the U.S. Supreme Court: The Historical Case for a 28th Amendment*, 67 U. CHI. L. REV. 995 (2000), which provides an accounting of the many jurists and politicians who favored mandatory retirement provisions, along with attempts to effectuate one sort or another. Certainly, at least some mentioned in Garrow supported such provisions for reasons quite apart from preserving an intellectually vibrant bench. But the number of proponents among former Supreme Court justices (*e.g.*, Charles Evans Hughes, Earl Warren) is impressive indeed. Moreover, Garrow is not the only scholar advocating mandatory retirement. *See, e.g.*, Henry Paul Monaghan, *The Confirmation Process: Law or Politics?*, 101 HARV. L. REV. 1202 (1988); Philip D. Oliver, *Systematic Justice: A Proposed Constitutional Amendment to Establish Fixed, Staggered Terms for Members of the United States Supreme Court*, 47 OHIO ST. L.J. 799 (1986).

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Wendell Holmes, Jr.;[63] Frank Murphy;[64] Sherman Minton;[65] Charles Whittaker;[66] Hugo L. Black;[67] William O. Douglas;[68] Lewis F. Powell, Jr.;[69] and Thurgood Marshall.[70]

Would a compulsory retirement at age sixty-nine (the mean in our sample) have worked to eliminate or at least reduce the problem? To consider this question, we amassed data on all post-1900 associate justices who remained on the Court past the age of sixty-nine, with Table 3 displaying the results, as well as some other details surrounding departures from the bench.[71]

Table 3: Associate Justices Remaining on the Court Past the Age of Sixty-Nine, 1900-2001

Justice (Age at the Time of Departure from the Court)	Year Justice Departed	Year Justice Would Have Been Forced to Retire, Assuming Mandatory Retirement at 69	"Extra" Years on the Court, Assuming Mandatory Retirement at 69
Black (85)	1971	1955	16
Blackmun (85)	1994	1978	16
Brandeis (82)	1939	1926	13
Brennan (84)	1990	1975	15
Burton (70)	1958	1957	1
Butler (73)	1939	1935	4
Day (73)	1922	1918	4
Douglas (77)	1975	1967	8
Frankfurter (79)	1962	1952	10
Harlan (72)	1971	1968	3
Holmes (90)	1932	1911	21
Lurton (70)	1914	1913	1
Marshall (83)	1991	1977	14

[63] Garrow, *supra* note 62, at 1017-18.
[64] *Id.* at 1027-28.
[65] *Id.* at 1043-45.
[66] *Id.* at 1045-50.
[67] *Id.* at 1050-52.
[68] *Id.* at 1052-56.
[69] *Id.* at 1069-70.
[70] *Id.* at 1072-80.
[71] For raw data, see EPSTEIN, *supra* note 41, at 361 tbl. 5-7.

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McReynolds (78)	1941	1932	9
Powell (79)	1987	1977	10
Reed (72)	1957	1954	3
Roberts (70)	1945	1944	1
Stone (73)	1946	1942	4
Sutherland (75)	1938	1932	6
Van Devanter (78)	1937	1928	9
White (76)	1993	1986	7

First, of the thirty-eight justices in the relevant subset of our total sample (the subset that excludes members of the current Court), twenty-one (those depicted in Table 3) or, 55.3 percent, remained on the bench after the age of sixty-nine. The average age of departure for those twenty-one was 77.3 with a standard deviation of 5.8, meaning that over two-thirds stayed on the Court at least two years longer than many European provisions would have permitted.

Now reconsider Garrow's list. Would mandatory retirement have helped reduce incidents of "mental decrepitude"? Using the age of sixty-nine as a benchmark, the answer seems clear: of the eight justices identified by Garrow, only three — Murphy (59), Minton (65), and Whittaker (61) — would not have been forced off the bench prior to the onset of their "decrepitude"; the other five (Holmes, Black, Douglas, Powell, and Marshall) would have retired, on average, 13.8 years before they did in fact depart.

And, yet, we cannot help but note that some distinguished careers would have been, perhaps regrettably so, cut short. Take William J. Brennan, whom scholars have rated as one of the "greats."[72] Though he was eighty-four when he retired, there is no indication — at least not in Garrow's comprehensive survey[73] — that he suffered from any mental infirmities during the latter part of his service. To the contrary, between the ages of sixty-nine (1975) and eighty-four (1990), Brennan, among other activities, cobbled together coalitions of justices sufficient in size to produce opinions of the Court,[74] brokered numerous agreements among his colleagues,[75] and authored scores of "salient" opinions,[76] including *United*

[72] *See* Bradley, *supra* note 50, at 14 tbl. 1.

[73] *See* Garrow, *supra* note 62.

[74] *See* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 6-9 (1998); FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT 1-5, 34 (2000).

[75] *See* EPSTEIN & KNIGHT, *supra* note 74, at 69-70, 76; MALTZMAN ET AL., *supra* note 75, at 96.

[76] *See* Lee Epstein & Jeffrey A. Segal, Measuring Issue Salience: List of Salient U.S. Supreme Court Cases 18-28 (2000), *at* http://www.artsci.wustl.edu/~polisci/epstein/ajps/salience.pdf. *See generally* Lee Epstein & Jeffrey A. Segal, *Measuring Issue Salience*, 44 AM. J. POL. SCI. 66 (2000) (explaining the use of media coverage as a measure of issue salience in U.S. Supreme Court decisions).

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Steelworkers of America v. Weber,[77] *Plyler v. Doe*,[78] *Aguilar v. Felton*,[79] *South Carolina v. Baker*,[80] *Texas v. Johnson*,[81] and *Ruttan v. Republican Party of Illinois*,[82] to name just a few.

Moreover, it is possible that some justices — again, including a smattering of those who regularly appear on lists of truly distinguished jurists — would never have attained a nomination had a compulsory retirement age existed. We think here of Benjamin N. Cardozo, whom Herbert Hoover appointed to the bench at age sixty-one. Had a departure provision been in effect and had Hoover felt any concern for leaving a legacy on the Court, it seems reasonable to suspect that he would not have turned to Cardozo in the first place.[83] On the flip side, several Court members whom scholars have rated as "average" or even "failures" may not have gotten the nod either.[84] Then again, it is possible that compulsory retirement would sufficiently change the strategic context in which the relevant actors operate to make older candidates attractive — especially in periods of divided government.

What then are we to make of the effect a mandatory retirement provision would have on the Supreme Court? Surely the answer depends on whether we Americans think that sort of cure for the problem of mental decrepitude is worse than the problem itself or, to put it in slightly different terms, whether we should pursue the goal of preserving an intellectually distinct bench via a method — mandatory retirement — that might actually undermine it.

It seems beyond doubt that compulsory departure provisions would have fundamentally changed the composition of past Supreme Courts, as well as the current one.[85] Four of the nine would no longer be active justices, with Ginsburg's retirement imminent. Our current president *might* have already made one appointment — a replacement for Kennedy — with another on the way.[86] But it was President Clinton who *may* have been the biggest beneficiary.[87] While, on average, presidents have the opportunity to make four appointments over the course of two terms, Clinton was able to fill only two vacancies. A mandatory retirement provision could have potentially brought his total to the more typical figure of four.

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[77] 443 U.S. 193 (1979).

[78] 457 U.S. 202 (1982).

[79] 473 U.S. 402 (1985).

[80] 485 U.S. 505 (1988).

[81] 491 U.S. 397 (1989).

[82] 497 U.S. 62 (1990).

[83] As history would have it, Cardozo died in office at sixty-eight.

[84] *See, e.g.*, BLAUSTEIN & MERSKY, *supra* note 50, at 39 (rating Horace H. Lurton, age sixty-five at the time of appointment, as "average"); *id.* at 40, (rating Sherman Minton, age fifty-eight, as a "failure").

[85] *See infra* Table 4.

[86] We might question whether Clinton would have given the nod to Ginsburg, age sixty at the time of her nomination, in the first place, thereby lessening the odds that Bush would be looking at a second appointment.

[87] We stress "might" and "may" because we do not assess the effect of a mandatory retirement provision on previous Courts.

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Table 4: The Potential Effect of Compulsory Retirement (at Age Sixty-Nine) on the Current Supreme Court (2001)

Justice	Age in 2001	Year Forced Retirement Would Have (or Would) Occurred	President in Year Forced Retirement Would Have (or Would) Occurred
Breyer	62	2008	?
Ginsburg	68	2002	Bush
Kennedy	69	2001	Bush
O'Connor	71	1998	Clinton
Rehnquist	77	1993	Clinton
Scalia	65	2005	?
Souter	61	2009	?
Stevens	81	1989	Bush
Thomas	53	2017	?

This leads us to one final point: Clinton may have lost out on two nomination opportunities because "early" retirement, unlike the criterion of legal experience, is not a norm or even close to becoming one. The lesson is thus clear. If Americans view compulsory retirement as a feasible mechanism for preserving the quality of the bench, then they will need to bring it about via constitutional reform. With over half the Court now surpassing the age of sixty-nine, they cannot count on the Justices themselves to effectuate it.

III. CREATING AND SUSTAINING A POLITICALLY INDEPENDENT JUDICIARY

Unlike the goals of creating and preserving a distinguished judiciary, that of creating and preserving an independent one is far more open to discussion. In the first place, scholars and other observers have offered a slew of definitions of the term "independent," variously identifying it as:

> [The ability of judges to be free] from political pressures and public outcry in order to settle disputes between parties fairly.[88]

> [T]he degree to which judges believe they can decide and do decide consistent with their own personal attitudes, values and conceptions of judicial role (in their interpretation of the law) . . . in opposition to what others, who have or are believed to have political or judicial power, think about or desire in like matters, and . . . particularly when a decision

[88] CHARLES H. SHELDON & LINDA S. MAULE, CHOOSING JUSTICE: THE RECRUITMENT OF STATE AND FEDERAL JUDGES 18 (1997).

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> adverse to the beliefs or desires of those with political or judicial power may bring some retribution on the judge personally or on the power of the court.[89]
>
> [The ability of judges not to] make decisions on the basis of the sorts of political factors (for example, the electoral strength of the people affected by a decision) that would influence and in most cases control the decision were it to be made by a legislative body such as the U.S. Congress.[90]
>
> [T]he right of judges to be free from inappropriate control by others in the exercise of judicial decisionmaking.[91]

However diverse these definitions may be in their specifics, a common thread runs through them. Namely, justices operate under maximal levels of independence when they are nearly always able to act sincerely — that is, to act on the basis of their own, sincerely-held preferences (whatever those preferences may be and regardless of the preferences of other relevant political actors) — without fear of facing reprisals from the public or the political regime. In other words, when justices are "independent" they will face low or even no opportunity costs for acting sincerely. But, as they move from maximal levels of independence to maximal levels of accountability, the opportunity costs for judges to act in accord with their own preferences (at least when those preferences are contrary to those of other relevant politicians) increase, leading them to engage in sophisticated behavior (that is, behavior that is not in line with their sincere preferences). Hence, to us the concept of judicial independence — especially as it pertains to institutions governing judicial selection and retention mechanisms — implicates the opportunity costs to justices of acting sincerely: the greater the accountability established in the institution, the higher the opportunity cost for judges to act sincerely, and, thus, the more extensive sophisticated behavior will be.[92]

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[89] THEODORE L. BECKER, COMPARATIVE JUDICIAL POLITICS 144 (1970).

[90] William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J.L. & ECON. 875, 875 n.1 (1975).

[91] Scott H. Bice, *Judicial Independence and Accountability Symposium: Foreword*, 72 S. CAL. L. REV. 311, 312 (1999).

[92] Of course it is true that most judicial specialists tend to speak in far more specific terms than do we. So, for example, rather than make claims about opportunity costs associated with particular selection institutions, they argue that justices who are "accountable" to, say, the public via elections, are more likely to suppress dissents than are their appointed counterparts. *See, e.g.*, RICHARD A. WATSON & RONDAL G. DOWNING, THE POLITICS OF THE BENCH AND THE BAR 321-22 & tbl. 9.4 (1969); Paul Brace & Melinda Gann Hall, *Integrated Models of Dissent*, 55 J. POL. 914, 919 (1993); Kenneth N. Vines, *Political Functions on a State Supreme Court*, *in* STUDIES IN JUDICIAL POLITICS 51, 70 (Kenneth N. Vines & Herbert Jacob eds., 1962). They also argue that such justices are more likely to reach decisions that reflect popular sentiment. *See, e.g.*, Harris v. Alabama, 513 U.S. 504, 515 (1995) (Stevens,

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Defining judicial "independence" is not the only source of disagreement among scholars. Yet another is over the question of whether judicial independence is even a desirable end — that we rather ought to work toward more accountable benches.[93] We ourselves are not unsympathetic to this perspective; after all, if justices make decisions in line with their own personal *political* preferences or those of their "constituents" — rather than on the basis of "neutral" principles, as so much of the literature suggests they do[94] — then why should we not hold them accountable in much the same way as we do elected officials?

For purposes of this essay, though, let us take the more conventional route and assume that an independent judiciary — in the way that we have defined "independent" — is a desirable end. What sorts of formal rules do societies invoke to attain it?

In the United States, the answer is apparent: we do not force federal jurists to function in a high opportunity cost environment — one in which they must attain re-election to retain their jobs — but rather, bestow them with life tenure. Releasing judges from the control of the electorate, the Framers felt, would be a — if not the — chief mechanism by which to achieve judicial independence.[95] While legislators and the executive would, by virtue of their electoral connection, necessarily reflect the popular will, judges could confine their attention to the law; they would stand above the political fray and enforce the law free from overt political forces and influences, and not pay a high price (for example, the loss of their position) for doing so.

And yet, most societies in our sample chose a very different path. As Table 5 shows, only six opted for life tenure; the other twenty-one opted for limited terms of two varieties: renewable and nonrenewable. Under the former, a justice would be able to serve an additional term(s) if she attained approval (typically) from whatever bodies appointed her in the first instance. Under non-renewable tenure systems, once the justice completes his term, he may not be reappointed.

J., dissenting); DANIEL R. PINELLO, THE IMPACT OF JUDICIAL SELECTION METHOD ON STATE-SUPREME-COURT POLICY 130 (1995); Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 726-29 (1995); Gerard S. Gryski et al., *Models of State High Court Decision Making in Sex Discrimination Cases*, 48 J. POL. 143, 148-49 (1986); Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1117 (1987); Alexander Tabarrok & Eric Helland, *Court Politics: The Political Economy of Tort Awards*, 42 J.L. & ECON. 157 (1999). To us, these are merely examples of the more general phenomenon; namely, the greater the accountability established in the institution, the higher the opportunity costs for judges to act sincerely.

[93] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 74; JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993); Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427 (1992).

[94] *See, e.g.*, EPSTEIN & KNIGHT, *supra* note 75, at 11; SEGAL & SPAETH, *supra* note 94, at 17-18; Hall, *supra* note 93, at 430.

[95] *See* EPSTEIN & WALKER, *supra* note 13, at 58.

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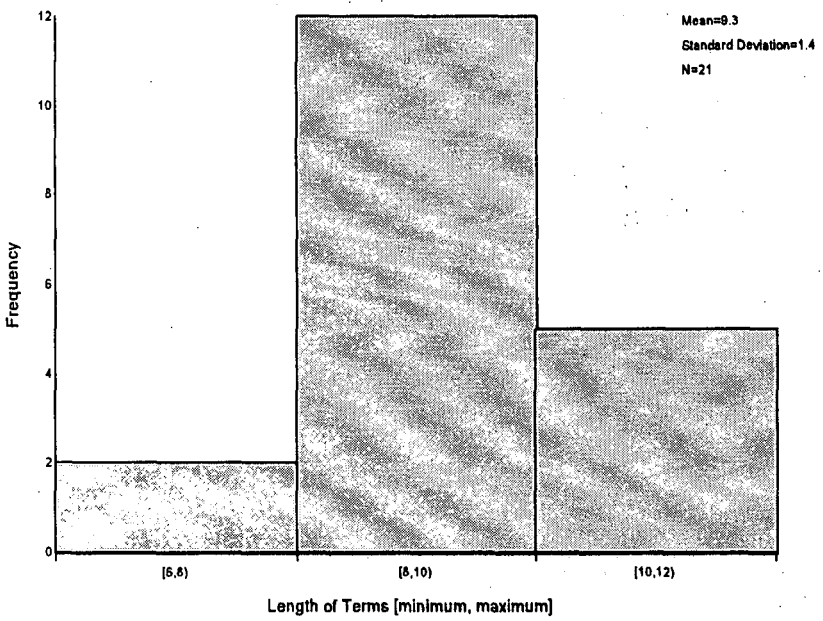
Table 5:
Retention Mechanisms for Justices Serving on Constitutional Courts in 27 European Nations

Mechanism	Number of Countries	Percent
Life Tenure	6	22.2
Renewable Terms	7	25.9
Non-Renewable Terms	14	51.9

Country-specific distinctions exist, of course, but variation in term length is not huge. Whether renewable or nonrenewable, it ranges from six to twelve years, with a mean of 9.3;[96] the means for countries with renewable and non-renewable service are quite comparable, at 9.1 and 9.4 respectively.[97]

Figure 3: Length of Terms for Justices Serving on Constitutional Courts in 21 European Nations (Histogram)



But the question remains: do these sorts of retention mechanisms — those that fail to provide for life tenure — necessarily lead to a less independent judiciary? We might begin answering this question with what is a hardly controversial response these days: no formal retention rule can guarantee judicial independence. This is so for any number of reasons, with a significant one being that courts are not the only players in their systems of government. Hence, if justices wish to issue

[96] *See infra* Figure 3.
[97] *Id.*

efficacious policy — policy that the public and the political regime will respect and with which they will comply — they will necessarily need to pay heed to the preferences and likely actions of those other relevant actors. This is as true in the United States, even with its automatic guarantee of life tenure, as it is in Slovakia. To see this we need only think of Professor William N. Eskridge's seminal research, showing among other things, that (1) justices of the United States Supreme Court should and do interpret laws in line with the policy preferences of *contemporary* political actors (including the president and members of Congress, especially congressional "gatekeepers," such as committee chairs and party leaders) rather than in accord with the intent of the *enacting* legislators; and (2) justices should and do behave in this way even if their policy preferences are out of line with the desires of contemporary political actors.[98] For when justices are inattentive to the preferences of the contemporaneous Congress and president — that is, when they fail to act strategically[99] — they run the risk of seeing their preferred interpretations overridden by the political branches. To put it in somewhat different terms, justices have goals which, according to Eskridge, amount to seeing their policy preferences written into law,[100] but realize that they cannot achieve them without taking into account the preferences and likely actions of other relevant political actors.

[98] *See* William N. Eskridge Jr., DYNAMIC STATUTORY INTERPRETATION 69-80 (1994); William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 373-77 (1991); William N. Eskridge Jr., *Reneging on History?: Playing the Court/Congress/President Civil Rights Game*, 79 CAL. L. REV. 613, 664-66 (1991); William N. Eskridge Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1359-60 (1994). Eskridge's findings pertain to statutory interpretation, but recent research indicates that his basic results apply to constitutional interpretation as well. *See* Lee Epstein et al., *The Supreme Court as a Strategic National Policy Maker*, 50 EMORY L.J. 583, 600 (2001).

[99] Strategic decision-making is "about interdependent choice: an individual's action is, in part, a function of her expectations about the actions of others. To say that a justice acts strategically is to say that she realizes that her success or failure depends on the preferences of other actors and the actions she expects them to take, not just on her own preferences and actions." EPSTEIN & KNIGHT, *supra* note 74, at 13. Sometimes, strategic calculations will lead a justice to make decisions that reflect her sincerely-held preferences (sincere behavior); other times, they will lead her to act in ways that do not accurately reflect her true preferences (insincere or sophisticated behavior).

[100] Eskridge is not alone: many proponents of strategic approaches to statutory interpretation assume that the goal of most justices is to see the law reflect their most preferred policy positions. *See, e.g.*, *id.*; Pablo T. Spiller & Rafael Gely, *Congressional Control or Judicial Independence: The Determinants of U.S. Supreme Court Labor-Relation Decisions*, 23 RAND J. ECON. 463 (1992). But this need not be the case. Strategic actors — including justices — can be, in principle, motivated by many things. As long as the ability of a justice to achieve his or her goal, whatever that may be, is contingent on the actions of others (as Eskridge suggests), his or her decision is interdependent and strategic. For an example of a strategic account of judicial decisions in which justices are motivated by jurisprudential principles, see John Ferejohn & Barry Weingast, *A Positive Theory of Statutory Interpretation*, 12 INT'L REV. L. & ECON. 263 (1992).

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This noted, we do believe that particular formal retention mechanisms are more (or less) likely than others to induce judicial independence, in the way we have defined that term. In the United States, for example, scholars have told us that when state supreme court justices know that they must face periodic electoral checks to retain their positions, they engage in sophisticated behavior, such as ruling in favor of the government in death penalty cases when they would prefer to find for the defendant.[101]

The same may be said of renewable terms. It seems to us undoubtedly the case that when societies require sitting justices to attain reapproval to retain their seats, those societies are seeking accountability at the cost of independence. But what of the difference between renewable terms and life tenure? Are justices operating under one or the other more or less likely to act "independently," or, under our definition of independence, to behave in a sincere fashion? The answer, at first blush, seems as transparent as it is for renewable terms: undoubtedly, life tenure provides the greatest degree of independence if only because a justice serving under a set term may have political aspirations after her tenure expires. Under those circumstances, she may act in a sophisticated fashion over the course of her judicial career to maximize her chances of successfully pursuing a political one.[102]

On second look, however, the answer is less clear. First (and if the United States is any indication), it seems unlikely that most justices would be in a position to pursue a political career after serving on the Court. Just consider that the mean age of associate justices appointed since 1900 is 53.6.[103] Adding 9.3 (the mean length of terms in Europe) to this figure brings the total to near sixty-three years of age — more than a decade older than the current U.S. president, as well as his predecessor. And even if the total drops lower — to, say, fifty — it would be possible for Congress to enact legislation prohibiting former justices from seeking public office.[104]

Second, and more to the point, a set, non-renewable term may actually promote and sustain judicial independence in the long run — by preserving the legitimacy of the high court as an independent branch of government. We base this claim on an empirical comparison we conducted of periods of congressional attacks on the Court and those of relative calm between the two branches. Specifically, we examined the length of service of justices serving during two sets of years that elicited a "high frequency" of "Court-attacking" bills in Congress (1935-1937, 1963-1965) and those that did not (1941-1943, 1972-1974).[105] Figure 4 displays the

[101] *See, e.g.*, Hall, *supra* note 92, at 1120.

[102] *See, e.g.*, Oliver, *supra* note 62, at 818 (arguing in favor of a constitutional amendment that would set fixed, staggered terms for Supreme Court Justices but, nonetheless, asserting that such an amendment, compared with the current system of life tenure, would lead to "a slight decrease in the independence of the Court").

[103] *See* EPSTEIN ET AL., *supra* note 41, at 305 tbl. 4-11.

[104] *See* Oliver, *supra* note 62, at 829.

[105] *See* Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369, 379 (1992) (displaying the number of "court-attacking" bills during nine periods in U.S. history).

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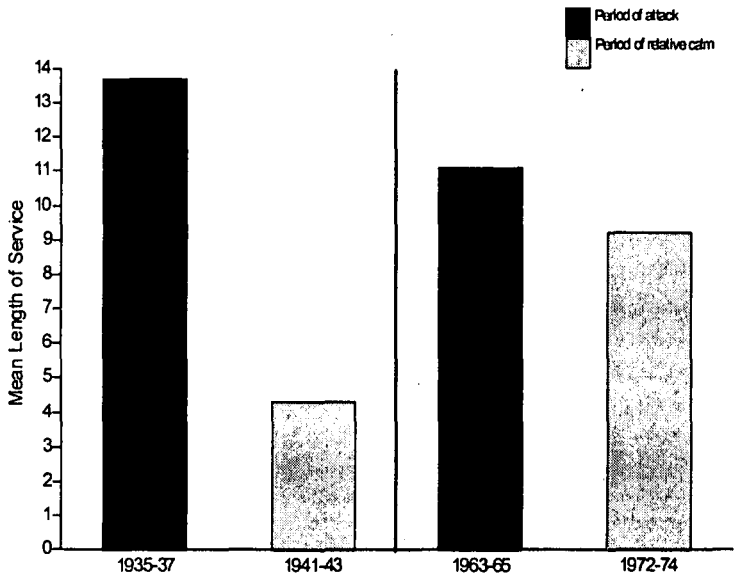
results.

Figure 4: Comparison of Lengths of Service of Justices Serving on Courts under Congressional Attack and Those Serving During Periods of Relative Calm



Consider, first, the comparison between the period of 1935-1937 — tension-filled years for the Court, with the introduction of thirty-seven "Court-attacking" bills in Congress,[106] including of course, President Franklin D. Roosevelt's famous "Court-packing" scheme — and the period of 1941-1943 — years of relatively peaceful relations between the justices and legislators, with members of Congress proposing far fewer bills designed to curb their independence. Note the difference in the mean length of service of justices sitting on those Courts, 13.7 years versus 4.3 years.[107] Had some version of non-renewable terms been in effect, say one creating a tenure of nine years — only three of the justices serving on the 1935-1937 Court would have been on the bench: Hughes (appointed Chief Justice in 1930); Owen J. Roberts (1930); and Benjamin Cardozo (1932). None of the "four horsemen" — justices who consistently voted against New Deal legislation thereby provoking the wrath of FDR[108] — would have been in active service. Willis Van Devanter would have departed in 1919; James Clark McReynolds, in 1923; George Sutherland, in 1931; and Pierce Butler, in 1931.

Turning to the 1963-65 and 1972-74 comparison, we see a smaller disparity

[106] *Id.*

[107] *See supra* Figure 4.

[108] They were often joined by Justice Owen J. Roberts.

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between the "attacked" (114 Court-curbing bills were proposed in Congress between 1963 and 1965) and the relatively "unattacked" Court (the 1972-1974 years do not make list of "high-attack" periods,[109] despite the furor caused by *Roe v. Wade*[110]): the mean lengths of service were 11.1 and 9.2, respectively.[111] Part of the explanation for this result, however, lies with the presence of a true outlier on the 1972-1974 Court: William O. Douglas, who, by 1972, had served for thirty-three years. The next closest in length of service, Brennan, had only been on the bench fifteen years.

Removing Douglas (who left the Court in 1975) from the calculations reduces the mean to 6.3 years. But even retaining him leaves us with an important (though perhaps *unsurprising*) result: on average, justices serving on "attacked" courts had held their positions for 12.4 years — three years above the mean term in Europe. That figure for justices serving on the 1941-1943 and 1972-1974 Courts falls to 6.8 — roughly two years below the mean European term.

Surely then, at least based on our data, courts with newer justices are less susceptible to congressional attacks than those with more senior members. This is not, as we emphasize above, a surprising finding. Quite the opposite: it sits compatibly with a long line of literature suggesting that it is holdovers from old regimes that have led to some of the more serious instances of Court-curbing in American history.[112] But to what does this speak in terms of our interest in judicial independence?

The answer seems straightforward: if we define judicial independence as the ability to behave sincerely, that is, in line with truly-held preferences, then non-renewable terms may be a better mechanism for inducing such behavior than life tenure. To see this, think of the plight of a justice when she first arrives at the Court: in all likelihood, she will share the preferences of the regime that appointed her,[113] thereby enabling her (for the most part) to vote in a sincere fashion without fear of congressional reprisal. As time goes on, however, and subsequent elections replace members of "her" regime with those that may not share her preferences, she becomes less and less able to vote sincerely, assuming she does not want to face the ire of Congress, the president, or both. Under such circumstances, her "independence" — again, in the way we have defined — may be curtailed no matter what course of action she takes. If she votes in a sophisticated fashion, that is, in a way that accords with the preferences of the new regime, she is hardly "independent"; if she votes sincerely, that is, in a way that does not accord with the preferences of the new regime, she (or more precisely, her Court) may confront a hostile political environment — one that could take any number of actions to curb her independence or otherwise render inefficacious her institution. Under a

[109] *See* Rosenberg, *supra* note 106.

[110] 410 U.S. 113 (1973).

[111] *See supra* Figure 4.

[112] *See, e.g.*, Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policymaker*, 6 J. PUB. L. 279, 285-86 (1957).

[113] *See* Jeffrey A. Segal et al., *Buyer Beware?: Presidential Success Through Supreme Court Appointments*, 53 POL. RES. Q. 557, 559, 564, 569 (2000).

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relatively short (say, nine-year) non-renewable term system, the Hobson choice she confronts would, in all likelihood, disappear; she would be able to vote sincerely for that period.

IV. DISCUSSION

At the onset we raised a deceptively simply question: if creating and preserving a legally distinguished and independent bench are important objectives, what selection and retention mechanisms would maximize their attainment? Given the normative nature of this question, our ensuing (and preliminary) attempt to address it has not led to any definitive answers. There is still much work to be done. But our analysis is certainly suggestive. If we hold as a goal the establishment and maintenance of a distinguished bench, then we might put some teeth in the norms (if such norms in fact exist) currently in effect to induce it. We ought to think about the possibility of giving substantive content to constitutional scriptures for the selection of justices by specifying qualifications for office and mandating retirement prior to the age of seventy; likewise, for the aim of establishing an independent judiciary. Conventional wisdom among American scholars (not to mention the Framers) seems to be that life tenure is the best, if not the only, mechanism for achieving that end. Our analysis of non-renewable terms — an institution used quite frequently in the European context — suggests otherwise — that, in fact, it may be more effective at encouraging sincere behavior on the part of justices.

But more important than these prescriptions, at least to us, is the type of investigation we undertook to arrive at them — a comparative study of judicial selection and retention. While we have not demonstrated that European practices ought to be transported lock, stock, and barrel to the United States, we have shown the importance of looking at practices elsewhere before we contemplate making changes, small or large, in our system. Only by doing so, perhaps ironically enough, can we truly shed light on the existing institutions we Americans have come to accept but so often fail to question. This certainly holds true for judicial selection and retention, but we can imagine many others for which it would hold as well, such as questions involving the timing and type of judicial review and standing. We commend these and other issues to scholars for further, truly comparative, analyses.

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