

Term Limits & Democratic Renewal

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Responding to Chief Justice Wallace Jefferson's assessment of the American Academy of Arts and Sciences' Our Common Purpose report, this essay focuses on the proposal of term limits for Supreme Court justices. It argues that life tenure is not necessary for judicial independence and that in fact it produces a judiciary susceptible to permanent capture by a minority party. There is no theoretical reason to think that minority capture is a good thing. Historical analysis supports the point: when the composition of the Court departs from what it would have been if each president had equal influence, the Court tends to clash with the elected branches and render decisions that are later repudiated.

It is a pleasure to have the opportunity to comment on Chief Justice Wallace Jefferson's assessment of Strategy 1 of the American Academy of Arts and Sciences' *Our Common Purpose* report: to achieve equality of voice and representation.¹ Anyone paying even cursory attention to the state of the nation can see that we are at a moment of crisis. Our governing structures and institutions are being tested more severely than at any other time in living memory. And some of them do not appear to be up to the task of sustaining the American experiment in self-governance.

Crisis provides both clarity and a moment at which the nation's attention can be focused on change. A critical look at which institutions are failing and why can offer us a path forward to a renewal of our fundamental democratic commitments.

That is the goal of *Our Common Purpose*: to reinvent American democracy for the twenty-first century. The report is, in Jefferson's words, "at once sobering and hopeful."² It offers concrete proposals to improve the functioning of our democracy and to connect our citizens more closely to each other and to the ideals of our nation.

Jefferson focuses on three recommendations from Strategy 1: expanding the House of Representatives, implementing eighteen-year term limits for Supreme Court justices, and introducing ranked-choice voting. I believe that all of these are important and valuable. Enlarging the House of Representatives will reduce the number of people each representative represents, allowing for a tighter and more meaningful connection between the governors and the governed. It will also improve the structural problems of partisan and incumbent-protective gerrymandering, helping the electoral system to reflect the true wishes of the people.

Ranked-choice voting, likewise, nudges our system closer to a true democracy. Under the current approach of partisan primaries and plurality voting, the winners of “safe” congressional districts are effectively determined by the primary elections. Turnout for primary elections tends to be around 20 percent. Thus, in many cases, the most politically engaged and extreme 20 percent of one party’s voters pick the ultimate winner. Ranked-choice voting allows moderates who represent the median voter the chance to prevail. It produces representatives who have incentives to cooperate across the aisle to get things done, rather than engage in political showboating to please extremists.

Other recommendations from Strategy 1 are also important. Repealing the requirement of single-member districts for the House would allow for proportional representation, increasing diversity and reducing the incentive to gerrymander. Independent redistricting commissions provide a direct way to address the problem of partisan and incumbent-protecting gerrymanders. And campaign finance reform would help our political system respond to the will of the people rather than the money of the powerful. Many of these reforms supplement each other synergistically. Together, they offer a powerful blueprint for improvement.

I focus here, however, on another recommendation in Strategy 1: term limits for Supreme Court justices. I have been interested in this issue for years, and I was a member of both President Joe Biden’s Commission on Supreme Court Reform and the American Academy’s Commission on the Practice of Democratic Citizenship working group that produced the report *The Case for Supreme Court Term Limits*.³ I am gratified that Jefferson endorses the proposal and I agree with his assessment: term limits are a nonpartisan solution to a structural flaw in our appointments process. In what follows, I attempt to make this case by unpacking the concept of judicial independence and considering the history of the Court.

Everyone agrees that judicial independence is a good thing. And most people agree, at a high level of generality, on what judicial independence is. A judge should decide cases without fear or favor: judges should not be influenced by the prospect of being rewarded or punished for decisions that other people like or dislike. A desire to preserve judicial independence is one of the main arguments that people offer in opposition to term limits.

But the leap from judicial independence to life tenure is a large one. No other modern democracy gives life tenure to its apex judges, nor does any American state with the exception of Rhode Island. It is hard to see how a sufficiently lengthy and nonrenewable term is less effective at protecting judicial independence. And, I will argue, according to a more sophisticated understanding of independence, term limits are actually a substantial improvement.

First, what is the concern that opponents of term limits have? A common assertion is that a term-limited justice will be thinking of a post-Court career. They might

have an incentive to decide cases in a way that will, for instance, please a large corporation that could then hire them at a lucrative salary.

This suggestion has always struck me as fanciful. Such a justice is, by hypothesis, greedy and corrupt. A greedy and corrupt justice could strike such a bargain in a life-tenure system, too: nothing prevents a justice from doing favors for a corporation and then resigning. For that matter, nothing prevents a justice from receiving substantial benefits while continuing to serve for life. (Recent news accounts have revealed the extent to which some justices have done this.)

In fact, life tenure may make the problem worse because it gives the justices themselves extra leverage. A justice might, for instance, express dissatisfaction with their salary and grouse about their finances. They might suggest that if they are unable to improve their financial situation, they will resign in search of a higher-paying job. Depending on who is president at the time, such a resignation might have an enormous impact on the partisan balance of power on the Court. If, for instance, a conservative justice suggested such a thing while a Democrat were president, conservatives would be highly motivated to act to retain that justice.

Second, we should consider what it means for the Court to be independent. We should ask from whom it is supposed to be independent. The conventional answer is: everyone. No one outside the Court should be able to influence its decisions. This is, I think, more or less true in terms of influence over particular decisions as the Court is making them. But threats or promises related to particular decisions are not the only way to influence the Court. Indeed, they are obviously improper and, one hopes, vanishingly rare. The way that people influence the Court is through the appointment process.

Because the Court is constituted through periodic appointments, there is actually no way to prevent appointments from influencing it. The question is, what kind of influence should appointments have or, more precisely, what should determine who gets to influence the Court through the appointment process?

Our current system embraces chance (unexpected death) and the decisions of the justices themselves as means to determine when vacancies arise. Because these factors are not tied directly to elections, they may seem pleasingly nonpartisan, especially if one believes that the justices themselves are simply neutral oracles of the law. But a look at patterns of judicial decision-making shows that justices embody particular worldviews and visions of the Constitution. They are not fungible. And a look at patterns of judicial retirement, especially recently, shows that elections do matter: justices time their retirements so that their replacement will be appointed by a president who shares their worldview.

What this means is that our current system gives substantial power over the composition of the Court to the justices themselves. Justices may even play a direct role in picking their successors, agreeing to retire only when presented with an acceptable list of potential replacements. That might sound like judicial independence,

and in a sense it is: it produces a Court that is largely insulated from the popular will.

But is that the Court we want? Consider this hypothetical. One political party, through good fortune and some political hardball, obtains a 6–3 majority on the Supreme Court despite winning a minority of presidential elections. (Suppose, for the sake of argument, that if each president had appointed two justices per four-year term this Court would lean 6–3 in the opposite direction.) Going forward, that party remains the choice of a minority of Americans: it wins the presidency once every twelve or even sixteen years. But the sitting justices time their retirements so that they will be replaced by a congenial president, with the result that the 6–3 tilt continues forever.

What has happened in this scenario? The Court has been captured by one political party. It is independent from the voters in the sense that the will of the people cannot restore balance. But that is not a desirable kind of independence. America is, after all, a democracy. Control of the judiciary, no less than the presidency or Congress, should not forever be taken away from the American people. A Court perpetually in thrall to a party that does not represent the popular will is not independent either.

I once debated a conservative law professor about the wisdom of term limits. They were dangerous, he said, because if the parties alternated presidential victories, control of the Court might shift back and forth. Or if one party won a majority of elections, it might control the Court for an extended period of time. I agreed that both of these things were possible. But what is the alternative to shifting control or extended majority control? Extended minority control. We should all be able to agree that that is the worst possible outcome.

History supports this view. It is relatively easy to figure out what the composition of the Supreme Court would be at any moment in history if we had been following a system of term limits under which each president gets to make two appointments per four-year term. Just go back five presidential terms and allot the appointments accordingly. (It is this method that suggests that the 2024 Court should have had six Democratic appointees and three Republicans: two Democrats from Biden and four from Obama, then two Republicans from Trump and one from George W. Bush.) Using this methodology, we can see how close to or far from this baseline the actual Supreme Court was at particular moments in history.

It turns out that periods of significant departure from this formula have featured conflict between the Court and other branches of government, as well as decisions that history has judged harshly. By contrast, periods in which the Court has remained closer to this baseline have generally featured cooperation between the Court and the other branches of government and have been marked by decisions that history has viewed more favorably.

Dred Scott, for instance, was the product of an out-of-balance Court. If each president had appointed two justices, that Court would have had four Whig appointees (two each from the Taylor/Fillmore and Harrison/Tyler administrations) and five Democrats (two from Pierce, two from Polk, and one from van Buren). Instead, it was a 7–2 Democratic majority with four justices, including Chief Justice Roger Taney, appointed by Andrew Jackson.

Dred Scott, of course, is now a reviled decision. And Congress soon thereafter enlarged the Court to give Lincoln another appointment in order to reduce the influence of the Democrats.

In 1935, what would have been a 6–3 Republican Court tilted further away from the Democrats than it should have; the actual composition was 7–2. FDR had no appointments during his first term; giving him two would likely have shifted the balance of power on the actual Court such that 5–4 decisions like *Carter v. Carter Coal* (which limited Congress’s power to regulate interstate commerce) and *Morehead v. Tipaldo* (which found a minimum wage law for women to be unconstitutional) would have gone the other way. The Court’s opposition to the New Deal is now generally rejected. And FDR proposed his court-packing plan in response to the inability of the people to affect the composition of the Court in the landslide Democratic victories of 1932 and 1936.

Dred Scott and the battle over the New Deal occurred, at least in part, because the composition of the Court strayed from the national will as expressed in presidential elections. By contrast, the Court that decided *Brown v. Board of Education* and the “one person, one vote” cases that significantly enhanced the responsiveness of our democracy was largely in line with where it should have been. That Court cooperated with Congress; *Brown* was supplemented by civil rights acts and the Voting Rights Act.

We are now three justices away from where we should be, further than the *Dred Scott* Court. It is not surprising that today’s Court has found itself in conflict with the other branches of government. It is not surprising that court-packing has been floated as a solution. But court-packing is a one-time partisan fix that risks an escalating cycle of retaliation. Term limits are a forward-looking, nonpartisan structural improvement to the system that can prevent the problems from arising.

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ENDNOTES

- ¹ American Academy of Arts and Sciences, *Our Common Purpose: Reinventing American Democracy for the 21st Century* (American Academy of Arts and Sciences, 2020), 22, https://www.amacad.org/sites/default/files/publication/downloads/2020-Democratic-Citizenship_Our-Common-Purpose.pdf.
- ² Wallace B. Jefferson, “Reimagining Democratic Institutions for a New American Century,” *Dædalus* 155 (3) (Summer 2026): 16, <https://www.amacad.org/daedalus/reimagining-democratic-institutions-new-american-century>.
- ³ American Academy of Arts and Sciences, *The Case for Supreme Court Term Limits* (American Academy of Arts and Sciences, 2023), https://www.amacad.org/sites/default/files/publication/downloads/2023_SCOTUS-Term-Limits.pdf.