

## Structural Reforms for the Supreme Court

With public approval of the Supreme Court of the United States (SCOTUS) at historic lows,<sup>1</sup> numerous proposals for reforms have been floated in recent years. Some structural reforms would require amendments to the US Constitution, which the Founders made notoriously difficult to do. Others are within the purview of Congress or could slip through a carefully threaded constitutional loophole. Here, we review two frequently proposed areas for reform: expanding the size of the Supreme Court and term limits.

### Size of the Court

Today, we have a longstanding norm, neither law nor constitutional prohibition, against altering the number of justices on the SCOTUS. The norm is so strong that any discussions of altering the size of SCOTUS typically are accompanied by the pejorative descriptor “court packing.”

Yet, changing the size of SCOTUS is one structural reform option that could be accomplished by Congress with no change to the Constitution. In fact, the constitutionality of this reform has been demonstrated by Congress eight separate times from 1789 to 1889 (minimum number of justices 5; maximum 10; 9 justices since 1889). While these changes occurred for a mix of institutional and political reasons, current proposals are offered primarily for political purposes.

Arguments **in favor of** expanding the Court include:<sup>2</sup>

- Preventing the erosion of democracy, e.g., from specific impacts of recent SCOTUS rulings contrary to voting rights.
- Strengthening the Court as an institution.
  - To add more diverse personal and professional perspectives the Court currently lacks.<sup>3</sup>
  - To enable the Court to take on more cases (about 150 per year in the 1980s has dropped to 70-80 more recently).

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<sup>1</sup> [Favorable views of Supreme Court remain near historic low](#)

<sup>2</sup> Another argument in favor is to respond to perceived violations of norms by which the Senate has handled nominations during election years differently depending on which President is in power. However, this suggests an issue with Congress, a topic beyond the scope of this LWV study on the Federal Judiciary.

<sup>3</sup> [Are a Disproportionate Number of Federal Judges Former Government Advocates? | Cato Institute; Most of Biden’s appointed judges to date are women, racial or ethnic minorities – a first for any president](#)

- Responding to the increased size of the US population since the last Court adjustment in the 19th Century.

Arguments **against** expanding the Court include:

- Recent changes in SCOTUS composition and rulings reflect electoral--i.e., democratic-- outcomes.
- Expanding the Court would:
  - Undermine SCOTUS independence.
  - Be partisan, which would undermine the Court's legitimacy.
  - Further degrade the confirmation process.
- Expansion would not alter the Court's jurisdiction or approach to judicial review.
- Expansion to achieve popular policy outcomes misconceives the Court's role. (Consider *Brown v. Board of Education*, which was not aligned with public preferences in 1954.)

Regardless of the rationale, any congressional action to alter the number of justices would require:

- Congressional majorities in the House and Senate (potentially, 60 votes in the Senate).
- A transition plan to avoid making an already-political problem worse.

### Term Limits

The Constitution clearly specifies lifetime tenure under "good Behaviour" for the federal judiciary with compensation not reduced during time in office. Removal requires impeachment, a near impossibility.

Arguments **in favor of** term limits include:

- Preserve judicial independence.
- Recognize that the US federal judiciary is virtually unique with no retirement age, no fixed term.
- Improve balance between judicial independence and long-term responsiveness.
- Avoid life tenure's concentration of too much power in individuals. For SCOTUS:
  - Consequences of life tenure have changed: Until 1970, average tenure was less than 18 years; since 1970, tenure has increased to approximately 26 years.
  - Longer terms raise the stakes for each nomination.
- Make the Court more responsive to electoral outcomes. Life tenure makes timing of judicial appointments unpredictable and less responsive to electoral outcomes. Term limits could alter strategic retirements or perception of strategic retirements.
- Enhance the Court's decision making through more regular rotation of justices.

Arguments **against** term limits include:

- Threat to judicial independence.

- Would further politicize SCOTUS appointments and worsen an already-partisan process.
- Post-Court employment could be problematic:
  - Potential for post-Court plans to alter justices' performance on the bench.
  - Post-Court employment restrictions might be required.
- More turnover on the SCOTUS could be problematic: destabilizing for Court doctrine; more frequent doctrinal shifts; less stability in the law.
- Would give each President too much power over the SCOTUS.
- Would minimize the role of the Senate.
- Potential for litigants or lower court judges to time cases strategically to match changes in SCOTUS membership.
- Changes to SCOTUS structure might weaken the stability of the judiciary.

Could term limits be accomplished without constitutional amendment?

One detailed bipartisan proposal says yes.<sup>4</sup> It recommends 18-year terms that could be defined by statute without amending the Constitution. The unusual nature of this proposal – in addition to being bipartisan – is that it addresses nearly all the pros and cons related to term limits and could address other related issues with SCOTUS. This proposal fits within constitutional boundaries by redefining the roles Supreme Court justices play within their life tenure, not by changing the life tenure provision.

Principles to Consider

LWVUS positions on the Congress and the presidency, the other two branches of government, pay little attention to specific policy approaches; instead, they focus on principles. Those principles were designed for evaluating future policy proposals and ensure a durable foundation for advocacy. Principles that recur in these two reform proposals – pro and con – include the following:

<ul style="list-style-type: none"> <li>● Judicial independence</li> <li>● Judicial accountability</li> <li>● Representativeness</li> <li>● Effectiveness</li> </ul>	<ul style="list-style-type: none"> <li>● Decision making capability</li> <li>● Legitimacy</li> <li>● Nonpartisanship</li> <li>● Stability of law</li> </ul>
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<sup>4</sup> [Term Limits/Time Rules for Future Justices: Eighteen Arguments for Eighteen Years](#)